

**State of New Jersey  
Department of Education  
Trenton**

**NEW JERSEY  
SCHOOL LAW DECISIONS**

**January 1, 1973, to December 31, 1973**

**State of New Jersey  
Department of Education  
Trenton**

**NEW JERSEY  
SCHOOL LAW DECISIONS**

**January 1, 1973, to December 31, 1973**



SCHOOL LAW DECISIONS 1973	Page
Aikins, Elizabeth v. Board of Education of the Borough of East Paterson, Bergen County . . . . .	80
Almeida's Construction Company, Inc., for Removal of Qualification as Bidder; In the Matter of the Application of . . . . .	430
Atlantic City, City of, Township of Marlboro, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey, Boards of Education of the Township of Galloway; Board of Education of the Township of Little Egg Harbor v. . . . .	324
Banick, Joseph v. Board of Education of the Township of Riverside, Burlington County . . . . .	401
Beam, Robert H., School District of the Borough of Sayreville, Middlesex County; In the Matter of the Tenure Hearing of . . . . .	157
Beckhusen, Eric H., Joseph L. Keefe, Harry W. McDowell and John J. Sprowls, M.D. v. Board of Education of the City of Rahway and Louis R. Rizzo, Union County . . . . .	167
Begier, Casimir A. v. Board of Education of the City of Rahway, Union County . . . .	91
Bergenfield, Bergen County, Board of Education of the Borough of; Evan Goldman, and others similarly situated, and the Bergenfield Education Association v. . . .	441
Bergenfield Education Association, and Evan Goldman and others similarly situated v. Board of Education of the Borough of Bergenfield, Bergen County . . . . .	441
Black Horse Pike Regional School District and the Sterling Regional School District, Camden County; In the Matter of the Appeals of the Boards of Education of the . . . . .	130
Boublis, Donald P. v. Board of Education of the Borough of Hawthorne, Passaic County . . . . .	417
Brennan, Anthony J., School District of the City of Elizabeth, Union County; In the Matter of the Tenure Hearing of . . . . .	235
Brick, Ocean County; In the Matter of the Tenure Hearing of Kathleen M. Pietruni, School District of the Township of . . . . .	9
Brick, Ocean County; In the Matter of the Tenure Hearing of Richard Royer, School District of the Township of . . . . .	460
Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey, Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the; Board of Education of the Township of Little Egg Harbor v. . . . .	324
Burlington, the City of, Burlington County, Boards of Education of the Township of Edgewater Park and; "T.A." by her parent and natural guardian v. . . . .	501
Central Regional Education Association v. Board of Education of the Central Regional High School District; Superintendent of Schools, Edwin L. Voll; and Principal, Spencer F. Sullivan, Jr., Ocean County . . . . .	247
Central Regional High School District Board of Education of the; Superintendent of Schools, Edwin L. Voll; and Principal, Spencer F. Sullivan, Jr., Ocean County; Central Regional Education Association v. . . . .	247
Cervase, John v. Board of Education of the City of Newark, Essex County . . . . .	701
Chappell, Greta <i>et al.</i> v. Commissioner of Education . . . . .	539
Cherry Hill, Camden County, Board of Education of the Township of; Joel and Marleen Hoffman v. . . . .	406

Cherry Hill, Camden County; In the Matter of the Annual School Election Held in the School District of	124
Clark, Union County; In the Matter of the Annual School Election Held in the School District of the Township of	129
Clayton, Gloucester County; In the Matter of the Tenure Hearing of Charles A. Ferrell, School District of the Borough of	293
Clementon, Camden County; In the Matter of the Annual School Election Held in the School District of the Borough of	164
Collingswood, Board of Education of the Borough of, and Walter C. Ande, Superintendent of Schools, Camden County, "K.C." by her guardian "D.C." v.	347
Collingswood, Camden County, Board of Education of the Borough of; Margaret A. White v.	261
Colts Neck, Board of Education of the Township of v. Mayor and Township Committee of the Township of Colts Neck, Monmouth County	623
Colts Neck, Monmouth County, Mayor and Township Committee of the Township of; Board of Education of the Township of Colts Neck v.	623
Commissioner of Education; Greta Chappell <i>et al.</i> v.	539
Coniglio, Charles v. Board of Education of the Township of Teaneck, Bergen County	449
Conner Malcolm, individually and as Acting Superintendent of Schools of the Borough of Spotswood, and the Board of Education of the Borough of Spotswood, Middlesex County; Joan Sherman v.	51
Crilly, Patrick J., Robert J. Hoffman and Frank Cirigliano; Frances Licato v.	361
Deal School District, Monmouth County; In the Matter of the Election Inquiry of the	108
De Renzo, Albert v. Board of Education of the City of Passaic, Passaic County	236
Dover, Township of, and Board of Education of the Toms River Regional School District v. Board of Education of the Borough of Lavallette and the Borough of Lavallette, Ocean County	609
Downe, Cumberland County, Board of Education of the Township of; Frank A. Young v.	671
East Greenwich, Gloucester County; In the Matter of the Annual School Election Held in the School District of the Township of	145
East Orange, Board of Education of the City of v. Mayor and Council of the City of East Orange, Essex County	179
East Orange, Essex County, Mayor and Council of the City of; Board of Education of the City of East Orange v.	179
East Paterson, Bergen County, Board of Education of the Borough of; Elizabeth Aikins v.	80
East Windsor Regional School District, Mercer County, Board of Education of the; "W.S." v.	341
East Windsor Regional School District, Mercer County, Board of Education of the; "W.S." v.	652
Eatontown, Monmouth County; In the Matter of the Tenure Hearing of Anna Simmons, School District of the Borough of	721
Edgewater Park, Boards of Education of the Township of, and the City of Burlington, Burlington County; "T.A." by her parent and natural guardian v.	501
Elizabeth, Union County; In the Matter of the Tenure Hearing of Anthony J. Brennan, School District of the City of	235
Essex County Vocational School District, Essex County, Board of Education of the; Lewis Moroze v.	385

Fair Lawn, Bergen County; In the Matter of the Annual School Election Held in the School District of the Borough of . . . . .	144
Farrell, Patrick v. Board of Education of the Borough of North Arlington, Rip Collins, Daniel Wickenseiser, and Joseph Kosakowski . . . . .	301
Ferrell, Charles A., School District of the Borough of Clayton, Gloucester County; In the Matter of the Tenure Hearing of . . . . .	293
Frankford, Sussex County; In the Matter of the Special School Election Held in the School District of the Township of . . . . .	680
Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey, Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro; Board of Education of the Township of Little Egg Harbor v. . . . .	324
Galloway, Atlantic County; In the Matter of the Special School Election in the Township of . . . . .	677
Galloway, Boards of Education of the Township of, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey; Board of Education of the Township of Little Egg Harbor v. . . . .	324
Gana, Francis A. v. Board of Education of the Township of Quinton, Salem County . . . . .	657
Gana, Francis A., School District of the Township of Quinton, Salem County; In the Matter of the Tenure Hearing of . . . . .	661
Glen Ridge <i>et al.</i> , Essex County, Board of Education of the Borough of; Luther McLean v. . . . .	217
Gloucester, Camden County, Board of Education of the Township of; Mr. and Mrs. Lawrence E. Smith v. . . . .	381
Goldman, Evan, and others similarly situated, and the Bergenfield Education Association v. Board of Education of the Borough of Bergenfield, Bergen County . . . . .	441
Green Brook, Somerset County; In the Matter of the Annual School Election Held in the School District of the Township of . . . . .	127
Guttenberg, Hudson County, Board of Education of the Town of; Board of Education of the Township of North Bergen v. . . . .	18
Haledon, Board of Education of the Borough of v. Mayor and Council of the Borough of Haledon, Passaic County . . . . .	146
Haledon, Passaic County; In the Matter of the Annual School Election Held in the School District of the Borough of . . . . .	154
Haledon, Passaic County, Mayor and Council of the Borough of; Board of Education of the Borough of Haledon v. . . . .	146
Hanover Park Regional High School District <i>et al.</i> , Morris County, Board of Education of the; Frank Monaco v. . . . .	272
Hawthorne, Passaic County, Board of Education of the Borough of; Donald P. Boublis v. . . . .	417
Helmetta, Middlesex County; In the Matter of the Annual School Election Held in School District of the Borough of . . . . .	279
Hillside, Board of Education of the Township of v. Township Committee of the Township of Hillside, Union County . . . . .	710
Hillside, Union County, Township Committee of the Township of; Board of Education of the Township of Hillside v. . . . .	710
Hoffman, Joel and Marleen v. Board of Education of the Township of Cherry Hill, Camden County . . . . .	406

Hopatecong School District, Sussex County; In the Matter of the School Election of the	115
Jackson, Ocean County, Board of Education of the Township of; Arnold Sroka, Jean F. Sroka, Elizabeth Murray <i>et al.</i> v.	301
Jersey City, Hudson County, Board of Education of the City of; Ruth Z. Yanowitz, Eugenia G. Hollingsworth, Elsie D. Camisa, Hazel P. Endersbe, Aloysius J. Kubacz, Rose C. Sachs, and the Jersey City Education Association v.	57
"K.C." by her guardian "D.C." v. Board of Education of the Borough of Collingswood and Walter C. Ande, Superintendent of Schools, Camden County	347
"K.K." by her parents v. Board of Education of the Town of Westfield, Union County	30
Karamessinis, Nicholas P. v. Board of Education of the City of Wildwood, Cape May County	351
K'Burg, Joann v. Board of Education of the Township of Lower Alloways Creek, Salem County	636
Knecht & Sons, Inc., Qualification as Bidder; In the Matter of	576
Lakeland Regional, Passaic County; In the Matter of the Annual School Election Held in the School District of	112
Lakewood, Board of Education of the Township of v. Lakewood Education Association, Ocean County	684
Lakewood Education Association, Ocean County; Board of Education of the Township of Lakewood v.	684
Lakewood, Ocean County, Board of Education of the Township of; "R.K." v.	343
Lambertville and in the South Hunterdon Regional High School District, Hunterdon County; In the Matter of the Annual School Elections held in the School District of the City of	371
Lavallette, Board of Education of the Borough of, and the Borough of Lavallette, Ocean County; Board of Education of the Toms River Regional School District and Township of Dover v.	609
Lavallette, Borough of, Ocean County, and the Board of Education of the Borough of Lavallette; Board of Education of the Toms River Regional School District and Township of Dover v.	609
Licato, Frances v. Patrick J. Crilley, Robert J. Hoffman and Frank Cirigliano	361
Little Egg Harbor, Board of Education of the Township of v. Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey	324
Lower Alloways Creek, Salem County, Board of Education of the Township of; Joann K'Burg v.	636
Lower Camden Regional School District, Camden County; In the Matter of the Annual School Election Held in the Constituent District of Waterford Township	125
Lower Cape May Regional, Cape May County; In the Matter of the Annual School Election Held in the School District of	1
"M.C.," by her mother and natural guardian v. Board of Education of the City of Trenton, Mercer County	254
MacDonald, James C., School District of Middle Township, Cape May County; In the Matter of the Tenure Hearing of	287

McLean, Luther <i>v.</i> Board of Education of the Borough of Glen Ridge <i>et al.</i> , Essex County . . . . .	217
Madison, Middlesex County, Board of Education of the Township of; Harry A. Romeo, Jr. <i>v.</i> . . . .	102
Maffei, Pasquale A., and Board of Education of the City of Trenton; Arthur L. Page <i>v.</i> . . . .	704
Mainland Regional High School District, Atlantic County; In the Matter of the Annual School Election Held in the Constituent District of Northfield . . . . .	128
Mainland Regional High School District, Atlantic County; In the Matter of the Annual School Election Held in the Constituent District of Somers Point . . . .	140
Manville, Somerset County, Board of Education of the Borough of; Julia Anne Sipos, Marian E. Kline, Esther M. Kormondi, Pauline Zorella, and Mary F. Simmons <i>v.</i> . . . .	434
Manville, Somerset County; In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of . . . . .	409
Marlboro, Township of, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey, Boards of Education of the Township of Galloway, City of Atlantic City; Board of Education of the Township of Little Egg Harbor <i>v.</i> . . . .	324
Martin, Adam W. <i>v.</i> Board of Education of the City of South Amboy, Middlesex County . . . . .	496
Matawan, Mayor and Council of the Borough of, and Township Council of the Township of Matawan, Monmouth County; Board of Education of the Matawan Regional School District <i>v.</i> . . . .	689
Matawan Regional School District, Board of Education of the <i>v.</i> Mayor and Council of the Borough of Matawan and Township Council of the Township of Matawan, Monmouth County . . . . .	689
Megnin, William, School District of the Township of Wayne, Passaic County; In the Matter of the Tenure Hearing of . . . . .	641
Middle Township, Cape May County; In the Matter of the Tenure Hearing of James C. MacDonald, School District of . . . . .	287
Middlesex, Board of Education of the Borough of <i>v.</i> Mayor and Council of the Borough of Middlesex, Middlesex County . . . . .	648
Middlesex, Middlesex County, Mayor and Council of the Borough of; Board of Education of the Borough of Middlesex <i>v.</i> . . . .	648
Miller, Dale, School District of the Borough of Manville, Somerset County; In the Matter of the Tenure Hearing of . . . . .	409
Milltown, Middlesex County; In the Matter of the Annual School Election Held in the School District of the Borough of . . . . .	126
Minelli, Kay <i>v.</i> Board of Education of the City of Trenton, Mercer County . . . . .	321
Monaco, Frank <i>v.</i> Board of Education of the Hanover Park Regional High School District <i>et al.</i> , Morris County . . . . .	272
Monroe, Gloucester County; In the Matter of the Annual School Election Held in the School District of the Township of . . . . .	212
Moore, Leonard V., Charles R. Driggins, Marcia Romanansky and Dorothy Pfarrer <i>v.</i> Board of Education of the Borough of Roselle, Union County . . . . .	526
Moroze, Lewis <i>v.</i> Board of Education of the Essex County Vocational School District, Essex County . . . . .	385
Mosselle, James <i>v.</i> Board of Education of the City of Newark, Essex County . . . . .	176

Mount Laurel, Burlington County; In the Matter of the Special School Election Held in the Township of . . . . .	96
Newark, Essex County, Board of Education of the City of; John Cervase v. . . . .	701
Newark, Essex County, Board of Education of the City of; James Mosselle v. . . . .	176
New Brunswick, Board of Education of the City of v. Board of Education of the Township of North Brunswick, Middlesex County . . . . .	578
North Arlington, Rip Collins, Daniel Wickenseiser, and Joseph Kosakowski, Board of Education of the Borough of; Patrick Farrell v. . . . .	301
North Bergen, Board of Education of the Township of v. Board of Education of the Town of Guttenberg, Hudson County . . . . .	18
North Brunswick, Middlesex County, Board of Education of the Township of; Board of Education of the City of New Brunswick v. . . . .	578
North Caldwell, West Essex Regional School District, Essex County; In the Matter of the Annual School Election Held in the Constituent School District of . . . . .	122
Northfield, Mainland Regional High School District, Atlantic County; In the Matter of the Annual School Election Held in the Constituent District of . . . . .	128
Oradell, River Dell Regional School District, Bergen County; In the Matter of the Annual School Election Held in the Constituent District of . . . . .	123
Orr, John, School District of the Township of Wyckoff, Bergen County; In the Matter of the Tenure Hearing of . . . . .	40
Page, Arthur L. v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County. . . . .	704
Passaic, Passaic County, Board of Education of the City of; Albert DeRenzo v. . . . .	236
Paterson, Board of Education of the City of v. Board of Finance and the Governing Body of the City of Paterson, Passaic County . . . . .	12
Paterson, Passaic County, Board of Finance and the Governing Body of the City of; Board of Education of the City of Paterson v. . . . .	12
Pietrunti, Kathleen M., School District of the Township of Brick, Ocean County; In the Matter of the Tenure Hearing of . . . . .	9
Piscataway, Middlesex County, Board of Education of the Township of; Gladys S. Rawicz v. . . . .	305
Point Pleasant Beach, Ocean County; In the Matter of the Special School Election Held in the Borough of . . . . .	697
Quinton, Salem County, Board of Education of the Township of; Francis A. Gana v. . . . .	657
Quinton, Salem County; In the Matter of the Tenure Hearing of Francis A. Gana, School District of the Township of . . . . .	661
Quinton, Salem County, Board of Education of the Township of; Sandra Robinson v. . . . .	257
"R.K." v. Board of Education of the Township of Lakewood, Ocean County . . . . .	343
Rahway, Board of Education of the City of, and Louis R. Rizzo, Union County; Eric H. Beckhusen, Joseph L. Keefe, Harry W. McDowell and John J. Sprowls, M.D. v. . . . .	167
Rahway, Union County, Board of Education of the City of; Casimir A. Begier v. . . . .	91
Rahway, Union County, Board of Education of the City of; Herman Scherman v. . . . .	85
Rawicz, Gladys S. v. Board of Education of the Township of Piscataway, Middlesex County . . . . .	305
Ridgefield Park <i>et al</i> , Bergen County, Board of Education of the Township of; Mr. & Mrs. Ralph Rovere, husband and wife, and Renee Rovere, their daughter, Mr. & Mrs. Steve Lipka, Jr., husband and wife, and Bernadette Lipka, their daughter v. . . . .	97

River Dell Regional School District, Bergen County; In the Matter of the Annual School Election Held in the Constituent District of Oradell . . . . .	123
Riverside, Burlington County, Board of Education of the Township of; Joseph Banick v. . . . .	401
Rizzo, Louis R., Union County, and Board of Education of the City of Rahway; Eric H. Beckhusen, Joseph L. Keefe, Harry W. McDowell and John J. Sprowls, M.D. v. . . . .	167
Robinson, Sandra v. Board of Education of the Township of Quinton, Salem County . . . . .	257
Romeo, Jr., Harry A. v. Board of Education of the Township of Madison, Middlesex County . . . . .	102
Roselle, Union County, Board of Education of the Borough of; Leonard V. Moore, Charles R. Driggins, Marcia Romanansky and Dorothy Pfarrer v. . . . .	526
Roselle, Union County, Board of Education of the Borough of; Robert F. X. Van Wagner v. . . . .	488
Rovere, Mr. & Mrs. Ralph, husband and wife, and Renee Rovere, their daughter, Mr. & Mrs. Steve Lipka, Jr., husband and wife, and Bernadette Lipka, their daughter v. Board of Education of the Township of Ridgefield Park <i>et al.</i> , Bergen County . . . . .	97
Royer, Richard, School District of the Township of Brick, Ocean County; In the Matter of the Tenure Hearing of . . . . .	460
Sayreville, Middlesex County; In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of . . . . .	157
Scherman, Herman v. Board of Education of the City of Rahway, Union County . . . . .	85
Sherman, Joan v. Malcolm Conner, individually and as Acting Superintendent of Schools of the Borough of Spotswood, and Board of Education of the Borough of Spotswood, Middlesex County . . . . .	51
Simmons, Anna, School District of the Borough of Eatontown, Monmouth County; In the Matter of the Tenure Hearing of . . . . .	721
Sipos, Julia Anne, Marian E. Kline, Esther M. Kormondi, Pauline Zorella, and Mary F. Simmons v. Board of Education of the Borough of Manville, Somerset County . . . . .	434
Smith, Mr. & Mrs. Lawrence E. v. Board of Education of the Township of Gloucester, Camden County . . . . .	381
Somers Point, Mainland Regional High School District, Atlantic County; In the Matter of the Annual School Election Held in the Constituent District of . . . . .	140
South Amboy, Middlesex County, Board of Education of the City of; Adam W. Martin v. . . . .	496
South Brunswick, Middlesex County; In the Matter of the Election Inquiry in the School District of . . . . .	36
South Harrison, Board of Education of the Township of v. Township of South Harrison, Gloucester County . . . . .	438
South Harrison, Gloucester County, Township of; Board of Education of the Township of South Harrison v. . . . .	438
South Hunterdon Regional High School District, Hunterdon County; In the Matter of the Annual School Elections Held in the School District of the City of Lambertville and in the . . . . .	371
Southern Regional High School District, Ocean County, Board of Education of the; Frank W. Zimmermann <i>et al.</i> v. . . . .	741
Spotswood, Middlesex County, Board of Education of the Borough of, Malcolm Conner, individually and as Acting Superintendent of Schools of the Borough of Spotswood, and; Joan Sherman v. . . . .	51



Sroka, Arnold, Jean F. Sroka, Elizabeth Murray <i>et al.</i> v. Board of Education of the Township of Jackson, Ocean County .....	301
Sterling Regional School District, Camden County; In the Matter of the Appeals of the Boards of Education of the Black Horse Pike Regional School District and the .....	130
Stratford, Board of Education of the Borough of v. Borough of Stratford and County Board of Taxation, Camden County .....	589
Stratford, Borough of, and County Board of Taxation, Camden County; Board of Education of the Borough of Stratford v. ....	589
"T.A." by her parent and natural guardian v. Boards of Education of the Township of Edgewater Park and the City of Burlington, Burlington County .....	501
Teaneck, Bergen County, Board of Education of the Township of; Charles Coniglio v. ....	449
Teaneck, Bergen County; In the Matter of the Annual School Election Held in the School District of the Township of .....	142
Toms River Regional School District and Township of Dover, Board of Education of the v. Board of Education of the Borough of Lavallette and the Borough of Lavallette, Ocean County .....	609
Trenton, Board of Education of the City of, and Pasquale A. Maffei, Mercer County; Arthur L. Page v. ....	704
Trenton, Mercer County, Board of Education of the City of; "M.C.," by her mother and natural guardian v. ....	254
Trenton, Mercer County, Board of Education of the City of; Kay Minelli v. ....	321
Union Beach, Board of Education of the Borough of v. Mayor and Council of the Borough of Union Beach, Monmouth County .....	231
Union Beach, Monmouth County, Mayor and Council of the Borough of; Board of Education of the Borough of Union Beach v. ....	231
Union Township, Union County; In the Matter of the Tenure Hearing of Sally Williams, School District of .....	464
Upper Saddle River, Bergen County; In the Matter of the Annual School Election Held in the School District of .....	196
Van Wagner, Robert F. X. v. Board of Education of the Borough of Roselle, Union County .....	488
Verona, Essex County, Board of Education of the Borough of; Nancy Weller v. ....	513
"W.S." v. Board of Education of the East Windsor Regional School District, Mercer County .....	341
"W.S." v. Board of Education of the East Windsor Regional School District, Mercer County .....	652
Watchung and in the Watchung Hills Regional High School District, Somerset County; In the Matter of the Annual School Election Held in the School District of the Borough of .....	376
Watchung Hills Regional High School District, Somerset County; In the Matter of the Annual School Elections Held in the School District of the Borough of Watchung and in the .....	376
Waterford Township, Lower Camden Regional School District, Camden County; In the Matter of the Annual School Election Held in the Constituent District of .....	125
Wayne, Passaic County; In the Matter of the Tenure Hearing of William Megnin, School District of the Township of .....	641
Weller, Nancy v. Board of Education of the Borough of Verona, Essex County .....	513



West Deptford, Gloucester County; In the Matter of the Annual School Election Held in the School District of the Township of .....	228
West Essex Regional School District, Essex County; In the Matter of the Annual School Election Held in the Constituent School District of North Caldwell ...	122
West Morris Regional School District, Morris County; In the Matter of the Special School Election Held in the .....	600
Westfield, Union County, Board of Education of the Town of; "K.K." by her parents v. ....	30
White, Margaret A. v. Board of Education of the Borough of Collingswood, Camden County .....	261
Wildwood, Cape May County, Board of Education of the City of; Nicholas P. Karamessinis v. ....	351
Williams, Sally, School District of Union Township, Union County; In the Matter of the Tenure Hearing of .....	464
Woodcliff Lake, Bergen County; In the Matter of the Annual School Election Held in the School District of the Borough of .....	143
Wyckoff, Bergen County; In the Matter of the Tenure Hearing of John Orr, School District of the Township of .....	40
Yanowitz, Ruth Z., Eugenia G. Hollingsworth, Elsie D. Camisa, Hazel P. Endersbe, Aloysius J. Kubacz, Rose C. Sachs, and the Jersey City Education Association v. Board of Education of the City of Jersey City, Hudson County .....	57
Young, Frank A. v. Board of Education of the Township of Downe, Cumberland County .....	671
Zimmermann, Frank W. <i>et al</i> v. Board of Education of the Southern Regional High School District, Ocean County .....	741

## DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION AND SUPERIOR COURT

Beisswenger, Blanche, Ruth Hayford, and Elizabeth Dale, individually and in behalf of others similarly situated as a Class (Englewood Teachers Association) v. Board of Education of the City of Englewood, Bergen County (State Board of Education) .....	760
Black Horse Pike Regional School District and the Sterling Regional School District, Camden County; In the Matter of the Appeals of the Boards of Education of the (State Board of Education) .....	138
Central Regional Education Association v. Board of Education of the Central Regional High School District; Superintendent of Schools, Edwin L. Voll; and Principal, Spencer F. Sullivan, Jr., Ocean County (State Board of Education) .	254
Chappell, Greta <i>et al.</i> v. Commissioner of Education (State Board of Education) ....	575
Citizens for Better Education <i>et al.</i> v. Board of Education of the City of Camden and Dr. Charles Smerlin, Superintendent of Schools, Camden County (Superior Court) .....	761
Clark, Mabel v. Board of Education of the Borough of East Paterson, Bergen County (State Board of Education) .....	764
Cornell, Robert J. v. New Jersey State Board of Education, Carl L. Marburger, Commissioner of Education (Superior Court) .....	765
Dawson, Mary v. Boards of Education of the Townships of Ocean and Berkeley, Ocean County (Superior Court) .....	766
Enslin, Robert G. v. Board of Education of Egg Harbor Township School District, Atlantic County (State Board of Education) .....	767
Franco, Rose v. Board of Education of the City of Plainfield, Union County (State Board of Education) .....	767
Freeland, Alfred W. v. Board of Education of the District of Scotch Plains-Fanwood, Union County (Superior Court) .....	768
Grossman, Paula a/k/a Paul M. Grossman, School District of the Township of Bernards, Somerset County; In the Matter of the Tenure Hearing of (State Board of Education) .....	769
Hall, Wardlaw, School District of the Township of Cinnaminson, Burlington County; In the Matter of the Tenure Hearing of (State Board of Education) .....	770
"K.K.," Parents of v. Board of Education of the Town of Westfield, Union County (State Board of Education) .....	34
Karamessinis, Nicholas P. v. Board of Education of the City of Wildwood, Cape May County (State Board of Education) .....	360
Kolbeck, Robert v. New Jersey State Board of Education, Board of Education of the Township of Lumberton and Cornelius T. McGlynn (Superior Court) .....	770
Matecki, Emma, School District of New Brunswick, Middlesex County; In the Matter of the Tenure Hearing of (State Board of Education) .....	773
Matecki, Emma v. Board of Education of the City of New Brunswick, Middlesex County (Superior Court) .....	773
Meyer, Patricia v. Board of Education of the Borough of Sayreville, Middlesex County (Superior Court) .....	774
Morris School District v. Board of Education of the Township of Harding and Board of Education of the Borough of Madison, Morris County (Superior Court) ...	775
Mt. Olive Fair Election Practices Committee v. Carl L. Marburger, Commissioner of Education, <i>et al.</i> (Superior Court) .....	775

Mountain, John v. Board of Education of the Township of Fairview, Bergen County (State Board of Education) .....	777
Noorigian, Jack v. Board of Education of Jersey City, Hudson County (State Board of Education) .....	777
North Bergen, Board of Education of the Township of v. Board of Education of the Town of Guttenberg, Hudson County (State Board of Education) .....	28
Oxfeld, Nancy, by her parent and natural guardian, Emil Oxfeld, and Jeffrey Goodman, etc. <i>et al.</i> v. Board of Education of South Orange-Maplewood, Essex County (Superior Court) .....	779
Passaic, Board of Education, David Hammer and Robert Hopkins, Board of Education of the City of Paterson, Passaic County v. Board of Education of Township of Wayne, Board of Chosen Freeholders of Passaic County and Board of Trustees of Passaic County Children's Shelter (Superior Court) ....	780
Pietrunti, Kathleen M., School District of the Township of Brick, Ocean County; In the Matter of the Tenure Hearing of (State Board of Education) .....	782
Raymond, Duncan, and the Board of Education of the Township of Montgomery, Somerset County; In the Matter of (Superior Court) .....	784
Ridgewood, Board of Education of, for the Termination of the Sending-Receiving Relationship with the School District of Ho-Ho-Kus, Bergen County; In the Matter of the Application of the (State Board of Education) .....	785
Ridgewood, Board of Education of, for the Termination of the Sending-Receiving Relationship with the School District of Ho-Ho-Kus, Bergen County; In the Matter of the Application of the (Superior Court) .....	799
South River, Board of Education of the Borough of, for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County; In the Matter of the Application of the (State Board of Education) .....	802
Winston, Marilyn and South Plainfield Education Association v. Board of Education of the Borough of South Plainfield, Middlesex County (Superior Court) .....	802
Yanowitz, Ruth Z. <i>et al.</i> v. Board of Education of the City of Jersey City, Hudson County (State Board of Education) .....	79

**In The Matter Of The Annual School Election  
Held In The School District Of  
Lower Cape May Regional, Cape May County.**

**COMMISSIONER OF EDUCATION**

**INQUIRY**

For the Petitioners, David H. Romberger, Esq.

Following the annual school election held February 1, 1972, an appeal was filed by two candidates requesting a recount of the votes cast for two members of the Lower Cape May Regional Board of Education from the constituent district of Lower Township for full terms of three years each. The recount was conducted on February 14, 1972, and a decision was issued by the Commissioner of Education under date of February 29, 1972, which determined that Robert A. White and George L. McCahey were elected on February 1, 1972, to the aforementioned seats.

Pursuant to a petition filed under date of February 15, 1972 by Candidates Shull O. Rutherford and Robert R. Gosselin, alleging irregularities in the conduct of the annual school election held on February 1, 1972 in Lower Township, an inquiry was conducted by a hearing examiner appointed by the Commissioner at the Office of the County Superintendent of Schools, Cape May Courthouse, on March 3, 1972.

The report of the hearing examiner is as follows:

In their notice of appeal, petitioners make the following allegations:

“1. There were many witnessed cases of voters marking their ballots outside of the voting booth.

“2. Ballots were handed to voters prior to their (sic) being an unoccupied voting booth.

“3. There was at least one instance of an uncertificated challenger at the polls where a Mr. Bierman, Jr. Transferred (sic) his challenger badge to another party and then left the voting area.

“4. An improper paper ballot was used in that the ballot was imprinted with rules which are now outdated and some of which were not pertinent to the election.”

At the opening of the hearing petitioners withdrew Allegation No. 4, *ante*, and submitted additional allegations as follows: (Tr. 4-5)

“5. At least three unregistered, unqualified individuals actually cast ballots in the election.

“6. A challenger improperly accompanied voters to and from the voting booth.

“7. There was at least one instance where a marked ballot was handed to a voter prior to his entering the voting booth.

“8. Unregistered individuals were brought to the polls to vote.

“9. The conditions at the Town Bank poll were chaotic and disorganized to the degree that the electorate was prevented from accurately indicating its choice of candidates.”

In addition to specifying the *additional* allegations, *ante*, counsel for petitioners formally requested a recount of the votes cast for the current expense and capital outlay budget questions at the annual school election held February 1, 1972. This request for a budget recount had not been made previously and, therefore, was not included in the decision of the Commissioner rendered February 29, 1972. Following the hearing, the Secretary of the Board of Education notified the Commissioner, by letter dated March 15, 1972, with enclosures (Exhibit P-6), that the governing bodies of the three constituent districts had approved the school budget for 1972-73 as it had been presented to the voters, without change, on February 1, 1972, pursuant to *N.J.S.A. 18A:22-37*. By letter under date of April 4, 1972, petitioners withdrew this request for a recount of the votes cast for the current expense and capital outlay budget questions.

The charges will be considered first separately and then as a whole.

#### ALLEGATIONS NO. 1 AND NO. 2

The Secretary of the Lower Cape May Regional Board of Education testified that in previous years the constituent district of Lower Township had two polling places for the annual school election, one at the Villas Fire Hall and one at Lower Cape May Regional High School. At the December 1971 meeting, the Board decided to add a third polling place for the convenience of the voters residing in Town Bank and North Cape May. The Town Bank Fire House, which was used each year as a polling place for the general election, was selected for the February 1, 1972 school election. (Tr. 85) This new polling place was considered adequate to accommodate the voter turnout which was anticipated, even though there were seven candidates on the ballot for two seats. The Board Secretary testified that in previous years the total vote cast in the three combined constituent districts of Cape May, West Cape May, and Lower Township averaged approximately 200. (Tr. 86)

A member of the Board of Education, who also acted as a challenger at the Town Bank Fire House, testified that he opened this polling place at the direction of the Board. According to this witness, approximately 140 people were standing outside of the poll at 4:50 p.m., and the weather was intensely cold. When the poll opened at 5:00 p.m., a long line of persons began to move into the poll and to form four lines in front of the tables where the signature

copy registers for Voting Districts 5, 7, 8, and 9 were placed. (Tr. 37-38) After the voters signed the poll lists and received their ballots, they formed a single line to the one voting booth which was provided. This witness also testified that approximately fifty people were standing in a line in front of this voting booth, holding their paper ballots. (Tr. 42)

He said that the voters, who were exiting from the one voting booth, dropped their ballots in the ballot box and then had to cross through the line of people waiting to enter the booth. (Tr. 41-42) During this time, he added, a large number of voters were standing outside in a line clamoring to be let into the polling place. (Tr. 39) This situation, it was testified, continued for at least two hours. (Tr. 43) This witness stated further that he then unlocked a second door to this poll in order to provide another means for voters to exit from the room, but this resulted in more confusion because people began to enter and leave by means of this second doorway. (Tr. 43) He testified that between 5:00 p.m. and 8:00 p.m., almost 500 citizens voted at this polling place. (Tr. 45) He averred that he personally observed voters marking their ballots before entering the voting booth. (Tr. 44)

A citizen testified that he voted at the Town Bank polling place, and that he waited in a line of approximately thirty-five people in front of the single voting booth. All of these persons had received ballots and were holding them as they stood in the line, which moved very slowly. (Tr. 23) This witness testified that he observed six voters marking their ballots and dropping them in the ballot box without entering the voting booth. (Tr. 24-25)

A husband and wife both testified that they voted at this poll at 6:15 p.m. and that over 300 persons had voted by that time. (Tr. 57)

These witnesses stated that they first stood in the wrong line in front of the signature copy registers, and that after receiving their ballots, they waited in a line of thirty to forty people for twenty minutes before they could individually enter the single voting booth. (Tr. 57-58, 61)

The judge of the election for the Town Bank polling place testified that the conditions were very confusing and almost impossible. (Tr. 63) He stated that 518 voters cast ballots at this polling place during the four-hour period of the election (Tr. 63), an average of 128 voters per hour. Since there was only one voting booth available, each voter would have an average time of thirty seconds to vote on the two budget questions and to vote for two of seven candidates for Board seats. (Tr. 64) Besides the judge of elections, one inspector and two clerks worked as election officials at this poll. (Tr. 66)

One of the ladies, who worked as a clerk of election at the Town Bank polling place, testified that she witnessed at least ten voters marking their ballots outside of the voting booth. (Tr. 90-91) A male voter also provided similar testimony regarding the improper marking of ballots at this poll. (Tr. 82) The second clerk at this poll generally corroborated the previous testimony of other witnesses regarding the crowded and confusing conditions. (Tr. 95) The

inspector of the election at the Town Bank polling place also testified that people stood in line with ballots in their hands waiting to enter the one voting booth. (Tr. 97) He also witnessed voters marking their ballots outside of the voting booth. (Tr. 97-101)

Two citizens, who voted at the poll located in the Regional High School, testified that they received ballots from the election workers before the voting booths were available for their use. (Tr. 72-78)

### ALLEGATION NO. 3

A member of the election board assigned to the Villas polling place testified that she observed a challenger taking off his official challenger's badge and handing it to his father, who was also a challenger. The father, she said, gave the challenger's badge to another man, who pinned it on his clothing. This witness then approached the individual, who had put on the challenger's badge, and asked him whether he possessed a certificate from the election board authorizing him to act as a challenger. According to the witness, the individual walked out of the polling place, and she reported the matter to the judge of election, who instructed her to go outside after the man and request him to surrender the challenger's badge. This election official stated, further, that she informed the individual that he must have proper authorization to act as a challenger or else surrender the badge. The individual then admitted that he had no challenger's credentials and surrendered the badge to the election officials. (Tr. 9-10) The judge of the election for this polling place corroborated this testimony, and added that upon the return of the original challenger, who had allowed his challenger's badge to be used, he disqualified him from further participation as a challenger in the election. (Tr. 16-17)

### ALLEGATION NO. 4

The registrar of the Cape May County Election Board testified that, following the annual school election held February 1, 1972, she was requested to check the voter registration records of seven voters who had signed affidavits that they were properly registered voters, although their names did not appear in the signature copy registers at the polls. These individuals were permitted to vote at the polls after they had executed the required affidavits. (Tr. 50-52)

This witness testified that the registration records of Cape May County disclosed that two individuals had registered on January 18, 1972, whereas the last day for voter registration to enable an individual to vote in the February 1, 1972 annual school election was December 23, 1972. (Tr. 53) Copies of the voter registration records for these two voters were received in evidence. (Exhibits P-1, P-2) An examination of these registration records discloses that these two persons, a husband and wife, did register on January 18, 1972, as testified by the registrar of the County Election Board. These two individuals signed affidavits, at the Town Bank Fire House polling place, stating that they were permanently registered voters at least forty days prior to the February 1, 1972 school election. (Exhibits P-4, P-5) These two affidavits were sworn and subscribed before the judge of election, who had also signed the affidavit forms.

The registrar further testified that she checked the voter registration records for any record of a voter named George Reid, who had signed an affidavit at the Town Bank Fire House polling place. (Exhibit P-3) According to the registrar, there is no person by that name registered from any community in Cape May County. (Tr. 53) The registrar also checked in the cross-index file, which lists registered voters by their addresses, and found that there is no person named George Reid registered at the address written upon the affidavit. (Exhibit P-3) (Tr. 54)

#### ALLEGATION NO. 6

A clerk of the election assigned to the Villas Fire House polling place testified that one of the challengers approached voters, who were standing in line with ballots in their hands waiting to enter the two voting booths, and shook hands with them and engaged them in conversation. This election board worker informed the challengers that he was not allowed to do this. She stated that the challenger then sat down in a chair beside the doorway and greeted and shook hands with voters as they entered the polling place. (Tr. 11-12) There was no additional testimony regarding this specific allegation.

#### ALLEGATION NO. 7

One witness testified that he went to the Town Bank Fire House to vote, and that after he identified himself and signed the poll list, he was handed a ballot by one of the election workers, which had been marked next to the names of two candidates for seats on the Board of Education. (Tr. 75) This citizen stated that when he noticed that he had received a marked ballot, he returned it to the election clerk, who was serving the people lined up for district nine, and that this clerk handed him another, unmarked ballot. (Tr. 76)

No additional testimony was presented regarding this incident.

#### ALLEGATION NO. 8

The judge of the election assigned to the Villas Fire House polling place testified that he observed a challenger bringing individuals into the polling place who were not properly registered to vote. This witness stated that he talked to several of these individuals and notified each of them that they were ineligible and, therefore, could not vote. (Tr. 16-18) No evidence was presented to indicate that any unregistered voter was permitted to vote at this polling place.

#### ALLEGATION NO. 9

The facts deduced concerning this general allegation are the same as those detailed above under Allegations No. 1 through No. 8.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter and the report of the hearing examiner as set forth above.



The Commissioner notices that Lower Township, a constituent district of the Lower Cape May Regional School District, experienced a large turnout of voters which far exceeded the experience of preceding years. This situation resulted from a large number of candidates, seven for two vacant seats, and a spirited campaign. Even with the addition of a third polling place at the Town Bank Fire House, the available polling places were inadequate to accommodate the large number of voters who participated in this election.

Extensive testimony was presented in regard to petitioners' allegations that voters received ballots before a voting booth was vacant and ready for occupancy, and that voters marked their paper ballots outside of the election booth at the Town Bank polling place.

The pertinent statute, *N.J.S.A. 18A:14-53*, reads in part as follows:

“ \*\*\* No ballot shall be handed to a voter until there is a booth ready for occupancy and until the voter shall have signed the poll list. The election officers shall not allow a voter to mark his ballot outside of an election booth unless the voter is unable to enter the booth by reason of his physical disability. \*\*\* ” (*Emphasis supplied.*)

It is clear that this statutory requirement was violated at two of the three polling places.

Allegation No. 3 concerning a non-certificated challenger appears to be true. The testimony regarding this incident indicates that the election officials took immediate action to stop the use of a challenger's badge by an unauthorized party.

The allegation contained in Item No. 4 was withdrawn during the course of the hearing and will not, therefore, be considered.

Allegation No. 5 will be considered at the conclusion of this decision.

The allegation, set forth in No. 6, that a challenger improperly accompanied voters to and from the voting booth, is not supported by the evidence and is, therefore, dismissed.

The incident regarding a voter's receiving a marked ballot, as alleged in Allegation No. 7, is supported by the direct testimony of this voter. No testimony was produced to clarify how the ballot came to be marked before the voter received it or who did the marking. The Commissioner cannot draw the inference, that this incident was an attempt at deliberate fraud, on the basis of only the simple fact that the incident did occur.

The testimony regarding Allegation No. 8, that unregistered voters were brought to the polls is inconclusive. There is no evidence in the record before the Commissioner that an illegal act was performed by persons who were turned away at the polls because they were not properly registered.

The general allegation of No. 9, that the conditions at the Town Bank Fire House were such as to prevent the electorate from expressing its will, is encompassed in all of the previous allegations.

It is clear, in the instant matter, that irregularities did occur in this election. The most flagrant of those stated were the violations of *N.J.S.A. 18A:14-53*. The election officials at the Town Bank Fire House had a large room for a polling place. A rearrangement of the tables, voting booth and ballot box would have allowed the voters, or at least a majority of them, to form lines inside of the building rather than to wait out of doors in extremely cold weather. The fact that only one voting booth was provided was an act of negligence, although this was not a violation of law. Election officials should not have handed ballots to voters prior to the vacancy of the voting booth. This would have prevented the additional violation of voters marking their ballots outside of the privacy of the voting booth.

Nothing in the record before the Commissioner leads to the conclusion that these violations of the statute by the election officials were either deliberate or constructive fraud, or that they thwarted the will of the electorate.

In the decision of the New Jersey Supreme Court, *In Re Clee*, 119 *N.J.L.* 310, at page 323, the Court stated that fraud is a conclusion of law which is based upon facts and may not be charged in general terms with any power to produce effect. The Court also stated the following:

“ \*\*\* The petition \*\*\* must show that the irregularities or fraud complained of produced a result so different from that which would have been declared in their absence, as to lead the court to conclude, *prima facie*, that on account of these irregularities the result is legitimately challenged. \*\*\* ”

The Supreme Court in *In Re Clee*, *supra*, at page 313, referred to the case of *Burrough v. Branning*, 9 *N.J.L.J.* 110, as a leading case on this subject. The court in *Burrough*, *supra*, stated the following, at page 115:

“ \*\*\* There are cases where the judges of election have been guilty of acts which render them liable to indictment and yet, in the absence of fraud by the party who claimed the benefit from the result, the election was held valid. If this be so, surely the will of the people is to be given effect, in the absence of fraud, if only irregularly expressed. Negligence or mistake in the performance of duty by election officers will not be allowed to stand in the way so as to defeat the expression of the popular will. \*\*\* ”

The Commissioner finds no evidence herein of a specific fraud, and in accordance with the weight of authority will not set aside the results of this election on the grounds set forth in Allegations Nos. 1, 2, 3, 6, 7, 8 and 9. *Wene v. Magner*, 13 *N.J.* 185 (1953); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951); *In Re Clee*, *supra*

In the instant matter, the Commissioner is constrained to point out that the laxity on the part of the election officials is distressing, as is the lack of adequate planning by the Board of Education. The Commissioner cautions the Board of Education, and most particularly the members of the election board, to give scrupulous attention and conformance to the statutes governing school elections. A strict and meticulous observance of the school election laws is required of all persons having responsibility for the conduct of a school election.

A most serious problem is presented by Allegation No. 5, that three unregistered voters cast ballots in the February 1, 1972 school election. The testimony of the registrar of the Cape May County Election Board (Tr. 50-54) and the evidence (Exhibits P-1, 2, 3, 4, 5) establish this as an indisputable fact. *N.J.S.A. 18A:14-44* requires of a voter that he "\*\*\*\* be *registered* to vote in an election district included within the school district \*\*\* at *least 40 days* prior to the election \*\*\*." Two of the voters who signed affidavits did not meet this statutory requirement and were not properly registered; therefore, these two votes cannot be counted. The third affidavit is fraudulent and invalid, since no record exists for the registration of this voter under either the name or address given on the affidavit. Accordingly, this vote cannot be counted, and the Commissioner so holds.

It cannot reliably be determined for whom these three unregistered persons voted. Since three votes are sufficient to affect the outcome of the election between Candidates George L. McCahey (463) and Shull O. Rutherford (460), the election cannot be regarded as conclusive with respect to either of them. *In the Matter of the Annual School Election Held in the School District of Lower Cape May Regional, Cape May County, 1972 S.L.D. 65*

The results of the recount were as follows:

	At Polls	Absentee	Total
Robert A. White	508	0	508
Shull O. Rutherford	452	8	460
George L. McCahey	463	0	463
Robert R. Gosselin	396	8	404
Robert C. Matthews	160	0	160
Franklin R. Hughes, Jr.	159	0	159
John D. Sheets	100	0	100

The vacancy, thus created, must be filled by the Cape May County Superintendent of Schools pursuant to *N.J.S.A. 18A:12-15. In the Matter of the Annual School Election Held in the School District of South River, Middlesex County, 1968 S.L.D. 84; In Re Dorgan, 44 N.J. 440 (1965)*

The Commissioner finds and determines that the will of the electorate cannot be fairly and clearly determined with respect to the election of a candidate to the second seat on the Lower Cape May Regional Board of Education. Such seat is, therefore, declared to be vacant. The Cape May County Superintendent of Schools is hereby directed to fill the vacancy on the Board by

the appointment of a qualified citizen who shall serve until the reorganization meeting following the next annual school election.

ACTING COMMISSIONER OF EDUCATION

May 5, 1972

**In The Matter Of The Tenure Hearing Of  
Kathleen M. Pietruni, School District  
Of The Township of Brick, Ocean County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Board of Education, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Brick Township Board of Education, hereinafter "Board," was suspended from her teaching duties by the Board on September 8, 1971. Subsequent to this act of suspension, the Board filed a determination with the Commissioner of Education that written charges against petitioner would be sufficient, if true in fact, to warrant a "dismissal" or "a reduction in salary" (*N.J.S.A. 18A:6-11*), and a hearing, lasting seven days over a four-months' period, was conducted by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Case submission of this matter was completed on May 19, 1972, and a decision of the Commissioner is pending. However, on April 6, 1972, petitioner moved that she be compensated at her regular salary pursuant to the requirement imposed by an amendment of the statute, *N.J.S.A. 18A:6-14*, embedded in *Laws of 1971, Chapter 435, § 2*, which became effective on February 10, 1972. This statute now reads as follows (underlined section indicates the amendment):

"Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, *but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.* Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension.

Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary, from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

A brief oral argument was conducted on this Motion at the hearing, and it was evident that there is no question regarding two pertinent facts necessary to an adjudication of this Motion by the Commissioner. These facts of pertinence are that:

1. Petitioner had indeed been suspended without compensation for a period of 120 days following the act of the Board, reported, *ante*, on September 8, 1971, and remains suspended to this day.
2. The "delay" in reaching a final decision in this matter is not attributable to petitioner.

The matter posed for the Commissioner's determination is whether or not the statute, *N.J.S.A.* 18A:6-14, is applicable in this instance, since petitioner was suspended from her employment approximately five months prior to the effective date of the statute in its amended form and since, on the date of her suspension, there was no provision at all for mandatory payment of salary to suspended teachers.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and determines that the statute, *N.J.S.A.* 18A:6-14, as amended, should be construed to provide for full salary to be paid beginning on the 121st day following certification of charges, excluding all delays which are granted at the request of the employee, regardless of whether the certification of charges occurred prior to February 10, 1972, the effective date of the act. However, the Commissioner also determines that if, as in the instant matter, the certification of charges occurred more than 120 days prior to February 9, 1972, the effective date on which full salary shall be paid is February 10, 1972 — the date on which the act became effective.

This determination is based on the belief that while it is settled that legislation is to have prospective application only, unless a contrary intention is expressed or unavoidably implied (*Alongi v. Schatzman*, 57 *N.J.* 564,578 (1971); *La Parre v. Y.M.C.A.*, 30 *N.J.* 225, 229 (1959)), the construction here given to the act is not retroactive. It does not require expenditures of funds or abridge contractual terms in the period prior to February 10, 1972, the effective date of the act.

The Commissioner believes that even if such a construction as here enunciated were considered retroactive, it would be permissible, as the Legislature has clearly expressed its intention that relief for teachers suspended without pay shall be provided if such matters are not decided by the Commissioner "within 120 calendar days *after* certification of the charges," and excludes only those delays which are granted at the request of the employee. (*Emphasis supplied.*)

Finally, the Commissioner holds that even if the construction of the act advocated herein were considered retroactive and not specifically mandated by the Legislature, it is nevertheless authorized under the principle that ameliorative or curative statutes are to be liberally construed (*State v. Meinken*, 10 N.J. 348, 352 (1952); *Wasserman v. Tannenbaum*, 23 N.J. Super. 599, 610 (Law Div. 1952)), and may be applied retroactively. *cf. In re Smigelski*, 30 N.J. 513, 526-28 (1959) It is settled law that remedial and procedural statutes, such as those providing new remedies for existing wrongs or affecting procedural steps in pending actions, are given retroactive effect. *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N.J. 372, 380-82 (1954); *Morris v. Becker*, 6 N.J. 457, 470-71 (1951)

For the reasons enunciated, *ante*, and cognizant of the fact that respondent was suspended from her employment more than 120 days prior to February 9, 1972, the Commissioner directs that respondent be compensated by the Brick Township Board at her regular salary, effective from February 10, 1972, in response to her Motion of April 6, 1972.

COMMISSIONER OF EDUCATION

June 14, 1972

**Board of Education of the City of Paterson,**

*Petitioner,*

*v.*

**Board of Finance and the Governing Body of the  
City of Paterson, Passaic County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Robert P. Swartz, Esq.

For the Respondents, Joseph A. LaCava, Esq.

Petitioner, the Board of Education of the City of Paterson, hereinafter "Board of Education," alleges that the Board of Finance of the City of Paterson, hereinafter "Board of Finance," has acted improperly and unlawfully by adopting a resolution which concurs with the action of the Board of School Estimate of the City of Paterson, hereinafter "Board of School Estimate," certifying \$14,488,532 as the amount to be raised by local taxation for public school purposes for the school year beginning July 1, 1972, and ending June 30, 1973, but which provides additionally that only \$5,342,266 instead of \$7,244,266, which amount is one half of the \$14,488,532, shall be raised and appropriated for the six-month period beginning July 1, 1972, and ending December 31, 1972.

The relevant material facts are stipulated and are essentially not in dispute. Accordingly, this matter is submitted by the parties for Summary Judgment by the Commissioner of Education. The facts in the case are set forth as follows:

Petitioner is a type I school district which encompasses the area coterminous with the City of Paterson. The Board of Education, which is appointed by the chief executive officer of the City, *N.J.S.A. 18A:12-7*, prepares the annual school budget, *N.J.S.A. 18A:22-7*, and the school budget is then submitted to the Board of School Estimate, composed of two members of the Board of Education, two members of the municipal governing body and the chief executive officer of the municipality. *N.J.S.A. 18A:22-1* The Board of School Estimate determines " \*\*\* the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year, exclusive of the amount which shall have been apportioned to it \*\*\*" by the Commissioner of Education, and certifies such amount to the municipal governing body and the Board of Education. *N.J.S.A. 18A:22-14* The governing body is directed by statute to appropriate automatically the amount so certified and include it in the tax ordinance, except that " \*\*\* the governing body shall not be required so to appropriate any amount in excess of 1½% of the assessed valuation of the ratables of the municipality, but may do so if it so determines by resolution." *N.J.S.A. 18A:22-15, 17* The City of Paterson

possesses a local Board of Finance invested with all the powers and duties in regard to control and management of the finances of the City, including levying of taxes and fixing the annual tax or tax levy or tax ordinance of the City, and the collection of taxes and assessments. *N.J.S.A.* 40:186-5, 6

This matter controverted before the Commissioner involves the local tax appropriation for the school year beginning July 1, 1972, and ending June 30, 1973. The Board of Education adopted its proposed school budget for 1972-73 (Exhibit P-5) on January 20, 1972. (Exhibit P-1) The proposed budget was advertised (Exhibit P-2) according to *N.J.S.A.* 18A:22-11, 12, and a public hearing was held by the Board of School Estimate on February 11, 1972. *N.J.S.A.* 18A:22-13 At the conclusion of the public hearing, the Board of School Estimate adopted a resolution (Exhibit P-4) by a roll call vote of four ayes with one member absent, certifying the amount of \$14,715,703 to be raised by local taxation for public school purposes for the 1972-73 school year.

It is stipulated that the Board of Finance adopted a resolution on February 18, 1972, concurring in the 1972-73 appropriation of \$14,715,703, which amount is in excess of 1½% of the assessed valuation of the ratables, but limiting the amount to be raised for school purposes for the period from July 1, 1972 through December 31, 1972, to \$5,342,266. On April 8, 1972, the Board of Finance adopted a resolution which rescinded its previous resolution of February 18, 1972. (Exhibit P-6)

On the same date of April 8, 1972, the Board of Finance adopted a second resolution (Exhibit P-7), which in sum provided that (1) the amount of \$227,171 for capital outlay will be bonded, leaving a balance of \$14,488,532 certified by the Board of School Estimate to be raised for school purposes for the school year July 1, 1972 to June 30, 1973, and (2) the Board of Finance will concur in the amount of \$14,488,532 for 1972-73 upon being advised that either the Commissioner of Education or a court of appropriate jurisdiction has determined that the City may raise \$5,342,266 of said amount in calendar year 1972 in lieu of \$7,244,266. This resolution (Exhibit P-7) also sets forth determinations by the Board of Finance regarding the Board of Education's local tax appropriations for the school year July 1, 1971 to June 30, 1972, which will be considered *post*.

The narrow issue in this case was determined in a conference of counsel as follows: May the City Board of Finance levy and pay the amount mutually agreed by the Board of Education, the Board of School Estimate and the Board of Finance [\$14,488,532], necessary to be raised by local taxation for school purposes for the period beginning July 1, 1972 through June 30, 1973, in an amount less than fifty percent for one of the six-month periods of either July 1, 1972 to December 31, 1972, or January 1, 1973 through June 30, 1973, provided that the Board of Education concurs.

The three Boards which are parties in the instant matter express a mutual and sincere concern for the local tax burden to be borne by the individual



taxpayers of the City of Paterson. The objective they seek is a lowering of the total local tax rate for either the 1972 or 1973 calendar year.

The statute which pertains particularly to the instant matter is *N.J.S.A. 18A:22-15*, which states the following:

“The governing body of each municipality comprising a type I district shall, upon the receipt of the certificate of the board of school estimate:

“a. Appropriate the amount, so certified, for the use of the public schools in the district for the ensuing school year, if such appropriations in the district are not made upon a calendar year basis; or

“b. Appropriate not less than one half of the amount, so certified, if such appropriations in the district are made upon a calendar year basis, and in any year except the first in which such appropriation is so made, appropriate also the unappropriated balance, if any, of the sum previously certified by the board of school estimate for the current school year.”

The Board of Finance argues in its Brief that *N.J.S.A. 18A:22-17* also pertains and must be considered *in pari materia* with *N.J.S.A. 18A:22-15*. This statute, *N.J.S.A. 18A:22-17*, reads as follows:

“The governing body of the municipality shall include the amount so appropriated in its tax ordinance, and the same shall be assessed, levied and collected in the same manner as other moneys appropriated are assessed, levied and collected, but the governing body shall not be required so to appropriate any amount in excess of 1½% of the assessed valuation of the ratables of the municipality, but may do so if it so determines by resolution.”

The Board of Finance correctly states that the two above-cited statutes were originally one in the predecessor statute, *N.J.S.A. 18:6-53*. It contends additionally that the governing body is entrusted with discretionary authority to appropriate less than the amount certified by the Board of School Estimate, provided that the amount certified is above the statutory minimum of 1½%, as is the case in the instant matter. Therefore, *a fortiori*, the governing body also has the authority to alter the amount of the appropriation to conform to the cash requirements of the Board of Education. In support of this argument the Board of Finance cites *Gualano et al. v. Board of School Estimate of the Elizabeth School District, Union County*, 72 N.J. Super. 7 (Law Div. 1962), affirmed 39 N.J. 300 (1963); and *Board of Education of the City of Elizabeth v. Board of School Estimate of the Elizabeth School District et al., Union County*, 95 N.J. Super. 284 (App. Div. 1967).

The Commissioner does not agree. The reliance of the Board of Finance upon the aforementioned cases is misplaced. In *Gualano et al. v. Board of Estimate of the Elizabeth School District*, *supra*, Judge Feller of the Superior Court, Law Division, decided that the 1½% of the “assessed valuation of

ratables” referred to in *N.J.S.A. 18:6-53* (now *N.J.S.A. 18A:22-17*) means “\*\*\* the valuation that the municipality puts upon the assessable ratables as determined by the county tax board and set out in column 7, Schedule A of the abstract of ratables.\*\*\*” Plaintiff had contended in that case that the 1½% was to be applied to the true valuation of ratables, thereby considerably raising the minimum amount represented by 1½%. The New Jersey Supreme Court affirmed the decision of the Law Division in 39 *N.J. 300* (1963).

In *Board of Education of the City of Elizabeth v. Board of School Estimate of the Elizabeth School District et al., Union County, supra*, the Board of Education argued that the City Council must either appropriate the entire amount certified to it by the Board of School Estimate over and above the mandatory 1½%, or reject it *in toto*. The theory of this contention was that, if the City Council rejected the amount *in toto*, the Board of School Estimate could reconsider and reduce the amount certified, which then must be approved or disapproved by Council *in toto*. The Appellate Division of Superior Court affirmed Judge Feller’s decision that the City Council was not required to confer with the Board of School Estimate as a condition precedent to its own action, and that City Council is not required to concur and consent to all or nothing, but may consent to as much or as little above the statutory minimum as it chooses.

In the case of *Board of Education of the City of Elizabeth v. City Council of the City of Elizabeth*, 55 *N.J. 501* (1970) the governing body’s principal contention was that “\*\*\* the legislative schemes for the fixing of annual school appropriations are so different between type I and type II districts as to evidence the intent that the governing body’s determination in type I districts shall be final. This result is claimed to be particularly dictated where the appropriation exceeds 1½% of assessed valuations.\*\*\*” The conclusion reached by the Supreme Court regarding the above-stated issue is set forth at p. 507 as follows:

“\*\*\* the 1½% provision (*N.J.S.A. 18A:22-17*) does not evince any different intent. All that provision means is that if the amount fixed by the board of school estimate is less than 1½% of the assessed valuation of the municipal ratables, the governing body must accept that figure and provide for a tax levy to meet it [*Gualano v. Board of School Estimate of Elizabeth School District*, 39 *N.J. 300, 304* (1963) ], but that if the amount fixed by the board exceeds that percentage, the governing body may reduce the amount, acting in accordance with the standard previously mentioned, to a sum not less than the 1½% figure. The provision has nothing whatever to do with the authority and obligation of the Commissioner.<sup>1</sup> \*\*\*”

“<sup>1</sup> It is at least interesting to note that when an additional appropriation is required during the school year, the governing body must accept the figure therefor fixed by the board of school estimate, even though the additional plus the original appropriation exceeds 1½%. *N.J.S.A. 18A:22-23*, covering this situation, does not contain the percentage provision.”

Thus, the Supreme Court of this State has settled the matter of the governing body's authority and discretion regarding school tax appropriations under *N.J.S.A. 18A:22-17*.

After the governing body has exercised its discretion and adopted a resolution setting forth the appropriation to be raised by local taxation for school purposes, the provisions of *N.J.S.A. 18A:22-15* are controlling. This statute bears repeating as follows:

"The governing body of each municipality comprising a type I district shall, upon the receipt of the certificate of the board of school estimate:

"a. Appropriate the amount, so certified, for the use of the public schools in the district for the ensuing school year, if such appropriations in the district are not made upon a calendar year basis; or

"b. Appropriate not less than one half of the amount, so certified, if such appropriations in the district are made upon a calendar year basis, and in any year except the first in which such appropriation is so made, appropriate also the unappropriated balance, if any, of the sum previously certified by the board of school estimate for the current school year."

This statute simply means that in a municipality where the tax levy is determined on a calendar year basis, and the school district's tax appropriation is based upon the school year beginning July 1 and ending on June 30, *N.J.S.A. 18A:36-1*, the governing body shall appropriate for the calendar year not less than one half of the amount certified for the ensuing school year plus the balance of the previous school year's appropriation. In the instant matter, the effect of this statute can be seen on the governing body's 1972 calendar year school tax appropriation by the following example:

The school district's total tax appropriation for the 1971-72 school year was \$15,537,572. Therefore, for the period January 1, 1972 to June 30, 1972, the governing body was required to appropriate the balance remaining or, in this instance, one half or \$7,768,786. The school district's total tax appropriation for the 1972-73 school year is \$14,488,532. One half is \$7,244,266 for the period July 1, 1972 to December 31, 1972. The sum of the two halves, \$7,768,786 and \$7,244,266, is \$15,013,052 which is the governing body's school tax appropriation for the calendar year 1972. Set down another way this example is as follows:

One half of 1971-72 appropriation, January 1, 1972 to June 30, 1972	\$ 7,768,786
One half of 1972-73 appropriation, July 1, 1972 to December 31, 1972	\$ 7,244,266
Calendar year 1972, appropriation	<u>\$15,013,052</u>

In the judgment of the Commissioner, after the governing body has exercised its discretionary authority in determining a school district's tax appropriation for the school year, in excess of 1½% of the assessed valuation (*N.J.S.A.* 18A:22-17), then the statute *N.J.S.A.* 18A:22-15 is mandatory in requiring that "The governing body \*\*\* shall \*\*\* appropriate not less than one half of the amount, so certified, if such appropriations in the district are made upon a calendar year basis \*\*\*" and the Commissioner so holds.

The previously-cited decisions of the Courts of this State do not support the argument by the Board of Finance that the discretionary authority granted to the governing body by *N.J.S.A.* 18A:22-17 extends to and includes authority to appropriate less than one half of the school year tax appropriation. To hold as the Board of Finance contends would create a chaotic fiscal situation for boards of education of type I school districts, because even after the official action by the board of school estimate and the governing body, the board of education would have no certitude regarding its tax appropriation while the governing body continued to manipulate the school tax appropriation.

Therefore, the Commissioner determines that the Board of Finance's allegation that it may alter the tax appropriation for the calendar year by reducing the appropriation to less than one half of the amount certified for the school year is without merit, and its reliance upon *N.J.S.A.* 18A:22-15 for such authority is groundless.

The Board of Finance's resolution of April 8, 1972, (Exhibit P-7) concurred in the amount of \$14,488,532 as the school tax appropriation for 1972-73 on the condition of a favorable determination that the City could raise only \$5,342,266 of said amount in calendar year 1972 instead of one half or \$7,244,266. Accordingly, the Board of Finance must now determine either to appropriate \$14,488,532 for the school year 1972-73 or a lesser amount, *N.J.S.A.* 18A:22-17. In either case, the Commissioner orders the Board of Finance to make such appropriation in accordance with *N.J.S.A.* 18A:22-15 as construed herein.

COMMISSIONER OF EDUCATION

January 11, 1973

**Board of Education of the Township of North Bergen,**

*Petitioner,*

*v.*

**Board of Education of the Town of Guttenberg,  
Hudson County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Joseph V. Cullum, Esq.

For the Respondent, John Tomasin, Esq.

Petitioner, the Board of Education of the Township of North Bergen, hereinafter "North Bergen Board," demands judgment that the total amount of tuition it has charged the Board of Education of the Town of Guttenberg, hereinafter "Guttenberg Board," for the education of high school pupils from Guttenberg during the years 1965-1971 was a lesser amount than that which should have been charged and that the error should be rectified at this juncture. The Guttenberg Board avers that the total sum it paid in tuition charges for the education of its pupils was a properly assessed sum and that laches now bars a further claim. Additionally, the Guttenberg Board advances a counterclaim that the calculation used by the North Bergen Board in the formulation of costs for tuition purposes is not correctly founded.

The Petition herein is submitted on the pleadings and on Briefs of counsel. The submission was supplemented by an argument conducted on September 28, 1972 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The dispute herein is concerned with a total sum of \$229,934.96 which the North Bergen Board now alleges is payable in tuition charges from the Guttenberg Board as the result of a series of undercharges for tuition costs in each of the school years 1965-66 through 1970-71. Specifically, the North Bergen Board details the tuition rates it set for each year of the six-year period together with the rates that it now alleges should have been set, and adds thereto a calculation of each resultant disparity. A summary chart of these listings is itemized as follows:

Year	Tuition Rate Set	Total Tuition Paid	Alleged Actual cost Per Pupil	Alleged Total Tuition Due	Alleged Balance Due
1965-66	\$500	\$106,425.00	\$688.04	\$146,449.31	\$40,024.31
1966-67	525	114,870.00	722.09	157,993.29	43,123.29

1967-68	600	125,340.00	764.30	159,662.27	34,322.27
1968-69	675	146,542.50	818.87	177,739.77	31,197.27
1969-70	750	175,650.00	908.58	212,789.44	37,139.44
1970-71	818	194,039.40	1,004.08	238,167.78	44,128.38
Alleged Total Balance Due . . . . .					\$229,934.96

It is noted here by the hearing examiner that the North Bergen Board now maintains its tuition charges for each of the years of the six-year period were in error, and it should be allowed to recoup the difference between each charge and what it now alleges was the correct amount. In the view of the North Bergen Board the correct amount, which should have been assessed in each of the six years, was one founded on a calculation of actual costs incurred in providing education for pupils from Guttenberg.

However this argument is not predicated in whole or in part on an avowal that the tuition rate set by the North Bergen Board during any of those years was advanced as a "tentative" rate, subject to later revision and delayed assessment. Indeed it is clear, in the opinion of the hearing examiner, that the opposite was true.

This opinion is founded on a scrutiny of each of the letters sent by the North Bergen Board to the Guttenberg Board during this period. Each of them sets definitive rates for succeeding years, and there is no mention of possible later adjustments founded on revised calculations of actual costs. Two of the letters which are typical of those sent to the Guttenberg Board by the North Bergen Board during this period are reproduced in their entirety as follows:

(Letter dated January 3, 1966)

"Please be advised that the North Bergen Board of Education, at its last meeting, decided to increase tuition of pupils attending North Bergen High School from \$500. to \$525. per year, effective September, 1966."

(Letter dated January 24, 1967)

"Please be advised that the North Bergen Board of Education, at a special meeting on Saturday, January 21, 1967, adopted the following resolution:

'After due consideration of costs in connection with provision of budget for school year 1967-1968, and due consideration of per pupil costs in adjacent communities as compared with charges made by adjacent communities for receiving pupils, it is hereby resolved by the North Bergen Board of Education that the per pupil charge of the Board of Education to the Town of Guttenberg, New Jersey, for receiving pupils from said Town, be the sum of Six Hundred (\$600.) Dollars per pupil for the school year 1967-1968.'

"This communication constitutes formal notice of the determination by the North Bergen Board of Education with respect to high school tuition costs for 1967-1968.

“This information is forwarded to you for use in connection with provision of your budget for 1967-1968.”

The first indication that the North Bergen Board had decided to adopt a “tentative” tuition rate subject to later “adjustment” for a succeeding school year came in January 1971. At that time the following letter was addressed to the Secretary of the Guttenberg Board by the Secretary of the North Bergen Board.

“Please be advised that I have been directed to inform you that the estimated tuition rates are as follows:

“North Bergen High School \$1,100.00 per pupil per year  
Educable classes \$1,532.00 per pupil per year

“These rates will be subject to adjustment upon actual per pupil cost for the ensuing school year.”

While not denying, at this juncture, that the tuition rates it established during each of the years 1965-66 through 1970-71 were definitive and not tentative rates, the North Bergen Board now argues that it has just discovered the error of previous North Bergen Boards in this regard and the North Bergen taxpayers have a right to recovery. This argument is founded on two principal points: (1) an agreement to accept less than the actual cost per pupil would be violative of provisions of our New Jersey Constitution, and (2) an agreement to accept less than the cost per pupil is voided by a conflict of interest which pervaded the transaction. These points will be summarized separately below.

In the first point of its argument, the North Bergen Board maintains that by Constitutional prescription, money may not be donated or appropriated by a municipality for other than a public use, and

“\*\*\* if an agreement to accept less than the cost of tuition to North Bergen taxpayers, is within the constitutional prohibition then the alleged agreement should be deemed unenforceable and a nullity. \*\*\*”  
(Petitioner’s Memorandum of Law, at p. 1)

In advancing this argument, the North Bergen Board avers that the acceptance of less than the actual costs incurred in the education of Guttenberg students has no discernible use or purpose so far as the taxpayers of North Bergen are concerned.

Further, the North Bergen Board argues that a requirement that the people of North Bergen pay more, by indirection, for the education of their pupils, than the people of Guttenberg pay for the education of pupils from Guttenberg, is “unconstitutionally discriminatory.” In support of this view the North Bergen Board cites *Robson v. Rodrigues*, 44 N.J. Super. 262 (Law Div. 1957), affirmed 26 N.J. 547 (1968); and *Boulevard Apartments v. Mayor and Council of Lodi*, 110 N.J. Super. 406 (App. Div. 1970).

Additionally, as a second point, the North Bergen Board avers that an agreement to accept less than the tuition cost per pupil is voided at this juncture by a conflict of interest which it alleges existed during all of the years 1965-1971. Specifically, the North Bergen Board now alleges that its Superintendent of Schools is, and has been, during all of these years the Mayor of Guttenberg, and

“\*\*\* under a duty to serve its citizens to the best of his ability which of course would include the achievement of a low tax rate. The conflict between the two positions is so apparent that further elucidation is unnecessary.\*\*\*” (Petitioner’s Memorandum of Law, at pp. 4-5)

In this latter regard, the North Bergen Board now suggests that it is necessary to proceed to a plenary hearing so

“\*\*\* that testimony concerning the circumstances surrounding the transactions can be adduced and evaluated.\*\*\*” (Petitioner’s Memorandum of Law, at p. 6)

However, this request is nowhere contained in the Petition and at the conference of counsel preceding the oral argument, *ante*, it was agreed the controversy herein would be submitted on the pleadings. The hearing examiner also observes that the Petition, *sub judice*, is a recital of alleged facts and figures involved with tuition costs – as summarized in the chart, *ante* – and contains no avowal that the North Bergen Superintendent of Schools was in any way responsible for the alleged underpayment of tuition costs.

The Guttenberg Board avers that the North Bergen Board established definite

“\*\*\* tuition rates for all said years, which rates were agreed to by the Town of Guttenberg; budgeted and paid and the agreements were performed as agreed to and are all executed and completed.\*\*\*” (Answer to Petition, at p. 2)

Therefore, Guttenberg maintains, there is no other bill for tuition due or payable absent an authority in law for a unilateral amendment of a previously stated tuition charge. It bases this avowal on a discussion of the statute *N.J.S.A. 18A:38-19* and the rules of the State Board of Education.

The two points raised by the Brief of the North Bergen Board are also addressed in the Brief of the Guttenberg Board. The Guttenberg Board avers that the Petition controverted herein advances no claim of a conflict of interest and that a tardy claim in this regard cannot constitute an issue for the present adjudication. However, the alleged conflict of interest is addressed by the Guttenberg Board’s Brief in some detail, and in summary, it is said in rebuttal to this charge that:

1. The Superintendent of North Bergen Schools did not set the tuition



rates herein controverted — the North Bergen Board had this responsibility and exercised it.

2. Financial matters involving school systems are the responsibility of school officials other than the Superintendent of Schools.

3. The Mayor of Guttenberg has no part in the conduct of the Guttenberg Schools. The Board of Education is responsible for such conduct.

4. There is no statutory or constitutional prohibition barring the holders of an educational position in one community from holding elected office in an adjacent community.

In the view of the Guttenberg Board there is likewise no constitutional issue herein since no moneys, credit nor property were loaned or given to the Guttenberg Board by the North Bergen Board. Additionally, the Guttenberg Board argues that in the case, *sub judice*, the North Bergen Board was not giving or loaning anything — it was “receiving” an amount of money as tuition payment in each of the years in question. In this view:

“\*\*\* the execution of statutory duty, under R.S. (sic) 18A:38-19, provides clear proof of public purpose, involving education and tuition of students. \*\*\*” (Guttenberg Board Brief, at p. 2)

The Guttenberg Board also argues that:

“\*\*\* Municipal and governmental agencies are required to act in accordance with fairness, justice and morality and are bound by their contracts and actions and, in appropriate cases, are estopped by equitable principles of laches, estoppel and fair dealing.\*\*\*” (Guttenberg Board Brief, at p. 18)

Finally, the Guttenberg Board avers by way of counter Petition that the North Bergen Board’s calculation of tuition rates is founded on an improper and illegal formula, and that its recent attempt to set an “estimated” rate subject to later “adjustment” has no proper foundation in law. The North Bergen Board denies the validity of this contention, but makes no response to the legal arguments advanced by the Guttenberg Board.

The hearing examiner has no basis to set forth a finding herein on the correctness of the dollar amounts which the North Bergen Board now alleges were the tuition costs due and payable for each of the years 1965-71. The formula which the North Bergen Board used was not the subject of proofs in the oral argument, *ante*, nor in the Briefs advanced by counsel. However, the hearing examiner believes the propriety of the submission of a “tentative” tuition rate subject to later “adjustment” poses an issue which has already been rendered *res judicata* by previous decisions of the Commissioner, and the hearing examiner concludes that the decision of the Commissioner will address this point.

The issues posed by this Petition may be stated succinctly as follows:

1. May the North Bergen Board be permitted at this juncture to reassess tuition costs payable by the Guttenberg Board for each year of the six-year period 1965-66 to 1970-71, and may it now enact additional levies based on such reassessment? Would allegations of conflict of interest or constitutional protection trigger such a privilege, and if so, is a plenary hearing necessary in this regard? Is the privilege barred by laches at this juncture?
2. If the North Bergen Board may be permitted to reassess and levy such costs, what is the basis for the tuition cost calculation?
3. Is the attempt of the North Bergen Board in 1971 to establish a "tentative" tuition rate subject to later "adjustment" correctly founded in law?

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, and it is noted that the contentions of the parties to the controversy herein are precisely pertinent to two time periods; namely, the period September 1965 through June 1971, and the period which comprises the 1971-72 school year. With respect to the first time period, it is noted that the North Bergen Board established definitive fixed tuition rates each year, and there is no contention to the contrary herein.

In such circumstances the Commissioner holds that there is no relief which can now be afforded with respect to costs for those years. The North Bergen Board clearly chose one of the two ways to assess such costs during all of that time and the assessments against Guttenberg were promptly paid. These assessments were fixed, firm rates similar to the ones considered by the Commissioner in *Board of Education of the City of Cape May v. Board of Education of the Township of Lower*, *Board of Education of the Borough of West Cape May*, and *Board of Education of the Borough of Cape May Point*, *Cape May County*, 1963 S.L.D. 48, and in the Commissioner's judgment the decision in the instant matter based on similar facts must be precisely the same; namely, that "\*\*\*\* petitioner is barred from claiming additional tuition \*\*\*\*" (p. 52) at this juncture.

The judgment herein is grounded, as it was in *City of Cape May, supra*, on a review of applicable rules of the State Board of Education and the prescription of the statutes. The controlling statute for consideration at this time is N.J.S.A. 18A:38-19 which provides:

"Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount

not in excess of the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.”

This statute is similar in all essential respects to *R.S. 18:14-7* which was in force and effect in 1953 at the time of the decision in *City of Cape May, supra*. Similarly, the current *New Jersey Administrative Code* contains the identical language of the rule of the State Board considered by the Commissioner in 1953. Now notated as *N.J.A.C. 6:20-3.1* it provides:

“ ‘ \*\*\* (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. \*\*\* ”

“ ‘ (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. \*\*\* ”

In a consideration of these essentially similar statutes and rules pertinent to the issues in *City of Cape May, supra*, the Commissioner advanced dicta equally pertinent to the matter controverted herein. This dicta was concerned with the interaction of the rules of the State Board and the statutes, and particularly emphasized that boards of education have two options when considering the assessment of tuition rates; an option to set a “fixed” rate or the option to set a “tentative” rate subject to later adjustment.

Since both of the options have been exercised by the North Bergen Board in the instant matter, during the two time periods which are considered herein, the dicta expounded in *City of Cape May, supra*, in this regard, is quoted in detail below:

“The Commissioner agrees with petitioner’s position that a rate fixed according to the procedures set forth in Part D of the State Board’s rules, *supra*, is prospective. He does not agree, however, that every tuition rate is prospective. Nothing in the State Board rule bars a receiving board of education from fixing a firm tuition rate subject only to the determination of the actual cost per pupil by a final audit of the receiving district’s cost according to the formula set forth in the State Board’s rule, and certified by the Commissioner, in order that the rate shall not exceed actual cost per pupil. R.S. 18:14-7 provides, 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. \*\*\* ’

“To state the matter conversely, the procedure for establishing a tentative rate, subject to later adjustment, is not a mandatory procedure. R.S. 18:14-7, *supra*, must be read *in pari materia* with the last sentence of R.S. 18:14-1, which states:

“ ‘ Nonresidents of the school district, if otherwise competent, may be admitted to the schools of the district with the consent of the board of education *upon such terms as the board may prescribe.*’ (Emphasis added.)

“Plainly an administrative rule of the State Board of Education may not deprive a school district of a right granted it by law. ‘Such an endeavor, however wisely exerted, oversteps the boundaries of administration and trespasses upon the field of the Legislature.’ *Frigiola v. State Board of Education*, 25 N.J. Super. 75, 81 (App. Div. 1953). ‘Administrative implementation cannot deviate from the principle and policy of the statute.’ *Abelson’s, Inc. v. N.J. State Board of Optometrists*, 5 N.J. 412, 424 (1950). The rule of the State Board upon which the instant controversy is based is purely procedural, designed to facilitate orderly budgeting of anticipated tuition receipts by the receiving district, and tuition costs by the sending districts. Thus, a receiving district has certain options with regard to setting the amount to be charged for tuition:

“(1) It may set a fixed rate from no charge to the best estimate of actual cost. Such a rate would not be subject to revision or adjustment unless it exceeded the actual cost per pupil for tuition purposes subsequently determined. Under this procedure, a sending district can anticipate with exactness the amount to be raised for tuition purposes, can feel sure that its bills have been paid, and that it need not fear a notice some years later that it still owes an until-then-unknown amount for past services.

“(2) It may set a tentative rate. Such a rate would be subject to subsequent revision and adjustment of payment if it is determined later that the actual cost was higher or lower than the tentative rate charged. The procedure by which such a rate is set and subsequently adjusted is established by rule of the State Board, *supra*. \*\*\*” (at pp. 50, 51)

Two other decisions of the Commissioner are also of pertinence herein. *Board of Education of the Borough of Red Bank v. Board of Education of the Township of Shrewsbury, Monmouth County*, 1963 S.L.D. 52, and *Board of Education of the City of Hackensack v. Board of Education of the Township of Rochelle Park, Bergen County*, 1970 S.L.D. 294.

A reading of these three decisions establishes the principles on which a decision in the instant matter is founded.

As the Commissioner observed in *City of Cape May, supra*, a local board of education has “certain options” with regard to establishing a rate to be charged for tuition; and one of these options is the setting of a “fixed” rate – the option exercised by North Bergen in the years 1965-66 through 1970-71. Having exercised this option, however, the Commissioner holds that the North Bergen Board is precluded from fixing another rate at this juncture for those years. As the Commissioner said in *City of Cape May, supra*, in regard to such “fixed” rates:

“\*\*\* Such a rate would *not be subject to revision or adjustment* unless it exceeded the actual cost per pupil for tuition purposes subsequently determined.\*\*\*” (*Emphasis ours.*)

Having held the rate set by the North Bergen Board is “\*\*\* not subject to adjustment \*\*\*” at this late date, the Commissioner is constrained to say that this holding may not be tempered by tardy allegations of conflict of interest against a school administrator. The members of the North Bergen Board and those members alone were given responsibility by N.J.S.A. 18A:38-19 to determine the tuition rate for each of the six years in question. In the Commissioner’s judgment, these members alone must be held responsible for all such rates.

Similarly, the Commissioner holds that the constitutional reasons advanced by the North Bergen Board provide no alternative reasons to temper this decision. It is the Legislature of the State of New Jersey which promulgates laws for the orderly government of the schools of New Jersey and the authority of the State Board derives therefrom. (N.J.S.A. 18A:4-3 *et seq.*) It is the State Board which is charged by N.J.S.A. 18A:4-10 with an “efficient development of public education.” Additionally the statute provides:

“The general supervision and control of public education in this state \*\*\* shall be vested in the state board \*\*\*.”

Accordingly, since the Legislature has enacted a specific statute detailing the law with respect to tuition charges (*N.J.S.A.* 18A:38-19), and since the State Board has also acted in a consistent manner to detail "efficient compliance with the statute (*N.J.A.C.* 6:20-3.1), and since the North Bergen Board acted in a manner pursuant to the statute and rule, there is no cause for the Commissioner to interpose a separate judgment at this juncture.

There remains the question of whether or not the North Bergen Board could set a "tentative" rate for the 1971-72 school year, subject to later "adjustment," in the manner proposed in its letter to the Guttenberg Board dated January 25, 1971. The Commissioner holds that it could and that the Guttenberg Board is now liable to pay an additional assessment for the education of its pupils in the North Bergen School System if, according to the terms of *N.J.A.C.* 6:20-3.1 (4), it is determined

"\*\*\*that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged\*\*\*."

In this regard, the "Method of determining high school tuition rates" is also set forth in *N.J.A.C.* 6:20-3.1, and is applicable herein. The Commissioner directs that the costs which are or may be controverted with respect to the 1971-72 school year be calculated as in this formula provided.

For the reasons advanced, *ante*, the portion of the instant Petition with respect to the request of the North Bergen Board to be permitted to levy additional tuition charges for the school years 1965-66 through 1970-71 is dismissed. However, the Commissioner holds that the North Bergen Board may adjust its tuition rate for the 1971-72 year by an application of the formula prescribed in *N.J.A.C.* 6:20-3.1. To expedite such possible readjustment, the Commissioner directs that the North Bergen Board and the Guttenberg Board appoint representatives to meet with responsible officials of the State Department of Education if controversy appears imminent over the application of the formula.

COMMISSIONER OF EDUCATION

January 12, 1973

**Board of Education of the Township of North Bergen,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Town of Guttenberg,  
Hudson County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, January 12, 1973.

For the Petitioner-Appellant, Joseph V. Cullum, Esq.

For the Respondent-Appellee, John Tomasin, Esq.

The Board of Education of the Township of North Bergen filed a Petition alleging its status, as a receiving district for the high school pupils of the Town of Guttenberg, and contending that for the academic school years 1965-1971, it established tuition rates which were in the aggregate \$229,934.96 less than the actual cost per pupil for the same period.<sup>1</sup> It sought a judgment in that amount against the respondent. Respondent, the Board of Education of the Town of Guttenberg, filed a counterclaim, (1) seeking a review of the method by which petitioner determined the amount due for the years in question, and demanding reimbursement for any payments made found to be in excess of the actual cost per pupil properly computed, and (2) contending that petitioner's attempt, for the academic year 1971-1972, to establish an "estimate" tuition rate subject to subsequent "readjustment" after determination of the actual cost per pupil rate be declared void and contrary to applicable law.

The Commissioner of Education of the State of New Jersey in his decision of January 12, 1973, acting under *N.J.S.A. 18A:38-19*, held that petitioner was not entitled to any claimed underassessment of tuition rates which it charged to respondent for the period 1965-1971; and that the establishment of an estimated tuition rate subject to readjustment by petitioner for the academic year 1971-1972, was permissible.

Petitioner's sole contention on appeal is that no opportunity was provided for amendment of pleadings and discovery that would have permitted it to obtain information which might lead to evidentiary support for its claim relating

---

<sup>1</sup>The applicable statute, *N.J.S.A. 18A:38-19*, provides:

"Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board \*\*\*."



to an alleged conflict of interest on the part of petitioner's Superintendent of Schools. Petitioner claims that the alleged conflict might possibly have tainted the actions of the petitioner Board of Education in underestimating tuition rates.<sup>2</sup> On appeal to the State Board, no factual evidence was advanced showing that the actions of petitioner Board were so tainted, but rather the argument hinged upon a naked right to explore this possibility. No application was made during the pendency of the appeal before the State Board, until oral argument before the Law Committee, for amendment and discovery.

The parties were furnished with copies of the report and recommendation of the Law Committee of the State Board of Education dated October 19, 1973.

In view of the limited scope of the appeal, we will consider it as embracing an application to obtain discovery and to present evidence touching upon the alleged conflict of interest and its effect, if any, on petitioner's actions. We grant petitioner fifteen days within which to file and serve affidavits in support of the application and grant respondent fifteen days within which to file answering affidavits.

Petitioner also asserts that in the proceedings before the Commissioner of Education of New Jersey, the Hearing Officer's report and recommendations were not submitted to the parties as required by *Winston v. Board of Education of the Borough of South Plainfield*, 125 N.J. Super. 131 (A.D., 1973), now pending before the Supreme Court of New Jersey on Petition for Certification, and that this matter should be remanded to the Commissioner.<sup>3</sup> *Winston* was not decided until August 9, 1973, some eight months after the Commissioner rendered his decision. Since that time, procedures have been modified to comport with the requirements of *Winston* (N.J.A.C. 6:24-1.16, R. 1973, d. 232, adopted September 18, 1973). There is nothing to indicate, however, that any objections which might have been made to the Hearing Officer's report and recommendation cannot be presented to the State Board while the proceedings are pending before us. To remand this matter to the Commissioner would

---

<sup>2</sup>It appears to be undisputed that petitioner's Superintendent of Schools, during the period in question, was the Mayor of Guttenberg. His duties as superintendent included recommending to petitioner Board the annual tuition rates to be charged to the Board of Education of Guttenberg. The argument is that his obligations as mayor of Guttenberg made it impossible for him to act with that degree of rectitude as superintendent that petitioner had a right to expect. Petitioner first raised this argument in its Brief before the Commissioner; and at oral argument before the Commissioner, informally sought leave to amend pleadings and pursue discovery. No action was taken on this request, although it appears to have been resolved against petitioner in the Commissioner's decision.

<sup>3</sup>Other assertions were as follows:

(a) that the Board members, in accepting the recommendations of the Superintendent, failed to exercise independent judgment; (b) that in addition to filing affidavits in support of its application for discovery, it should be permitted "to take depositions if it so desires," and (c) that its Petition, includes a claim "for such relief as may be appropriate." However, the significance of these assertions will depend upon petitioner's ability to demonstrate the basis for the claim of conflict of interest and the effect of that conflict, if any, on the petitioner Board's action.



unnecessarily prolong the litigation with no discernible benefit to any of the parties. Petitioner is granted fifteen days in which to file any exceptions, objections, or reply to the Hearing Officer's report and recommendation as it is incorporated in the Commissioner's decision.

The New Jersey State Board of Education retains jurisdiction herein.

December 5, 1973

"K.K.," by her parents,

*Petitioners,*

*v.*

Board of Education of the Town of Westfield,  
Union County,

*Respondent.*

# COMMISSIONER OF EDUCATION

## Decision

For the Petitioner, Ralph Kline, *Pro Se*

For the Respondent, Nichols, Thomson and Peek (William D. Peek, Esq.,  
of Counsel)

Petitioners aver that the State Board of Education, hereinafter "State Board," determined in 1971 that their daughter, hereinafter "K.K.," was a handicapped child and that the determination entitles petitioners to reimbursement for sums of money they expended for their daughter's education prior to that time. The Board of Education of the Town of Westfield, hereinafter "Westfield Board," contests the claim and contends the prayer of the instant Petition is *res judicata*. Its Motion to Dismiss is grounded on this contention.

An oral argument on the Motion was conducted by a hearing examiner appointed by the Commissioner on November 29, 1972 at the State Department of Education, Trenton. Memorandums were filed by counsel for the Westfield Board and by petitioners, acting *pro se*. The report of the hearing examiner is as follows:

The instant Petition is a sequel to a Petition brought by petitioners on September 29, 1970. These two Petitions together with a decision of the Commissioner, a result of the first Petition, in *The Parents of "K.K." v. Board of Education of the Town of Westfield, Union County*, dated June 1, 1971, and a later decision of the State Board, on an appeal from the Commissioner's

decision, dated August 26, 1971, must be viewed *in pari materia* to evaluate the limited prayer of the instant Petition and the merits of the Motion to Dismiss. A brief review of the contentions of the earlier Petitions and the resultant decisions, *ante*, is a necessary prerequisite to the present adjudication.

Petitioners enrolled K.K. in the Westfield School System in January 1970, and she was placed in a regular second grade classroom. She remained in that placement for the remainder of the 1969-70 school year.

However, petitioners withdrew K.K. from the Westfield School System in September 1970 and enrolled her instead in a private school at their own expense. This action was occasioned by their belief that the child had not been properly classified as a handicapped child by the Westfield Board or placed in an educational program appropriate to her needs.

Subsequently, petitioners filed their first Petition with the Commissioner, requesting the Commissioner to make such a judgment, and demanding reimbursement for the tuition expenses they had already begun to assume.

However, following a hearing on the merits of the Petition, the Commissioner found, in his decision of June 1, 1971, *supra*, that the Westfield Board's psychological services team had made "\*\*\*\* a judgment it was empowered to make, \*\*\*\*" that K.K. had been properly placed and that the Petition was without merit. Additionally, the Commissioner said that:

"\*\*\*\* While parents have a right to send their children to private schools, they do not have a right to require that public school districts pay the tuition costs involved. *Malcolm Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County*, decided by the Commissioner July 17, 1970; *In the Matter of 'R' v. the Board of Education of the Town of West Orange*, 1966 S.L.D. 210.\*\*\*\*"

This decision of the Commissioner was appealed to the State Board and the decision of the State Board is repeated in its entirety as follows:

"There seems to be no doubt that petitioners' daughter is a handicapped child within the meaning of *N.J.S.A. 18A:46-1*. Their petition filed with the Commissioner of Education of the State of New Jersey was dismissed by him on June 1, 1971.

"The child, a pupil in respondent's district from January to June, 1970, was examined and evaluated by a child study services team pursuant to *N.J.S.A. 18A:46-1 et. seq.*<sup>1</sup> Petitioners contend, among other things, that there were irregularities in the evaluation process and team composition, and that the ultimate finding by that team was erroneous to the extent that it did not classify the child under one of the categories set forth in *N.J.S.A. 18A:46-3*<sup>2</sup>.

“The record before us indicates that the team was unable to so classify the child either because of diagnostic difficulties, or the lack of sufficient data and observation, or both. The record further indicates that this may have been caused in part by the withdrawal of the child by petitioners from respondent’s district for private placement. Petitioners have suggested to us that they may be financially unable to continue the child in the private school which it was attending at the time of the Commissioner’s decision. In these circumstances, an adjudication of the issues raised by this appeal at this time would serve no useful purpose and would not carry out the spirit and intent of the statutes enacted for the benefit of handicapped children.

“The identification, examination and classification required by *N.J.S.A. 18A:46-8* shall be made within 30 days following the opening of the 1971-72 school year, *provided* petitioners enroll the child in the appropriate school of respondent’s district for the 1971-72 school year.

“The matter is remanded to the Commissioner for further action consistent herewith.” (*Emphasis in text.*)

It is noted here that this decision of the State Board was not appealed by petitioners. Following the decision, K.K. was classified as a handicapped child and was placed in a class for handicapped children which was deemed to be appropriate by the Westfield Board’s psychological services team and by petitioners.

However, petitioners reiterate a claim at this juncture that they first expressed in September 1970 – a claim against the Westfield Board for reimbursement of the tuition expense for the education of K.K. during the 1970-71 school year. The claim is currently founded primarily on two contentions; namely (1) that the State Board did find, in its decision, *supra*, that K.K. was a handicapped child, but (2) neglected to rule on another claim made by petitioners in their appeal – a claim for reimbursement for tuition money they had expended for the education of K.K. during school year 1970-71. Further, petitioners argue, in effect, that the remand of the State Board should have occasioned a further review by the Commissioner of the request for tuition expense reimbursement in the context of the State Board’s decision that K.K. was indeed a handicapped child. Petitioners had argued this was true at the time K.K. was withdrawn by them from further attendance in Westfield Schools and enrolled in a private school.

The Westfield Board avers that the Petition herein is now *res judicata* since the Commissioner did consider petitioner’s demand for reimbursement of tuition expense in his decision of June 1, 1971, and the Commissioner’s determination in this regard, *supra*, was not reversed on appeal by the subsequent State Board decision. In the view of the Westfield Board, the State Board’s decision of August 26, 1971, reported in full, *supra*, tacitly approved the Commissioner’s decision of June 1, 1971, but mandated a new and updated approach from that time forward. Specifically the Westfield Board avers:

“\*\*\* The State Board indirectly concurred with the decision of the Commissioner that the petition for reimbursement was without merit and that the respondent Board would be responsible for private education in the future if and *only* if the child study team was given an opportunity to continue its examination and have time to make a reasonable evaluation and classification. The decision did not say that any further classification would be applied retroactively to the school year 1970-71.\*\*\*” (Westfield Board’s Brief, at p. 3)

It is clear from a review of these contentions of the parties reported, *ante*, that the Commissioner is now called upon to review his original decision in this matter *in pari materia* with the decision of the State Board and to interpret the latter decision in one specific respect: to determine whether or not the State Board did indeed give tacit approval to the Commissioner’s decision of June 1, 1971. If it did, the present Petition is clearly *res judicata*. If it did not, or if the decision and remand of the State Board demanded further consideration by the Commissioner of petitioners’ request for reimbursement of tuition expense, the present Petition is viable and its claim for reimbursement must be considered anew.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and it is noted that the determination of the instant Motion to Dismiss petitioners’ claim rests upon an interpretation of the decision of the State Board dated August 26, 1971, and reported, set forth in full, *supra*. In this regard, it is true, as petitioners claim, that the decision of the State Board does not directly and succinctly treat petitioners’ request for the reimbursement of tuition funds that they expended for the education of their daughter during the 1970-71 school year.

Indeed it is evident that the State Board was silent on this subject.

However, the silence is of great significance in the Commissioner’s judgment. It speaks as loudly as words can to the effect that the principal findings of the Commissioner in his decision of June 1, 1971, are not reversed, but are affirmed in effect and stand as the basis for progress from that point in time forward with respect to the education of K.K. The State Board stated that it would not reach a decision with respect to the 1971-72 school year, thereby implicitly affirming the Commissioner’s decision.

It follows that the Commissioner determines the State Board concurred with that part of his decision reported, *supra*, which dealt with the freedom of parents to send their children to private schools and determined that the exercise of such freedom of choice demanded a concomitant exercise of responsibility to pay the costs of such school attendance.

Accordingly, the Commissioner finds the instant Petition is not viable — the issues it poses have already been decided.

The Motion is granted. The Petition is dismissed.

COMMISSIONER OF EDUCATION

January 18, 1973

Parents of "K.K.,"

*Petitioners-Appellants,*

*v.*

Board of Education of the Town of Westfield,  
Union County,

*Respondent-Appellee.*

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 18, 1973

For the Petitioner-Appellant, Ralph Kline, *Pro Se*

For the Respondent-Appellee, Nichols, Thomson and Peek (William D. Peek, Esq., of Counsel)

Petitioners appeal the decision of the Commissioner of Education of New Jersey dated January 18, 1973. The issue framed by the appeal centers about the interpretation and meaning of a prior decision of the State Board of Education in this matter dated August 26, 1971. The background facts can be briefly summarized.

Petitioners' daughter was admitted to school in respondent's district from January to June 1970. The record reflects, and we held, that the child was handicapped although the evaluation team of respondent was unable to specify the precise classification in which the child was to be placed.<sup>1</sup> In September 1970, petitioners removed the child from public school in respondent's district and placed her in a private institution (The child remained privately placed until September 1971, following our order of August 26, 1971, directing re-enrollment of the child by respondent and completion of its classification.) On September 29, 1970, petitioners filed a petition seeking (1) proper

---

<sup>1</sup>*N.J.S.A.* 18A:46-8 requires that each handicapped child be identified, examined and classified in one of ten specified categories.

classification of the child and (2) reimbursement for their private placement expenses. On June 1, 1971, the Commissioner dismissed the Petition, finding that respondent had discharged its statutory obligation. On appeal to the State Board, we expressly did not adjudicate the issues raised because, in our judgment, the identification-examination-classification process required by *N.J.S.A. 18A:46-8* had not been completed, and ordered respondent to complete the process within thirty (30) days following the opening of the 1971-72 school year, remanding the matter to the Commissioner.<sup>2</sup> Thus, we reversed the Commissioner's decision. A misunderstanding of our opinion may well have resulted from the fact that we declined to retain jurisdiction. Our view was that the question of entitlement to reimbursement should be determined by the Commissioner in the course of proceedings on remand. The classification of the child has been completed, and the only question remaining is petitioners' entitlement to reimbursement.

*N.J.S.A. 18A:46-13* requires a local board

“\*\*\* to provide suitable facilities and programs of education for all the children who are classified as handicapped \*\*\*.”

*N.J.S.A. 18A:46-16* permits a board to exclude or refuse to admit a child

“\*\*\* for a reasonable time pending his examination and classification\*\*\*.”

These expressions, taken together, indicate a legislative intent that no liability for education of allegedly handicapped children is to come into being until the handicapped child has been classified. A board's unreasonable and unjustified delay, absent parental fault, in classifying a child, might well expose it to reimbursement liability if the parents are compelled thereby to seek private placement for the education and training that the Legislature intended should be afforded by the district. The record indicates reasonable attempts to complete the identification-examination-classification process in an unusual and difficult case, and difficulty in fitting the child into one of the ten (10) statutory categories. Further, it appears that had petitioners not removed the child from public school in September 1970, the classification process might well have been completed by October 1970. Under the circumstances, we cannot say that respondent has not complied with its statutory obligation within the intentment of *N.J.S.A. 18A:46-1 et seq.*

---

<sup>2</sup>Our opinion stated:

“\*\*\* The record before us indicates that the team was unable to so classify the child either because of diagnostic difficulties, or the lack of sufficient data and observation, or both. The record further indicates that this may have been caused in part by the withdrawal of the child by petitioners from respondent's district for private placement. Petitioners have suggested to us that they may be financially unable to continue the child in the private school which it was attending at the time of the Commissioner's decision. In these circumstances, an adjudication of the issues raised by this appeal at this time would serve no useful purpose and would not carry out the spirit and intent of the statutes enacted for the benefit of handicapped children.\*\*\*”

We would hold that petitioners are not entitled to reimbursement for their expenses in private placement of the child between September 1970, and September 1971.

December 5, 1973

Pending before Superior Court of New Jersey

**In the Matter of the Election Inquiry  
in the School District of South Brunswick,  
Middlesex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

Petitioner, a candidate for election to a seat on the South Brunswick Board of Education, hereinafter "Board," alleges that the drawing for ballot positions for the 1973 school election was conducted improperly in that, *inter alia*, an incorrect container and slips of paper instead of cards, were used. Petitioner prays for relief in the form of an Order by the Commissioner of Education setting aside the results of the drawing for ballot positions and directing the Secretary of the Board of Education to conduct a second drawing.

An inquiry was conducted on Friday, January 19, 1973 at the Middlesex County Administration Building, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The essential, relevant facts are undisputed. Testimony and documentary evidence were adduced concerning the procedure of the drawing for ballot positions held January 5, 1973. The three witnesses included petitioner, the Board Secretary and a newspaper reporter who had observed the drawing. The testimony of these individuals was almost identical with only one minor exception.

Petitioner testified that when he arrived for the drawing at the library in the Cross Roads School, the Board Secretary and the newspaper reporter were already present. According to petitioner, the Board Secretary stated that the time had arrived to begin the drawing, and he asked petitioner to assist in folding four pieces of paper, each of which contained the name of a candidate, while the Secretary proceeded to do the same to the remaining four slips of paper. Petitioner stated that the eight slips of paper (Exhibit J-1) were then placed into a box (Exhibit J-4), that both the Board Secretary and he shook the box, and that the Board Secretary reached into the box and began to draw single slips of paper which he handed to petitioner to read aloud. (Tr. 3)

Petitioner testified that after six ballots had been drawn, the Board Secretary reached into the box and could not find either one of the two remaining ballots. After several moments, petitioner stated, the Board Secretary picked up the box and looked inside through the top opening, but still could not find the two remaining ballots. Petitioner testified that the Board Secretary then held the box at an angle, reached into the box and was then able to draw the two remaining ballots, which petitioner then read aloud. (Tr. 3-4)

Finally, petitioner stated that he protested to the Board Secretary that his ballot had been stuck under a flap in the bottom of the box, and according to petitioner, the Board Secretary said that this could have happened to anybody. (Tr.4)

The Board Secretary's testimony corroborated that of petitioner, with the single minor exception that he could not positively recall lifting up the box and looking in but he assumed that he had. According to the Board Secretary, the seventh and eighth slips of paper had become lodged under a bottom flap on the inside of the box, and he was able to retrieve them after he lifted this flap. As the slips were individually drawn by the Board Secretary, he testified, each slip was marked with a number to indicate its numerical order. The Board Secretary also testified that he wrote the candidate's names, in the order which they were drawn, upon a piece of paper. (Exhibit J-2) (Tr. 6-7)

The newspaper reporter, who witnessed the drawing for ballot positions, provided testimony which corroborated that of petitioner and the Board Secretary. This witness testified that the Board Secretary had lifted up the box when he could not find the two remaining slips of paper. (Tr. 9-11)

The drawing box (Exhibit J-4) is a rectangular-shaped, corrugated box approximately ten inches high, seventeen inches in length and twelve inches wide. It is covered with brown wrapping paper. In the top there is a u-shaped incision measuring approximately six inches on each of three sides. The flap which covers this incision is closed by a piece of masking tape. According to the newspaper reporter, this masking tape was loosened by the Board Secretary after the box was shaken, in order that a hand could be placed inside the box to draw the slips of paper. (Tr. 10)

An examination of the eight slips of paper (Exhibit J-1) by the hearing officer discloses that they are plain white paper of identical size and thickness upon which are typewritten the individual names of eight candidates for election. The numerals, No. 1 through No. 8, are written in blue ink on these eight slips. All eight slips are folded twice in an identical manner. Both slip No. 7 and the list of positions in the order drawn (Exhibit J-2) disclose that petitioner's name was drawn seventh. This fact is also corroborated by the testimony.

This concludes the report of the hearing examiner.

\* \* \* \*



The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The narrow question which is dispositive in this matter is whether the facts as set forth show compliance with the requirements of the applicable statute, *N.J.S.A. 18A:14-13*, which reads in pertinent part as follows:

“The position which the names of candidates shall have upon the annual school election ballot in each school district shall be determined by the secretary of the board of education of the district by conducting a drawing in the following manner:

“a. The drawing of names shall take place at eight P.M. on the day following the last day for filing petitions for the annual school election at the regular meeting place of the board of education. In case the day fixed for the drawing of names falls on a Sunday, the drawing shall be held on the following day. The drawing shall be done by the secretary, or in the event of his sickness or disability or absence from the district, by a person designated by the president of the board of education. The persons making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.

“b. A separate drawing shall be made for each full term and for each unexpired term, respectively. The names of the several candidates for whom petitions have been filed for each of the terms shall be written upon cards of the same size, substance and thickness. The cards shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be turned and shaken thoroughly to mix the cards and the cards shall be withdrawn one at a time.”\*\*\*”

The Commissioner takes notice of his decision under date of January 26, 1972, which involved a drawing for ballot position in this same school district. *In the Matter of the Election Inquiry in the School District of South Brunswick, Middlesex County*. In that decision the Commissioner cited the words of the Court in *Dimon v. Erlich et al.*, 97 N.J. Super. 83 (App. Div. 1967), wherein the following pertinent statement appears at p. 88:

“\*\*\*The fact that two people rather than one were actually involved in the here questioned draw procedure is irrelevant. So far as the statutory language and intent are concerned, one person may perform the entire operation. The reliance of the statute for a fair draw is upon the identical physical character of the cards used and upon the thorough shaking and turning over of the box after the cards are placed in it; this, of course, under the implicit assumption that the official will not look into the box when drawing the card from it.”\*\*\*”

Also, in *South Brunswick, supra*, the Commissioner issued a caveat to this Board and all other local boards of education to make certain that the exact requirements of *N.J.S.A. 18A:14-13* are met, including the requirement for cards “\*\*\* of the same size, substance and thickness\*\*\*,” which is intended to dispel any assumption that the drawer may be able to differentiate among the various names in the box by feeling each item with his hand.

In the instant matter, the use of slips of paper (Exhibit J-1) constitutes a violation of *N.J.S.A. 18A:14-13*, and the Commissioner so holds. *South Brunswick, supra*

Another serious defect in this drawing for ballot positions resulted from the use of a box (Exhibit J-4) which permitted two of the name slips to become lodged under a loose flap. This effectively prevented petitioner’s slip, No. 7, and one other, No. 8, from being drawn at random, which is an intention of this statute (*N.J.S.A. 18A:14-13*).

The final defect is that the drawer looked into the box while trying to find a slip to draw out. *Dimon v. Erlich et al., supra*.

The Commissioner finds and determines that the drawing for ballot positions in the South Brunswick School District on January 5, 1973, was conducted in an unlawful and improper manner, and is hereby declared a nullity.

Accordingly, the Commissioner orders that a new drawing for ballot positions for the 1973 school election be conducted by the Secretary of the South Brunswick Board of Education as soon as possible following prior written notification of such drawing to each of the eight candidates.

COMMISSIONER OF EDUCATION

January 24, 1973

**In the Matter of the Tenure Hearing of John Orr,  
School District of the Township of Wyckoff,  
Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, John J. Sullivan, Esq.

The Board of Education of the Township of Wyckoff, Bergen County, hereinafter "Board," charges respondent, a tenured principal in its employ, has maintained a personal, emotional involvement with members of his school staff which "may" interfere with his ability to evaluate such staff members objectively. Respondent asserts that the Board's charges are a series of conclusions, inferences and speculations and present no grounds for his removal or for a reduction in salary under applicable law. Additionally, respondent moves for dismissal of the charges on procedural grounds.

A hearing in this matter was conducted on September 21, 1972 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. Counsel subsequently filed Briefs. The report of the hearing examiner is as follows:

Some of the facts pertinent to the present adjudication were contained in a previous decision of the Commissioner on a Motion to Dismiss which was decided on June 2, 1972. A reiteration of these facts is necessary as a prerequisite to further consideration of the Board's charges on their merits and a review of the evidence in support thereof.

Respondent was divorced from his first wife on July 18, 1969, and on August 8, 1969, he married Evelyn Hansen, who, for three years prior to the marriage, had been a teacher under respondent's supervision. This marriage continued until it was dissolved by a "final judgment" of the New Jersey Superior Court, Chancery Division, on October 7, 1971. (According to a document attached to the Petition.)

The Court's action was in response to a complaint from Evelyn Hansen Orr that respondent had "committed adultery" with one Mary J. Bagli on six different occasions in March and April 1971. (The corespondent, Mary Bagli, is a teacher in the Wyckoff School System and is assigned to the school of which respondent is principal.) The complaint of Evelyn Hansen Orr was unopposed by respondent prior to the decision promulgated in the "final judgment." In the absence of testimony from respondent, the Court found:

\*\*\*\* that defendant has been guilty of the adultery charged against him in the said complaint\*\*\*."

Prior to the “final judgment” of the Court, *supra*, an article appeared in a column of the *Paterson News* on September 22, 1971, after a hearing before Passaic County Judge Salvatore Ruggiero on September 20, 1971. This article stated:

“\*\*\* Evelyn Orr, 1268A Valley Rd., Wayne, obtained a divorce from John R. Orr, 40-A Atherton Court, Wayne. She charged him with adultery. The couple was married Aug. 8, 1969.\*\*\* ”

Thereafter, on or about October 15, 1972, respondent was asked by the Superintendent of the Wyckoff Schools to state whether or not the article was “accurate.” Respondent maintains “I readily did.” [so state]

On October 18, 1972, the Superintendent addressed the following letter (R-1 Motion) to respondent:

“\*\*\* As reported to you last Friday, October 15, 1971, the Board of Education instructed me to request your letter of resignation for a reason known to you, as soon as possible. At that time, I set the deadline for Wednesday, October 20, 1971, 4:00 P.M. The resignation is to become effective in sixty days.\*\*\*”

Respondent did not so resign, and in a letter of October 21, 1971, stated that he had been advised to “maintain” his “present status” in the school system. However, on October 26, 1971, respondent met again with the Superintendent, and as a result of that meeting, the Superintendent addressed the following letter (R-3 Motion) to respondent on October 27, 1971:

“\*\*\*To confirm the understanding we reached during our private conference yesterday, October 26, 1971, regarding your resignation as principal to become effective June 30, 1972, we agreed to a deadline of Monday, November 1, 1971.

“In this framework, the Board of Education has decided to delay taking any further action thereby giving you ample time to confer with your advisor.\*\*\*”

On the deadline date set for his decision, November 1, 1971, respondent did address himself to the request for his resignation as follows in a letter (R-4 Motion) to the Superintendent:

“Subsequent to our conference last Tuesday afternoon, I have sought further advice from the N.J.E.A. Essentially, my Counsel maintains that the submission of a resignation at this time is unwarranted and unfounded.

“In the interim, I will continued to evaluate my effectiveness with staff and parents. Any valid signs of decay will cause me to reassess my present plans.

"I intend to earnestly seek new employment commencing in January, regardless of any positive improvements in the situation that may occur. I am working toward the termination of my services with the Wyckoff School System at the end of the current school year."

The Board resolution embodying the instant charges against respondent was adopted thereafter on December 20, 1971, and certified to the Commissioner for determination. The date of adoption of this resolution was almost exactly three months from the date of the newspaper article of September 22, 1971, reported, *ante*, which stated that respondent had been divorced. The resolution, (R-1) reported in its entirety, is as follows:

"Mr. Dial introduced and moved the adoption of the following resolution. Mr. Neil seconded the motion and it was carried:

"The Board of Education of the Township of Wyckoff, by majority vote of its full membership, does hereby determine that the following charge against John Orr would be sufficient, if true, in fact, to warrant dismissal or a reduction in salary, namely;

"Following his divorce from his first wife, Joan Orr, on July 18, 1969, John Orr on August 8, 1969, married Evelyn Hansen, who, for three years prior to such marriage had been a teacher under Mr. Orr's supervision at the Abraham Lincoln School in Wyckoff.

"On June 1, 1971, Evelyn Hansen Orr filed suit for divorce from John Orr alleging that he had committed adultery on March 27, 29, April 5, 7, 8 and 21, 1971. Mr. Orr did not submit a defense to the allegations, and the divorce was granted on October 7, 1971. The correspondent was at the time of the alleged adultery, and is presently, a teacher under Mr. Orr's supervision in the Abraham Lincoln School in Wyckoff.

"In the opinion of the Wyckoff Board of Education, the foregoing sequence of events reflects emotional involvement with members of the school staff over whom he has supervisory responsibility. Such involvement may interfere with Mr. Orr's ability to evaluate, objectively and fairly, the performance of staff members. Since evaluation of staff members constitutes a critical part of the principal's function, the Board must have a complete confidence in a principal's capabilities in this regard. Mr. Orr's aforesaid actions, and the inference drawn therefrom, render such confidence no longer warranted.

"The Board does hereby direct the board secretary to forward this charge to the Commissioner of Education of the State of New Jersey together with a certificate of such determination.

"And does further direct the board's secretary to serve forthwith a copy of this written charge and a copy of the certificate of determination upon said John Orr by certified mail directly to his last known address.

“The foregoing resolution was adopted by the following vote:

“Ayes — 7

Noes — 0”

It is noted here by the hearing examiner that respondent contends there was no signed “charge” as a preface to the introduction and passage of the above resolution. (R-1) Such a preferment of a signed “written charge or charges” is a principal prescription of the statute *N.J.S.A. 18A:6-10* which provides:

“No person shall be dismissed or reduced in compensation,

“(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

“(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in any other educational institution conducted under the supervision of the commissioner:

“except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a *written charge or charges*, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

“Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.” (*Emphasis supplied.*)

Further mention of a “written charge or charges” is contained in *N.J.S.A. 18A:6-11* wherein it is directed that:

“If *written charge* is made against any employee of a board of education under tenure during good behavior and efficiency, it *shall be filed* with the secretary of the board\*\*\*.” (*Emphasis supplied.*)

In respondent’s view the lack of a signed written charge prior to the Board’s action approving the resolution (R-1) quoted in its entirety, *ante*, is a fatal defect warranting a decision by the Commissioner that the charges should be dismissed. In this regard respondent avers:

“\*\*\* The ultimate question here is whether the language of *N.J.S.A. 18A:6-10* (1970) is *mandatory* in that the charge has to be signed by the accuser or is *directory* in that the statute will be satisfied with something less than strict compliance.\*\*\*” (Respondent’s Brief, at p. 3)

Respondent further maintains that the use in the statute (18A:6-10) of the word "shall" signifies that the direction of the statute is mandatory since there is a significant and substantial property right involved herein: namely, the right of respondent to continue in his position as principal and to preserve his career and reputation. In support of this position respondent cites a number of cases wherein such strict interpretation of a statute's prescription was held to be necessary; *Miner v. Lamey*, 87 N.J.L. 40 (Sup. Ct. 1915); *Smith v. Board of Education of Camden*, 1966 S.L.D. 107; *Friscella v. Nulton*, 22 N.J. Super. 367 (1952); *Moses v. Moses*, 140 N.J. Eq. 575 (E. & A. 1947); *Hepner v. Township Comm. of the Township of Lawrence*, 115 N.J. Super. 155 (1971).

Further, respondent avers that the Commissioner, in his decision of June 2, 1972 on the Motion to Dismiss the instant Petition, adopted a strict, literal position with regard to statutory interpretation; namely, that the newspaper account of respondent's divorce did not constitute written charges. Consequently, respondent avers that a determination of the instant Motion on a basis of less than strict compliance would be inconsistent.

The Board avers that the Commissioner rendered this instant procedural question *res judicata* by his decision of June 2, 1972 on the Motion to Dismiss, and specifically by that part of the decision wherein the Commissioner said:

“\*\*\* When the Board finally acted in this matter, it was at a regular meeting of the Board, its action was unanimous with seven members present, the action was recorded in its minutes, and ‘true and exact’ copies of the resolution it approved were forwarded to the Commissioner. While the ‘written charge’ of the certification lacks the signature of ‘the person or persons’ making the same as required by statute (N.J.S.A. 18A:6-10), Mr. Dial’s name as the mover of the resolution was duly recorded as a matter of record in the minutes of the Board.\*\*\*”

In the Board’s view:

“\*\*\*The charge is not by an individual but is by the Board in its official capacity and it is so recited in the resolution. The certification by the Secretary of the Board is an official act and it is specious to say that each individual member of the Board must personally sign the charge. \*\*\*” (Board’s Brief, at p. 17)

With regard to this procedural Motion to Dismiss the hearing examiner finds that there were no signed charges *per se* against respondent as required by the statute N.J.S.A. 18A:6-10, prior to the time the Board passed its resolution of December 20, 1971. (R-1) The hearing examiner has presented the conflicting contentions of the parties in this regard in capsule form.

It is now necessary to examine the Board’s resolution (R-1) of December 20, 1971, containing the charges against petitioner and to weigh the evidence advanced in support of such charges by the Board. With what is respondent charged?

It appears to the hearing examiner that the sum and substance of the charge is that respondent was guilty of adultery and that such guilt warrants a finding:

(a) that in the circumstances of the allegation it must be inferred that respondent was emotionally involved with a member of his staff and that he should have limited his involvement to a professional relationship instead and that

(b) such involvement “may” interfere with respondent’s administration of his school.

The principal proof in support of the charge and the weight which should be ascribed to it is a major source of contention herein. This proof consists of a judgment of the New Jersey Superior Court, Chancery Division, which was ruled admissible by the hearing examiner at the hearing, *ante*, and recorded as P-1 in the list of exhibits over the objection of counsel for respondent. This judgment of the Court was that respondent was guilty of adultery although there were evidently no proofs offered to this effect and respondent did not appear in his own defense before the Court.

Neither did respondent testify to the truth or falsity of the charge of adultery at the hearing before the hearing examiner, *ante*. The only evidence on this principal charge was found in the testimony of the Superintendent of Wyckoff Schools.

His testimony was that following the appearance of the newspaper article recited, *ante*, which reported that respondent had been divorced from Evelyn Hansen Orr, he had discussed the article with respondent. The Superintendent testified:

“\*\*\*A. That was a very brief discussion. I came immediately to the point of identifying the Board’s concern. It would be hard to say just how much we discussed. \*\*\* We had a little discussion about divorce due to adultery. This is one of the easiest \*\*\* ways to get a divorce. That was stated to me by Mr. Orr. That was a routine matter, and the quickest way to sever the marriage was to go to court for divorce and her lawyer recommended that there be a charge of adultery which was brought to bear.\*\*\*” (Tr. 82)

Also, the Superintendent testified:

“\*\*\*A. In July I did not ask him whether he committed adultery. I was asking him to explain to me, if any, what his relationship, social, emotional, affectionate relationships were with Mrs. Baglie (sic)\*\*\*

“Q. And?

“A. And he denied any relationship with her except that he had ridden -- hitched a ride with her on some occasions. \*\*\*” (Tr. 83-84)



And later:

“\*\*\*A. He explained it that her lawyer told her that the quickest way to get a divorce was to charge adultery, and I think he implied or stated that he agreed to that in order to expedite the divorce.\*\*\*” (Tr. 86)

In summary, there were no proofs offered by the Board at the hearing, *ante*, in support of the basic charge that respondent was guilty of adultery. Its case in support of this charge rests on the final court judgment, *ante*. (P-2)

Neither were proofs offered to support that part of the Board’s resolution (R-1) containing charges against respondent that inferred he was emotionally involved with members of his school staff and that such involvement might interfere with respondent’s work as a principal. The only testimony concerned with the quality of respondent’s work as a school administrator and supervisor was offered by the Superintendent of Schools.

While this official expressed some reservations about respondent’s work as a principal (Tr. 92-93), his conclusion was that respondent is:

“\*\*\* in my estimation — and I have known a lot of building principals in my time — is a very good elementary principal.\*\*\*” (Tr. 92)

At the conclusion of the hearing held on September 21, 1971, the hearing examiner requested that Briefs of counsel be filed and addressed to two principal points: (1) whether or not the judgment of the Court (P-2) in the uncontested divorce proceeding involving respondent is admissible as proof of the charge of adultery in the action, *sub judice*, and (2) whether or not, if it is, such evidence presents sufficient cause to warrant respondent’s dismissal or a reduction in his compensation — the penalties prescribed by law for unbecoming conduct of a teaching staff member.

The Board argues that the record of the divorce proceedings involving respondent (P-1,2) was properly admissible at the hearing, *ante*, and cites a number of cases in support of this position; *Nugent v. Lindsley*, 97 N.J.L. 268 (E. & A. 1921); *Stewart v. Stewart*, 93 N.J. Eq. 1; *Tucker v. Tucker*, 101 N.J. Eq. 72; *Gerard Trust Co. v. McGeorge*, 128 N.J. Eq. 91 (Chan. 1940); *Evangel Baptist Church v. Chambers*, 96 N.J. Super. 367 (Chan. Div. 1967); *McAndrew v. Malarchuk*, 38 N.J. 156 (1962). The Board further maintains that the proofs herein justify respondent’s dismissal and for support of this argument the Board cites extensively from *In re Emmons*, 63 N.J. Super. 136, 140 (1960). This case involved a policeman and his conduct while off duty. The Court said:

“\*\*\*What Chief Justice Weintraub had to say in *State v. Cohen*, 32 N.J. 1, 11 (1960), with respect to the nonpunishability of mere ‘immorality’ on the part of a policeman, obviously had reference to criminal proceedings. He stated that immoral conduct might well be grounds for removal from office. *Ibid.*, at pages 12, 13. It is clear that conduct which will justify disciplinary action need not be criminal in nature.\*\*\*”

The Board also cites *Oliver v. Board of Education of Hoboken*, 1938 S.L.D. 339 and a number of other cases of the Commissioner and the courts which hold that a high standard above the norm must be expected from those who choose to work in the public schools.

Respondent argues that the divorce judgment against him (P-1,2) cannot be ruled admissible in the case *sub judice*, and should not have been accepted by the hearing examiner at the hearing, *ante*. This argument is based on respondent's opinion that the instant complaint against him "\*\*\*\* is not based on charges of immoral conduct." (Respondent's Brief, at p. 13) However, while respondent advances this opinion, he also states, *arguendo*, that in any event, civil judgments (such as P-1,2) may not be used in succeeding proceedings except in well-defined instances. In respondent's view:

"\*\*\*\*The stranger must prove his case without the help of any conclusions drawn by the previous trial. The following New Jersey cases applying this rule are applicable here, through analogy since they do not bear any factual similarity to the case presented, and are therefore not here analyzed. *Bd. of Directors of Ajax Electrothermic Corp. v. First National Bank of Princeton*, 33 N.J. 456, 165 A. 2d 513 (1960); *Giordana v. Wolcott*, 46 N.J. Super. 278, 134 A. 2d 593 (1957); and *Ettin v. Ava Truck Leasing, Inc.* 53 N.J. 463, 251 A. 2d 278 (1969).\*\*\*\*" (Respondent's Brief, at p. 14)

In a conclusion of this argument respondent avers that:

"\*\*\*\*Since New Jersey does not usually admit into evidence civil judgments offered by strangers, the divorce judgment should have been excluded from evidence and in any event, it should not be regarded as proof by the Commissioner of Education.\*\*\*\*" (Respondent's Brief, at p. 16)

And further,

"\*\*\*\* it is important to note that even if the divorce judgment is held to be proof, there still was no need for Orr to testify because that is not the issue in the case *sub judice*.\*\*\*\*"

"A divorce judgment is no determination of the guilt or innocence of the defendant on adultery or any other charges except and limited to the quantum of proof necessary for that specific purpose. 'Guilt' is the exclusive province of a criminal court.\*\*\*\*" (Respondent's Brief, at p. 19)

In summary, the hearing examiner states that the primary issue posed for the Commissioner's determination is whether or not the charges against respondent contained in the Board's resolution (R-1), and the proofs offered in support thereof, are sufficient to justify respondent's dismissal from his tenured position; or that in the alternative, the proofs warrant the imposition of a lesser penalty. Additionally, the Motion to Dismiss poses an additional question:

whether or not the charges herein were properly presented for determination and are viable at this juncture.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, and it is noted that a decision in this matter must be responsive to a Motion to Dismiss, or, in the alternative, the decision must be concerned with the merits of the charges against respondent, and the proofs offered in support thereof. However, the Commissioner finds no compelling reason to decide the Motion and will leave the narrow question it raises to another day. He opines that such questions are minor when compared to the broader issues here set forth, and that such issues are those which should be addressed.

With regard to these issues, the Commissioner is asked, in effect, to accept for other purposes the judgment of the Court that respondent is guilty of adultery and to decide that this judgment is proof of conduct unbecoming a professional staff member employed in the public schools. He is asked to make this decision in the absence of any proofs presented against respondent in an adversary hearing in any court or before the Commissioner's representative.

However, the Commissioner opines that a decision by him to this effect would open a Pandora's box of charges involving marital relationships — charges alleging "cruelty," "desertion," etc. Would not such charges, even though not contested, constitute evidence of conduct unbecoming a teacher in the public schools if the present prayer of the Board is granted?

The Commissioner holds that they would, even though in all such cases the only "evidence" might be an unsupported allegation never offered to the test of an adversary-type proceedings, but considered true in fact, because no defense was advanced.

However, the Commissioner opines that such "evidence" is not the preponderance of believable evidence to which the Commissioner has referred in the past as the quantum of necessary proof in cases involving charges against tenured employees. As the Commissioner said in *Irene Smith v. Board of Education of the City of Camden*, 1966 S.L.D. 107:

\*\*\*\*In an administrative hearing it is necessary that charges of conduct unbecoming a public employee be sustained by a preponderance of the believable evidence. *Park Ridge v. Salimone*, 36 N.J. Super. 485, 498 (App. Div. 1955), affirmed 21 N.J. 28 (1956); *Kravis v. Hock*, 137 N.J.L. 252, 254 (Sup. Ct. 1948); *DeBellis v. Board of Education of Orange*, 1960-61 S.L.D. 148, 151 In the instant matter, the Commissioner finds and determines that respondent Board has not sustained the burden of proving its charges with a preponderance of believable evidence.\*\*\*\* (at p. 111)

In the instant matter the Commissioner holds the Board has not "sustained the burden of proving its charges" by submission of the Court's judgment (R-2),

since that judgment was founded on untested allegations, and the Board has no obligation to offer such proof of its own. Board members and school officials are not policemen or law enforcement officials and have no statutory mandate or direction to engage in the gathering of evidence in an effort to prove such charges.

As the Commissioner stated *In the Matter of the Tenure Hearing of Paul W. Jones, School District of the Borough of North Arlington*, 1971 S.L.D. 520, school administrators have no “\*\*\* obligation, moral or otherwise, to a school system or to its board of education, to stalk school employees by stealth or indirection to obtain proofs \*\*\*” involving the use of drugs by teaching staff members. In the instant matter the Commissioner holds in a parallel manner — there is no obligation for a local board of education to gather and advance proofs to support rumors or allegations against members of its staff involving their moral affairs or their marital relationships.

However, the Commissioner also holds that when such proofs are offered in a court of proper jurisdiction, and when an adversary hearing results, the Court’s findings may be considered for use as properly admissible before the Commissioner. In the instant matter, the proofs concerned with adultery were never submitted to such a test and will not be further considered herein.

Having decided that the Board’s principal offer of proof is not admissible herein, it remains to assess the remainder of the charges contained in the Board’s resolution (R-1) and the evidence offered in support thereof. The Commissioner has scrutinized this resolution and finds that it is vague, conjectural, and totally unsupported by the record. The only specific element of what could be held as an additional charge is that respondent’s emotional involvement with members of his staff “\*\*\* may interfere with Mr. Orr’s ability to evaluate objectively and fairly, the performance of staff members.”

However, it is noted by the Commissioner that the charge, if a charge it is, is not concerned with something that has happened, nor does it state that there are firm grounds on which to base a judgment that something will happen. Instead there is a speculation that an ability “may” be impaired. The Commissioner holds that such a charge, totally unsupported by proofs — and contradicted in essence by testimony that respondent is a “very good” principal — presents no grounds for censure.

The essence of this charge is clearly speculative. It is a conjectural opinion of the kind the Supreme Court of the United States discussed in the case *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1970). Specifically, in that case, the Court held that a board of education was not justified in suppressing a tangible exercise of free speech on the supposition that such exercise might prove troublesome; probable cause is required to support such supposition. In *Tinker, supra*, the Court found no support for such a supposition, and the Commissioner finds none herein for the supposition that an ability “may” be impaired.

Finally, the Commissioner believes it is necessary to restate certain principles enunciated by the Commissioner on previous occasions when the employment of tenured teachers was contested. *In the Matter of the Tenure Hearing of Frank Marmo, School District of Newark, Essex County*, 1966 S.L.D. 112, 142 it was said:

“ ‘ Tenure of office of professional staff employees of boards of education is a legislative status provided as a public policy for the good order of the public school system and the welfare of its pupils. *Wall v. Jersey City Board of Education*, 1938 S.L.D. 614, 617, affirmed State Board of Education 618, 622, affirmed 119 N.J.L. 308 (Sup. Ct. 1938); *Viemeister v. Prospect Park Board of Education*, 5 N.J. Super. 215, 218 (App. Div. 1949); *Redcay v. State Board of Education*, *supra*. Its objectives are to protect competent and qualified professional staff members in the security of their positions during good behavior and to protect them against removal for ‘unfounded, flimsy or political reasons.’\*\*\*\*”

Applying this criteria to the instant matter, the Commissioner holds that an uncontested divorce action provides no foundation for a finding that respondent is incompetent to continue in his employment as a tenured employee of the Board, and that other elements of the charges against him reported, *ante*, constitute flimsy cause for his removal or censure as a public employee engaged in work in the public schools.

Accordingly, the instant charges are dismissed and the Board is directed to restore respondent to his tenured position forthwith with all the back compensation to which he is entitled from the date of his suspension mitigated by any earnings from other employment. The Board is also directed to grant respondent all other benefits which he would have received had his service not been interrupted.

COMMISSIONER OF EDUCATION

January 26, 1973

**Joan Sherman,**

*Petitioner,*

*v.*

**Malcolm Conner, individually and as Acting Superintendent  
of Schools of the Borough of Spotswood, and  
Board of Education of the Borough of Spotswood,  
Middlesex County,**

*Respondents,*

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent, Borough of Spotswood Board of Education, Golden & Shore (Philip H. Shore, Esq., of Counsel)

For the Respondent, Malcolm Conner, Abraham J. Zager, Esq.

Petitioner, a nontenure kindergarten teacher previously employed with the Board of Education of the Borough of Spotswood, hereinafter "Board," alleges that she was illegally terminated by the Board because she is of the Jewish faith.

The Commissioner of Education rendered an earlier decision in *Joan Sherman v. Malcolm Conner et al.*, 1972 S.L.D. 340 which held in part as follows:

(1) Petitioner's "employment was involuntarily terminated under duress," and

(2) "\*\*\*\* her employment was illegally terminated by the Board on October 21, 1970\*\*\*\*" because petitioner was not compensated for the thirty-days' notice required by her contract. (at p. 351)

The Commissioner, therefore, directed the Board to pay petitioner for the thirty-day period from October 20, 1970, the date of her illegal termination, to November 20, 1970.

The Commissioner's decision referred to, *supra*, held also that:

\*\*\*\* petitioner has made no offer of proof that the Board has discriminated against her, nor has she shown that there exists a *prima facie* case of religious discrimination. The agreements reached between counsel and the hearing examiner [to order depositions taken and interrogatories answered] go beyond the scope of this office to entertain further litigation without any offer of proof whatsoever, or the presenting of a *prima facie*

case of discrimination against petitioner. Her mere allegations are insufficient to order the agreed-upon interrogatories and depositions.

“The Commissioner will allow petitioner, therefore, ten days from the date [June 21, 1970] of receipt of this decision in which to amend her petition of appeal and submit an offer of proof with respect to her allegations, or to show that there existed a *prima facie* case of religious discrimination.” (at p. 352)

Oral argument on a Motion to Dismiss the Amended Petition of Appeal, submitted by petitioner pursuant to the Commissioner’s directions, *supra*, was heard on October 10, 1972 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Amended Petition of Appeal repeated the allegations of religious discrimination and again charged that the Board’s action was “\*\*\*\* illegal \*\*\* discriminatory, arbitrary, capricious, unreasonable and in bad faith, based on bias and personal animosity and without foundation in fact, contrary to Federal and State Law \*\*\* and denies [petitioner] procedural due process.” (Amended Petition of Appeal)

Petitioner alleges also that:

“6. By virtue of the Respondents’ failure to give such notice as is required under Exhibit A [employment contract September 1, 1970 to June 30, 1971] \*\*\* Petitioner alleges that she continued to be an employee for the full term set forth therein and acquired tenure in accordance with R.S. 18A:28-5 (c) (sic) [N.J.S.A. 18A:28-5 (c)].” (Amended Petition of Appeal)

Therefore, petitioner prays for judgment against respondents and avers that she has acquired tenure pursuant to N.J.S.A. 18A:28-5 (c).

The pertinent provision in the statute provides that a teaching staff member acquires tenure if he/she serves:

“\*\*\* (c) the equivalent of more than three academic years within a period of any four consecutive academic years\*\*\*.”

She demands, therefore, “\*\*\*\* reinstatement to her position of employment \*\*\* and payment of all back wages due since the aforesaid illegal termination.”

Petitioner further demands that in the event she has not acquired tenure, that she be granted back wages due her “\*\*\*\* for the remainder of the term of the contract\*\*\*” and that she “\*\*\*\* is entitled to receive reasons for her discharge, together with access to her personnel records, together with adequate opportunity for [a] hearing concerning same.” (Amended Petition of Appeal)

Thereafter, on September 11, 1972, petitioner filed a second count of the Amended Petition of Appeal additionally requesting the following:

“\*\*\*2. By virtue of the Respondents’ failure to give such notice as is required under Exhibit ‘A’ attached to the Amended Petition for Hearing, and refusal to permit the Petitioner to work on October 21, 1970 and thereafter, Petitioner’s standing and associations in the community have been damaged, her reputation is at stake, and opportunity for future employment has been impaired.

“3. The foregoing constitutes denials of procedural due process encompassed within the Fourteenth Amendment protection of liberty (effect on her reputation; standing and associations in the community, as well as opportunity for future employment) and property (legitimate claim of entitlement to complete the contract year, as well as any tenure rights that may accrue upon such completion).\*\*\*”

Petitioner’s offer of proof is based on an affidavit which she alleges may show discrimination against her. That affidavit declares: (1) that two teachers of the Jewish faith did not have their contracts renewed at the end of the same school year in which she was terminated, (2) that the acting Superintendent was new and did not have time to properly evaluate her services, (3) that she had been recommended for tenure by the building principal and the Superintendent of Schools (then on leave of absence), and (4) that her evaluations were favorable to her. Her affidavit also holds that the Board told the Superintendent, in a closed meeting, to terminate her, and that the methods they employed to terminate her raise such serious questions that she should be entitled to a hearing after discovery proceedings are completed.

The Board argues, however, that petitioner has not followed the direction of the Commissioner in his decision of June 21, 1972, wherein petitioner was directed to make an offer of proof or show a *prima facie* case of religious discrimination.

The Superintendent’s affidavit states that he personally recommended for re-hiring at least eight teachers whom he believed “\*\*\* to the best of [his] knowledge were of the Jewish faith.\*\*\*”

The Board Secretary submitted an affidavit which stated that she has been the Board Secretary since July 1966 and that she is:

“\*\*\* familiar \*\*\* [with the procedures] \*\*\* relative to hiring and firing of Board teachers \*\*\* and with matters dealing with the petitioner \*\*\*.”

Her affidavit further stated that:

“Since I have been Board Secretary, I can state without qualification, that I have never been aware of any policy or seen any indication whereby the Board hired or fired teachers or other employees with regard to religious affiliation.”



And,

“Since I have been Board Secretary, employment applications used by the respondent Board have in no way required information as to religious affiliation.”

Also,

“On information and belief I would estimate that the Board has employees of approximately 8 to 12 different religious affiliations, although there are no records of any kind maintained by the Board that would either affirm or contradict my estimate.”

The Board admits that it did not re-hire two other teachers of the Jewish faith as alleged by petitioner, but argues that “\*\*\* This allegation, even if proven does not establish a *prima facie* case.”

Petitioner and respondent cite *Board of Regents of State Colleges vs. Roth*, 405 U.S. 564, 33 L. Ed. 2nd 548, 92 S. Ct. 2701 (1972); and *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2nd 570, 92 S. Ct. 2694 (1972), to support their arguments with respect to the denial of due process and the protection of liberty and property.

The plaintiff in *Roth, supra*, was an assistant professor at a state university who was not rehired at the end of his first academic year. He alleged that the decision not to re-hire him infringed on his Fourteenth Amendment rights. He alleged further that the decision was based on his exercise of his right to freedom of speech which deprived him of certain “liberty” and “property” rights; but the Court held as follows:

“\*\*\* on the record before us, all that clearly appears is that the respondent was not rehired (sic) for one year at one University. It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired (sic) in one job but remains as free as before to seek another.” (Roth, supra, 92 S. Ct., at p. 2708)

And,

“\*\*\* In these circumstances, the respondent surely had an abstract concern in being rehired, (sic) but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.” (*Emphasis in text.*)

Also,

“We must conclude \*\*\* the respondent [Roth] \*\*\* has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment.” (Roth, supra, 92 S. Ct., at p. 2710)

The plaintiff in *Sindermann, supra*, had been employed as a junior college professor for four years under a series of one-year contracts. There was no formal tenure right in that college system. He alleged that his freedom of speech guaranteed under the First Amendment and his right to a hearing and procedural due process under the Fourteenth Amendment were violated by the nonrenewal of his contract without reasons or a hearing. The Court wrote:

“We have held today in *Board of Regents v. Roth, supra*, 405 U.S. — 92 S. Ct. 2701 (sic), that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher’s contract, unless he can show that the decision not to rehire (sic) him somehow deprived him of an interest in ‘liberty’ or that he had a ‘property’ interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

“Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired (sic) in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property.” (*Sindermann, supra*, at p. 2698)

Also, in *Roth, supra*, 92 S. Ct., at p. 2698, the Court held that:

“Our analysis of the respondent’s constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.” (\*\*\*  
(*Roth, supra*, 92 S. Ct., at p. 2710)

The matter herein is similar in that petitioner’s contract was terminated by the Board and that she does not have tenure. Her contractual employment with the Board was for the school years 1968-69, 1969-70 and 1970-71, and her final contractual employment was terminated by the Board on October 20, 1970. Therefore, she was employed under contract for two full academic years, one month and twenty days. Petitioner has not served”\*\*\* (c) the equivalent of more than three academic years \*\*\*.” N.J.S.A. 18A:28-5 (c) Therefore, her claim of tenure is groundless.

Nor has petitioner shown that she has been deprived of “liberty” or “property” rights. Her offer of proof is her affidavit which states that: “\*\*\* upon information and belief\*\*\* [the] Board of Education failed to renew [her contract and] the contracts for two other non-tenure Jewish teachers at the end of June, 1971\*\*\*.” (Petitioner’s Affidavit)

Considering the guidelines of the Court set forth in *Roth* and *Sindermann, supra*, and examining the record for proofs of religious discrimination, or that a

*prima facie* case of discrimination exists, the hearing examiner concludes that no foundation for the allegations made by petitioner has been established.

\* \* \* \*

The Commissioner has read the report, findings, and conclusions of the hearing examiner.

Petitioner's allegations of religious discrimination have not been supported by fact nor has petitioner established a *prima facie* case of religious discrimination. The Supreme Court, as quoted in *Roth* and *Sindermann, supra*, has established rather precise guidelines in its interpretation of a person's rights to "liberty" and "property", rights to which petitioner alleges she has been deprived. However, the Commissioner concurs with the finding of the hearing examiner in the analysis of the court decisions, *supra*, that no such deprivation of "liberty" or "property" can be determined from the allegations and circumstances as alleged.

Having found, therefore, that a *prima facie* case of religious discrimination has not been established, and having determined that petitioner has not been deprived of a "liberty" or "property" right, the Motion to Dismiss the Amended Petition of Appeal and the second count of the Amended Petition of Appeal is granted.

COMMISSIONER OF EDUCATION

January 26, 1973

**Ruth Z. Yanowitz, Eugenia G. Hollingsworth, Elsie D. Camisa,  
Hazel P. Endersbe, Aloysius J. Kubacz, Rose C. Sachs,  
and the Jersey City Education Association,**

*Petitioners,*

*v.*

**Board of Education of the City of Jersey City,  
Hudson County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Philip Feintuch, Esq.

For the Respondent, Brown, Vogelman, Morris & Ashley (Barbara A. Morris, Esq., of Counsel)

Petitioners are six teachers employed by the Board of Education of the City of Jersey City, hereinafter "Board" or "respondent," together with the unincorporated organization of teachers known as the Jersey City Education Association. Petitioners allege that each of the herein named six teachers was improperly placed upon the Board's salary guide for teachers, by reason of the fact that the Board did not recognize the total of each petitioner's years of teaching service within the school district when it made that determination. Respondent Board denies the allegations by stating that it acted properly in making the determination of the appropriate placement of each of the herein named teachers upon the salary guide, and answers that the policies of the Board in effect at that time, and still in effect, did not allow inclusion of the years of service claimed by petitioners.

Petitioners pray for relief in the form of an Order by the Commissioner of Education requiring the Board of Education to place each of the herein named teachers upon the appropriate step of the salary guide; remunerate each petitioner in the amount of salary lost each year by virtue of the Board's improper action; and provide similar relief for all similarly-situated teachers presently employed by the Jersey City Board of Education.

A large number of documents were received and marked in evidence, and both parties filed Briefs. The parties waived hearing and submit this matter for Summary Judgment by the Commissioner of Education on the pleadings and the evidence in the record.

The relevant material facts are essentially not in dispute. In order to clarify the employment status of each of the six petitioners, the facts pertinent to each are hereinafter set forth.

Ruth Z. Yanowitz was originally appointed as a teacher of social business studies assigned to Lincoln High School at the annual salary of \$4,400 for the period beginning September 1, 1961 and ending August 31, 1962, as stated in the minutes of the meeting of the Jersey City Board of Education held September 28, 1961. (Exhibit R-12) These minutes refer to this teacher and others as "teachers-in-training." A contract was issued to Mrs. Yanowitz for this employment, dated October 5, 1961. This contract form required that she hold an appropriate teacher's certificate issued in New Jersey now "in full force and effect." (Exhibit R-16) A letter addressed to Mrs. Yanowitz by the Superintendent of Schools under date of October 3, 1961, advised her that the above-stated contract had been awarded to her. (Exhibit R-17) The salary guide in effect at the time (Exhibit R-1) indicates that her salary of \$4,400 represented the first step of the salary guide for teachers possessing a bachelor's degree.

The minutes of the Board meeting held June 14, 1962, disclose the appointment of Mrs. Yanowitz for the period beginning September 1, 1962, and ending August 31, 1963, as a "teacher-in-training" of high school business education for the annual salary of \$4,600 (Exhibit R-13), which was the second step of the aforementioned salary guide for teachers with a bachelor's degree. (Exhibit R-1) A contract of employment was issued to Mrs. Yanowitz for the 1962-63 school year under date of June 15, 1962. (Exhibit R-18) Mrs. Yanowitz received a letter notification of this appointment from the Superintendent dated June 15, 1962. (Exhibit R-19) A subsequent letter to this teacher from the Superintendent, under date of August 27, 1962, advised that her assignment for 1962-63 was business arithmetic, law and bookkeeping in Lincoln High School. (Exhibit R-20)

The appointment of Mrs. Yanowitz as a teacher of social business studies for the 1963-64 year was set forth in the Board's minutes of the meeting held June 13, 1963, as follows:

"BE IT RESOLVED, that the following named persons be and they hereby are appointed to the positions herein indicated, at annual salaries in accordance with the salary guide, payable in twelve monthly installments, subject, however, to such deductions for the purposes of the Teachers' Pension and Annuity Fund as may be required by law, these appointments to take effect September 1, 1963, to be contingent upon the presentation of proper Limited or Permanent State Certification (sic) by September 1, 1963, and the subsequent acquisition of a Jersey City certificate in accordance with the terms of the recruitment procedures established for the position, and to be subject to such further action as the Board of Education may direct \*\*\*." (Exhibit R-15)

By letter dated June 14, 1963, Mrs. Yanowitz was notified of her appointment for 1963-64 (Exhibit R-22), and by a second letter, dated August 15, 1963, she was informed that her assignment was the Lincoln High School. (Exhibit R-23) The contract for the 1963-64 school year between this petitioner and the Board, dated June 19, 1963, omits any reference to the acquisition of a

Jersey City teaching certificate, but specifies the requirement for a limited or permanent certificate to teach, issued by the State of New Jersey. (Exhibit R-21) This contract lists her 1963-64 salary as \$5,000.

The salary guide in effect for the 1963-64 school year indicates that petitioner's salary of \$5,000 (Exhibit R-21) was the first step of the guide for teachers possessing a bachelor's degree. (Exhibit R-2)

For the 1964-65 school year, Mrs. Yanowitz received a teaching contract to teach social business studies for the period beginning July 1, 1964, and ending June 30, 1965, at the annual salary rate of \$5,400. (Exhibit R-24) This was the fourth year of Mrs. Yanowitz' employment, and her salary of \$5,400 was \$100 more than the third step of the salary guide for teachers with a bachelor's degree. (Exhibit R-2) The Board avers that this additional amount of \$100 was added to this petitioner's 1964-65 salary in order to comply with the State minimum salary schedule prescribed by *N.J.S.A. 18A:29-7*. The State minimum salary schedule, *ante*, indicates that the salary for a teacher who holds a bachelor's degree and is in the fourth year of service would be \$5,450, which is \$50 more than Mrs. Yanowitz received in 1964-65. By granting the \$100 increase in salary, the Board was admittedly recognizing that Mrs. Yanowitz was entitled to three years of experience on the State minimum salary schedule and placement on the fourth step of that guide. The total salary which she received in 1964-65, namely \$5,400, was in fact \$50 less than the amount prescribed by the State schedule.

For the school year 1965-66, Mrs. Yanowitz' salary was \$5,700, which was \$100 more than the third step of the Board's salary schedule for teachers with a bachelor's degree (Exhibit R-2), and this amount represented the fifth step of the State minimum salary guide, *N.J.S.A. 18A:29-7*.

Mrs. Yanowitz received the salary of \$6,700 during the 1966-67 school year, which was her sixth year of employment in the school district. This amount was \$100 more than the \$6,600 which was the fourth step of the Board's salary schedule (Exhibit R-3), and exceeded the sixth step of the State minimum salary schedule, *ante*.

For the 1967-68 school year this petitioner was paid \$7,400, which was \$100 more than the fifth step of the Board's salary schedule. (Exhibit R-4) This was her seventh year of employment with the Board.

During the 1968-69 school year, Mrs. Yanowitz received a salary of \$7,800, which was \$100 more than the sixth step of the appropriate salary schedule. (Exhibit R-5)

For the 1969-70 school year this petitioner received a salary of \$9,500, which was \$500 more than the seventh step of the appropriate guide. (Exhibit R-6) This amount of \$500 consisted of \$100 which she had annually retained since 1964-65, *ante*, and \$400 for two years of prior service granted in accordance with the first agreement negotiated between the Board and the

Jersey City Education Association. (Exhibit R-10) This agreement contained a provision under Schedule 6, Prior Service, which stated the following at p. 35:

“Commencing February 1, 1970, the annual salary of any teacher who, at the time of his most recent employment in this system, had previous teaching experience shall be increased above the salary guide in Schedule A as follows: Two Hundred (\$200.00) Dollars per year for each year of prior experience up to but not exceeding five (5) years of prior experience.”

For the 1970-71 school year Mrs. Yanowitz received \$11,650, which is the eighth step of the Board's salary schedule. The 1970-71 school year was this petitioner's tenth year of continuous service in the district.

Her claim is that she was incorrectly and improperly paid for the school years 1963-64 through 1968-69 and the Board owes her the total amount of \$3,100. Also, she avers that she should be placed upon the proper step of the Board's salary schedule in accordance with her total years of service within the district. The amount of \$3,100 claimed by this petitioner is summarized as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1963-64	\$5,000	\$5,600	\$ 600
1964-65	5,400	5,900	500
1965-66	5,700	6,200	500
1966-67	6,700	7,200	500
1967-68	7,400	7,900	500
1968-69	7,800	8,300	500
			<hr/> \$3,100

The record of Mrs. Yanowitz' certification is clear. She was issued a provisional secondary teacher's certificate by the State Board of Examiners on October 27, 1961. On December 4, 1962, she was issued a limited secondary teacher's certificate for accounting and social business subjects. Mrs. Yanowitz received her permanent secondary teacher's certificate on August 10, 1965. (Exhibit R-38)

Mrs. Yanowitz received a recommendation for appointment from the local Board of Examiners on September 1, 1963. (Exhibit R-38)

This petitioner began to make contributions to the Teachers Pension and Annuity Fund during her first year of employment in September 1961. (Exhibit R-11)

The facts regarding Eugenia G. Hollingsworth's employment by the Board are as follows:

Mrs. Hollingsworth was employed as a *per diem* substitute teacher during the 1958-59, 1959-60 and 1960-61 school years. (Exhibits R-25, R-26, R-27, R-28) During these three years she made no contributions to the Teachers Pension and Annuity Fund. (Exhibit R-11)

The minutes of the meeting of the Board held September 28, 1961, disclose that Mrs. Hollingsworth was awarded a contract as a "teacher-in-training" for the period beginning September 1, 1961, and terminating August 31, 1962, at the annual salary of \$4,400, assigned to teach science at Lincoln High School. (Exhibit R-12, R-29) Her employment contract for 1961-62 describes her position as "teacher of science," and states the requirement that she hold an "\*\*\*appropriate teacher's certificate issued in New Jersey now in full force and effect.\*\*\*" (Exhibit R-30) Mrs. Hollingsworth's salary of \$4,400 for 1961-62 represents step one of the salary guide then in effect, for a teacher possessing a bachelor's degree. (Exhibit R-1)

For the period beginning September 1, 1962 and ending August 31, 1963, Mrs. Hollingsworth was employed to teach science for the annual salary of \$4,600. (Exhibits R-13, R-31, R-32, R-33)

The minutes of the Board's meeting held April 29, 1963, (Exhibit R-14) disclose the appointment of this petitioner as a teacher of biological science and general science, by a resolution identical in wording to that hereinbefore cited. (Exhibit R-15) Mrs. Hollingsworth was notified by letters regarding this appointment (Exhibits R-34, R-35), and her employment contract for the period September 1, 1963, to August 31, 1964, lists her salary as \$5,000 for this, her third year of full-time service. This salary was the first step of the bachelor's degree category of the salary schedule which became effective July 1, 1963. (Exhibit R-2) Mrs. Hollingsworth's contract for this twelve-month period of 1963-64 (Exhibit R-36) makes no mention of the requirement of a Jersey City teaching certificate, which was stated in the appointing resolution. (Exhibit R-14)

Mrs. Hollingsworth's contract for the period beginning September 1, 1964, and ending August 31, 1965, provides a salary of \$5,400. (Exhibit R-37) This amount is \$100 more than that provided for the second step of the bachelor's degree category of the salary schedule then in effect (Exhibit R-2), and is \$50 below the fourth step of the State minimum salary schedule. *N.J.S.A. 18A:29-7* In its Brief, the Board asserts that this petitioner's salary for 1964-65 was increased from \$5,300 to \$5,400 in order to conform to the State minimum salary requirements. The Board also claims that for 1964-65 and 1965-66 she received an additional \$100 for each year in order to comply with the State minimum salary guide. Her salaries for these two years were \$5,400 and \$5,800 respectively. (Exhibit R-37)

Mrs. Hollingsworth's salaries for the subsequent years were \$6,800 for 1966-67, \$7,500 for 1967-68 and \$7,900 for 1968-69. These three years were this petitioner's sixth, seventh and eighth years of full-time service, and the corresponding steps of the bachelor's degree category of the salary guides



effective for these three years were \$7,200 for 1966-67 (Exhibit R-3), \$7,900 for 1967-68 (Exhibit R-4) and \$8,300 for 1968-69. (Exhibit R-5)

For 1969-70, Mrs. Hollingsworth's ninth year of service, her salary was \$9,200, and the ninth step of the appropriate category of the effective guide was \$9,700.

The Board asserts in its Brief that Mrs. Hollingsworth applied for and received \$200 for each of two years of prior experience, and this total of \$400 was included in her salary of \$9,200 in accordance with the terms of the first negotiated salary guide. (Exhibit R-10)

Mrs. Hollingsworth's claim is that she was incorrectly and improperly paid for the school years 1963-64 through 1968-69, and that as a result the Board owes her the total amount of \$2,700. She also asserts that she should be placed upon the proper step of the Board's salary schedule in conformance with her total years of experience within the district. This total amount of \$2,700 is summarized as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1963-64	\$5,000	\$5,600	\$ 600
1964-65	5,400	5,900	500
1965-66	5,800	6,200	400
1966-67	6,800	7,200	400
1967-68	7,500	7,900	400
1968-69	7,900	8,300	400
			<hr/> \$2,700

Mrs. Hollingsworth's certification status during the years listed above was as follows:

She was issued a limited secondary teacher's certificate on November 18, 1957, to teach science and German. On January 9, 1963, she was reissued a limited secondary teacher's certificate. This petitioner received her permanent secondary teacher's certificate on May 1, 1963. (Exhibit R-38)

Mrs. Hollingsworth received a recommendation for appointment from the local Board of Examiners on September 1, 1963. (Exhibit R-38)

This petitioner began to make contributions to the Teachers Pension and Annuity Fund in September 1961. (Exhibit R-11)

The facts regarding the employment by the Board of Mrs. Elsie D. Camisa are as follows:

Mrs. Camisa was employed for the period beginning September 1, 1960, and ending August 31, 1961. She was assigned to Lincoln High School to teach

secretarial practice at the annual salary of \$4,400, by resolution adopted by the Board at a meeting held September 26, 1960. (Exhibit R-40) Her salary of \$4,400 was the amount designated for step one of the bachelor's degree category of the salary schedule then in effect. (Exhibit R-1)

The minutes of the Board meeting held September 28, 1961 (Exhibit R-12), disclose Mrs. Camisa's assignment to Lincoln High School effective September 1, 1961, and the minutes of a Board meeting held November 16, 1961, indicate that she was awarded a contract in the amount of \$4,600 for the period September 1, 1961 to August 31, 1962. (Exhibit R-41) This salary was the amount indicated for step two of the effective salary guide. (Exhibit R-1)

Mrs. Camisa received a letter of notification (Exhibit R-43) and a written contract (Exhibit R-42) for the 1960-61 period. She also received two letters, one dated August 30, 1961 (Exhibit R-44), and one dated November 20, 1961 (Exhibit R-45), in addition to a written contract (Exhibit R-46) for her 1961-62 employment by the Board.

For the period beginning September 1, 1962, and ending August 31, 1963, this petitioner was notified by letter dated June 15, 1962 (Exhibit R-47) that she had been appointed by the Board at a meeting held June 14, 1962 (Exhibit R-13) at the annual salary of \$4,800, which was the amount designated as step three of the effective salary schedule. (Exhibit R-1) By letter dated August 27, 1962 (Exhibit R-48), she was notified that her assignment was personal typewriting and general business subjects at Lincoln High School. Mrs. Camisa again received a written contract for the twelve-month period of 1962-63, identical in form to those she had previously received. (Exhibit R-49)

The minutes of the Board meeting held April 29, 1963 (Exhibit R-14), disclose the resolution which appointed, *inter alia*, Mrs. Camisa and Mrs. Hollingsworth for the 1963-64 year. This resolution was identical in wording to the previously-cited resolution of June 13, 1963, regarding the appointment of Mrs. Yanowitz for 1963-64. (Exhibit R-15) By letter under date of April 30, 1963 from the Superintendent, Mrs. Camisa was advised of her appointment for the 1963-64 year. (Exhibit R-50) This letter is almost identical in wording to that received by Mrs. Hollingsworth, (Exhibit R-34) and is quoted in pertinent part as follows:

“\*\*\*Dear Mrs. Camisa:

“At a meeting of the Board of Education held April 29, 1963, you were appointed to the position of teacher of Secretarial Studies, to be assigned, at an annual salary in accordance with the salary guide, payable in twelve monthly installments, subject, however, to such deductions for the purposes of the Teachers' Pension and Annuity Fund as may be required by law, this appointment to take effect September 1, 1963, to be contingent upon the presentation of proper Limited or Permanent State Certification by September 1, 1963, and the subsequent acquisition of a Jersey City certificate in accordance with the terms of the recruitment

procedures established for the position and to be subject to such further action as the Board of Education may direct.

“Please let me know in writing on or before May 6, 1963, whether or not you plan to accept this appointment.

“You will receive notification of your school assignment in August, 1963.” (Exhibit R-50)

Mrs. Camisa accepted the above-mentioned appointment by letter to the Superintendent dated May 3, 1963. (Exhibit R-51) The Superintendent advised Mrs. Camisa that her 1963-64 assignment was Lincoln High School, by letter dated August 15, 1963. (Exhibit R-52) Mrs. Camisa’s contract for the period beginning September 1, 1963, and ending August 31, 1964, specified her salary as \$5,100 (Exhibit R-53), which was \$100 higher than step one of the bachelor’s degree category of the effective salary schedule. (Exhibit R-2) The explanation for this, stated in the Board’s Brief at p. 5, is that the Board provided the annual increment of \$300 to “newly appointed teachers” rather than placing them on the first step of the salary schedule, if the first step or base salary of the schedule was less than the teacher’s previous salary plus a \$300 increment.

For the 1964-65 school year, Mrs. Camisa received a \$300 increment and an additional \$100 to bring her salary up to the amount of \$5,500. (Exhibit 53A) The Board states, in its Brief at p. 5, that the additional \$100 was granted to Mrs. Camisa in order to conform to the State minimum salary schedule. *N.J.S.A. 18A:29-7* However, the State minimum salary schedule indicates the amount of \$5,700 for a teacher possessing a bachelor’s degree, in the fifth year of service. In its Brief, the Board contends that \$100 was also granted to Mrs. Camisa, in addition to the \$300 increment, for the 1965-66 school year to conform to the State minimum salary schedule. Her salary for 1965-66 was \$5,900, and the sixth step of the State schedule is \$5,950.

For the next three years, Mrs. Camisa’s salaries were as follows: \$6,900 for 1966-67; \$7,600 for 1967-68; and \$8,000 for 1968-69. At the end of the 1968-69 school year, Mrs. Camisa retired from her teaching position.

Mrs. Camisa’s claims, which are very similar to those previously stated for Mrs. Yanowitz and Mrs. Hollingsworth, *ante*, are summarized for a total of \$3,900 as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1963-64	\$5,100	\$5,900	\$ 800
1964-65	5,500	6,200	700
1965-66	5,900	6,500	600
1966-67	6,900	7,500	600
1967-68	7,600	8,200	600
1968-69	8,000	8,600	600
			<hr/> \$3,900

Mrs. Camisa's record of certification indicates that she was issued a permanent secondary teacher's certificate on July 1, 1931, and this certificate was reissued by the State Board of Examiners on November 6, 1959. (Exhibit R-38)

Mrs. Camisa received a recommendation for appointment from the local Board of Examiners on September 1, 1963. (Exhibit R-38)

She began to make contributions to the Teachers Pension and Annuity Fund in September 1960, at the beginning of her employment in the Jersey City School District. (Exhibit R-11)

The facts regarding the employment of Mrs. Hazel P. Endersbe by the Board are as follows:

Mrs. Endersbe was originally appointed by the Board as a "teacher-in-training" for the period beginning September 1, 1962, and ending August 31, 1963, to teach business education subjects at the annual salary of \$4,400, which was then step one of the salary schedule. (Exhibits R-13, R-1) She was issued the standard contract for this twelve-month period of 1962-63 (Exhibit R-54), and she was notified by letter of June 15, 1962, of her appointment. (Exhibit R-55) Her assignment for 1962-63 was to the Lincoln High School to teach stenography and typewriting, as stated in the letter of notification, dated August 27, 1962. (Exhibit R-56) By letter dated July 26, 1962, Mrs. Endersbe was notified regarding an orientation program for "all new contract teachers-in-training in the Jersey City Public Schools," which was to be held at Lincoln High School on September 4, 1962. (Exhibit R-57)

The minutes of the Board meeting held April 29, 1963 (Exhibit R-14) indicate Mrs. Endersbe's appointment for the period beginning September 1, 1963, and a letter to her from the Superintendent dated April 30, 1963, provided notice of this employment. (Exhibit R-58) Mrs. Endersbe received notification under date of August 15, 1963, of her assignment to Lincoln High School. (Exhibit R-59) Mrs. Endersbe's contract for the period beginning September 1, 1963, and ending August 31, 1964, to teach secretarial studies, specified her salary as \$5,000 (Exhibit R-60), which was step one of the bachelor's degree category of the effective salary schedule. (Exhibit R-2)

Mrs. Endersbe's contract for the period beginning July 1, 1964, and ending June 30, 1965, to teach secretarial studies, indicated that her salary for this period was \$5,300, which was step two of the salary schedule (Exhibits R-61, R-2), for her third year of full-time employment.

Mrs. Endersbe claims that she has been incorrectly and improperly paid for the school years 1963-64 through 1968-69, and that consequently the Board owes her the total sum of \$1,800.

The Board claims that, in accordance with the policy adopted by the Board effective July 1, 1969, *ante*, Mrs. Endersbe applied for and received \$200 for one year of prior service.

Mrs. Endersbe's claim is summarized as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1963-64	\$5,000	\$5,300	\$ 300
1964-65	5,300	5,600	300
1965-66	5,600	5,900	300
1966-67	6,600	6,900	300
1967-68	7,300	7,600	300
1968-69	7,700	8,000	300
			<hr/> \$1,800

When Mrs. Endersbe began her employment in 1962-63, she possessed a limited secondary teacher's certificate to teach accounting, general business and secretarial studies, which was issued by the Board of Examiners on October 31, 1962. (Exhibit R-38) She received a permanent secondary teacher's certificate on August 10, 1965. (Exhibit R-38)

Mrs. Endersbe received a recommendation for appointment from the local Board of Examiners on September 1, 1963. (Exhibit R-38)

In September 1962, Mrs. Endersbe began to make regular contributions to the Teachers Pension and Annuity Fund. (Exhibit R-11)

Aloysius J. Kubacz was originally appointed as a teacher of social business studies assigned to Lincoln High School at the annual salary of \$4,400, for the period beginning September 1, 1961, and ending August 31, 1962, as stated in the minutes of the Board meeting held August 21, 1961. (Exhibit R-61A) Mr. Kubacz was notified of this appointment by letter under date of August 23, 1961, from the Superintendent of Schools (Exhibit R-62), and he received an employment contract (Exhibit R-63) which was similar to those received by other petitioners, *ante*. The salary of \$4,400 was the first step of the salary guide for teachers with a bachelor's degree. (Exhibit R-1)

The minutes of the Board meeting held July 31, 1962, indicate that Mr. Kubacz was again appointed as a "teacher-in-training," for the period beginning September 1, 1962, and ending August 31, 1963, to teach business education subjects, at the salary of \$4,600. (Exhibit R-64) He received one letter notifying him of this appointment (Exhibit R-65), and a second letter informed him of his assignment to the Lincoln High School to teach bookkeeping and record keeping. (Exhibit R-66) He also received a contract of employment for this second year of his service. (Exhibit R-67) His 1962-63 salary of \$4,600 was the amount listed as the second step of the effective salary guide. (Exhibit R-1)

Mr. Kubacz was notified by letter dated June 14, 1963 (Exhibit R-68), that at a meeting held June 13, 1963 (Exhibit R-15), the Board had appointed him as a teacher of bookkeeping and accounting for the period of September 1, 1963, to August 31, 1964, at "\*\*\*\*" an annual salary in accordance with the salary

guide\*\*\*.” He received a letter notification, dated August 15, 1963 (Exhibit R-69) of his assignment to Lincoln High School and a contract of employment (Exhibit R-70) which specified his 1963-64 salary at \$5,000, which was step one of the bachelor’s degree category of the salary guide, which became effective July 1, 1963. (Exhibit R-2)

For the period July 1, 1964 to June 30, 1965, Mr. Kubacz received a teaching contract in the amount of \$5,400. (Exhibit R-71) According to the Board, this salary included an increment of \$300 set forth in the salary guide plus an additional \$100 adjustment to bring Mr. Kubacz’ salary into compliance with the State minimum salary schedule for a teacher with three years of experience. As was previously stated, the fourth step of the State minimum schedule for teachers in this petitioner’s category is \$5,450. During 1964-65, Mr. Kubacz was paid \$50 less than the amount specified as step four of the State minimum schedule.

For the 1965-66 school year, Mr. Kubacz received a salary of \$5,800, which included an increment of \$300 plus an adjustment of \$100 in order to comply with the State minimum salary schedule, which is \$5,700 for step five.

For 1966-67, 1967-68 and 1968-69, Mr. Kubacz received the respective salaries of \$6,800, \$7,500 and \$7,900.

Mr. Kubacz asserts that he has been incorrectly and improperly paid for the school years 1963-64 through 1968-69, and, therefore, the Board owes him the sum of \$2,700.

The Board answers that, in accordance with the policy effective July 1, 1969, *ante*, Mr. Kubacz applied for and received the sum of \$600 for three years of prior teaching experience, one of which was in a private, parochial high school.

Mr. Kubacz’ claim is listed in summary as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1963-64	\$5,000	\$5,600	\$ 600
1964-65	5,400	5,900	500
1965-66	5,800	6,200	400
1966-67	6,800	7,200	400
1967-68	7,500	7,900	400
1968-69	7,900	8,300	400
			<hr/> \$2,700

Mr. Kubacz was issued a provisional secondary teacher’s certificate for accounting on September 21, 1961. He received a limited secondary teacher’s certificate on February 22, 1962, and added an endorsement for general business

on July 29, 1963, and for typewriting on November 15, 1963. He was issued a permanent secondary teacher's certificate on November 24, 1964. (Exhibit R-38)

Mr. Kubacz received a recommendation for appointment from the local Board of Examiners on September 1, 1963. (Exhibit R-38)

In September 1961, Mr. Kubacz began to make contributions to the Teachers Pension and Annuity Fund. (Exhibit R-11)

The last petitioner is Rose C. Sachs. Mrs. Sachs was employed as a substitute teacher on a *per diem* basis between September 1957 and January 31, 1958. (Exhibit R-72) By action of the Board at the meeting held January 9, 1958, Mrs. Sachs was appointed as a teacher-in-training in physical education, for the period beginning February 1, 1958, and ending January 31, 1959, at the salary of \$3,800. (Exhibit R-74) She received notification regarding this appointment by letter dated January 13, 1958 (Exhibit R-75), and she was also issued an employment contract. (Exhibit R-76)

At the Board meeting held February 19, 1959, Mrs. Sachs was awarded a contract to teach physical education, assigned to Dickenson High School, for the period beginning February 1, 1959 to January 31, 1960, at the annual salary of \$4,400. (Exhibit R-77) She received a written notification of this appointment (Exhibit R-78) and a teaching contract. (Exhibit R-79) Mrs. Sachs' salary of \$4,400 during her second year of teaching in Jersey City was the amount indicated as step one of the bachelor's degree category of the then effective salary guide. (Exhibit R-1) In the Briefs of counsel, it is stated that Mrs. Sachs did not teach more than one day in September 1960, and therefore completed only one-half of this twelve-month appointment. As of September 1960, she had one and one-half years of experience within the district.

From February 1, 1961 to June 30, 1961, Mrs. Sachs served as a substitute teacher, and she continued to serve as a substitute teacher during the 1961-62 school year. No payments were made to the Teachers Pension and Annuity Fund by Mrs. Sachs during this one and one-half year period. (Exhibit R-11)

The minutes of the Board meeting held September 13, 1962, indicate that Mrs. Sachs was appointed to teach physical education for the period beginning September 1, 1962, and ending August 31, 1963, at the annual salary of \$4,600. (Exhibit R-82) Mrs. Sachs received a letter of notification dated September 18, 1962, regarding this appointment (Exhibit R-83) and a contract. (Exhibit R-84)

Mrs. Sachs was appointed as a teacher of physical education, assigned to Lincoln High School, for the period September 1, 1963 to August 31, 1964, at the salary of \$5,000, at the Board meeting held June 13, 1963. (Exhibit R-86) She received letters, dated June 14, 1963 (Exhibit R-87) and August 15, 1963 (Exhibit R-88) notifying her of this appointment and assignment. Mrs. Sachs also received a written contract for this period of employment. (Exhibit R-89)



For the period September 1, 1964 to August 31, 1965, Mrs. Sachs was appointed to teach health and physical education at Lincoln High School for the salary of \$5,300, by the Board at a meeting held July 1, 1964. (Exhibit R-92) By letter dated July 2, 1964 (Exhibit R-93), she was notified regarding this Board action, and she also received an employment contract. (Exhibit R-94)

At a meeting of the Board held July 1, 1965, Mrs. Sachs was appointed for the period beginning September 1, 1965, as a teacher of health education. (Exhibit R-95) She received notice of this assignment by letter dated July 2, 1965. (Exhibit R-96) By letter dated August 12, 1965, Mrs. Sachs was assigned, as a "regularly appointed teacher" of health education at Lincoln High School. (Exhibit R-97) Her contract specified her employment from September 1, 1965 to August 31, 1966, at the annual salary of \$5,600. (Exhibit R-98)

It is stipulated that Mrs. Sachs' employment for 1966-67, 1967-68 and 1968-69 earned the respective salaries of \$6,600, \$7,300 and \$7,700.

The Board asserts that, in accordance with Schedule G of the policy effective February 1, 1970, *ante*, Mrs. Sachs applied for and received a total of \$800, or \$200 each, for her four years of experience in 1957-58, 1958-59, 1959-60 and 1962-63.

Mrs. Sachs claims that she was improperly paid for the school years 1962-63 through 1968-69, and accordingly the Board owes her the total of \$7,600. She also claims that she should be placed upon the proper experience step of the prevailing salary schedule. The amount of \$7,600 claimed by this petitioner is summarized as follows:

SCHOOL YEAR	ACTUAL SALARY	CLAIMED SALARY	DIFFERENCE
1962-63	\$4,600	\$5,000	\$ 400
1963-64	5,000	6,200	1,200
1964-65	5,300	6,500	1,200
1965-66	5,600	6,800	1,200
1966-67	6,600	7,800	1,200
1967-68	7,300	8,500	1,200
1968-69	7,700	8,900	1,200
			<hr/> \$7,600

Note: In petitioners' Brief, the total is incorrectly added and is stated as \$6,400.

The record of Mrs. Sachs' State certification is as follows: She received a provisional secondary certificate for biology and general science on April 11, 1957, and a limited secondary certificate for the same subjects on December 29, 1959. A limited secondary certificate in health education was issued to Mrs. Sachs on January 27, 1965, and a permanent secondary certificate for biology, general science and health education on November 3, 1965. She had received an emergency certificate for physical education on July 16, 1957, which was



renewed annually until June 1965, and she also received an emergency certificate for health education on March 10, 1961. (Exhibit R-38)

Mrs. Sachs received a recommendation for appointment from the local Board of Examiners on September 1, 1965. (Exhibit R-38)

Mrs. Sachs made contributions to the Teachers Pension and Annuity Fund beginning February 1958 and ending March 1960. She resumed making contributions in September 1962 and made them continuously thereafter. (Exhibit R-11)

The dispositive issue in the matter herein controverted before the Commissioner is: Did or did not the Board act properly in placing petitioners on the various steps of its salary schedule during each year of their respective periods of employment?

Counsel for petitioners argues that in the case of each respective petitioner, at a given point in time, they were placed on the first step of the bachelor's degree category of the then effective salary schedule after having accumulated several years of full-time teaching experience within the school district. Therefore, it is asserted, each of the petitioners was deprived of his rightful placement on the salary schedule and consequently was improperly and unlawfully underpaid for certain specific years.

It is further argued by petitioners that the use of terms such as "permanent substitute" and "contract teacher" as differentiated from "appointed teacher" is unique to the Jersey City School District, and that this procedure was used as a guise to enable the Board to pay lower salaries to those teachers who were not granted an "appointed" status at the time of their initial employment by the Board.

The Board answers that the adopted salary schedules set forth compensation levels for regularly-appointed teachers, and when each of the petitioners was regularly appointed by the Board, he was paid the annual compensation consistent with the effective salary guide. Also, the Board asserts that both prior to and upon appointment, petitioners were aware of the Board's policy whereby newly-appointed teachers were placed on the initial step of the then effective salary guide.

It is the Board's position that each of the petitioners served for several years as permanent substitutes, and that giving them credit, therefore, for these years of service which were prior to their "appointment" would constitute discrimination against those teachers who were regularly appointed. The Board argues that there is a distinct difference between the services of petitioners as permanent substitutes and their services as regularly-appointed teachers.

The final argument advanced by the Board is that the matter of credit for prior years' teaching experience was negotiated and settled by the agreement reached for the 1969-70 school year between the Board and the Jersey City

Education Association. (Exhibit R-10) Accordingly, the Board avers that petitioners are now estopped from litigating this issue before the Commissioner.

In rebuttal to the Board's assertions, petitioners answer that the argument advanced that petitioners were not "appointed" teachers during several years of their employment is of no significance in the instant matter. Counsel argues that these teachers regularly contributed to the Teachers Pension and Annuity Fund, performed regular teaching duties, acquired the status of tenure at the appropriate times and were held as freely accountable as all "appointed" teachers.

The Commissioner takes notice of the fact that the Jersey City School District has for many years maintained a local Board of Examiners. In the instant matter, the contested legal status of the petitioners relates directly to the functions of the local Board of Examiners in establishing eligibility lists of teaching candidates and recommendations for appointment to teaching positions. As the facts have shown, each of the petitioners was employed by the Board of Education for several years before being "appointed" by the Board of Education upon recommendation of the Board of Examiners. Therefore, a review of the statutory authority for the functioning of a local board of examiners is in order.

The original act which permitted the creation of a local board of examiners in city school districts is found in *L. 1903 (2d Sp. Sess.) c. 1, § 31*, p. 14. The pertinent part reads as follows:

"In each city school district there may be a Board of Examiners consisting of the Superintendent of Schools of such district, if there be one, and such persons as the board of education of the school district shall appoint. No person shall be appointed as such examiner unless he or she shall hold either a state certificate or the highest grade certificate issued in said district, or shall be a graduate of a college or university. Said Board of Examiners shall, under such rules and regulations as the State Board of Education shall prescribe, grant certificates to teach which shall be valid for all schools of such school district. No teacher shall be employed in any of the schools of such district unless he or she shall possess such certificate or a state or county certificate; *provided*, that nothing herein contained shall be construed to prevent the Board of Education of such school district from prescribing and requiring other and further qualifications to teach than shall have been prescribed by the rules and regulations of the State Board of Education as aforesaid; *provided further*, that if any such school district shall maintain a Normal School or a training school for teachers, which school shall have been approved as to its course of study by the State Board of Education, then the diplomas or certificates issued to pupils of any such school upon graduation therefrom may be accepted by the board of education of said school district as certificates to teach valid for the schools of such school district."

By *L. 1911, c. 282, § 1, p. 594*, the last proviso of the above-stated statute was amended as follows:

“If any school district shall maintain a normal school or a training school for teachers, which school shall have been approved as to its course of study by the State Board of Education, then the diplomas or certificates issued to pupils of any such school upon graduation therefrom may be accepted by the *State Board of Examiners* as certificates to teach, valid for the schools of such school district.” (*Emphasis ours.*)

This enactment was repealed by *L. 1912, c. 364, p. 640*.

The editorial revision which resulted from the adoption of the Revised Statutes, *L. 1937, c. 188*, produced *N.J.S.A. 18:13-2*, which reads in pertinent part as follows:

“\*\*\* The board of examiners shall, under such rules and regulations as the state board of education shall prescribe, and such additional rules and regulations as may be prescribed by the board of education of the school district, grant certificates to teach which shall be valid for all schools of such school district.

“No teacher shall be employed in any of the schools of the district unless he shall possess such certificate, or a state or county certificate, or a certificate or diploma issued to pupils upon graduation from a normal school or a teachers’ training school maintained by such school district, if any, the course of study in which has been approved by the state board of education.”

This statute, *N.J.S.A. 18:13-2*, received further editorial revision through the enactment by the Legislature of *Title 18A, Education*. The provisions of the original statute are now found in *N.J.S.A. 18A:26-3,4,5,6*.

*N.J.S.A. 18A:26-5* states the following regarding the function of a district board of examiners:

“A district board of examiners shall, under such rules as the state board shall prescribe, and under such additional rules as may be prescribed by the board of education of the district, issue certificates to teach, which shall be valid for all schools of the district.”

*N.J.S.A. 18A:26-6* is also of particular relevance to the instant matter, and states:

“No teaching staff member shall be employed in any of the schools of a district having a district board of examiners unless he shall be issued a certificate by said board and holds an appropriate certificate issued by the state board of examiners or the county superintendent of schools of the county.”

From this review of the legislative history of these statutes, it can be seen that the provisions have remained basically unchanged for a period spanning almost seventy years.

At the time the original act was created in 1903, the majority of the State's school districts were rural. The major task of recruiting teaching candidates fell to the city school districts, where the need was the greatest. These statutes, always permissive, provided a means and a functioning body, the district board of examiners, to screen applicants for teaching positions on the basis of local examinations, and to establish a rank order of eligible candidates from which qualified individuals could be selected by the board of education for appointment as teachers. The certificate issued by the district board of examiners was the license of eligibility for appointment by the board of education.

The increasing urbanization of the State, the development of the four-year teacher training college and the evolution of an extensive and upgraded code of rules for teacher certification by the State Board of Education have diminished the need for district boards of examiners to the present-day situation which finds few in existence.

It is significant that, although *N.J.S.A. 18A:26-5* (formerly part of 18A:13-2), provides that “\*\*\* A district board of examiners shall, under such rules as the state board shall prescribe, \*\*\* issue certificates to teach \*\*\*,” there are no rules of the State Board in *N.J.A.C., Title 6, Education*, which govern this function of a district board of examiners.

The rules of the Jersey City Board of Education contain provisions regulating the local Board of Examiners under Section VI, Board of Examiners and Certification of Teachers. Two versions of these rules, those in existence prior to 1966, and the amended rules currently in effect, are marked in evidence. (Exhibit R-39) The rules in effect prior to 1966 required an examination indicating good physical and mental health, a written professional examination, an oral examination and an evaluation of the candidate's experience and professional preparation. A final score determined the candidate's placement, in order of rank, on an eligibility list, with the exception that no person scoring less than seventy points could be placed on such list. This score was computed by assigning a weight of forty percent to the written examination and sixty percent to the other parts of the examination.

It is noteworthy that the 1966 amendment to these rules represent a drastic reduction in the minimum requirements of the selection procedure. Section 602-02, para. b. states that:

“\*\*\* The procedures to be followed in the selection of applicants shall be determined by the Board of Examiners with the approval of the Superintendent of Schools and the Board of Education. The specific requirements and qualifications for appointment shall be published in an official announcement, to be issued at times to be determined by the Board of Examiners\*\*\*.”

In reply to a request for certain documentary information, a letter dated September 20, 1972 from the assistant superintendent (Exhibit R-38), provides the following information regarding the appointments of petitioners, all of which were made by the Board upon recommendation of the Board of Examiners, and after each petitioner had been employed by the Board for several years:

“\*\*\* Prior to appointment as a regular teacher through recommendation of the Board of Examiners, one may have been employed either as a long-term substitute or as a one-year contract teacher. It is only when a ‘true’ vacancy exists that appointment as a regular teacher is made. Long-term substitutes and contract teachers normally fill vacancies of a temporary nature brought about by, for example, personal, maternity and sabbatical leaves. Since 1966 all such temporary vacancies have been filled by contract teachers.

“When true vacancies exist, the Board of Examiners screens applicants for such positions. Section VI of the Rules of the Board of Education (prior to 1966 and after 1966) is enclosed.

“The ‘local’ certificates which you refer to in your letter have not been issued since the 1950’s. It was judged sufficient that appointment from eligibility lists established by the Board of Examiners sufficed and that ‘local’ certificates did in fact duplicate State certification. Thus none of the six involved were issued ‘local’ certificates at the time of their appointment.

“Documents previously submitted do, I believe, indicate the status of each individual prior to his or her appointment.\*\*\*”

This practice by the Board is specifically prohibited by *N.J.S.A. 18A:26-6*. The language of that statute clearly requires that “No teaching staff member *shall be employed* in any of the schools of a district having a district board of examiners *unless he shall be issued a certificate by said board\*\*\*.*” (*Emphasis added.*)

The Board’s defense is that each petitioner was a long-term substitute teacher for several school years, and the real distinction between the status of a substitute teacher and a regularly-appointed teacher prevented the Board from according petitioners credit for those years of experience when it determined each petitioner’s placement on the salary schedule.

The Commissioner agrees that there is a definite distinction between the conception of the classification “teacher” and “teaching staff member” as used in the school law and in school practice, as opposed to the definition of “substitute teacher.” In the judgment of the Commissioner, petitioners clearly were not “substitute teachers” during their full-time employment for several school years, under proper State certification.

The distinction between teachers and substitute teachers had been dealt with on previous occasions by the Commissioner and by the courts of this State. In *Board of Education of Jersey City, Hudson County v. Margaret M. Wall and State Board of Education of the State of New Jersey*, 119 N.J.L. 308 (Sup. Ct. 1938) the Court affirmed the finding of the State Board of Education that the teacher, Miss Wall, had been continuously employed by the Board in two teaching assignments for a period in excess of four years, and had thereby acquired a tenure status, notwithstanding the Board's attempt to evade the tenure statutes by the device of compensating the teacher on a *per diem* basis and contending that her status was merely that of a substitute teacher.

In *Madeline L. Schulz v. State Board of Education and Board of Education of the City of Newark, Essex County*, 132 N.J.L. 345 (E. & A. 1945) the Court pointed out that the Legislature was not a stranger to the distinction between teachers and substitute teachers by citing that the amendment L. 1919, c. 80, which incorporated the pension fund feature in the general public school statute of 1903 (L. 1903 2d Sp. Sess., c. 1) and was previously N.J.S.A. 18:13-25 (now N.J.S.A. 18A:66-2p.), stated the following in precise language:

“\*\*\* No person shall be deemed a teacher within the meaning of this article who is a substitute teacher\*\*\*.”

The Court's words are particularly pertinent to the instant matter as follows at pp. 352, 353:

“\*\*\* Both the office of the State Commissioner of Education and the State Board of Education have been on record since 1938 (*Waters v. Board of Education of Newark, School Law Decisions*, 1938, pp. 623, 624) as construing the tenure statute not to include substitute teachers employed to do particular substitute work for absent teachers.

“The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher. ‘It clearly appears from the record that the seven persons designated as special substitute teachers were actually continuously employed, the minutes notwithstanding. The action of the board was the merest subterfuge to defeat the legislative purpose \*\*\*.’ *Downs v. Board of Education of Hoboken*, 13 N.J. Mis. R. 853 (1935).\*\*\*”

The Court also cited *Board of Education of Jersey City v. Wall, supra*, and then stated the following at p. 353:

“\*\*\* The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers.\*\*\*”

The distinction between substitute teachers and teachers was also the basis of the decision of the Court of Errors and Appeals in *Dora Gordon v. State*

*Board of Education and Board of Education of the City of Newark, Essex County*, 132 N.J.L. 356 (E. & A. 1945).

The Commissioner also notices that the language of N.J.S.A. 18A:66-2p. (formerly 18:13-25), has remained unchanged since 1919, a period of fifty-three years.

There is no distinction between vacant teaching positions which require the employment and assignment of full-time teachers for a period of one or several school years, as is the case in the instant matter. The Commissioner finds the Board's defensive arguments to be groundless and its policy to be wholly without merit.

The periods of employment for each of the petitioners, with the sole exception of *per diem* substitute teaching, were full-time teaching assignments. The record before the Commissioner discloses that in each instance petitioners were holders of appropriate State certificates and paid contributions to the Teachers Pension and Annuity Fund. The Board's practice of referring to petitioners as "teachers-in-training" and "contract teachers" as opposed to "appointed teachers" has no meaning, and constitutes a violation of N.J.S.A. 18A:26-6, and the Commissioner so holds.

Based on this meaningless practice, the Board admits the policy of placing each teacher on the first step of the appropriate category of the effective salary schedule at the time that such teacher was "appointed." This policy was equally violative of the rights of petitioners, and created the evil of depriving petitioners of their appropriate placement on the salary guide, based upon their prior full-time teaching experience within the school district.

The remaining point to be considered is the Board's contention that petitioners are now estopped from litigating this matter on the grounds that the issue in this case has been the subject matter of negotiations and has been resolved in a contract and Board policy which now precludes petitioners from pursuing this or any other litigation.

The doctrine of estoppel by simple contract is intended to embrace all cases in which there is an actual or virtual undertaking to treat a fact as settled. Estoppel by contract means no more than that a party is bound by the terms of his own contract until it is set aside or annulled for fraud, accident or mistake.

It is well agreed, however, that there are two forms of what has been termed estoppel by contract; namely, estoppel to deny the truth of facts agreed on and settled by entering into the contract, and estoppel arising from acts done under, or in performance of the contract. The first form of estoppel is wholly based upon the written instrument. The second form rests upon the broad principle which precludes a party from taking inconsistent positions to another's prejudice, and is therefore usually considered a form of quasi-estoppel. 31 C.J.S. Estoppel § 55, pp. 360-361.



If, in making an agreement, the parties agree on a particular fact as the basis of negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake. There can be no estoppel as to matters not included in the agreement, and the agreement must be invoked in all of its terms by one party against the other. 31 C.J.S. Estoppel § 55, pp. 361-363.

The Board cites *Dooley v. Lehigh Valley R.R. Co.*, 130 N.J. Eq. 75 (Chan. Div. 1941) wherein the Court relied upon *Christiansen v. Local 680, Milk Drivers et al.* 126 N.J. Eq. 508 (1940) in stating that an agreement between the employer and the representative of the employees circumscribes the rights of both parties in regard to individual contracts of employment. The essence of the Court's statement is that the agreement is enforceable against or by individual members of the employee unit in matters which affect them either peculiarly or by class or all alike.

The New Jersey Supreme Court in *Casriel et al. v. King*, 2 N.J. 45 (1949) stated the principle that the intention of parties to an agreement must be found within the four corners of the instrument itself. The Court stated the following, which is particularly pertinent, at p. 50:

“\*\*\* The polestar of construction is the intention of the parties to the contract as disclosed by the language used, taken as an entirety \*\*\*. The inquiry is the meaning of the words when assayed by the standard adopted by the law. On the theory that all language will bear some different meanings, evidence of the circumstances is always admissible in the construction of integrated agreements, but not for the purpose of giving effect to an intent at variance with any meaning that can be attached to the words.\*\*\*”

The words in question here are those contained in the first agreement negotiated between the Board and the Jersey City Education Association. (Exhibit R-10) The precise portion in issue is the previously cited provision under Schedule G, Prior Service, which reads as follows:

“Commencing February 1, 1970, the annual salary of any teacher who, at the time of his most recent employment in this system, had previous teaching experience shall be increased above the salary guide in Schedule A as follows: Two Hundred (\$200.00) Dollars per year for each year of prior experience up to but not exceeding five (5) years of prior experience.”

In the judgment of the Commissioner, these words, *ante*, do not constitute an estoppel by contract to deny petitioners the right to claim restitution for a wrong which arose from actions of the Board that were illegal and shown to be violative of statutory requirements.

The promotion and enforcement of fair dealing and the prevention of results contrary to good conscience and fair dealing are involved in estoppel. The doctrine can be invoked only to promote fair dealing.



Neither could petitioners waive their rights under the statutory provisions, *ante*, by which the Board of Examiners was required to certify them upon their employment. Persons may waive statutory provisions for their benefit only if they do not involve considerations of public policy. *Linden Board of Education v. Liebman*, 56 N.J. Super. 556, 564 (Chan. Div. 1959). In the instant matter, the creation and function of the district Board of Examiners was to benefit the public by providing a means beyond State certification to secure the best teaching staff candidates for the school district.

It is elemental that a municipal corporation, such as a local board of education, cannot make an illegal or *ultra vires* act legal on any principles of estoppel. As the Court stated in *Gruber et al. v. Mayor and Township Committee of Raritan Township*, 73 N.J. Super. 120 (App. Div. 1962) at p. 126: “\*\*\*A municipality is not totally exempt from the principles of fair dealing.\*\*\*” The Court quoted *Howard D. Johnson Company v. Township of Wall*, 36 N.J. 443, 446 (1962) as follows:

“\*\*\* Indeed, government itself is created to provide justice; its agent, a municipality, should be loath to succeed upon a mere tactical advantage.\*\*\*”

See also *City of East Orange v. Board of Water Commissioners of East Orange*, 73 N.J. Super. 440 (Law. Div. 1962).

Public policy demands that the mandate of the law should override the doctrine of estoppel. No amount of misrepresentation can prevent a party, whether a citizen or an agency of government, from asserting as illegal that which the law declares to be such. *Montgomery v. Wilmerding*, 26 N.J. Super. 214, 220 (Chan. Div. 1953), 31 C.J.S. Estoppel § 138, p. 685.

The language of the agreement, *ante*, means no more and no less than that persons with prior years of service in teaching could secure \$200 as a salary increment for each year of such experience up to a maximum of five years. It is noteworthy that this language clearly permits such increments for prior years of experience in other school districts. There is nothing in the words of the agreement which convinces the Commissioner that petitioners intended this agreement to constitute either a waiver, which would be contrary to public policy, or a total settlement of their legal claims. Even were this not so, the Commissioner would be required to remedy the evil which has been created as the result of the Board's failure to comply with the statutes, *ante*. *In re Masiello*, 25 N.J. 590, 606-607 (1958)

The Commissioner finds and determines, for the reasons stated, that petitioners have been improperly paid for prior years of service in the Jersey City School District. Accordingly, the Commissioner orders that (1) the Board of Examiners shall henceforth comply with the statutes, *supra*, and issue a local certificate to each candidate immediately prior to or at the time of such candidate's employment by the Board of Education in any full-time teaching position, and (2) the Board of Education shall immediately place each petitioner

herein on the appropriate step of the applicable salary schedule, and (3) the Board shall remit to each of the petitioners herein the sum of moneys which represents the difference between each actual annual salary received and the amount each petitioner would have received by virtue of receiving proper credit for each year of full-time teaching experience within the district, less any amount received under the provisions of Schedule G, *ante*, for prior years of experience within the Jersey City School District.

COMMISSIONER OF EDUCATION

January 26, 1973

**Ruth Z. Yanowitz, Eugenia G. Hollingsworth, Elsie D. Camisa,  
Hazel P. Endersbe, Aloysius J. Kubacz, Rose C. Sachs, and the  
Jersey City Education Association,**

*Petitioners-Appellees,*

*v.*

**Board of Education of the City of Jersey City,  
Hudson County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, January 26, 1973

For the Petitioners-Appellees, Philip Feintuch, Esq.

For the Respondent-Appellant, Brown, Vogelmann & Ashley (Irving I. Vogelmann, Esq., of Counsel)

Respondent-Appellant appealed to the State Board of Education from the decision of the Commissioner of Education which found that Petitioners were improperly paid for prior years of service in the Jersey City School District. The Notice of Appeal was filed on February 6, 1973. According to State Board rules, *N.J.A.C. 6:2-1.3*, Respondent-Appellant must file fourteen copies of the points within twenty (20) days after the Appeal has been taken. Therefore, in this case, points were due February 26, 1973. A dismissal warning letter was sent March 16, 1973. Respondent-Appellant then requested an extension for filing, and a new due date was set for April 12, 1973. Respondent-Appellant did not comply with the new due date. By letter of May 3, 1973, Respondent-Appellant was advised that dismissal would be entered on June 6, 1973, the next meeting of the State Board. Respondent-Appellant's Brief was received on May 8, 1973, five (5) days after the letter of dismissal had been sent, and ninety-one (91) days after the Notice of Appeal was filed.

We find that there has been an unreasonable delay on the part of Respondent-Appellant. The Appeal has not been perfected and is out of time.

Dismissed.

June 6, 1973

**Elizabeth Aikins,**

*Petitioner,*

*v.*

**Board of Education of the Borough of East Paterson,  
Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion for Summary Judgment**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Law Offices of Charles A. Bartlett, (Charles A. Bartlett, Esq., of Counsel)

Petitioner is a guidance counselor under tenure in the East Paterson Borough School System. Respondent, hereinafter "Board," denied petitioner a salary increment for the school year 1971-72. The matter is submitted for adjudication by the Commissioner on the pleadings, attachments and the transcript of oral argument in *Mabel Clark v. Board of Education of East Paterson, Bergen County*, decided by the Commissioner on May 17, 1972, affirmed by the State Board of Education on February 7, 1972.

Counsel for the parties in the instant matter (*Aikins*) agreed to postpone litigation until *Clark, supra*, was decided by the Commissioner.

Counsel agree that the *Aikins* and *Clark* matters are identical, with the exception that the Superintendent of Schools in the instant matter (*Aikins*), recommended to the Board that petitioner be awarded her increment for the 1971-72 school year. In the *Clark* matter, the Superintendent recommended that petitioner's increment be withheld.

Petitioner files a Motion for Summary Judgment in her favor on the following grounds:

"1. An analysis of the Board's salary guide for 1970-71 shows that there is no implementation nor are there correlary (sic) conditions set down for

advancement on the guide and that only years of service are necessary to advance from step to step.

“2. On or about June 14, 1971, the Superintendent of Schools recommended that Petitioner be issued a contract for \$15,650 for the 1971-72 school year but despite this recommendation, the respondent denied the increment and issued the contract for the ensuing school year without increase.

“No opportunity was offered petitioner to speak in her own behalf before the Board and the Board’s action was taken without the opportunity to be heard.

“Annexed hereto are copies of letters from the Superintendent to the petitioner dated June 24, 1971 and August 27, 1971, respectively, pertaining to the above allegations.

“3. There are no conditions precedent to advancement on the schedule either in the agreement between the East Paterson Education Association or the salary guide, which makes the denial invalid and illegal.

“But even if such condition does exist, it was met in this instance.

“4. For such further relief as may be proper. \*\*\*”

Attachments to the Petition of Appeal are reproduced below:

“Board of Education  
East Paterson, New Jersey 07407  
Office of the Superintendent

\*\*\*

June 24, 1971

“Mrs. Elizabeth Aikins  
\*\*\*

“Dear Mrs. Aikins:

“On two occasions I recommended to the Board of Education the issuance of a continuing contract to you at a salary of \$15,650 for the school year 1971-72. Unfortunately in both instances the Board of Education did not approve my recommendation. As I discussed with you on the telephone, I cannot issue you a statement regarding your salary for the school year 1971-72 since the Board of Education has taken no definite action on my recommendation.

“Since my recommendation of June 7th was not approved, there has been no change in your salary.

“Sincerely,

“\*\*\*

“Edward M. Dzurinko  
“Superintendent of Schools”

\*\*\*

and,

“August 27, 1971

“Mrs. Elizabeth Aikins  
\*\*\*

“Dear Mrs. Aikins:

“The Board of Education at its adjourned meeting on August 24, 1971, approved a continuing contract for you at a salary of \$14,800, for the 1971-72 school year.

“Enclosed herewith you will find your Annual Notice. Please sign all copies and return to my office.

“Hoping you had a good summer, and look forward to seeing you soon.

“Sincerely,

“\*\*\*

“Edward M. Dzurinko  
“Superintendent of Schools”

\*\*\*

Other attachments to the Petition of Appeal were: (a) Schedule A-Teacher Salary Guide 1970-71, and (b) Article VI-1970-71 Rules for Payment of Salaries.

Petitioner relies on the argument presented in *Clark, supra*, and avers that the matter submitted herein for adjudication by the Commissioner should be decided in her favor. Petitioner also avers that the following decisions of the Commissioner are dispositive of the matter: *Anthony G. Pekich v. Board of Education of the City of Bridgeton, Cumberland County*, decided by the Commissioner June 8, 1971, affirmed by the State Board of Education December 1, 1971; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; *Charles Brasher, v. Board of Education of the Township of*

*Bernards, et al., Somerset County*, decided by the Commissioner March 19, 1971; *Ross v. Board of Education of the City of Rahway, Union County*, 1968 S.L.D. 26; and *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, decided by the Commissioner October 21, 1971.

Specifically, petitioner asserts that her placement on the salary guide for the 1971-72 school year is governed by the terms of the policy adopted by the Board, pursuant to the agreement reached with the East Paterson Education Association, effective from September 3, 1970 to June 30, 1971 (J-1). Petitioner asserts further that the policy, *ante*, does not include "corrollary (sic) conditions set down for advancement on the guide and that only years of service are necessary to advance from step to step." (Notice of Motion, *supra*)

The Board argues that petitioner cannot rely on the salary guide alone, but that she must consider the policy as a whole, since the Board and all personnel covered by the agreement are bound by all of the terms and conditions of the adopted policy. The Board avers that the adopted policy gives it the authority to withhold a teacher's increment. That portion of the policy (Article IV A) reads as follows:

"\*\*\* No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth \*\*\*."

Secondly, the Board argues that the policy contained in the Agreement for the 1971-72 school year was adopted in February 1971, and "was in effect at the time the petitioner was denied her increment" and that the "71-72 salary guide clearly allows the Board to withhold for just cause the petitioner's increment." (*Mabel Clark*, Tr. 11) The Board claims that the 1971-72 policy includes a clause printed at the foot of the salary guide, which gives it the authority to withhold a teacher's increment, and that in the matter, *sub judice*, this authority is granted to the Board under the provision of the policy (Article IV A).

The Commissioner hereby dismisses that portion of the Board's argument, which claims that the 1971-72 policy governs the matter, *sub judice*, on the basis of the provision of the 1970-71 policy (Article XV) stating that the policy is effective from September 3, 1970 through June 30, 1971. The 1971-72 policy (J-2) states that it shall be effective beginning September 1, 1971 through June 30, 1972; therefore, it could not possibly govern any action taken by the Board before its effective date of September 1, 1971.

The salient issue to be considered by the Commissioner is as follows:

Is the Board bound by the recommendation of the Superintendent of Schools that petitioner be awarded her salary increment for the school year 1971-72?

This issue is the only one distinguishable from the *Clark, supra*, matter.

The Board does not deny that it acted to withhold petitioner's increment despite the recommendation by its Superintendent that the increment be granted. Nor does the Board deny that petitioner was not afforded a hearing, nor given any reason for the withholding of her increment. The Board relies on the policy, *ante*, which it avers grants it the authority to withhold increments for "just cause." (Article IV)

In the judgment of the Commissioner, the Board improperly denied petitioner's increment because no "just cause" has been established by the Board. Assuming, *arguendo*, that the Board had a just cause for withholding petitioner's increment, certainly fair play would dictate that the teacher be informed of the reasons. In the instant matter, there is no evidence to show that the Board was dissatisfied with petitioner's performance of her duties. By contrast, the evidence before the Commissioner in *Clark, supra*, disclosed unsatisfactory performance by the petitioner.

The Commissioner wrote, in *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County*, 1969 S.L.D. 4, that:

“\*\*\* The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous. \*\*\*” (at p. 7)

In *Alvin F. Applegate, Jr. v. Freehold Regional High School District, Monmouth County*, 1969 S.L.D. 56 the Commissioner said that:

“\*\*\* respondent did not follow the procedure established by its own salary policy for such an action. \*\*\*”

Paramount in the evaluation of professional staff members should be an emphasis on improving staff performance which will ultimately benefit the school pupils. No evidence has been offered by the Board that anyone could benefit from having an increment withheld, with no reason being given for such

withholding and in contradiction to the recommendation of the Superintendent of Schools.

The Commissioner concludes, therefore, that the failure of respondent to follow a clearly-defined procedure in withholding the increment in the case herein, constitutes a fault within the bounds of the Commissioner's determination in *Fitzpatrick* and *Applegate, supra*.

The Commissioner determines, therefore, that petitioner was improperly denied a salary increment, and directs that the East Paterson Board of Education pay petitioner the increment due her for the 1971-72 school year.

COMMISSIONER OF EDUCATION

February 9, 1973

**Herman Scherman,**

*Petitioner,*

*v.*

**Board of Education of the City of Rahway,  
Union County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

Petitioner, the tenured principal of the Rahway Junior High School, avers that the Board of Education of the City of Rahway, hereinafter "Board," improperly and illegally denied him a salary increment for the 1972-73 school year. The Board maintains that its actions were entirely proper and that the increment was legally withheld for cause.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on September 20, 1972 at the office of the Union County Superintendent of Schools, Westfield. The report of the hearing examiner is as follows:

Petitioner has served for four years as the principal of the Rahway Junior High School and during school year 1971-72 his salary was \$19,975. This was



the designated salary for a junior high principal at the fourth level of the Board's policy for the "Administrators Salary Guide." This policy was adopted by the Board as the result of negotiating a comprehensive "Agreement Between the Board of Education of the City of Rahway in the County of Union and the Rahway Administrators and Supervisors Association as Majority Representative of Certain Public Employees" for the period July 1, 1971 through June 30, 1972, hereinafter "Agreement." (P-1) The part of the Administrators Salary Guide applicable herein is as follows:

**EXPERIENCE IN YEARS**

	0	1	2	3	4
Junior High Principal	\$17,200	\$18,125	\$19,050	\$19,975*	\$20,900

\*Petitioner's salary

It is noted by the hearing examiner that the Administrators Salary Guide, hereinafter "Guide," (P-1) contains no corollary clause which modifies in any way the stated terms which the Guide (P-1) contains. Neither are there other clauses contained in the larger Agreement in which the attainment of the stated salary levels are made conditional on the result of a judgment made by the Board as to the competence or performance of its staff members in administrative or supervisory positions.

However, such a corollary clause was suggested by the Rahway Superintendent of Schools, hereinafter "Superintendent," in a memo to the Administrators Negotiating Committee on March 27, 1972 for inclusion in the 1972-73 Agreement between the Board and the Rahway Administrators and Supervisors Association. (P-5) This memo stated:

"This should be a requirement in salary schedule language of contract — 'Any salary schedule *does not* guarantee an automatic salary increase but merely indicates the agreed upon value for basic services rendered by the individual whose performance and professional record meet the standards expected by the Board for the position held, and the Board reserves the rights granted to it under Title 18A concerning this question.' " (*Emphasis supplied.*)

The Superintendent's suggestion was evidently accepted and the successor Agreement (R-1) between the Board and the Administrators and Supervisors Association, applicable to the 1972-73 school year, contained the following paragraph which modified the salary scale which followed:

"The granting of any salary increment and/or adjustment as set forth in the salary schedule shall not be deemed to be automatic. The Superintendent of Schools shall have the power to recommend to the Board of Education the withholding of any salary increment or adjustment for inefficiency or for other good cause."

The salary scale of this successor Agreement (R-1) provided the following compensation levels for a junior high principal.

EXPERIENCE IN YEARS

0	1	2	3	4
\$17,845	\$18,770	\$19,695	\$20,620	\$21,545

The contentions of the parties herein are set in the framework of these Agreements (P-1, R-1) and arise from a series of events in the Spring of 1972. These events and actions are as detailed below.

The Superintendent evidently informed petitioner, by letter dated March 24, 1972, (not a part of the file) that the Board was considering his increment for the 1972-73 school year and, specifically, that this consideration involved the possibility of the Board withholding his increment. The letter offered petitioner a hearing concerning this possibility and a hearing was afforded on April 12, 1972, which petitioner charged was not in accord with proper procedural due process.

In any event, following the hearing, the Board met in regular session on April 18, 1972, and by majority vote approved a motion to withhold petitioner's increment for the 1972-73 school year. The reasons for this action were outlined in a letter (P-4) the Superintendent wrote to petitioner on April 18, 1972, which appeared to found the action on the statute *N.J.S.A. 18A:29-14*. Specifically, the Superintendent stated that:

“\*\*\*The Board of Education in accordance with *N.J.S.A. 18A:29-14* to withhold for inefficiency and other good cause, both the employment increment and the adjustment increment for the year July 1, 1972 to June 30, 1973 of the Principal of Rahway Junior High School \*\*\*.”

The letter (P-4) also contained the statement that the vote in favor of the resolution to withhold petitioner's increment had been approved by a vote of “seven ayes and one not voting.” The minutes of the Board (R-2), in recording this vote, contain the following recital:

Roll Call: 7 Ayes, 1 not voting (Mr. Keefe),  
1 absent (Mr. Pratt)

Petitioner now avers that this recording of the vote was not a properly recorded roll call vote as required by statutory prescription.

The Board avers that the roll call, as recorded in R-2, was sufficiently detailed to be informative concerning the vote of each member of the Board and that the evident intent of the statute requiring a “recorded roll call vote” has been met. Additionally, the Board argues that its action of April 17, 1972 in withholding petitioner's increment for the 1972-73 school year, was properly founded on the Agreement (R-1) which was approved by the Board in August

1972. In the Board's view, there was no agreement of any kind with respect to a 1972-73 salary scale for administrators and supervisors at the time of the Board's action on April 17, 1972, and, therefore, the Board had an entitlement to reserve its rights in this regard.

The issues of this matter are presented for the Commissioner's review as they were stated by agreement at the conference of counsel held prior to the hearing, *ante*; namely,

\*\*\*\* (a) Did the Board, with propriety, invoke *N.J.S.A.* 18A:29-14 to withhold employment and adjustment increments that were due petitioner?

“(b) If not, what is the remedy?

“(c) Was the action of the Board, *sub judice*, an arbitrary one unjustified by the facts which were elicited?

“(d) Was the action of the Board to withhold petitioner's increments, referred to, *supra*, pursuant to its own rules contained in corollary conditions contained in its salary guide? (In this regard the Board contends that in the absence of an existent agreement after June 30, 1972, there is no guide applicable to the withholding of the increments in question and the issue herein is not a valid one.)

“(e) At the time of the Board's decision in this matter was there a proper recorded roll call of the Board pursuant to statutory prescription?\*\*\*\*”

The hearing examiner finds that there is no procedural fault contained in the evidence reported, *ante*, of such gravity as to justify a reversal of the Board's action controverted herein, and he recommends that the Commissioner's evaluation of these issues be substantively limited to paragraphs “a” and “d,” *ante*.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and concurs with his recommendations that the decision in the matter, *sub judice*, must be based on two principal issues; namely, whether or not the Board's action purporting to withhold petitioner's increment is properly grounded on the statute *N.J.S.A.* 18A:29-14 or, in the alternative, on its own adopted salary policy. Such issues are similar to those considered by the Commissioner in a number of previous decisions.

It is settled, as the Commissioner said in *Rose Franco v. Plainfield Board of Education*, 1972 *S.L.D.* 327, that local boards of education have the authority to institute an action to withhold increments if the action that results in withholding is lawfully and properly grounded. However, the Commissioner

has held, and still holds, that such an action may not be based, as the Superintendent stated it was based herein, on the statute *N.J.S.A. 18A:29-14*.

In this regard, the Commissioner also stated in *Charles Brasher v. Board of Education of the Township of Bernards, Somerset County*, 1971 S.L.D. 132, that:

“\*\*\* *N.J.S.A. 18A:29-14* has no application to the matter *sub judice*, since the Commissioner has previously found the applicability of this statute to be limited to the stated terms of the minimum salary law found in *N.J.S.A. 18A:29-6 et seq.* However a variation of *18A:29-14* could have been adopted and published by the Board, if it had chosen to do so, as an additional provision of its salary guide for 1970-71. Such provisions may still be adopted in written form for future implementation.\*\*\*”

In the instant matter, the Commissioner holds in similar fashion – the statute *N.J.S.A. 18A:29-14*, standing alone, may not be used by the Board as the basis for a denial of an increment to petitioner. The question that remains is whether or not a “variation” of *N.J.S.A. 18A:29-14* exists herein as a substantial base to justify such denial.

It is relevant to this question to note that the Superintendent’s letter to petitioner (P-4) apparently intimates the Board’s action controverted herein was founded on the statute *N.J.S.A. 18A:29-14*. At the same time, it is argued that in the alternative, the Board could found its action of April 17, 1972 on a salary program provision not adopted until the following August. However, the Commissioner finds this second argument as invalid as the first. It rests on the assumption that the Agreement between the Board and the administrators for the 1971-72 school year (P-1) has no continuing force and effect after June 30, 1972. How can such an assumption have validity when the Agreement (P-1) embraces a salary scale containing, *inter alia*, a graded series of steps embracing a five-year period? Was petitioner entitled to move to step four of the Guide in April 1972 according to its precisely stated terms?

The Commissioner holds that he was entitled to move to step four of the Guide in April 1972 in the absence of a corollary clause or condition of any kind that predicated such advancement on a recommendation of the Superintendent or on other criteria. There is no such clause or condition attached to, or part of, the precisely stated Guide contained in P-1, and the corollary clause, contained in the Agreement (R-1), had no force and effect in April of 1972. As the Commissioner said in *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 S.L.D. 120:

“\*\*\* Since the adoption of *Chapter 236*, the Legislature has also adopted *Chapter 303, Laws of 1968*, now embodied in *N.J.S.A. 34:13A-1 et seq.*, imposing on boards of education and other public employers the obligation to negotiate the ‘terms and conditions of employment.’ While there has as yet been no precise definition of that mandate, as regards peripheral meanings of the phrases, there is no argument that a salary

schedule for teachers, and the directly associated provisions that affect compensation, are within the purview of the legislation. Presumably, these statutes (*N.J.S.A. 34:13A-1 et seq., supra*.) were enacted to reduce the number of disputes between public employees and governing bodies and to insure that machinery is available to process the disputes when they do arise. *However, if following negotiations pursuant to the mandate imposed by Chapter 303, the resulting 'agreements' are not committed to writing but are left to vague 'understandings' or the habits derived from custom, the Commissioner holds that the resultant 'agreement' is no agreement at all except in so far as it is precisely stated.* In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the terms of this contract are those committed to writing and contained in the terms of the salary guide (P-2). The Commissioner knows of no reason why at the time this contract was negotiated, the Board could not have attached 'additional provisions' to it, as it had for the guides adopted for the previous year and in 1955. Having failed to attach such provisions or conditions to the guide, whereby increments are conditional upon recommendations from the Superintendent or from others, the Commissioner holds that the Board and petitioners are bound only by the terms of the guide.\*\*\*" (*Emphasis supplied.*)

Similarly, in the instant matter the Commissioner holds that the Board was bound by the stated terms of the Guide it adopted in 1971 (P-1) to be in force and effect for the 1971-72 school year and that when the Board was compelled by the provisions of that Agreement (P-1) to make decisions on contracts for the 1972-73 school year, such decisions at that juncture had to be in conformity with all the provisions which that Agreement (P-1) alone contained and with the statutory prescription of *N.J.S.A. 18A:29-4.1*. This statute, which reads as follows, obligated the Board to observe the salary scales contained in P-1 prospectively, despite the June 30, 1972 termination date which that Agreement contained:

“\*\*\* A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. *Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy* but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.” (*Emphasis ours.*)

This holding takes cognizance of the fact that a “\*\*\* subsequent adoption of policies \*\*\*” (the Board’s R-1), if finalized prior to April 1972 would have resulted in the expiration of P-1 on its scheduled date of June 30, 1972. However, in the absence of such “\*\*\* subsequent adoption of policies \*\*\*” before the date scheduled for a decision on contracts of Rahway school administrators applicable to the school year 1972-73, the Commissioner holds that all provisions of P-1 were “binding” and remained in force and effect prospectively. A holding to the contrary would, in the Commissioner’s judgment, render the statute (*N.J.S.A. 18A:29-4.1*) a nullity.

Accordingly, the Commissioner finds that petitioner is entitled to move to the fourth step of the salary guide contained in the Agreement (P-1) during the school year 1972-73, and the Commissioner directs that he be placed at that level retroactive to July 1, 1972. However, the Commissioner rejects an argument by petitioner that he is entitled to be placed on the fourth step of the subsequently-negotiated salary guide contained in the Agreement (R-1). This Agreement does contain a corollary clause permitting the Board to withhold salary increments for cause, and the Commissioner holds that petitioner cannot demand its benefits without accepting its limitations as well.

COMMISSIONER OF EDUCATION

February 7, 1973

Casimir A. Begier,

*Petitioner,*

*v.*

Board of Education of the City of Rahway,  
Union County,

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, George G. Gussis, Esq.

For the Respondent, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

Petitioner, a former teacher now retired, was employed by the Board of Education of the City of Rahway, hereinafter “Board,” prior to the time of his retirement. He now avers that he was improperly denied salary increments by the Board during each of five successive years from 1966 through 1971, and seeks retroactive compensation. The Board denies that petitioner was not

properly compensated and avers that he is barred by laches from invoking a claim at this juncture.

A hearing in this matter was conducted on September 12, 1972 by a hearing examiner appointed by the Commissioner of Education, at the office of the Union County Superintendent of Schools, Westfield. Memoranda were subsequently filed by counsel. The report of the hearing examiner is as follows:

Petitioner was a tenured employee of the Board and served as an elementary school teacher in Rahway during the period September 1, 1955 through June 30, 1966. (PR-1) During that time he was granted salary increments each year and his salary increased from \$3,800 during school year 1955-56 to a total of \$8,600 during school year 1965-66.

However, in the course of the year 1965-66, the Rahway Superintendent of Schools, hereinafter "Superintendent," reviewed a series of reports (P-2) concerned with petitioner's classroom performance, and, finding them unsatisfactory, recommended that the Board move to retire petitioner — who was then 62 years of age — on June 30, 1966. (Such involuntary retirement was possible at that time pursuant to the statute, *R.S. 18:13-112.45*.) Thereafter, on April 20, 1966, the Board adopted a resolution requesting this retirement, and on April 28, 1966, the Superintendent filed notice of this action with the Teachers' Pension and Annuity Fund, hereinafter "TPAF." (R-1) TPAF, by letter of May 10, 1966 (R-2), acknowledged receipt of the Board's resolution and requested petitioner to decide on certain retirement options which were available to him.

However, on June 12, 1966, the Superintendent called petitioner to his office and discussed with him a recent statutory change in the law which had rendered the Board's resolution, purporting to retire petitioner involuntarily, as a nullity. The statutory change was that embodied in *Chapter 66, Laws of 1966* (now *N.J.S.A. 18A:66-112*), which raised the age limits for involuntary retirement to include "Any member who shall have reached 70 years of age \*\*\*."

The Superintendent testified that during the discussion of June 12, 1966, petitioner indicated that he did not want to retire, and that he wished to remain in the Rahway system in any capacity. At that point, the Superintendent testified, he offered petitioner an opportunity to remain as an employee of the Board assigned to non-teaching duties at an annual salary of \$8,600, with the understanding that this salary would remain the same in future years. According to the Superintendent, petitioner accepted the offer and said he would "\*\*\*\* do his best to show that he \*\*\* was deserving of more \*\*\*." (Tr. 45)

On June 15, 1966, the Board rescinded its resolution of April 20, 1966 to retire petitioner involuntarily and thereafter, during each of the school years 1966-67, 1967-68, 1968-69, 1969-70, and 1970-71, petitioner served as audiovisual coordinator assigned to an elementary school, without regular classroom assignment. The salary for this work remained the same each year and,



according to the Superintendent, petitioner received notice of it annually without protest and continued to perform duties that might be classified as custodial or clerical in nature; namely, assisting the librarian, checking out audiovisual equipment, returning films and materials to the County Film Library, etc.

While petitioner does not deny that he remained silent and, in effect, accepted his assignment and the salary for it, during all of the five-year period from 1966-67 through 1970-71, he did present the Board with a grievance in the Spring of 1971, and requested payment of \$11,150 in retroactive salary. On June 17, 1971, the Board considered this matter and found (R-6) that the Superintendent had "\*\*\*\* tried to help a marginal teacher \*\*\*\*" and that petitioner had "\*\*\*\* turned on his benefactor \*\*\*." Further, the Board found that petitioner had "\*\*\*\* agreed to the arrangement described,\*\*\*\*" and that there was no violation of "\*\*\*\* the contract \*\*\*." Accordingly, the Board denied the grievance, and petitioner now brings the same dispute before the Commissioner, although he retired on July 1, 1971.

Respondent argues that petitioner should be denied his claim to additional salary-increment compensation for the five-year period in question, by the doctrine of laches:

"\*\*\*\* since he clearly cannot come in with good conscience, did not act in good faith, was not vigilant, did not do equity, and has not come into this hearing with clean hands.\*\*\*\*" (Respondent's Memorandum, at p. 6)

In support of its position that the doctrine of laches bars relief to petitioner at this juncture, the Board cites *Cramer v. Roberts*, 19 N.J. Super. 1 (Chan. Div. 1952); *Atlantic City v. Civil Service Commission of New Jersey*, 3 N.J. Super. 57, (App. Div. 1949); *Good v. Lackawanna Leather Co.*, 96 N.J. Super., (Chan. Div. 1967); *Elowitch v. Bayonne Board of Education*, 1967 S.L.D. 78, affd. State Board of Education 86; and *Johnston v. Board of Education of Wayne Township*, 1966 S.L.D. 180, affd. Superior Court, App. Div., May 1, 1967. It is the Board's contention that the factual situation in this case demands judgment that the law concerning estoppel, developed in the case citations, *supra*, is equally applicable herein.

On the other hand, petitioner avers that he never knew, during all of the five-year period from September 1966 through the 1970-71 school year, that the salary scale for teachers provided for a higher compensation than he received during that period, and he maintains that he "never inquired" (Tr. 11, 13) about it. Counsel for petitioner avers in his Memorandum of Law that:

"\*\*\*\* There is nothing unusual about Petitioner's not being aware of that to which he was entitled. \*\*\* The Petitioner had no prior reason to concern himself with legalities.\*\*\*\*" (at p. 2)

Petitioner further avers that his claim to compensation is timely because it is "based on contract" and that the statute of limitations of the State of New



Jersey on contract actions is six years. In his development of this point of view, counsel for petitioner maintains that:

“\*\*\* In determining whether equitable relief should be granted the Respondent regardless of the Statute of Limitations two questions would have to be answered in the affirmative: (1) Has the party seeking restitution been unreasonable in his delay *after learning the facts*, and (2) has the delay made it unfair to permit the suit because a hardship would result to third persons because of a change of circumstances.\*\*\*” (Petitioner’s Memorandum of Law, at p. 4)

In the factual report, *ante*, the hearing examiner stated that the Superintendent had offered petitioner an opportunity to remain in the Board’s employ in a capacity other than teacher, at the time it was determined petitioner could not be retired involuntarily. It should be stated that the Superintendent indicated to petitioner, at the time the offer was made, that in the event the change of assignment was refused by petitioner, the Board would seek his dismissal by proffering charges and proceeding against him according to the provisions of the Tenure Employees Hearing Law. (*N.J.S.A. 18A:6-10 et seq.*) (See Tr. 55) The Superintendent also testified he told petitioner that the salary payable for the new assignment would not be increased in the future but “would be retained annually.” While petitioner does not confirm that this agreement was made, it is clear that the identical salary of \$8,600 was paid to him for each of five successive academic years beginning in 1966-67, and there was no protest from petitioner during all of that period.

Finally, the amount of money in contention herein is nowhere precisely stated in the Petition, although petitioner estimates it at approximately \$11,000. (Tr. 13)

The principal issues that are posed for the Commissioner’s determination are those agreed to in the conference of counsel held prior to the hearing, *ante*, and stated as follows:

1. Was petitioner illegally denied a salary increment for each of the school years 1966-67 through 1970-71, because of an agreement made in oral form between petitioner and the Superintendent?
2. Does laches bar consideration of the propriety of the compensation for each or all of the years mentioned, *ante*?

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and has noted the issues posed for consideration. Additionally, it is noted that petitioner grounds his demands for an additional sum of money on an allegation that for a period of five years (1966-67 through 1970-71), he was denied salary increments which were due him according to the terms of a teachers’ salary scale.

However, the demand for such compensation, according to the stated terms of the teachers' salary scale, is nowhere accompanied by evidence that, during all of the five years in question, petitioner performed the professional duties of a teacher as a member of the school district's teaching staff. In fact, it seems clear that during all of that period, petitioner did not perform such duties, but instead, was engaged in work as a clerk — he assisted the librarian, he checked out audiovisual equipment, and he returned films and materials to the County Film Library. It is equally clear that petitioner performed this work voluntarily and that the work was not of such character as to require an appropriate certificate as librarian, or for some other special field. Accordingly, the Commissioner holds that petitioner could not be classified during that period as a "teaching staff member," pursuant to the definition of such classification contained in *N.J.S.A. 18A:1-1*, (See also *N.J.A.C. 6:11-3.3*) which provides:

"Teaching staff member means a member of the professional staff of any district or regional board of education \*\*\* holding office, position or employment of such character that the qualifications, for such office position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse."

It follows then that petitioner is not now entitled to claim salary benefits as a "teaching staff member" for the five-year period 1966-71 during which he held no such "office, position or employment" in the Rahway School System, but instead he is entitled only to such salary benefits as were afforded to clerks. Absent a showing that the emoluments petitioner received as a clerk were not commensurate with such work during this period, there is no relief the Commissioner can afford.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 7, 1973

**In the Matter of the Special School Election  
Held in the Township of Mount Laurel,  
Burlington County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting on a proposal to authorize the issuance of \$930,000 of bonds of the School District of the Township of Mount Laurel for an addition to the existing Middle School at a special referendum held on January 17, 1973, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Yes	461	1	462
No	463	3	466
Void	2	- 0 -	2

Pursuant to a request submitted by the President of the Mount Laurel Board of Education a hearing examiner appointed by the Commissioner conducted a recount of the ballots at the office of the Burlington County Superintendent of Schools, Mount Holly, on January 25, 1973. At the conclusion of the recount the tally stood:

	AT POLLS	ABSENTEE	TOTAL
Yes	460	1	461
No	463	3	466
Void	2	- 0 -	2

There was no dispute at the recount over the two void ballots; however, even if both of the void ballots were added to the tally of "Yes" votes, there would be no change in the result.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and determines that the proposal submitted to the citizens of the School District of the Township of Mount Laurel at the special school election on January 17, 1973, failed to be approved by the voters.

COMMISSIONER OF EDUCATION

February 16, 1973

**Mr. & Mrs. Ralph Rovere, husband and wife, and Renee Rovere, their daughter,  
Mr. & Mrs. Steve Lipka, Jr., husband and wife, and Bernadette Lipka, their  
daughter,**

*Petitioners,*

*v.*

**Board of Education of the Township of Ridgefield Park et al.,  
Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioners, George D. Malhiot, Esq.

For the Respondent, Parisi, Evers & Greenfield (Irving Evers, Esq., of  
Counsel)

Petitioners, the parents and guardians *ad litem* of two pupils enrolled during the 1971-72 school year in the senior class of Ridgefield Park High School, hereinafter "High School," under the jurisdiction of the Board of Education of the Township of Ridgefield Park, hereinafter "Board," appeal to the Commissioner of Education to expunge from the school records of their daughters a three-day suspension and denial to participate in the annual senior class trip on the grounds that the rule under which the penalty was administered is unreasonable and additionally on the grounds that the aforesaid penalty was excessive.

The Board denies that the violated rule is unreasonable and that the penalty suffered by the two pupils was excessive.

On June 13, 1972, the return date of petitioner's Notice of Motion for temporary relief, *pendente lite*, to restrain the Board from the execution of its denial to participate in the annual senior class trip, oral argument was heard, and the Commissioner, by decision under date of June 15, 1972, denied the requested relief.

The material facts as stipulated are not disputed, and this matter is submitted for Summary Judgment by the Commissioner on the documents marked in evidence. Both parties have submitted Briefs.

Petitioners' daughters were suspended from school for the three-day period of May 23, 24, and 25, 1972 by the principal of the High School, as the result of an incident which took place during the Board-sponsored junior-senior dance, which was held Friday, May 19, 1972. (Exhibit P-2, P-3) Both pupils were reinstated in school on May 26, 1972, following conferences between petitioners and the principal. In addition to the three-day suspension from

school, *ante*, the principal also prohibited both pupils from participating in the annual senior class trip held Friday, June 16, 1972.

The affidavit of the principal states that approximately one week prior to the scheduled date of the junior-senior dance, one of the two pupils requested the principal's permission to leave the dance at 12:00 p.m. in order to travel to New York City with her escort to attend a show. According to the principal, the second pupil and her escort were to accompany this couple. The principal explained to the pupil the Board's firm policy regarding the conduct of the junior-senior dance and denied her request. This pupil appealed the principal's decision to the Superintendent of Schools, who subsequently also denied her request. The same request was then made by the pupil and her parents to the Board of Education. The Board after considering the request, denied permission by letter under date of May 15, 1972. Prior to this series of events, the parents had been required to sign a permission form (Exhibit P-1), stating that they were giving permission for their daughter to attend this Board-sponsored activity.

On the evening of the junior-senior dance, the parents of both pupils arrived at approximately 12:00 p.m. and removed them from the premises. The affidavits furnished by petitioners do not deny that this action on their part was for the purpose of aiding the pupils to travel to New York City with their escorts.

At this juncture petitioners request relief in the form of an order of the Commissioner directing the Board to expunge from the school records of both pupils all mention of the aforesaid violations and disciplinary action on the grounds that the violated rule is unreasonable and that the penalty was excessive.

An explanation of the arrangements for the Board-sponsored junior-senior class dance is necessary in order to understand the Board's rule which is under attack in the instant matter. This pupil activity was held at a place of public accommodation located in East Rutherford, which was sufficiently distant to require some form of transportation in order to be reached. The Board's arrangements required that all attending pupils and their guests, if any, were to assemble at the High School, from which point the Board furnished buses to transport them as a group to the site of the dance. All pupils and guests were required to remain at the dance until 2:00 a.m., barring, of course, some emergency. At the conclusion of the dance, all the participants were again transported by Board-furnished buses to the High School, where a breakfast had been prepared for them. Following this, the pupils and their guests were free to depart from the High School. All of the pupils, and presumably their parents, were informed of these arrangements well in advance of the date of the activity.

The permission form (Exhibit P-1) contains a notice to parents regarding the junior-senior class dance which states, *inter alia*, that "\*\*\*\* Meetings will be held and all necessary information and rules and regulations will be stipulated.\*\*\* The signing of the permit below gives permission for your son or daughter to attend this function.\*\*\*\*" Following spaces for the name of the pupil and guest, the next statement on the permission form reads:

"I understand the limits of responsibility of the school authorities at the Junior-Senior Prom to be held May 19, 1972 from 7 p.m. to 2 a.m. at the \*\*\*.

"I hereby understand and give permission for my daughter, \_\_\_\_\_ to attend the Prom.

---

signature of Parent or Guardian"

In sum, petitioners argue that the rule which required that their daughters remain at the school activity until 2:00 a.m. is unreasonable, and that since they removed their daughters from the activity at 12:00 p.m., they are not deserving of punishment. Petitioners contend that they were within their rights to thus revoke permission for their daughters to remain at the dance, that their reasons for this action are no one's concern but their own, and neither the Board nor the school administrators had any right to even inquire as to why they revoked their permission in this manner. In addition, petitioners assert that the Board failed, in this instance, to recognize the limitations of its authority to regulate extracurricular activities, and to understand that parents have the ultimate authority over their children. Petitioners state that, although the Board may set reasonable rules for pupils concerning voluntary extracurricular activities, these rules cannot bind their parents.

Petitioners cite *Hoey v. Lakewood Board of Education*, 1938 S.L.D. 678 and *Pasko v. Dunellen Board of Education*, 1961-62 S.L.D. 188 as examples of cases wherein the Commissioner has reviewed the severity of punishment meted out to pupils for violations of school rules. Also, petitioners allege that their daughters were improperly suspended by virtue of the fact that they were not given any preliminary notice and review prior to the imposition of the suspension. *R.R. v. Board of Education of Shore Regional High School District*, 109 N.J. Super. 337 (Chan. Div. 1970), 263 A. 2d 180.

The Board replies that the rule requiring pupils and guests to be transported to and from the annual dance, and to remain at the premises during the dance, is reasonable and is in the best interests of the pupils. The Board avers that this rule has been respected and observed by pupils and their parents for a period of fourteen years, and consequently has resulted in the annual dance being a highly successful affair. The Board claims that the orderliness and freedom from untoward incidents of these annual dances has resulted in their increased attendance, primarily due to the adherence to the rules by the participants. Pointing to the fact that attendance at the annual dance is not compulsory, the Board asserts that those who did attend, with foreknowledge of the reasonable rules pertaining thereto, had the duty and obligation to abide by those rules. Citing *E.E. v. Board of Education of the Township of Ocean*, decided March 9, 1971, the Board avers that its denial of participation to petitioners' daughters regarding the senior class trip was a reasonable exercise of its discretionary authority, following the three-day suspension, in view of their deliberate violation of a school policy.

The Commissioner takes notice of the fact that a number of local boards of education in past years have elected to organize and hold annual class dances at places of public accommodation rather than in school facilities. The reasons usually given for that arrangement are to provide a more decorative setting away from the accustomed places of pupil activity, and, as in the instant case, to provide a formal dinner as part of the evening's events. Holding a school dance at a place of public accommodation poses several problems, beginning with adequate transportation. The problem of supervision is particularly acute, since the festive spirit of such occasions may generate youthful exuberance resulting in adventuresome antics. School officials can be hard put to pre-plan all arrangements so as to eliminate or at least control most temptations which can lead to untoward incidences of pupil behavior. Notwithstanding the most exhaustive planning, incidents do occur which mar the enjoyment intended by this type of affair. Hence, the Board, in the instant matter, attempted to regulate the annual dance by transporting all participants by bus, and by requiring that all remain for the duration of the dance, which included a seven-course dinner. Upon the return to the High School, the participants received a breakfast prepared by the local Parent-Teachers Association.

In the judgment of the Commissioner, the Board's rule requiring pupils and guests to remain on the premises during this voluntary activity was reasonable, given all the circumstances, and the Commissioner so holds.

It is clear that petitioners' daughters did violate the aforementioned rule, and that their parents aided and abetted this violation. Significantly, neither of the pupils' parents deny that their daughters were removed from the activity for the purposes of traveling to New York City to see entertainment. Instead, petitioners state that the Board and its school administrators simply have no right to question their purpose. The Commissioner does not agree. The Board and its administrators carry a heavy burden of responsibility for pupils for whom they stand *in loco parentis* during a school-sponsored activity. In circumstances as described in this instance, that responsibility for the welfare of all the pupils was difficult to discharge because of the location, nature and scope of the activity.

In previous instances the Commissioner has rendered decisions regarding the rule-making authority of both principals and Superintendents of Schools. In *Thomas J. McCurran et al. v. Board of Education of the City of Trenton, Mercer County*, 1938 S.L.D. 577, the Commissioner cited Art. VIII, section 125, of the 1914 edition of the School Law (now N.J.S.A. 18A:37-4) as statutory authority which clearly holds the teacher or principal responsible for the conduct of the children under his charge. The Commissioner stated that the above statute "\*\*\*\* also implies that he shall have power to make rules and regulations concerning the discipline of his school. \*\*\*\*" The Commissioner cited Art. VIII, section 144 (now N.J.S.A. 18A:37-1,2) which then read in part as follows:

"Pupils in the public schools shall comply with the regulations [now, rules] established in pursuance of law for the government of such schools.  
\*\*\*\*"

N.J.S.A. 18A:37-2 now states in pertinent part that:

“Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him \*\*\* shall be liable to punishment and to suspension or expulsion from school.”

The Commissioner determined in *McCurran, supra*, that the principal had authority under the law to make rules and regulations that tend to the better control and discipline of his school and the pupils therein. This long-standing principle of fifty-nine years is particularly applicable to the instant matter. See, also, *Bertha S. Gebhart v. Hopewell Township Board of Education, Mercer County*, 1938 S.L.D. 570, affirmed 1938 S.L.D. 575, regarding the authority of the principal and Superintendent of Schools to make rules governing the performance of duties by teachers.

The Commissioner has reviewed the facts in this matter, and finds and determines that the rule for the annual junior-senior class dance is reasonable, and that the penalty meted to petitioners' daughters for violating this rule was reasonable and within the discretionary authority of the Board.

Petitioners' argument that the suspensions were improper due to a lack of a preliminary review is without merit in this particular instance. There was no question here of a possible case of mistaken identity, and both pupils were aware of the rule, having previously been denied permission to leave early by the principal, Superintendent and the Board. *R.R. v. Board of Education of Shore Regional High School District, supra*.

In their pleadings, petitioners have requested that any notation of this suspension penalty be expunged from the permanent school records of their daughters. The Commissioner notices that both of these pupils have been graduated from high school at this point in time. In this particular instance, the Commissioner can find no useful or beneficial purpose for the Board to make a notation of this disciplinary infraction on both pupils' permanent records or academic transcripts. This single indiscretion should not forever blemish the otherwise salutary public school records of these two pupils. The Commissioner therefore directs that no notation of the suspension be placed on petitioners' daughters' permanent records and academic transcripts. *In the Matter of "G,"* 1965 S.L.D. 146; *"E.E." v. Board of Education of the Township of Ocean, Monmouth County*, decided March 9, 1971.

Accordingly, for the reasons stated, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 20, 1973



**Harry A. Romeo, Jr.,**

*Petitioner,*

*v.*

**Board of Education of the Township of Madison,  
Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, George G. Gussis, Esq.

For the Respondent, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq.,  
of Counsel)

Petitioner, a school principal employed by the Board of Education of the School District of Madison Township, Middlesex County, hereinafter "Board," alleges that the Board's action in denying him placement on a certain administrative salary scale was unreasonable and improper. The Board answers that its action in making its determination concerning petitioner's placement within the salary guide was proper and in accord with a long-standing policy which has been uniformly interpreted and applied to all staff members.

Petitioner prays for relief in the form of an order by the Commissioner of Education directing the Board to place him on the appropriate salary level and step, and that such judgment be made retroactive to the date of petitioner's original request.

This matter is submitted for Summary Judgment by the Commissioner. Counsel for petitioner filed a Brief, and counsel for the Board declined to submit a Brief. Relevant documents were received and marked in evidence. There is no dispute regarding the essential material facts.

Petitioner's contention is that he has been denied placement on salary level #5, which applies to persons holding a master's degree plus thirty semester-hour graduate credits, for the school years 1969-70, 1970-71, and 1971-72. Petitioner's argument may be summarized as follows:

In June 1962 petitioner was awarded a Master of Arts degree by Newark State Teachers College. (Exhibit P-1) He asserts that he does, in fact, possess thirty graduate credits beyond his master's degree, but he admits that eight of these credits were earned at the same time he was engaged in academic study leading to the acquisition of his Master of Arts degree. He claims that these eight credits did not count toward the acquisition of that degree.

During the three-year period 1969-70 through 1971-72, the salaries of principals, including petitioner, were determined by an administrative salary

policy (Exhibit R-4) which applied a ratio to the teachers' salary guide.

Petitioner asserts that on April 22, 1969, the then-acting and now Superintendent of Schools approved petitioner's request form listing all of petitioner's graduate credits, including the aforementioned eight, which totaled twenty-six graduate credits to be counted toward placement on salary level #5. (Exhibit P-2) According to petitioner, upon his completion of four additional semester hours of graduate study he applied for placement on salary level #5 for 1969-70, but his request was denied on the grounds that the disputed eight graduate credits could not be counted for that purpose because they were not acquired after he was awarded his Master of Arts degree.

Petitioner now argues that he should prevail because (1) the disputed eight graduate credits were earned at a time when the Board had no policy such as that stated as grounds for its denial, (2) the Superintendent of Schools did, in fact, sign petitioner's request form, thereby approving the eight disputed graduate credits, and (3) the Board policy stated above does not appear in writing and has never been articulated to members of the administrative staff.

The Board's position is that all graduate credits to be applied toward salary level #5 must be acquired subsequent to the date a master's degree is conferred. The Board (1) denies that petitioner's disputed eight graduate credits were earned at a time when it had no such policy; (2) denies that the Superintendent unconditionally granted petitioner's request for approval of the eight disputed credits; (3) asserts that the policy stated above has been in effect for the past ten years; and (4) contends that numerous applications similar to petitioner's have been received and have been uniformly denied over a period of years. Finally, the Board states that it informed petitioner, by letter under date of January 15, 1970, that he has twenty-three graduate semester-hour credits beyond his Master of Arts degree, and upon his completion of seven additional graduate credits, the Board will place him on salary level #5.

The sole issue of the matter controverted herein is whether or not the eight disputed graduate, semester-hour credits possessed by petitioner must be counted toward the requirements for petitioner's placement on salary level #5.

The answer to the question contained within the narrow issue may be gleaned from a careful scrutiny of the documentary evidence in the record.

Petitioner was conferred the degree of Bachelor of Science in education by Newark State Teachers College in 1956. His graduate program transcript discloses that he began academic study in the graduate program of the same institution during July 1956. Thereafter, he continued part-time graduate study in the September semesters of 1959 and 1960 and the February semester of 1961. He also earned credits during the July session of 1961. He continued his graduate studies during the September semester of 1961 and the February semester of 1962. This transcript (Exhibit P-1) further discloses that he was conferred the degree of Master of Arts in June 1962. The total semester-hour

credits listed on his transcript at the time petitioner was conferred the Master of Arts degree is thirty-eight. (Exhibit P-1)

The eight disputed credits consist of four graduate courses of two credits each, which are stipulated by the parties, and which are identifiable from petitioner's transcript. (Exhibit P-1) These four courses were acquired by petitioner during the semester specified on the transcript as follows:

DATE	COURSE	CREDIT
July 1956	Reading Dis.	2
February 1961	Field Prog.	2
September 1961	Individual Beh.	2
February 1962	Development Indiv.	2

It is clear, therefore, that the four disputed courses totaling eight semester-hour credits were all earned during the period of time when petitioner was pursuing his graduate study program leading to a master's degree, and these courses were all completed prior to June 1962, when he was conferred his Master of Arts degree.

The next item to be considered is the Board's policy regarding salaries for members of the administrative staff. By affidavit (Exhibit R-5), the Superintendent states that administrative salaries were negotiated between the principals as a group and the Superintendent, prior to the adoption of the first ratio guide (Exhibit R-4) on April 9, 1962. This ratio guide is identified as Board policy #4141.2 (Exhibit R-4) which apparently became effective for the school year beginning July 1, 1962 and ending June 30, 1963. Thus, the 1962-63 school year was the first instance when administrative salaries were determined by a ratio index applied to the teachers' salary guide.

Teachers' salary guides have been received in evidence for the school years 1964-65 (Exhibit R-1), 1965-66 (Exhibit R-2), and the two school years of 1967-68 and 1968-69 (Exhibit R-3). The pertinent parts of these teachers' salary guides are the various salary classifications, rather than the actual salary schedules, because petitioner, in the instant matter, claims he is entitled to a higher classification than the Board has granted him.

The teachers' salary guide for 1964-65 (Exhibit R-1) lists four classifications. The first, classification #1, is for teachers who do not possess a bachelor's degree. Classification #2 includes teachers possessing a bachelor's degree. Classification #3 is the category for teachers who hold a master's degree. Classification #4, which petitioner claims, reads as follows:

*Classification 4:*

"Teachers must possess the degree of Master of Arts or Master of Science plus thirty additional semester hours credit of graduate study, which study must be approved by the Superintendent and the Board of Education at

the beginning of the program of graduate study beyond the Master's Degree." (Exhibit R-1)

The next paragraph following the description of the four classifications, *ante*, states that "\*\*\*\* only official transcripts of accredited colleges will be accepted as evidence of collegiate study. \*\*\*\*"

This 1964-65 salary policy (Exhibit R-1) was originally adopted by the Board on March 8, 1962 for the 1962-63 school year, and was subsequently revised on March 14, 1963 for the 1963-64 school year, and on April 23, 1964 for the 1964-65 school year. Absent any statement by the parties to the contrary, it must be assumed that the above-stated four classifications remained unchanged from the 1962-63 school year through 1964-65.

The teachers' salary guide policy for the 1965-66 school year (Exhibit R-2), adopted by the Board February 23, 1965, describes five classifications. This 1965-66 policy (Exhibit R-2) lists classification #4 for teachers who possess a master's degree, and classification #5 is stated in identical language to classification #4 from the previous, 1964-65 policy, *ante*. Therefore, the last two classifications remained basically unchanged from 1964-65 to 1965-66, but merely received the changed designation of classifications #4 and #5, rather than the previous #3 and #4.

The teachers' salary policy for the school years 1967-68 and 1968-69 (Exhibit R-3) retained the same five classifications listed for 1965-66 (Exhibit R-2), but added the following revision:

"Effective July 1, 1967, classification 3 (BA + 15 credits) and classification 5 (M.A. + 30 credits) of the salary guide for teachers will be changed to include all graduate courses and in-service courses authorized by the Superintendent of Schools and approved by the Board of Education.

"A. All course work taken for salary credit must have prior approval from the Superintendent of Schools.\*\*\*"

"7. Final interpretation of both the guidelines and the staff member's substantiation shall be left to the discretion of the Superintendent of Schools. \*\*\*\*"

In response to a letter request dated October 6, 1972, the Board filed copies of the salary policies which are marked in evidence herein.

Since no additional salary policies have been submitted by the parties, it must be concluded that the policy embracing the school years 1967-68 and 1968-69 (Exhibit R-3) has remained unchanged.

As has been shown, the eight disputed graduate, semester-hour credits were all earned by petitioner during the period of time when he was pursuing his

graduate study program leading to a master's degree, and the four courses which comprise the eight credits were all completed prior to June 1962, when petitioner was conferred his Master of Arts degree.

The administrative salary guide (Exhibit R-4), which became effective for the 1962-63 school year, applied a ratio index for petitioner's position to the appropriate classification in the teachers' salary guide. At some unspecified time during the 1968-69 school year, petitioner applied to the Superintendent for placement in classification #5, *ante*, for the 1969-70 school year. The then-acting Superintendent signed petitioner's course-approved form on April 22, 1969, (Exhibit P-2) which is entitled "Request for Approval of Courses to be Credited Toward Points Beyond the Bachelor's or Master's Degrees." This form listed ten courses, four of which are now in dispute, totaling twenty-six credits. By letter dated January 15, 1970, the Board notified petitioner that he had twenty-three graduate credits beyond his Master of Arts degree at that time.

In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance *Lane v. Holderman*, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.*, 20 N.J. 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 N.J.L. 206, 211 (E. & A. 1944); *Bass v. Allen Home Development Co.*, 8 N.J. 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 N.J. 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (3rd ed. 1943), section 4502

In the instant matter, the salary guide for 1964-65 (Exhibit R-1) discloses the first evidence of the availability of classification #4, *ante*. (changed to classification #5 for 1965-66) As has been hereinbefore stated, the four classifications are assumed to have been created for the 1962-63 school year, and remained unchanged through 1964-65. The description of this classification bears repeating as follows:

*Classification 4:*

"Teachers must possess the degree of Master of Arts or Master of Science plus thirty additional semester hours credit of graduate study, *which study must be approved* by the Superintendent and the Board of Education at the beginning of the program of graduate study beyond the Master's Degree." (*Emphasis ours.*)

It can be seen from the explicit language of the policy, *ante*, that prior approval of the Superintendent is required before the applicant begins the graduate study beyond the master's degree. Moreover, the starting point is plainly the master's degree. The evidence of the graduate study is the official transcript, as the policy states, *ante*. A Superintendent would have to know the date of acquisition of the master's degree, and then grant prior approval for

graduate study beyond that point. Prior approval simply means that the Superintendent must approve the courses of study which the applicant intends to pursue. It is implicit that the Superintendent may inform an applicant that a specific course is inappropriate, perhaps because it merely duplicates some previously studied course, and therefore, refuse to grant prior approval.

No language of this policy, *ante*, makes provision for retroactive approval by the Superintendent of any graduate study beyond the master's degree completed prior to the 1962-63 school year, the first effective year of this policy. (Exhibit R-1) Nor does this policy permit the Superintendent to grant approval for any previously-completed graduate study, since the clear intention is that such approval must be given prior to the applicant's matriculation in the specific subject or course of study.

The previously-stated amendment to the salary policy for 1967-68 and 1968-69 (Exhibit R-2) also bears repeating:

"Effective July 1, 1967, classification 3 (BA + 15 credits) and classification 5 (MA + 30 credits) of the salary guide for teachers will be changed to include all graduate courses and in-service courses authorized by the Superintendent of Schools and approved by the Board of Education.

"A. All course work taken for salary credit *must have prior approval* from the Superintendent of Schools.\*\*\*"

"7. Final interpretation of both the guidelines and the staff member's substantiation shall be left to the discretion of the Superintendent of Schools. \*\*\*" (*Emphasis ours.*)

The above amendment repeats the previously-stated requirement that the Superintendent must grant prior approval of the course work which an applicant intends to pursue in order to qualify for either classification #3 or #5.

Petitioner's reliance on the fact that the Superintendent signed his course approval form (Exhibit P-2) on April 22, 1969, is of no avail, because the Superintendent had no authority whatsoever under this policy to grant any but prior approval.

Petitioner has presented a letter from an associate professor of education of Newark State College, under date of October 16, 1969, wherein it is stated that petitioner has completed the four disputed courses of study beyond his master of arts degree. (Exhibit P-3) The Commissioner does not agree. Such an interpretation is contrary to the clear intent of the Board's salary policy, *ante*.

In a previous decision, *Robert J. Cusack v. Board of Education of the Borough of West Paterson, Passaic County*, 1970 S.L.D. 144, the Commissioner held that the petitioner was entitled to an equivalency classification of a master's degree plus thirty additional semester-hours of graduate study. The matter

herein controverted is distinguishable since here there is an explicit policy whereas in *Cusack, supra*, the classification was controlled by *N.J.S.A.* 18A:29-6, thereby permitting an equivalency.

Accordingly, for the reasons stated, the Commissioner finds and determines that the eight disputed graduate, semester-hour credits possessed by petitioner may not be counted under the Board's policy, *ante*, toward placement on salary level #5.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 20, 1973

**In the Matter of the Election Inquiry of the Deal School District,  
Monmouth County.**

**COMMISSIONER OF EDUCATION**

**Decision**

Petitioner, an incumbent candidate for reelection to a seat on the Deal Board of Education, hereinafter "Board," alleges that the Secretary of the Board, has improperly denied him the right to inspect applications for absentee ballots filed by voters of the school district with the Secretary of the Board in accordance with *N.J.S.A.* 18A:14-26. Petitioner prays for relief in the form of an Order by the Commissioner of Education directing the Board and its Secretary to make available publicly name and address information from all absentee ballots in the form of a posted listing.

An inquiry was conducted on Friday, February 2, 1973 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Testimony and documentary were adduced from petitioner and the Board Secretary concerning this matter. The essential facts are basically not in dispute.

Both petitioner and the Board Secretary testified that several days after January 5, 1973, petitioner telephoned the Board Secretary and requested that she furnish him with a list of names and addresses of voters who filed applications for absentee ballots. The Board Secretary testified that she told petitioner she did not keep a record of the addresses of such applicants, and that she only kept carbon copies of letters of transmittal which accompanied the applications that she had mailed to the County Clerk of Elections. An examination of these numerous carbon copies by the hearing examiner disclosed a series of letters addressed to the County Clerk of Elections, each of which



stated that the enclosed applications for absentee ballots were for the persons listed. Each letter listed names of one or more voters of the district, with no addresses. The dates of these carbon copies disclose daily mailings of the absentee ballot applications by the Board Secretary to the County Clerk of Elections.

The Board Secretary explained that she kept these carbon copies on file because, in numerous instances, voters would telephone her to complain that they had not received absentee ballots, and the Board Secretary could then inform each individual voter of the date she had mailed his application to the County Board of Elections.

The Board Secretary also testified that she telephoned the President of the Board, and he agreed with her, that the applications for absentee ballots are not public records and that she should continue to mail them to the Clerk of the County immediately upon receipt. According to the Board Secretary, the Board President directed her to discuss this matter with the County Clerk of Elections and the County Superintendent of Schools, which she subsequently did.

Petitioner testified that the applications for absentee ballots are public records in his opinion, and he has a right, therefore, to inspect them in the Board Secretary's office so long as he does not interfere with or impede her from sending such applications to the County Clerk "forthwith," as required by *N.J.S.A. 18A:14-26*.

Petitioner's purpose for securing the names and addresses of applicants for absentee ballots, as stated in his letter complaint, is to "\*\*\*\* send to each potential absentee voter written information about my record and qualifications \*\*\*\*" prior to the casting of the absentee ballot by mail.

The Monmouth County Superintendent of Schools sent a communication to the Board Secretary under date of January 15, 1973 (Exhibit R-1), wherein he stated, *inter alia*, that he had discussed this matter with the County Clerk of Elections. He was informed that a list of people receiving absentee ballots is available in the office of the County Clerk of Elections as soon as the ballots have been mailed. The County Superintendent pointed out in this letter that, until an absentee ballot is mailed to an applicant, "\*\*\*\* there is no assurance that the applicant is eligible to vote.\*\*\*\*"

By letter dated January 18, 1973 (Exhibit P-1), the Board Secretary informed petitioner that she was enclosing a letter opinion from the Board's attorney, dated January 16, 1973, (Exhibit P-2) regarding petitioner's request to examine applications for absentee ballots. In addition, the Board Secretary suggested that petitioner contact the Board's attorney directly if he desired to discuss] his request or raise further questions. Copies of both the Secretary's letter (Exhibit P-1) and the Board attorney's letter opinion (Exhibit P-2) were also sent to the County Superintendent of Schools, the County Clerk of Elections, the other three candidates for election, and other members of the Board.



Two of the remaining three candidates for election filed letters addressed to the hearing examiner, both dated January 31, 1973, (Exhibit R-2, R-3) each stating that he could secure from the County Clerk of Elections the names and addresses of voters receiving absentee ballots, and that he had made no such request to the Board Secretary.

Petitioner testified that, since the date when the Board Secretary denied his request, he has been visiting the office of the County Clerk of Elections on a daily basis. Each day, he stated, the County Clerk of Elections reads him the names and addresses of voters residing within the district who are actually being mailed absentee ballots. In this manner petitioner is compiling the information he previously sought from the Board Secretary.

A third witness, who is a voter within the school district and a member of the local Parent-Teacher Association, testified that prior to a school building referendum held in June 1972, she examined applications for absentee ballots in the office of the Board Secretary for the purpose of securing names and addresses of absentee voters to whom literature favoring the passage of a school building bond issue was mailed.

The concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The narrow and dispositive issue in this case is whether a candidate for a school board election, whether or not an incumbent, may examine applications for absentee ballots submitted by voters within the district to the Secretary of the Board in accordance with *N.J.S.A.* 18A:14-26. The purpose for any such examination is not relevant to the above-stated issue.

The functions statutorily required of a Board Secretary, particularly in regard to absentee ballots for school elections, are limited. The Board Secretary is required to publish notice of any school election (*N.J.S.A.* 18A:14-25) and to “\*\*\* cause to be printed a sufficient number of military service and civilian absentee ballots \*\*\*” and transmit such ballots to the County Clerk pursuant to *N.J.S.A.* 19:57-8. (*N.J.S.A.* 18A:14-27) Also, *N.J.S.A.* 18A:14-26 is applicable, and reads as follows:

“The secretary shall receive all applications for military service or civilian absentee ballots and shall forward the same to the county clerk of the county forthwith.”

The record before the Commissioner in the instant matter discloses that the Board Secretary has complied with the requirement of *N.J.S.A.* 18A:14-26, by forthwith mailing all applications for absentee ballots to the County Clerk. The carbon copies of the letters transmitting the applications indicate daily

mailing by the Board Secretary. The Secretary's retention of these carbon copies, for the purpose of answering inquiries by voters concerning the date of mailing of individual applications, is a proper and sound procedure, since it evidences compliance with *N.J.S.A. 18A:14-26*.

The Commissioner can find no statutory requirement in either *N.J.S.A. 18A:14-25 et seq.* or *N.J.S.A. 19:57-1 et seq.* that a secretary of a local board of education must prepare a list of names and addresses of applicants for absentee ballots.

The functions of processing the applications and issuing the absentee ballots are set forth in *N.J.S.A. 19:57-1 et seq.* The Absentee Voting Law *N.J.S.A. 19:57-9* and *10* provide that applications for military and civilian absentee ballots, respectively, must be received and either approved or disapproved by the County Clerk. The County Clerk forwards or delivers the actual absentee ballots, both military and civilian, to the voters. *N.J.S.A. 19:57-11* Each county clerk is required, *inter alia*, by *N.J.S.A. 19:57-12* to “\*\*\* keep a list of such requests received by him showing the disposition of each request, *which list shall be made available to the public* and all election officials charged with the duty of administering this act.” (*Emphasis ours.*)

The Commissioner does not construe the above statutes contained in *N.J.S.A. 19:57-1 et seq.*, the Absentee Voting Law, but has reviewed them merely to distinguish the role of a local board of education secretary in regard to applications for absentee ballots.

This distinction is important to the question of whether the applications for absentee ballots received by the Deal Board Secretary in accordance with *N.J.S.A. 18A:14-26*, are public records under *N.J.S.A. 47: 1 A-1 et seq.*

*N.J.S.A. 47: 1 A-2* reads in part as follows:

“Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, *all records which are required by law to be made, maintained or kept on file* by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the ‘custodian’ thereof) shall, for the purposes of this act, be deemed to be public records. \*\*\*” (*Emphasis supplied.*)

In the judgment of the Commissioner, the application for an absentee ballot, during the brief period of time that it is in the possession of the Board Secretary, before being transmitted forthwith to the County Clerk in accordance with *N.J.S.A. 18A:14-26*, is not a public record as defined by *N.J.S.A. 47: 1 A-2*.

Accordingly, petitioner's request to examine such applications for absentee ballots, while in the possession of the Board Secretary, is hereby denied.

Petitioner is not foreclosed by this decision from securing the names and addresses of absentee voters, since his own testimony discloses that he has been obtaining this information from the County Clerk on a daily basis.

COMMISSIONER OF EDUCATION

February 23, 1973

**In the Matter of the Annual School Election  
Held in the School District of Lakeland Regional,  
Passaic County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for two seats on the Lakeland Regional High School Board of Education, Passaic County, from the constituent district of the Borough of Wanaque, for full terms of three years, at the annual school election on February 6, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Theodore (Ted) Luciani	329	1	330
August Shutte	446	14	460
Alfred "Bunny" Villa	446	14	460
William J. Anderson, Jr.	460	5	465

However, on the basis of an allegation from the Regional Board that the electorate of Wanaque had been instructed by ballot strips contained in the Borough of Wanaque voting machines to vote for three rather than two representatives, the Commissioner appointed and directed a hearing examiner to conduct a hearing or inquiry in the matter. The hearing was conducted on February 13, 1973 at the office of the Passaic County Superintendent of Schools, Paterson. His report is as follows:

At the hearing, *ante*, certain documentation was introduced into evidence which proves conclusively, in the judgment of the hearing examiner, that:

- (a) the voters of the Borough of Wanaque were incorrectly directed by ballot strips contained in the voting machines to vote for three candidates to serve as members from Wanaque on the Lakeland Regional Board of Education for full three-year terms, whereas the direction should have been to vote for two;

(b) the error was an inadvertent printing error confined to the ballot strip alone;

(c) the error was not occasioned by any action of the Lakeland Regional Board of Education or its administrative officials.

These findings are founded on an examination of the following: a ballot strip (PR-4) which was submitted in evidence as part of the record; a copy of the absentee ballot (PR-2); a letter from the acting Board Secretary, Lakeland Regional School District, to the school district's printer dated January 19, 1973 (PR-1). This letter specifically directs that ballot strips for the Borough of Wanaque were to contain the direction,

"Full Term (three years) Vote for Two."

The error, herein, is thus appealed by the Lakeland Regional Board of Education which requests that a special election be called to rectify the error. This appeal is joined by Candidates Shutte and Villa.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and finds that the election for candidates from the Borough of Wanaque to serve as members of the Lakeland Regional Board of Education must be vitiated. This finding is grounded on the nature of the irregularity; those voters who indicated a choice of three candidates for seats on the Lakeland Regional Board of Education were given incorrect directions and their choice of the two preferred candidates from the three for whom they voted, cannot be ascertained.

In this regard the Commissioner observes that there was an error of the kind found herein *In the Matter of the Application of Ralston Weeks for a Recount of the Ballots Cast at the Annual School Election in the Township of Shamong, Burlington County*, 1938 S.L.D. 182 wherein the Petition stated:

"\*\*\* that there were two vacancies for the three-year term to be filled on the Board of Education of Shamong Township. Through an error in the printing of the ballots, the directions to the voters were 'Vote for Three' whereas they should have been 'Vote for Two.'\*\*\*"

On that occasion, however, paper ballots were employed and some voters voted for two candidates while others voted, as directed, for three. In fact, twenty-four voters voted on that occasion for three candidates and the Commissioner said in respect to these twenty-four ballots;

"\*\*\*It is impossible to determine which candidates would have received the votes if the voter had been properly instructed to vote for two only. These ballots were, therefore, rejected so far as they affected the votes for the three-year term. Since no candidates had a plurality in excess of the

number of ballots disqualified through the error in printing, the election is hereby declared void. The County Superintendent of Schools is directed to appoint members to serve until the next election in the district in accordance with Chapter 1, P.L. 1903, S.S., Section 25, subsection IV \*\*\*.” (at p. 183)

This statute of reference dealt with instances in which there was a failure “to elect” and is similar to the present statute *N.J.S.A. 18A:12-15* which provides, *inter alia*, that in instances wherein there is a “\*\*\* failure to elect a member \*\*\*” of a board of education, appointments to fill such vacancies as are present shall be made by the county superintendent of schools.

There has not been in the past, and there is not now, any provision in law for a second “annual election” in any given year; instead the Legislature has provided alternative interim measures in instances such as that in the matter, *sub judice*, where the “annual election” must be held to be invalid. These measures provide for a temporary appointment as noted, *ante*, and a subsequent vote at the next succeeding annual election. (See also *In the Matter of the Annual School Election Held in the Township of Fredon, Sussex County*, 1970 S.L.D. 131; *In the Matter of the Contested Annual School Election in the City of Rahway, Union County*, 1959-60 S.L.D. 138; *In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County*, 1965 S.L.D. 62.)

Accordingly, having found that that part of the annual election conducted by the Lakeland Regional School District in the Borough of Wanaque, Passaic County, must be vitiated, the Commissioner directs that the County Superintendent of Schools for Passaic County appoint two members to the Board of Education of the Lakeland Regional School District, from the citizens of the Borough of Wanaque having the qualifications for such office, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

February 23, 1973

**In the Matter of the School Election of the  
Hopatcong School District,  
Sussex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

Petitioners herein are two residents of the Borough of Hopatcong, Sussex County, who have challenged the validity of a Petition submitted on behalf of Eugene Bacquet, a successful candidate for election to a three-year term as a member of the Board of Education of the Borough of Hopatcong, hereinafter "Board," in the annual school election held February 13, 1973. Petitioners allege that two signatures, of ten that the Petition originally contained, were rendered a nullity by the fact that the signers were not registered voters in the district, as required by statute, and that this fact constitutes a fatal defect in the Petition which could not be remedied at a later date by the addition of other signatures. This prayer is, in effect, that the election of Candidate Bacquet be set aside.

An inquiry concerned with the contentions, *ante*, was conducted on February 5, 1973 at the office of the Sussex County Superintendent of Schools, Newton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Secretary of the Board of Education, hereinafter "Board Secretary," received on December 29, 1972, the prescribed form "Nominating Petition for Annual School Election," hereinafter "Nominating Petition," which endorsed the candidacy of Eugene Bacquet for a three-year term on the Board of Education. The form (P-1) contains the signatures of ten endorsers, as required by statute (*N.J.S.A. 18A:14-9 et seq.*), and the signature of Amy Bacquet is affixed and notarized as the "Signature of Petitioner."

However, at a date subsequent to the official filing of the Nominating Petition, the Board Secretary was told orally that two of the ten persons, who had endorsed the document, were not registered voters in the Borough of Hopatcong. Accordingly, the Board Secretary called the County Board of Elections to ascertain the truth or falsity of the allegation and found that the allegation was apparently true. At that juncture, the Board Secretary evidently consulted with the Board's solicitor and the County Superintendent of Schools. The Board Secretary determined that she should notify Candidate Bacquet of her findings and afford him a chance to substitute the names of two properly-registered voters for the names of the voters, who had not, to that date, completed registration with the County Election Board.

Thereafter, on January 26, 1973, the Board Secretary crossed out the names of endorsers William Sutphen and Priscilla Sutphen and allowed endorsers Ruth Matthew and Marian O'Hara to affix their signatures, as substitute endorsers in the margin of the Nominating Petition. (P-1)

On January 29, 1973, the instant Petition of Appeal, in the form of a letter, was addressed to the Commissioner of Education by Andrew Parlman and Robert Botti, petitioners, calling attention in written form to the alleged irregularity and requesting the Commissioner to take "immediate action." The letter was accompanied by a copy of a letter written to Andrew Parlman (P-2) by the Secretary of the Sussex County Board of Elections which states:

"Please be advised that, after checking our records, we do not find Priscilla Sutphen and William H. Sutphen to be registered voters in Sussex County.\*\*\*"

Thereafter on February 5, 1973, the hearing, *ante*, was held, and on February 13, 1973 at the conclusion of the balloting of the annual school election, the following tally was announced for candidates running for three-year terms on the Board of Education:

	At Polls	Absentee	Total
Eugene Bacquet	308	3	311
Joseph Garsinsky	369	3	372
Robert Gincel	253	2	255
Thaddeus Wilhelm	361	10	371

Thus, at this juncture, it is clear that if Candidate Bacquet's Nominating Petition is adjudged to be a proper and legally-formulated one, he has been elected to a seat on the Board of Education. If it is not so adjudged, it is equally clear that his name appeared on the ballot illegally, and all check marks that appeared in the appropriate box to the left of his name may not be added to a tally for Candidate Bacquet.

It is of pertinence, in a consideration of the issues raised in the controversy herein, to consider three statutes contained in *N.J.S.A.* 18A; namely, 18A:14-9, 18A:14-10 and 18A:14-12, as amended by Chapter 147, Laws of 1969. The first of these statutes states that all such nominating petitions must be "\*\*\*\* signed by at least 10 persons \*\*\*\*"; the second provides that all such signers shall be "\*\*\*\* qualified voters of the school district \*\*\*\*"; and the third statute, as recently amended, provides for a remedy for defective petitions "\*\*\*\* but not to add signatures. \*\*\*\*" These three statutes must be read in *pari materia* and are quoted in their entirety below:

"Each candidate to be voted upon at a school election shall be nominated directly by petition, signed by at least 10 persons, none of whom shall be the candidate himself, and filed with the secretary of the board of education of the district on or before four P.M. of the fortieth day preceding the date of the election, except that nominating petitions for special elections to be held pursuant to section 18A:8-10 shall be so filed on or before four P.M. of the fifteenth day before said special election. The signatures need not all appear upon a single petition and any number of petitions may be filed on behalf of any candidate but no petition shall contain the endorsement of more than one candidate."

“Each nominating petition shall be addressed to the secretary of the board of education of the district and therein shall be set forth:

“a. A statement that the signers of the petition are *all qualified voters of the school district*;

“b. The name, residence and post office address of the person endorsed and the office for which he is endorsed;

“c. That the signers of the petition endorse the candidate named in the petition for said office and request that his name be printed upon the official ballot to be used at the ensuing election; and

“d. That the person so endorsed is legally qualified to be elected to the office.

“Accompanying the nominating petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:

“a. He is qualified to be elected to the office for which he is nominated;

“b. He consents to stand as a candidate for election; and

“c. If elected, he agrees to accept and qualify into said office.”  
(*Emphasis supplied.*)

“When a nominating petition is found to be defective *excepting as to the number of signatures*, the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate endorsing the petition may amend the same in form or substance, *but not to add signatures*, so as to remedy the defect at any time prior to said date.” (*Emphasis supplied in text.*)

Thus, the issue herein may be succinctly stated in two parts:

(a) Was the Nominating Petition for Candidate Bacquet a legally viable petition on the date it was given to the Board Secretary?

(b) If the Nominating Petition for Candidate Bacquet was not viable at the time it was offered, was it rendered legally proper by the later addition of two signatures?

In this latter regard, counsel for the Board advances the view that the action of the Board Secretary in permitting two properly-registered voters to affix their names to Candidate Bacquet’s petition on January 26, 1973, was not an act that resulted in an “addition” of names but an act of “substitution.” Thus, counsel argues that the action was not rendered a nullity by the clearly-stated terms of the statute, *N.J.S.A. 18A:14-12*.



Finally, the hearing examiner states that he personally visited the office of the Sussex County Board of Elections to verify a central alleged fact in this case; namely, that two of the signers of the Nominating Petition for Candidate Bacquet were not registered voters at the time the petition was signed by them or at the time the petition was submitted to the Board Secretary on December 29, 1972. The hearing examiner finds, as a result of this visit, that this fact, *ante*, is verified. Accordingly, the hearing examiner observes that the Nominating Petition for Candidate Bacquet, which was filed “\*\*\* on or before four P.M. of the fortieth day preceding the date of the election \*\*\*” (N.J.S.A. 18A:14-9) contained, at that time and at all times up to the filing deadline which the statute provides, a total of only eight signatures of “\*\*\* qualified voters of the school district \*\*\*.” (N.J.S.A. 18A:14-10)

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, and he notes that a decision in this matter involves a balancing between two principles enunciated by the Commissioners in prior years. The first principle of extreme importance herein is that school elections must be given effect whenever possible, despite irregularities, if the will of the people, freely expressed, may be clearly seen. The second principle is that school elections, like all elections, must be conducted in strict compliance with the law as embodied in the statutes.

A previous decision, *In the Matter of the Special Election Held in the School District of Beverly City, Burlington County*, 1964 S.L.D. 85, contained one enunciation of the facets involved in the first principle to be considered herein. In that matter the Commissioner was also concerned with an “irregularity” in election procedure — specifically, that a legal notice of an election was not provided and the Commissioner looked to pronouncements of the courts for guidance as follows:

“\*\*\* 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, and thus deduce the legislative intent reasonably to be implied.

“\*\*\* ‘The right of suffrage is too sacred to be defeated by an act for which the voter is in no way responsible, unless by the direct mandate of a valid statute no other construction can be given.’ *Bliss v. Woolley*, 68 N.J.L. 51, on p. 54 (Sup. Ct. 1902); *Lane v. Otis*, 68 N.J.L. 656, on p. 660 (E. & A. 1903); *Attorney-General v. Belleville*, 81 N.J.L. 200, on p. 206 (Sup. Ct. 1911).’ *Sharrock v. Keansburg*, 15 N.J. Super. 11, 17 and 18 (App. Div. 1951).

“ ‘It is the duty of the court to uphold an election unless it clearly appears that it was illegal.’ *Sharrock v. Keansburg*, 15 N.J. Super. 11, 17 and 18 (App. Div. 1951).

“ ‘It is the duty of the court to uphold an election unless it clearly appears that it was illegal. *Love v. Freeholders, &c.*, 35 N.J.L. 269, 277; public policy so ordains.’ *In re Clee*, 119 N.J.L. 310,330 (*Sup. Ct.* 1938).

“ ‘\*\*\* Laws directing the way and manner in which elections shall be conducted are generally construed by the courts as directory, unless a non-compliance with their terms is expressly declared to be fatal. 20 C.J. § 223, page 181; 29 C.J.S., *Elections*, § 214. Elections should never be held void unless they are clearly illegal.

“ ‘\*\*\* Certainly irregularities on the part of election officers or others which do not appear to affect, alter or void the voting, the counting, or the returns, will not form a ground of contest. *Lehlbach v. Haynes*, 54 N.J.L. 77, 23 A. 422 (*Sup. Ct.* 1891). *In Re Wene*, 26 N.J. Super. 363, 376, 377 (*Law Div.* 1953).

“ ‘Acts and omissions to act may render the local election officers liable to indictment, and yet, absent malconduct, fraud, or corruption, the election result is unimpeachable. *In re Clee*, 119 N.J.L. 310, 321 (*Sup. Ct.* 1938). Where, as here, there is an unwitting omission of a formal requirement otherwise supplied in substance, the ballots are invulnerable; the overturning of the result in such circumstances would frustrate the will of the voters for errors and omissions of form not related to the merits; and this would do violence to the legislative will. In this regard, acts and omissions by the district board mandatory before election may for reasons of policy be deemed directory after the election, if it indubitably appears that the election result was not thereby prejudiced. The question is essentially one of fairness in the election. An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of the popular will in all human likelihood has been thwarted.’ *Wene v. Meyner*, 13 N.J. 185, 196 (1953).” (at pp. 86-87)

Thereafter, the Commissioner found that the election in *Beverly City* should not be vitiated even though the strict and literal terms of the statutes concerned with legal notice prior to an election had not been met.

Subsequently, however, another petition in the same matter was initiated before Judge Wick, Superior Court, Law Division, and the Court found in a decision on a Motion for Summary Judgment, that

“\*\*\* the notice required by N.J.S.A. 18:6-63 is a basic jurisdictional requisite which must be complied with before a valid election can be held thereunder \*\*\*.” *Harold J. Fucille v. Board of Education of the Borough of Lakehurst, Ocean County* 1967 S.L.D. 97, 100)

Whereupon, the Commissioner, in effect reversed his decision in *Beverly City*, *supra*, to accept less than strict compliance with the laws concerned with legal notice prior to an election and said, also at page 100 of the decision in *Harold J. Fucille*, *supra*:

“In the light of this judgment of a New Jersey Court, it appears that *strict compliance* with the requirements of notice is essential to the validity of a special school election in this State. Under such circumstances, the Commissioner is constrained to reevaluate his finding in the *Beverly City* case, *supra*. The Commissioner now holds, therefore, that failure to provide the notices of a special school election as required by statute is a *fatal defect* which cannot be cured by other means. \*\*\*” (*Emphasis ours.*)

Thus, the second principle referred to, *ante*, was enunciated — that statutes which are clear and specific must receive “strict compliance.” Having balanced the two principles, *ante*, over a period of three years, with their relationship to a specific statute concerned with legal notice prior to an election, the Commissioner had finally decided that at least with respect to those pertinent statutes a strict and literal statutory interpretation was required.

The same principles must be considered in the matter, *sub judice*, and must be applied to arrive at a balanced view of the Nominating Petition of Candidate Bacquet in the contest of the election which followed.

On the one hand there is the Nominating Petition. (P-1) The basic fact concerned with this document is that at the time it was presented it contained the signatures of only eight voters qualified to vote in the Hopatcong district, and it must be viewed in the context of the statute, *N.J.S.A. 18A:14-12*, as amended. This statute clearly provides in a direct and explicit way, without a semblance of ambiguity, that defective petitions may be amended “\*\*\* in form or substance, but not to add signatures \*\*\*.”

On the other hand, there is the clearly-expressed will of the people to elect Candidate Bacquet at the election of February 13, 1973 to a three-year term on the Hopatcong Board of Education.

Having weighed these facets of the matter, the Commissioner is constrained to observe that, at any time prior to the 1969 amendment of *N.J.S.A. 18A:14-12*, Candidate Bacquet’s Nominating Petition could have been altered in “\*\*\* form or substance \*\*\*” at any time prior to the time the ballots for the election were printed. This observation is founded on a review of the statute, which was controlling prior to that year. It provided and reads as follows:

“When a nominating petition is found to be defective, the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate endorsing the petition may amend the same in form or substance so as to remedy the defect at any time prior to said date.”

(See *Clark Taylor and Charles Remschell v. Board of Education of the Borough of Ringwood, Passaic County*, 1964 *S.L.D.* 122.) However, the 1969 amendment of the statute *N.J.S.A. 18A:14-12* can only be regarded as a restrictive one since the only basic change which it contains is pertinent to the exact source of

controversy herein; namely, the signatures which the Nominating Petition of Candidate Bacquet contained when it was submitted. As the amended statute states, defective petitions may still be amended “\*\*\* *excepting as to the number of signatures* \*\*\*.”

Accordingly, cognizant of this clearly-stated restriction and in the context of the Court’s decision in *Beverly City, supra*, the Commissioner is forced to conclude that the Nominating Petition for Candidate Bacquet lacked the requisite number of legally-proper signatures when it was filed with the Board Secretary on December 29, 1972, and that such a defect could not be cured by a later addition of proper signatures. It follows that Candidate Bacquet’s name should not have been placed on the ballot and that votes which were cast for him in the box opposite his printed name could not have been properly tallied in his favor. His apparent election to the Hopatcong Board of Education is, therefore, rendered a nullity. The Commissioner so holds.

While holding that Candidate Bacquet was not properly elected to a seat on the Board of Education, the Commissioner also holds that Candidate Gincel is not entitled to be adjudged the third successful candidate by virtue of Candidate Bacquet’s disqualification. Instead the Commissioner finds a failure to elect a candidate for this third seat and directs the Sussex County Superintendent of Schools to proceed to appoint a member to the Hopatcong Board of Education pursuant to the prescription of the statute, *N.J.S.A. 18A:12-15*, to serve until the next annual election.

COMMISSIONER OF EDUCATION

February 23, 1973

**In the Matter of the Annual School Election Held  
in the Constituent School District of North Caldwell,  
West Essex Regional School District, Essex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

At the annual school election held in the School District of West Essex Regional, Essex County, on February 6, 1973, one member from the constituent district of North Caldwell was to be elected to the Regional Board of Education for a three-year term. The announced results of the tally of votes cast in North Caldwell were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
C. Burton Whitehouse	167	- 0 -	167
John R. Stafford	170	- 0 -	170

Pursuant to a letter request received from Candidate C. Burton Whitehouse, dated February 8, 1973, the Commissioner of Education ordered a recount of the votes cast in the constituent district of North Caldwell. The recount was conducted on February 21, 1973 by an authorized representative of the Commissioner at the voting machine warehouse, Essex County Board of Elections, Newark. At the conclusion of the recount the tally of votes as set forth above was confirmed.

The Commissioner finds and determines that John R. Stafford, from the constituent district of North Caldwell, was elected to a full three-year term on the West Essex Regional Board of Education at the school election held on February 6, 1973.

COMMISSIONER OF EDUCATION

February 23, 1973

**In the Matter of the Annual School Election  
Held in the Constituent District of Oradell,  
River Dell Regional School District,  
Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

At the annual school election held in the River Dell Regional School District, Bergen County, February 6, 1973, one member from the constituent district of the Borough of Oradell was elected to the Regional Board of Education for a three-year term. The announced results of the tally of votes in Oradell were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Maynard E. Steiner	222	- 0 -	222
William R. Fuller	267	7	274
Seth Perlmutter	42	4	46
Joseph J. Murphy	273	2	275

Pursuant to a letter request from William R. Fuller, dated February 9, 1973, the Commissioner of Education ordered an authorized representative to conduct a recount of the votes cast at Oradell. The recount was conducted on February 21, 1973 at the voting machine warehouse of the Bergen County Board of Elections. At the conclusion of the recount, the tally stood as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Maynard E. Steiner	222	- 0 -	222
William R. Fuller	267	7	274
Seth Perlmutter	42	4	46
Joseph J. Murphy	279	2	281

The Commissioner finds and determines that Joseph J. Murphy was elected at the annual school election on February 6, 1973 to a seat on the River Dell Regional Board of Education from the constituent district of the Borough of Oradell for a term of three years.

**COMMISSIONER OF EDUCATION**

February 23, 1973

**In the Matter of the Annual School Election  
Held in the School District of Cherry Hill,  
Camden County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election on February 13, 1973, held in the School District of Cherry Hill, Camden County, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Eugene Kasmin	1,103	8	1,111
Maxwell Jarvis	1,176	5	1,181
Eric Rand Reed	711	8	719
Donald H. Widmayer	1,979	11	1,990
Bob Schlesinger	1,287	11	1,298
Roland Piccone	1,181	5	1,186
Leonard Wollack	862	8	870
William J. Discher	1,277	2	1,279
Albert Rabassa	1,276	5	1,281
Sheldon Lambert	- 0 -	2	2

Pursuant to a letter request from Candidate Discher dated February 16, 1973, an authorized representative of the Commissioner of Education conducted a recheck of the voting machines on February 23, 1973 at the warehouse of the Camden County Board of Elections in Camden. The recheck was made only because of the closeness of the vote for Candidates Discher, Schlesinger and Rabassa. The recheck confirmed the previously-announced results above.

The Commissioner finds and determines that Donald Widmayer, Bob Schlesinger and Albert Rabassa were elected on February 13, 1973 to seats on the Cherry Hill Board of Education for full terms of three years each.

**COMMISSIONER OF EDUCATION**

February 27, 1973

**In the Matter of the Annual School Election  
Held in the Constituent District of Waterford Township,  
Lower Camden Regional School District, Camden County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for one member of the Board of Education for a full term of three years at the annual school election held in the constituent district of Waterford Township, Lower Camden Regional School District, Camden County, on February 6, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Edward Hickman	102	4	106
Anthony Previtera	103	- 0 -	103

Pursuant to a letter request dated February 12, 1973 from Candidate Previtera, a recount of the votes cast was conducted by an authorized representative of the Commissioner of Education at the office of the Camden County Superintendent of Schools in Pennsauken on February 22, 1973.

At the conclusion of the recount with all but three ballots counted, the tally stood:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Edward Hickman	104	5	109
Anthony Privetera	103	- 0 -	103

Two of the three ballots, *ante*, not counted had stickers bearing the name of Candidate Previtera affixed thereon, and one ballot had a sticker bearing the name of Candidate Hickman.

Since the inclusion or exclusion of the contested ballots would not change the outcome of the election, it is unnecessary to determine their validity.

The Commissioner finds and determines that Edward Hickman was elected to a full three-year term on the Board of Education of the constituent district of Waterford Township, Lower Camden Regional School District, Camden County, at the annual school election on February 6, 1973.

COMMISSIONER OF EDUCATION

February 27, 1973



**In the Matter of the Annual School Election  
Held in the School District of the Borough of  
Milltown, Middlesex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held on February 13, 1973 in the School District of the Borough of Milltown, Middlesex County, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Roger Brown	438	- 0 -	438
Donald Fraser	716	7	723
James Dunlap	451	7	458
Harold Paton	386	3	389
Richard Scivetti	461	3	464
Eugene Stark	382	3	385
Donald Appleby	767	5	772
Robert Feickert, Sr.	1	- 0 -	1

Pursuant to a letter request received by the Commissioner of Education on February 20, 1973 from Candidate Dunlap and at the direction of the Commissioner of Education, a recount of the ballots cast for Candidates James Dunlap and Richard Scivetti, whose names appeared on the ballot, was conducted by an authorized representative of the Commissioner of Education on February 27, 1973, in the office of the Middlesex County Superintendent of Schools. At the conclusion of the recount of the uncontested ballots, with three ballots referred for determination pursuant to a challenge by Candidate Dunlap, the tally was as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
James Dunlap	444	7	451
Richard Scivetti	453	3	456

There being no necessity to determine the three referred ballots, since in any case they could not alter the result, they were left undetermined.

The Commissioner finds and determines that Donald Fraser, Richard Scivetti, and Donald Appleby were elected on February 13, 1973 to seats on the Milltown Borough Board of Education for full terms of three years each.

**COMMISSIONER OF EDUCATION**

March 5, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Township of  
Green Brook, Somerset County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting at the annual school election held February 13, 1973 in the School District of the Township of Green Brook, Somerset County, for three members of the Board of Education for full terms of three years each were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Warren B. Griffin	377	3	380
Charlotte D. Mues	372	5	377
Fred J. Coles	373	5	378
Stanley J. Wainwright	347	3	350
Bruce L. DiGirolamo	396	5	401
Jerome Kadesh	283	3	286
A. Fiordaliso	1	- 0 -	1

Pursuant to a letter request on behalf of Candidate Mues, dated February 16, 1973, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the voting machine warehouse of the Somerset County Board of Elections on February 27, 1973.

The Commissioner's representative reports that the recheck confirms the announced totals as set forth above.

\* \* \* \*

The Commissioner finds and determines that Warren B. Griffin, Fred J. Coles, and Bruce L. DiGirolamo were elected to full terms of three years each on the Green Brook Township Board of Education at the annual school election held on February 13, 1973.

COMMISSIONER OF EDUCATION

March 6, 1973

**In the Matter of the Annual School Election  
Held in the Constituent District of Northfield,  
Mainland Regional High School District,  
Atlantic County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for two candidates for one full term of three years, from the constituent district of Northfield, on the Board of Education of the Mainland Regional High School District, Atlantic County, at the annual school election held on February 6, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Earl S. Lansing, Jr.	345	2	347
Joseph J. Dimaio	336	9	345

Pursuant to a letter request dated February 12, 1973 from Candidate Dimaio, an authorized representative of the Commissioner of Education conducted a recount of the votes cast for each candidate, which was held at the voting machine warehouse of the Atlantic County Board of Elections, Northfield, on February 22, 1973.

The hearing examiner reports that a recheck of the voting machines confirmed the results previously announced.

The Commissioner finds and determines that Earl S. Lansing, Jr., from the constituent district of Northfield was elected on February 6, 1973 to a seat on the Mainland Regional High School Board of Education for a term of three full years.

COMMISSIONER OF EDUCATION

March 6, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Township of Clark,  
Union County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting at the annual school election held on February 13, 1973 in the School District of the Township of Clark, Union County, for one member of the Board of Education for a term of two years were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Philip A. Miller	435	- 0 -	435
Madeline Britman	425	1	426

Pursuant to a letter request from Candidate Britman dated February 15, 1973, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the voting machine warehouse of the Union County Board of Elections on February 27, 1973.

The Commissioner's representative reports that the recheck confirms the announced results of the election as set forth above.

\* \* \* \*

The Commissioner finds and determines that Philip A. Miller was elected to a two-year seat on the Board of Education of the Township of Clark at the annual school election held on February 13, 1973.

COMMISSIONER OF EDUCATION

March 6, 1973

**In the Matter of the Appeals of the Boards of Education of the  
Black Horse Pike Regional School District and the Sterling Regional  
School District, Camden County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner Black Horse Pike Board, Hyland, Davis & Reberkenny  
(Richard Schramm, Esq., of Counsel)

For the Petitioner Sterling High Board, William D. Hogan, Esq.

Petitioners, the Boards of Education of the Black Horse Pike Regional School District and the Sterling High School District, hereinafter "Boards of Education," jointly allege that administrative officials of the State Department of Education have acted improperly in a denial of approval for their summer school programs. They request the Commissioner to reverse such denials and to render a judgment which will insure approval of summer programs in the future. Officials of the State Department of Education deny any impropriety in the matter controverted herein and found their actions on the prescription of the statutes, the State Constitution, and rules of the State Board of Education. A hearing in this matter was conducted on December 1, 1972 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. A Brief was jointly filed by the Boards of Education. The report of the hearing examiner is as follows:

Prior to the summer of 1971, the Black Horse Pike Board of Education had conducted annual summer school programs for approximately six years and all such programs had received the approval of the State Department of Education, hereinafter "State Department." Again, in 1971, such approval was given by the State Department, but was later rescinded by action of a State Department official. The present controversy is set in the context of this action and the written exchanges, which were pertinent to it, have established the respective views of the parties. Therefore, certain of these written exchanges are fully set forth below.

It is stipulated herein that for a period of approximately six years prior to 1971, and in 1971, the Black Horse Pike Board of Education had levied a fee, which it labeled a "registration fee," to be charged to all students as a prerequisite to summer school admission. In some years this fee was \$2.00, but in later years the amount was increased to \$5.00.

In any event the Black Horse Pike Board of Education contends that it had made no attempt to keep the "fee" a secret prior to 1971 and that, in fact, the approval for summer school programs in those years was given by the State Department despite the fact that there was knowledge the "fee" would be charged. This contention was not denied by any administrative official at the hearing, *ante*, but it cannot be held to be true in fact without the testimony of officials who have since left the employ of the State or who were not present at

the hearing. In any event, it would appear that no conclusion in this regard is required at this juncture; an improper approval of the past could hardly justify the continuance of impropriety.

In February 1971, the Black Horse Pike Board of Education filed the usual "Application for Approval of Summer High School" (P-1) and such approval was apparently given. However, on June 21, 1971, Roy Wager, an official of the State Department, addressed the following letter (P-2) to the Superintendent of Schools of the Black Horse Pike Regional High School District, hereinafter "Black Horse Pike Superintendent":

\*\*\*\* Your district recently made application for an approved secondary summer school. Previously, rules and regulations were forwarded concerning such programs. Within these rules and regulations the following statement is made:

"The rules for the approval of full-time secondary schools except as otherwise provided shall apply to secondary summer schools. No summer secondary session may be approved unless it:

"(1) is operated by a board of education without charge to the pupils living within that district. ...."

"On your application your district does attest that it is following these rules and regulations. Your program was then approved by this department and by the State Board of Education. It has now come to the attention of this department that you are charging a \$5.00 registration fee for local resident pupils to attend your summer school.

"Consequently, if there is such a charge, there are two alternatives you may take.

- "1. Return the registration fee to all local pupils (you may, of course, charge non-resident pupils tuition). At which time there would be no question concerning meeting State Rules and Regulations, or;
- "2. Continue to charge the pupils. This will necessitate withdrawal of approval by the State Department of Education and appropriate State Board of Education action.

"Could you please clarify whether you are charging a registration fee, and if so what will be your intentions. I should remind you that if you follow step number 2 that you do have an obligation to notify parents and pupils that the summer school is not a State approved program.

"May I hear from you as soon as possible.\*\*\*\*"

In reply Mr. Wager received the following letter (P-3) from the Black Horse Pike Superintendent:

“\*\*\* In response to your letter of June 21, 1971, I wish first of all to make it clear that no effort has been made by my office, this year or any past year, in any respect whatsoever, to misrepresent the intent of the district in the data submitted on the application for approval of a Summer High School.

“I call to your attention that the matter was personally discussed with you earlier in the year when the budget was submitted for public hearing.

“As a resident of this school district, you are well aware that anything less than what is now being done would have resulted in total elimination of the Summer School Program.

“As an alternative to saving money by utilizing non-certificated personnel, we have instead offered a program (at no tuition cost to the boys and girls in our community) including make-up, advancement, and enrichment courses directed by fully certificated staff, which only involves a registration fee of \$5.00 (total) for a partial or full program.

“This approach is contrary to the wishes of some of our Board members and is strongly opposed by practically all of the members of the governing bodies (for tax reasons) who insist annually that those participating should underwrite the total cost of the program.

“Your records should indicate that this matter was called to your attention last year, as well as this year, and in like manner it was similarly discussed on several occasions in previous years with Dr. William Warner.

“The Rules for Approved Secondary School Summer Sessions are observed. The program is operated by the Board of Education without charge to the pupils living within the district (see enclosed copy of Summer School bulletin). Tuition is charged only to non-residents.

“I call to your attention that not a single complaint has been submitted to us over these many years concerning the registration fee. In the interest of our pupils, I urge you to give this matter your most serious and understanding consideration.

“A negative reaction to this appeal can only injure innocent young pupils. The rejection of this program (as has been cited to your office over the past years) will result in:

“(1) Elimination of the entire program

“(2) Making graduation impossible for ‘senior failures’ unless enrollment is made for another year

- “(3) Increased cost per pupil from \$5.00 registration to tuition fee of \$40.00 to \$50.00 for available programs in other districts
- “(4) Making participation almost impossible for most pupils due to the lack of public transportation in this regional district
- “(5) Eliminating the opportunity for enrichment and advancement courses except for those fortunate pupils whose parents can afford the costly tuition and transportation expenditures
- “(6) Necessitating a 5th and/or 6th year from some pupils
- “(7) An increase in the number of school drop-outs, especially those who reject falling behind their peers.

“In fairness to the students, I urge you to submit a prompt reply outlining your decision. On the basis of this decision, if negative, the Board will be requested to decide if the registration fee shall be refunded and the Summer School be brought to an immediate close.

“In submitting your decision to those involved, we shall certainly try to make them understand your cause for concern. \*\*\*”

Thereafter, in a letter dated September 7, 1971, (P-4) the Black Horse Pike Superintendent was notified by Roy Wager that approval for the 1971 summer school had, in effect, been rescinded.

Approval was subsequently withheld again for the summer session proposed by the Black Horse Pike District in 1972, and such approval was also withheld in that year for the first time from the Sterling High School District. Both of these latter actions were similarly founded on the fact that the respective Boards of Education had required the payment of a registration fee as a prerequisite for summer school enrollment. However, in 1972, the letters of the State Department which detailed the reasons why approval would not be granted were more explicit; specifically, the arguments which were advanced were founded on Constitutional and statutory mandates that public education shall be “free” to all pupils resident in the State, between the ages of 5 and 20. (See P-8.) There was also a reiteration of the rules of the State Board of Education in this regard. (*N.J.A.C.* 6:27-3.1)

Ultimately, the instant Petition was advanced by the Boards of Education and they ask, in effect, that the Commissioner review the actions of the State Department in this matter. The Petition propounds the opinion that the registration fees, which are involved herein as the substantive causal factor in the controversy, are not inconsistent with the statutes or the rules of the State Board of Education. It demands judgment to this effect and retroactive approval of their summer schools of 1971 and 1972.



The Boards of Education offer extensive argument in support of this view and other views in their Brief of Counsel.

Their first argument, in support of a request for retroactive approval for the summer schools sponsored by the Boards of Education in 1971 and 1972, is that the schools were initially approved by the State Department and that such approval could not be withdrawn absent a hearing and the chance for the Boards of Education to express their views. They maintain that they were entitled to such a hearing for the reason that the State Department officials, who rescinded approval in those years, acted unilaterally in a quasi-judicial role. In other words, they aver that "fair play" was not afforded although it was required. In support of this avowal they cite *Fitzgerald v. Montvale*, 1969 S.L.D. 48 and *Juzek v. Hackensack Water Co.*, 48 N.J. 302 (1966).

This substantive argument of the Boards of Education herein is, however, that all fees levied by local boards of education are not proscribed by the New Jersey Constitution, by statutes or by rules of the State Board of Education. They aver that:

"It is only those elements of the educational program which are essential to the existence of a 'thorough and efficient' educational program which must be made available to the children domiciled in each school district without any charge. The issue in this case is not really the meaning of 'free' or 'without cost'; it is the scope of educational services encompassed within a 'thorough' educational program." (Brief of the Boards of Education, at p. 8)

The Boards of Education also maintain that some costs are already entailed in other requirements of the statutes, or exist as the result of past tradition and practice, and that these costs also act as a prerequisite to school attendance; namely, the costs involved with vaccination or various immunizations. Therefore, they argue:

"\*\*\* it is difficult to see why a minimal charge may not be imposed for participation in an extended, voluntary and non-compulsory summer school program.\*\*\*" (Brief of the Boards of Education, at p. 10)

Additionally, the Boards of Education maintain that summer sessions are not an inherent, basic part of a local board's educational program, but are akin to an extracurricular activity such as athletics. In this view, the summer sessions and the athletic programs are set apart because participation is voluntary and the fees which are customary as admission costs to pupils at athletic events are not essentially different from the registration fees charged for summer school participation.

While counsel for the Boards of Education advance no court decision in New Jersey directly at point to the matter, *sub judice*, they do cite court decisions in other states which have dealt with supplementary fees similar to the ones herein controverted. *Paulson v. Minidoha County School District*, #331, 93

*Idaho* 469 (1970); *Bond v. Public Schools of Ann Arbor*, 383 Mich. 493, 178 N.W. 2d 484 (1970); *Vincent v. County Board of Education*, 222 Ala. 216, 131 So. 893 (1931); *Hamer v. Board of Education*, 265 N.E. 2d 616 (Ill. 1970); and *Granger v. Cascade County School District*, 499 P. 2d 780, 785 (Mont. 1972) The Boards of Education aver:

“The common message that appears in each of these cases \*\*\* is this: A ‘free’ public school system is not one totally free from all fees or charges to pupils.” (Brief of the Boards of Education, at p. 19)

Finally, the Boards of Education state that the matter herein is a statewide problem, which has not been litigated before and that even an adverse ruling should not be retroactive but prospective because of this fact.

Officials of the State Department have provided an Answer to the Petition of the Boards of Education which generally reiterates reasons previously advanced and reported, *ante*, for the decisions to withhold approval for the summer sessions conducted by the Boards of Education in 1971 and 1972. However, additionally, the Answer states, with reference to fees as a prerequisite to summer school admission: (P-8)

“\*\*\* it is clear that it makes no difference whether the charge is \$5.00 or \$50.00 since all such charges are proscribed by the New Jersey Constitution, by statute, and by the State Board of Education.\*\*\*”

Further, the Answer avers that on May 6, 1970, the State Board of Education stated:

“\*\*\* ‘the Board construes ‘school programs’ to include any activity which is directly or indirectly an integral part of the curriculum, or which contributes to the pupils’ academic standing and enunciates a State Board rule that no school district shall charge any student or parent fees for any such activity.’ ”

Finally, the hearing examiner sets forth some other facts of pertinence herein.

1. The Boards of Education have had budget difficulties in the past and they maintain that the fee for summer schools is a necessity if the schools are to be continued. They aver that if the schools are abandoned, the alternative for their pupils is attendance elsewhere with large tuition costs.

2. The Boards of Education, while stipulating that a fee is a prerequisite for summer school, deny that it is “tuition” and aver that no pupil has been or would be rejected if he could not pay it.

3. The summer schools in question offer both make-up and enrichment courses.

4. The registration fees herein controverted comprise approximately 20-25% of the total cost of summer school programs in these two districts.

The issue which is posed for the Commissioner's determination is one simply stated; namely, whether or not officials of the State Department acted properly to rescind approvals previously given for summer school programs in the Black Horse Pike Regional High School District in 1971 and 1972, and in the Sterling High School District in 1972 in the circumstances of this recital.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and has noted the contentions of the parties. He observes, however, that there is no contention herein that a local board of education is, or should be, free to charge a registration fee as a prerequisite for attendance in a public school during the course of the regular school year between September and June. The contention, instead, is that the summer school sessions are somehow set apart from the regular school year by certain facts; namely, attendance at such sessions is voluntary, the sessions are not supported directly by the State, etc.

How can such an argument be maintained when credits earned in such schools are made an integral part of the record of each pupil? The Commissioner opines that the argument cannot be so maintained and that summer school sessions are, and ought to be, regarded as companion school sessions equal in all respects to school sessions required to be provided by Constitutional mandate and statutory prescription for all children between the ages of five and twenty who are resident in the State. A ruling to the contrary would, in the Commissioner's opinion, seriously jeopardize the integrity of summer school offerings.

Since summer schools must, if they are to retain integrity, be regarded as companion schools to those conducted during the course of the regular school year, the State Board has properly, in the Commissioner's judgment, joined both kinds of schools together in the opening sentence of the rule on the operation of summer schools. This rule (*N.J.A.C. 6:27-3.1 (a)*) provides that:

“The rules for the approval of full-time secondary schools except as otherwise provided shall apply to secondary summer sessions. \*\*\*”

Thus, the two kinds of schools — full-time secondary schools and secondary summer sessions — are inextricably linked together.

It follows, therefore, that the following provisions of the State Board rule (*N.J.A.C. 6:27-3.1 (a)*) which states that

“\*\*\* No summer secondary session may be approved unless it:

“1. Is operated by a board of education without charge to the pupils living within the district \*\*\*,”

is a necessary and cogent requirement of the rule. Education in New Jersey must be thorough and efficient and "free," and in so far as the rule is applicable to regular programs of instruction, it is also applicable to companion summer sessions.

In this regard, the Commissioner holds that it makes no difference that the summer session is voluntary. If it is offered at all, it must be offered in a parallel manner to the offering of the regular school program, and any provisions which mandate a cost as a prerequisite to program admission must be rendered a nullity.

In the instant matter, the costs which were required for summer school admission clearly fall in a proscribed category; they were the charges which the State Board rule, *ante*, expressly forbids. Accordingly, while the Boards of Education were free to make such charges, and to operate summer school sessions as unapproved offerings, they are not able to demand that the Commissioner or other State officials give an approval which is clearly proscribed by conditions.

Therefore, the Commissioner finds no merit in the Petition herein on the basis of a substantive argument. Neither does he find merit in an argument that the Boards of Education were denied due process rights which were due them. The action to rescind approval was not precipitate, and the letters contained herein as evidence and reported, *ante*, attest to this fact.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

March 6, 1973

**In the Matter of the Appeals of the Boards of  
Education of the Black Horse Pike Regional School  
District and the Sterling Regional School District,  
Camden County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, March 6, 1973

For the Petitioners-Appellants, Hyland, Davis & Reberkenny (John S. Fields, Esq., of Counsel)

For the Respondent, Dr. Donald E. Beineman

Petitioners, the Boards of Education of Black Horse Pike Regional School District and Sterling Regional School District, appeal to the New Jersey State Board of Education, attacking the action of the Commissioner of Education in denying approvals to their summer school program. The controversy focused on whether these districts acted properly in charging their district students "registration fees" as a prerequisite to admission to summer school programs offered by these districts, notwithstanding the requirements of the *New Jersey Constitution of 1947*, Article 8, Section 4, Paragraph 1, *N.J.S.A. 18A:38-1*, and *N.J.A.C. 6:27-3.1* (a), all providing basically that public school education shall be free.<sup>1</sup>

<sup>1</sup> *The New Jersey Constitution of 1947*, Art. 8, Sec. 4, par. 1 provides:

"The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

*N.J.S.A. 18A:38-1* provides:

"Public schools shall be free to the following persons over five and under 20 years of age:

(a) Any person who is domiciled within the school district;

(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term; \*\*\*

(d) Any person for whom the bureau of children's services in the department of institutions and agencies is acting as guardian and who is placed in the district by said board."

*N.J.A.C. 6:27-3.1* (a) provides:

"The rules for the approval of full-time secondary schools except as otherwise provided shall apply to secondary summer sessions. No summer secondary session may be approved unless it:

1. Is operated by a board of education without charge to the pupils living within the district \*\*\*."

The parties were furnished with copies of the report and recommendation of the Law Committee of the State Board of Education dated October 19, 1973.

Some arguments raised by petitioners were addressed to the question of whether summer school offerings are mandatorily embraced in the constitutional concept of a "thorough and efficient" system of free public schools, the contention being that if they are not, registration fees may be charged (Objections to Report and Recommendation of the Law Committee, Nos. 1, 2, 3, 4 and 7). It is undisputed that prior approval was sought from the N.J. State Department of Education by petitioners for the summer school offerings under the provisions of *N.J.A.C. 6:27-3.1 et seq.*, which include specific requirements relating to teacher qualification (*N.J.A.C. 6:27-3.2*), limitations on pupil assignments and maximum number of courses which may be taken (*N.J.A.C. 6:27-3.3*), and credit toward high school graduation requirements for courses successfully completed (*N.J.A.C. 6:27-3.4 (a) and (b)*). Unmistakably, approved summer school offerings are considered the same as course offerings in the regular calendar year curricula. These Code requirements have been enacted pursuant to the State Board's statutory duties fixed upon it by the Legislature and in accordance with the Legislature's constitutional obligation previously cited. The Legislature's charge to the State Board, set forth in *N.J.S.A. 18A:4-10*, is a firm one:

"The general supervision and control of public education in this state, except higher education, and of the state department of education shall be vested in the state board, which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education, other than higher education, of people of all ages within the state."

In our view, it matters not whether summer school programs are mandated by the Constitution as a component of a "thorough and efficient" school system. If a district undertakes to offer such programs and obtains *full State recognition* through the approval process, such programs must be offered in accordance with existing law.

Another argument dealt with the applicability of the case of *Granger v. Cascade County School District*, 499 P. 2d 780, 785 (*Montana*, 1972) (Objection 6). In view of the strong constitutional, statutory, and administrative policies previously cited, the *Granger* case, a decision of a sister state not based on the constitutional or statutory law of New Jersey, cannot be considered as persuasive, even assuming it has some factual similarity to the case before us.

Still another argument asserted that certain "tests," set forth in three decisions of the Commissioner, *Willet v. Board of Education of Colt's Neck*, 1966 S.L.D. 202, *Affirmed State Board of Education* 1968 S.L.D. 276; *Howard v. Board of Education of the Township of Jefferson*, 1967 S.L.D. 267; and *Smith v. Board of Education of Paramus*, 1968 S.L.D. 62, *Affirmed State Board of Education* February 5, 1969, for imposing fees for summer school programs have been met (Objection 5). These cases are not in point.

A final argument asserts that the "revocation of approval" was effected without notice, contrary to due process requirements (Objection 8). The record of correspondence between the parties reflects not only that prior notice of denial of approval was given, but that approval would be granted upon return to the participating resident students of the registration fees charged (as to Black Horse Pike, Exhibits P-2, P-9, and P-10; as to Sterling, Exhibits P-6, and P-8).

For the above reasons, and those expressed by the Commissioner, we affirm his decision of March 6, 1973.

December 5, 1973

**In the Matter of the Annual School Election  
Held in the Constituent District of Somers Point,  
Mainland Regional High School District,  
Atlantic County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for two candidates for one full term of three years each, from the constituent district of Somers Point on the Board of Education of the Mainland Regional High School District, Atlantic County, at the annual school election held on February 6, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Elva L. Havrilchak	291	- 0 -	291
Morton L. Bates	296	- 0 -	296

Pursuant to a letter request dated February 8, 1973 from Candidate Havrilchak, a recount of the votes cast for the candidates and an inquiry of an alleged irregularity in voting procedure were conducted by an authorized representative of the Commissioner of Education at the voting machine warehouse of the Atlantic County Board of Elections, Northfield, on February 22, 1973.

The recount of votes cast for the candidates on the voting machines confirmed the results previously announced.

Candidate Havrilchak alleged that the election workers did not check each signature against the signature copy register as required by law. This allegation is corroborated by the Board Secretary who stated that the alleged infraction was brought to his attention and that attempts were made to have the election workers check all names as required.

There was no testimony taken at the inquiry; however, the Board Secretary stated further that the election workers claimed they had never

checked voters' signatures because they [the election workers] knew all the voters in the district.

There was no charge that any person voted who was not eligible to vote, nor was any evidence or proof offered to show that any voters were cast illegally.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner. There can be no question that the election officials were in violation of *N.J.S.A. 18A:14-51*, by not checking voters' signatures on the poll list against the signature copy register. The Commissioner finds no basis to conclude that there was any intent of fraud or deception of the public, and in no way questions the honesty or intent of the election officials. However, this does not relieve the officials of their legal responsibility and duty to follow the mandates of the statutes in every respect.

As he has observed before, the Commissioner takes the position that school elections are no less important than other elections and they are to be conducted with careful regard and strict compliance with every requirement of law. *In re Annual School Election in Palisades Park, 1963 S.L.D. 99; In re Annual School Election in the Township of Pittsgrove, 1970 S.L.D. 126*

While it may be true that the election officials may know every voter, it does not necessarily follow that they know that each such voter is properly registered and eligible to vote. In any case, it is not within the discretion of the election officials to decide which laws they must follow and which they may disregard.

The Commissioner concludes that the election officials failed to comply with the procedures established by law for use of the signature copy registers. However, absent any showing that anyone voted who was not qualified, the Commissioner finds no sufficient grounds for challenging the election results. The results, therefore, will stand as announced. In all future elections, the election officials are directed to follow all the statutory requirements of the laws governing school elections, including use of the signature copy register as set forth in the statutes.

The Commissioner determines, therefore, that Morton L. Bates was elected on February 6, 1973 from the constituent district of Somers Point, to a seat on the Board of Education of the Mainland Regional High School District for a full term of three years.

COMMISSIONER OF EDUCATION

March 7, 1973



**In the Matter of the Annual School Election  
Held in the School District of the Township of Teaneck,  
Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the annual school election held on February 13, 1973 in the School District of the Township of Teaneck, Bergen County, on the question of the appropriation of \$10,986,689 for current expenses for the 1973-74 school year were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Yes	3,321	296	3,617
No	3,653	69	3,722

Included in the total results as set forth above, are the results of Polling District Number 3 as reported here:

	<b>Yes</b>	<b>No</b>
Current Expense	143	176

Pursuant to a letter request from the Teaneck Board of Education Secretary dated February 16, 1973, on behalf of the Board, the Commissioner of Education directed an authorized representative to recheck the two machines used in District No. 3. The recheck was conducted at the voting machine warehouse of the Bergen County Board of Elections, Carlstadt, on March 5, 1973. The results of the recheck of the machines used in Polling District No. 3 are as follows:

	<b>Yes</b>	<b>No</b>
Current Expense	243	176

The total results of the voting on the question of the appropriation for current expenses for the 1973-74 school year now stand as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Yes	3,421	296	3,717
No	3,653	69	3,722

\*       \*       \*       \*

The Commissioner finds and determines that the question of the appropriation of \$10,986,689 for current expenses for the 1973-74 school year failed the approval of the voters of the Township of Teaneck at the annual school election held on February 13, 1973.

COMMISSIONER OF EDUCATION

March 8, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Borough of  
Woodcliff Lake, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the voting for three members of the Board of Education of the Borough of Woodcliff Lake, Bergen County, for full terms of three years each at the annual school election held on February 13, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
James V. DePiero	555	4	559
Lawrence T. Brennan	486	9	495
Allan J. Gottdenker	450	8	458
Joan M. Wright	599	4	603
Richard F. Bradley	444	3	447
Eleanor P. Cummins	477	8	485

Pursuant to a letter request received from Candidate Cummins dated February 15, 1973, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the voting machine warehouse of the Bergen County Board of Elections in Carlstadt on March 5, 1973.

The Commissioner's representative reports that the recheck confirms the totals as set forth above.

\* \* \* \*

The Commissioner finds and determines that James V. De Piero, Lawrence T. Brennan, and Joan M. Wright were elected to full terms of three years each on the Borough of Woodcliff Lake Board of Education at the annual school election held on February 13, 1973.

COMMISSIONER OF EDUCATION

March 8, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Borough of  
Fair Lawn, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the annual school election held February 13, 1973 in the School District of the Borough of Fair Lawn, Bergen County, on the question of the appropriation of \$9,720,858 for current expense for the 1973-74 school year were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Yes	1,895	44	1,939
No	1,820	13	1,833

Pursuant to a letter request dated February 16, 1973 from the Fair Lawn Board of Education Secretary and on behalf of the Board, the Commissioner of Education directed an authorized representative to recheck the totals on the machines used in this election. The recheck was conducted at the voting machine warehouse of the Bergen County Board of Elections, Carlstadt, on March 5, 1973.

At the conclusion of the recount, the tally of votes for the current expense proposal stood at:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Yes	1,895	44	1,939
No	1,920	13	1,933

\* \* \* \*

The Commissioner finds and determines that the question of the appropriation of \$9,720,858 for current expense for the 1973-74 school year was approved by the voters in the school district of the Borough of Fair Lawn, Bergen County, at the annual school election held on February 13, 1973.

COMMISSIONER OF EDUCATION

March 8, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Township of  
East Greenwich, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the School District of the Township of East Greenwich, Gloucester County, on February 13, 1973, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Russell H. Nolte	128	7	135
Gerald N. Michael	131	4	135
E. G. "Pete" Jones	172	8	180
William Doerrmann	144	5	149

Pursuant to a letter request dated February 20, 1973 from Mr. N. P. Kafka, Secretary of the East Greenwich Township Board of Education, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast for Board members. The recount was conducted at the office of the Gloucester County Superintendent of Schools, Sewell, New Jersey, on March 6, 1973.

The Commissioner's representative reports that the recheck of the ballots confirmed the results previously announced.

\* \* \* \*

The Commissioner finds and determines that E. G. "Pete" Jones and William Doerrmann were elected at the annual school election on February 13, 1973 to seats on the Board of Education of the Township of East Greenwich for full terms of three years each. There was a failure to elect a third member to one vacant seat on the Board. The Gloucester County Superintendent of Schools is therefore authorized under the provisions of *N.J.S.A. 18A:12-15*, and is hereby directed, to appoint from among the residents of the School District of the Township of East Greenwich a citizen who holds the qualifications for membership to a seat on the Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 12, 1973

**Board of Education of the Borough of Haledon,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Haledon,  
Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, James V. Segreto, Esq.

Petitioner, the Board of Education of the Borough of Haledon, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Haledon, hereinafter "Council," appropriating a lesser amount of money for the current and capital expenses of the school district for the school year 1972-73 than the amount proposed by the Board in its budget, which was rejected by the voters at the polls. The Board alleges that it cannot provide an adequate and efficient system of education based upon the reduced amount, and also asserts that Council, in making its reductions, acted in an arbitrary and capricious manner. Furthermore, the Board filed a Motion to Strike Council's written testimony in this matter as well as its Answer. Council denies the allegations and assertions herein and opposes the Motion to Strike.

Hearings were conducted in this matter on October 6 and December 14, 1972 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Additionally, a written testimony of the parties was accepted. The report of the hearing examiner is as follows:

At the annual school election held on February 8, 1972, the Board submitted proposals for the following amounts to be raised by local taxation for 1972-73:

For current expenses	\$534,151.40
For capital outlay	<u>17,806.65</u>
TOTAL	\$551,958.05

After these proposals were rejected by the voters, the proposed budget was submitted to Council, which certified the following amounts to the Passaic County Board of Taxation to be raised by local taxation:

For current expenses	\$516,911.40
For capital outlay	<u>16,806.65</u>
TOTAL	\$533,718.05

The Motion to Strike was originally denied by the hearing examiner in a letter to both parties dated June 30, 1972; however, the Board revived its Motion during the hearing held December 14, 1972. The Board avers that its Motion to Strike Council's Answer herein should be granted because, as filed, the Answer lacked verification. However, the hearing examiner notes that an affidavit was received on October 6, 1972, signed by the Mayor of the Borough of Haledon attesting to the veracity of the Answer. Accordingly, the hearing examiner recommends that the Board's Motion to Strike Council's Answer be denied. In regard to the Motion to Strike Council's written testimony, in support of its underlying reasons for the reduction, the Board asserts the original resolution of March 13, 1972 (Exhibit B), adopted by Council, provided only lump-sum reductions, and not the underlying reasons for such reductions as required by *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94.

On April 10, 1972, Council adopted a resolution which provided its statement of underlying reasons (Exhibit D) which the hearing examiner finds to be consonant with *East Brunswick, supra*, where the Court, at page 105, said:

“\*\*\* Where its [Council's] action entails a significant aggregate reduction in the budget and a resultive appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons \*\*\*.”

Accordingly, it is recommended that the Motion to Strike Council's testimony, in support of underlying reasons for its reductions, be denied.

As set forth in the Board's budget and in Council's answer, the line item appropriation, Council's proposal, and the resultant reductions are shown in the following table:

Acct. No.	Item	Board's Budget	Council's Proposal	Amount of Reduction
CURRENT EXPENSE				
110B	Sal.-Board Secy.'s Off.	\$ 9,900	\$ 9,800	\$ 100
110C	Sal.-Custodian of Sch. Moneys	1,100	600	500
110F	Sal.-Supt.'s Off.	24,300	23,500	800
120A	Pub. Sch. Acct.'s Fee	900	800	100
120B	Legal Fees	2,450	2,000	450
130D	Other Exp.-Sch. Elections	800	700	100
130F	Other Exp.-Supt.'s Off.	650	450	200
211	Sal.-Vice-Principal	17,150	16,800	350
213-1	Sal.-Music Tchr.	8,440	- 0 -	8,440
213-1	Sal.-Sub. Tchrs.	7,000	6,500	500
215A	Sal-Secy.-Princ.'s Off.	5,800	5,450	350
216	Sal-Clerical Aids	600	- 0 -	600
220	Textbooks	8,000	7,600	400
240	Teaching Supplies	9,300	8,800	500
250A	Misc. Supls.	3,500	3,100	400
610A	Sal.-Custodians	36,100	35,100	1,000
640B, C, D	Electricity, Gas, Telephone & Telegraph	9,500	9,000	500

650	Custodial Supplies	2,750	2,500	250
720A, B	Maint.-Cont. Services	5,600	4,600	1,000
730B	Replacement of Noninstruc- tional Equipment	1,700	1,500	200
740B	Other Exp.-Rpr. of Bldg.	2,000	1,500	500
		Total Current Expense Reduction		\$17,240
CAPITAL OUTLAY				
1230C	Remodeling of Bldg.	\$22,100	\$21,100	\$ 1,000
		Total Capital Outlay Reduction		\$ 1,000

The findings, conclusions and recommendations of the hearing examiner regarding each of the disputed items is as follows:

*110B Salaries-Board Secretary's Office.* Council argues that the increase between the 1971-72 salary of the Board Secretary, which was \$9,200, to the 1972-73 proposed salary of \$9,900, is excessive and contrary to the intent of the President [of the United States]. The Board, however, asserts that the salary of \$9,900 was agreed to as the result of negotiations and accordingly fixed the Board Secretary's salary at that amount on March 15, 1972.

*110C Salaries-Custodian of School Moneys.* Council recommends a reduction of \$500 in this item, because the person who held the post for a long period of time retired, and it was felt that a new person should not receive the same starting salary. The Board avers that the custodian who retired received a yearly salary of \$1,100, but that his replacement agreed to a tentative salary of \$600 pending the outcome of this dispute. The Board doubts that it could hire a custodian for much less than \$1,100, but also argues that \$600, as advanced by Council is extremely unreasonable.

The hearing examiner, mindful of the responsibilities attached to the position of Custodian of School Moneys, agrees with the Board that \$600, as suggested by Council, is unreasonable. Accordingly, it is recommended that the reduction in this item be restored.

*110F Salaries-Superintendent's Office.* The Board, in its written testimony, avers that as the result of negotiations between it and the Superintendent of Schools, a resolution was passed by the Board fixing his salary for the 1972-73 school year at \$24,300 on March 15, 1972. (Exhibit P-2) Furthermore, the Board, without being specific, asserts that the Commissioner cannot sustain the \$800 cut as advanced by Council in view of the Commissioner's prior decisions. Council argues that the increase from the previous year's salary of \$22,500 to the proposed salary of \$24,300 is excessive, in view of the fact that five years ago the position of Superintendent called for a salary of only \$12,000. The hearing examiner opines that five years ago, most salaries, not merely exclusive to education, were less than today's.

Accordingly, absent an effective challenge by Council to the action of the Board establishing the salary at \$24,300, the hearing examiner recommends restoration of the amount cut by Council so that the Board may meet the terms of its agreement with the Superintendent of Schools.

Absent a positive showing that the Board acted in any manner *ultra vires*, the hearing examiner recommends restoration of Council's cut in this item so that the Board may meet the terms of its agreement with the Board Secretary.

*120A Public School Accountant's Fee.* Council proposes to cut this item by \$100 and states that this action is justified to prevent large cost increases by the hiring of a new auditor. The Board states that it hired a new auditor at a retainer of \$800, and the additional \$100 is to cover any additional audits or consultations which may be necessary during the year between the Board and the auditor.

The hearing examiner finds that the \$900 proposed by the Board is necessary in order to pay the auditor, as well as to be prepared to meet unforeseen obligations. Accordingly, restoration of the amount cut in this item is recommended.

*120B Legal Fees.* Council suggests a reduction of \$450 from the proposed amount of \$2,450 advanced by the Board because "The reduction is justified." (Council's testimony, at p. 1) The Board, however, avers in its written testimony that the sum of \$4,872 for legal fees was expended during 1970-71 and the sum of \$3,100 was expended during 1971-72.

An amount of \$2,450 for legal fees for 1972-73, as based on past experience, does not seem to be unreasonable in the hearing examiner's view. Therefore, it is recommended that the reduction in this item be restored.

*130D Other Expenses - School Elections.* Council proposes a reduction of \$100 in this account because, it avers, the costs for school elections do not vary. The Board asserts, to the contrary, that it expended \$700 for the 1972 election and that this year it must change printers, a change which it strongly believes will result in higher printing costs.

It is recommended that the reduction in this account be restored.

*130F Other Expenses-Superintendent's Office.* Council argues that this item arbitrarily increased from \$275 in 1971-72 to \$650 for 1972-73. It suggests that even with its proposed reduction of \$200, the increase is reasonable. The Board's testimony shows that the purpose of this account is to absorb the costs of the Superintendent of School's attendance at the New Jersey Association of School Administrators' convention, the American Association of School Administrators' convention, and registration fees to both. Furthermore, the Board points out that the Superintendent is a delegate from the Passaic County Superintendents' Round Table to the New Jersey Association of School Administrators' monthly meetings in New Brunswick and that expenses pertaining thereto are charged to this account.

In the hearing examiner's view, the responsibilities of superintendents of schools are such that their attendance at professional meetings and convention is to be encouraged by boards of education. In this manner, superintendents and boards have the opportunity of learning by sharing common problems and successful experiences with their colleagues.



Accordingly, it is recommended that the reduction herein be restored.

*211 Salaries-Vice-Principal.* Council avers that the salary increase from \$15,900 to \$17,150 in this item is excessive, particularly when the increase, Council asserts, is accompanied by separate expenses, good benefits, and clerical aides to assist in the work. The Board, as a result of negotiations with the vice-principal, established the salary for 1972-73 on March 15, 1972. (P-2)

It is recommended that the reduction herein be restored so that the Board may meet the terms of its agreement.

*213-1 Salaries-Music Teacher/Substitute Teachers.* There are two items in dispute here: (1) the employment of a music teacher, and (2) the tentative appropriation for substitute teachers. In regard to the music teacher, Council asserts that there is no need for incurring an \$8,440 expense at the present time because music instruction is provided by another teacher already being paid for other duties. Furthermore, Council argues, the County provides a music instructor for the district's graduation exercises. The Board avers that a music teacher had been employed up until four years ago when that person then resigned. Finding a replacement at that time was difficult and because of prior disputes with Council regarding the school budget, the Board agreed (in an effort to solve the prior disputes) to eliminate the position from the budget. Now, however, the Board finds that music instruction has been neglected for too long a period of time and it asserts that such instruction is essential to its school system.

The hearing examiner is of the belief that music is an essential component of a sound educational program. The effectiveness of a person providing music instruction while being paid for other duties must be questioned. It is therefore recommended that the reduction advanced by Council in this category be restored.

In regard to the Board's proposed appropriation for substitute teachers, the Board asserts that during the school year 1970-71, the sum of \$6,772.50 was expended in this account, while for 1971-72 an approximate amount of \$6,500 was expended. The Board asserts that in view of the expenditure for 1970-71, an amount of \$7,000 for 1972-73 is reasonable. Council, to the contrary, argues that there is no reasonable basis for such an anticipated expenditure and recommends a reduction of \$500.

The hearing examiner finds that the Board did use a reasonable base of prior expenditures in this account to project a necessary amount for 1972-73 and, accordingly, recommends restoration of Council's reduction.

*215A Salaries-Secretary-Principal's Office.* The Board states that the salary of \$5,800 was established for the secretary to the vice-principal on March 15, 1972 (P-4), whose duties will be expanded to work with a newly established child study team. Council declares that even with a \$350 reduction, the increase from \$5,000 to \$5,450 is sufficient.

The duties of a secretary are many and, in most instances, enable more efficient operation by school administrators. It is recommended that the reduction in this account be restored.

*216 Salaries-Clerical Aide.* Testimony of the Board shows that the inclusion of a clerical aide, to assist in securing substitutes, was the result of negotiations with the teachers. It admits that while it appropriated \$600 for this account, only \$425 of that sum would be necessary. Council proposes to eliminate the position entirely, thereby saving \$600.

The hearing examiner recommends that a reduction of \$175 be sustained in this account, and the remaining \$425 be restored.

*220 Textbooks.* The Board proposes a sum of \$8,000 for this account of which \$2,250 would enable the purchase of new textbooks for language arts and reading in all first and second grades. The remaining moneys would be used for regular textbook replacements. Council urges a reduction of \$400 which would still provide more than a \$1,000 increase in this account from the 1971-72 figure of \$6,600.

The hearing examiner does not find Council's action herein unreasonable and recommends that the reduction be sustained.

*240 Teaching Supplies.* The Board proposes a reduction of \$500, asserting that that amount could be saved if proper inventory methods were applied. The Board avers that based on its 1970-71 expenditure of \$8,838.54, an appropriation of \$9,300 is reasonable. The hearing examiner observes from the Board's audit report for 1971-72 a sum of \$9,419.38 was expended for that year.

The hearing examiner notes that as of September 30, 1973, the pupil enrollment in grades kindergarten through eight was 626. Using the figure of \$9,300 proposed by the Board would mean an average per pupil expenditure of approximately \$15 for 1972-73 which in the hearing examiner's view is not unreasonable. Accordingly, it is recommended that Council's reduction herein be restored.

*250A Miscellaneous Supplies.* The Board appropriated the sum of \$3,500 for this account, while Council proposes a reduction of \$400. The Board, in its testimony, stated that it felt because it expended \$3,077.40 in this account during 1970-71, an amount of \$3,500 would not be unreasonable for 1972-73. However, the hearing examiner observes that the 1971-72 audit report shows an expenditure of only \$1,803.71.

Accordingly, the hearing examiner finds that the proposed reduction of \$400 by Council is not unreasonable and recommends that it be sustained.

*610A Salaries-Custodians.* The Board operates three school buildings staffed by four full-time custodians. The total budgeted for 1972-73 for these

four salaries is \$32,200. Three part-time custodians are employed at a cost of \$2,400 during the summer months as replacements for regular custodians during vacation periods. Additionally, \$1,500 is included to employ substitute custodians in the event of sickness or hospitalization of one or more of the regular men. The Board, therefore, appropriated a sum of \$36,100 for this account for 1972-73. Council recommends a \$1,000 reduction which still leaves an increase from the \$32,400 appropriated in 1971-72.

The hearing examiner finds that the Board has arrived at its proposed figure of \$36,100 in a reasonable and conscientious manner. Accordingly, it is recommended that the reduction be restored.

*640 B, C, D Electricity, Gas, Telephone and Telegraph.* For these three accounts the Board budgeted \$9,500. In 1970-71, actual expenditures came to \$8,666.87 for these three items. In 1971-72, the appropriation was \$6,200 while the actual cost was \$11,052.32. Council asserts that \$9,500 for 1972-73 cannot be justified.

The hearing examiner finds the Board's appropriation of \$9,500 to be reasonable in light of prior years' costs and recommends restoration of Council's reduction herein.

*650 Custodial Supplies.* The Board agrees to Council's reduction of \$250 in this account.

*720 A, B Maintenance-Contracted Services.* The Board proposed a sum of \$5,200 in this account which is to be used for emergency repairs of damage to school facilities, as well as for renovations to older structures. Council argues that the \$3,000 of the total earmarked for emergency repairs is not justified and recommends a reduction of \$1,000.

The hearing examiner can discern no short-or-long-range plan regarding renovations or anticipated repairs offered by the Board. It is noted that an "emergency repair" cannot be anticipated; however, it is found that an amount of \$4,200, based on the testimony in the record, is reasonable. Accordingly, the hearing examiner recommends the reduction herein be sustained.

*730B Replacement of Noninstructional Equipment.* The Board proposes the sum of \$1,700 for this account which would replace plastic guide caps for chairs and desks; a drinking fountain; typewriter; and a movie projector. The Board testified that Council was aware of the need to replace those specific items, but failed to inform the Board where the proposed \$200 reduction should be made. Council avers its reduction is reasonable.

It is recommended that the reduction be restored.

*740 B Other Expenses-Repair of Building.* The Board proposed a sum of \$2,000 for this account. Council recommends a reduction of \$500. In 1970-71,

actual expenditures in this account totaled \$2,032.37; in 1971-72 actual expenditures totaled \$521.98.

In view of prior years' expenditures, a reduction of \$500 does not seem unreasonable. Accordingly, it is recommended that the reduction be sustained.

# **CAPITAL OUTLAY**

## **1230C Remodeling of Building.**

**1240C Equipment.** The Board asserts that it formed a citizens' committee in 1971 which recommended certain building remodeling. The Board agreed and, in an effort to ease the burden of financing all needed renovations at one time, spread the work over a period of four to five years. Thus, for the first year, \$22,100 was anticipated as needed, of which \$17,806.65 would be raised locally. The Board argues that even though a member of Council was on the citizens' committee, Council now makes an arbitrary reduction of \$1,000. Council argues that the \$1,000 reduction is reasonable.

The hearing examiner observes that the Board offered no testimony which would show it could not accomplish its purposes for this account without the \$1,000 reduction. Accordingly, it is recommended that the reduction be sustained.

The following table reflects the recommendations of the hearing examiner with respect to each of Council's suggested reductions:

Current Expense	Amount Reduced	Amount Restored	Amount Not Restored
110B	\$ 100	\$ 100	\$ - 0 -
110C	500	500	- 0 -
110F	800	800	- 0 -
120A	100	100	- 0 -
120B	450	450	- 0 -
130D	100	100	- 0 -
130F	200	200	- 0 -
211	350	350	- 0 -
213-1	8,440	8,440	- 0 -
213-1	500	500	- 0 -
215A	350	350	- 0 -
216	600	425	175
220	400	- 0 -	400
240	1,500	- 0 -	500
250A	400	- 0 -	400
610A	1,000	1,000	- 0 -
640B, C, D	500	500	- 0 -
650	250	- 0 -	250
720 A, B	1,000	- 0 -	1,000
730B	200	200	- 0 -
740B	500	- 0 -	500
TOTALS	\$17,240	\$14,015	\$3,225
CAPITAL OUTLAY			
1230C	\$ 1,000	- 0 -	\$1,000
TOTALS	\$ 1,000	- 0 -	\$1,000

\* \* \* \*

The Commissioner has reviewed the findings, conclusions, and recommendations of the hearing examiner as set forth above. He finds the amounts certified by Council to be insufficient to maintain a thorough and efficient school system in the Borough of Haledon for the school year 1972-73. He, therefore, directs the Mayor and Council of the Borough of Haledon to certify to the Passaic County Board of Taxation the following additional amount:

For Current Expenses \$14,015

to be raised by local taxation for the school year 1972-73.

COMMISSIONER OF EDUCATION

March 14, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Borough of Haledon,  
Passaic County.**

**COMMISSIONER OF EDUCATION**

**Decision**

At the annual school election held in the Borough of Haledon, Passaic County, February 13, 1973, three members were to be elected to the Board of Education for full terms of three years each. Additionally, voters of the district were asked to approve current expense appropriations of \$594,369.68 and the sum of \$555.31 for capital outlay.

1

At the conclusion of the balloting the announced results were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Judy Anne White	254	- 0 -	254
Virginia Gravino	272	- 0 -	272
Jeffrey Fischer	286	2	288
John P. Iurato	254	- 0 -	254
Jim Segreto (Write-in Candidate)	1	- 0 -	1

**CURRENT EXPENSE**

<b>AT POLLS</b>		<b>ABSENTEE</b>		<b>TOTAL</b>	
<b>For</b>	<b>Against</b>	<b>For</b>	<b>Against</b>	<b>For</b>	<b>Against</b>
199	201	2	- 0 -	201	201

**CAPITAL OUTLAY**

195	206	- 0 -	- 0 -	195	206
-----	-----	-------	-------	-----	-----

However, in addition to the announced results for the current expense and capital outlay appropriations, there was a total of 28 additional votes cast which were not added to the tally because of an error which did not become apparent to election officials until after the polls had closed. Accordingly, because of the apparent error, counsel for the Haledon Board addressed a Petition to the Commissioner dated February 16, 1973, which requested that "\*\*\*\* the election be set aside for irregularities, and that a new election be ordered \*\*\*." Candidate White also requested a recount of the tally for the members of the Board of Education.

Thereafter, on February 28, 1973, a recount of the votes cast for the above-named candidates and for the appropriation items was conducted by an authorized representative of the Commissioner. The recount was combined with an inquiry regarding the alleged irregularities referred to, *ante*.

At the conclusion of the recount of votes which were cast for candidates for a three-year term, the tally stood as originally announced, and there was no evidence of any kind that there was an irregularity of substance concerned with that portion of the tally. The irregularity which had been alleged in the Petition of the counsel for the Board, *ante*, was found to be applicable only with respect to the tally for the items of appropriation.

This irregularity was found to be exactly as alleged in the Petition from counsel for the Board, at paragraph 6, which is reported in its entirety as follows:

"The public questions were so arranged that each question was spread across three key positions on the machines so that the entire area occupied by the questions covered six-keys. There was one key marked yes and one key marked no for each question. Between the keys marked yes or no for the current expense proposal and those marked yes or no for the capital outlay proposal there were two blank keys. *These keys should have been inoperative.* However, when the machine was opened there were 17 votes registered under one blank key and 11 votes registered under another blank key." (*Emphasis supplied.*)

Perhaps the fact of this situation can best be seen from a visual presentation of the tally recorded under the six keys on each of the two machines in question. It is noted here that keys three and four were correctly locked out by a capping device, but there was no such lock-out device on machine number two (Absalom Grundy School).

	CURRENT EXPENSE		CAPITAL OUTLAY	
	YES	NO	YES	NO
<b>Machine No. One</b>				
	<b>LOCKED OUT</b>			
(Voting Levers)	.	.	.	.
Tally	113	088	111	086

**Machine No. Two**

(Voting Levers)

Tally	086	113	017*	011*	084	120
Subtotal Tally	199	201			195	206
Correct						
Subtotal Tally			017	011		
Incorrect						

\*(Locking device was missing. A separate tally was thus possible, but it was without meaning, since the votes recorded were not directly related to a "yes" or a "no" vote.)

The net effect of the failure to lock out the two keys on machine number two is, therefore, that 28 votes were cast which cannot be added to the tally of those who approved the proposed appropriations or to the tally of those who were opposed. Since this is so, and in the circumstance of the close vote, it becomes readily apparent that the true expression of the people with respect to these items cannot be definitely ascertained; a tie vote and a vote with a difference of nine could be changed in either of two possible directions by a proper tally of the 28 votes which were cast improperly.

The issues which are posed for the Commissioner's determination are, therefore, whether or not the election herein with specific pertinence to the appropriation proposals must be vitiated and a new election ordered. There is no question, in the judgment of the hearing examiner, with respect to the tally for the candidates, and he recommends that this tally be adjudged as proper and that it be given effect.

Finally, it must be noted that voting machine number two was not properly locked at the time it was taken from the polling place to the election warehouse. However, as noted, *ante*, the tally from that machine at the end of the recount was exactly as reported by election officials at the conclusion of the voting.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and finds that it is impossible to determine the will of the voters of the Borough of Haledon with respect to the appropriation items proposed for approval at the election of February 13, 1973. Therefore, the election, with respect to these items, must be vitiated. The Commissioner so holds.

However, as the Commissioner has observed in the past, there is no provision in the school laws (*N.J.S.A.* 18A) for a second "annual" election which the Board requests. (See *In the Matter of the Annual School Election Held in the School District of Lakeland Regional, Passaic County*, decided by the Commissioner February 23, 1973.) Therefore, the net effect of the determination, *ante*, with respect to appropriation items is that such items have failed of approval — they have been rejected. This result is, therefore, the same one which had been previously announced.

Accordingly, the Commissioner directs the Board to submit the items which failed of approval to the governing body pursuant to the prescription of the statute. (*N.J.S.A.* 18A:13-9) The Board, of course, retains all of its rights of appeal, at a subsequent date, if the determination of the governing body is other than one which the Board believes is appropriate for the provision of a thorough and efficient school system in Haledon.

The Commissioner also finds that Jeffrey Fischer and Virginia Gravino were each elected to serve three-year terms on the Haledon Board of Education but that there was a failure to elect a third member. Accordingly, he directs the Passaic County Superintendent to appoint a member to the existing vacancy for this seat to serve until the next succeeding annual election according to the prescription of the statutes. (*N.J.S.A.* 18A:12-15)

COMMISSIONER OF EDUCATION

March 17, 1973

**In the Matter of the Tenure Hearing of Robert H. Beam,  
School District of the Borough of Sayreville,  
Middlesex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

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

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

This matter comes before the Commissioner of Education as the result of a written charge made by the parents of a thirteen-year-old girl, hereinafter "D.D.," a pupil enrolled in St. Mary's School, Sayreville, which alleges that D.D. was "assaulted" by Robert H. Beam, hereinafter "respondent" or "teacher," employed by the Sayreville Board of Education, hereinafter "Board."

The charge, dated September 13, 1972, was considered by the Board at a special meeting held September 27, 1972, and was certified to the Commissioner of Education by a resolution adopted by the Board on the same date. The teacher was also suspended by the Board at one-half pay for sixty days. The teacher, in his filed Answer to the Petition herein, denies the charge.

A hearing in this matter was conducted on December 15, 1972 at the office of the Middlesex County Superintendent of Schools before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:



Pertinent parts of the parents' letter to the Board which form the bases for the charge, *sub judice*, is as follows:

“\*\*\* My wife and I wish to make a formal complaint against a teacher in our public school system by the name of Robert Beam.

“This same teacher assaulted our 13 year old daughter on Friday, the 8th of September 1972, at about 9:15 P.M. on Washington Road & Johnson's Lane in Parlin, New Jersey.

“We have filed charges against this man in police headquarters and there are several witnesses to this assault.

“Our concern right now is to keep Mr. Beam from teaching in our system and for that matter in any system as he has poor qualifications for a teacher.

“We request the board to remove this man from his teaching duties immediately.\*\*\*”

Testimony regarding the incident of September 8, 1972, was heard from: D.D.'s father; D.D. who was allegedly assaulted, a fifteen-year-old boyfriend, hereinafter “J.S.,” who allegedly witnessed the incident; a man who allegedly became involved in the incident; and the President of the Board. Additionally, the Board also elicited testimony from a police officer who is in charge of the Sayreville Police Department's Record Bureau. The hearing examiner refused to accept into evidence a police report regarding the incident of September 8, 1972, which was offered by the Board.

The testimony of the Board's witnesses is summarized as follows:

During the evening of September 8, 1972, D.D., accompanied by three girl friends, had a repast at a restaurant located on Washington Road in Sayreville. Upon leaving the restaurant around 8:45 p.m., the girls met two boyfriends outside, L.G. and J.S. (J.S. offered testimony herein in corroboration of D.D.'s statements), and a conversation ensued.

At that time, a man was observed standing alongside Washington Road. After taking a closer look, J.S., who is a pupil at the Sayreville High School, noticed that the man was “Mr. Beam,” [respondent herein] (Tr. 51) a teacher in the Sayreville School System. It was testified that the teacher walked to the restaurant parking lot which borders the corner of Johnson Place and Washington Road. J.S. and L.G. then walked over to talk with the teacher, while the four girls remained in front of the restaurant. J.S. testified that the teacher was “\*\*\* dressed up.\*\*\*” (Tr. 52) This fact was corroborated by the man who later became involved and who testified that the teacher was dressed in a “\*\*\* sport jacket and a tie and a shirt\*\*\*,” with the shirt open and the tie pulled down. (Tr. 64) During the conversation with the teacher, the boys asked him how he was going to get home. It was testified that he replied by indicating with

his arms that he was going to fly home. (Tr. 53) In regard to the teacher's physical appearance, J.S. testified that "\*\*\*\*his hair was a little messed and he [his complexion] was red.\*\*\*\*" (Tr. 53)

While the two boys were conversing with the teacher, two of the girls standing in front of the restaurant with D.D. decided that they would go home. The remaining girl and D.D. then decided they, too, would go home. The hearing examiner notices, according to a very rough sketch of the area (P-1), that for D.D. to get home she had to pass the corner of Johnson Place and Washington Road adjacent to the parking lot where the boys and the teacher were talking. D.D. testified that when she walked past the corner, the man [known at that time by J.S. as respondent herein and identified by D.D. at this hearing as the respondent] called to her and asked what time it was. She replied "\*\*\*\* nine o'clock\*\*\*\*" and added that she had to go home. (Tr. 29-30) Further testimony by D.D. reveals that there was no prior conversation between her and the teacher. D.D., in continuing testimony which is substantially corroborated by J.S., stated that when she told the teacher the time, he then grabbed her by the upper part of her arms. (Tr. 31, 54, 55) D.D. began to scream for the teacher to let her go (Tr. 31), while the two boys thought, initially, that he was "\*\*\*\* fooling around.\*\*\*\*" (Tr. 55) Finally, the two boys began telling the teacher to release D.D. (Tr. 55), while she apparently was still screaming "\*\*\*\* let go.\*\*\*\*" It is alleged that respondent then told D.D. he was going to take her to the [Sayreville] junior high guidance counsellor. She told him that she didn't attend the junior high, to which he replied that he was going to take her anyway. (Tr. 31, and substantially corroborated at Tr. 55) Finally, he said he would take her to the police station. (Tr. 31, 55)

At this juncture, D.D. testified that the teacher's "\*\*\*\* eyes were real wide and glassy and his face was real red.\*\*\*\*" (Tr. 32) While D.D.'s friends were telling the teacher to let her go, D.D. states that she was kicking his legs and punching his arms in an effort to free herself. Finally, the teacher released her only to chase her and again grab her — this time on her right wrist. This happened in the restaurant parking lot, approximately thirty feet from the curb line of Washington Road. (Tr. 33) According to D.D., the teacher then dragged her by the right wrist across the parking lot towards the restaurant building. (Tr. 34) Parked in the lot, right next to the building, was a Volkswagen bus. At this location, the teacher was telling her to get closer to him (Tr. 35, 55), and in her judgment she believed that the teacher was trying to force her into the Volkswagen bus. (Tr. 36)

In the meantime, J.S. and his friend ran into the restaurant to secure assistance. One of the several men who came outside to help was Paul Mikalas, twenty-five years of age, who testified for the Board at this hearing. Mr. Mikalas stated that when he went outside, one of his companions was already trying to separate the teacher from D.D. At that point, Mr. Mikalas testified that he heard the girl say [to the teacher], "\*\*\*\* Let me go. You are hurting me.\*\*\*\*" (Tr. 62) The teacher still held the girl. Subsequently, a fight broke out between the teacher and two of the patrons who had come outside to help D.D. Paul Mikalas testified that he then tried to break up that fight. According to Mr. Mikalas, the

teacher then attacked him, but he was successful in restraining the teacher against a wall until the police arrived. Upon the arrival of the Sayreville police, D.D. testified, she was required to go to the police station, as was the teacher.

Finally, in regard to the events set forth above, D.D. testified that as a result of the teacher grabbing her arms, her biceps became bruised and black and blue, a condition which lasted about ten days. (Tr. 39, and as corroborated by her father as to a bruise at Tr. 84)

The President of the Board testified that while the Board was considering the certification of the complaint, *ante*, he received a telephone call from the teacher. In summary, the teacher asked the President whether the Board would consider not proceeding against him because he was sorry for what had occurred. The President testified that he asked the teacher if there were anything that he could tell the Board regarding the incident which would assist the Board to reach a determination not to certify the charge to the Commissioner. The Board President testified that the teacher responded by saying: “\*\*\* I can’t remember anything that happened that night \*\*\*.” (Tr. 100) The hearing examiner points out that no objection to the question was raised by teacher’s counsel.

The hearing examiner concludes from the credible testimony presented by the witnesses that the actions of the teacher herein were substantially as stated above.

According to a report from the Deputy Court Clerk of the Municipal Court, Borough of Sayreville (R-4), accepted over the objection of counsel for the Board, the following occurred as a result of the incident of September 8, 1972:

“MUNICIPAL COURT OF THE BOROUGH OF SAYREVILLE

\*\*\*

“December 12, 1972

“\*\*\*

“Re: *State vs. Robert H. Beam*

“Gentlemen:

“This is to certify that the trial of charges against Robert H. Beam came on for hearing on October 19, 1972 and the original charges were, three charges of assault and battery on Anthony DiCorcia, Paul Mikalas and Patrolman Robert Dunworth, of the Sayreville Police Department. During the trial, the court amended it to read violation of Borough Ordinance

deleting the charges of assault and battery. Robert H. Beam was found guilty on the disorderly conduct charges and paid a fine of \$200.00.

“Yours truly,

\*\*\*

“ANN ZEBRO,  
DEPUTY COURT CLERK”

The hearing examiner notices that R-4, *ante*, specifies original “assault” charges upon Paul Mikalas (a witness in this hearing before the Commissioner), Anthony DiCorcia, a friend of Mr. Mikalas who, according to the testimony of Mr. Mikalas, was one of the two men who became involved in an altercation with the teacher, *ante*, and Patrolman Robert Dunworth.

In the instant matter, no evidence was presented that any formal complaint was preferred against respondent at Sayreville Police Headquarters by the parents of D.D., as was stated in their letter complaint addressed to the Board.

During opening statements, counsel for the teacher moved that the Commissioner order the Board to pay him the remaining one-half salary withheld during the sixty-day period of his suspension. The Motion was made on the grounds that *N.J.S.A. 18A:6-14* provides for the suspension of a teacher, with or without pay, pending a determination of charges by the Commissioner. There is no provision, respondent asserts, for a teacher to be suspended at one-half pay because such action is tantamount to the Board inflicting its own punishment upon him, and such punishment by the Board, respondent avers, is outside its authority.

In opposition to respondent’s Motion, the Board asserts that it acted properly under the authority of *N.J.S.A. 18A:6-14*. Moreover, the Board avers, respondent’s argument, if carried to a logical conclusion, would create a situation wherein a suspension without pay would not constitute a penalty, whereas a suspension at half-pay would constitute a penalty.

The hearing examiner notes that no proofs were offered by respondent that the Board’s suspension action was contrary to *N.J.S.A. 18A:6-14*, nor that the suspension was unreasonable.

Counsel for the Board, in final oral summation, avers that the uncontradicted testimony herein discloses that a thirteen-year-old girl was, in fact, detained against her will, bruised, physically hurt, frightened, and that the teacher had to be physically forced to release her. Such conduct, counsel argues, is surely sufficient to warrant dismissal or reduction in salary.

Counsel for respondent argues that perhaps respondent imbibed unwisely, and that he was in a “frolicsome” state in mind at the moment the incident with

D.D. occurred. However, counsel poses the question of whether the incident of September 8, 1972, warrants dismissal. (Tr. 126) Counsel argues that the Board itself answered that question when it suspended respondent for only sixty days and then reinstated him to his full-time teaching position. Counsel therefore concludes that the Board does not believe this incident warrants dismissal.

In regard to what occurred on the evening of September 8, 1972, counsel asserts that presumably the front of the restaurant was well-lighted, and children aged thirteen, fourteen and fifteen were wandering in and out of the restaurant. Respondent asked the girl the time and he placed his hands on her to ask her the question. There is no showing, counsel avers, that he did anything to her, other than place his hands on her.

Respondent argues that because the original charges of assault and battery (R-4, *ante*) were reduced to disorderly conduct, coupled with the Board's suspension of respondent for sixty days at one-half pay, the Commissioner must find that no additional penalty should be inflicted upon respondent as a result of these proceedings. (Tr. 131)

Furthermore, counsel argues that there was no showing that this single incident constitutes incapacity, unbecoming conduct or other just cause, pursuant to *N.J.S.A.* 18A:6-10, which warrants a substantial penalty. Finally, because the incident occurred outside of and away from the public schools, counsel questions whether the Commissioner of Education has any authority to act in this instance. This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully reviewed the report of the hearing examiner as set forth above, and the record in this instant matter.

In regard to the Board's action in suspending the teacher at one-half pay for sixty days, the Commissioner notes that *N.J.S.A.* 18A:6-14 provides in pertinent part as follows:

"Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same \*\*\*."

It is clear that a board may suspend a teacher with or without pay once charges are certified to the Commissioner. However, the precise issue of whether a board, upon certification of charges to the Commissioner against a tenured employee, may suspend such employee at one-half pay has not, to the Commissioner's knowledge, been heretofore adjudicated.

The Commissioner observes that local boards of education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie*, 3 N.J. 17 (1949); *N.J.*

*Good Humor Inc. v. Bradley Beach*, 124 N.J.L. 162 (E. & A. 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 N.J. Super. 524 (Law Div. 1949) In regard to the instant matter, the Legislature empowered local boards of education by N.J.S.A. 18A:6-14 with the authority to “\*\*\* suspend \*\*\* with or without pay \*\*\*.” In the judgment of the Commissioner, neither this Board nor any other local board of education may modify the precise requirements of N.J.S.A. 18A:6-14. A board may suspend only with or without pay, and not with a portion of such pay. Also, the suspension clearly must extend to the “\*\*\* final determination \*\*\*” of the charge by the Commissioner. Accordingly, the Commissioner determines that the Board’s action of suspending the teacher at one-half pay for the limited period of sixty days was outside of the statutory authority granted it by N.J.S.A. 18A:6-14 and is hereby set aside. The Commissioner therefore orders the Sayreville Board of Education to remit to Robert H. Beam at the next regular pay period following this decision, the sum equal to the one-half pay which was withheld for the aforementioned sixty-day period mitigated by any moneys earned by him during that time.

Secondly, the Commissioner has carefully considered the report of the Municipal Deputy Clerk. (R-4, *ante*.) As the hearing examiner has stated, the original complaint at the municipal level was against respondent for assault and battery, later amended to disorderly conduct, upon two adult civilians and one policeman. The Commissioner notes that contrary to the parents’ letter, *ante*, upon which the Board certified a charge, there is no evidence in the record before the Commissioner that the parents of D.D. signed a complaint at Sayreville Police Headquarters against respondent as a result of the incident of September 8, 1972. The administrative hearing before the Commissioner has been conducted as the result of the parents’ alleging an “assault” on their daughter and the subsequent resolution of the Board certifying that charge. Accordingly, R-4, *ante*, is only relevant to the instant matter insofar as it establishes proof of the occurrence of the September 8, 1972, incident.

Thirdly, the Commissioner finds respondent’s argument that, because the occurrence happened in the evening away from school premises, both the Board and the Commissioner have no authority to act, is without merit. The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia*, a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. See *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1965 S.L.D. 159, affirmed State Board of Education 1970 S.L.D. 448; *In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County*, 1971 S.L.D. 623.

From a careful review of the record in the instant matter, the Commissioner finds that D.D., a thirteen-year-old pupil, was threatened, cajoled,

and bruised by a person who possesses the responsibilities of a teacher. That this incident occurred during the evening hours only heightens the seriousness of its nature. Testimony regarding this incident was provided by D.D., her fifteen-year-old friend, and a man, twenty-five years old, who came to D.D.'s assistance.

Having found that the credible evidence amply supports the allegations herein, as described by D.D., there remains the question of whether this charge demonstrates conduct unbecoming a teacher or other just cause warranting dismissal, or, if not, what lesser penalty, if any, should be imposed. While the Commissioner will not under any circumstance, condone behavior such as exhibited by respondent herein, this single, isolated incident is not sufficient to warrant dismissal from his tenured position. However, the conduct demonstrated by respondent herein does deserve a penalty lesser than dismissal. The Commissioner determines, therefore, that Robert H. Beam continue in his capacity as a teacher in the Borough of Sayreville Public Schools, Middlesex County, and further that he shall receive a reduction in salary, effective as of the date of this decision, equivalent to the last salary increment provided him by the Sayreville Board of Education. Such level of salary shall be maintained for the 1973-74 school year.

COMMISSIONER OF EDUCATION

March 20, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Borough of Clementon,  
Camden County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held February 13, 1973 in the Borough of Clementon, Camden County, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
John F. Henderson	178	- 0 -	178
James P. Dailey	241	2	243
Peter G. Pino, Jr.	226	2	228
William Davidson	172	2	174
Kurt G. Kluge	137	- 0 -	137

Included in the announced results but omitted from the results as set forth above are four write-in choices, three of whom received one vote, while one received two votes. Pursuant to a letter request from Candidate Davidson dated

February 15, 1973, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast in this election. The recount was conducted at the office of the Camden County Superintendent of Schools on February 28, 1973.

The Commissioner's representative reports that at the conclusion of the recount, the tally of the uncontested ballots with nine ballots left for the Commissioner's determination, stood as follows:

	At Polls	Absentee	Total
John F. Henderson	177	- 0 -	177
James P. Dailey	239	2	241
Peter G. Pino, Jr.	228	2	230
William Davidson	176	2	178
Kurt G. Kluge	137	- 0 -	137
	*	*	*

The Commissioner makes the following determination with respect to the nine ballots referred to him.

*Exhibit A* – Two ballots, each of which contains no cross (X), check (✓) or plus (+) in the squares to the left of the candidates' names as required by law. The Election Law, Title 19, to which the Commissioner looks for guidance, at R.S. 19:16-3g provides:

“\*\*\*No vote shall be counted for any candidate \*\*\* unless the mark made is substantially a cross X, plus + or check ✓ and is substantially within the square.”

Although one of the two ballots has cross (X) marks to the right of two candidates' names, both ballots, in the Commissioner's view, may not be counted because the statutory requirement of “\*\*\* substantially within the square\*\*\*” has not been met. See *In the Matter of the Annual School Election Held in the Borough of South Belmar, Monmouth County*, 1966 S.L.D. 27; *In the Matter of the Annual School Election Held in the School District of the Borough of Somerdale, Camden County*, 1969 S.L.D. 21.

*Exhibit B* – Three ballots, all of which have completely filled-in squares to the left of candidates' name instead of a cross (X), a plus (+), or a check (✓) to identify the voter's choice. The Commissioner cannot reconcile a voter indicating his choice of candidates by completely filling in the squares to the left of the selected candidate's name, with the statutory requirement for the mark to be “\*\*\* substantially a cross X, plus + or check ✓ \*\*\*.” R.S. 19:16-3g Accordingly, the ballots contained within this exhibit shall not be counted as votes for any of the candidates. See *Petition of Wade*, 39 N.J. Super. 520 (App. Div. 1956); *In re Keogh-Dwyer*, 85 N.J. Super. 188 (App. Div. 1964).



*Exhibit C* – Two ballots, one of which is identified as C-11, has properly placed cross (X) marks in the squares to the left of the names of Candidates Henderson and Dailey. However, to the right of Candidate Henderson's name is also a cross (X) mark. The Commissioner is satisfied that the mark made to the right of Candidate Henderson's name is not intended to identify the ballot and, therefore, allows on this ballot one vote for Candidate Henderson and one vote for Candidate Dailey. See *In re Recount of the Ballots Cast in the Annual School Election in the Borough of Bloomingdale, Passaic County, 1955-56 S.L.D. 103*; *In the Matter of the Annual School Election Held in the School District of the Borough of Somerdale, Camden County, supra*. In regard to the second ballot herein, identified as C-8, three candidates, Henderson, Dailey and Kluge, have substantially made cross (X) marks in the squares to the left of their names. However, all the marks thereon are embellished with additional lines. It is the Commissioner's judgment that all votes on this ballot must be counted. Such marks as these, although crudely made, are not uncommon and are obviously the result of careless marking, infirmity, poor vision or visibility, or some other cause rather than an attempt to distinguish the ballot. The mark is substantially a cross (X), is substantially within the square, and meets the provisions of R.S. 19:16-3g, which provides in part:

"If the mark made for any candidate \*\*\* is substantially a cross X, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate. \*\*\*."

See also *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County, 1970 S.L.D. 82*.

*Exhibit D* – Two ballots, one of which, identified as C-7, has properly-made cross (X) marks in the squares before Candidates Henderson, Dailey and Pino's names. In addition, however, is an apparent cross (X) mark before Candidate Davidson's name which has been penciled over. It is the Commissioner's judgment that this voter either erroneously voted for Candidate Davidson and attempted to change his vote, or voted for Candidate Davidson and then changed his mind. In any event, the Commissioner has no reason to believe that this voter intended to identify or distinguish his ballot and shall, accordingly, allow one vote each for Candidates Henderson, Dailey, and Pino.

In like manner, the second ballot in this exhibit, identified as C-5, has properly-placed cross (X) marks in the squares to the left of the names of Candidates Dailey, Pino, and Davidson. However, this voter also drew heavy lines through the name of Candidate Henderson. As in the first ballot of this exhibit, the Commissioner has no reason to believe that this voter intended to identify or distinguish his ballot by drawing lines through Candidate Henderson's name. Accordingly, on this ballot one vote each shall be allowed for Candidates Dailey, Pino, and Davidson. See *In re Middlesex Borough Annual School Election, 1938 S.L.D. 161*; *In the Matter of the Annual School Election Held in the School District of the Borough of Somerdale, Camden County, supra*.

When the ballots in Exhibits C and D are added to the recount total as set forth above, the results are as follows:

**EXHIBITS**

	<b>Uncontested</b>	<b>C</b>	<b>D</b>	<b>Total</b>
John F. Henderson	177	2	1	180
James P. Dailey	241	2	2	245
Peter G. Pino, Jr.	230	- 0 -	2	232
William Davidson	178	- 0 -	1	179
Kurt G. Kluge	137	1	- 0 -	138

The Commissioner finds and determines that John F. Henderson, James P. Dailey, and Peter G. Pino, Jr. were elected to full terms of three years each on the Board of Education of the Borough of Clementon, Camden County, at the annual school election on February 13, 1973.

COMMISSIONER OF EDUCATION

March 20, 1973

**Eric H. Beckhusen, Joseph L. Keefe,  
Harry W. McDowell and John J. Sprowls, M.D.,**

*Petitioners,*

*v.*

**Board of Education of the City of Rahway and  
Louis R. Rizzo, Union County,**

*Respondents.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioners, Methfessel & Werbel (John Methfessel, Esq., of Counsel)

For the Respondents, Hutt & Berkow (Stewart M. Hutt, Esq., of Counsel)

Petitioners, four members of the Board of Education of the City of Rahway, Union County, hereinafter "Board," allege that the action taken by four other members of the Board at a regular meeting held May 15, 1972, electing a person to a vacant seat on the Board, was improper and illegal. The Board denies the allegation and asserts that the procedure of electing a person to fill the vacancy was wholly proper and within the Board's statutory authority.

Petitioners pray for relief in the form of an Order by the Commissioner of Education setting aside the Board's above-stated action and declaring a vacant seat on the Board.

Testimony and documentary evidence were adduced at a hearing conducted on November 15, 1972 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. Both parties subsequently filed original and reply Briefs by December 22, 1972.

The report of the hearing examiner is as follows:

The School District of the City of Rahway is organized as a type II district with a nine-member elected Board of Education. (*N.J.S.A. 18A:12-18,19*)

One member of the Board submitted a letter under date of March 21, 1972, wherein he requested that the Board accept his resignation effective May 1, 1972. (Exhibit R-1) This resignation was formally accepted by the Board at the regular meeting held April 17, 1972. (Exhibit R-4)

The Board President testified that the question of a possible candidate for appointment by the Board to the vacant seat was discussed informally at a conference of the Board held April 13, 1972. (Tr. 7-8) According to the President, two names were suggested as possible candidates for appointment to the single vacancy, and, although no formal vote was taken, it was clear that four Board members favored one candidate and the remaining four Board members favored another. (Tr. 8-9) At this same April 13, 1972 conference, an unspecified Board member requested that the regular meeting scheduled for May 15, 1972, be postponed until May 16, 1972, because Petitioner Beckhusen had notified the Board that he would be away on business on May 15, 1972, and Petitioner Sprowls, the Board President, and Petitioner Keefe both had children scheduled to participate in a religious confirmation exercise during the evening of May 15, 1972. (Tr. 9) The minutes of the regular meeting held April 13, 1972, disclose that a motion was made and seconded to postpone the regular meeting of May 15, 1972 to the next evening of May 16, 1972. This motion was defeated by a vote of four ayes to four nays (Exhibit R-4), with the four aye votes cast by the four petitioners in the instant matter. These minutes also disclose a suggestion by one of the Board members who voted against the motion to postpone, that the President call special meetings between May 1 and May 15, 1972 for the purpose of considering an appointment to the Board's vacant seat. (Exhibit R-4) (Tr. 36-37) The President testified that he did not follow this suggestion and call any special meetings between May 1 and May 15, 1972 for the purpose of selecting an appointee to the vacant Board seat because "\*\*\*\* basically they [the four nay voters] did not want to change the meeting date from the 15th of May to the 16th of May. There was not much point then in pursuing any special meeting along that line. \*\*\*\*" (Tr. 44)

The Board President also testified that prior to the regular meeting of May 15, 1972, he discussed with Petitioner McDowell the probability that the four

Board members, who are not petitioners, would nominate an appointee to fill the Board's vacant seat at the May 15, 1972 meeting. (Tr. 14)

Also prior to the May 15, 1972 meeting, the President testified, he secured a legal opinion from the Board's regular counsel that four members of the Board could not constitute a quorum to conduct business. (Tr. 50,53) The Board President also testified that he had discussed this same question with the Executive Director of the New Jersey School Boards Association. (Tr. 50) The President stated that he related these two discussions to Petitioner McDowell. (Tr. 75) Also prior to May 15, 1972, the President testified, he informed Petitioner McDowell that he would leave the May 15, 1972 meeting if a nomination were made to appoint an individual to fill the vacant Board seat. (Tr. 49) When asked whether he and Petitioner McDowell jointly agreed to leave the May 15, 1972 meeting, the President testified, *inter alia*, as follows:

“\*\*\* after these conversations, Mr. McDowell and I, I guess, arrived separately or jointly at a conclusion that our only alternative [to stop the nomination] was to leave the meeting. \*\*\*” (Tr. 50)

The Board President testified further that he made no attempt to influence Petitioner McDowell to leave the May 15, 1972 meeting, and Petitioner McDowell made no attempt to influence him. (Tr. 75)

Petitioner McDowell testified that he was informed prior to May 15, 1972, that four Board members, other than petitioners, would place their candidate in nomination for the vacant Board seat on May 15, 1972. (Tr. 86) He testified that he had several conversations with the Board President in April and May, during which both discussed the possibility of leaving the May 15, 1972 Board meeting, so that no quorum would exist, in the event that nominations were opened to fill the vacant seat. (Tr. 87) Petitioner McDowell also testified that during these conversations the Board President mentioned that he had received legal advice regarding the question of a quorum. (Tr. 87) Petitioner McDowell did not speak to the Board's regular counsel regarding a quorum, he said, but other persons had given him the same unsolicited advice regarding preventing a nomination on May 15, 1972. (Tr. 88) Petitioner McDowell testified that he and the Board President did not make any agreement that they would leave the May 15, 1972 meeting to prevent a quorum and the transaction of business. (Tr. 88)

Petitioner Keefe's deposition was marked in evidence in this matter. (Exhibit R-11) According to Petitioner Keefe, he spoke to the Board President on May 15, 1972 at approximately 7:00 p.m. in front of a church where he was to participate in a religious ceremony, and the Board President told him that if a nomination were made at the Board meeting to fill the vacant seat, the President and Petitioner McDowell “\*\*\* had generally decided that they would leave the meeting. \*\*\*” (Tr. 58) (Exhibit R-11, at p. 72)

The Board President testified that he probably discussed his general position regarding leaving the May 15, 1972 meeting with Petitioner Beckhusen. (Tr. 59) Petitioner Beckhusen testified that, although he was away on business

and did not attend the Board meeting of May 15, 1972, he had discussed the matter of a quorum with the Board President and Petitioner McDowell, and he believed that both of them would leave the meeting if a nomination were made to fill the vacant seat. (Tr. 97)

It is stipulated that six members of the Board were present at the May 15, 1972 meeting. Of the six, only two of the petitioners, the President and Petitioner McDowell, were present. Petitioners Keefe and Beckhusen were absent, and one seat was vacant.

The minutes of the regular meeting held May 15, 1972 (Exhibit R-7), disclose that a nomination was made and seconded for an appointee to fill the vacant seat. Immediately following the seconding of the motion, the following comments were made by the Board President:

"I just want to make a few public comments along this line. This task of appointing a replacement for Mr. Pratt on the Board of Education will not be an easy matter. I feel that any vote should be delayed for the following reasons: Due to unforeseen circumstances two Board members cannot be present. I was able to make this meeting because only one ticket was available for a family at the confirmation. Mr. Keefe who is also at the confirmation had a part in the honor guard and was not able to be here. Mr. Beckhusen is out of town. Until this recent Board caucus only two names were submitted and neither could garner more than four votes. I suggest that we sit down and discuss other names in the near future to see if some compromise candidate could be chosen. We are all mature men and should be able to discuss this matter intelligently and without undue emotional overtones. I feel the Board has been functioning very well despite the differences in our philosophical approach to education. A special public meeting of the Board can then be held to confirm the appointment of the person having the majority approval. This can be done any time and thus make the individual chosen a member of the Board before next month's regular meeting. For these reasons I cannot participate any further in this meeting until the matter as important as this has been thoroughly discussed." (Exhibit R-7, at p. 2)

Immediately following the above statement, the minutes disclose a statement by the Board Secretary that the President left his seat and walked offstage, and that Mr. McDowell was not present in his seat. (Exhibit R-7, at p. 3)

These minutes also record the fact that the Board's regular counsel, who was present on May 15, 1972, was asked whether the Board could continue to transact business with only four members present, and he advised the Board that the remaining four members did not constitute a quorum, therefore no further business could be transacted. (Exhibit R-7, at p. 3) Following additional extensive discussion, the roll was called on the motion to elect an individual to the Board's vacant seat, and the vote was four ayes and no nays. (Exhibit R-7, at p. 7)

Petitioner McDowell testified that he had left his seat immediately following the nomination of a candidate, and he did not hear the comments, *ante*, made by the Board President. (Tr. 88, 91)

The bylaws of the Board of Education (Exhibit R-10) state, *inter alia*, that “\*\*\* In special and regular meetings a majority of the whole Board shall constitute a quorum to do business. \*\*\*”

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

Since the annual school election occurred on February 13, 1973, and the seat in question has now been filled by a vote of the electorate, the issue herein may be considered moot. From the record before the Commissioner, it is noted that the parties made efforts to reconcile this issue following a conference of counsel, depositions of petitioners were taken in October 1972, a hearing was held on November 15, 1972, and Briefs and rebuttals were filed by December 22, 1972.

Although the Commissioner does not generally adjudicate moot issues, the question of a quorum posed herein is one that is frequently raised by local boards of education. The Commissioner will depart from his usual practice, therefore, and rule on this issue for the future guidance of this and other local boards of education.

In *Polonsky et al. v. Red Bank Board of Education et al.*, 1967 S.L.D. 93, the Commissioner decided an issue regarding the number of votes required to elect a citizen to fill a board vacancy. In that case, three persons were nominated to fill a single vacancy, and following a vote by secret ballot, one nominee received four votes, the second nominee received two votes, the third received one vote and one ballot was blank. The single vote was then transferred, by request of the voting member, to the candidate receiving two votes. This resulted in a final tally of four votes for one nominee and three votes for the second nominee. Subsequently, an attack was made on the Red Bank Board's action on the grounds that the election to fill the vacancy should have required a majority vote of the whole number of members of the Board.

The Commissioner's decision in *Polonsky, supra*, stated that:

“\*\*\* Nowhere does the statute [now N.J.S.A. 18A:12-15] express or imply that a majority of the whole number of members is needed to elect. It must be concluded, therefore, that where there are more than two candidates for election to fill the vacancy under this statute, a plurality of votes is sufficient. \*\*\*” (at p. 96)

The Commissioner concluded in *Polonsky, supra*, that the nominee who received four votes was elected by a plurality of the votes cast at a legally-constituted meeting to a seat on the Board, until the first meeting of the succeeding Board of Education.

The novel feature of the instant matter is that only four members of the existing eight members of the Board were actually present and voting for a nominee to fill the single vacancy, in accordance with *N.J.S.A.* 18A:12-15.

Thus, the narrow issue now before the Commissioner is whether the presence of four members of a normally nine-member Board of Education, constituted a quorum for the legal transaction of the Board business.

The word "quorum," now in common use, is from the Latin. In *Snider v. Rinehart*, 31 P. 716, 18 *Colo.* 18, the Court stated the following at p. 718:

"It was anciently used in the commissions by which the king of Great Britain designated certain justices 'jointly and severally to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be done without their presence.' The persons so designated as essential to the transaction of business were called 'justices of the quorum.'\*\*\*\*"

The adjudication of questions regarding a quorum for the transaction of business may be found in New Jersey court decisions spanning a period in excess of one hundred years. In 1871, the New Jersey Supreme Court considered a quorum question in *State ex rel. Mason v. Mayor and Alderman of the City of Paterson*, 6 *Vroom* 190 [35 *N.J.L.* 190 (*Sup. Ct.* 1871)]. Regarding the precise question of the constitution of a quorum, the Court stated the following at p. 194:

\*\*\*\* The principle is so well settled that it is difficult to select, among the many authorities that may be cited in support of the position, that the general rule is, that to make a quorum of a select and definite body of men possessing the power to elect, a majority at least must be present, and then a majority of the quorum may decide. The distinction is between a corporate act to be done by a select body, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act. *Willcocks, ex parte*, 7 *Cow.* 409, and note; *King v. Miller*, 6 *Term R.* 269; *King v. Bellringer*, 4 *Term R.* 810 [100 *E.R.* 1315 (*K.B.* 1792)] \*\*\*."

In 1883, in the case of *McDermott v. Miller*, 16 *Vroom* 251, [47 *N.J.L.* 251 (*Sup. Ct.* 1883)] the Court stated at p. 254:

\*\*\*\* It is the general rule that a majority of a select body of men possessing the power to elect being present, a majority of the quorum may elect. *State v. Paterson*, 6 *Vroom*, 190 \*\*\*\*"



The Court pointed out that this rule would not be enforced where there were specific directions in the city charter prescribing the mode of election and the number of electors required to appoint to an office. The Court added at p. 254 that “\*\*\* Where the statute directs the mode of election, this must be exactly followed to effect a valid appointment. \*\*\*”

In *McDermott, supra*, the Court decided that five members of the total of an eight-member city council constituted a quorum, and the prosecutor was properly elected by a majority of four votes to the position of city clerk. The Court noted that if all eight members of the council had been present, a majority of all would have been required to elect.

In 1885, in the case of *State ex rel. Cadmus v. Farr*, 18 *Vroom* 208, [47 *N.J.L.* 208 (*Sup. Ct.* 1885)] the Court pointed out at p. 216 that, in regard to the transaction of business by municipal corporations:

“\*\*\* the legislative intent was to require a specified majority in certain cases. In other cases, in respect to which no rule was prescribed, it is clear the intent was to leave them to the general rule governing the action of corporate bodies.

“The general rule, in the absence of specific provision, is well settled, and is that when the body empowered to act consists of a definite number of individuals, a majority of that number will constitute a quorum for the transaction of business, and when duly met a majority of the quorum may act. The rule was thus stated in *McDermott v. Miller*, 16 *Vroom* 251, and in *State v. Paterson*, 6 *Vroom* 190, and rests on a long line of authority from which I find no dissent. 2 *Kent’s Com.* \*293; *Ang. & A. on Corp.*, §§ 501-504; *Dill. on Mun. Corp.*, f 216; 5 *Dane’s Abr.* 150; *Rex v. Miller*, 6 *T.R.* 268; *Rex v. Bellringer*, 4 *T.R.* 810 [100 *E.R.* 1315 (*K.B.* 1792)]; *Rex v. Monday, Cowp.* 530; *Rex v. Varlo, Cowp.* 250; *Oldknow v. Wainright*, 1 *W. Bl.* 229; *Gosling v. Veley*, 7 *Ad. & E. (N.S.)* 406; *Ex parte Willcocks*, 7 *Cow.* 401; *Lockwood v. Mech. Nat. Bank*, 9 *R.I.* 308; *Buell v. Buckingham*, 16 *Iowa* 284; *Colombia &c., Co. v. Meier*, 39 *Mo.* 53; *Sargent v. Webster*, 13 *Metc.* 497; *First Parish v. Stearns*, 21 *Pick.* 148; *State v. Green*, 37 *Ohio St.* 227. \*\*\*”

In *Cadmus, supra*, at p. 212 the English case of *Rex v. Monday, supra*, is cited wherein an election of an alderman was conducted by five of a definite municipal body having six members, and the choice made by three of them was sustained. In *Monday, supra*, Lord Mansfield said: “\*\*\* When the assembly are duly met, I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting. \*\*\*”

In *Public Service Railway Co., v. General Omnibus Co.*, 93 *N.J.L.* 344 (*Sup. Ct.* 1919) the Court stated the following at p. 351:

“\*\*\* The fact that the Home Rule act makes no provision whatever as to what vote shall be sufficient for the passage of an ordinance, or the



transaction of any other lawful business, is a cogent circumstance tending to establish that the legislature intended that the common law rule, that a majority vote of the members of the municipal body constituting a quorum shall be sufficient for the purposes mentioned.”

The Court continued by stating that:

“This legal rule is well expressed in *Barnert v. Paterson*, 48 N.J.L. 395, [Sup. Ct. 1886] by Mr. Justice Knapp (at p. 400), where he says:

‘When the charter of a municipal corporation or a general law of this state does not provide to the contrary, a majority of the board of aldermen constitute a quorum, and the vote of a majority of those present, there being a quorum, is all that is required for the adoption or passage of a motion or the doing of any other act the board has power to do.’

\*\*\*\* *Hutchinson v. Belmar*, 61 Id. 443; *Whittingham v. Millburn Township (Court of Errors and Appeals)*, 90 Id. 344, 347. \*\*\*\*”

See also *Wescott v. Scull*, 87 N.J.L. 410 (Sup. Ct. 1915) at p. 414 regarding the necessity for a quorum to fill a vacancy on the common council.

The common law rule regarding a quorum is set forth in *Ross v. Miller*, 115 N.J.L. 61 (Sup. Ct. 1935) as follows at p. 63:

\*\*\*\* at common law, a majority of all the members of a municipal governing body constituted a quorum; and in the event of a vacancy a quorum consisted of a majority of the remaining members. [cases cited] \*\*\* And it was likewise the rule at common law that a majority of a quorum was empowered to fill a vacancy, or take any other action within its proper sphere, *Houseman v. Earle*, 98 Id. [N.J.L.] 379; *Cadmus v. Farr*, supra \*\*\*\*”

In *Manno v. City of Clifton*, 14 N.J. Super. 100 (App. Div. 1951) the Court stated at p. 102 that:

\*\*\*\* The common law rule which requires for valid action the affirmative vote of a mere majority of a quorum will prevail in the absence of a statutory provision. \*\*\* Accordingly, the common law rule applies. *Hutchinson v. Belmar*, 61 N.J.L. 443, 449 (Sup. Ct. 1898), affirmed 62 N.J.L. 450 (E. & A. 1898); *Houseman v. Earle*, 98 N.J.L. 379 (Sup. Ct. 1922); *Matthews v. Asbury Park*, 113 N.J.L. 205 (Sup. Ct. 1934). \*\*\*\*”

A case where the common law voting rule regarding a majority of a quorum does not apply is *Dombal v. City of Garfield*, 129 N.J.L. 555 (Sup. Ct. 1943). In that instance the Court determined that the question of how many votes were necessary to fill a vacancy in the Common Council in Garfield was clearly answered by an express provision of the Charter Act that “\*\*\*\* a majority

of the *whole* number of councilmen shall constitute a quorum for the transaction of business \*\*\*.” (at p. 556) Therefore, a quorum of the eight-member council was five councilmen, and, when a vacancy occurred, four members could not act to fill that vacancy.

The decision of the Court in *Prezlak v. Padrone et al.*, 67 N.J. Super. 95 (Law Div. 1961) stated at p. 100 that:

“the [charter] provision which determines that a majority of the whole number of a body requires the presence of a majority of all seats of that body, whether filled or not, has been firmly established in our common law. \*\*\*”

In that case, the charter required that no “corporate action” shall be taken except by the affirmative votes of at least a majority of the whole number of the council members. The Court determined that:

“\*\*\* the action of a city council or municipal governing body in filling a vacancy in such body constitutes the transaction of business. \*\*\*” (at p. 105)

The Court also determined that the charter requirement, *ante*, meant that at least six of the ten members of the city council had to be present in order to duly convene a meeting and transact business, and furthermore, action taken by a bare majority of six of the ten had to receive the unanimous consent of the quorum of six to succeed. (at p. 103)

The school laws of this State set forth instances where specific actions of local boards of education require a majority vote of the full membership of the board. In these instances, the majority must be of all of the seats, regardless of any vacancies on the board. *Dombal v. City of Garfield, supra*; *Prezlak v. Padrone et al., supra*. Actions of local education boards which require a majority vote of the full membership include, but are not limited to: N.J.S.A. 18A:27-1, 25-1, 33-1, 34-1, 29-14, 6-11, 38-6, 17-15, 17-16, 17-5, 17-13, 17-14.1, 17-25, 25-6, 15-2, 16-8, 14-39, 20-8, 20-5, 51-1, 51-11.

N.J.S.A. 18A:12-15 provides, *inter alia*, that vacancies in the membership of a local board of education shall be filled

“\*\*\* b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking \*\*\*.”

Accordingly, in instances where a board is constituted either of three, five, seven or nine members, or more in the case of one regional board, at no time does the statutory plan permit the lack of a quorum by reason of vacancies. In the improbable but not impossible instance where five seats of a nine-member board suddenly became vacant, the county superintendent would thereupon appoint one to maintain a quorum of five members.

In the instant matter, the Board is constituted to have the definite number of nine members; therefore, a quorum to transact business must be composed of no less than five members, and the Commissioner so holds.

Because the statutory provision, *N.J.S.A. 18A:12-15*, insures that each local board of education shall consist of a quorum of the full membership under all circumstances, the common law rule that a quorum shall consist of a majority of the occupied seats, as stated in *Ross v. Miller, supra*, does not apply.

The Commissioner will also consider the arguments set forth in defense by the Board in this matter.

The Board argues that since Petitioner Sprowls was present just prior to the voting on the nomination to fill the vacancy, and since he expressed his dissent to the voting prior to his departure from the meeting, the Commissioner should construe his action as a negative vote. Assuming, *arguendo*, that the Commissioner adopted this argument by the Board, the Board concludes that this one negative vote added to the four affirmative votes cast, would then constitute a legal quorum of five voting Board members. The Board cites *State, ex rel. Rhinesmith v. Goodfellow*, 111 *N.J.L.* 604 (*E. & A.* 1933) to buttress this argument.

The Commissioner observes that in *Rhinesmith, supra*, three members of a six-member borough council voted to reappoint the borough clerk, and the three remaining members expressed their dissent to the appointment, quit the council table while remaining in the meeting room, and did not vote. These three members were recorded in the minutes as casting negative votes, and the Mayor declared a tie and cast the tie-breaking vote in favor of the appointment. The Court found in favor of the borough clerk, stating of the three members who quit the council table:

“\*\*\* Their refusal to vote justified recording them in the negative. *Kozusko v. Carretson*, 102 *N.J.L.* 508. \*\*\*” (at p. 607)

The Commissioner does not agree that *Rhinesmith, supra*, controls in the instant matter. In this instance, both Petitioners Sprowls and McDowell actually departed not only from the table, but from the meeting room and did not return thereafter. Their expressed intention to act thusly is clearly stated in the record before the Commissioner. At the point in time when these two petitioners physically departed from the Board meeting, the number of members present was reduced from six to four, thus resulting in the lack of a quorum, and the Commissioner so holds.

The Board also argues that the destruction of the quorum by the exit of two petitioners should be held void on the grounds that their action was motivated by a conspiracy in violation of their public trust. The Board cites *Cullum v. Board of Education of North Bergen Township*, 15 *N.J.* 285 (1954) wherein the New Jersey Supreme Court found that several board members violated their positions of public trust by conspiring to usurp the

decision-making authority of the board in the selection of a Superintendent of Schools. The Court upheld the board's subsequent invalidation of the action taken at a secret special meeting, stating that the circumstances were convincing, in the language of Justice Burling in *Grogan v. DeSapio*, 11 N.J. 308 (1953), that there was "\*\*\*\* a lack of exercise of discretion and an arbitrary determination.\*\*\*\*" (at p. 325)

In the judgment of the Commissioner, the instant matter is distinguishable from both *Cullum*, *supra*, and *Grogan*, *supra*. In each of those cases a group of board or council members took action in a manner which the Court found wholly improper and illegal. Also, in each case the action in question was set aside by the Court. The actions in question were found to be contrary to the public interest in each case.

The uncontradicted testimony of Petitioners Sprowls and McDowell is that each reached an independent determination to exit from the meeting, each was aware of or had been informed by advices of counsel regarding the applicable law, and, apparently, each believed his action to be in the public interest.

The Board asserts that petitioners should be denied relief by invocation of the doctrine of unclean hands. This doctrine was expressed by Justice (then Judge) Jacobs in *Medical Fabrics Co. v. D. C. McClintock Co.* 12 N.J. Super. 177 (*App. Div.* 1951) as follows at pp. 179-180:

"\*\*\*\* The clean hands doctrine is an ethical concept long applied in courts of equity although not peculiar thereto. *Chaffee, Some Problems of Equity* (1950), pp. 1, 94. In general, its requirement is not that suitors seeking relief in equity 'shall have led blameless lives' (*Loughran v. Loughran*, 292 U.S. 216, 229, 78 L. Ed. 1219, 1227 (1934)), but rather that they shall not have acted fraudulently or unconscionably with respect to the particular controversy in issue. *Precision Instr. Mfg. Co.*, 324 U.S. 806, 815, 89 L. Ed. 1381, 1386 (1945); *Neubeck v. Neubeck*, 94 N.J. Eq. 167, 170 (*E. & A.* 1922). When applicable it is invoked not out of regard for the defendant or to punish the plaintiff but upon larger considerations 'that make for the advancement of right and justice.' *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 88 L. Ed. 814, 891 (1944). *Cf. Casini v. Lupone*, 8 N.J. Super. 362, 365 (*Ch. Div.* 1950); *Hansen v. Local No. 373*, 140 N.J. Eq. 586, 589 (*Ch.* 1947).

"While the doctrine is firmly rooted and naturally appeals to persons of good conscience, it may well disserve the interests of justice if applied oversensitively or as a rigid formula restraining the court's just exercise of discretion. *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.*, *supra*; *Chaffee, supra*, p. 99. Accordingly, there has been a recent wholesome tendency amongst courts to apply the doctrine flexibly in the light of the particular circumstances presented. See 60 *Harv. L. Rev.* 980, 981 (1947); *Rasmussen v. Nielsen*, 142 N.J. Eq. 657, 661 (*E. & A.* 1948); *A. Hollander & Son, Inc., v. Imperial Fur Blending Corp.*, 2 N.J. 235, 247 (1949); *Hansen v. Local No. 373, supra*. \*\*\*\*"

In *Medical Fabrics Co.*, *supra*, Justice Jacobs reviewed the cases of *Rasmussen*, *supra*, *Hollander*, *supra*, and *Hansen*, *supra*, setting forth standards for applying the equitable principle exemplified by the familiar maxim: "He that hath committed iniquity shall not have equity." *Hansen*, *supra*, at p. 589.

The Commissioner notices from his review of *Hollander*, *supra*, the following statement of Justice Wackenfeld at p. 247:

“\*\*\* The doctrine, however, is not so rigid nor should it be so construed as to allow or permit an unconscionable gain to the wrongdoer at the complainant's expense. In cases of this kind the court should not invoke the principle where there has been no misrepresentation or fraud and the suitor has acted upon the advice of counsel. To permit such a windfall to the wrongdoer would do violence to equity and good conscience. *Rasmussen v. Nielsen*, 142 N.J. Eq. 657 (E. & A. 1948). \*\*\*”

Here the Commissioner is satisfied that the circumstances of the matter, within the authorities previously cited, do not warrant that this doctrine of law be invoked against petitioners and in favor of the Board.

In sum, the Commissioner finds and determines that the action of the Board on May 15, 1972, electing a citizen to a vacant seat by a vote of four ayes and no nays, with only four Board members present, was *ultra vires* by virtue of the fact that the Board lacked a quorum to transact such business. Accordingly, the election was a nullity.

COMMISSIONER OF EDUCATION

March 20, 1973

**Board of Education of the City of East Orange,**

*Petitioner,*

*v.*

**Mayor and Council of the City of East Orange,  
Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Edward Stanton, Esq.

For the Respondent, Julius Fielo, Esq.

Petitioner, the Board of Education of the School District of the City of East Orange, hereinafter "Board of Education," appeals from an action of respondents, Mayor and Council of the City of East Orange, certifying to the Essex County Board of Taxation an amount of appropriations for school purposes for the 1972-73 school year \$2,000,000 less than that proposed by the Board of Education to the Board of School Estimate and the Mayor and Council.

Petitioner alleges that it is impossible to maintain the thorough and efficient system of public schools mandated by the *New Jersey State Constitution* within the limit of appropriations certified by the Board of School Estimate and the Mayor and Council. Petitioner prays for relief in the form of an Order by the Commissioner of Education directing Council to restore such amount of the \$2,000,000 budget reduction as is necessary to provide for the operation of a thorough and efficient system of public schools within the School District of the City of East Orange.

Council answers that the Board (1) has not provided specific and exact information to substantiate the need for items contained within the proposed school budget, (2) has refused permission to Council to examine its budgetary records, and (3) has adopted a proposed budget which would create an unwarranted hardship in the form of a confiscatory financial burden upon local taxpayers. Council requests that the Commissioner find the amount of local taxes, certified by it, to be sufficient and proper for the maintenance of a thorough and efficient system of public schools for the 1972-73 school year.

A hearing on the Petition of Appeal was held December 4, 1972 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Exhibits were received in evidence at the hearing, and additional documentary evidence was received by January 18, 1973 at the request of the hearing examiner.

The report of the hearing examiner is as follows:

East Orange is a Type I school district having a Board of School Estimate. On February 1, 1972, the Board of Education adopted and submitted to the Board of School Estimate a proposed budget for the 1972-73 school year in the total amount of \$15,769,500, of which \$12,534,500 was to be raised by local taxation. A meeting was held between the Board of Education and Mayor and Council on February 9, 1973 for the purpose of receiving the Board's proposed 1972-73 school budget. Following a public hearing, the Board of School Estimate, on February 12, 1973, fixed and determined the amount to be raised by local taxation for 1972-73 as \$10,534,500, and submitted an appropriate certification of this action to Council with the following breakdown:

For Current Expense	\$10,450,000.00
For Capital Outlay	84,500.00
<b>TOTAL AMOUNT TO BE RAISED</b>	<b>\$10,534,500.00</b>

Thereafter, following its own study of the proposed school budget, Council adopted on March 13, 1972, Resolution No. I-116, fixing the amount of \$10,534,500 to be raised by local taxation for the operation of the public schools for the fiscal year 1972-73. This reduction of \$2,000,000 was from only the current expense portion of the proposed school budget, as stated above in the certification by the Board of School Estimate.

Council's Amended Answer to the Petition of Appeal, filed September 12, 1972, contained a detailed statement of proposed reductions totaling only \$1,222,738, instead of \$2,000,000 as required by the Commissioner in accordance with *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966) at pp. 105-106. During the hearing in this matter, counsel for respondent stipulated being bound by the itemized proposed reductions in the total amount of \$1,222,738 instead of \$2,000,000. (Tr. 93)

The total reduction of \$1,222,738, proposed by Council, is itemized as follows:

	<b>Current Expense Account</b>	<b>Budgeted By Board</b>	<b>Proposed By Council</b>	<b>Reduction</b>
J110B	Sal., Board Secy.'s Off.	\$ 147,000	\$ 143,000	\$ 4,000
J110F	Sal., Supt.'s Off.	111,160	104,380	6,780
J110J	Sal., Bldgs. & Grounds	27,000	21,300	5,700
J211A	Sal., Prins.	316,700	291,490	25,210
J211B	Sal., Asst. Prins.	149,700	134,500	15,200
J211C	Sal., Adm. Assts.	128,350	78,850	49,500
J213A	Sal., Tchrs.	8,000,000	7,462,936	537,064
J214A	Sal., Librs.	175,750	151,400	24,350
J214C	Sal., Pupil Servs.	182,100	150,110	31,990
J215A	Sal., Prins.' Secys.	312,000	293,120	18,880
J215C	Sal., Pupil Servs. Secys.	36,800	31,050	5,750
J216	Sal., Para-Professionals	87,960	85,199	2,761
J310	Sal., Attend. Officers	118,500	103,850	14,650
J410C	Sal., Nurses	155,500	147,300	8,200
J610C	Sal., Janitors	28,000	21,000	7,000
J710	Sal., Maintenance	235,500	216,592	18,908
J1010	Sal., Athletics	41,225	31,450	9,775

J1179	Sal., Work-Study Prog.	40,000	25,600	14,400
J120D	Fees, Contracted	38,500	11,970	26,530
J130M	Prtg. & Publ.	15,000	10,000	5,000
J220	Textbooks	160,000	141,592	18,408
J230A	Library Books	42,200	41,347	853
J230C	A-V Mats.	27,500	27,091	409
J230D	Television Mats.	4,000	1,600	2,400
J230E	Library Supls.	2,000	1,465	535
J240	Teaching Supls.	360,000	248,105	111,895
J250C	Misc. Expenses	62,850	50,575	12,275
J250P	Data Processing	102,400	98,224	4,176
J320	Attnd. Off. Exps.	1,500	1,000	500
J420A	Nurses' Supls.	5,500	4,494	1,006
J420C	Health Expenses	27,000	3,000	24,000
J520C	Pupil Trans. Fld. Trips	25,000	10,000	15,000
J650A	Janitorial Supls.	47,700	31,400	16,300
J720A	Grnds. Maint. Contractual	7,200	1,200	6,000
J720B	Bldg. Maint. Contractual	100,000	60,000	40,000
J740A	Grounds, Mats.	2,300	1,100	1,200
J740B	Bldgs., Mats.	50,000	46,426	3,574
J740C	Equip. Repair, Mats.	6,000	3,800	2,200
J810C	Pension Payments	30,000	25,540	4,460
J820A	Insurance	100,000	90,000	10,000
J830	Rental, Lands & Bldgs.	338,000	304,406	33,594
J870	Tuition Payments	475,000	428,000	47,000
J1030	Athletic Prog. Exps.	58,775	46,550	12,225
J1116	Swimming Program	15,000	11,920	3,080
J1199	Vocational Day School Expenses	20,000	- 0 -	20,000
TOTALS		\$12,416,670	\$11,193,932	\$1,222,738

During the hearing, the Board conceded reductions in various line items totaling \$87,739. These concessions, and the reasons therefore, will be described under the pertinent line items.

The hearing examiner's findings and recommendations in regard to each of the proposed reductions are as follows:

*J110B Sal., Board Secretary's Office*

The Board's written testimony (Exhibit P-2) states that the secretary-business manager and the administrative assistant were employed for 1972-73 at an aggregate of salaries totaling \$4,000 less than the amount budgeted by the Board. Accordingly, it is recommended that Council's proposed reduction in the amount of \$4,000 be sustained.

*J110F Sal., Superintendent's Office*

Council proposes a reduction of \$6,780 budgeted by the Board for an additional secretarial position to alleviate a situation wherein one secretary presently serves nine curriculum personnel. In view of the fact that a staff of nine professional curriculum personnel would suffer severe inefficiency without at least a minimum of secretarial and clerical support, the restoration of one-half of the reduction, or \$3,390, is recommended for such service for the remainder of the 1972-73 school year.



*J110J Sal., Buildings and Grounds*

The Board claims a need for an additional secretary for the supervisor of buildings and grounds, plus an additional \$1,500 to meet the actual salary of the supervisor for 1972-73. Council's proposed reduction of \$5,700 does not remove the \$1,500 deficit which the Board requires, but merely eliminates the additional secretarial position. Absent a showing by the Board of the necessity for this additional secretarial position, it is recommended that Council's proposed reduction stand.

*J211A Sal., Principals*

Council's suggested reduction of \$25,210 was based upon the fact that the principalship of the Elmwood School was unfilled as of the date of Council's study report completed August 21, 1972. The Board testified that this principalship was filled on September 1, 1972 at a cost of \$18,000. The Board therefore concedes the amount of \$7,210 as a reduction. The hearing examiner recommends that \$18,000 be restored to this line item and \$7,210 be sustained.

*J211B Sal., Assistant Principals*

Council's proposed reduction of \$15,200 represents the amount budgeted by the Board for an assistant principal for an elementary school presently housing 923 pupils enrolled in grades kindergarten through eight. The Board claims that a school of this size requires additional administrative staffing in order to provide efficient management and supervision of staff and pupils. The hearing examiner recommends that the position be restored and that \$7,600 be allocated for this purpose for the remainder of the 1972-73 school year.

*J211C Sal., Administrative Assistants*

The Board has budgeted for three new administrative assistants for three elementary schools with pupil populations of 1,040 in grades kindergarten through eight, 1,281 in grades kindergarten through eight, and 907 in grades kindergarten through six, respectively. The Board asserts that it needs \$36,000 for these positions, plus \$11,050 for a guidance position which is now filled, for a total of \$47,050.

The evaluation report of the East Orange School District prepared by the New Jersey Department of Education (Exhibit P-5) points to a clear need for extensive curriculum revision, an inventory of all instructional materials, and a comprehensive plan for in-service staff training. The success of such ongoing projects will depend to a large extent on the amount of time and effort which can be contributed by the total administrative staff. If members of the administrative staff are excessively burdened by other duties, these projects which bear most directly upon the quality of the instructional program would have scant hope of success. The three positions of administrative assistant are designed to relieve principals and assistant principals from many routine management duties in order that they may better perform curricular and instructional functions. It is therefore recommended that one-half of the \$36,000 reduction be restored for this purpose for the remainder of the school

year. The need for \$11,050 for a guidance position is improperly requested in this line item, and should be listed under J214B.

The balance of Council's \$49,500 reduction is \$2,450, which is conceded by the Board.

*J213A Sal., Teachers*

The Board concedes \$259,950 of Council's proposed reduction of \$537,064 in this line item, but asserts that the remaining \$277,114 is essential for a thorough and efficient program of public education. (Tr. 86)

The Board's documentation of need for the restoration of \$277,114 (Exhibit P-2) includes ten teachers at \$10,000 each, the average salary within the district (Tr. 108), for a total of \$100,000. The Board states that six of these teachers are presently employed in the Title I, E.S.E.A. program and have acquired a tenure status. Also, the Board stated that four teachers are employed in the Help Alienated Youth (H.A.Y.) project. An examination of the Board's 1971-72 audit report discloses that both the Title I, E.S.E.A. project and the H.A.Y. project were fully-funded from federal and State sources. No evidence was presented by the Board to prove the necessity to include the total amount of these ten salaries in this line item from local tax revenues. Although the expenditures for these ten salaries must be made from budget line items, either in the regular budget or in separate special budgets, the costs for these salaries are reimbursed from federal and State sources and are not raised by local taxation. Council's accountants have calculated the sum of these ten teaching salaries to be \$103,525, which appears more accurate than the Board's estimate of \$100,000. Accordingly, this line item may be reduced by the sum of \$103,525 for ten teachers' salaries, and it is so recommended.

This line item also contains a contingency fund for 1972-73 salary increases for nineteen specific categories of personnel, both professional and non-professional. The Board and Council agree that this fund is to be distributed among the nineteen separate salary accounts to provide for 1972-73 salary increases for personnel other than teachers, but the Board claims the need for \$117,451 and Council asserts the total amount required is \$104,093. An examination of the affidavits (Exhibits P-9 and R-3) filed by both parties at the request of the hearing examiner discloses that Council's calculations were derived from a systematic addition of salary contracts for all positions which were filled during August 1972, whereas the Board included vacant positions which were to be filled at the earliest possible time.

The hearing examiner recommends that the amount of \$117,451 be restored in order to provide for salary increments which have been contracted for personnel listed in the nineteen specific salary line items, and also recommends that the Board transfer by resolution the various sums which comprise the total of \$117,451 to properly distribute the required amounts to the correct line items.

At this point a recapitulation of this line item will be useful. Of the original \$537,064 proposed as a reduction by Council, the Board conceded \$259,950. From the balance of \$277,114, the hearing examiner has recommended that \$103,525 be sustained for the salaries of ten teachers who are paid from federal and State funds. Also, the hearing examiner has recommended that \$117,451 be restored and properly distributed among nineteen specific salary line items. There remains \$56,138 of Council's proposed reduction. The hearing examiner notices that Council's accountants calculated the total of actual salaries required for 630 teachers for 1972-73. The Board's calculations included 641 teachers. Although Council's calculations were carefully performed by the addition of individual salary contracts, they did not make provision for vacant positions which the Board was proceeding to fill. Accordingly, the hearing examiner recommends that the amount of \$56,138 be restored to this line item.

In summary, it is recommended that \$173,589 be restored and \$363,475, of which, \$259,950 is conceded by the Board, stand as a reduction in this line item.

It is also recommended that the Board maintain a separate line item in its budget (Exhibit P-1) under J213B Special Education Teachers' Salaries. The Board's affidavit (Exhibit P-9) indicates that this procedure is followed, presumably for internal bookkeeping purposes, but the J213B line item does not appear in the 1971-72 audit report (Exhibit P-8) or the Board's detailed budget. (Exhibit P-1) This provision should properly be made in the 1973-74 proposed budget.

#### *J214A Sal., Librarians*

Council proposed a reduction of \$24,350 which amount is the total of two salaries for librarians' positions that were unfilled at the time of Council's study of the school budget in August 1972. These positions are not new and the vacancies were filled prior to September 1, 1972. (Exhibit P-2) It is recommended that \$24,275 of the proposed reduction of \$24,350 be restored.

#### *J214C Sal., Pupil Services*

The suggested reduction in the amount of \$31,990 represents two positions for school psychologists which were vacant in August 1972. The Board points out that these are existing, rather than new, positions which cannot be abolished without dire consequences to the already overburdened child study team's ability to serve the needs of handicapped pupils.

It is recommended that the amount of \$31,990 be restored to this budget line item.

#### *J215A Sal., Principals' Secretaries*

Council's proposed reduction of \$18,880 is for three existing school secretary positions which were vacant during August 1972. At the time of the

hearing, two of these vacant positions had been filled. Each vacant position is for an individual elementary school.

The hearing examiner recommends that the total amount of the proposed reduction, \$18,880, be restored.

*J215C Sal., Pupil Services Secretaries*

The amount of reduction suggested by Council in this line item is \$5,750, which is an allocation for an additional secretarial position to assist the school psychologists and the child study team personnel. The Board argues that the transfer of total responsibility for the home instruction and supplemental instruction program from the central administrative office to the pupil services office creates a work load which justifies the necessity for this position.

It is recommended that one-half of \$5,750, or \$2,875 be restored for this necessary function for the remainder of the 1972-73 school year.

*J216 Sal., Para-Professionals*

The proposed reduction of \$2,761 represents the amount which Council claims is in excess of the cost of the budgeted positions in this line item. The Board asserts that it underestimated its needs in this line item, and now requires an additional \$12,040 in order to pay its share of the cost for nine teacher interns under the Professional Development Act. In addition, the Board avers that it requires the sum of \$51,000 which was not budgeted for seventeen teacher aides for kindergarten classes during the 1972-73 school year.

An examination of the 1971-72 audit report (Exhibit P-8) discloses that \$84,369.66 was expended for para-professional aides during the 1971-72 school year, and \$87,960 has been budgeted for this purpose for 1972-73, an increase of \$3,590.34.

The hearing examiner recommends the restoration of \$2,761 as a small salary contingency for this line item for 1972-73. It is recommended that the Board refrain from employing seventeen additional kindergarten aides during 1972-73, for the reasons that the salaries therefore have not been budgeted and the addition of seventeen additional aides is simply not justifiable under these circumstances, particularly in view of the proposed reduction in local tax revenues for the public schools. If the Board has under-budgeted by \$12,040 for its teacher intern program for 1972-73, it will be necessary to reorder budget priorities to cover this expense.

*J310 Sal., Attendance Officers*

Council's suggested reduction of \$14,650 in this line item represents the allocation for a single position of school social worker which was vacant at the time of Council's budget review, but which is not a new and additional position. The Board asserts that this vacancy was filled on October 3, 1972, and that the position is vital to prevent a curtailment of existing pupil services.

It is recommended that this amount of \$14,650 be restored in order to maintain existing pupil services.

*J410C Sal., Nurses*

The amount of \$8,200 was proposed as a reduction by Council for the salary of one additional school nurse for 1972-73 on the grounds that a full-time nurse is not required for the 193 pupils enrolled in the Rutledge Avenue School. The Board contends that a new curriculum has been planned for 1972-73 in the area of school health which includes classroom instruction by the school nurse. This plan is an experimental innovation which the Board desires to implement in a new middle school which will reach completion in September 1974, at which time this nursing position will be transferred to the middle school.

In view of the fact that more than one-half of the 1972-73 school year has been completed, it is doubtful whether any worthwhile progress could be accomplished in the implementation of the above-mentioned health curriculum. Also, the Rutledge Avenue School could be reasonably served by a half-time nurse for the remainder of the 1972-73 school year.

It is therefore recommended that the proposed reduction of \$8,200 for an additional school nurse be sustained.

*J610C Sal., Janitors*

The Board concedes that the \$7,000 reduction proposed by Council is no longer necessary for the new position of truck driver for the cafeteria program, because the position is now included in the cafeteria account. (Exhibit P-2)

The suggested reduction of \$7,000 is sustained.

*J710 Sal., Maintenance*

Council's proposed reduction in the total amount of \$18,908 consists of \$6,858 for a new position of heating and ventilating mechanic and \$12,050 which Council asserts is an additional amount in excess of budgeted positions. The Board argues that the \$12,050 is for two existing positions of plumber and electrician which were vacant at the beginning of this school year. The Board also states that the new position of heating and ventilating mechanic is necessary because maintenance on this type of equipment has been deferred for a prolonged period of time.

The hearing examiner recommends that the \$12,050 necessary to fill the existing vacant position of plumber and electrician be restored, and that the amount of \$6,858 for a new position be sustained, since this provision may be made in the subsequent school budget for 1973-74.

*J1010 Sal., Athletics*

Council contends that \$9,775 in this line item is unsubstantiated by the Board's budget documents, and the Board replies that this sum is required for a

new cross-country coach at one high school plus salary increases for coaches, game officials, and police guards for athletic events.

A review of the 1971-72 audit report (Exhibit P-8) discloses that \$35,000 was budgeted for that fiscal year, and \$4,775 was subsequently transferred to J1020 Other Expense-Athletics, leaving a revised allocation of \$30,225, which amount was transferred to the separate athletic fund and expended. The disputed \$9,775 is the total amount of increase proposed for 1972-73, which is a percentage increase of 32.33 percent.

The hearing examiner recommends that \$3,250, which is one-third of the proposed reduction, be restored to this line item for the remainder of the 1972-73 school year.

*J1179 Sal., Work-Study Program*

Council suggested a reduction of \$14,400 in this line item based upon a lack of documented commitments or contract liabilities for this sum. The Board replies that \$40,000 is budgeted for this project during 1972-73, and the correct amount of State aid receivable for this program is \$20,000. Therefore, \$20,000 of local funds are required to match the State aid. The Board asserts that Council incorrectly calculated the State aid receivable for this program and erroneously recommended the \$14,400 reduction.

The hearing examiner finds that the Board requires a total of \$20,000 for its share of allocation for the work-study program, and accordingly recommends that the reduction of \$14,400 be restored.

*J120D Other Fees Contracted*

Council's proposed reduction of \$26,530 consists of \$2,500 claimed to be unsupported budget increases and \$1,530 of specific reduction for a balance of a contractual order. The total of the Board's original allocation is \$38,500, of which \$5,000 is estimated for studies regarding school district reorganization, \$8,500 for revision of the Board's policy manual, \$20,000 for a study by the State Department of Education and \$5,000 for preparation of a desegregation plan for submission to the State Department of Education. Council asserts that both the \$20,000 and \$5,000 items were unsubstantiated in August 1972, and that the cost of the Board's policy manual preparation is actually \$1,530 less than the amount budgeted.

The hearing examiner finds that the study by the State Department of Education, which has been completed, is free to the Board, and accordingly recommends that the \$20,000 reduction be sustained. Also, the Board has not provided evidence of the necessity for the remaining \$1,530 reduction, and therefore it is recommended that this proposed reduction be undisturbed. The total reduction which is recommended to stand is \$21,530. The balance of \$5,000 for preparation of a necessary desegregation plan is recommended for restoration.

*J130M Printing and Publishing*

Council proposed a reduction of \$5,000 in this line item on the grounds that the Board's budgetary documentation fails to support the need for this sum. The Board argues that this amount is necessary for the printing of various study guides and contracts. A review of the Board's 1971-72 audit report (Exhibit P-8) discloses that expenditures in this line item totaled \$7,865.31 from an allocation of \$10,000, leaving an unexpended balance of \$2,134.69. The Board's 1972-73 budgetary allocation for this line item is \$15,000.

The hearing examiner can find no justification for a one-third increase in this line item for 1972-73, and therefore recommends that Council's suggested reduction remain undisturbed.

*J220 Textbooks*

The Board's allocation of \$160,000 for this line item represents an increase of \$3,000 above that budgeted for 1971-72. Expenditures during 1971-72 totaled \$154,260.82, leaving a balance of \$2,739.18. Council's proposed reduction of \$18,408 is based upon a compilation of textbook requisitions from the various schools which were available during August 1972. The Board asserts that additional supplemental requests will be forthcoming during the school year and, in addition, certain textbooks will be ordered which were not available during August 1972. Also, inflationary increases in the cost of textbooks will cause higher costs in 1972-73 for the same volume of books purchased during 1971-72.

The hearing examiner recommends that \$15,408 be restored to this budgetary line item in order to sustain the same level of support as the prior year.

*J230A Library Books*

Council has suggested a reduction of \$853 in the Board's budgeted allocation of \$42,200. For 1971-72, the Board budgeted \$30,000 but only expended \$21,211. The Board's 1972-73 allocation represents an increase in excess of one-third of the previous year's budgeted amount, and is double the actual amount expended during 1971-72. It is recommended that the reduction of \$853 suggested by Council, be sustained.

*J230C Audiovisual Materials*

The reduction suggested by Council in this line item is \$409 of the Board's allocation of \$27,500 for 1972-73, which is less than the amount of \$33,500 budgeted for 1971-72, of which \$32,076.18 was expended. The Board now avers that its budgeted allocation of \$27,500 is underestimated by \$4,000.

The hearing examiner finds that the amount budgeted by the Board is modest for the needs of a school district of this size, and recommends that the \$409 suggested reduction be restored.



*J230D Television Materials*

Council proposed a reduction of \$2,400 from the Board's budgetary allocation of \$4,000. The Board states that this sum is necessary to conduct an educational television program which was curtailed during 1971-72 because of budgetary restrictions.

It is recommended that the amount of \$2,400 be restored to this line item to permit the conduct of the valuable learning experiences available through educational television.

*J230E Library Supplies*

The amount of \$535 is proposed as a reduction by Council from the Board's budgetary allocation of \$2,000 which remains unchanged from 1971-72. Expenditures for 1971-72 totaled \$1,106.17. (Exhibit P-8) The Board avers that, although certain library supplies are ordered annually, a contingency is required to supply all libraries with additional materials as supplies are exhausted.

The hearing examiner recommends that \$535 be restored as a small reserve for additional school library supplies during 1972-73.

*J240 Teaching Supplies*

Council proposed a reduction of \$111,895 from the Board's budgeted allocation of \$360,000, following a compilation of requisitions during August 1972. The Board argues that expenditures of \$258,494.64 for 1970-71 and \$254,461.28 during 1971-72, which were minimal, did not adequately provide for the needs of the pupils because of severe budgetary restrictions.

The hearing examiner recognizes the need for supplemental purchases of school supplies during the course of the school year. Also, a per pupil allocation of \$20.70 is not sufficient to provide sufficient supplies for a thorough system of public schools. Accordingly, it is recommended that \$100,000 of the proposed reduction of \$111,895 be restored.

*J250C Misc. Expenses*

The reduction suggested by Council in this line item is \$12,275, which Council states is unsupported by the Board's budgetary documentation. The Board asserts that \$11,435 is required for evaluation of two high schools by the State Department of Education, although neither details nor dates for such evaluations are provided to substantiate this assertion. Council's suggested reduction leaves the Board an allocation of \$50,575 for 1972-73, which is almost \$20,000 greater than 1971-72 expenditures.

It is recommended that Council's suggested reduction of \$12,275 remain undisturbed.

*J250P Data Processing*

The Board concedes that \$4,176, proposed as a reduction by Council, is not necessary for 1972-73.



*J320 Attendance Office Expenses*

Council suggested a reduction of \$500 in this line item, for the reason that this sum is not substantiated as being needed by the Board. The Board avers that the increases included in the 1972-73 school budget are necessary for mileage expenses for school social workers who are now included in this line item.

It is recommended that the proposed reduction of \$500 be restored.

*J420A Nurses' Supplies*

Council proposed a reduction of \$1,006 from the Board's allocation of \$5,500. Actual expenditures for 1971-72 in this line item were \$5,341.23. (Exhibit P-2)

The hearing examiner recommends the restoration of \$1,006 as necessary to maintain existing levels of support, particularly in view of increases in costs for such supplies because of inflation.

*J420C Health Expenses*

Council suggested a reduction of \$24,000 for the specific elimination of a sickle cell anemia testing program. Expenditures in this line item during 1971-72 totaled \$5,185.50. (Exhibit P-8) The total allocation proposed by the Board for 1972-73 is \$27,000, and the aforementioned testing program comprises the bulk of proposed costs.

The hearing examiner recommends that the suggested reduction of \$24,000 be restored in order to permit the operation of the sickle cell anemia testing program.

*J520C Pupil Transportation, Field Trips*

The Board proposed an amount of \$25,000 for this line item, and Council suggested a reduction of \$15,000. Actual expenditures for 1971-72 were \$11,048.80. (Exhibit P-8) The Board defends its proposed increase on the grounds that it must discontinue its policy of requiring pupils to pay for educational fields trips, by direction of the State Department of Education.

The hearing examiner recommends that \$15,000 be restored to this line item on the grounds that pupils and their parents may not be required to pay either all or a portion of the costs of educational field trips which are an integral part of the total curriculum offered by the school district. *Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County*, 1966 S.L.D. 202, affirmed State Board of Education, 1968 S.L.D. 276

*J650A Janitorial Supplies*

Council suggested a reduction of \$16,300 from a total allocation of \$47,700 for this line item. The Board points out that expenditures for this purpose were \$42,775 in 1969-70, \$39,219 in 1970-71 and \$21,276 in 1971-72. The reason for the reduced 1971-72 expenditure, says the Board, is that the

budget was reduced by \$1,000,000 and consequently all available stocks of supplies were depleted. The Board also states that present supply costs are higher for quantities similar to those purchased during previous normal years.

The hearing examiner recommends that the total of \$16,300 be restored to this line item.

*J720A Grounds Maintenance, Contractual*

The Board states that Council's proposed reduction of \$6,000 from a total budgetary allocation of \$7,200 is excessive and unreasonable in view of the fact that virtually no needed repairs to sidewalks and fencing were performed during 1971-72 because of the curtailed budget.

The hearing examiner recommends that the sum of \$5,000 be restored to this line item so that a major portion of needed grounds repairs can be undertaken immediately.

*J720B Building Maintenance, Contractual*

Council proposed a reduction of \$40,000 from the Board's allocation of \$100,000 for this line item. The Board points out that 1971-72 budget reductions required a limited expenditure of \$55,284.75 instead of the originally budgeted \$90,000. Also, the Board states that the 1970-71 cost for building maintenance was \$77,735.17 and for 1969-70 it was \$103,270.15. At this point in time, the Board argues, major maintenance projects such as roof replacements and library renovations must be implemented to maintain the district's schoolhouses in a decent semblance of repair.

From the testimony of the Board's witnesses, it is clear that the schoolhouses in this school district are for the most part old buildings which need substantial repairs. Therefore, it is recommended that the total proposed reduction of \$40,000 be restored in order that major repair projects may be completed as soon as possible.

The next three line items may be considered as a group. These are as follows:

*J740A Grounds, Materials*

Council has proposed a reduction of \$1,200 in this line item, from a total allocation of \$2,300.

*J740B Buildings, Materials*

The reduction suggested by Council is \$3,574 from a total allocation of \$50,000.

*J740 C Equipment Repair, Materials*

From a total budgetary allocation of \$6,000, Council proposes a reduction of \$2,200.

In regard to J740A, it is noted that this line item provides for materials which are used by maintenance employees in the performance of grounds maintenance. The same requirement is noted for J740B for building repairs, and for J740C which provides materials for equipment repairs.

The hearing examiner notices the needs specified for the amounts reduced from J740A, Grounds Materials, and from J740C, Equipment Repair, Materials, and recommends the restoration of \$1,200 and \$2,200 respectively, to these line items.

In regard to J740B, Buildings, Materials, it is noted that only \$42,206.15 was expended of the \$50,000 available during 1971-72 (Exhibit P-8), and therefore it is recommended that Council's proposed reduction of \$3,574 be sustained.

#### *J810C Pension Payments*

The Board concedes that \$4,460 is no longer required in this line item due to the demise of two pensioners.

#### *J820A Insurance*

Council's proposed reduction of \$10,000 is for a builder's risk insurance policy for the middle school which is presently under construction. The Board argues that this cost is properly chargeable to this line item and therefore should be restored.

The cost of builder's risk liability insurance coverage may be properly charged to the Improvement Authorization (L-IA) account which consists of funds derived from the sale of bonds or borrowing on temporary notes for a capital construction project. It is recommended that this necessary cost be transferred from J820A to the Improvement Authorization (L-IA) account.

#### *J830 Rental, Lands and Buildings*

Council suggested a reduction of \$33,594 in this line item, which the Board declares is necessary for the rental of administrative offices in a location other than the East Orange High School. The Board's reason is that the overcrowded conditions of East Orange High School make this relocation necessary.

In view of the fact that this relocation, which may be desirable, is not proven to be necessary at this point in the 1972-73 school year, it is recommended that the suggested reduction be sustained.

#### *J870 Tuition Payments*

The amount proposed as a reduction by Council is \$47,000 from a total allocation of \$475,000 by the Board. Actual 1971-72 expenditures for this line item were \$399,222.98. Council's action leaves a budgetary appropriation of \$428,000 for the 1972-73 school year.

At the time of the hearing on December 4, 1972, the Board provided no documentary or oral testimony detailing actual costs for the first three months of 1972-73, nor did the Board substantiate any necessity for these specific funds which might arise during the remainder of the 1972-73 school year. Accordingly, the reduction proposed by Council in the amount of \$47,000 should be permitted to stand.

*J1030 Athletic Programs, Expenses*

Council proposed a reduction of \$12,225 from the total of \$58,775 budgeted by the Board for this line item. Although actual expenditures during 1971-72 were \$47,775, which was above the originally budgeted amount of \$43,000, the Board states that increasing costs for equipment and transportation, together with decreasing revenues, have required a curtailment of repair and replacement of athletic equipment during recent years. This situation, says the Board, increases the possible injury of pupil participants in the various athletic programs.

The hearing examiner recommends that the proposed reduction of \$12,225 be restored to this line item, primarily for the purchase of needed replacements of athletic equipment and for the proper repair of existing athletic equipment in order to safeguard pupils participating in various athletic programs.

*J1116 Swimming Program*

The Board states that Council's suggested reduction of \$3,080 of the total of \$15,000 appropriated for the swimming program should be restored because the program is in progress and the amount of \$15,000 is required to continue this program during the 1972-73 school year.

It is recommended that the sum of \$3,080 be restored to this line item so that this instructional program for fifth grade pupils may be maintained to the end of the current school year.

*J1199 Vocational Day School Expenses*

Council proposed a reduction of \$20,000 which represents the entire amount budgeted by the Board for this line item. This line item did not appear in the 1971-72 school audit (Exhibit P-8) and is an additional item for the 1972-73 school year. The Board has provided no evidence of the necessity, as opposed to the desirability, for the restoration of this specific amount for the 1972-73 school year. Therefore, it is recommended that Council's proposed reduction of \$20,000 be sustained.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed in the following table:

	Current Expense Account	Proposed Reduction	Amount Restored	Amount Not Restored
J110B	Sal., Board Secy.'s Off.	\$ 4,000	\$ - 0 -	\$ 4,000
J110F	Sal., Supt.'s Off.	6,780	3,390	3,390

J110J	Sal., Bldgs. & Grounds	5,700	- 0 -	5,700
J211A	Sal., Prins.	25,210	18,000	7,210
J211B	Sal., Asst. Prins.	15,200	7,600	7,600
J211C	Sal., Adm. Assts.	49,500	18,000	31,500
J213A	Sal., Tchrs.	537,064	173,589	363,475
J214A	Sal., Librs.	24,350	24,275	75
J214C	Sal., Pupil Servs.	31,990	31,990	- 0 -
J215A	Sal., Prins.' Secys.	18,880	18,880	- 0 -
J215C	Sal., Pupil Servs. Secys.	5,750	2,875	2,875
J216	Sal., Para-Professionals	2,761	2,761	- 0 -
J310	Sal., Attend. Officers	14,650	14,650	- 0 -
J410C	Sal., Nurses	8,200	- 0 -	8,200
J610C	Sal., Janitors	7,000	- 0 -	7,000
J710	Sal., Maintenance	18,908	12,050	6,858
J1010	Sal., Athletics	9,775	3,250	6,525
J1179	Sal., Work-Study Prog.	14,400	14,400	- 0 -
SUBTOTAL		\$800,118	\$345,710	\$454,408
	<b>Current Expense Account</b>	<b>Proposed Reduction</b>	<b>Amount Restored</b>	<b>Amount Not Restored</b>
J120D	Fees, Contracted	\$ 26,530	\$ 5,000	\$ 21,530
J130M	Prtg. & Publ.	5,000	- 0 -	5,000
J220	Textbooks	18,408	15,408	3,000
J230A	Library Books	853	- 0 -	853
J230C	A-V Mats.	409	409	- 0 -
J230D	Television Mats.	2,400	2,400	- 0 -
J230E	Library Supls.	535	535	- 0 -
J240	Teaching Supls.	111,895	100,000	11,895
J250C	Misc. Expenses	12,275	- 0 -	12,275
J250P	Data Processing	4,176	- 0 -	4,176
J320	Attend. Off. Exps.	500	500	- 0 -
J420A	Nurses' Supls.	1,006	1,006	- 0 -
J420C	Health Expenses	24,000	24,000	- 0 -
J520C	Pupil Trans. Fld. Trips	15,000	15,000	- 0 -
J650A	Janitorial Supls.	16,300	16,300	- 0 -
J720A	Grnds., Maint. Contractual	6,000	5,000	1,000
J720B	Bldgs., Maint. Contractual	40,000	40,000	- 0 -
J740A	Grounds, Mats.	1,200	1,200	- 0 -
J740B	Bldgs., Mats.	3,574	- 0 -	3,574
J740C	Equip. Repair, Mats.	2,200	2,200	- 0 -
J810C	Pension Payments	4,460	- 0 -	4,460
J820A	Insurance	10,000	- 0 -	10,000
J830	Rental, Lands & Bldgs.	33,594	- 0 -	33,594
J870	Tuition Payments	47,000	- 0 -	47,000
J1030	Athletic Prog., Exps.	12,225	12,225	- 0 -
J1116	Swimming Program	3,080	3,080	- 0 -
J1199	Vocational Day School Expenses	20,000	- 0 -	20,000
TOTALS		\$1,222,738	\$ 589,973	\$632,765
ADD: AMOUNT STIPULATED BY COUNCIL			777,262	
TOTAL TO BE RESTORED			\$1,367,235	

\* \* \* \*

The Commissioner has reviewed the findings of fact and recommendations of the hearing examiner as set forth above.

The Commissioner is aware of the difficult and unique problems which are present in an urban school district. He is cognizant of the effort being made by the East Orange Board of Education to provide a comprehensive and thorough instructional program as is demonstrated by the record in the instant matter. The Commissioner notices that many desirable and systematically-planned programs are being conducted in an effort to solve many of the problems which are peculiar to city school systems.

The jurisdiction of the Commissioner in this case is limited to determining the sum of moneys necessary for the maintenance and operation of a thorough and efficient system of public schools in the City of East Orange for the 1972-73 school year. Having examined the detailed report of the hearing examiner together with the record in the instant matter, the Commissioner concurs in the recommendations as supported by the findings of fact.

The Commissioner notices that Council originally reduced the Board's proposed school budget for 1972-73 by \$2,000,000. At the time of the hearing in the instant matter, December 4, 1972, Council stipulated and documented a reduction which totaled \$1,222,738. (Tr. 93) Accordingly, the Board is entitled to the restoration of the difference between these two sums, which is \$777,262. The recommendations hereinbefore detailed substantiate the necessity for the Commissioner to restore \$589,973 to the Board in order to insure the operation of a thorough and efficient system of public schools in the East Orange School District for the 1972-73 school year. The total of these sums, \$777,262 which is conceded by Council and \$589,973 which the Commissioner hereby restores, is \$1,367,235.

The Commissioner directs that the Mayor and Council of the City of East Orange certify to the Essex County Board of Taxation an additional sum of \$1,367,235 to be raised by taxation for current expenses for the public schools of East Orange in the 1972-73 school year.

COMMISSIONER OF EDUCATION

March 21, 1973

**In The Matter Of The Annual School Election  
Held In The School District Of Upper Saddle River,  
Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting at the annual school election held February 13, 1973 in the School District of the Borough of Upper Saddle River, Bergen County, for two members of the Board of Education for full terms of three years each, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Allen Blau	157	1	158
Mary K. Thieringer	367	4	371
Edward A. Knapp	103	1	104
Roger DeBerardine	267	1	268
Richard C. McDonnell	265	2	267

Pursuant to a letter request dated February 20, 1973 from Candidate Richard C. McDonnell, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the voting machine warehouse of the Bergen County Board of Elections, 567 South Commercial Avenue in Carlstadt, on March 6, 1973.

The Commissioner's representative reports that the announced tallies as stated above were confirmed.

The Commissioner finds and determines that Mary K. Thieringer and Roger DeBerardine were elected to full terms of three years each on the Upper Saddle River Borough Board of Education by the voters at the annual school election on February 13, 1973.

**COMMISSIONER OF EDUCATION**

March 21, 1973

**James Mosselle,**

*Petitioner,*

*v.*

**Board of Education of the City of Newark,  
Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Petitioner, John Cervase, Esq.

For the Respondent, Victor A. DeFilippo, Esq.

Petitioner, a tenured teaching staff member employed by the Board of Education of the City of Newark, Essex County, hereinafter "Board," alleges that the Board has improperly and illegally transferred him from his position of employment within the Newark school system. He requests the Commissioner to render a judgment that he should be restored to such position forthwith. The Board denies that its actions controverted herein are illegal and avers that its decision to transfer petitioner was a decision it was empowered by statutory prescription to make.

At this juncture the Commissioner has advanced his own Motion to ascertain whether or not some relief should be afforded in this matter *pendente lite*, and thereafter directed a hearing examiner appointed by him to conduct an oral argument with respect to such Motion. The oral argument was conducted on February 16, 1973, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

Petitioner, until January 29, 1973, was serving as a "\*\*\*\* Teacher to assist the Principal \*\*\*\*" (Petition of Appeal) at the Vailsburg High School in Newark. However, on or about that date petitioner was notified to absent himself from his usual post of duty and report for work to the central office of the Board. This purported transfer of petitioner was evidently temporarily rescinded on one occasion, but then was again continued in force and effect and so continues at this juncture.

In petitioner's view the purported transfer was occasioned by the charges of persons resident in the community that petitioner was insensitive to the needs of black children, although petitioner himself is a black man, and he avers that the charges are false. In any event, petitioner states that he knows of "\*\*\*\* no good or legal cause why he should be transferred against his will\*\*\*\*" (Petition of Appeal, at p. 2), and he asserts that he "\*\*\*\* has been and will be damaged in his professional reputation\*\*\*\*" (Petition of Appeal, at p. 2) because of the action of respondent.



Petitioner's prayer is that he be reinstated in his position forthwith, at least on a temporary basis pending completion of the litigation, and that the Board be restrained from interfering with his right to work free from pressure from the Board.

The Board argues that there is no proof herein that it has acted unreasonably or irresponsibly and, therefore, that the Commissioner may not interpose his discretion for that of the Board. The Board avers that a decision by the Commissioner at this juncture, which is founded on the basis of an allegation that there is turmoil in the streets, would be a decision from the wrong forum and inappropriate in response to a Motion for Relief *pendente lite* grounded on the pleadings of the parties.

The Board further avers, and petitioner does not deny, that it has not preferred charges against petitioner pursuant to the tenure employees hearing law (*N.J.S.A. 18A:6-10 et seq.*), and that certain due process rights to which petitioner lays claim may not, therefore, be asserted.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, and it is noted that the basic issue in the matter, *sub judice*, is whether or not the Board has acted properly to transfer petitioner from his tenured position to another comparable position within the school system. However, for purposes of this Motion, this issue may not be explored in depth.

The exploration herein must be limited instead to an examination of certain statutes and legal principles concerned with such relief *pendente lite* as is herein proposed by petitioner; namely, temporary reinstatement in his position pending completion of litigation.

In this regard it is clear that local boards of education are empowered to transfer tenured teaching staff members from one position to another subject only to the limitation of the statute, *N.J.S.A. 18A:25-1*, which provides:

"No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed."

Such power of local boards is more directly and explicitly stated in decisions of the Courts.

Such a decision was that of the Court in *Cheesman v. Gloucester City*, 1 *N.J. Misc.* 318 (1923) wherein the Court held:

"\*\*\* The Gloucester city board of education had the power of transfer.\*\*\*"

Also, in *Wilton P. Greenway v. Board of Education of the City of Camden*, 129 *N.J.L.* 461 the Court said, at page 465:

“The district boards are expressly invested with authority to transfer principals and teachers. \*\*\* The exercise of the power rests in sound discretion. \*\*\* The transfer was in no sense a demotion.” See also *John C. McGrath v. Board of Education of the Town of West New York*, 1965 S.L.D. 94.

Thus, the power of a board to transfer teaching staff members to comparable positions within its school system is clear, absent a showing that in some manner the Board’s discretion has been abused. The Commissioner can find no such showing herein at this juncture. Therefore, he holds, as he did in *William A. Pepe v. Board of Education of the Township of Livingston, Essex County*, 1969 S.L.D. 47, 50 that:

“\*\*\* It is well established that the Commissioner of Education will not substitute his judgment for that of a local board of education in matters which lie within the exercise of its discretionary authority, or intervene unless there is a clear showing of abuse of such discretion.\*\*\*”

Having determined that the Board had power to transfer petitioner to a comparable position in the Newark school system and that there is no reason for the Commissioner to substitute his judgment for that of the Board with respect to such transfer at this juncture, there remains the question of whether or not there are other reasons to justify the granting of the relief which petitioner requests. It is true that such relief is sometimes granted as the result of a series of estimates.

As the Court stated in *United States v. Fenwick*, 197 F. Supp. 47 (D.D.C. 1951), at p. 48:

“\*\*\* Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: The relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balance of damage and convenience generally\*\*\*.”

See also *General Electric Co. v. Glen Vacuum Stores*, 36 N.J. Super. 234 (App. Div. 1955).

However, the Commissioner has balanced the “estimates” to which the Court referred, *ante*, with the allegations of the instant Petition, and he fails to find therein the probability of irreparable harm to petitioner if the Petition advanced herein is adjudged on its merits. It is certainly true that petitioner can, at some future date, at the conclusion of litigation in this matter, be restored fully to his position if the facts as developed warrant such a determination, and petitioner can be made whole if there are other ways in which he was harmed by action of the Board.

Finally, the Commissioner is cognizant that there is a split of community opinion on this issue and that arguments for or against petitioner have been advanced by residents of the City of Newark. However, in this regard, the Commissioner determines that such opinions are so divergent that they offer no basis for a proper assessment and certainly no grounds for a legal determination which the Commissioner is obligated to make.

Accordingly, having examined the arguments in support of the Motion to ascertain if there is relief which the Commissioner can or should afford in this matter, and having found no reasons at this point to justify such intervention, the Commissioner directs that petitioner proceed with his proofs as expeditiously as possible as directed by the hearing examiner.

COMMISSIONER OF EDUCATION

February 17, 1973

**James Mosselle,**

*Petitioner,*

*v.*

**Board of Education of the City of Newark,  
Essex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, John Cervase, Esq.

For the Respondent, Victor A. DeFilippo, Esq.

This matter is a sequel to the decision of the Commissioner issued on February 17, 1973, which was concerned with a Motion for Relief *pendente lite*. That Motion was denied pending the presentation of proofs. *James Mosselle v. Board of Education of the City of Newark, Essex County*, decided by the Commissioner February 17, 1973

Such proofs have now been offered in three days of hearings which concluded on March 9, 1973, and it appears likely that the Petition will be successful at least in part. Therefore, it is possible, at this juncture, to grant at least some of the “\*\*\* relief which petitioner requests \*\*\*.” *James Mosselle, supra* Specifically, the Commissioner finds preliminarily that:

1. Petitioner was a tenured teaching staff member of the Newark Board of Education, hereinafter “Board,” entitled to all the privileges which tenure affords in his position of employment. *N.J.S.A. 18A:28*

2. Petitioner was transferred initially from such position because, in part at least, charges were presented against him in oral and written form.

3. Such transfer, under the circumstances, constituted a penalty in its practical effect on petitioner even though it appears to be true that such penalty was not intended.

4. A penalty may not be assessed against a tenured teaching staff member except in the manner prescribed in the statutes (*N.J.S.A. 18A:6-10 et seq.*) and was, therefore, apparently illegal.

Accordingly, the Commissioner directs that petitioner be assigned forthwith to a position in the Vailsburg High School with duties other than those involved with the discipline of students. A full decision on the merits of this Petition will follow.

COMMISSIONER OF EDUCATION

March 10, 1973

**James Mosselle,**

*Petitioner,*

*v.*

**Board of Education of the City of Newark,  
Essex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John Cervase, Esq.

For the Respondent, Victor A. DeFilippo, Esq.

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the City of Newark, Essex County, hereinafter "Board," maintains he was improperly and illegally transferred from his position and demands judgment to this effect. He requests that he be restored to such position forthwith. The Board denies it has acted improperly or illegally and requests the Commissioner of Education to deny such restoration.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, February 27, 1973, and was continued on March 2, 6 and 9, 1973. At the hearing eleven exhibits were offered in evidence. Subsequently, Briefs were filed. The report of the hearing examiner is as follows:

Petitioner has been employed by the Board since 1956 as a teacher. During all the years of his employment, he has possessed a standard or permanent teacher's certificate with endorsements which qualify him to teach accounting, social business and English. However, in 1968 the Board approved a resolution:

“\*\*\* That James Mosselle teacher of Commercial subjects at Vailsburg High School be temporarily assigned as teacher to assist the Principal at Vailsburg High School. \*\*\*” (PR-7) (Tr.I-130)

Similar resolutions were approved by the Board in each of the years that followed, including the 1972-73 school year, and in each case the resolution contained a phrase which defined petitioner's assignment as that of a teacher to “\*\*\* assist the Principal \*\*\*” in Vailsburg High School. In recent years, the salary provision applicable to the assignment was that petitioner be awarded “\*\*\* \$125.00 per month extra compensation \*\*\*” (PR-7) — a sum which was additional to his regular salary as a teacher.

The only testimony concerning petitioner's specific duties in this assignment was given by petitioner himself. He said that in past years he had helped to develop a “set of rules” concerned with discipline of pupils so that the Vailsburg High School could be administered in an “\*\*\* orderly type atmosphere \*\*\*.” (Tr. I-30-31) Additionally, he testified he had worked “hand in hand” with the staff and faculty to “get their ideas” for submission to the Principal (Tr. I-31), and he stated that he made no decisions himself involved with discipline unless he had first conferred with those higher in authority. (Tr. I-36)

During all of the present school year, up to and including January 26, 1973, petitioner served in the assignment of teacher “\*\*\* to assist the Principal \*\*\*” of Vailsburg High School. However, as the result of three meetings on that date and subsequent to a decision of the Acting Superintendent of Newark Schools, hereinafter “Superintendent,” which followed the meetings, petitioner's assignment was changed and the instant controversy ensued. Therefore, a recital of the events which transpired on January 26, 1973, is of importance herein and is set forth in summary form below.

The first meeting of importance to the matter, *sub judice*, was held at approximately 11 a.m. on January 26, 1973 in the office of the Superintendent and, at the request and direction of school officials, petitioner was present. Also, present on that occasion were some twenty-five or thirty persons. An indeterminate number of those persons who were present were from Vailsburg High School and another group was evidently composed of persons not directly connected with the school. Some members of the Board were also present and the group also included the Superintendent and other school officials.

The meeting lasted approximately one hour and evidently was devoted almost entirely to a recital of statements or charges which were made against petitioner, charges that he was insensitive to pupil needs, that he harassed them, etc. By consensus, those who testified at the hearing, *ante*, said that the mood of the meeting was hostile to petitioner.

Toward the end of this first of three meetings of January 26, 1973, petitioner was asked by the Superintendent if he wished to make any response, but petitioner declined.

The first meeting ended at about noon and the second meeting began shortly thereafter at another location in the central school office building. On this occasion, the audience numbered in the hundreds (variously 150-300) and the mood was reportedly also hostile to petitioner. (Tr. II-47) According to the testimony, this second meeting of the day was punctuated on occasion by the chant "Big Mo must go" (Tr. I-49) and it lasted for approximately two hours. Again, charges or statements were made against petitioner by various persons who were present and petitioner was again asked if he wished to defend himself or make a response, but, he declined to do so. (Tr. I-55) (Tr. II-49)

The third meeting of January 26, 1973, was one involving petitioner, an assistant Superintendent of the Newark Schools, and the Superintendent. The meeting was held at approximately 2:30 p.m. and at its conclusion petitioner was told by the Superintendent that he was to report to the central school office, rather than Vailsburg High School, on the following Monday, January 29, 1973. According to petitioner, the Superintendent

\*\*\*\* felt for the atmosphere in the school and for my health and safety, it would be best if I reported to the -- he felt it would be best if I reported to the central office.\*\*\*\* (Tr. I-60)

The testimony of the Superintendent in this regard was similar. He said:

\*\*\*\* I indicated to Mr. Mosselle that I wished to have him report there because of the volatile nature that I felt, the unrest that I felt might be caused with his presence at the school; and for his own health and welfare, I felt it was advisable for him to report to the Central Office.\*\*\*\* (Tr. III-70)

While the Superintendent testified he did not get "involved" (Tr. III-71) with petitioner on that occasion concerning the truth or falsity of charges which had been made against petitioner, he did indicate that the "allegations" had formed at least part of the reason he decided to transfer petitioner effective January 29, 1973 on a temporary basis. (Tr. III-143, 149, 150)

Thus, at the close of the third meeting of record on January 26, 1973, petitioner had been told to report to the central office of the school and the instant controversy was born. The days that followed succeeded only in aggravating the situation -- on the one hand, there were groups of people at various meetings and times demanding petitioner's transfer be continued, while on the other hand, other groups demanded that he be reinstated. A brief recital will establish the nature of the uncertainty and conflict which prevailed:

1. On Saturday, January 27th, petitioner attended a meeting of approximately 200 persons during which charges against him were discussed.

2. On Monday, January 29th, a meeting was held at Vailsburg High School which was attended by 1,000 or more people, and some seven or eight of these persons spoke. Included as part of the discussion that evening was a "list of demands" made upon the Board. (Tr. II-119) These demands had been drawn up by community leaders and pupils and the principal demand was evidently that petitioner be restored to the position he had held prior to his transfer.

At the conclusion of this meeting, the Superintendent said that petitioner would be returned to Vailsburg High School on the following day. The Superintendent also announced a meeting to be held on January 30th to discuss the "demands" referred to, *ante*.

3. On January 30th, the meeting was held as announced, but it was aborted by a telephone call received by the Superintendent to the effect that there was a group gathered in his own office area in the building of the Board. The Superintendent returned to that building.

4. Upon returning to the Board building, the Superintendent met "\*\*\*\* With black students and parents and their representatives, community representatives again in the Board room. \*\*\*\*" (Tr. III-79)

According to the Superintendent,

"\*\*\*\* There was a great deal of tension in the room. When I came into the room they were chanting, 'Big Mo must go.' The atmosphere was very hostile. And the speakers, those who spoke said that they wanted Mr. Mosselle out of Vailsburg High School until a decision had been reached on him. \*\*\*\*" (Tr. III-80)

At the conclusion of the meeting the Superintendent said:

"\*\*\*\* I stated to the audience there that I would request Mr. Mosselle to report to the Board of Education. \*\*\*\*" (Tr. III-81)

The reason for this decision, according to the Superintendent, was:

"\*\*\*\* there was a general condition, a general condition of unrest and hostility, controversy, over Mr. Mosselle that had reached such proportion as to — I think it would cause a threat to the welfare of the school and even to the welfare of the city. \*\*\*\*" (Tr. III-82)

5. The fifth meeting of importance in succeeding days occurred in a restaurant in Newark on February 2, 1973. It was attended by petitioner, the Superintendent and the President of the Board. Petitioner's attorney was also present. At this meeting, the Superintendent expressed the feeling that there was tension surrounding the controversy which would be relieved if petitioner would

“\*\*\* voluntarily transfer from Vailsburg High School.\*\*\*” (Tr. III-88)

Thereafter, petitioner sent a letter (PR-I) which requested his own transfer. This letter reads in its entirety as follows:

\* \* \*

\* \* \*

“February 2, 1973

“To the Members of the Board of Education

“From: James Mosselle

“I have been advised by the President of the Board, Charles Bell, and Acting Superintendent of Schools, Dr. Edward I. Pfeffer, and the Police Director, Edward L. Kerr, that violence is imminent (sic) because of the dispute surrounding the administration of my duties at Vailsburg High School.

“It is not my desire to be the cause, directly or indirectly, of violence in the city and within our schools.

“It is my desire to protect the people and the students in any way that it is within my power to do. I therefore request to be transferred from Vailsburg High School to another position in the educational system of Newark.”

Thereafter, on the same evening the Board “\*\*\* accepted the letter \*\*\*” (also PR-1), which petitioner had written. However, petitioner later retracted his transfer request and said in a letter forwarded by his attorney to the Superintendent on February 22, 1973, that he requested to be

“\*\*\* assigned to Vailsburg High School in the position he held before you transferred him.\*\*\*” (PR-5)

This completes a summary recital of the meetings and actions incidental to the controversy herein. Within this recital are contained the principal issues posed for the Commissioner's determination:

(a) Petitioner has tenure as a teacher. What other tenure entitlement, if any, does he hold?



(b) In the event that he holds no other tenure entitlement, is there a lesser right to employment in the position of "teacher to assist the Principal" which he held during school year 1972-73?

(c) Regardless of his tenure entitlement, or entitlements, was petitioner properly transferred by the Superintendent on January 26, 1973?

With respect to these issues, petitioner avers that:

\*\*\*\* A Teacher-To-Assist-The-Principal is another name for assistant principal and fits into the definition of 'position' set forth in 18A:28-1. \*\*\*\* (Petitioner's Brief, at p. 6)

He further avers that the specific question herein is:

\*\*\*\* *can a tenured teacher who has worked for five consecutive years as aide to the principal, acquire tenure as an administrator?* (Petitioner's Brief, at p. 7) (*Emphasis in text.*)

Petitioner maintains that he can attain such tenure.

Both petitioner and the Board cite *Michael J. Keane v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County*, 1970 S.L.D. 162 and 176 and also cite *Herbert J. Buehler v. Board of Education of the Township of Ocean, Monmouth County*, 1970 S.L.D. 436, *aff'd N.J. Super. (App. Div. 1972)* in support of their respective positions on these central issues.

However, the Board maintains that petitioner has no tenure entitlement other than "teacher" since he has not been assigned to, or worked in, a position which required other than a teacher's certificate. In the Board's view:

\*\*\*\* while N.J.S.A. 18A:28-5 is considerably broader than its predecessor, it denies its protection to persons whose position does not require certification. \*\*\*\* (Board's Brief, at p. 10)

Having stated the principal issues, the hearing examiner is constrained to observe that there appears to be another and more fundamental issue involved herein which is peripheral to the issues, *ante*, but nonetheless important. It is an issue concerned with the discipline policy, and the procedures used in its implementation in Vailsburg High School. The issue is concerned with what appears to be conflicting philosophies about such policies. Specifically, as recited by petitioner: (Tr. I-118)

\*\*\*\* We have a system in the chain [of command] that we follow in the discipline of the schools. \*\*\*\* Time and again these guidelines are breached to the extent that a parent will go directly to the assistant superintendent. The assistant superintendent, in this case Miss David, will issue an order to the school without consultation with the principal and the principal

through me to see exactly what the facts and details of the given situation are.

“And in essence, this is what has created, to a large extent, the big problem. Once the students and parents find out that they are no longer beholden to the \*\*\*Vailsburg High School \*\*\* and can go directly to the Board of Education and get a regulation not based upon facts but based on hearsay in reference to their reporting of an incident, they do this. And once they do this, they feel they have an innate power.

“So, I found myself constantly being pushed over into the background and told I have nothing to do with this; ‘You can’t talk to my child, you can’t handle this, Mosselle. I don’t even want to talk to you because I’ve spoken with Miss David, the assistant superintendent and she has issued the edict and the order for Mr. Petitti and that’s all I want to see.’ \*\*\*”

Petitioner also expressed the view that his philosophies with respect to discipline at Vailsburg High School were different from those of at least some members of the Board. (Tr. I-112)

Finally, the hearing examiner notes the following items of some pertinence herein:

1. The Board took no action pursuant to *N.J.S.A.* 18A:25-1 to transfer petitioner on January 26, 1973. The decision was an administrative one.
2. The exhibit PR-2 is a “Contemplated Employee Action Form,” effective February 5, 1973, which informed petitioner of an “administrative action” to “transfer” him from his position as teacher to assist the Principal to a position in the “Central Office.” The Superintendent stated that this new position was comparable to the former one, since it was concerned with attendance.
3. In the interim, since the time of the final decision of the Superintendent to transfer petitioner, petitioner has been reporting each day for work to the central office in Newark.
4. The exhibit PR-6 is a collection of documents concerned with allegations or “charges” which had been made against petitioner prior to January 26, 1973. The Superintendent refers specifically to “charges” in his recital of events which is contained in the cover document of the exhibit.
5. The position of teacher to assist the Principal exists in a kind of limbo in the Agreements which the Board has with its teaching and administrative employees. In fact, the hearing examiner notes the position is specifically excluded as one to be covered by the Agreement between the Board and teachers (P-2), and is nowhere specifically mentioned in the

draft agreement between the Board and supervisory and administrative associations. (P-5)

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and makes the following determinations in the matter, *sub judice*.

1. Petitioner has tenure as a teacher in the employ of the Board, but no other position tenure.
2. As a tenured teacher, petitioner may not be dismissed from such employment, or otherwise penalized by a reduction in salary, absent charges presented against him in the manner prescribed in the statutes. (*N.J.S.A. 18A:6-10 et seq.*)
3. As a tenured teacher, petitioner may be transferred by action of a "majority" of the whole Board from one position for which he is certified to another position for which he is equally qualified. (*N.J.S.A. 18A:25-1*)
4. In the instant matter, petitioner's initial transfer was not pursuant to the statutory prescription and thus was illegal from that time.
5. The root cause of the difficulty herein appears to be grounded in a lack of a well-defined, cohesive disciplinary policy adopted and espoused by the Board and embraced with enthusiasm by all those responsible for its implementation in Vailsburg High School.

These determinations are discussed *seriatim* as follows:

1. Petitioner's tenure as a teacher is a stipulated fact, but it is limited to employment as a teacher who is assigned to duties within the scope of his certification. He is protected in this employment by the statutes pertinent to tenure (*N.J.S.A. 18A:28*), but this entitlement cannot be broadened in scope to include the position of teacher to assist the Principal.

This named specific position clearly requires no special certificate and imposes no supervisory nor other responsibility, except that which a teacher would exercise. As the Commissioner stated in a matter of some comparability, *Keane v. Flemington-Raritan, supra*:

“\*\*\* Until petitioner serves more than two years in a position *for which a specific certificate is required* he can not (sic) claim tenure except within the general category of teaching staff member and respondent [the Board] is entitled to assign him, at its discretion, to any position which petitioner's certification qualifies him to fill.\*\*\*” (*Emphasis supplied.*) (at p. 177)

2. The statutes provide that tenured employees of the Board may be “dismissed or reduced in compensation” (*N.J.S.A. 18A:6-10*), but only in those instances in which “written charges” have been filed with the Board (*N.J.S.A. 18A:6-11*) and certified by the Board to the Commissioner of Education for a hearing. (*N.J.S.A. 18A:6-11 et seq.*) There is no provision in any statute for a hearing on such charges to be conducted by a local board of education or by any of its school administrators.

The most pertinent statute herein is *N.J.S.A. 18A:6-10*, and it is reproduced in its entirety below:

“No person shall be dismissed or reduced in compensation,

“(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

“(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:

“except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

“Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.”

3. As a tenured teaching staff member, petitioner can be transferred to a comparable position which he is qualified to fill, but only by a “recorded roll call vote” of a “majority” of the Board. (*N.J.S.A. 18A:25-1*) The statute provides in its entirety:

“No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed.”

The statute has been one of continuing force and effect in New Jersey for decades and the source of many decisions of the Commissioner and the Courts.

In this regard, the Supreme Court of New Jersey said in 1921, with regard to the transfer of a Gloucester City teacher, *Helen G. Cheesman v. Board of Education of Gloucester City*, 1938 S.L.D. 498, 502 that:

“\*\*\* The Gloucester City Board of Education had the power of transfer. (Sec. 68, School Law, C.S., Vol. 4, p. 4744.) Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act, \*\*\* and in the manner prescribed in said act. Her salary was not reduced or she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons. \*\*\*”

(See also *Abigail J. Williams v. Board of Education of the Borough of Madison*, 1938 S.L.D. 552.)

At a more recent date, in 1965, the Commissioner was also asked to adjudicate a dispute similar to the one herein. *John C. McGrath v. Board of Education of the Town of West New York, Hudson County*, 1965 S.L.D. 88. Specifically, the similarity was that petitioner in this case held a tenure entitlement to a teaching position, but not to the position of Dean of Boys from which he had been transferred. In considering the matter of transfer which was again the issue, the Commissioner said in part:

“\*\*\* It is also clear that \*\*\* he [petitioner] held tenure as a teacher and as such, respondent [the local board of education] 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. \*\*\* The Commissioner holds that respondent [the local board of education] had the authority, under R.S. 18:13-16, to transfer petitioner \*\*\* in order to avoid tenure in the position of dean or for any other valid reason.\*\*\*” (at p. 92)

In the context of these statutes and decisions of the Courts and the Commissioner, it is clear, therefore, in the instant matter that petitioner could have been transferred on January 26, 1973, by a recorded roll call majority vote of the full membership of the Board (*N.J.S.A. 18A:25-1*) and in no other way.

4. It is equally clear that petitioner's initial transfer from his position at Vailsburg High School on January 26, 1973, was not a transfer which followed the requisite “roll call majority vote” of the Board. It was an administrative action and thus illegal because the authority which ordered it was not the authority which the statutes prescribe; (*N.J.S.A. 18A:25-1*)

(a) the motivating force for the action was, in part at least, a series of allegations on which only the Commissioner of Education is empowered to act. (*N.J.S.A. 18A:6-10*)

5. Accordingly, it is apparent that, barring other factors of importance, petitioner has entitlement to return to the position he held prior to his transfer, and the Commissioner so holds.

However, there is one factor of importance herein which must be considered — the apparent lack of well-defined disciplinary policy adopted and espoused by the Board, which can be readily understood and embraced by all of those persons in Vailsburg High School charged with its implementation. This factor alone, in the Commissioner's judgment, does act as a bar to petitioner's immediate resumption of duties which he formerly performed. As petitioner himself has testified, the "big problem" (Tr. I-118) herein is concerned with such disciplinary procedures, and their implementation. Differing philosophies concerned with such procedures also appear to be a source of conflict according to the record of the hearing, *ante*.

How may such fundamental problems be cured? Who is primarily responsible for the development of such policies as are required herein? What should petitioner's role be?

In answering such questions the Commissioner finds, most importantly, that:

- (a) The Board is responsible for the "government and management" of the public schools of Newark pursuant to the statutory authority vested in it by the Legislature, (*N.J.S.A.* 18A:11-1) and must exercise such responsibility herein to review and ultimately adopt the disciplinary procedures to be followed in Vailsburg High School. In the process of review which is required herein, the Board may, of course, consult with any groups or officials that it deems appropriate, but the ultimate authority for a decision in such matters is the Board's and the Board's alone. Such authority may not be usurped. It should not be delegated.
- (b) When such policy has been reviewed and established, petitioner's relationship to it must be reassessed — both by the Board and by petitioner — and a decision made by both parties as to future implementation.

Consequently, the Commissioner holds that until such joint reassessment has been completed, petitioner's status should remain that of a teaching staff member assigned to work with the Vailsburg High School Principal, but with duties other than those concerned with the discipline of pupils.

Finally, the Commissioner opines that petitioner has become a symbol for the expression of one point of view with respect to the discipline of pupils and has become the fulcrum around whom discussions on the subject evolve. Such symbolism imposes an unfair burden on petitioner and is unnecessary in the circumstances, since petitioner's responsibility herein has not been that of a school administrator who developed or administered such policies on his initiative alone, and since petitioner alone has no authority to review or change such policies.

Therefore, it appears to the Commissioner that the prime requisite, as stated, *ante*, is a review and updating of the pertinent policies by the Board, and he directs that such review begin forthwith. At the time such review is completed, petitioner's status may be reviewed by the Board as a whole and by petitioner as well. Following such review, the Board is directed to assign petitioner to a position which, in the Board's discretion, is appropriate to petitioner's tenure as a teacher and according to the clear prescription of the statutes as outlined, *ante*.

COMMISSIONER OF EDUCATION

March 27, 1973

**In The Matter Of The Annual School Election Held  
In The School District Of The Township Of Monroe,  
Gloucester County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for three members of the Board of Education, hereinafter "Board," for full terms of three years each at the annual school election held February 13, 1973 in the Township of Monroe, Gloucester County, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Leslie E. Thurman	324	3	327
Edward F. Barber	288	1	289
Margaret Farris	272	15	287
Frederick Straub, Jr.	331	1	332
Anthony L. Pizzo	367	2	369
George Wardle	320	15	335
Ronald H. Campbell, Sr.	423	4	427
Ray H. Gross	263	1	264

Pursuant to a complaint filed by Frederick Straub, Jr., a defeated candidate, the Commissioner of Education ordered a recount of the ballots cast in the election and an inquiry into alleged statutory violations of procedure in the handling of absentee ballots. A hearing examiner, assigned by the Commissioner, conducted a recount and inquiry at the office of the Gloucester County Superintendent of Schools, Gloucester County, on March 2, 1973.

The recount was confined to a check of votes cast for Candidates Thurman, Straub and Wardle, who received 327, 332 and 335 votes respectively for the contested third seat on the Board. The hearing examiner reports that at the conclusion of the recount of the uncontested ballots, with thirteen ballots referred to the Commissioner for his determination, the tally stood as follows:

	At Polls	Absentee	Total
Leslie E. Thurman	322	3	325
Frederick Straub, Jr.	330	1	331
George Wardle	316	15	331

Candidate Straub complains that the procedural manner in which thirteen absentee ballots were handled was defective. He avers that the thirteen ballots were hand-delivered to the Board Secretary and that they should, therefore, be eliminated, if identifiable, from the final ballot count, or in the alternative, that all absentee ballots for all candidates should be eliminated. In either case, he claims, he should be declared the winner of the third contested seat.

The facts in the instant matter are not in dispute. The testimony of the principals follows:

At the inquiry, the Board Secretary testified that a current Board member delivered a packet of absentee ballots to her office on the day preceding the annual school election and that the packet of ballots remained in her unlocked desk overnight, although her office door was locked. She testified further that on February 13, 1973, the date of the annual school election, a messenger employed by the Board delivered the absentee ballots to the office of the County Board of Elections, but they were not accepted for counting because they had not been received by mail. They were left there by the Board messenger. After being advised by the Board solicitor, the Board Secretary testified, she arranged through Mrs. Fallon, the person in charge at the County Board of Elections office at the time, to have the ballots taken to the post office and mailed to the County Board of Elections, and she further arranged to reimburse Mrs. Fallon for the \$1.04 mailing cost for the thirteen ballots if she would advance that amount to one of her clerks for the mailing.

That portion of her testimony which dealt with the delivery of the ballots to the County Board of Elections and their subsequent mailing was corroborated by the testimony of the Board's messenger and Mrs. Fallon.

The Board member, who delivered the absentee ballots to the Board Secretary, testified that he made it known by word of mouth and through direct contact with some of the absentee voters that he would be willing to pick up the absentee ballots and deliver them as testified, *ante*. He testified further that seventeen persons casting absentee ballots were so alerted and that of those seventeen, thirteen saw fit to have him deliver the ballots to the Board Secretary. He also testified that the reason this procedure was used was because of the poor service offered by the postal service and that if the absentee voters had mailed their ballots, they would have been disenfranchised because the mail would not have been delivered on time.

He testified further that the ballots were secret, that they were in sealed envelopes tied with rubber bands, and that they had not been tampered with. He testified finally that the total vote result of the absentee ballots is public knowledge, as reported by the County Board of Elections to the Secretary of the



Board of Education; however, the choice on the ballot of an individual voter is not public knowledge.

There was neither testimony nor evidence of any tampering with the absentee ballots; however, Candidate Straub avers that the ballots were handled by unauthorized persons and that they were left unguarded overnight in the Board Secretary's office; therefore, he claims, they could have been accessible to anyone. An allegation that this practice of hand-delivery of absentee ballots has been the practice in the school district for several years during school board elections was not denied.

\* \* \* \*

The Commissioner has read the report and findings of the hearing examiner and has examined the thirteen ballots referred to him for final determination.

*Exhibit A* — These eight ballots cannot be counted for any candidate because the voters voted for more than three candidates for full three-year terms. No determination can be made, therefore, as to the intent of the voters on these ballots.

*Exhibit B* — No determination has to be made for this ballot since none of the candidates in question has a mark in front of his name.

*Exhibit C* — These two ballots may not be counted for any candidate since the marks made by the voters are placed to the right of the candidates' names and not in the square to the left of the name as required by N.J.S.A. 18A:14-55, which reads in part as follows:

“\*\*\* the voter shall mark a cross (x) or plus (+) or check (✓) mark \*\*\* in the square at the left of the name \*\*\*.”

*Exhibit D* — This one ballot had heavy scribbled marks in the square to the left of the name of Candidate Wardle. Through these scribbled marks can be seen a cross (x); however, the Commissioner is unable to tell whether the voter originally intended to vote for Candidate Wardle and then tried to eliminate his mark by scribbling over it, or, whether he intended to emphasize his vote. Therefore, the vote cannot be counted for lack of any clear intent of the voter.

*Exhibit E* — This one ballot has poorly made, but proper, crosses (x) in the square to the left of the names of three candidates, one of whom is Candidate Wardle. It appears that the voter retraced the cross (x) in front of the names several times. In the Commissioner's judgment, this ballot must be counted. Above the marks for the three candidates, a fourth mark was made for another candidate, then the mark and that candidate's name were crossed out with heavy black pencil lines.

The Commissioner determines that the intent of the voter is clear; the fourth mark and the candidate's name have been crossed out. Therefore, a vote for Candidate Wardle will be added to his total, *ante*.

When this single additional vote for Candidate Wardle is added to the previous total, the results stand as follows:

	At Polls	Exhibit E	Absentee	Total
Leslie E. Thurman	322	0	3	325
Frederick Straub, Jr.	330	0	1	331
George Wardle	316	1	15	332

There remains a question of procedure with respect to the handling of the thirteen absentee ballots referred to, *ante*.

Candidate Straub alleges that the hand-delivery of these absentee ballots was a violation of proper procedure. He alleges further that the refusal of the County Board of Elections representative to accept the ballots when delivered by hand is proof that they were not handled properly.

The Commissioner notes that *N.J.S.A. 18A:14-27*, which reads as follows, deals with the handling of absentee ballots:

“The secretary shall cause to be printed a sufficient number of military service and civilian absentee ballots, in the form prescribed by the county clerk of the county and section 14 of the ‘Absentee Voting Law (1953),’ (C. 19:57-14) for each school election and shall furnish them, together with inner and outer envelopes and printed directions for the preparation and transmission of such ballots for use in such election, to the county clerk, pursuant to section 8 of the ‘Absentee Voting Law (1953)’ (C. 19:57-8).”

Also, *R.S. 19:57-16* provides in pertinent part as follows:

“Each county clerk shall send, with each absentee ballot, printed directions for the preparation and transmitting of absentee ballots as required \*\*\* together with two envelopes of such sizes that one will contain the other.

“The outer envelope shall be addressed to the county board of elections of the county in which is located the home address of the person to whom the absentee ballot is sent, as certified by the county clerk.\*\*\*”

Additionally, *R.S. 19:57-23* reads in part as follows:

“\*\*\* said sealed outer envelope with the inner envelope and the ballot enclosed therein shall then *be mailed* with sufficient postage *to the county board of elections to which it is addressed.*” (*Emphasis ours.*)

The Commissioner can find no statutory authority for absentee ballots to be received, delivered or mailed by the secretary of the board of education to the county board of elections. The requirements and procedures for mailing absentee ballots to the county board of elections are clearly stated in the statutes. The Commissioner directs, therefore, the Secretary of the Board of Education of the Township of Monroe and reminds all board secretaries, in future elections, not to accept absentee ballots or cause them to be delivered or mailed.

The Commissioner determines that the evidences of irregularities of procedures in getting the thirteen absentee ballots, *ante*, to the Gloucester County Board of Elections, while not in any way condoned by the Commissioner, do not warrant his setting aside the election.

The Commissioner is without authority to make any determination with respect to the results of the counting of the absentee ballots. 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 law (*N.J.S.A. 18A:6-9*). Procedures for the *counting* of absentee votes 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 \*\*\* civilian absentee voters to vote or as to whether or not or how any such \*\*\* civilian absentee ballot shall be counted in such election shall be referred to the County Court of the county for determination.\*\*\*”

Candidate Straub's complaint in regard to the counting of the votes on the thirteen absentee ballots, *ante*, is therefore, 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 Gloucester County Board of Elections, as previously received by the Secretary of the Board of Education of the Township of Monroe and included in the vote totals of the election as required by *N.J.S.A. 18A:14-28*. *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County, 1957-58 S.L.D. 79; In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Little Ferry, County of Bergen, 1960-61 S.L.D. 203.*

The Commissioner finds and determines, therefore, that Ronald H. Campbell, Sr., Anthony L. Pizzo and George Wardle were elected at the annual school election on February 13, 1973, to seats on the Board of Education of the Township of Monroe for full terms of three years each.

COMMISSIONER OF EDUCATION

March 27, 1973

**Luther McLean,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Glen Ridge et al.,  
Essex County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Essex County Legal Services Corporation (Elliot M. Baumgart, Esq., of Counsel)

For the Respondent, Roger M. Nelson, Esq.

Petitioner, a school janitor employed on an annual basis by the Glen Ridge Board of Education, hereinafter "Board," alleges that his employment was terminated without just cause, adequate notice or hearing, and without a written statement of reasons in violation of his employment contract. The Board denies petitioner's allegations and asserts that his employment was terminated for just cause and in accordance with the terms of his employment contract.

A hearing was held in this matter on June 5, 1972 at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner. Memoranda of Law were subsequently filed by counsel in support of their respective positions. The report of the hearing examiner is as follows:

The Board asserts that petitioner, who had been assigned to a specific work shift at the high school, changed his work period to an earlier time on a specific day without authorization. Furthermore, the Board asserts and petitioner admits that: petitioner initially represented to his superiors that he punched his own time card; and when it was determined that petitioner misrepresented the facts regarding who had punched his time card on that day, he further misrepresented to his superiors his knowledge of the identity of that person. (Tr. 100, 103-104) For these reasons, as well as by reason of petitioner's past performance record, the Board asserts that its action terminating the employment of petitioner was justified.

Petitioner had been assigned to work the 11 p.m. to 7 a.m. shift at the time the matter, *sub judice*, arose. The Superintendent of Schools, who is also the Board Secretary, testified that this late work shift was instituted by the Board to reduce vandalism and excessive overtime costs. (Tr. 44) Petitioner testified that, upon completion of his assigned shift on the morning of December 15, 1971, he returned to school at 9 a.m. to collect his semimonthly paycheck. Petitioner then asserts that the following occurred: (Tr. 91)

“\*\*\*\* Well \*\*\* after I come (sic) to get my paycheck \*\*\* Joe Kecmer [head janitor in charge of the high school and petitioner’s immediate superior] was talking to Johnston Smith [a fellow janitor] and he said, ‘Well, you guys can come in early, half a day of school as long as the work was done.’ That was it that he said. (sic) So, I took it for granted that he meant me, too. \*\*\*\*”

It is deduced from the sworn testimony that pupils of the Glen Ridge Schools were dismissed every other Wednesday at 12:30 p.m. (Tr. 17, 81) The day of December 15, 1971, in the instant matter, was a Wednesday when the pupils were dismissed at 12:30 p.m. (Tr. 81)

Although Johnston Smith, on direct examination, corroborated petitioner’s testimony regarding the alleged conversation he had with the head janitor, Joe Kecmer, on the morning of December 15, 1971, *ante*, (Tr. 109) the head janitor asserts that while on past occasions he did call janitors in early, he did not inform any janitor on the day in question that they were allowed to come in early. (Tr. 82)

Petitioner testified that because he believed he was allowed to work an earlier shift, he reported to work on December 15, 1971 for the 3:30 to 11:30 p.m. shift. Arriving at the high school at approximately 3:25 p.m. (Tr. 89) and after a short conversation with a pupil in the parking lot adjacent to the building (Tr. 94, 105), petitioner asserts he proceeded to the time clock to punch in. Petitioner swears that the time was no later than 3:31 p.m., when he discovered that someone had punched his card at 3:30 p.m. In his own defense, petitioner avers that he did not report his card being punched by someone other than he because the time difference when the card was punched and the time when he went to punch it — one minute — was so close he didn’t believe it important. (Tr. 94, 97) Petitioner avers he then worked eight hours, completing his shift at 11:30 p.m. (R-1) This fact is not contradicted by any witness for the Board.

The Board’s supervisor of buildings and grounds testified that following his semimonthly procedure, while visiting the high school on December 15, 1971 between 3:30 p.m. and 3:45 p.m. and while inserting new time cards for the next pay period, he observed that not only was petitioner’s time card punched in at 3:30 p.m., but the card of another janitor, John Johnston, was punched in as well. (Tr. 4, 8) Realizing that both men were assigned the 11 p.m. to 7 a.m. shift, he made inquiries of the head janitor, who was present in the building, as to why the work times of both men had been changed. According to the supervisor’s testimony, the head janitor disclaimed changing anyone’s work time for that day, as well as asserting that he, the head janitor, had no authority to change anyone’s work shift unless “ \*\*\* it [the approval] comes from myself, Mr. Skinner [the supervisor] \*\*\*.” (Tr. 9)

Notwithstanding the head janitor’s disclaimer of authority to alter work schedules, an agreement (R-6) between the Board and the Amalgamated Industrial Union Local 76B-99 of which petitioner is a member, provides, *inter alia*, at page 17, in regard to his responsibilities as a “Custodian I”:

*“CLASSIFICATION I*

“Custodian ‘I’ is the Head Custodian of the building to which he has been assigned and as such is responsible for:

“I. the work schedules \*\*\* for all men assigned to his building.\*\*\*”

Furthermore, article II of the agreement, *ante*, states the following at page 3:

“2.4. This AGREEMENT constitutes Board Policy for those items included and for the term of said AGREEMENT.\*\*\*”

Therefore, the hearing examiner concludes that by virtue of adopted Board policy, effective June 20, 1971 (R-4, *ante*), the head janitor did, in fact, have authority to alter work schedules of men under his supervision.

The supervisor immediately made an attempt to locate the men, but he was unable to find them in the building until 5:50 p.m. when, he testified, he first saw petitioner and the other janitor, John Johnston. (Tr. 9-10) In response to questioning why they were working the early shift, they informed the supervisor that they “\*\*\* had come in earlier under Mr. Kecmer’s [the head janitor] instructions.\*\*\*” (Tr. 10) In response to further questioning by the supervisor, both men explained that they had individually punched in at 3:30 p.m. that day. Petitioner’s presence in the building that day had been observed by the head janitor at approximately 4:45 p.m. (Tr. 84) According to the testimony of Johnston Smith, he observed petitioner in the building at 3:30 p.m. (Tr. 84-85, 112-113) It is noted that Johnston Smith plays a critical role in the instant matter, and the hearing examiner finds no reason to question the credibility of his testimony.

Smith, in uncontradicted testimony, declared that he altered his own work shift on the same authorization of the head janitor as alleged by petitioner, on the date in question, by reporting for work an hour earlier than his regularly-assigned shift. (Tr. 110) Both the head janitor and the supervisor, upon seeing petitioner working a shift other than his assigned shift, allowed him to continue the earlier shift, and did not instruct him to report at his regularly-assigned time of 11:00 p.m.

Questioning of the two men continued on a day thereafter when petitioner stated to the supervisor that John Johnston, who was also employed by Public Service Electric and Gas Company in Newark, had taken a personal day from that job to report to the high school for the earlier shift; that Johnston’s car had broken down that day so that he, petitioner, drove Johnston to work and they arrived together; that they, both janitors, individually punched in their own time cards on December 15, 1971.

After further investigation, the supervisor determined through Public Service that Johnston did not take a personal day on December 15 and that, in fact, he had worked for the Company until 4:32 p.m. that day. (Tr. 13) When confronted with this information, petitioner then admitted he drove to work alone and that someone other than he had punched in his time card, but he refused to inform the supervisor of that person, even though by now petitioner knew who had performed that act. Petitioner testified that he refused to disclose this person's identity in order to "protect him." (Tr. 96)

On December 21, 1971, the supervisor reported to the high school principal what he had discovered regarding petitioner and his work period for December 15, 1971. The principal testified that a meeting was held on December 23, 1971, which included petitioner, the principal, petitioner's union steward, the head janitor, and John Johnston. According to the principal's testimony (Tr. 25), petitioner admitted that someone other than he had punched his time card on December 15, 1971, but he also insisted that he was in the building at that time. The other janitor, John Johnston, admitted he had not arrived until 5:30 p.m. Although petitioner acknowledged that he knew who, in fact, had punched his card, the principal testified that he "\*\*\*\* steadfastly refused to tell \*\*\*." (Tr. 26)

On or about January 3, 1972, Johnston Smith informed the principal that he had punched petitioner's card in because he had seen petitioner "\*\*\*\* in the building \*\*\* " and had assumed he was working the 3:30 to 11:30 p.m. shift (Tr. 27-28)

On January 13, 1972, the principal submitted a report to the Superintendent of Schools concerning petitioner and the other two janitors involved in the incident of December 15, 1971. The principal's report included recommendations providing that: all three men be docked one day's pay; that petitioner and John Johnston be placed on a shift other than the 11 p.m. to 7 a.m. shift so that they might receive more direct supervision; that an official report of the incident be made part of the record of each of the three men; and that each be issued a warning that further misuse or misrepresentation of time schedules would be cause for dismissal. (R-3)

Although the principal testified that the supervisor of buildings and grounds had first informed him of the incident on December 21, 1971 (Tr. 24), the Superintendent of Schools testified (Tr. 35) that the supervisor informed him of the incident on December 16, 1971, the day after it occurred. The Superintendent further testified that he discussed this matter with the principal and the supervisor around the first of the year. (Tr. 36) At that time, the Superintendent asked the principal for recommendations (Tr. 37) which he subsequently received on January 13, 1972. (R-3, *ante*) Upon receipt of the recommendations (R-3, *ante*), and after concluding that the change of shifts was deliberately carried out by the janitors without authorization (Tr. 38), the Superintendent testified that he decided to recommend dismissal of the janitors, including petitioner. Therefore, the Superintendent sent the following letter to petitioner on January 21, 1972: (R-4, Tr. 38)

“Mr. Luther McLean  
Custodian  
Glen Ridge High School

“Dear Mr. McLean:

“The incident involving the unauthorized punching of time cards and change of shifts has been brought to my attention. After a thorough review of the incident and of your past (sic) work record, I have no alternative than to terminate your employment as of January 31, 1972.

“Keys are to be turned in to Mr. Skinner on Monday, January 31st.

“Respectfully,

“James F. Gray  
Superintendent”

Subsequent to January 21, 1972, a representative of the union contacted the Superintendent and requested a meeting in regard to the dismissal of petitioner. (Tr. 39, 43) Confirming a date for the requested meeting, which was later attended by petitioner, the Superintendent issued the following letter: (R-5)

“Mr. Robert M. Head  
Business Representative  
Amalgamated Industrial Union  
Local No. 76B-92-A.F.L.C.I.O. (sic)  
25 Halstead Street  
East Orange, New Jersey 07018

“Dear Mr. Head:

“We will be glad to meet with you at 3:00 p.m. on Wednesday, February 2nd at 10 High Street.

“The dismissal for just cause i.e., falsifying time cards, vacating a shift assignment and building coverage, falls into the just cause category and is not a grievance matter.”

“Respectfully,

“James F. Gray  
Superintendent”

Testifying in regard to this meeting, the Superintendent stated that he was primarily concerned with the change in shifts as opposed to someone punching in petitioner's time card. (Tr. 44) On cross-examination, the Superintendent added that he was concerned about petitioner's falsehoods in regard to the facts of the matter. Additionally, the Superintendent was concerned that the physical



plant of the high school was in jeopardy of vandalism by not having the men on their proper — *e.g.*, 11 p.m. to 7 a.m. — shift, all of which led to his decision as stated in R-4, *ante*. (Tr. 68, 70, 77) The hearing examiner observes that the foregoing decision of the Superintendent was based upon reports submitted to him and conversations he had with school personnel. (Tr. 59, 62, 65, 71, 77) At no time had the Superintendent ever talked with petitioner regarding this matter (Tr. 60) prior to the meeting of February 2, 1972, *ante*, when in the Superintendent's view "\*\*\*\* He [petitioner] had the opportunity at the [that] time \*\*\* to give me the entire story \*\*\*." (Tr. 65) It is also noted that petitioner was not given any written summation of the facts as perceived by the Superintendent, nor of the conclusions upon which the Superintendent based his recommendation for dismissal. (Tr. 61)

The Board's official action in this matter occurred, according to the undisputed testimony of the Superintendent-Board Secretary, on March 20, 1972: (tr. 62)

“\*\*\*\* Page 159, the official minutes of the Board of Education, Custodial Dismissal in accordance with the Superintendent's recommendation, the dismissal of the following custodians was accepted. Mr. Luther McLean, high school, effective January 31, 1972, and Mr. John Johnston, high school, effective January 31, 1972. \*\*\*\*”

During oral summation immediately following the hearing on the factual issues involved herein, petitioner urges credibility be attached to his assertion that he, in fact, understood that he was authorized to change his shift on December 15, 1971. Furthermore, although petitioner admits lying about the time card, he avers that there was no conspiracy nor collusion between him and Johnston Smith and that he, in fact, reported to work at 3:31 p.m. Accordingly, punishment, if any, petitioner argues, should be limited to that recommended by the high school principal. (R-3)

The findings of fact by the hearing examiner in this matter are as follows:

1. Petitioner had reason to believe that he was authorized to report to work at an earlier time on December 15, 1971, and did so, by reporting to work for the earlier 3:30 to 11:30 p.m. shift.
2. Johnston Smith punched in petitioner's time card because he had seen petitioner in the building.
3. Petitioner erred in his judgment by misrepresenting the facts regarding the time clock to his superiors on at least two occasions.
4. A meeting was held on December 23, 1971, during which the principal attempted to obtain the facts of the matter and at which petitioner withheld pertinent information.

5. Based on R-4, *ante*, the employment of petitioner was effectively terminated as of January 31, 1972. No testimony nor documentary evidence was offered to show that the Board took action on January 21, 1972, the date of the Superintendent's letter. (R-4)

6. The Superintendent, at the request of petitioner's union representative, held a meeting on February 2, 1972, which did not change the dismissal decision.

7. The Board's official action in this matter occurred on March 20, 1972, when the Superintendent's action contained in R-4, *ante*, was affirmed.

In his Memorandum of Law petitioner argues that there was no just cause for his discharge and relies on article VI, section 6.7 of the agreement (R-6), *ante*, to support his position in that regard. Article VI, section 6.7 of the agreement, at page 9, states, *inter alia*:

"6.7 It is understood and the BOARD agrees to offer each employee an employment contract for a period commencing July 1, 1971, and ending June 30, 1973, the position and salary to be described in the individual contract to be issued by the BOARD to the employee.\*\*\*"

The "individual contract" referred to, *ante*, reads as follows: (R-10):

#### *"CUSTODIAN'S CONTRACT"*

"It is agreed between the Board of Education of the Borough of Glen Ridge in the County of Essex (hereinafter referred to as the Board), and Luther McLean that said Board has appointed the said employee to act as Custodian-Class 2 in the Glen Ridge Public Schools, effective beginning the 1st day of July 1971 to the 30th day of June 1972 at an annual salary of \$6,800 to be paid in equal semi-monthly installments.

"It is hereby agreed that this contract shall be renewed for the year commencing July 1, 1972 and ending June 30, 1973 providing that the employee, after thorough and continuous evaluation of performance is found to be satisfactory and is not, at that time, subject to discharge under the 'just cause' procedure of the contract agreement presently existing between the Amalgamated Industrial Union Local 76B-99 (hereinafter referred to as the Union), and the Board, and providing that there is no grievance procedure in process of such a serious nature that job termination is a possibility. If such is the case, the issuance of a new contract shall be contingent upon the disposition of said dispute under the said terms of the agreement. The renewal of this contract is also subject to the position being available in the table of organization for the 1972-73 school year.

“In addition this contract incorporates by reference the terms and provisions of the agreement between the Board and the Union for the period commencing July 1, 1971.

“The said custodian hereby accepts the employment aforesaid and undertakes that he will faithfully do and perform his duties under the employment aforesaid.

“Dated this 1st day of  
July 1971

THE BOARD OF EDUCATION OF THE  
BOROUGH OF GLEN RIDGE IN THE  
COUNTY OF ESSEX, NEW JERSEY

“Attest:

By Fulton H. MacArthur  
President

James F. Gray  
Secretary

Luther McLean, Jr.  
Custodian”

“Witness

Theresa Leonard”

Petitioner asserts that because he was never afforded a hearing prior to his dismissal, a material breach of his contract occurred. Relying on *N.J.S.A. 18A:6-30*, as well as citing *Roselle v. La Fera Contracting Co.*, 18 *N.J. Super.* 19, 28 (*Ch. Div.* 1952); *De Pava v. Camden Forge Co.*, 254 *F. 2d* 248, 250 (3rd *Cir.* 1958), *cert. den.* 358 *U.S.* 816; and, *Moore v. Central Foundry Co.*, 68 *N.J.L.* 14 (1902), petitioner demands that, due to the alleged breach of contract in the procedure used in his dismissal, he be reinstated as an employee of the Board retroactive to January 31, 1972.

Finally, petitioner argues that his constitutional right to due process was denied by the failure of the Board to give adequate notice of the charges against him, as well as the Board's failure to hear him on those allegations. Counsel for petitioner cites *Board of Regents v. Roth*, 408 *U.S.* 564, 40 *U.S.L.W.* 5079 (June 29, 1972) and *Olson v. Regents of the University of Minnesota*, 301 *F. Supp.* 1356 (*Minn.* 1969) in support of this position.

The Board, in its Memorandum, asserts that petitioner's constitutional rights to due process were not violated and argues that *N.J.S.A. 18A:6-10* cited by petitioner, is not applicable to nontenured employees.

The Board asserts that petitioner was given every opportunity to set forth his point of view regarding the incident of December 15, 1971 in the following manner:

The supervisor of building and grounds sought out the facts, notwithstanding petitioner's lack of cooperation, prior to submitting the matter to the principal for his recommendations.

The principal met with petitioner and petitioner's representative on December 23, 1971 at which time petitioner was informed of the possibility of dismissal.

After being informed of the possibility of dismissal, petitioner still chose not to cooperate; instead, "\*\*\*\* in a questionable sense of loyalty, chose to protect a fellow employee\*\*\*." (Board's Memorandum, at p. 6)

The matter was submitted to the Board, through the Superintendent, for decision.

Petitioner was advised of the decision and the reasons in support thereof by letter dated January 21, 1972. (R-4, *ante*)

Petitioner had every opportunity to be heard at the meeting of February 2, 1972.

The Board also argues that petitioner was discharged for good cause; specifically, the alleged unauthorized punching of time cards, the unauthorized change of shifts, and petitioner's past work record. Counsel for the Board asserts that the charges herein are essentially insubordination, malfeasance, and deliberate conduct tantamount to theft and fraud.

Finally, the Board contends that it did not breach its policy nor did it breach article VI, section 6.7 of the agreement as asserted by petitioner, *ante*. The failure of petitioner to carry the burden of proof related to this charge, the Board avers, causes petitioner's argument to fail.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner as set forth above and the record in the instant matter.

In regard to the agreement between the Board and the Amalgamated Industrial Union Local 76B-99, R-6, it is observed that the agreement, adopted by the Board as its policy, has a life span of two years. It is well established that a board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Cummings v. Board of Education of Pompton Lakes, et al.*, 1966 S.L.D. 155; *Skladzien v. Bayonne Board of Education*, 12 N.J. Misc. 603 (Sup. Ct. 1934), affirmed 115 N.J.L. 203 (E. & A. 1935); *Evans v. Gloucester City Board of Education*, 13 N.J. Misc. 506 (Sup. Ct. 1935), affirmed 116 N.J.L. 448 (E. & A. 1936) N.J.S.A. 18A:29-4.1 provides boards with the authority to adopt a salary policy for two years for teaching staff members. N.J.S.A. 18A:17-15 provides boards with authority to appoint a superintendent of schools for a period of time not exceeding five years. No authority can be found, however, for a board of education to adopt a non-salary policy as in the instant matter, and, accordingly, the Commissioner

holds that the portion of R-6, regarding the two-year life of the policy, is *ultra vires* and is hereby set aside. The Board, however, is bound by that policy for the 1971-72 school year. In like manner, the individual contract (R-10) of petitioner herein is binding for the 1971-72 school year only. Any agreement therein to bind a future board of education is *ultra vires* and hereby set aside.

There is no question that boards of education have statutory authority to employ janitors. *N.J.S.A.* 18A:16-1 provides in pertinent part:

“Each board of education, *subject to the provisions of this title* \*\*\* may employ \*\*\* janitors \*\*\*” (*Emphasis supplied.*)

Furthermore, *N.J.S.A.* 18A:17-41 provides:

“The board of education of every district shall make such rules and regulations, not inconsistent with this title, as may be necessary for the employment, discharge, management and control of the public school janitor, janitor engineers, custodians or janitorial employees of the district.”

The Commissioner observes that petitioner was employed for a fixed term beginning July 1, 1971 and ending June 30, 1972. Therefore, the legislative provisions for tenure of janitors set forth in *N.J.S.A.* 18A:17-3 do not apply herein.

However, the Commissioner is constrained to observe that petitioner’s employment contract, R-10, contains no provision for termination on notice by either party, therefore the contract can only expire by its own terms, on June 30, 1972. On past occasions, the Commissioner has upheld the validity of a board of education entering into fixed-term contracts with janitors, as well as the termination of such contracts by either party invoking a termination clause therein. See *Olley v. Board of Education of Southern Regional High School*, 1968 *S.L.D.* 20. In like manner with probationary teachers, the Commissioner has sustained boards of education in terminating contracts entered into, so long as the termination is in accord with the terms of the contract. See *Branin v. Board of Education of the Township of Middletown*, 1967 *S.L.D.* 9. On the other hand, however, where a board of education attempted to terminate a contract with a teacher in violation of the terms of said contract, the Commissioner has set aside such termination. Specifically, in *Gager v. Board of Education of the Lower Camden County Regional High School District No. 1*, 1964 *S.L.D.* 81, at page 84, the Commissioner held:

“\*\*\* that the termination of petitioner’s [Gager’s] services by the Lower Camden County Regional Board of Education was not in accordance with the terms of their mutually agreed upon contract of employment.\*\*\*”

Accordingly, the Commissioner ordered the Board to pay Petitioner Gager his salary according to the sixty-day termination provision which was part of his contract with the Board.

In the case of *John McKeown et al. v. Board of Education of the Gateway Regional High School District, Gloucester County*, 1968 S.L.D. 210, affirmed State Board of Education, 1968 S.L.D. 213, petitioners were employed as janitors by fixed-term contracts for the 1967-68 school year. Petitioners' contracts of employment provided for a ninety-day probationary period for each, and the Board terminated the employment of the janitors after the expiration of the probationary period. The Commissioner stated, *inter alia*, the following at p. 212:

“\*\*\* petitioners had every right to believe that their period of probation had been successfully accomplished and that their status had become one of regular employment for the balance of the year as set forth in the initial employment action. Respondent took no action with respect to petitioners' services until after the 90-day probationary period had elapsed. Petitioners therefore acceded to regular employment status and as such could not be discharged without a statement of charges and a hearing thereon.\*\*\*”

The instant matter bears similarity to *McKeown, supra*, in that petitioner herein also possessed a regular employment status for the precise limited duration of the 1971-72 school year. This is not a tenure status such as may be acquired under the conditions set forth in *N.J.S.A. 18A:17-3*, because that statute specifically exempts those janitors “\*\*\* appointed for a fixed term \*\*\*.” In *McKeown, supra*, the Commissioner stated the requirement for charges and a hearing, in order to terminate such a regular employment status as petitioner in this matter possess. As was previously stated, petitioner possesses this status as the result of the absence of a provision for notice of termination in petitioner's one-year contract. Furthermore, the Board has no authority to conduct such a hearing for a nontenure employee such as petitioner in the circumstances of the matter herein controverted. The only proper dismissal procedure for a local board of education to follow in these circumstances is to file charges and request a hearing by the Commissioner. *McKeown, supra*

The Commissioner is well aware that the aforementioned remedy of charges and a hearing may be construed as an extension of a tenure right to a nontenured employee. However, in the absence of a notice of termination provision in the employment contract of a nontenured employee, some remedy must be available to a local board of education which finds it necessary to terminate an employee whose presence is detrimental to the proper conduct of the public schools within its jurisdiction. The Commissioner believes that the Legislature could best resolve this state of affairs by enacting a statutory requirement that all employment contracts for nontenured employees contain a provision for notice of termination by either the employee or the board of education. Absent such legislation, local boards of education may now include such a provision in employment contracts of nontenured personnel.

In regard to the Superintendent's action of “\*\*\* terminating [petitioner's] employment \*\*\*” (R-4), the Commissioner points out that a board of education alone has the authority to employ (*N.J.S.A. 18A:16-1*) and

discharge (N.J.S.A. 18A:17-41) janitors. No statutory authority exists for a superintendent of schools, or a board secretary, to terminate the employment of a janitor. Accordingly, that action of the Superintendent of Schools is hereby set aside, and the resolution of March 20, 1972 by which the Board affirmed the dismissal of petitioner, is also set aside.

The Commissioner has determined that (1) the employment contract of petitioner was valid only for the 1971-72 school year, (2) petitioner's 1971-72 employment contract contained no notice of termination provision, and (3) the employment of petitioner was improperly terminated by the Superintendent of Schools and the Board.

Accordingly, the Commissioner hereby orders the Board of Education of Glen Ridge to pay to Luther McLean the sum of money he would have received in uninterrupted service from the date of his improper dismissal until the end of the 1971-72 school year. Such sum of money shall be mitigated by the amount of salary earned by petitioner in other employment from the date of his dismissal until the expiration of his 1971-72 employment contract.

Since petitioner's employment contract expired on June 30, 1972, the question of the reinstatement of petitioner to his former position is a matter wholly within the jurisdiction of the Board of Education of the Borough of Glen Ridge.

COMMISSIONER OF EDUCATION

March 29, 1973

**In The Matter Of The Annual School Election Held  
In The School District Of The Township of West Deptford,  
Gloucester County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the annual school election held in the Township of West Deptford, Gloucester County, February 13, 1973 on the question of the appropriation of \$3,640,026 for current expenses for the 1973-74 school year were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Yes	413	1	414
No	412	0	412

Pursuant to a request made by Robert J. Oldt, *et al.*, an authorized representative of the Commissioner of Education conducted a recount of the ballots cast on the question. The recount was held at the office of the Gloucester County Superintendent of Schools, Sewell, on March 13, 1973.

At the conclusion of the recount, with all but eight ballots counted, the tally stood as follows:

	At Polls	Absentee	Total
Yes	407	1	408
No	406	0	406

Several ballots were not considered in the recount because the voters' marks were made over the words YES or NO and not in the square to the left of the question as required by statute. *N.J.S.A. 18A:14-55*

The eight ballots reserved for determination fall into two categories as follows:

*Exhibit A* — Three of the eight ballots were marked with blue ink. Two were marked YES and one was marked NO.

The Commissioner commented *In the Matter of the Annual School Election Held in the School District in the Township of Voorhees, Camden County, 1970 S.L.D. 82*, as follows:

“\*\*\* blue ink marks are valid under the provisions of *R.S. 19:16-4* and that the only basis for rejecting this ballot would be to find that it was so marked by the voter for the purpose of identifying his ballot. \*\*\* [Although the marks were made with] blue ink, distinguishing his ballot was not the intent of the voter and that the ballot is valid under the authority of *R.S. 19:16-4* \*\*\*.”

That statute reads in part as follows:

“\*\*\* 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 county board, judge of the Superior Court or other judge or 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. \*\*\*”

These three ballots, therefore, will be counted; two for the question and one against the question.

*Exhibit B* — Of the five remaining ballots, three have been marked YES and two have been marked NO. All five of these ballots have been marked with a cross (X); however, on three of them, two legs of the cross (X) have been closed with another line. The two remaining ballots have crosses which are poorly made and the legs have been made at least twice so as to give the impression of a double cross (X).



It is the Commissioner's judgment that all of these ballots are valid and that the intent of the voter has been properly expressed. Such marks as these are not uncommon and are obviously the result of careless marking, infirmity, poor vision or visibility or some other cause rather than to attempt to distinguish the ballot. The marks are substantially crosses (X) contained within the square and clearly not made for an improper purpose. See *In the Matter of the Special School Election in the Township of Tewksbury, Hunterdon County, 1939-49 S.L.D. 96*; *In the Matter of the Annual School Election in the Borough of Watchung, Somerset County, 1960-61 S.L.D. 170*; *In the Matter of the Annual School Election in the Township of Randolph, Morris County, 1965 S.L.D. 66*. Also, the Supreme Court held in the case of *Keogh Dwyer, 45 N.J. 117 (1965)*, that where the mark in question is adequate to meet the test set forth in *R.S. 19:16-3g* which requires that the mark be substantially a cross (X), plus (+) or (✓), it will be counted.

The Commissioner determines, therefore, that three additional votes must be added to the total for the question and two added to the total against the question.

When the votes in Exhibits A and B are added to the previous totals, the results stand as follows:

		Exhibits			
	Uncontested	A	B	Absentee	Total
Yes	407	2	3	1	413
No	406	1	2	0	409

The Commissioner finds and determines that the proposed appropriation for current expenses for 1973-74, was approved by the voters at the annual school election on February 13, 1973.

COMMISSIONER OF EDUCATION

March 29, 1973

**Board of Education of the Borough of Union Beach,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Union Beach,  
Monmouth County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Peter J. Edwardsen, Esq.

For the Respondent, Blanda & Blanda (Philip J. Blanda, Jr., Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," certifying a lesser amount to the Monmouth County Board of Taxation to be raised by local taxation for the current expenses of the school district for 1972-73 than the amount rejected by the voters of the school district. Petitioner alleges that the amount certified will be insufficient to maintain a thorough and efficient system of public schools in the district. Respondent denies the allegation and asserts that even after the reductions it proposes, sufficient funds remain to operate and maintain a thorough and efficient school system.

A hearing in this matter was held at the office of the Monmouth County Superintendent of Schools, Freehold, on December 18, 1972 by a hearing examiner appointed by the Commissioner. The record was completed on January 26, 1973, when the required budgetary documentation was submitted by the Board. The report of the hearing examiner follows:

At the annual school election held on February 8, 1972, the Board submitted to the electorate a proposal to raise by local taxation the amount of \$840,946.20 for current expenses of the district in 1972-73. The proposal was rejected. Subsequent to consultation with Council, pursuant to *N.J.S.A. 18A:22-37*, the Board's budget was reduced by \$238,766.50, and Council adopted a resolution on March 9, 1972, certifying \$602,179.70 to the Monmouth County Board of Taxation as the amount necessary to be raised by tax levy for the 1972-73 school year.

The reductions proposed by Council apply to the following line items as follows:

Acct. No.	Item	Board's Budget	Council's Proposal	Amount Of Reduction
J-110-f	Supt.'s Sal.	\$ 21,500.00	\$ 20,750.00	\$ 750.00
J-110-f-a	Supt.'s Secy. Sal.	5,800.00	- 0 -	5,800.00
J-120-d	Other Contr. Serv.	2,000.00	- 0 -	2,000.00

J-130-a	Bd. Members' Exp.	2,000.00	1,500.00	500.00
J-130-b	Secy.'s Off. Exp.	600.00	300.00	300.00
J-130-f	Administrative	750.00	375.00	375.00
J-130-n	Misc. Exp. for Adm.	300.00	150.00	150.00
J-213	Teachers	589,852.20	545,800.20	44,052.00
J-214-a	Librarian	7,912.50	— 0 —	7,912.50
J-214-c	Psychologist	7,596.00	— 0 —	7,596.00
J-215-c	Other Secretarial Serv.	11,250.00	— 0 —	11,250.00
J-216	Other Sals. for Instr.	38,373.00	16,127.00	22,246.00
J-216-a	Sals. for Playground Aids	3,600.00	— 0 —	3,600.00
J-220	Textbooks	12,500.00	10,000.00	2,500.00
J-230-a	School Library Books	5,000.00	1,000.00	4,000.00
J-230-b	Periodicals and News.	1,700.00	700.00	1,000.00
J-230-c	A-V Mats.	4,000.00	1,000.00	3,000.00
J-230-e	Other School Lib. Exp.	650.00	450.00	200.00
J-240	Teaching Supls.	13,000.00	10,000.00	3,000.00
J-250-a	Misc. Supls. for Instr.	1,500.00	500.00	1,000.00
J-410-a-3	Nurses' Sals.	20,305.50	12,105.50	8,200.00
J-420-a	Supls. for Health Serv.	1,000.00	500.00	500.00
J-420-c	Misc. Exp. for Health Serv.	4,500.00	1,500.00	3,000.00
J-510-a	Pupil Trans. Sals.	10,867.00	5,867.00	5,000.00
J-520-a	Contr. Serv. to & from School	27,722.00	22,722.00	5,000.00
J-550	Other Exp.	5,000.00	3,000.00	2,000.00
J-610-a	Operation-Sals.	58,278.00	28,278.00	30,000.00
J-710-b	Maintenance	6,910.00	— 0 —	6,910.00
J-720-b	Contr. Serv. — Repair Bldg.	3,000.00	— 0 —	3,000.00
J-740-a	Other Exp. for Upkeep of Grounds	1,925.00	— 0 —	1,925.00
J-740-b	Other Exp. for Repr.	2,000.00	— 0 —	2,000.00
J-870	Tuition	460,000.20	410,000.70	50,000.00
TOTAL REDUCTION				<u>\$238,766.50</u>

The findings, conclusions and recommendations of the hearing examiner as to each of the proposed reductions are as follows:

The Board's budget proposal is adequately supported through its oral and written testimony except for item J-710-b, which it has agreed to eliminate, J-213, which it agreed to reduce by \$3,000, and its free balance account which will be discussed at length.

However, Council's reasons for suggesting economies in the line items shown in the table, *ante*, were not adequately supported or documented to show how the recommended economies could be effected; nor did Council demonstrate that the supporting statements and documents offered by the Board in support of the contested line items were in error or excessive in the amounts proposed.

Council simply made statements with respect to individual line items indicating that it was of the "opinion" that a reduction could be made; that the Borough of Union Beach could not afford the proposed expenditure; that an account be reduced in the "interest of economy;" that "austerity is upon" the school district; that "items seem to be inflated;" that it is of the "opinion" that a position is not needed; that a reduction "works no hardship," etc. (Answer to Petition of Appeal)

Except for accounts numbered J-710-b (on which the parties agree) and J-213 in which the Board agrees to a \$3,000 reduction, Council did not follow the dictates of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council*, 48 N.J. 94 (1966), in which the Court said that the governing body must set forth its underlying determinations and *supporting reasons* for its action to reduce the budget of the Board of Education.

The hearing examiner concludes that the statements made by Council with respect to the line items in the table, *ante*, and excerpted, *ante*, do not set forth reasons, as demanded by the Court, in *East Brunswick, supra*, to show the Board how it could economize and continue to operate a thorough and efficient system of the public schools in its district.

The hearing examiner recommends, therefore, that the agreed-upon \$6,910 in line item J-710-b, Maintenance, and \$3,000 from account J-213, Teachers be eliminated from the budget, but that the remainder of the proposed budget be restored.

There remains a question of how much free balance, if any, should remain in the Board's surplus account which, as reported in the June 30, 1972 audit, to be \$103,281.39.

In Council's Amended Answer to Petition of Appeal, it requested that the Commissioner direct the Board to use "\*\*\*\* at least a minimum of 75 per cent of the surplus funds \*\*\*."

The hearing examiner opines that Council's recommendation that the Board apply three-fourths of the free balance to the 1972-73 school budget, however, is reasonable, and he therefore recommends that the Commissioner direct the Board to apply \$77,500 to its 1972-73 school budget.

After eliminating \$6,910 (J-710-b) and \$3,000 (J-213) from the Board's proposed budget, *ante*, and applying \$77,500 of the free balance to Council's proposed economy, the totals stand as follows:

Board's Budget	Council's Reductions	Amount Restored	Less Applied Surplus	Total Restored
\$460,000.20	\$238,766.50	\$228,856.50	\$77,500	\$151,356.50
	*	*	*	*

The Commissioner has reviewed the findings, conclusions and recommendations of the hearing examiner and concurs therein.

It is well established that Council's budget reductions must be supported by reasons for its recommendations. See *East Brunswick, supra*; *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon*, 1970 S.L.D. 70; and *Board of Education of the Borough of National*

*Park v. Borough of National Park and the Gloucester County Board of Taxation*, 1968 S.L.D. 135.

The statements submitted by Council as reported, *ante*, do not give adequate reasons, but merely indicate conclusions and judgments made by Council, which it determined to be better than those reasoned determinations made by the Board.

The Commissioner determines, however, that such statements by Council do not meet the Court guidelines in *East Brunswick, supra*; therefore, they cannot be considered.

The other major area of contention is the Board's surplus account or free balance. According to the Board's annual audit report dated June 30, 1972, its free balance in the current expense account was \$103,281.39.

Council's recommended cut in the free balance account is sustained, and the Board is directed to apply \$77,500 of its free balance to the 1972-73 school budget.

The Commissioner further determines that there is a need to maintain a reasonable reserve for unanticipated and emergency expenditures and that after the application of \$77,500 of the surplus to its 1972-73 school budget, the remainder of the Board's free balance is adequate in light of its total budget.

The Commissioner determines finally that \$151,356.50 must be added to the amount previously certified by the Mayor and Council of the Borough of Union Beach in order to provide sufficient funds to maintain a thorough and efficient school system. He therefore directs the Mayor and Council of the Borough of Union Beach to add to the previous certification to the Monmouth County Board of Taxation the sum of \$151,356.50 for current expenses of the school district of the Borough of Union Beach for the 1972-73 school year.

COMMISSIONER OF EDUCATION

March 29, 1973

**In the Matter Of The Tenure Hearing Of  
Anthony J. Brennan,  
School District of the City of Elizabeth,  
Union County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

Anthony J. Brennan, a carpenter and custodial employee of the Board of Education of the City of Elizabeth, in the County of Union, hereinafter "Board," is charged with conducting himself in a manner unbecoming a Board employee pursuant to *N.J.S.A. 18A:6-10 et seq.* The charges were certified to the Commissioner of Education by resolution of the Board dated February 8, 1973, and the Board suspended respondent from his employment without pay for a period of ten days.

In accordance with *N.J.S.A. 18A:6-15*, a copy of the charges and resolution were served upon respondent by certified mail, received on March 6, 1973. On February 28, 1973, respondent was directed by letter from the Assistant Commissioner of Education in charge of Controversies and Disputes to file and serve his Answer to the charges or, in the alternative, to indicate that he did not intend to enter a defense. In a letter to the Division of Controversies and Disputes, State Department of Education, dated March 9, 1973, respondent stated that he did not wish to present any defense in his behalf.

The Commissioner has previously dealt with matters in which respondents have chosen not to answer charges to defend themselves. See *In the Matter of the Tenure Hearing of Hugh Mullen, School District of Madison Township, Middlesex County*, 1968 S.L.D. 51; *In the Matter of the Tenure Hearing of William Nagy, School District of Caldwell-West Caldwell, Essex County*, 1968 S.L.D. 23; *In the Matter of the Tenure Hearing of Mert P. Hyland, School District of the Township of Millburn, Essex County*, 1968 S.L.D. 253. In the decisions cited, *supra*, the Commissioner upheld the charges stated therein because of the absence of any defense thereto.

The Commissioner finds and determines, in consideration of the charges certified to him by the Elizabeth Board of Education against respondent, and particularly in view of the complete and expressed absence of any defense thereto, that the charges as stated will be considered to be true. The Commissioner further finds the misconduct of respondent to be sufficient to warrant the ten-day suspension without pay already imposed by the Board, and affirms this penalty as if the Commissioner had originally ordered it.

COMMISSIONER OF EDUCATION

March 30, 1973

**Albert DeRenzo,**

*Petitioner,*

*v.*

**Board of Education of the City of Passaic,  
Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Louis Marton, Jr., Esq.

Petitioner, a vice-principal at the Passaic High School, alleges that the Board of Education of the City of Passaic, hereinafter "Board," improperly and illegally altered his established salary for the 1970-71 school year in violation of his tenure rights. The Board denies petitioner's allegations and asserts that its action was taken to correct a clerical error. Furthermore, the Board avers, petitioner is estopped from seeking relief at this juncture on the grounds of laches.

A hearing was held in this matter on June 29, 1972 at the County Administrative Building, Paterson, by a hearing examiner appointed by the Commissioner of Education. Three months thereafter, counsel filed Memoranda of Law in support of their respective positions. The report of the hearing examiner is as follows:

It is stipulated that petitioner, an employee of the Board for twenty-six years, became an assistant principal in 1962. Eventually, he was appointed to the position of assistant principal at Junior High School No. 4, which he held until June 22, 1970. On that date, the Board adopted a resolution which assigned petitioner to the Passaic High School as vice-principal effective September 1, 1970 at a salary of \$19,492.50. Subsequently, by letter dated July 10, 1970 (P-1) from the former administrative assistant to the former Superintendent of Schools (both of whom have since left the Board's employ), petitioner was informed of the following:

\*\*\*\* Dear Mr. DeRenzo:

"As you requested I am enclosing a copy of the Administrative Salary Schedule.

"At the meeting of the Board of Education on June 22, 1970, among other transfers, you were transferred from Assistant Principal at School No. 4 to Vice Principal of the High School, effective September 1, 1970, at a salary of \$19,492.50 — C-4-8.

“In accordance with Item 3 under implementation of Administrative Supervisory Schedule, this salary was incorrect. A resolution amending this salary to C-4-7 – \$18,927.50 will be acted upon at the July 13 meeting of the Board.

“Sincerely,

\*\*\*

“Salvatore Ginexi  
Administrative Assistant  
to Superintendent of Schools”

Petitioner disagreed that his salary was incorrect and made known his objection by letter dated July 13, 1970. (P-2)

“\*\*\* Mr. Peter Cannici  
Superintendent of Schools  
Board of Education  
220 Passaic Street  
Passaic, New Jersey

Re: Letter, 7/10/70,  
from Mr. S. Ginexi,  
Adm. Asst.

“Dear Mr. Cannici:

“Relative to the Board’s meeting of 6/22/70 at which time I was transferred from Asst. Principal at School No. 4 to Vice Principal of the High School, effective 9/1/70, at a salary of \$19,492.50, C-4-8 (Step 8) it is correct in accordance with Item I, Implementation of Administrative-Supervisory Schedule.

“I disagree with the Board’s belated position that Item 3, Implementation of Administrative-Supervisory Schedule, Step 7 applies not only in my case but in any situation where an administrator has had 8 or more years of experience in Passaic.

“I respectfully request that this disagreement be brought to the Board’s attention prior to the meeting of the Board on 7/13/70.

“Very truly yours,

“Albert C. DeRenzo”  
\*\*\*

On August 27, 1970, the Board adopted the following resolution (P-3):

“\*\*\* *Amendment of Salary*

“Your Committee of the Whole recommends that the salary indicated for 1970-71 for Albert DeRenzo in the resolution transferring him from



Assistant Principal at School No. 4 to Vice Principal of the High School, adopted at the meeting of June 22, 1970, be rescinded since the placement was in error.

“Your Committee of the Whole further recommends that Mr. DeRenzo be placed on C4-7-\$18,927.50.

“\*\*\* Motion carried on roll call vote.\*\*\*”

It is this action of the Board that forms the basis of petitioner’s Appeal.

During the time petitioner was assistant principal at Junior High School No. 4, *ante*, his salary placement was at the maximum step, scale 4 of schedule B of the Board’s administrative and supervisory salary schedule. Upon his assignment as vice-principal of the Passaic High School, his salary was originally determined to be at the maximum step, scale 4 of schedule C, which was later revised by P-3, *ante*. Pertinent parts of the Board’s salary policy (J-1) are as follows:

“BOARD OF EDUCATION, PASSAIC, NEW JERSEY – SALARY SCHEDULE EFFECTIVE SEPT. 1, 1970

“ \*\*\* ADMINISTRATIVE-SUPERVISORY SALARY SCHEDULE

“Implementation of Administrative-Supervisory Schedule

- “1. Placement of present personnel shall be in accordance with years of experience in administration or supervision in Passaic.
- “2. Newly appointed administrators or supervisors shall be placed on the first step of the appropriate schedule, or on the step carrying the salary figure next higher than the one he would have received in his previous position.
- “3. Promotions from one administrative or supervisory position to another shall be placed on the step in the new position which carries a salary in excess of one increment of the last position.
- “4. Ratios are based on Teachers’ schedule maximum for appropriate scale.

“SCHEDULE A – Supervisors of Music, Fine Arts, Physical Education and Elem. Instruction.\*\*\*

“\*\*\* SCHEDULE A1 – Assistant Principal of Elementary Schools\*\*\*

“\*\*\* SCHEDULE B – Elementary Principals with 14 or less teachers, Assistant Principals of Junior High Schools  
Ratio 1.03 to 1.275 = .035 annual increment

“Steps	Ratio	Scale 2	Scale 2A	Scale 3	Scale 4
		B.A.	B.A.+32	M.A.	M.A.+32
1	1.03	\$12,591.75	\$13,209.75	\$13,673.25	\$14,548.75

“\*\*\* SCHEDULE C – Elementary Principals with 15 or more teachers, Vice Principal of High Schools, Director of Division of Special Education Ratio 1.10 to 1.38 = .04 annual increment

“Steps	Ratio	Scale 2	Scale 2A	Scale 3	Scale 4
		B.A.	B.A.+32	M.A.	M.A.+32
1	1.10	\$13,447.50	\$14,107.50	\$14,602.50	\$15,537.50***
8	1.38	16,870.50	17,698.50	18,319.50	19,492.50****

The hearing examiner observes that there is no dispute regarding the placement of petitioner at scale 4 of schedule C of the Board’s salary policy; the dispute centers around the step of scale 4, schedule C, at which placement should be made.

Petitioner asserts in his Memorandum, at page 3, that it was Mr. Ginexi who had determined that his salary was to be governed by paragraph one of the Board’s salary policy, and the Board acted accordingly on June 22, 1970, *ante*. By virtue of that action, petitioner argues, his salary as originally established cannot be lowered at a subsequent meeting without violating his tenure status.

The Board, however, in its Memorandum states, at page 3:

“\*\*\* The Board of Education considered the transfer of Petitioner as a distinct promotion in title and salary. Unfortunately, the person who drafted the resolution of transfer and inserted the salary [within the resolution], erred in his placement according to the long established salary policy rule as enunciated under No. 3.\*\*\* Mr. Ginexi was not the person responsible for the error \*\*\*.”

The hearing examiner observes that the precise manner in which the alleged error occurred was never fully explained.

The present assistant superintendent of schools, who at the time of the Board’s June 1970 meeting, was the principal of School Number 11, was named Acting Superintendent of Schools at the Board’s meeting of July 21, 1970. He testified that while he had no involvement with the Board’s resolution adopted June 22, 1970, he did, as Acting Superintendent, bring the matter of petitioner’s alleged erroneous salary placement to the attention of the Board at an executive session prior to August 27, 1970. Notwithstanding the Board’s denial that Mr. Ginexi was not the person responsible for the alleged error, the Acting Superintendent, testifying for the Board on direct examination, had the following question posed to him: (Tr. 68)

“Q. Now Mr. Puckowitz, if you had been involved personally rather than Mr. Ginexi in placing Mr. DeRenzo on a proper salary step, what item of

policy in the categories one through four would you consider to be strictly applicable to Mr. DeRenzo's case?"

Over the objection of petitioner's counsel, the hearing examiner allowed the answer, which was "I would have applied Item 3 since I consider it [the reassignment] a promotion \*\*\*." (Tr. 69)

Subsequent to the Board's action on August 27, 1970, petitioner testified that he then consulted with the negotiations chairman of the Passaic Administrative and Supervisory Association, hereinafter "Association." Thereafter, a series of letters were sent to the Board by the negotiations chairman to support petitioner's position. The letters were accepted into evidence on the offer that "\*\*\*\* the only purpose of these letters is to show that the petitioner didn't sit back and acquiesce in the actions of the Board \*\*\*." (Tr. 20) This argument is raised by petitioner to nullify the allegation that he is guilty of laches, which is raised by the Board as a separate defense. Counsel for the Board strenuously objected to the acceptance of these letters into evidence on the grounds that they are self-serving documents (Tr. 18) and asserts, in contradiction to petitioner's argument, that the letters cannot be used to toll the period of laches. (Tr. 23)

The letters, dated October 8, 1970 (P-4), December 9, 1970 (P-5), and February 17, 1971 (P-6), reflect petitioner's efforts to resolve his salary dispute with the Board.

On February 18, 1971, a letter (P-7) was sent by the Board Secretary to the negotiations chairman explaining that the Board had considered petitioner's salary claim at an executive meeting subsequent to December 9, 1970, and had determined that its position [regarding the August 27 resolution, *ante*] was firm. This letter (P-7) concludes by stating:

"\*\*\*\* In the event your association intends to challenge this decision, will you please advise, so that the Board can then follow the procedures established in the Tenure Act by filing a written charge or cause of complaint.

"Sincerely yours,

\*\*\*

"Robert B. Hopkins  
Secretary-Business

\*\*\* Administrator"

Thereafter, on April 12, 1971, a letter (P-8) was sent by the assistant superintendent of schools, upon direction of the President of the Board, to the chairman of the Board's grievance committee requesting that a meeting be set with the Association's negotiating committee regarding petitioner's salary. (Tr. 38) Petitioner testified that, during this meeting he reasserted his objection to the Board's action of August 27, 1970, *ante*. (Tr. 38-39) At this meeting, which

was held on an unspecified date, the Acting Superintendent, testifying for the Board asserted that petitioner was notified that his salary contentions were rejected by the Board.

A letter dated December 10, 1971 (P-9) from the negotiations chairman of the Association to the Board Secretary was accepted by the hearing examiner over the objection of the Board. (Tr. 39) This letter (P-9) reads as follows:

“\*\*\* Dear Mr. Hopkins [Board Secretary ]:

“Since receiving your communication of February 18, 1971 [P-7, *ante* ], in regard to Mr. DeRenzo’s salary for the school year 1970-71, I have been attempting \*\*\* to arrange a meeting with the Grievance Committee of the \*\*\* Board \*\*\*.

“If we do not have a Grievance Committee meeting within thirty days, we shall challenge this ruling [Board’s action of August 27, 1970, *ante* ] in through (sic) the Commissioner of Education; and I would advise the Board to proceed with such charge as previously stated.

“Yours truly,

“S. G. Jarquesy  
Negotiations Chairman”

The Petition of Appeal, which forms the basis of the instant dispute, was received by the Commissioner of Education on March 14, 1972. However, the hearing examiner notes that both the petitioner and the then Acting Superintendent, in adversary testimony, asserted that a meeting did occur as the result of P-8, *ante*, which testimony is in conflict with P-9, *ante*. Whether a meeting subsequent to P-8, *ante*, occurred, is not in dispute between the parties.

Petitioner raises three points in his Memorandum: the first is raised in support of his claim that the salary originally voted him was proper; the second, that if the Board did, in fact, err, the subsequent reduction of his salary constitutes an impairment of his tenure rights and must be declared null and void; the third point refutes the Board’s claim of laches. Petitioner argues that the Board relied upon the advice of a high administrative official in the application of its salary policy in the June 22, 1970 resolution. While there may have been an administrative error, and petitioner does not concede there was, petitioner avers the Board did not err in its resolution and, accordingly, the salary originally established was and is proper.

But assuming the Board did err in its original resolution, petitioner argues the error was not of his doing and any subsequent action to reduce his salary is illegal. In support of his claim, petitioner cites *Docherty v. Board of Education of the Borough of West Paterson, Passaic County*, 1967 S.L.D. 297, and *Mateer v. Fair Lawn*, 1950-51 S.L.D. 63, affirmed by State Board of Education, 1951-52 S.L.D. 62.

Petitioner argues that he protested the Board's action vehemently and continuously from the date of the salary rescission. He asserts he attempted to convince the Board that its action was invalid. Petitioner states the Board spent considerable time before determining that it would not act on his demands, and therefore, it cannot now invoke the doctrine of laches in this matter. *Mitchell v. Alfred Hoffman, Inc.*, 48 N.J. Super. 396, 403 (App. Div. 1958), cert. denied 26 N.J. 303 (1958). The principal element in applying laches, petitioner argues, is not so much the period of delay in bringing action, but the factor of resulting prejudice to the defendant. *Auciello v. Stauffer*, 58 N.J. Super., 522, 530 (App. Div. 1959). Petitioner cites *Elowitch v. Bayonne Board of Education*, 1967 S.L.D. 78, affirmed State Board of Education 1967 S.L.D. 86; *Biddle v. Board of Education of Jersey City*, 1939-49 S.L.D. 49, reversed in part by State Board of Education 1939-49 S.L.D. 49; and *Opeken v. Board of Education of Jefferson*, 1970 S.L.D. 134, in support of his argument that the Board has submitted no proofs to substantiate that it was prejudiced by an alleged delay on the part of petitioner.

The Board, in its Memorandum, states that the original salary (\$19,492.50) was established as the result of a clerical error and petitioner was not properly placed on the Board's salary schedule in accord with controlling policy. The Board argues that petitioner's reassignment was a promotion and, accordingly, paragraph three of the salary policy must be applied.

Secondly, the Board asserts that the clerical salary error was discovered subsequent to June 22, 1970, the date of adoption of the resolution, and this discovery not only justified but mandated correction as a matter of public policy. The Board disputes the applicability of *Docherty* and *Mateer*, *supra*, in the instant matter. But, assuming *arguendo*, that the doctrines of law enunciated therein are found to be consonant with the instant matter, the Board suggests that the Commissioner reevaluate and refine the scope and extent of the application of such doctrines. The latter argument of the Board is advanced in light of *Board of Education of Passaic v. Board of Education of the Township of Wayne*, 120 N.J. Super. 155, in which the Court held, at page 163:

“\*\*\* The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.\*\*\*”

Furthermore, the Board quotes the Court in *Passaic*, *supra*, where it cites *United States v. Hart*, 12 F. Supp. 596 affirmed 90 F. 2d 987 (3 Cir. 1937) which held:

“\*\*\* it is well settled that in case of the government, states, and even municipalities, money paid by mistake may be recovered.\*\*\*”

Continuing, the Board quoted the Court in *Passaic*, *supra*, when it said, at pages 163-164:

“\*\*\* this court will adopt the majority view and hold that municipalities may recover payments made under mistake of law. The reasoning behind

such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge. \*\*\*\*

Concluding this argument of “public interest,” the Board asserts that if it is accepted that the Board’s original resolution was the result of error, and if the Commissioner holds that such an error inures to the benefit of the individual without just and equitable entitlement thereto – as against the public interest – such holding would violate long-established legal concepts concerning priorities between public as opposed to individual rights.

In regard to the Board’s claim that petitioner is estopped by laches from now seeking relief from the Commissioner, the Board asserts that petitioner “\*\*\* sat by idly on his alleged rights for more than a year and one-half \*\*\* before filing his petition in Trenton. This constitutes an inordinate and unreasonable period of time constituting (sic) laches \*\*\*.” (Board’s Memorandum, at p. 7) Citing *Mitchell, supra*, the Board holds that it was placed in a prejudiced position because Mr. Ginexi (the administrative assistant to the Superintendent, who allegedly discovered the “clerical error” and was the author of the rescinding resolution), as well as the then Superintendent of Schools, were unavailable to testify since “\*\*\* neither were in the employ of the respondent [Board] at the time of the hearing.\*\*\*” (Board’s Memorandum, at p. 8) Accordingly, the Board avers that because these two witnesses were unavailable, it was placed at a disadvantage, and it was therefore prejudiced.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, as set forth above, and the record in the instant matter.

In regard to the question of laches, the Commissioner observes that petitioner, upon first being informed that his salary was to be adjusted (P-1), filed his disagreement over the contemplated Board action with the then Superintendent of Schools. (P-2) On August 27, 1970, the Board acted regarding the salary adjustment. (P-3) The Association assisted petitioner in pressing his claim by sending communications on petitioner’s behalf to the Board. (P-4, P-5, P-6) The Board answered petitioner’s request for relief through its communication of February 18, 1971, (P-7) and advised petitioner, at that time, to notify the Board whether he wished to formally appeal the Board’s action to the Commissioner.

Thereafter, a meeting between the Board’s grievance committee and the Association’s negotiating committee was held, specifically in regard to petitioner’s salary claim. (P-8) Finally, on December 10, 1971, the negotiations chairman of the Association, on behalf of petitioner, advised the Board that an appeal would be made to the Commissioner of Education. (P-9) The Commissioner has considered the objections raised by the Board regarding acceptance of P-9, *ante*, into evidence by the hearing examiner. The document

was offered to oppose a claim of laches, not in support of the Association representative's opinion of law. Accordingly, the Commissioner agrees with the hearing examiner's ruling and allows P-9 into evidence for the limited purpose of refuting the allegation of laches. (See Rule 6 of the *Rules of Evidence* (N.J.S.A. 2A:84A-16).)

In the Commissioner's judgment, petitioner consistently pressed his demand for relief before the Board, and only after it was manifestly clear that he could not obtain his desired result, did he proceed with his appeal before the Commissioner. From the time of the Board's action on August 27, 1970 until the Board was advised on December 10, 1971, that an appeal would be filed, petitioner pressed his claim before the appropriate forum at the local level. Accordingly, the Commissioner holds that the period of time between August 27, 1970, and March 14, 1972, when the appeal was filed does not constitute "\*\*\*\* delay \*\*\*\* unexplained and inexcusable \*\*\*\*" in enforcing a known right." *Mitchell v. Hoffman, supra*

In any event, the Commissioner finds no evidence that the Board has been prejudiced by the passage of time in the instant matter. The Board's statement that the former administrative assistant and the former Superintendent of Schools were not available to testify at the hearing because they were no longer in the employ of the Board is not sufficient to conclude that the Board was, in fact, prejudiced. Certainly, if their testimony was critical to the Board's case herein, counsel could have served them with subpoenas to secure their testimony.

The State Board of Education articulated the elements necessary for the application of the doctrine of laches in *Elowitch, supra*, at p. 88:

"\*\*\*\* Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. \*\*\*\*"

Accordingly, the Commissioner finds and determines that petitioner herein is not guilty of inaction, nor is there detriment to the opposing party. Therefore, the Board's defense of laches is without merit.

The issue now before the Commissioner is whether the Board's action taken on August 27, 1970, reducing petitioner's 1970-71 salary from the amount established on June 22, 1970, was legal and proper. The Commissioner observes that on June 22, 1970, a resolution was passed by the Board assigning petitioner to a vice-principalship at the High School at a salary of \$19,492.50. That salary is consonant with scale 4, schedule C of the Board's salary policy. On the grounds that the salary of \$19,492.50 was erroneously adopted through the application of policy one instead of policy three (J-1, *ante*), the Board then acted on August 27, 1970, and applied policy three. The net result of that action was to lower petitioner's salary to \$18,927.50 for the 1970-71 school year.

The Board argues that its original action of June 22, 1970, was taken "in error." That the Board did act on that date and fix petitioner's salary at \$19,492.50 is not disputed. The Board's action on August 27, 1970, taken on the grounds that it erred in its original resolution, is, in fact, a violation of petitioner's tenure rights. The testimony of the then Acting Superintendent, that he would have applied policy three instead of policy one, is not relevant to the instant matter. From his own testimony, he was not involved in the original resolution adopted by the Board.

In regard to the Board's action, *ante*, the Commissioner held in *Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County*, 1972 S.L.D. 638, 640, that when a board establishes a teacher's salary, it cannot at a later date reduce that amount because of an error it originally made. More specifically, the Commissioner noted:

"\*\*\* If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the Board in fixing their salaries for the 1970-71 school year.\*\*\*"

The Commissioner also reaffirmed in *Anson, supra*, the principles established in *Docherty, supra*, regarding the reduction of a tenure teacher's salary which had allegedly been fixed "in error" as follows:

"\*\*\* 'The Commissioner has previously considered the question of a tenure teacher's right to a voted salary in the case of *Harris v. Board of Education of Pemberton Township*, 1939-49 S.L.D. 164. In that case, Mrs. Harris, a tenure teacher, was voted a salary of \$1,800 for the ensuing year. Some three months later, the Board of Education adopted a new salary schedule, and adopted a resolution rescinding the salary previously voted for Mrs. Harris and fixing a new salary of \$1,600. In ruling upon Mrs. Harris' petition that the action reducing her salary be set aside, the Commissioner said:

" 'A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment. The resolution of May 5th, above set forth, was the final action at the meeting on that date in relation to the appointment of teachers \*\*\*.

" ' If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute, to which procedure the board has not reverted.\*\*\* ' "

" And elsewhere:

" \*\*\* An acquired right through the adoption of a resolution by a board



of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.' \*\*\* ”

Although the Commissioner observes that Board policies one and three appear to be contradictory in their intent, the Commissioner finds that policy one was originally applied to petitioner herein and that the June 22, 1970 resolution of the Board was and is valid. Therefore, the mere allegation that the Board adopted its August 27, 1970 resolution to correct a clerical error in the public interest, is held to be without merit. Accordingly, there is no need to discuss the application of the Court's holding in *Passaic, supra*, because there was not, nor will there be payment of moneys under a mistake of law.

The Board fixed petitioner's salary level on June 22, 1970, in accordance with that amount of money set forth by scale 4, step 8 of schedule C of its own salary schedule and policies. *N.J.S.A.* 18A:28-5 provides *inter alia*:

“The services of all teaching staff members including \*\*\* vice principals \*\*\* shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause \*\*\*.”

There is no dispute that petitioner enjoys a tenure status. The Board violated *N.J.S.A.* 18A:28-5 by reducing petitioner's compensation on August 27, 1970 without cause founded in law. Therefore, the Commissioner directs that petitioner be paid the difference in earnings to which he is entitled for the 1970-71 school year in accordance with the determination herein.

COMMISSIONER OF EDUCATION

April 19, 1973

**Central Regional Education Association,**

*Petitioner,*

*v.*

**Board of Education of the Central Regional High School District;  
Superintendent of Schools, Edwin L. Voll; and  
Principal, Spencer F. Sullivan, Jr., Ocean County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Manna and Kreizman (John C. Manna, Esq., of Counsel)

For the Respondents, Wilbert J. Martin, Esq.

Petitioner contests the administrative action by the Superintendent of Schools of the Central Regional High School District in assessing a \$15.00 penalty for teachers who accumulate four late appearances to work.

Petitioner appeared before the Superior Court of New Jersey, Chancery Division, to ascertain the rights of the parties herein and has been ordered to exhaust administrative remedies before the Commissioner of Education.

This Petition is submitted on the pleadings and Briefs of counsel for adjudication by the Commissioner.

The issue under consideration is, to wit:

Is the administrative regulation supported by the Board, which provides for a \$15.00 reduction in pay for four latenesses to work, a proper exercise of the Board's discretionary authority pursuant to Title 18A?

The parties concur that the Board of Education of the Central Regional High School District, hereinafter "Board," adopted a salary policy for the school years 1969-70, 1970-71, and 1971-72, as the result of negotiations with petitioner and that the salary policy did not contain any clause concerning penalties to be imposed upon teachers for lateness to work.

Petitioner argues that the Board breached its obligation by unilaterally approving a policy which modified its negotiated and binding agreement. Petitioner avers that the agreement provided for a salary schedule, which was signed by petitioner and the Board, and that it was in full force and effect. Petitioner argues further that there was an attempt to place the lateness item "\*\*\*\* on the negotiating table prior to finalizing the contract and [it] was tabled at that time pending further negotiations because of the lateness of the proposal.\*\*\*\*" (Petitioner's Brief, at p. 3)

And,

“\*\*\* petitioner specifically maintains that a fully binding contract [agreement] was negotiated and accepted embodying all terms and conditions of employment including \*\*\* [but] not limited to salaries and the school board has specifically altered said contract [agreement] without negotiating a term of said contract [agreement]; to wit salaries \*\*\*.” (Petitioner’s Brief, at p. 7)

The Board admits that it supports the administrative penalty as described, *ante*, and argues that by so doing, it maintains its management prerogative “\*\*\* to punish, short of dismissal or the withholding of increments, the violation of individual contracts \*\*\*” by the repeated lateness of individual teachers. (Board’s Brief, at p. 3)

The Board argues that its approval of the administrative regulation assessing a monetary penalty for individual teachers after four latenesses, in no way altered the salary guide or the annual increments, but merely imposed a penalty for nonperformance or partial performance of an individual’s contract to teach.

Petitioner prays for relief by the Commissioner as follows:

“\*\*\* a. Relief under *Title 34, Chapter-13A:1*\*\*\*.

“b. Relief under the New Jersey Constitution.

“c. Relief under the United States Constitution.

“d. Relief for a violation of the contract [agreement] negotiated.

“e. Relief for a violation of the terms and conditions of employment.

“f. Relief for a violation of the due process clause of the United States Constitution.

“g. Relief for a violation of the right of public employees to be able to properly negotiate all terms and conditions of employment.\*\*\*” (Petitioner’s Brief, at p. 8)

Petitioner alleges, and it is not denied, that the Board has not formally adopted any policy which calls for the reduction of a teacher’s salary for four latenesses to work. The Board admits relying on and supporting the administrative rule which was issued by memorandum to teachers that there would be a \$15.00 penalty for the accumulation of four latenesses. Therefore, avers petitioner, the policy was not adopted legally and it should be declared invalid.

Petitioner complains also that the policy being followed in the instant matter is in violation of the Tenure Employees Hearing Law since “\*\*\* no notice nor hearing has ever been given to any individual who has been penalized in pay.\*\*\*” (Petitioner’s Brief, at p. 11)

Petitioner alleges that salaries are a term and condition of employment and that the issue of lateness was negotiated by the parties to this action; however, no agreement was reached on this subject of lateness. Petitioner alleges further that *N.J.S.A. 34:13A-1 et seq., Chapter 303, Laws of 1968*, specifically provides that any term or condition of employment shall be negotiated by public employees and their employers. Since there was no agreement on the issue herein controverted, avers petitioner, the unilateral action of the Board’s reduction of teachers’ salaries for lateness should be set aside.

Petitioner argues finally that there was “\*\*\* no proper delegation of authority by the Board \*\*\*” and that the Board left its administrators “\*\*\* in a position to do whatever they deem necessary for the moment \*\*\*” denying the employees a “\*\*\* right to a fair hearing \*\*\*” and the right to negotiate the matter now in dispute. (Petitioner’s Brief, at p. 17)

A summary of the Board’s factual and legal contentions follows:

The Board contends that it has the authority pursuant to the education statutes to establish rules and regulations governing the conduct of teachers, including the assessment of penalties for lateness, and that their rules and regulations are subject only to the question of reasonableness. Petitioner’s challenge of its rule-making authority, avers the Board, is clearly a controversy or dispute arising under the school laws and cannot be considered a term and condition of employment requiring a negotiated agreement.

The Board avers further that its Superintendent of Schools has the authority to make rules, including the lateness penalty here controverted, subject only to approval by the Board and the question of being reasonable. The Board denies any violation of the Constitutions of the United States or the State of New Jersey, and further denies any violation of *Title 34* or the Tenure Employees Hearing Law as alleged by petitioner.

The Board avers finally that this is a matter wholly within the jurisdiction of the Commissioner of Education.

Although petitioner argues that the Board’s lateness rule must be termed a condition of employment under *N.J.S.A. 34:13A-1 et seq.*, it is the judgment of the Commissioner, that petitioner’s attack on the rule, *sub judice*, is properly within his jurisdiction under *N.J.S.A. 18A:6-9*, and specifically under *N.J.S.A. 18A:11-1* which reads in part as follows:

“The Board shall –

\*\*\*

“c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, *for its own government and the transaction of its business and for the government and management of the public schools* \*\*\* and for the employment, regulation of conduct and discharge of its employees \*\*\*.

“d. Perform all acts and do all things, *consistent with law* and the rules of the state board, *necessary for the lawful and proper conduct*, \*\*\* of the public schools of the district.” (*Emphasis supplied.*)

And,

N.J.S.A. 18A:27-4 which reads:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

Therefore, the Commissioner concludes that the instant matter is a controversy arising under the school laws which lies clearly within his jurisdiction, and it is subject to the applicable education statutes and the question of reasonableness. The fact that the administrative ruling was well known by petitioner is not denied, nor is it denied that the teachers were notified by memorandum of the lateness regulation.

Specifically, the Board argues that it forwarded a staff memorandum, through its administration, setting forth the policy which is now in dispute. The Board asserts that one of the affected teachers filed a grievance and had a hearing, after which the Board “\*\*\* determined that there was no misinterpretation or misapplication or violation of any agreement or policy. \*\*\*” (Board’s Brief, at p. 1) The Board contends also that it has never refused a grievance hearing on the matter of salary deductions for lateness to school.

The position of the Board respecting the origin of the administrative lateness penalty differs from that alleged by petitioner. The Board avers that it sought to include penalties for lateness in its negotiations with petitioner, but withdrew its request when petitioner agreed that this was a management right and not an appropriate matter for inclusion in the agreement. The Board avers that it did not raise the lateness issue again and refused to consider it when it was raised by petitioner.

Petitioner’s argument carried to its logical conclusion would cause the Commissioner to hold that the only remedies available to the Board concerning continued lateness to school by its teachers are (1) suspension of tenure teachers without pay after certification of charges before the Commissioner pursuant to

*N.J.S.A. 18A:6-10 et seq.*, or (2) refusal to offer another contract to nontenure teachers. Another answer, which is certainly no remedy, is to ignore the continued lateness of the teachers in question and allow them to continue to arrive at school late without penalty.

However, none of the Commissioner's decisions or New Jersey court decisions cited by petitioner are squarely on point with the issue disputed herein. Petitioner refers also to decisions in other jurisdictions. While decisions in other states are to be considered with respect, they reflect the judicial decisions, legislative history, traditions and conditions of their own states. The Commissioner does not consider them applicable here. Nor does the Commissioner find any violation of the New Jersey or United States Constitutions as alleged by petitioner, but not supported by fact or argued in its Brief.

The attack herein is upon a rule of the school administration supported by the Board. The Commissioner has previously held that a rule must meet three tests: (1) it must be reasonable, (2) it must not be inconsistent with other provisions of *Title 18A* or the rules of the State Board of Education, and (3) its effect must be toward the maintenance and support of a thorough and efficient system of public schools. *Angell and Ackerman v. Newark Board of Education*, 1959-1960 *S.L.D.* 141, 143. The Commissioner applied these criteria also in *Greenberg v. Board of Education of the City of New Brunswick*, 1963 *S.L.D.* 59, in which the petitioner sought the restoration of one day's pay which she claimed was illegally deducted by the Board. In the *Greenberg* matter the Board rule was supported as reasonable. In *Angell*, the Commissioner found that the Board's rule requiring residency in the district as a necessary condition of employment, did not meet the criteria, *ante*, and it was set aside.

The Commissioner notes that the administrative rule is invoked after four latenesses and that teachers are notified in advance of the accumulation of latenesses. The Board avers that the notices and penalty have had the effect of reducing teacher lateness.

To be reasonable, a rule must be appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose.

It is fundamental that school programs cannot commence and pupils cannot be taught at prescribed times without the prompt arrival of members of the teaching staff. This historic view is a necessary, even vital, ingredient for the efficient operation of the public schools. It may also be said, without serious contradiction, that a prerequisite for efficient performance of a teacher's professional duties is a punctual reporting to begin such duties. Rules of this kind are for the ultimate benefit of the children, their parents and the taxpayers at large, for whom the public schools have been created and are maintained.

The Commissioner commented on the teacher's working day in *Smith v. Board of Education of Paramus*, 1968 *S.L.D.* 62, 67 as follows:

“But even more importantly, the Commissioner must reject the contention that a teacher’s employment obligation begins and ends with the satisfactory discharge of his assigned classroom duties. The board of education has an indisputable statutory right to define the working day and to assign members of the professional staff to perform the various services and responsibilities with respect to pupils which, in the board’s judgment, contribute to the effective accomplishment of the objectives which it has set for the schools. In terms of the expectations of the community which it represents, limitation on its powers in this respect could not be tolerated. In the adoption and administration of rules, assignments and requirements *the board is constrained, to act reasonably and fairly.* \*\*\*

And,

“The principle enunciated by the Court in *Bates v. Board of Education*, 72 P. 907 (Calif. Sup. Ct. 1903), and quoted with approval in *McGrath v. Burkhard*, 280 P. 2d 864 (Calif. App. 1955), bears repeating here:

“ ‘The public schools were not created, nor are they supported, for the benefit, of the teachers therein, \*\*\* but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.’ \*\*\*” (*Emphasis supplied.*)

Although that decision dealt primarily with the teachers’ obligations to perform certain extracurricular activities, the same principles apply in the matter *sub judice*.

In *Florence Greenberg v. Board of Education of the City of New Brunswick*, 1963 S.L.D. 59, the Commissioner held:

“\*\*\* that forfeiture of a day’s pay as a result of infraction of a proper rule of the employer \*\*\* [does not constitute] a reduction in salary.\*\*\*” (at p. 61)

In that case, the petitioner took two days’ personal leave prior to a vacation period with full knowledge of the Board’s rule, which she later attacked as unreasonable.

A Commissioner’s decision in the matter of *Wilma Farmer v. Board of Education of the City of Camden*, 1967 S.L.D. 287, determined that that petitioner was not entitled to two days’ sick leave pay, because the excuse which she was required to present was not accepted by the Board. Excuses were required of many teachers at that time, because of mass absenteeism which the Board construed to be a work stoppage. The Commissioner held that:

“Such a deduction \*\*\* cannot be said to be a reduction in the employee’s salary; it is unearned pay, no more and no less. Further, a board *may pay*

for absence not constituting sick leave. R.S. 18:13-23.12 [Now *N.J.S.A.* 18A:3-07] If it elects not to do so, however, the denial does not constitute a reduction in salary \*\*\*.” (at p. 289) (*Emphasis in text.*)

In *Barry Kotler v. Board of Education of the Borough of Manville*, decided by the Commissioner on August 26, 1972, the Commissioner determined “\*\*\* that the Board is not obligated to pay for service not rendered – in fact it is barred from doing so – and that during a part of the school day on March 10, 1971, petitioner did not render the service for which he had contracted. \*\*\*” In that matter the Commissioner directed the Board to assess an appropriate penalty and suggested that one such penalty had already been suggested by the school principal; namely, withholding of salary for services not rendered.

In the matter, *sub judice*, the Commissioner determines that the controverted rule is reasonable. It is not inconsistent with the general rule-making power of the Board pursuant to *N.J.S.A.* 18A:11-1, *N.J.S.A.* 18A:27-4 or any other statute, and its effect is toward the maintenance and support of a thorough and efficient system of public schools. The effect of the rule is to assess a penalty against a teacher’s salary for services not rendered or services partially rendered. This action is certainly more highly desirable than the more serious remedies available to the Board as previously discussed. It is not a reduction of salary in violation of the Tenure Teachers Hearing Law.

However, the fact is that there is no official Board policy permitting the withholding of any part of a teacher’s pay for continued lateness. For this reason the Board’s actions in this matter cannot be supported and they must be set aside. Therefore, the Board is directed to pay those teachers who have had part of their earnings withheld pursuant to the controverted administrative lateness rule. In the future, if the Board chooses to assess the lateness penalty as described, *ante*, it may do so after formally adopting the administrative rule as a Board policy.

COMMISSIONER OF EDUCATION

April 23, 1973



**Central Regional Education Association,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Central Regional High School District;  
Superintendent of Schools, Edwin L. Voll; and  
Principal, Spencer F. Sullivan, Jr., Ocean County,**

*Respondents-Appellees.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, April 23, 1973

For the Petitioner-Appellant, Manna and Kreizman (John C. Manna, Esq.,  
of Counsel)

For the Respondents-Appellees, Wilbert J. Martin, Esq.

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

December 5, 1973

Pending before Superior Court of New Jersey

**“M.C.,” by her mother and natural guardian,**

*Petitioner,*

*v.*

**Board of Education of the City of Trenton,  
Mercer County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Petitioner, William L. Bunting, Jr., Esq.

For the Respondent, McLaughlin, Dawes, Abbotts & Cooper (James J.  
McLaughlin, Esq., of Counsel)

Petitioner on behalf of her daughter, hereinafter “M.C.,” a pupil in the  
ninth grade at Trenton Junior High School No. 5 alleges that the Trenton Board  
of Education, hereinafter “Board,” acted arbitrarily and capriciously in regard to

its suspension of M.C. on January 16, 1973. Petitioner seeks *pendente lite* relief in the form of reinstatement of M.C. to school, pending a final determination of this dispute by the Commissioner of Education.

Oral argument on the Motion for Interim Relief was heard at the State Department of Education, Trenton, January 31, 1973 by a hearing examiner appointed by the Commissioner. Supplemental documents were submitted on February 1, 1973 by the Board upon the request of the hearing examiner. The report of the hearing examiner is as follows:

On December 18, 1972, while M.C. was walking through a school corridor with a friend, both of whom were carrying food, she had an encounter with a teacher. Petitioner alleges that after a verbal exchange regarding the impropriety of carrying food in school corridors, the teacher grabbed M.C., twisted her arm, and ripped her coat. M.C. admits that she then slapped the teacher.

Subsequently, petitioner arrived at the school and removed M.C. from the premises. M.C. has been out of school since that time. Petitioner conferred with the school authorities on December 19, 1972, and on December 20, 1972, the teacher involved, accompanied by a guidance counselor, visited petitioner and M.C. at their home in regard to the aforementioned incident. The following day, December 21, 1972, a letter (C-1) was sent to petitioner by the school principal advising that M.C. was suspended pending further action by the Board.

On January 10, 1973, a disciplinary hearing was held for M.C. by the chairman of the Board's legal committee. M.C. was represented by counsel, had the opportunity to produce witnesses to testify on her behalf, and was permitted to cross-examine adverse witnesses. A transcript was made of this disciplinary hearing which lasted approximately four hours.

On January 16, 1973, the Board, meeting in public session, received the following report from the chairman of its legal committee:

“\*\*\* [M.C.] – *Assault on a teacher.*

“It is recommended that her suspension be continued for the rest of the 1972-73 school year and then be re-admitted to \*\*\* [school] on September 4, 1973 on strict probation, after an interview by the principal or his representative with the student and her parent or parents for instruction concerning her probation, with full knowledge that the next infraction of rules will result in expulsion.”

According to a report filed by the Board's counsel, the above recommendation was unanimously adopted by the Board on January 16, 1973. An affidavit of the Board Secretary states that the Board declared a fifteen-minute recess during the meeting of January 16, 1973, at which time the chairman gave an oral report to the entire Board regarding the disciplinary hearing held for M.C. on January 10, 1973, *ante*. By letter dated January 17,

1973, petitioner was informed that M.C. was suspended from school until September 4, 1973.

Petitioner asserts that M.C., who had previously missed a number of days from school because of a kidney infection, is being unduly punished for this infraction. Although M.C. receives some home instruction from one of her teachers, petitioner argues that she is still being deprived of the benefit of a full education. Petitioner avers that the Board overreacted in this situation because of the totality of the discipline problems the Board is alleged to be having; that although M.C. may have been wrong in striking the teacher, the teacher was wrong in attacking M.C.; and, finally, that the teacher's behavior in this incident was improper and illegal.

The Board, however, contends that the limited issue to be decided herein is the Motion for *pendente lite* relief and not the merits of the allegations contained within the Petition of Appeal. The Board argues that interim relief should be denied, because absent an affirmative showing that it acted incorrectly or improperly, its actions are entitled to the presumption of correctness. Citing a recent decision on Motion for Interim Relief, *Coleman v. Board of Education of the City of Trenton*, decided by the Commissioner January 18, 1973, the Board asserts that a similar reliance upon the following statement in *Thomas v. Board of Education of Morris Township*, 89 N.J. Super. 327 must be made by the Commissioner in the instant matter:

“ ‘ \*\*\* When such a body [a board of education] 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 and unreasonable. \*\*\* ’ ” (at p. 332)

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner. The narrow issue before the Commissioner at this juncture is whether the Board acted properly when it determined to continue the suspension of M.C. until September 1973.

The Commissioner notices that a disciplinary hearing was conducted concerning the allegations against M.C. on January 10, 1973. Furthermore, the Commissioner is cognizant of the recommendation made to and accepted by the Board, as well as the fifteen-minute oral report made during the executive session by the chairman of the legal committee. Finally, the Commissioner has reviewed *Coleman, supra*, and the reliance placed therein upon *Thomas, supra*.

However, the matter, *sub judice*, has a dimension not addressed in the *Coleman* matter; i.e. the basis upon which the Board acted subsequent to the hearing it afforded M.C. The Commissioner notices that guidelines regarding due process hearings and subsequent actions by local boards of education are stated in *E.H. v. Board of Education of the City of Trenton*, 1972 S.L.D. 475. The pertinent part of that decision held as follows:

“\*\*\* the Commissioner emphasizes that, following the conclusion of a hearing on pupil discipline as described in the instant matter [a pupil assault on another pupil], *the Board as a whole must receive and consider either the transcript or a detailed, written report of the hearing, prior to taking any final action\*\*\*.*” (*Emphasis supplied.*) (at p. 478)

In the instant matter, the Board acted solely on the recommendation of one member, *ante*, and on his oral report given during a fifteen-minute executive session. Both actions, the Commissioner concludes, are not sufficient to sustain the Board herein. An action by a board of education to suspend and/or expel a pupil requires that the whole membership of that board know in detail exactly what transpired at a disciplinary hearing.

Accordingly, the Board’s action of January 16, 1973, suspending M.C. from school until September 4, 1973, is hereby set aside.

The Commissioner orders the Board of Education of the City of Trenton to immediately reinstate M.C. as a pupil in the public schools.

COMMISSIONER OF EDUCATION

March 5, 1973

**Sandra Robinson,**

*Petitioner,*

*v.*

**Board of Education of the Township of Quinton,  
Salem County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Henry Bender, Esq.

For the Respondent, William C. Horner, Esq.

Petitioner is a teacher who was terminated on thirty-days’ notice by the Board of Education of the Township of Quinton, hereinafter “Board.” She alleges that the action taken by the Board was not only procedurally and statutorily defective, and therefore illegal, but it was also arbitrary, capricious and retaliatory against her because she was an officer in the Quinton Township Teachers Association, hereinafter “Association.” She prays for reinstatement and back salary during the time of her “illegal suspension.” (Petition, unp) This matter is submitted for adjudication by the Commissioner on the pleadings, Briefs of Counsel, and affidavits.

Petitioner was employed under contract with the Board for the school year 1970-71, and was reemployed by contract dated April 15, 1971, for the school year 1971-72. At that time she held an emergency certificate. Her contract with the Board provided, *inter alia*, that:

“\*\*\* this contract may at any time be terminated by either party giving to the other thirty days’ notice in writing of intention to terminate the same \*\*\*.” (Exhibit A)

At a special meeting on September 14, 1971, the Board terminated the remedial reading program being taught by petitioner, and gave her thirty-days’ notice in writing by letter dated September 16, 1971, which stated the Board’s reason for termination as follows:

“\*\*\* Word has been received by our Board of Education that Trenton has refused our Title I funds for the 1971-72 year and has held up approval of our Title program pending further investigation.

“It is with much regret, therefore, that we must serve you with a thirty day notice, from the date of this letter, of termination of your services as remedial reading teacher in the Quinton school district.

“Effective October 15th, 1971, your services will be discontinued.

“Thank you for your performance and contribution to our system while in our employ.\*\*\* ”

Only four of nine Board members were notified of this meeting on September 14, 1971; the others were out of town or otherwise unavailable. On September 23, 1971, at a subsequent special meeting, the Board ratified its action of the September 14, 1971 meeting, and the minutes of both special meetings were approved at the regular Board meeting on October 4, 1971. (Board Secretary’s Affidavit)

Petitioner alleges that:

“\*\*\* The transaction of such business [termination of petitioner] at a meeting so informally convened is procedurally illegal under N.J.S. 18A:6-10 (sic) [N.J.S.A. 18A:10-6].\*\*\*” (Petitioner’s Brief, at p. 4)

That statute holds, *inter alia*, that:

“All board meetings shall be public \*\*\*.”

However, there was no evidence offered by petitioner that the meeting of September 14, 1971, was not a public meeting of the Board.

The Commissioner commented at length on the legality of board meetings and specifically on the number of board members necessary to make up a

quorum, in *Beckhusen et al. v. Board of Education of the City of Rahway*, decided by the Commissioner on March 20, 1973. In *Beckhusen, supra*, the Commissioner quoted from *State ex rel. Cadmus v. Farr*, 18 *Vroom* 208 [47 *N.J.L.* 208 (*Sup. Ct.* 1885)] as follows:

“\*\*\* the legislative intent was to require a specified majority in certain cases. In other cases, in respect to which no rule was prescribed, it is clear the intent was to leave them to the general rule governing the action of corporate bodies.

“The general rule, in the absence of specific provision, is well settled, and is that when the body empowered to act consists of a definite number of individuals, a majority of that number will constitute a quorum for the transaction of business, and when duly met a majority of the quorum may act. The rule was thus stated in *McDermott v. Miller*, 16 *Vroom* 251, and in *State v. Paterson*, 6 *Vroom* 190, and rests on a long line of authority from which I find no dissent. 2 *Kent's Com.* \*293; *Ang. & A. on Corp.*, §§ 501-504; *Dill. on Mun. Corp.*, f216; 5 *Dane's Abr.* 150; *Rex v. Miller*, 6 *T.R.* 268; *Rex v. Bellringer*, 4 *T.R.* 810 [100 *E.R.* 1315 (*K.B.* 1792)]; *Rex v. Monday*, *Cowp.* 530; *Rex v. Varlo*, *Cowp.* 250; *Oldknow v. Wainwright*; 1 *W. Bl.* 229; *Gosling v. Veley*, 7 *Ad. & E. (N.S.)* 406; *Ex parte Willcocks*, 7 *Cow.* 401; *Lockwood v. Mech. Nat. Bank*, 9 *R.I.* 308; *Buell v. Buckingham*, 16 *Iowa* 284; *Colombia & c., Co. v. Meier*, 39 *Mo.* 53; *Sargent v. Webster*, 13 *Metc.* 497; *First Parish v. Stearns*, 21 *Pick.* 148; *State v. Green*, 37 *Ohio St.* 227. \*\*\*” (at. p. 216)

And elsewhere, the Commissioner quoted from *Prezlak v. Padrone et al.*, 67 *N.J. Super.* 95 (*Law Div.* 1961) that:

“\*\*\* the [charter] provision which determines that a majority of the whole number of a body requires the presence of a majority of all seats of that body, whether filled or not, has been firmly established in our common law.\*\*\*” (at. p. 100)

In the instant matter, the Board is constituted to have the definite number of nine members; therefore, a quorum to transact business must be composed of no less than five members. *Beckhusen, supra*

Therefore, the special meeting of the Board on September 14, 1971, was illegal since only four members of the nine-member Board were present. A quorum in that instance required that five of the Board members be present.

However, the record shows that six members attended the special meeting on September 23, 1971, and voted to affirm the Board action of September 14, 1971, as follows:

“\*\*\* Original decision of September 14th was restudied. Roll call vote showed all members present still in favor of the original decision.\*\*\*” (Exhibit B)

The Commissioner determines, therefore, that the action of the Board on September 14, 1971 of terminating petitioner, pursuant to the terms of her contract, was an improper action and it will be set aside.

The action taken by the Board on September 23, 1971, terminating petitioner, pursuant to the terms of her contract, was a proper action taken at a special meeting of the Board because a quorum was present. The six members present voted to terminate petitioner. Three members were absent.

The Commissioner determines, therefore, that proper notice to petitioner was not given by the Board, subsequent to its action of terminating petitioner on September 23, 1971. Therefore, the Board is directed to pay petitioner for the eight-day period between September 16, 1971 and September 23, 1971. After doing so, the Board will have met its contractual obligation to petitioner.

Petitioner did not offer any evidence to show that the Board's decision to terminate her was in any way arbitrary, capricious or retaliatory because of her affiliation with the Association. Having failed to offer any proof for her allegations, *ante*, the Commissioner further determines that the actions of the Board in terminating petitioner's employment are consistent with the authority granted boards pursuant to *N.J.S.A. 18A:27-1 et seq.*

Except for the directive, *ante*, respondent's Motion is granted and the Petition is dismissed.

ACTING COMMISSIONER OF EDUCATION

May 1, 1973

**Margaret A. White,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Collingswood,  
Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Samuel D. Natal, Esq.

For the Respondent, Brown, Connery, Kulp, Wille, Purnell and Greene  
(George Purnell, Esq., of Counsel)

Petitioner, a nontenure teacher, has been employed for the past three academic years by the Board of Education of the Borough of Collingswood, hereinafter "Board". Petitioner was not offered her fourth or tenure contract, and the Board has denied her request that she be given reasons for the nonrenewal. Petitioner prays for an Order directing the Board to offer her a contract of employment for the 1972-73 school year.

This matter is submitted on the pleadings, exhibits, and Briefs of counsel. The Board filed a Motion for Summary Judgment, stating that no disputed issue of material fact has been raised, and that the Board has not violated its contract with petitioner. The Board avers that the contract expired by its own terms on June 30, 1972. The Board asserts, also, that petitioner has no legal right to be informed of the reason for the nonrenewal of her contract and that she has not acquired a tenure status.

The following facts show the history of the instant matter, and they are not disputed:

1. Petitioner was employed as a nontenure teacher under contracts for the school years 1969-70, 1970-71 and 1971-72.
2. The Board adopted certain policies governing the conduct of the teachers and that of the Board.
3. The Board policy at issue, adopted pursuant to the negotiated agreement between the Board and the teachers' association, states that a nontenure teacher must be notified in writing by March 1st of the current school year if he/she is to be released at the end of that year, to wit:

“\*\*\* ‘Any teacher who is not under tenure and who is to be released at the end of any current school year shall be notified of such intention in conference with either the building principal, a member of the



superintendent's staff, or both, as the occasion requires. Such notification shall be made official in writing by March 1st of such school year. Copies of such letter of release shall be made a part of the documentation materials of the agenda of the Board of Education at the meeting subsequent to such notice.' \*\*\*\*" (Petitioner's Brief, at p. 5)

4. No written notice of release was given to petitioner by the March 1st date.

5. At the Board meeting on March 20, 1972, a list of teachers' names, including petitioner's, was approved by voice vote of the Board for renewal of contracts.

6. Petitioner was informed that her contract would not be renewed on April 13, 1972.

7. At a meeting of the Board on May 8, 1972, the Board resolved to remove petitioner's name from the approved list by a voice vote, and also by voice vote, awarded contracts to the remaining teachers on the list for the 1972-73 school year.

8. At that same meeting the Board awarded a contract to a new teacher to replace petitioner for the school year 1972-73.

Petitioner alleges that she was evaluated on the performance of her duties on six separate occasions, and that none of her ratings were less than a "B-," and that she was recommended for tenure after her last rating. Petitioner alleges also that she relied on the policy of the Board, *ante*, and did not seek other employment. She contends that she was further encouraged by the Board's action of March 20, 1972, which approved her name on a list of teachers scheduled for reemployment for the 1972-73 school year. Petitioner alleges also that she accepted the Board's offer by letter, although she submitted no proof of such letter and no such claim is made in her Petition of Appeal. That claim of a letter of acceptance is, therefore, disregarded.

The essential issues to be determined are:

1. Is petitioner entitled to reemployment because of the Board's policy of written notice of release by March 1st of the school year?
2. Is petitioner entitled to reasons for her failure to be reemployed?
3. Was the Board's action, by voice vote, removing petitioner's name from its list of teachers to be awarded contracts, illegal or improper?
4. Is petitioner guaranteed renewal of contract by the doctrine of "promissory estoppel?"

With regard to the first issue, petitioner contends that the Board's failure

to give her notice as set forth in its policy, *ante*, entitles her to reemployment just as surely as if the Board had taken an affirmative action to reemploy her.

The Commissioner determines that, at the time of the May 8, 1972 Board meeting, there was no statutory provision granting reemployment to nontenure teachers who had not been given prior notice pursuant to a written Board policy. Although boards may make rules governing the employment and dismissal of staff members, such rules must be consistent with the school laws.

N.J.S.A. 18A:27-4 is particularly pertinent and reads as follows:

“Each board of education may make rules, *not inconsistent with the provisions of this title*, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.” (*Emphasis supplied.*)

N.J.S.A. 18A:27-1, which is also particularly pertinent, reads as follows:

“No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.”

The statutory construction of Chap. 303, P.L. 1968, permits negotiations between public employers and employees on the terms and conditions of employment. However, N.J.S.A. 34: 13A-8.1 (Supp. 1972) specifically provides that:

“Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, *nor shall any provision hereof annul or modify any statute or statutes of this State.*” (*Emphasis supplied.*)

Therefore, a board may not adopt a rule or policy which would in effect either amend a statute or deny the board’s authority conferred by statute. Moreover, any board rule or policy, whether adopted as the result of an agreement with its employees or otherwise affecting the employment or reemployment of a teaching staff member in a way other than the manner specifically provided by N.J.S.A. 18A:27-1, which mandates appointment of a teaching staff member “\*\*\* by a recorded roll call majority vote of the full membership of the board \*\*\*” is, on its face, *ultra vires*.

Although the Commissioner finds that the parties had no authority to write into an agreement what is essentially an automatic renewal provision triggered by failure to give notice, the Commissioner further finds that even if

they intended to do so, the remedy petitioner seeks (reinstatement) is contrary to statutory law, specifically *N.J.S.A. 18A:27-1*, and the statutes contained in the Tenure Teachers Hearing Act, *N.J.S.A. 18A:28-5 et seq.* However, petitioner can seek other remedies.

A recent unreported case, *Eberhardt v. Board of Trustees of Jersey City State College*, App. Div., Docket No. A-1576-70 (January 18, 1972), appeal dismissed, *Sup. Ct.*, Docket No. M-42 (September 19, 1972), involved an assistant professor who did not receive timely, formal notice that she would not be reemployed according to the regulations of the Department of Higher Education. Eberhardt would have acquired tenure if reinstated. The Chancellor of Higher Education determined that the violation of rules did not require reinstatement as a remedy, but that petitioner should be permitted to make a claim for damages for breach of contract. His decision was affirmed by the State Board of Higher Education; however, the Board found that the Chancellor lacked authority to award damages. This decision was affirmed by the Appellate Division, Superior Court on September 19, 1972.

In a similar matter, *Greene v. Howard University*, 412 F. 2d 1128 (D.C. Cir. 1969), a federal case on the same point, the Court determined that the University failed to abide by a regulation requiring notification of nontenured faculty members of non-reappointment by a specified date. Nevertheless, the Court held that the violation of that contractual provision did not warrant reappointment as a remedy, and observed that pecuniary damages might be available to compensate teachers for any injury suffered by reason of the University's failure to effect non-reemployment in accordance with its contractual obligations. 412 F. 2d at 1135

On February 10, 1972, the Legislature enacted *L. 1971, c. 436 § 5* (now *N.J.S.A. 18A:27-10 to 13* (Supp. 1972) effective first in the 1972-73 school year, which requires that a nonrenewal notice be given a nontenured teaching staff member by April 30, if he/she is not to be reemployed in the next school year. *N.J.S.A. 18A:27-11* provides the following:

“Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.”

In the judgment of the Commissioner, *N.J.S.A. 18A:27-10 through 13*, which became effective September 1, 1972, provides an exception to the appointment provisions of the hereinbefore cited statute *N.J.S.A. 18A:27-1*. Prior to the enactment of *N.J.S.A. 18A:27-10 through 13*, no statutory authority existed as grounds for the automatic contract renewal which petitioner seeks in the instant matter. Since the Board's actions, which petitioner contests,

occurred in March, April and May of 1972, petitioner does not have the retroactive benefit of the provisions of *N.J.S.A.* 18A:27-10 through 13, which became effective September 1, 1972.

It is clear in the instant matter that the Board, for whatever reasons, did not hold to its policy which required written notice by March 1st to those teachers who were not to be reemployed for the following year. The Commissioner determines that, absent the statutory authority pursuant to *N.J.S.A.* 18A:27-10 through 13, which was not effective at the time of the Board's actions, *ante*, the Board is not compelled to grant petitioner reemployment for the 1972-73 school year. The failure of the Board to conform to its policy in this instance does not affect the Board's obligation to employ nontenure teaching staff members in accordance with *N.J.S.A.* 18A:27-1.

With respect to the second issue of "reasons," the courts have held that nontenure teachers may not demand reemployment, and that probationary teachers are not entitled to a statement of reasons for their termination *with certain exceptions*. For instance, the law provides for a hearing if the petitioner can show *prima facie* evidence of the deprivation of a constitutional right because of race, religion, ancestry, denial of freedom of speech, etc. Proof of such allegations would result in reinstatement of the employee.

This principle has been enunciated by the courts in several cases. In *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65 (1962), the Supreme Court quoted from *People v. Chicago*, 278 *Ill.* 318, 116 *N.E.* 158, 160 (1917) to illustrate the "historically prevalent view" as follows:

\*\*\*\* A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant *for any reason whatever or for no reason at all.* \*\*\*\* (Emphasis supplied.)

However, the Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of a board of education. But,

\*\*\*\* Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit. \*\*\*\* (Id., at p. 71)

In the matter of *Katz v. Board of Trustees of Gloucester County College*, 118 *N.J. Super.* 398 (*Chan. Div.* 1972), the petitioner was a college instructor who was not offered his fourth or tenure contract, nor was he given reasons for his nonrenewal. The Court held that:

\*\*\*\* To require the board to refute plaintiff's proofs of his teaching ability is to require it to give reasons, a requirement which would unduly restrict its discretionary function. \*\*\*\* (at p. 409)

And,

“Inherent in our legislatively enacted tenure policy is the existence of a probationary period during which the board will have a chance to evaluate a teacher with no commitment to reemploy him.” (at pp. 409-410)

And elsewhere,

“To require such dismissals to be subject to procedures for tenure teachers would be costly and against the public policy of New Jersey. It would effectively amend our laws by judicial fiat. We will not take this step. Until our Supreme Court or the Supreme Court of the United States determines otherwise, we hold that it is the prerogative of a board of trustees to discontinue the employment of a nontenured teacher at the end of his contract with or without reason.” (at p. 410)

Petitioner cites *Board of Regents v. Roth*, 92 S. Ct. 2701; and *Perry v. Sindermann*, 92 S. Ct. 2694, to support her claim; but the Commissioner determines that although these cases qualify the principle set forth in *Zimmerman* and *Katz*, they show only that petitioner has not been denied any of her rights.

*Roth, supra*, was an assistant professor at a state university who was not re-hired at the end of his first academic year. He alleged that the decision not to re-hire him infringed on his Fourteenth Amendment rights. He alleged specifically that “\*\*\* the nonrenewal of his contract was based on his exercise of his right to freedom of speech \*\*\*” and, therefore, denied him liberty and property rights. The Court held as follows with respect to his argument of deprivation of liberty:

“\*\*\* Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one University. It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.” (Roth, supra, at p. 2708)

Also, 92 S. Ct. 2707 (footnote No. 13),

“The District Court made an *assumption* ‘that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.’ 310 F. Supp. at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that ‘the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor’ amounts to a limitation on future employment opportunities sufficient invoke (sic) procedural due process guaranties. 446 F. 2d, at 809. But even assuming *arguendo* that such a ‘substantial adverse effect’ under these circumstances would constitute a state imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how non-

retention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' Cf. *Schwartz v. Board of Bar Examiners, supra.*" (*Emphasis in text.*)

And the Court held with respect to Roth's argument of deprivation of property that:

"\*\*\* To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.\*\*\*"

Also, 92 S. Ct. 2708-9 (footnote No. 15),

"*Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had 'published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible . . . The rules further provided that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.' *Id.*, at 119, 46 S. Ct. at 216. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' *Id.*, at 123, 46 S. Ct. at 217."

And,

"\*\*\* In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.\*\*\*" (*Emphasis in text.*)

And,

"\*\*\* We must conclude \*\*\* the respondent [Roth] has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment.\*\*\*" (*Roth, supra*, at p. 2710)

It is well established that the Commissioner will not intervene to compel a board of education to employ a nontenured teacher whom it does not wish to employ, unless it is clearly shown that the board has acted *unlawfully or in violation of its contract with the teacher*. *Ruch v. Board of Education of Greater Egg Harbor Regional High School District*, 1968 S.L.D. 7, dismissed State Board of Education 11, affirmed Superior Court, Appellate Division, March 24, 1969; *Taylor and Ozman, v. Paterson State College*, 1966 S.L.D. 33; *Amorosa v. Board of Education of Bayonne*, 1966 S.L.D. 214; *Branin v. Board of Education of Middletown Township*, 1967 S.L.D. 9; *Schaffer v. Board of Education of Fair Lawn*, 1968 S.L.D. 213; *Gager v. Board of Education of Lower Camden County Regional High School District*, 1964 S.L.D. 81; *Ruggiero v. Board of Education of Greater Egg Harbor Regional High School District*, 1970 S.L.D. 99; *Nashel v. Board of Education of West New York*, 1968 S.L.D. 183; *Gibson v. Board of Education of the Borough of Collingswood*, 1970 S.L.D. 117, affirmed State Board of Education, October 7, 1970; *Kennedy v. Board of Education of the Township of Willingboro*, 1972 S.L.D. 138

The plaintiff in *Sindermann*, the other major case on this point, was employed as a junior college professor for four years under a series of one-year contracts. There was no formal tenure right in that college system. He alleged that his freedom of speech guaranteed under the First Amendment, and his right to a hearing and procedural due process under the Fourteenth Amendment, were violated by the nonrenewal of his contract without reasons or a hearing. The Court wrote:

“\*\*\* We have held today in *Board of Regents v. Roth*, supra, 408 U.S. 564, 92 S. Ct. 2701, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a *formal contract*. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor. (*Emphasis supplied.*)

“\*\*\* Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property.” (*Sindermann*, supra, at p. 2698)

In the instant matter, petitioner had a contract of employment for the school year 1971-72. There is nothing to show that either party did not comply with and fulfill the terms of *that contract*. The contract expired by its own terms at the end of the school year. Thereafter, no rights accrued to either party nor has either one any further obligation to the other. *Gibson*, supra

In the instant matter, petitioner asserts that her “liberty” to secure a contract has been infringed upon, and that she was deprived of a “property”



interest in a contract by a procedurally-defective vote by the Board. In the judgment of the Commissioner, the record in this instance does not support petitioner's allegations regarding these constitutional rights. Petitioner's specific allegation that her liberty interest to secure a new contract was infringed upon is untenable. She had ample time to seek reemployment elsewhere. And the Commissioner determines that she cannot claim any property rights to a contract which had not been offered. Petitioner's reliance upon *Roth, supra*, and *Sindermann, supra*, is misplaced, because within the authority of those cases, she was not deprived of either liberty or a property right.

A board of education may choose to announce reasons which dictated its decision not to re-hire a probationary employee, but, except under the circumstances as discussed in *Roth, supra*, it is under no compulsion to do so. *Zimmerman v. Board of Education of Newark, supra*; *Parker v. Board of Education of Prince George's Co., 237 F. Supp. 222 (D.C. Md. 1965)*; *Schaffer v. Fair Lawn Board of Education, supra*. Were it otherwise, the distinction between tenure and probationary status would be without difference. *Katz v. the Board of Trustees of Gloucester County College, supra*

The Commissioner dealt with the problems of the Board's reversal of its position posed in fact No. 7, *ante*, in *Docherty v. Board of Education of West Paterson, 1967 S.L.D. 297*. Docherty, a tenured employee, claimed that he had acquired a vested right to a salary increment voted to him by the Board and that its subsequent determination to reduce his compensation was a violation of his vested rights and his protection under the tenure statutes. See also *Robert Anson et al. v. Board of Education of Bridgeton, 1972 S.L.D. 638*.

In *Docherty, supra*, the Commissioner quoted from *Harris v. Board of Education of Pemberton Township, 1939-49 S.L.D. 164*, as follows:

“\*\*\* A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment. The resolution of May 5th, above set forth, was the final action at the meeting on that date in relation to the appointment of teachers\*\*\*.”

And elsewhere:

“\*\*\* An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.\*\*\*”

However, this matter is distinguishable from *Docherty, supra*, because petitioner in the matter, *sub judice*, had not acquired any vested right to continued employment. She had not even been offered a new contract. Her name was simply approved on March 20, 1972, on a list with other teachers' names, as a teacher who *would be* offered a contract for the coming school year.



Petitioner was thereafter informed on April 13, 1972, that her contract would not be renewed. Then on May 8, 1972, the Board awarded contracts to the remaining teachers on the list after removing petitioner's name. If petitioner's name had been included on the list of teachers awarded employment contracts for the 1972-73 academic year by the Board at its May 8, 1972 meeting, she would not have acquired a tenure status at that point in time, because she would still have been subject to a notice of termination clause in the employment contract. Tenure does not accrue for teaching staff members employed on an academic year basis until a teaching staff member completes three consecutive academic years of employment together with employment at the beginning of the next succeeding year. *N.J.S.A. 18A:28-5* See *Canfield v. Board of Education of Pine Hill*, 1966 S.L.D. 152, affirmed State Board of Education, April 5, 1967, affirmed 97 N.J. Super. 483 (*App. Div.* 1967), 235 A. 2d 470, reversed 51 N.J. 400 (1968).

There remains a question of the legality of the Board's actions by voice vote on matters, which petitioner alleges statutorily require a recorded roll call majority vote. She avers that the result of the voice vote is clearly inconsistent with *N.J.S.A. 18A:27-1*. She argues that if the appointment of a teacher requires a "\*\*\*\* recorded roll call majority vote of the full membership of the board \*\*\*\*" (*N.J.S.A. 18A:27-1*), the removal of a teacher's name from a board-approved list would require identical board action.

Petitioner concludes, therefore, that the action of respondent by voice vote of the Board in removing petitioner's name from the approval list is illegal and must be set aside.

There is no statutory requirement for a recorded roll call majority vote for the removal of a teacher's name from a renewal list; neither does petitioner attack the Board's approval by voice vote of the list of names which included hers. Petitioner accepted that original determination of the Board in approving a list of teachers' names who would be later awarded contracts. Absent any statutory requirement for a recorded roll call majority vote for the removal of a teacher's name from a list of teachers recommended for reemployment, the Commissioner determines that petitioner's contention for that procedure is without merit.

The Commissioner finds, however, that the action of the Board on May 8, 1972 in awarding contracts to teachers required a recorded roll call majority vote of the full membership of the Board, but that no sensible nor useful purpose can now be served by declaring that action of the Board null and void. However, the Board is directed in all future actions to comply with the precise language of *N.J.S.A. 18A:27-1* and all other statutes which require a recorded roll call majority vote of the membership.

Petitioner cites the doctrine of "promissory estoppel" as reported in the American Law Institute's *Restatement of Contracts*, section 90 as follows:

“\*\*\* This has sometimes been referred to as the doctrine of ‘Promissory Estoppel.’ The guide lines set forth in applying this doctrine are as follows:

“1) The detriment suffered in reliance must be substantial in an economic sense;

“2) the substantial loss to the promisee in acting must have been foreseeable by the promisor; and

“3) the promisee must have acted reasonably in justifiable reliance on the promise as made.\*\*\*” (Petitioner’s Brief, at p.8)

Although petitioner avers that she relied on the Board’s approval of the list of teachers to be awarded contracts at the regular Board meeting on March 20, 1972, she admits that she “\*\*\* was informed that her contract was not going to be renewed on April 13, 1972 \*\*\*.” (Petition of Appeal, Third Count, No. 4) Therefore, with respect to her claim of reliance on the doctrine of “promissory estoppel,” *ante*, which alleges that she relied on the Board’s action of March 20, 1972, the record shows that she knew she would not be reemployed on April 13, 1972, more than two and one-half months prior to the expiration of her contract in June, and four and one-half months before the beginning of the new school term on September 1, 1972. The Commissioner cannot agree, therefore, that there was any great detriment to petitioner in terms of § 90 (1) *Restatement of Contracts*, *ante*. In any event, petitioner’s request for reinstatement is not an appropriate remedy in light of the injury she claims. The provisions cited in the doctrine, *ante*, may not be used for reinstatement, a remedy which would violate the conditions mandated by *N.J.S.A. 18A:27-1*.

The Commissioner determines, therefore, that petitioner’s contract alone is the governing instrument with respect to her employment period, and it expired by its own terms on June 30, 1972. Also, petitioner’s reliance on *N.J.S.A. 18A:27-10* and *11*, which require early notice to teachers not being reemployed, can have no application to the matter considered herein because such statutes became effective during the 1972-73 school year, the year for which petitioner did not receive a contract.

Respondent’s Motion for Summary Judgment is, therefore, granted and the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 3, 1973

**Frank Monaco,**

*Petitioner,*

*v.*

**Board of Education of the Hanover Park Regional  
High School District et al.,  
Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Frank Monaco, *Pro Se*

For the Respondent, Jacob Green, Esq.

Petitioner, Frank Monaco, a tenure teacher in the School District of Hanover Park Regional High School District, Morris County, appeals the action of the Board of Education, hereinafter "Board," in not reappointing him to the position of head baseball coach for the school year 1971-72.

This matter is submitted for adjudication by the Commissioner of Education on the pleadings, Briefs, Motions and affidavits of counsel. Additionally, several documents were submitted in evidence by the Board in support of its action.

Petitioner also submitted many documents to support his allegation that the Board's action is unreasonable, when weighed against the chronology of events which culminated in its final decision, *ante*.

The original appeal in this matter was submitted to Superior Court, Chancery Division, for Order to Show Cause and Restraint prohibiting petitioner, Frank Monaco, and the Hanover Park Regional Education Association, hereinafter "Association," from proceeding with arbitration as the forum for settling this dispute. The Court remanded the matter to the Commissioner for exhaustion of administrative remedies. However, petitioner avers that the Commissioner lacks jurisdiction and claims that the instant matter arises under the provisions of *P.L. 1968, Chapter 303* (codified as *N.J.S.A. 34:13A-1 et seq.*), the New Jersey Employer-Employees Relations Act, which permits negotiations on the terms and conditions of employment.

At a conference of counsel, the Association was directed to show its standing as a party of interest in this matter. The Association relies primarily on the argument that this is a matter which lies within the jurisdiction of *N.J.S.A. 34:13A-1 et seq.*, and that it is not a matter of school law which is clearly under the jurisdiction of the Commissioner. The Association offered no evidence to show that it was in fact a party of interest. The Association argues, however, that as the collective negotiating agent for the teachers, it negotiated a grievance

procedure which permits the instant matter to be handled locally. The Association finally avers that the Commissioner has no authority to interpret *N.J.S.A. 34:13A-1 et seq.*, and, therefore, the instant matter is outside his jurisdiction.

The Commissioner cannot agree. Although local boards of education are required to negotiate the terms and conditions of employment pursuant to the applicable provisions in *N.J.S.A. 34:13A-1 et seq.*, the Commissioner notes in particular *N.J.S.A. 34:13A-8.1* which reads as follows:

“Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State.”

This statute codifies the general rule that all statutes, pertaining to the same subject must be construed together, in order that all legislative policies may be harmonized and given effect. *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411, 421 (1958) Accordingly *N.J.S.A. 34:13A-1 et seq.* do not modify nor diminish Title 18A, Education in any respect, and agreements between school boards and their employees must be reached within the framework of the policies and objectives set forth in the education laws.

Boards of education have statutory authority to make determinations governing the employment of teaching staff members pursuant to *N.J.S.A. 18A:27-4*, which reads as follows:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

Petitioner’s reliance on *N.J.S.A. 34:13A-1 et seq.*, is unfounded, therefore, since *N.J.S.A. 34:13A-8.1* clearly limits the authority of negotiating parties to adopt agreements, which by indirection, would place all matters which the Association deemed to be grievable or arbitrable issues, outside the jurisdiction of the Commissioner and the education laws.

In *Board of Education of the Township of Rockaway v. Rockaway Township Education Association and Joseph Youngman*, 120 *N.J. Super.* 564; the Court held:

“\*\*\* It cannot be argued, therefore, that Title 18 ‘Education’ insofar as it is concerned with relationship between Boards, teachers *and* pupils has

been superseded. Even were this language eliminated from Chapter 303, our Supreme Court has held that the general rule of statutory construction, in the absence of clear legislative direction to the contrary, requires a determination that a later statute will not be deemed to repeal or modify an earlier one, but all existing statutes pertaining to the same subject matter 'are to be construed together as a unitary and harmonious whole, in order that each may be fully effective.' *Clifton v. Passaic County Board of Taxation*, 28 N.J. 411, 421 (1958). Thus, the provisions of both Title 18A and Chapter 303 must be read together so that both are harmonized and each is given its appropriate role.\*\*\*\* (at p. 569) (*Emphasis in text.*)

In *South Plainfield Education Association and Marilyn Winston v. Board of Education of the Borough of South Plainfield*, 1972 S.L.D. 323, the Commissioner determined that the South Plainfield Education Association had no standing in a non-contract matter which pertained to only one of its members. The matter, *sub judice*, is similar, and petitioner's contention that the instant matter is distinguishable from *Winston, supra*, because the Association was a party to the earlier Superior Court proceeding which remanded this matter to the Commissioner, is without support or merit.

Absent any affirmative showing by the Association that it should be a party of interest herein, the Commissioner determines that the Association has no standing in the instant matter and that this is a dispute between Petitioner Monaco and the Board. The Commissioner determines further that the matter, *sub judice*, is clearly embraced by Title 18A and is, therefore, entirely within the jurisdiction of the Commissioner.

The essential facts in this matter are not in dispute. Petitioner stipulates that:

- a) "\*\*\*\* tenure is not at issue.
- b) "\*\*\*\* tenure is not permissible nor possible for the position of any coach.
- c) "\*\*\*\* contracts for head baseball coach are renewed annually at the respondents' option.
- d) "\*\*\*\* the Commissioner cannot substitute his judgment for that of the board on matters which are by statute delegated to the local boards except where unreasonableness clearly appears.\*\*\*\*"

(Petition of Appeal, at p. 4)

In addition to his regular duties as a teacher, petitioner received appointments and served as head baseball coach for the school years 1967-68, 1968-69, 1969-70 and 1970-71. He was not reappointed to this duty for the school year 1971-72.

He prays for reinstatement as the head baseball coach and claims that the Board's action in not reappointing him was unreasonable. He alleges that an understanding existed between the parties that he had a probationary status as coach for the 1970-71 school year based upon performance, and that his performance was not the criteria used by the Board in its decision not to reappoint him. He alleges, further, that the Board's decision not to reappoint him as a coach was based on negative recommendations by three school administrators. The administrators' recommendations were so motivated, he avers, because the Board appointed him to a position of coordinator of physical education, despite the administration's recommendation of a different candidate. He asserts further that "\*\*\*\* the administration sought [t]o neutralize their 'defeat' and remove coach Monaco from his coaching position.\*\*\*" (Petition of Appeal, at p. 16)

The documents submitted in evidence by the Board contained evaluations of petitioner's overall performance as a teacher and recommendations for his improvement as a coach. The Commissioner finds it unnecessary to detail the substance of those evaluations which showed that the administration was less than satisfied with his overall performance as a coach.

Petitioner avers, that the qualities required by the Board for department coordinator are identical in many respects to those required of a coach; therefore, his appointment as a coordinator and his subsequent failure to receive reappointment as a coach, is further proof of the unreasonableness of the Board's action which was based on the recommendations of three administrators, *ante*.

Petitioner was given reasons by the Board for its decision not to reappoint him as a coach. Petitioner's Brief listed eight of those reasons, one of which contained five additional sub-complaints; however, he refuted or had an explanation for the circumstances surrounding each of them. (Petition of Appeal, at p. 11)

The Board held hearings, as requested by petitioner, on three different evenings and listened to the testimony of approximately thirty witnesses. After deliberating over this testimony and the recommendations of the school administration, the Board wrote a lengthy opinion outlining its reasons for not reappointing petitioner as head baseball coach. Its decision concludes as follows:

"\*\*\*\* *It is the unanimous opinion of the Board that Mr. Monaco's personal character and technical competence are not in issue in this case in any way and that there has been no criticism of him in this regard.*

"2. By accepting the position as Head Baseball Coach Mr. Monaco accepted full responsibility for the complete job, which included the administration of the details of the job and conducting himself in such a way at least as to minimize interpersonal difficulties with his players, his students and their parents.

“3. The facts presented to the Board establish an undeniable record of various deficiencies of Mr. Monaco’s performance of the complete job as Head Coach, in the areas of administrative and inter-personal (sic) relationships, extending back to 1968. Furthermore, even after being warned several times, Mr. Monaco continued to conduct himself so as to create other complaints. The Board is particularly concerned with the fact that Mr. Monaco attaches less significance to many of the items which the Principal and Assistant Principal consider vitally important in carrying out the complete job. This indicates a likelihood that similar problems would continue to occur in the future.

“4. The preponderance of evidence shows continued accumulation of incidents, many of which are of a minor nature, which taken together are sufficient to sustain the decision of Mr. Watson not to renew Mr. Monaco’s contract as Head Baseball Coach for the school year 1971-72.

“5. We have searched the record carefully and can find no evidence of any arbitrary, hasty or vindictive action on the part of either Mr. Michael, Mr. Alexander or Mr. Watson; indeed, the fact that they waited so long indicates that they did so reluctantly and with a great deal of regret and hesitation. In consideration of all the facts set forth, the Board concludes that it is in the best interests of the school system and the students of Whippany Park High School to affirm their decision.\*\*\*” (*Emphasis supplied.*)

In *Wassmer v. Board of Education of the Borough of Wharton*, 1967 S.L.D. 125, the Commissioner held that local boards of education were vested with the authority for the management of the public schools in their districts. In that decision the Commissioner stated:

“\*\*\* While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination.\*\*\*” (at p. 127)

A similar matter was adjudicated in *Nello Dallolio v. Board of Education of the City of Vineland*, 1965 S.L.D. 18, in which Dallolio claimed tenure as a football coach. However, the Commissioner commented that:

“\*\*\* 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)\*\*\*\*

In *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School*, 1971 S.L.D. 336, the question of reassignment of teachers to extra-classroom duties was discussed as follows:

“\*\*\* Under these circumstances, the Board had no obligation to give reasons for not reassigning petitioner or in fact to grant petitioner a hearing. In *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962) at p. 70, the Court reaffirmed the long established precedent of prior decisions in New Jersey involving non-tenure employment by citing *People ex rel v. Chicago* 278 Ill. 160, L.R.A. 1917 E. 1969 (Sup. Ct. 1917) as follows:

“ ‘\*\*\* A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. *The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.* \*\*\*’ (Emphasis ours.) ’ \*\*\*” (at p. 344)

In *Dignan, supra*, the Commissioner approved the Board’s action in not reappointing the petitioner as faculty advisor to the school newspaper where no reasons were given by the Board for its action. The Commissioner commented that:

“\*\*\* It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements.” (at p. 345)

Also, in *Boney v. Board of Education of the City of Pleasantville*, 1971 S.L.D. 579, the Commissioner declared:

“\*\*\* In this instance, the Commissioner finds that the Board merely exercised its right to decline to reassign a teacher to a nontenured duty, and, in exercising this discretion, it had no obligation to defend its action or to afford a hearing. The applicable statute, N.J.S.A. 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status. As was previously stated, petitioner’s tenure status as a teacher was not threatened by the Board’s action. It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements.\*\*\*” (at p. 586)

In the instant matter a hearing was afforded petitioner, and reasons were



given by the Board, even though it had no obligation to do either. Petitioner does not claim that his reappointment was denied for statutorily-proscribed discrimination on the basis of race, color, religion, etc.; rather, he alleges that the Board's action was unreasonable.

It is not the proper function of the Commissioner to question the wisdom of the Board's decision not to reappoint petitioner to the position of head baseball coach. The Board has the statutory right to assign teachers as it sees fit, subject of course, to the limits 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 1939 S.L.D. 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 1938 S.L.D. 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); *Dallolio v. Vineland Board of Education*, *supra*; *Joseph J. Dignan v. Rumson-Fair Haven Regional Board of Education*, *supra*; *Boney v. Board of Education of Pleasantville*, *supra*. The words of the Appellate Division of the New Jersey Superior Court in *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 327, 332 (App. Div. 1965) affirmed 46 N.J. 581 (1966) bear directly to the point of the instant matter as follows:

“\*\*\* 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.\*\*\* *Quinlan v. Board of Education of North Bergen*, 73 N.J. Super. 40 (App. Div. 1962)\*\*\*.”

In the matter, *sub judice*, petitioner has failed to establish any proof that respondent's action was arbitrary, capricious, unreasonable or punitive. Respondent's Motion for Summary Judgment in this matter is granted, and accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 11, 1973

**In the Matter of the Annual School Election  
Held in the School District of the Borough of Helmetta,  
Middlesex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

Petitioners, ten citizens residing in the School District of Helmetta, allege six separate counts of irregularities in the conduct of the annual school election held February 13, 1973. An inquiry into the school election procedures was conducted on March 1, 1973 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

A total of fourteen witnesses provided testimony in regard to the six counts of alleged irregularities. The testimony, with respect to each count, will be reported *seriatim*.

*Count No. 1*

“Voter Margaret Pohl, having voted early in the election and left the polling place, returned to the voting room along with two elderly gentlemen and proceeded to instruct them in the voting process with the use of a mock ballot.”

The first witness to testify regarding this count was Candidate Dix, a petitioner who was at the polling place at the time of the alleged incident. According to this witness, Mrs. Pohl entered the polling place with two gentlemen and proceeded to show them the sample ballot which was affixed to the table where the election officials were stationed. This witness testified that she could not hear the conversation between Mrs. Pohl and the two gentlemen because she was too distant from them.

Mrs. Pohl testified that she has been escorting voters to the election polls for eighteen years, and on this occasion she assisted two senior citizens, one of whom was over seventy years of age, to the polling place. She testified that she assisted these elderly voters into the polls and pointed out the sample ballot affixed to the table where the election officials were seated.

This concludes the testimony regarding Count No. 1. The hearing examiner finds no proof of an election irregularity based upon this allegation and therefore recommends that Count No. 1 be dismissed.

*Count No. 2*

“Voter Patrick Connelly upon entering the polling place, stopped in the hallway outside the voting room door and engaged in a conversation with Margaret Pohl. During this conversation, Mrs. Pohl stated to Mr. Connelly

that he should pull any lever on the voting machine except the one containing the name Eva Dicks, a candidate.”

Petitioner Connelly testified that the incident with Mrs. Pohl occurred exactly as stated in Count No. 2 of the Petition of Appeal.

Mrs. Pohl testified that she met Mr. Connelly in the classroom used as the polling place and not in the hallway. She stated that she was preparing to leave the poll at 6:30 p.m. to purchase sandwiches for the election workers, when she met Mr. Connelly entering the room. According to this witness, she only said hello to Mr. Connelly as she left the room.

No other testimony was received regarding this allegation. The hearing examiner recommends that Count No. 2 be dismissed for lack of proof.

### *Count No. 3*

“The Challenger (sic) Certificate for Candidate Larry Young was dated Feb. 13, 1973, notarized (sic) the same date which is not five days prior to the election and therefore is in direct violation of Title 18.”

The Board Secretary testified that Candidate Young telephoned him on February 13, 1973, and requested challengers' certificates. The Board Secretary testified that he informed Candidate Young that he was five days late in making this request, and that it is the responsibility of each candidate to take the necessary steps to provide challengers and secure the proper credentials. According to the Board Secretary, he called the County Election Board following his telephone conversation with Candidate Young, and he was told by someone from that office that he could issue an emergency challenger's certificate. Later, the Board Secretary stated, he received a telephone call from Mrs. Boyles inquiring about the possibility of Candidate Young securing challengers' certificates. The Board Secretary testified that he informed both Candidate Young and Mrs. Boyles that he would issue the requested challengers' certificates in view of the fact that Mr. Young was a candidate running for the first time; but, the Board Secretary also informed them that there could be problems created if they actually used the challengers' certificates in order to challenge individual voters. The Board Secretary stated that he received the list of names of the challengers from Candidate Young at approximately 11:00 a.m. on election day, and immediately issued the challengers' certificates. Later in the day, the Board Secretary testified, he informed Candidate Dicks regarding Candidate Young's challengers' certificates. During the election, Mrs. Boyles served as an alternate challenger for Candidate Young, and Mrs. Young, the candidate's spouse, served as his challenger.

Candidate Dicks testified that prior to the election she called the Board Secretary to secure challengers' certificates, but he had none at the time. She stated that she secured these certificate forms from the County Election Board, and then obtained the signed challengers' certificates from the Board Secretary. She testified further that the Board Secretary telephoned her and described his

earlier conversation with Candidate Young, wherein Candidate Young inquired why he had not received challengers' certificates for the election. According to Candidate Dicks, the Board Secretary related to her that he advised Candidate Young that candidates, and not the Board Secretary, are responsible for initiating procedures to secure challengers' certificates.

*Count No. 4*

"Mr. John Petroski, Judge of the election was confronted with the illegal challange (sic) certificate and the incident involving Mrs. Pohl. Mr. Petroski chose not to accept these challanges (sic) stating that he did not have Title 18 in his posession (sic) and was not familiar with the rules and regulations governing same."

Petitioner Hein testified that she was a challenger for Candidate Dicks during the school election. According to this witness, she received her challenger's certificate when she arrived at the polling place at the opening of the polls. At that time, she testified, she observed two challengers' certificates on the election officials' table, dated February 13, 1973. Petitioner Hein stated that when she brought this matter to the attention of the Judge of the Election, he did nothing about it. She further testified that Mrs. Boyles entered this conversation between her and the Judge of the Election, and stated that the challengers' certificates were valid because they were signed by the Board Secretary. Petitioner Hein also testified that when the Board Secretary later arrived at the polling place, she asked him who at the County Election Board had advised him to issue the challengers' certificates, and she also informed the Board Secretary that she had a right to protest his issuance of the certificates. This witness also testified that she did not know whether Candidate Young's challengers actually challenged any voter during the February 13 school election.

Candidate Dicks testified that, during the election she questioned the Judge of the Election regarding the validity of Candidate Young's challengers' certificates, and the Judge admitted to her that he was not familiar with the applicable school laws. This witness also testified that neither Candidate Young, nor his challengers, actually challenged any voter during the school election.

Petitioner Kolessar testified that she was an alternate challenger for Candidate Dicks, and she was present at the polling place when Petitioner Hein questioned the Judge of the Election regarding Candidate Young's challengers' certificates. According to Petitioner Kolessar, the Judge replied that he was not a lawyer and did not know all of the laws regarding challengers' credentials for school elections.

*Count No. 5*

"To our knowledge, no drawing of any kind was held by the Borough of Helmetta to determine the position of candidates on the ballot which we feel is also in direct violation of Title 18."

Candidate Dicks testified that she and Candidate Young were the only candidates on the ballot for a two-year unexpired term. The third candidate was unopposed for a three-year term. (Exhibit P-3) Candidate Dicks was an incumbent member of the Board, and she stated that to her knowledge neither she, nor the other two candidates, were notified regarding the date, time and place for the drawing for ballot position prior to the February 13, 1973 school election. According to Candidate Dicks, she examined a voter's absentee ballot on February 10, 1973, and thereby obtained her first knowledge of the position of candidates' names on the ballot.

Candidate Dicks further testified that she telephoned the Board Secretary and was told by him that he conducted the drawing for ballot position on January 5, 1973, accompanied by his wife, and no one else attended the drawing.

The Board Secretary testified that he recalled mentioning the date, time and place for the drawing for ballot position at the meeting of the Board held December 21, 1972, when Candidate Dicks was present. According to the Board Secretary, during the morning of January 5, 1973, he instructed his secretary to telephone both Candidates Young and Dicks to inform them that the drawing would be held on January 5, 1973 at 8:00 p.m. at the school, but his secretary was unable to reach either of these two candidates. He further testified that he did conduct the drawing at the appointed time and place, accompanied by his wife, and no other person attended the drawing.

On cross-examination, Candidate Dicks testified that she did not remember hearing any mention at the December 21, 1972 Board meeting of the date, time and place of the drawing for ballot position.

The minutes of the Board meeting held December 21, 1972, (Exhibit P-1) disclose discussion and Board action regarding arrangements for the annual school election, but make no mention of the arrangements for the ballot position drawing.

Candidate Dicks testified that she received an undated memorandum from the Board Secretary (Exhibit P-2) following the meeting of December 21, 1972, which listed "dates to remember" beginning January 8, 1973 through February 26, 1973, but which omitted any reference to the drawing for ballot position.

Petitioner Space, a Board member who was not a candidate, testified that he was present at the Board meeting held December 21, 1972, and he could not recall any statement made regarding the ballot position drawing.

*Count No. 6*

"Numerous people were observed loitering in the hallway of the polling place which is approximately ten feet from the voting machine."

Richard Dicks, husband of Candidate Dicks, testified that when he went to the polling place to vote, he observed eight people, including two challengers and

one candidate standing in the hallway outside of the classroom where citizens were voting. After leaving the polls, he telephoned the Board Secretary to register a complaint about this situation. Mr. Dicks stated that the Board Secretary advised him to inform the Judge of the Election regarding any loitering at the polls. According to Mr. Dicks, he then returned to the polling place where he observed six or seven persons standing in the hallway. He testified further that he spoke to an election official, Mr. Stuart, regarding the people standing in the hallway and then he departed from the premises.

Candidate Dicks testified that at one point during the school election she observed five or six persons standing in the hallway, including one candidate and one challenger. She stated further that she observed one voter who remained in the hallway for three or four hours during the election.

Petitioner Space testified that he went to the polling place at 6:30 p.m. and at that time noticed five people in the hallway, including one challenger and one candidate. While leaving, he testified, he observed that several lights in the parking lot were extinguished, and he subsequently made five trips back into the schoolhouse to secure light bulbs of the proper size and a ladder. During this time, Petitioner Space testified, he observed from three to five people in the hallway, but on each occasion different people were in the hallway.

Petitioner Hein, a challenger for Candidate Dicks, testified that during the election she complained to the Judge of the Election regarding persons standing in the hallway, and the Judge told her that Mr. Stuart, an election board member, would take care of the problem. Petitioner Hein further testified that Mr. Stuart accompanied her into the hallway and told several people they would have to leave, and they did.

Petitioner Kolessar testified that she and her husband voted at 7:15 p.m., and as an alternate challenger for Candidate Dicks, she was told that only one challenger could remain in the polling place at any given time. She testified that she and her spouse were standing in the hallway with other people when Petitioner Hein and an election board worker came out to the hallway. According to Petitioner Hein, when Mr. Stuart told the people to leave the hallway, she and her husband left. She further testified that the principal arrived approximately forty-five minutes later, and she and her husband, the principal and several others accompanied the principal to his office to look up the school laws regarding challengers. Petitioner Hein testified that the principal told her that she could enter the polling place as a challenger, and the principal also telephoned the Board Secretary.

Mrs. Schulz, a voter, testified that when she was at the polling place there were five people in the hallway, but no one stayed more than five minutes. According to Mrs. Schulz, the weather was bitter cold and voters would stand in the hallway for several minutes before leaving the building.

The Judge of the Election testified that he was stationed at the single voting machine near the doorway during the entire election, and he noticed that

voters would stop to chat for several minutes in the hallway as they arrived or were leaving the polling place. According to the Judge, Mr. Stuart, an election board worker, advised him that he had asked several persons to leave the hallway as the result of a complaint. The Judge further testified that the argument among the challengers ceased when the Board Secretary arrived at the polling place.

The testimony of Mrs. Boyles, the alternate challenger for Candidate Young, corroborated the testimony of the previous witnesses regarding the election worker asking people to leave the hallway.

Mr. Maglies, a voter, testified that he voted at 7:00 p.m. and was at the polling place a total of twenty-five minutes. He stated that some voters remained in the hallway from five to ten minutes to converse with friends, but he heard no discussion regarding candidates nor the election during that period of time.

The Board Secretary testified that when Candidate Dicks telephoned him regarding alleged loitering at the polls, he advised her to request the election board officials to remove any loiterers. Also, the Board Secretary testified that he then called the Police Department and requested that a police officer be stationed in the polling place hallway for the remainder of the election, and this was done. The Board Secretary further testified that he went to the polls to discuss the challenger credential problem, and as a result the misunderstanding was settled. In the opinion of the Board Secretary, the disagreement regarding challengers' credentials did not affect the election procedures.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The Commissioner finds that the proofs regarding the allegations set forth in Counts No. 1 and No. 2 are insufficient to establish any irregularities, and therefore Counts No. 1 and No. 2 are hereby dismissed.

In regard to Count No. 3, the issuance of challengers' certificates by the Board Secretary, the applicable statute is *N.J.S.A. 18A:14-15*, which states in pertinent part as follows:

“\*\*\* Challengers shall be appointed in writing, signed by the candidate, specifying the names and addresses of the challengers and the polling district for which they are severally appointed, *which shall be filed with the secretary of the board of education not later than five days preceding the election.*” (Emphasis ours.)

It is clear from the above-stated statute, that each candidate must initiate the procedures for securing challengers' credentials. However, it is also clear



from the facts in this matter that the request made by Candidate Young for such credentials was untimely, the request having been made on the morning of the designated school election day. The Commissioner finds that the credentials for Candidate Young's challenger and alternate challenger were improperly issued by the Board Secretary.

The Commissioner also observes the uncontradicted testimony of Candidate Dicks; she requested challengers' certificates from the Board Secretary and she was informed by him that he had none.

Assuming, in the case of Candidate Dicks, that her request was timely in accordance with *N.J.S.A. 18A:14-15*, the issuing of challengers' certificates is described as follows by *N.J.S.A. 18A:14-16*:

"The secretary of the board of education *shall make a certificate* of the appointment of the challengers and the polling districts for which they are severally appointed, which shall be submitted by the challengers to the election officers of said respective polling districts." (*Emphasis ours.*)

*N.J.S.A. 18A:14-17*, which also applies, reads as follows:

"Each challenger shall wear a mark of identification as a challenger *which shall be furnished to him by the secretary of the board.*" (*Emphasis ours.*)

In order to perform the duty of issuing challengers' certificates required by *N.J.S.A. 18A:14-16, 17*, a board secretary must be prepared by having on hand an adequate supply of the necessary credentials. That the Board Secretary in the instant matter failed to properly perform this statutory duty is clear from the testimony of Candidate Dicks, that she had to secure the necessary forms for the Board Secretary's signature. Candidates for a school election may not be thwarted in their proper efforts to secure challengers' certificates simply because a board secretary fails to prepare for the performance of this required duty.

The testimony of all other witnesses regarding Count No. 3 fails to disclose that any voter was actually challenged by either the challenger or the alternate challenger, who possessed the defective challengers' certificates.

In regard to Count No. 4, the Commissioner observes the testimony of the Judge of the Election wherein he admitted his lack of knowledge concerning the questioned validity of the challengers' certificates. While it would be most desirable that all persons serving as school election board officers have a thorough understanding of the school election laws, as a practical matter, this is not always the case. In the instant matter, the Judge of the Election was confronted by a complaint regarding challengers' credentials which bore the signature of the Board Secretary, who was the designated issuing officer. Also, the Judge was operating the single voting machine at the one polling place, a task which under the circumstances probably occupied the majority of his attention. Later, the appearance of the Board Secretary at the polling place had the temporary effect of restoring calm to the various challengers.



Count No. 5 alleges that the drawing for ballot position required by *N.J.S.A. 18A:14-13* was not held. The statute reads in pertinent part as follows:

“The position which the names of candidates shall have upon the annual school election ballot in each school district shall be determined by the secretary of the board of education of the district by conducting a drawing in the following manner:

“a. The drawing of names shall take place at eight P.M. on the day following the last day for filing petitions for the annual school election at the regular meeting place of the board of education. In case the day fixed for the drawing of names falls on a Sunday, the drawing shall be held on the following day.”\*\*\*”

Although *N.J.S.A. 18A:14-14* provides that any legal voter of the district may witness the drawing, neither *N.J.S.A. 18A:14-13* or 14 requires that individual candidates must be notified regarding the drawing. Nor is there any requirement in the two aforementioned statutes that public notice of any kind must be made regarding the date, time and place of the drawing. The presumption is that candidates bear the responsibility to be familiar with *N.J.S.A. 18A:14-13* and 14, as must interested citizens.

The Commissioner recommends, both in the interest of fairness and to avoid allegations regarding the ballot position drawing, that local boards of education provide advance notice to all candidates regarding such drawing, and at least announce the date, time and place of the drawing at a regular board meeting preceding the drawing. This minimum notification will assist the implementation of *N.J.S.A. 18A:14-14* which permits the legal voters to witness the drawing.

In the instant matter, the testimony of the Board Secretary shows that the drawing was held as required by *N.J.S.A. 18A:14-13*, and that some effort was made by the Board Secretary to notify the two concerned candidates, even though this notification was not required.

Accordingly, Count No. 5 is dismissed.

In regard to the allegations of loitering set forth in Count No. 6, the Commissioner observes from the testimony that an election board officer did remove persons standing in the hallway when this was brought to his attention. Also, the Board Secretary secured a police officer to be stationed in the hallway after a complaint of loitering was made to him. The testimony of other witnesses discloses that numerous voters paused to converse briefly in the hallway upon entering or leaving the polls, but no testimony substantiates that improper electioneering or loitering took place. The Commissioner finds, therefore, that the evidence fails to substantiate the allegation of loitering. Count No. 6 is therefore dismissed.

In summary, the Commissioner has dismissed Counts Nos. 1, 2, 5 and 6 as

unsupported by the facts, and finds that Count No. 3 and part of Count No. 4 are proven.

From the evidence before the Commissioner in the instant matter, he cannot find that the will of the people was suppressed and could not be fairly determined. It is purely speculative to propose that the presence of challengers with improper certificates, absent any proof of a challenge to voters, caused the results of the election to be contrary to the will of the voters. The Commissioner has consistently declined to set aside contested school elections unless it can be shown that the irregularities clearly affected the result of the election. *In the Matter of the Annual School Election in the School District of Voorhees Township, Camden County*, 1968 S.L.D. 70. See also *Application of Wene*, 26 N.J. Super. 363 (Law Div. 1958); *Sharrock v. Keansburg*, 15 N.J. Super. 11 (App. Div. 1951); *Love v. Freeholders*, 35 N.J.L. 269 (Sup. Ct. 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County*, 1960-61 S.L.D. 181

The Commissioner finds and determines that the irregularities attendant upon the annual school election held in the School District of the Borough of Helmetta do not constitute sufficient grounds to set aside the announced results. He therefore finds that Robert L. Young was elected to a two-year unexpired term and Dorothy Kosior was elected to a three-year term as members of the Helmetta Board of Education.

COMMISSIONER OF EDUCATION

May 16, 1973

**In the Matter of the Tenure Hearing of James C. MacDonald,  
School District of Middle Township, Cape May County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Cafiero and Balliette (William M. Balliette, Jr., Esq., of Counsel)

For the Respondent, Henry Bender, Esq.

Written charges by the Middle Township Board of Education, hereinafter "Board," were certified against respondent for determination by the Commissioner of Education that such charges would be sufficient if true in fact to warrant dismissal or reduction in salary or some lesser but appropriate disciplinary action.

A hearing was held in the office of the Cape May County Superintendent of Schools on November 13, 1972 before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Pursuant to *N.J.S.A. 18A:6-10 et seq.*, the Tenure Employees Hearing Law, respondent was charged with missing a regularly-scheduled, properly-planned and organized curriculum meeting on May 10, 1972 in violation of his responsibility and duty to attend that meeting and without requesting permission from his superiors to be absent.

On May 11, 1972, he was notified by letter from the Superintendent of Schools that a recommendation would be made to the Board that respondent be suspended from his teaching duties for three days without pay for his infraction. The letter reads as follows:

“This is to advise you that I will recommend to the Middle Township Board of Education that you be suspended from your duties as a teacher in the Middle Township High School for a period not to exceed three (3) days without pay. (May 22, 23 and 24)

“Teachers are required to attend all meetings called by the administration as outlined in the 1971-72 ‘Teachers Agreement’, VI A-3 and VI A-9, which was ratified by the Middle Township Education Association and the Board of Education, June 9, 1971 after several months of negotiations under provisions of Chapter 303.

“The Administrative Bulletin distributed September 8, 1971, clearly denotes all dates upon which meetings may be held and that teachers are required to attend. The date of May 10, 1972 is one of these dates. *Suspension is based on your inattendance (sic) at this meeting and your inattentiveness to the need to be excused.*

“After four (4) notifications of this K-12 Science Committee for the S.C.I.S. Workshop which were promulgated in the Newsletter, April 4, 1972; two C.A.I.B.’s, April 17, 1972 and May 8, 1972 and a phone reminder to the High School on May 10, 1972, it is inconceivable that you were unaware of this meeting, as twenty-two of the twenty-three parties were present.

“You may attend the meeting of the Middle Township Board of Education which will be held at the Middle Township High School at 8:00 p.m. on May 18, 1972.

“By the power vested in me under Title 18A:25-6 and 18A:6-11 et seq, you could have been suspended immediately. I chose not to do this but rather to allow you to be present when the Board was charged with this recommendation.” (*Emphasis supplied.*)

Respondent appeared at the May 18, 1972 Board meeting referred to in the letter, *ante*, to explain his reasons for missing the May 10, 1972 meeting. On May 19, 1972, the Superintendent sent respondent the following letter:

“I am sorry to advise you that the Middle Township Board of Education

did not see 'fit' to accept your explanation of the absence from the meeting. The suspension will be effective Monday, May 22, 1972.

*"One of the factors relating to their decision not to revoke the suspension was the fact that you still have not submitted your curriculum guide.*

*"Although I regret having to do this, there must be teacher accountability." (Emphasis supplied.)*

Respondent admits missing the curriculum meeting on May 10, 1972, and admits also that he did not submit his curriculum guide on time. He avers, however, that he had good and adequate reasons for the admitted infractions and avers further that the Board's reaction was excessive and unjustified by the facts.

Respondent's testimony disclosed that the reasons for his absence from the curriculum meeting on May 10, 1972, were personal and pertained to his family situation at that time. The hearing examiner concludes that no useful purpose can be served by detailing respondent's reasons; suffice to say, however, that the Board rejected his reasons and imposed the three-day suspension without pay. The hearing examiner understands why respondent felt that it was absolutely necessary to miss the meeting and go home on the afternoon of May 10, 1972, and his reasons were not contradicted by the Board. However, respondent's testimony discloses that he became aware of his personal family problem on May 7, 1972, and he also knew then of the pending May 10 curriculum meeting, but did not take any steps through the school administration to be excused from that meeting. (Tr. 20) Respondent testified further that he went to the offices of the principal and the assistant principal on the afternoon of May 10, 1972 to request permission to miss the meeting, but was unsuccessful because neither administrator was in his office at the time. Respondent did not leave word with any secretary that he would be absent; rather he testified that he approached a fellow teacher and said "\*\*\*\* I'm going home \*\*\* and if anybody asks where I am will you please tell them I went home \*\*\*." (Emphasis supplied.) (Tr. 13) Respondent made no further attempt to notify the administrators by telephone on the same afternoon; nor did he approach either of them during the next morning about his absence from the meeting on the previous afternoon.

Respondent's reasons for not handing in his curriculum guide are detailed in part as follows in his testimony:

*"A.\*\*\* [The assistant superintendent] wanted this [curriculum guide] done at a certain date. We had some meetings about it and we were expected to do quite a bit of it on, you know, our own. I did not have enough time. I was helping my friend a great deal, a metal shop teacher, build his new home, which I spent considerable time on that. All of my vacation, 12, 13, 14 hours a day. I also have a part-time job as a butcher, which I do on the weekends, on Saturdays.*

“\*\*\* I normally work Friday nights if I can get there, Saturdays, and before we close on Sundays, I am the Sunday butcher, more or less, for about six hours. I, also, on my vacation worked on a clam boat, if I can get a lift, get a ride out and –

“Q.\*\*\*During the year explain what pressures prevented you from having your curriculum guide prepared on time, your curriculum guide?

“A. Well, I did spend a great deal of time at my friend’s house helping him build, and this is pretty presently known so we could get him into his house. My wife was pregnant at this time; she was having difficulties. I had my regular classroom schedule to attend to, and to do paperwork, and to mark, grade. And we had been directed by the Principal, Mr. Webb, to include four laboratories and I was trying to do that at the same time. In other words, to revamp my own curriculum so that it would be, you know, with what he wanted. And with all this, I’m afraid that my curriculum guide, as far as things to be done, I’m afraid this had to fail. In other words, after my children’s papers were marked, at many times ten o’clock at night, I would not feel like working on it. \*\*\*” (Tr. 15-16)

The Board avers that respondent’s testimony indicates that he believed that outside pressures rather than his school duties were more important to him than his professional obligation to the Board.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report, findings and conclusions of the hearing examiner and observes that there is no dispute over the facts in the instant matter. Rather, a question is raised in regard to the Board’s action of imposing a three-day suspension without pay.

The Commissioner commented in *Smith v. Board of Education of Paramus*, 1968 S.L.D. 62 as follows:

“\*\*\* The principle enunciated by the Court in *Bates v. Board of Education*, 72 P. 907 (Calif. Sup. Ct. 1903), and quoted with approval in *McGrath v. Burkhard*, 280 P. 2d 864 (Calif. App. 1955), bears repeating here:

“ ‘The public schools were not created, nor are they supported, for the benefit of the teachers therein, \*\*\* but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.’ ” (at p. 67)

In the Commissioner’s judgment there is no more important function for a teacher than those direct and indirect activities which have as their purpose the improvement of instruction for pupils. Respondent’s own testimony indicates

that his preoccupation with outside activities limited the amount of time and energy he was able to devote to completion of the curriculum guide. The Commissioner concludes that the curriculum guide should have taken precedence over the activities cited by respondent as reasons for its not being completed on time.

In *Smith v. Paramus, supra*, the Commissioner commented also, that:

“\*\*\* Respondents’ position is that the extracurricular activities assigned to petitioners are typical of the normal and customary kind of secondary school duties that have always been assigned to and performed by teachers as an essential part of their employment obligations. In respondents’ view the extracurricular activities program constitutes a supplement to the regular courses of studies conducted in the classroom and is a valid and vital part of the total education program offered to their pupils.

“A board of education is authorized to (1) employ such teachers as it shall determine (*N.J.S. 18A:16-1*); (2) make rules governing the employment of teaching staff members for the district; and (3) change, amend or repeal such rules. The employment of any person in any such capacity and his rights and duties with respect to such employment are dependent upon and are to be governed by the rules in force with reference thereto. \*\*\*” (at p. 64)

Nor can the Commissioner understand why respondent did not take affirmative action on the afternoon of May 10, 1972 by notifying the administrators’ secretaries that he would be absent from the curriculum meeting, or notify the administrators on the following morning of the reason for his absence. Such an affirmative action should have been taken by respondent.

The Commissioner finds that respondent did not perform his professional obligations to wit:

- 1) nonattendance at the curriculum meeting on May 10, 1972, and
- 2) failure to submit his curriculum guide on time.

In regard to the Board’s action in suspending the teacher for three days without pay, the Commissioner notes that *N.J.S.A. 18A:6-14* provides in pertinent part as follows:

“Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same \*\*\*.”

It is clear that a board may suspend a teacher with or without pay once charges are certified to the Commissioner. However, the precise issue of whether a board, upon certification of charges to the Commissioner against a tenured employee, may suspend such employee for three days without pay has not been heretofore adjudicated.

The Commissioner observes that local boards of education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie*, 3 N.J. 17 (1949); *N.J. Good Humor Inc. v. Bradley Beach*, 124 N.J.L. 162 (E. & A. 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 N.J. Super. 524 (Law Div. 1949) In regard to the instant matter, the Legislature empowered local boards of education by N.J.S.A. 18A:6-14 with the authority to “\*\*\*suspend \*\*\* with or without pay \*\*\*.” In the judgment of the Commissioner neither this Board nor any other local board of education may modify the precise requirements of N.J.S.A. 18A:6-14. A board may suspend only with or without pay, and not with a portion of such pay. Also, the suspension clearly must extend to the “\*\*\* final determination \*\*\*” of the charge by the Commissioner. Accordingly, the Commissioner determines that the Board’s action of suspending the teacher without pay for the limited period of three days was outside of the statutory authority granted it by N.J.S.A. 18A:6-14 and is hereby set aside.

For an example of a case wherein a local board of education improperly suspended a tenured teaching staff member for sixty days at one-half pay subsequent to its certifying of charges under N.J.S.A. 18A:6-10 *et seq.*, see *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County*, decided by the Commissioner March 20, 1973.

In *Barry Kotler v. Board of Education of the Borough of Manville, Somerset County*, 1972 S.L.D. 196, the Commissioner pointed out that there are several courses of action available to local boards of education when a tenured teaching staff member fails his obligation to render required services. If the board’s salary policy contains provision for withholding of an increment, that course of action may be followed if circumstances so warrant. Another available remedy would be the certifying of charges against the employee by the board, in instances where such charges, if true in fact, would be sufficient to warrant dismissal or a reduction in salary. Also, as the Commissioner stated in *Kotler, supra*, a local board of education is barred from paying for services which have not been rendered. In *Kotler, supra*, the Commissioner found that the board had no policy to support its withholding of petitioner’s salary increment, and he remanded the matter to the board for action since petitioner had failed to render certain obligatory services.

In the instant matter, the Board could properly have required that the teaching staff member forfeit a portion of his salary for failure to render required services. But once a charge was certified against the teacher, the statutory provisions of N.J.S.A. 18A:6-10 *et seq.* strictly delimited the Board’s alternatives for further action. *In the Matter of the Tenure Hearing of Robert H. Beam, supra*

Having found that respondent failed to perform heretofore stated professional duties, the Commissioner determines that an appropriate penalty, in

light of all of the circumstances, will be the forfeiture of a sum equal to three days' salary. Since respondent has improperly received a three-day suspension without pay, the penalty assessed herein by the Commissioner will be in lieu of, and not in addition to, the previous pay reduction.

COMMISSIONER OF EDUCATION

May 16, 1973

**In the Matter of the Tenure Hearing of  
Charles A. Ferrell, School District of the Borough of  
Clayton, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Milton L. Silver, Esq.

For the Respondent, Henry Bender, Esq.

Charles A. Ferrell, a teacher employed by the Borough of Clayton Board of Education since 1964, is charged by the Superintendent of Schools with unbecoming conduct, incapacity, and insubordination. At its regular monthly meeting held on July 10, 1972, the Board of Education, hereinafter "Board," made a determination that such charges, if proven to be true in fact, would warrant dismissal or reduction in salary. The Board suspended Charles A. Ferrell, hereinafter "respondent," without pay pending final determination of the charges by the Commissioner of Education.

A hearing into the merits of the charges was conducted at the office of the Gloucester County Superintendent of Schools, Clayton, on December 13, 1972, and January 13, 1973 by a hearing examiner appointed by the Commissioner. Counsel for the Board filed a Brief subsequent to the close of the hearing.

Because of prior commitments, counsel to the parties herein waived the requirements of *N.J.S.A.* 18A:6-16 which requires a hearing by the Commissioner within sixty days upon receipt of charges. The hearing examiner also points out that, under the provisions of *N.J.S.A.* 18A:6-14, respondent is now being paid his regular salary. (Tr. 77) The report of the hearing examiner is as follows:

The charges, *sub judice*, arise from a single occurrence; namely, the distribution of the following communication of the Professional Rights and Responsibilities Committee of the Clayton Education Association, hereinafter "Association," on or about May 12, 1972, and signed by respondent as chairman of that Committee: (J-1)



“To: All C.E.A. members

“From: C.E.A. Professional Rights and Responsibilities Committee

“Yesterday afternoon eleven C.E.A. members met to discuss next year’s negotiations package. At the meeting several problems came to light which demand immediate attention.

“The uncomfortable thing about most problems is that action is required to solve them. Ninety-nine percent of the time teachers or administrators prefer to allow injustices to occur, or to ignore problems, rather than ‘rock the boat’ by taking corrective action.

“We do, however, complain a great deal when we congregate with our associates. This practice does not help school morale, does not eliminate the problem, and in many cases only compounds it by allowing similar instances to occur again.

“Complaining to the right people, while creating undesired friction in the beginning, is the only effective way to work toward the elimination of certain practices. Just talking to the people concerned, or filing a formal grievance when necessary, will either promote a cooperative solution or firmly establish an answer as to what is correct. Complaining should be viewed as a method toward reaching solutions and creating a better situation; not as a deliberate attack upon someone – and a mature adult will recognize it as such.

“If any of the problems listed below effect (sic) you or come to your attention – SPEAK OUT. Talk to the person(s) concerned and if the problem is not resolved get in touch with a C.E.A. officer. We are prepared to go all the way to the Board of Education to get definitive answers and solutions. There is nothing sacred about a fellow teacher, or an administrator, who does not do his (her) job.

“The following were some of the major problems brought out yesterday which we felt should no longer be tolerated.

“1. Teachers failing to maintain control of their classes and allowing other classes to be disturbed.

“2. Students being taken or reported to the office for disciplinary action, and the student either not being disciplined or being disciplined too lightly for the offense committed.

“3. School employees or students being subjected to or threatened with property or bodily harm by students, and no effective disciplinary action being taken.

“4. School employees or students being subjected to abusive or foul language and no effective remedial action being taken.

“5. Deference or prejudice being shown toward certain groups which allows, promotes, or encourages anti-social behavior.

“6. Quality education for *every* student being ignored or passed over out of a desire to ‘save’ money.

“If any teacher sees or experiences any of the above, (s)he is encouraged to take action or come to the C.E.A. and allow it to take action. As stated above, we are prepared to go all the way to the Board for solutions.

---

“Additional note:

“The Board of Education has guaranteed that every teacher will be issued every key that he *requests, has a right to, and needs*. If any teacher has any keys which were not issued to him or her by the administration, and if the administration finds out and takes action against that teacher, the C.E.A. should not be expected to come to the aid of the teacher except to assure that (s)he receives due process.

“Teachers who do possess unissued keys are encouraged to turn them in immediately. To assure anonymity, if desired, turn the key over to a C.E.A. officer and ask them to turn it in.

“C A Ferrell (sic)”  
(*Emphasis in text.*)

The instant dispute is before the Commissioner because the memorandum (J-1) had been perceived, by four school administrators, as charges by respondent that the examples of conditions articulated therein actually existed in the Clayton Schools.

Subsequent to the release of the memorandum (J-1) the assistant principal of the high school, where respondent was assigned, took personal objection to its contents. He believed that the enumeration of the six areas of concern, *ante*, were in fact, charges that those conditions actually existed in the high school. (Tr. 24) Because he is assistant principal, he concluded that the memorandum (J-1) was a personal indictment against him as well as an indictment of the high school.

The assistant principal detailed his objections to J-1, *ante*, in a memorandum (P-1) to the principal of the high school. For every type of problem described in the memorandum (J-1, *ante*) the assistant principal asserted that when an incident occurred in the high school, strong administrative action was taken to correct it. The principal recommended that he confer with respondent to arrive at an amicable solution to the dispute. Several individual conferences ensued between the assistant principal and respondent, in addition to conferences with the assistant principal, respondent, and the president of the Association.

According to the assistant principal's testimony, respondent explained that the memorandum (J-1) was not meant as criticism of the administrators of the high school since it pertained only to the elementary school. Although the assistant principal testified that he could accept that explanation, he nevertheless recommended to respondent that he:

“\*\*\* put out a memorandum saying to all [association] members please disregard the communication [J-1] \*\*\* what is printed \*\*\* in this memorandum is not what we meant. Please disregard it. Destroy all copies \*\*\*” (Tr. 16)

Such a recommended memorandum was not issued by respondent, nor by the Association. By letter dated May 24, 1972, (P-2) the assistant principal informed the principal that no satisfactory results regarding his objection had been reached and that, in his judgment, respondent was unwilling to offer a clarification or retraction of the memorandum. (J-1)

On the same day, May 24, 1972, the principal informed respondent as follows: (P-3)

“\*\*\* It is my finding that Mr. Dever [the assistant principal] has a legitimate complaint and that his performance of his professional duties has been questioned. I must therefore instruct you to provide written documentation of the allegations made or, failing this, to issue a statement that such 'major problems which can no longer be tolerated' do not arise from Mr. Dever's failure to fulfill his professional obligations. \*\*\*”

At this juncture, the hearing examiner points out that the Superintendent of Schools, by letter dated May 18, 1972 (P-11), ordered respondent to “\*\*\* document by teacher name any charge against an administrator covering any or all points in your letter [J-1]. \*\*\*”

The principal testified that in addition to his memorandum to respondent (P-3, *ante*), he also asked respondent to come to his office to discuss the matter. Respondent, however, asserted in a letter response to the principal (P-4) that “\*\*\*[the Superintendent] told me on the phone two days ago that I am not to meet with any of the principals on this issue [J-1 and subsequent objections thereto] without him (sic) being present at the meeting \*\*\*,” and accordingly he did not attend the requested meeting with the principal. For the same reason, respondent did not attend a requested meeting with the elementary school principal. (P-9) (Tr. II-27-28)

In regard to the principal's instruction to “\*\*\* provide written documentation of the allegations [contained in J-1] \*\*\*,” (P-3) respondent, in conjunction with the president of the Association, submitted the following letter (P-5) to the principal of the high school:

“Clayton Education Association  
“Clayton, New Jersey 08312

“May 26, 1972

“Dear Mr. Gilmartin: [principal]

“In response to your memo of May 24 to Charles Ferrell, no allegations are being made against any individual or group of individuals in the Clayton School District.

“It was, and is, the intent of the Professional Rights and Responsibilities Committee and the Clayton Education Association to improve the educational climate of the system by encouraging professional employees to be more responsible.

“Yours truly,

“Angela Anderson, President  
Clayton Education Association

“Charles Ferrell, Chairman  
Professional Rights and  
Responsibilities Committee  
Clayton Education Association\*\*\*\*”

However, the principal did not accept this letter as the satisfactory written documentation he had required. (P-3, *ante*) (Tr. 64) Accordingly, by letter dated May 26, 1972 (P-6), the principal referred the matter to the Superintendent of Schools with the “\*\*\*\* request that a disciplinary hearing be set up to determine why Mr. Ferrell [respondent] has not followed my directions. \*\*\*\*”

By letter dated May 26, 1972 (P-12), the Superintendent of Schools informed respondent to appear at his office at one o'clock, the same day, to “\*\*\*\* show cause for failure to comply with my directive of May 18, 1972 [P-11, *ante*] and Mr. Gilmartin's [principal] directive of May 24, 1972. \*\*\*\*” [P-3, *ante*]

That meeting was attended by the Superintendent, respondent, and the president of the Association. Respondent testified that the Superintendent told him that his letter (P-5, *ante*) was not satisfactory and the he, respondent, had failed to follow the instructions of the principal. (P-3) (Tr. 31) According to the Superintendent, the outcome of that meeting was that respondent refused to comply with his request of May 18, 1972. (P-11) (Tr. 144) Respondent testified that the Superintendent had given him and the president of the Association until noon on May 30, 1972, to draft another memorandum retracting J-1, *ante*. Respondent further testified that after this draft was submitted to the Superintendent on May 30, 1972, it was subsequently rejected as unsatisfactory. (Tr. II-31) Later that same day, the Superintendent suspended respondent for

three days — May 31, June 1, and June 2, 1972. (P-13) It is asserted by the Superintendent, on direct examination (Tr. I-146), that respondent actually was out of school one day; he returned on June 1, 1972.

Subsequent to the Board meeting of July 10, 1972 at which time the instant charges were certified to the Commissioner, a tentative agreement was reached between the Board and respondent, as well as the administrators involved in this dispute. Part of the agreement was that respondent was to sign a memorandum (P-14) prepared by the principal which was then to be distributed to all teachers as reproduced here:

“To All Teachers: —

“The bulletin issued by Mr. C. A. Ferrell, Chairman of the Professional Rights and Responsibilities Committee, on May 11, 1972 was intended to encourage teachers to make proper use of the grievance procedures as laid down in the negotiated teachers agreement.

“It was not intended to indict members of the administration or board of education, nor was it meant to charge that the conditions cited as examples did, in fact, exist in the Clayton School System.”

Such a settlement was discussed between the parties on October 9, 1972. The following day, an article appeared in a newspaper circulating in the Borough of Clayton entitled “Clayton Board OKs Settlement of Dispute on Ferrell’s Terms.” (P-8) Contained therein are statements attributed to, and essentially admitted by respondent, that aver he was to return to school on his conditions. Thereafter, on October 18, 1972, counsel for the Board filed “additional specific charges” against respondent with the Commissioner. However, because the Board of Education did not formally certify such charges pursuant to *N.J.S.A. 18A:6-11*, it is recommended that the “additional specific charges” be dismissed. (Tr. I-5)

Subsequent to the publication of the newspaper article, *ante*, the Board determined to proceed on the charges, *sub judice*, because of an alleged lack of good faith on the part of respondent (Tr. I-164), and because he allegedly refused to comply with the Superintendent’s directive of May 18, 1972, *ante*. (Tr. I-144)

Respondent contends that the examples, numbered one through six (J-1, *ante*) were comments made to him by various teachers. (Tr. II-35, 46) He admits that he refused to divulge names of complaining teachers because, as chairman of the Professional Rights and Responsibilities Committee, he considered such information privileged. (Tr. II-42)

Counsel for respondent presented a Motion to Dismiss on the grounds that the charges, *sub judice*, were too nebulous to defend. In any event, if the Motion is denied, respondent argues that the distribution of the memorandum (J-1, *ante*) was in conjunction with his duties as chairman of the Committee, and as

such protected by law; that the act of preparation and distribution of the memorandum (J-1) is not an act of incapacity or insubordination; that several efforts were made by respondent to explain the memorandum (J-1); and finally, that the memorandum (J-1) contains no charges, nor was it meant to contain any charges, against any administrator of the Clayton School District.

The hearing examiner observes that the testimony of the principal discloses that respondent had been courteous to him throughout this dispute, and in fact, is a good teaching staff member. Furthermore, while the principal avers his belief that respondent should be disciplined, he considers dismissal unwarranted.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner as set forth above and the record in the instant matter.

Firstly, the Commissioner concurs in the hearing examiner's recommendation that the "additional specific charges" filed herein be dismissed on procedural grounds. *N.J.S.A. 18A:6-11* provides:

"If written charge is made against any employee of a board of education under tenure during good behavior and efficiency it shall be filed with the secretary of the board and the board *shall* determine by majority vote of its full membership *whether or not* such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination." (*Emphasis supplied.*)

Nowhere is there proof that the Board complied with the provisions of that statute. Accordingly, such additional charges are hereby dismissed.

Secondly, in regard to the suspension of respondent by the Superintendent for three days (P-13, *ante*), the Commissioner points out that *N.J.S.A. 18A:25-6* provides:

"The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this Title. Amended by L. 1968, c. 295, § 12, eff. Sept. 9, 1968."

In the instant matter, there are no proofs that the Superintendent took such action with the knowledge of the Board President, nor is there any proof that such action was reported forthwith to the Board. Accordingly, that action of the Superintendent of Schools in suspending respondent for three days is found to be *ultra vires* and is hereby set aside. Any compensation respondent may have lost as the result of such illegal suspension is to be tendered him at the next regularly-scheduled pay period of the Board.

The Commissioner has carefully reviewed respondent's memorandum. (J-1, *ante*) According to the provisions of *N.J.S.A. 18A:6-9 et seq.*, he is asked to make a determination on the charges, *sub judice*. The Commissioner can find no basis for petitioner's interpretation that respondent's memorandum (J-1) constitutes allegations against one or more administrator's in the Clayton School System. The Commissioner finds that items one through six, while admittedly complaints voiced by some teaching staff members, were examples of the kinds of complaints that respondent urged should be taken before the proper authorities for resolution.

Even had the memorandum (J-1, *ante*) contained allegations, respondent offered his statement (P-5, *ante*) that they were not, in fact, directed against any administrator. His explanations were rejected. In order to settle the matter, respondent agreed to distribute the explanatory memorandum prepared by the principal. (P-14) As Justice Weintraub observed in *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 53 N.J. 29 (1964) at page 40:

“\*\*\* Individuals, severally or in association, of course have the right to denounce a public body, its officers, and its programs, in the most searing terms, and even with a wide margin of error. \*\*\* It is the right of the individual, and it serves equally the collective interest of society, thus to bring government before the bar of public opinion, thereby to alter its course.”\*\*\*”

The subsequent newspaper story, *ante*, unfortunately terminated all efforts for reconciliation. It is the Commissioner's judgment that this kind of problem could best be settled between the administrators of the local school and respondent. The Commissioner finds no reason to discuss the substance of the newspaper report. Although the newspaper story may have been premature and ill-advised, no substantive proofs were offered that respondent herein was directly responsible for the article nor its headline.

For the reasons stated, charges of insubordination, unbecoming conduct, and incapacity certified to the Commissioner against respondent are found to be without merit. The Board is ordered to reinstate Charles A. Ferrell to his former position with all rights and privileges pertaining thereto, including any compensation he may have been denied, mitigated only by what he earned during his suspension.

COMMISSIONER OF EDUCATION

May 17, 1973

**Patrick Farrell,**

*Petitioner,*

*v.*

**Board of Education of the Borough of North Arlington,  
Rip Collins, Daniel Wickenseiser, and Joseph Kosakowski,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**ORDER**

On the Motion of petitioner for an Order directing respondents to reinstate petitioner as a member of respondents' track team pending final adjudication of the validity of respondents' Eligibility Rule; and for good cause shown

IT IS on this 21st day of May, 1973

ORDERED that respondents reinstate petitioner as a member of respondents' track team pending final adjudication of the validity of Rule #3 of respondents' "Athletic Eligibility Rules."

COMMISSIONER OF EDUCATION

May 22, 1973

**Arnold Sroka, Jean K. Sroka, Elizabeth Murray, et al.,**

*Petitioners,*

*v.*

**Board of Education of the Township of Jackson,  
Ocean County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioners, Kannen, Starley, Turnbach & White (Edward J. Turnbach, Esq., of Counsel)

For the Respondent, Russo & Courtney (James P. Courtney, Jr., Esq., of Counsel)

Petitioners, three teachers employed by the Board of Education of the Township of Jackson, Ocean County, hereinafter "Board," are supported by the



Jackson Education Association, hereinafter "Association," to which they belong, on behalf of themselves and other teachers similarly situated, in a demand that salary increments which were withheld from them for the school year 1972-73 be restored forthwith. They jointly aver that such withholding is illegal in the context of the negotiated agreements which exist between them and the Board. The Board maintains that its action controverted herein is legally correct and properly founded on an interpretation of the same negotiated agreement which petitioners invoke.

The matter is mutually submitted by the parties on the pleadings and Briefs of counsel for Summary Judgment. The essential facts are not in dispute and are recited below:

The controversy herein is grounded in an interpretation of the agreement negotiated between the Association and the Board, and subsequently adopted by the Board as a policy for the 1971-72 school year. Specifically, the controversy is related to those portions of the agreement with either direct or indirect reference to the salary policy contained therein, and its designation of increment levels in terms of earned degrees and years of experience.

This salary policy (article III, page 4 of the agreement) contains the designation "Teachers Salary Guide" for 1971-72, and a total of 14-16 step positions which are appropriate for five categories of teachers who hold earned degrees plus credits. The salary policy also contains the notation at the bottom:

"Effective with the 1971-72 salary guide, personnel will not receive additional Inservice Increments."

There are no other notations or corollary conditions of note which are directly attached to the schedule or made an incorporated part of it.

Because there are no additional corollary conditions directly attached to the salary guide in the contract, petitioners argue that:

"\*\*\* Article III of the contract [agreement] between the Education Association and the Board of Education very clearly vests in the teachers employed by the Board a right to a fixed salary dependent only upon their educational background and years of service. Nothing contained in that Article permits the Board to alter its duty or obligation to pay that salary. There is neither discretion vested in the Board nor conditions imposed upon the teachers." (Petitioner's Brief, unp)

Petitioners then cite a number of decisions of the Commissioner in support of their view that the Board has an obligation to "pay that salary" which is indicated for each of the levels: *Van Etten and Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 S.L.D. 120; *Brasher v. Board of Education of the Township of Bernards et al.*, 1971 S.L.D. 127; *Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, 1971 S.L.D. 484.

The Board on the other hand, while not denying that the salary policy, *per se*, contained in article III of the agreement, includes no corollary clauses which permit it to withhold the increments, avers that there is a clause in the agreement which permits it to use discretion in the awarding of such compensation. This clause which the Board invokes is found in article VII, page 14 of the agreement, and is recited as follows:

“\*\*\* The Jackson Township Board of Education and the Jackson Education Association agree that no teacher shall be disciplined, reduced in rank or salary, or discharged *without just cause*, in accordance with New Jersey Statutes 18A:28-1 *et seq.* \*\*\*” (*Emphasis supplied.*)

From this clause the Board devises its argument that if there is “just cause,” a teacher may be “disciplined” or reduced in “salary” – the increment withheld.

The Board founds this argument on a recent decision of the Commissioner, *Mabel Clark v. Board of Education of the Borough of East Paterson, Bergen County*, 1972 S.L.D. 251, *aff’d.* State Board of Education February 7, 1973. In *Clark* there was a similar clause contained within the negotiated agreement and the Commissioner held that the clause was sufficient to permit the local board of education to withhold salary increments.

This view is directly disputed by petitioners who aver that *Clark* represents a “strained result.” Petitioners maintain the clause contained in *Clark*

“\*\*\* may be termed a due process provision in the contract guaranteeing that the teacher will be protected from arbitrary action by his employer. \*\*\* It does not in any way attach ‘additional provisions’ to the salary schedule as recommended by [the] Commissioner in *Durkin*. To hold that such a provision guaranteeing teacher rights in effect constitutes a limitation on their right to remuneration under a clear and unconditional salary schedule is almost ‘Carrollesque.’\*\*\*” (Petitioner’s Brief, unp)

In support of such an avowal, petitioners cite *Newark Publishers Assn. v. Newark Typographical Union*, 22 N.J. 419 (1956) and *Krosnowski v. Krosnowski*, 22 N.J. 386 (1956).

Finally in this recital of the views and contentions of the parties, it is noted that the Board contends in its Answer to the Petition of Appeal:

“7. Petitioners were informed in writing on numerous occasions through supervision reports and have met with members of the administration personally and have been informed of their short comings (sic) and need to improve and were subsequently informed in February of 1971 that a recommendation would be made to withhold their increments. Petitioners have failed to exhaust the remedies provided for them in the contract \*\*\*concerning any grievances they may have and have failed to request a hearing by the Board of Education of such grievance as they are entitled to under the terms of the contract between the parties.\*\*\*”

These contentions are nowhere contradicted by petitioners.

The Board also contends that the Association named herein is not a proper party to the dispute, *sub judice*. This contention is disputed by petitioners. In this latter regard the Commissioner finds for the Board; the Association is not a proper party to the instant matter. However, the Petition remains a viable one, since the three teachers named herein have attested to its accuracy, and they are directly concerned with the ultimate determination of the Commissioner which is required.

It is noted here by the Commissioner that a decision in the instant matter was delayed pending a decision of the State Board of Education in *Clark*, on appeal. However that decision was affirmed as noted, and the facts which it presented are so similar to those herein as to govern the basic decision herein. A local board may withhold a salary increment for "cause," and those agreements between local boards and teacher associations which have such omnibus provisions as that contained herein, may be read in *pari materia*, with stated salary scales which are also contained in the agreements.

The ruling by the Commissioner in *Clark*, does however, require the presentation of "just cause," and when such cause is nowhere in evidence, and where there are no other corollary clauses to modify the clearly-stated terms of the salary policy, the policy must receive full implementation.

In a recent matter, the Commissioner had occasion to deal with just such a set of circumstances, as are considered herein and in *Clark*, except for one important fact — while the local board relied on an omnibus clause containing similar wording to that controverted in *Clark*, and the one in the matter, *sub judice*, no "just cause" had been established by the Board in that case to justify increment withholding. *Elizabeth Aikins v. Board of Education of the Borough of East Paterson, Bergen County*, decided by the Commissioner February 1, 1973. In this respect the Commissioner said:

\*\*\*\* In the judgment of the Commissioner the Board improperly denied petitioner's increment because no 'just cause' has been established by the Board. Assuming, *arguendo*, that the Board had a just cause for withholding petitioner's increment, certainly fair play would dictate that the teacher be informed of the reasons. In the instant matter, there is no evidence to show that the Board was dissatisfied with petitioner's performance of her duties. By contrast, the evidence before the Commissioner in *Clark, supra*, disclosed unsatisfactory performance by the petitioner.\*\*\*\*  
(1973 S.L.D. at 84)

Applying the facts in the matter, *sub judice*, to the facts and decisions of *Clark, supra*, and *Aikins, supra*, the Commissioner notes that the Board avers, and such an avowal is nowhere denied, that petitioners were "informed in writing" of their "shortcomings" and have also met with school administrators concerning them. There is no record that a hearing *per se* was ever thereafter requested by petitioners, and the "shortcomings" stand therefore as the "just cause" which grounds the Board's action.

Accordingly, having found the same conditions herein as those in *Clark, supra*, the Commissioner holds in similar fashion; the Board has provided the “just cause” to temper the stated terms of its salary guide for the 1972-73 school year, and there is authority for it to withhold the increment of petitioners. While this decision is firm and unequivocal, the Commissioner is constrained to state that even though such clauses as that in the agreement controverted herein may, on occasion, be construed broadly in matters such as salary increments, the sweeping nature of the clause is not the preferred kind which such agreements should contain. Rather, the Commissioner prefers a clause directly and explicitly affixed to the salary guide, so that its applicability is clear and unambiguous.

For the reasons advanced, *ante*, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 25, 1973

Gladys S. Rawicz,

*Petitioner,*

*v.*

Board of Education of the Township of Piscataway,  
Middlesex County,

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

Petitioner, a nontenure teacher in the employ of the Board of Education of the Township of Piscataway, hereinafter “Board,” avers that the Board improperly and illegally refused to renew her contract for the 1971-72 school year. Her appeal is supported by the Piscataway Education Association. At this juncture she requests that the Commissioner direct the Board to “rehear and renew” such contract and to direct the payment of retroactive compensation which is due her. The Board denies any impropriety with regard to its action. It avers that petitioner’s contract of employment for the 1970-71 school year expired by its own terms and that there is no relief the Commissioner can afford petitioner in the context of existing law.

A hearing in this matter was conducted on October 2 and November 14, 1972 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Certain basic facts in the controversy herein are not in dispute; namely, that petitioner was a properly-certificated teacher who was employed by the Board for each of the school years 1968-69, 1969-70, and 1970-71. Neither is it disputed that her third contract was fulfilled by the parties herein and expired by its stated terms on June 30, 1971. Thus, petitioner had not, as of that date, acquired a tenured status. (*N.J.S.A.* 18A:28)

However, petitioner avers that the Board failed to comply with its obligation to notify her by April 30, 1971 of its decision concerning the renewal or nonrenewal of her employment contract for a fourth year. This avowal is grounded on the "Fair Dismissal Procedure" incorporated as an integral part of the "Agreement Between the Piscataway Township Board of Education and the Piscataway Township Education Association" (P-9), which was effective and binding on each of the parties for the 1970-71 school year. This Agreement thus became a "Board Policy" and is hereinafter so identified.

This "Fair Dismissal Procedure" is included as Article XV of the Board Policy (P-9) and is reproduced in its entirety as follows:

"Article XV  
"FAIR DISMISSAL PROCEDURE

"A. On or (sic) before April 30, or (sic) each year, the Board shall give each nontenure teacher either:

"A written offer of contract for employment, or a written notice that such employment shall not be offered with reasons. The nontenure teacher shall also be entitled to a hearing before the appropriate director provided that a request is received within five (5) days.

"1. Any nontenure teacher who receives a notice of non-employment may within five (5) days thereafter, in writing, request a statement of reasons for such non-employment from the appropriate director, which statement shall be given to the teacher within five (5) days after receipt of such request and a copy forwarded to the Principal.

"2. Any nontenure teacher who has received notice of non-employment and statement of reasons shall be entitled to a hearing before the Superintendent, provided a written request for hearing is received within five (5) days after receipt by the teacher of the statement of reasons.

"3. If the teacher disagrees with the determination of the Superintendent, he may submit the dispute to the Board of Education provided a written

request is received within five (5) days after receipt by the teacher of the Superintendent's statement of reasons."

In the application of this "Fair Dismissal Procedure" to her own situation, petitioner contends not only, as noted *ante*, that the Board failed to notify her of her contract renewal status "on or before April 30," 1971, but also that the Board failed to provide her with a "statement of reasons" upon request as provided in section 1, *ante*, or a "hearing" before the Superintendent of Piscataway Township Schools, hereinafter "Superintendent," or the Board as provided in section 2, *ante*. (Specifically, in this latter regard, petitioner maintains that she was entitled to an adversary-type hearing before the Superintendent, not someone acting in his place, and should have been afforded the right to cross-examination of witnesses who stood as her accusers.)

Additionally, petitioner maintains that she was not evaluated as a teacher pursuant to the provisions contained in Article XIV of the Board Policy (P-9) and she avers, finally, that all of the grievances contained in this Petition are presented to the Commissioner for consideration because the Superior Court of New Jersey, Chancery Division, Middlesex County, in response to an action initiated by the Board, has restrained petitioner from proceeding with the invocation of arbitration proceedings to consider them.

In this regard the grievance procedure listed as Article III of the Board Policy (P-9, at p. 5) provides, *inter alia*, that:

\*\*\*\*6. If the Association is dissatisfied with the determination of the Board of Education it may initiate binding arbitration\*\*\*."

On the other hand, the Board maintains that it did in fact, provide petitioner with timely notice that her contract would not be renewed for the school year 1971-72 in accordance with the "Fair Dismissal Procedure" contained in the Board Policy (P-9). The Board further avers that another clause of the Board Policy (P-9) must be invoked -- a clause concerned with such grievances as alleged herein and contained in section B of Article IV which provides, *inter alia*:

\*\*\*\* Notwithstanding anything contained in this Article IV or in this Agreement, to the contrary, a nontenure teacher shall have no right to grieve by reason of his not being reemployed. Nor shall any employee have the right to grieve due to an appointment to, or lack of appointment to, retention in, or lack of retention in any position for which tenure is not possible or not required."

However, the Board postulates, *arguendo*, that even if it is held that petitioner had a right to grieve any of the issues raised herein, she failed to take an action to exercise the right within the twenty-day time limit prescribed by a third clause of the Agreement. (P-9) This clause is contained in Article III, section B, and it provides, *inter alia*, with respect to the presentation of a grievance that:

“The employee(s) or Association shall present the grievance, either orally or in writing to his immediate supervisor within *twenty school days* following the treatment, act or condition which is the basis of his grievance, and this initial grievance, shall make known the full details of the grievance so that a decision can be based on total pertinent information.\*\*\*” (*Emphasis in text.*)

The Board also argues that the Board Policy (P-9) nowhere contains a requirement that an “adversary”-type hearing must be afforded in instances such as this and that the phrase contained in Article XV, which states as reported *ante*, that:

“Any nontenure teacher who has received notice of nonemployment and statement of reasons shall be entitled to a *hearing* before the Superintendent\*\*\*.” (*Emphasis supplied.*)

does not contain the definition of the word “hearing” which petitioner ascribes to it. In the Board’s view, a hearing was afforded to petitioner, and it avers that she failed to use the opportunity to rebut the merits of reports which had been made against her.

Finally, if it is maintained, *arguendo*, that a hearing was afforded petitioner, the parties are in disagreement over whether or not the Board complied with the specific requirement that such hearing must be afforded by the Superintendent as specified in a phrase from Article XV. (P-9, *ante*) In petitioner’s view, the requirement must receive strict compliance. The Board argues that a hearing before school officials of lesser rank is sufficient.

The hearing before the hearing examiner was concerned with the proofs offered in support of, and in opposition to, the contentions of the parties as reported, *ante*, and no proofs were excluded on the basis of a unilateral determination by the hearing examiner that they were offered in an inappropriate forum or jurisdiction. Therefore, the hearing examiner’s reporting of the evidence which follows stands as a record only, and not as a recommendation that all such contentions should be determined by the Commissioner as appropriate controversies under the education statutes (*N.J.S.A. 18A*).

The reporting of the evidence concerned with the facts in controversy herein will be considered sequentially with relation to:

- (a) the evaluations of petitioner by supervisors and administrators prior to April 30, 1971;
- (b) the notice given to petitioner that her contract would not be renewed for the 1971-72 school year;
- (c) the reasons which were afforded to her for such nonrenewal;
- (d) the “hearings” which were subsequently held.

(a) The first question is whether petitioner received an appropriate number of evaluations pursuant to the terms of the Board Policy. (P-9) This policy requires one “supervisory report” for all teachers not later than March 15 each school year, and “at least” two supervisory reports, not later than March 15, for all “new teachers to the district.” (Article XIV, section D, 2, d.) In this regard the Board offered two exhibits: an evaluation report of a classroom visit dated November 23, 1970 (R-8); and the same type of report dated April 19, 1971 (R-3).

Each of these reports contained certain commendatory comments concerning petitioner and certain comments which might be categorized as “suggestions for improvement.” In general, the hearing examiner opines that the reports are not unfavorable to petitioner; in fact, the report R-8 contains the phrase:

“\*\*\* For the most part I was impressed with this lesson.\*\*\*”

The question is whether these two reports were consistent with the Board Policy (P-9) as agreed between the parties. The hearing examiner holds that they were: petitioner was not, in the 1970-71 school year, a teacher “new” to the district, but a teacher in her third year of employment. Accordingly, she was entitled to one such report prior to March 15 and she received it. (R-8)

(b) It is noted here that the “Fair Dismissal Procedure” (P-9, Article XV) reproduced, *ante*, in its entirety, requires that the Board shall give each nontenure teacher, by April 30, a “\*\*\* written offer of contract \*\*\*” or written notice that “\*\*\* employment shall not be offered \*\*\*” for the succeeding year. The proofs in this regard are two in number; a document admitted as R-1 in evidence, and a check list evaluation report submitted by a school principal. (P-1)

The document R-1 is an interim “form” document concerned with the offering of teacher contracts for the 1971-72 school year. It is addressed to petitioner and was sent to her on April 5, 1971 by the Superintendent. Item 4 contains the notation:

“4. *Delayed Decision* – A decision, with regard to your employment for the 1971-72 school year, has been delayed until April 30, 1971 for reasons already discussed with you by your immediate superior.”

The second document, P-1, was dated April 30, 1971, and sent to petitioner by her principal. It contains a total of 29 rating symbols relative to teacher service – two of which are equated to mean “Needs Improvement” – and the following question and answer posed for, and answered by, the principal:

“Do you recommend for reemployment? No.”

There is no other documentary evidence and no testimony that the Board, *per se*, ever acted with respect to petitioner’s contract for the 1971-72 school year as mandated by the “Fair Dismissal Procedure” (P-9, Article XV) prior to



April 30, 1971. There was testimony that the Board considered petitioner's reemployment at a meeting held May 17, 1971, and determined at that time not to reemploy petitioner for the 1971-72 school year. (Tr. I-92)

(c) As noted, *ante*, in the Board Policy (P-9 Article XV) a teacher may request a "statement of reasons" following receipt of notice of non-employment for the succeeding year. Petitioner requested such "reasons" by a letter (P-2) directed to the Director of Elementary Education on May 1, 1971, and in response petitioner received a document "Evaluation of Services of Mrs. Gladys Rawicz, Teacher in Dwight D. Eisenhower School," (R-9) which contained a summary of such "reasons." These "reasons" were evidently founded on previous classroom visitations and conferences and were set forth as follows:

\*\*\*\* 1. She teaches and functions lacking the essential recognitions of individual needs of children.

"2. She teaches and functions lacking the insights required to recognize when variations in children's activities need to be made.

"3. She teaches and functions lacking the personal recognition that children's interests must be maintained.

"4. She teaches and functions failing to 'see' signs of waning and lack of enthusiasm among some children while she herself is caught up in the enthusiasm of other participating children.

"5. She teaches and functions failing to exhibit the self-assured quality of leadership so basically necessary for efficient classroom dynamics. \*\*\*\*"

In her letter of May 1, 1971 (P-2), petitioner had also, in effect, requested a "hearing" with respect to the "reasons" pursuant to the terms of the Board Policy (P-9) and such hearing was subsequently scheduled by the Director of Elementary Education.

(d) On May 13, 1971, a "hearing" was held before the Director of Elementary Education. Petitioner was accompanied on that occasion by a representative of her own choosing but she "\*\*\*\* did not offer any testimony \*\*\*\*" (Tr. I-51) although she was offered the opportunity to speak on her own behalf. (Tr. I-52) Neither did witnesses appear for the Board at such hearing in support of the "reason," *ante*, which had been given for the Board's decision not to reemploy petitioner for the succeeding year.

According to petitioner's representative, who was present for the hearing of May 13, 1971, the hearing was not in his opinion, the proper, adversary-type hearing which should have been afforded. Specifically, the representative said;

"We advocated the right of cross-examining witnesses; the right that evidence be introduced properly; we advocated the procedure of an impartial decision maker \*\*\*." (Tr. I-62)

Following this initial hearing of May 13, 1971, the Director of Elementary Education addressed a letter to petitioner (P-4) dated May 20, 1971, which reviewed some questions raised at the hearing, and concluded with this statement:

“\*\*\* After carefully studying all pertinent written documents and weighing the statements made by both parties at the May 13th hearing, I am recommending to the Superintendent of Schools that the decision of Mr. Wilkos [school principal] be sustained, and that you not be offered a teaching contract for the 1971-72 school year. \*\*\*”

Subsequently petitioner appealed this decision to the Superintendent (P-5), and a hearing similar to the one reported, *ante*, was afforded to petitioner by the Superintendent on June 15, 1971. Again, no testimony was offered by either party on the merits of the Board's reasons for its decision not to reemploy petitioner for the 1971-72 school year, but petitioner was given the opportunity to file a Brief in support of her position that the appropriate procedure should have been to provide her a true adversary hearing.

Thereafter, the Superintendent issued a written opinion in the matter (R-2) dated June 28, 1971 which, in effect, rejected all of petitioner's claims of impropriety with respect to the provisions of the Agreement (P-9) and concluded with the statement:

“The Superintendent sees no need for any further hearings on his level in this case.” (at p. 8)

There followed, however, a hearing before the Board on July 27, 1971, and again petitioner and her representative pressed claims to an adversary-type hearing, and advanced the view that previous hearings, *ante*, had been defective in this regard. (Tr. I-65) Subsequent to this hearing before the Board, the Superintendent addressed a letter to petitioner dated September 14, 1971 (P-8) in which the Superintendent indicated petitioner's appeal had been denied.

Approximately one month later on October 14, 1971, petitioner filed the “Initial Submission [of a] Grievance,” (R-5) and on November 15, 1971, the “Grievance” was submitted to the American Arbitration Association. (R-6)

Thereafter, petitioner attempted to have the matter proceed to arbitration, but this procedure was aborted as the result of a court injunction which remanded the matter to the Commissioner for the exhaustion of administrative remedies. (Tr. I-7) As has been stated, the hearing before the Commissioner's hearing examiner resulted, although counsel for petitioner indicated in an opening statement that, in some respects, this might not be the most appropriate forum. Specifically he stated, with respect to one provision of the Agreement (P-9):

“\*\*\* Now, the interpretation of that provision ought normally to be for an arbitrator. Since, however, we are under an injunction not to arbitrate

until we first exhaust the administrative remedies before the Commissioner and presumably the State Board, we are here but that does not say that the Commissioner is not similarly obligated by law to interpret this contract in a fair manner. \*\*\*\*” (Tr. I-7)

The “provision” to which counsel referred, *ante*, is the one contained in the Board Policy (P-9), *ante*, which establishes April 30 as the Board’s terminal date for notification of teachers with respect to their reemployment for the succeeding year. While acknowledging that this “provision” was adopted by the Board in the Board Policy, (P-9) prior to the time a similar provision was enacted into law by the Legislature (*Chapter 436, Laws of 1971*), petitioner also contends:

\*\*\*\* the point is that this shows it is not contrary to the public policy of the State of New Jersey to have such a provision. \*\*\*\*” (Tr. I-7)

(The Board’s position in this regard has been set forth, *ante*; summarily, it is that the Agreement (P-9) specifically exempts contract renewal or nonrenewal as a grievable issue.)

Thus, the issues are posed for the Commissioner’s determination as they were stated at the conference of counsel held prior to the hearing, *ante*.

\*\*\*\* 1. Did the agreement with the teachers in effect at the time provide legal remedies for a nontenure teacher regarding nonrenewal of contracts?

“2. Did the Board of Education violate its agreement with the teachers by not giving timely notice to the petitioner of non-reemployment?

“3. Did the Board act in an arbitrary, capricious, unreasonable, or discriminatory manner regarding the nonrenewal of petitioner’s contract?

“4. Was petitioner afforded due process regarding the instant controversy?\*\*\*\*”

The prayer of petitioner herein is that the Commissioner “rehear” and “renew” her contract for the 1971-72 school year, and pay all amounts to her which she would have earned if employed from September 1, 1971 to the present day. Petitioner also requests that she be continued “\*\*\*\* in her position under such contract. \*\*\*\*”

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and it is noted that petitioner asks the Commissioner, in effect, to judge certain facts and events by the standards of a criterion which is not contained in the school laws, or prior decisions of the Commissioner or the courts of New Jersey, but which criterion is contained instead in a Board Policy (P-9) as agreed between the Board and members of its professional staff. The questions immediately raised are jurisdictional. Who shall interpret such an Agreement? By what

authority, if any, may the Commissioner act in such matters? If the Commissioner may act, what criterion may or must he employ in arriving at a lawful decision on points in controversy?

It seems apparent that the answers to all of these questions is found in the school laws alone – those laws contained in Title 18A, and specifically the statutes therein which are pertinent to the Commissioner’s general powers to decide controversies and disputes. These powers and the jurisdiction derived therefrom are both specific and limited in scope by the statute *N.J.S.A. 18A:6-9* which provides:

“The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all *controversies* and *disputes* arising under the *school laws*, excepting those governing higher education, or under the rules of the state board or of the commissioner.” (*Emphasis supplied.*)

The school laws alone are explicitly and clearly designated as the criteria which must be used by the Commissioner in the determination of controversies, and the Commissioner so holds.

The question then arises: what facets of the present dispute, as set forth, *ante*, by the hearing examiner, are governed by the school laws which were in existence at the time the dispute was engendered? Basically they are limited in number to:

1. those laws that delegate to local boards of education the powers to employ professional personnel;
2. those laws pertaining to employment contracts;
3. those laws pertinent to the acquisition of tenure.

Additionally, however, an important aspect of the instant adjudication must be the interpretation of school laws as such interpretations appear in previous decisions of the courts and the Commissioner. The various facets of such laws and their interpretation are set forth in the following manner.

The statutory laws pertinent to employment of “teaching staff” members are contained in *N.J.S.A. 18A:27-1 et seq.* The first pertinent statute provides that:

“No teaching staff member shall be appointed, except by a recorded *roll call majority vote* of the *full membership* of the board of education appointing him.” (*Emphasis supplied.*)

Succeeding statutes have reference to certification requirements of teaching staff members (*N.J.S.A. 18A:27-2*); to the “school year” as defined for employment purposes (*N.J.S.A. 18A:27-3*); and to powers which are granted to local boards to “make rules” governing the employment of teachers (*N.J.S.A. 18A:27-4*). This last statute is pertinent and is quoted in its entirety as follows:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

In the context of these school laws, certain facts of the matter, *sub judice*, as reported by the hearing examiner, *ante*, are clearly important; namely, that:

1. petitioner never received an affirmative appointment for a fourth year of employment as a “teaching staff member” in Piscataway Schools by a “recorded roll call majority vote of the Board;”
2. petitioner never received notice from the Board prior to April 30, 1971, that her contract would not be renewed for the succeeding school year.

In considering these two facts in the context of the statutes’ clear prescription, the Commissioner holds that he does have jurisdiction herein. The appointment of teaching staff members, and the rules promulgated by boards of education which are directly pertinent thereto, are clearly within the purview of school laws and thus within the parameters of the authority of the Commissioner of Education. A discussion of these two facts in the context of the statutes recited, *ante*, is now in order.

What was petitioner’s status when her third contract expired by its stated terms on June 30, 1971? Since there was no affirmative action by the Board to renew it for a fourth year, could it be renewed by indirection?

The Commissioner holds that in the circumstances herein, petitioner had no right to continuing employment for a fourth academic year since the precise requirement of the statute (*N.J.S.A. 18A:27-1*) had not been met. As the Supreme Court of New Jersey stated in *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962):

“Except for statutory conditions, a teacher is retained solely on a contract basis during his probationary employment. At the expiration of an annual contract period, the employment relationship ceases to exist unless a new contract has been entered into. While some states provide for automatic reemployment or renewal of contract unless contrary notice is given, *our statute does not so specify*. And except to the extent of constitutional or statutory limitations, there is no legal duty on the part of a board to reemploy a teacher at the end of a contract term. \*\*\* Accordingly, unless *Zimmerman* by an *affirmative act of the Board* was reemployed 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.”\*\*\*” (*Emphasis supplied.*) (at p. 75)

The Court specifically stated that an “affirmative act” of the Board was requisite to reemployment of a teaching staff member, and absent such an act, the Court held, (in the context of existing law) and the Commissioner holds in the matter, *sub judice*, there is no right to continuing public employment. In this regard, the Court in *Zimmerman, supra*, also said in quoting *People v. Chicago*, 278 Ill. 318, 116 N.E. 158, 160 (1917)

“\*\*\* ‘ A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The Board has the absolute right to decline to employ or to reemploy any applicant for any reason whatever or for no reason at all. \*\*\*’ ”

The Commissioner also holds that the Board’s policy to provide notice of nonrenewal of contract by a given date in the 1970-71 school year was *ultra vires* in the context of existing law during that year. (Prior to the 1972-73 school year, New Jersey has not had a statute which provided for “\*\*\* automatic reemployment or renewal of contract unless contrary notice is given \*\*\*.” *Zimmerman, supra*) This holding of the Commissioner is consistent with his recent decision in *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County*, 1973 S.L.D. (decided May 3, 1973).

In *Margaret A. White* the Commissioner was considering a board policy similar in all essential respects to the one herein and he said:

“\*\*\* With regard to the first issue, petitioner contends that the Board’s failure to give her notice as set forth in its policy, *ante*, entitles her to reemployment just as surely as if the Board had taken an affirmative action to reemploy her.

“The Commissioner determines that at the time of the May 8, 1972 Board meeting, there was no statutory provision granting reemployment to nontenure teachers who had not been given prior notice pursuant to a written Board policy. Although boards may make rules governing the employment and dismissal of staff members, such rules must be consistent with the school laws. *N.J.S.A.* 18A:27-4 is particularly pertinent and reads as follows:

“ ‘Each board of education may make rules, *not inconsistent with the provisions of this title*, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.’ (*Emphasis supplied.*)

“*N.J.S.A.* 18A:27-1, which is also particularly pertinent, reads as follows:

“ ‘No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.’

“The statutory construction of *Chap. 303, P.L. 1968*, permits negotiations between public employers and employees on the terms and conditions of employment. However, *N.J.S.A.* 34:13A-8.1 (Supp. 1972) specifically provides that:

“ ‘Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and employee organization, *nor shall any provision hereof annul or modify any statute or statutes of this State.*’ (*Emphasis supplied.*)

“Therefore, a board may not adopt a rule or policy which would in effect either amend a statute or deny the board’s authority conferred by statute. Moreover, any board rule or policy, whether adopted as the result of an agreement with its employees or otherwise affecting the employment or reemployment of a teaching staff member in a way other than the manner specifically provided by *N.J.S.A.* 18A:27-1, which mandates appointment of a teaching staff member ‘\*\*\*’ by a recorded roll call majority vote of the full membership of the board ‘\*\*\*’ is, on its face, *ultra vires*.

“Although the Commissioner finds that the parties had no authority to write into an agreement what is essentially an automatic renewal provision triggered by failure to give notice, the Commissioner further finds that even if they intended to do so, the remedy petitioner seeks (reinstatement) is contrary to statutory law, specifically *N.J.S.A.* 18A:27-1, and the statutes contained in the Tenure Teachers Hearing Act, *N.J.S.A.* 18A:28-5 *et. seq.* However, petitioner can seek other remedies.\*\*\*” (at pp. 262-264)

In support of this opinion in *Margaret A. White*, the Commissioner cited an unreported case, *Eberhardt v. Board of Trustees of Jersey City State College*, *App. Div.*, Docket No. A-1576-70 (January 18, 1972), appeal dismissed, *Sup. Ct.* Docket No. M-42 (September 19, 1972), and a federal case *Greene v. Howard University*, 412 *F. 2d* 1128 (*D.C. Cir.* 1969).

Subsequently, the Commissioner discussed the Board’s policy concerned with the matter of notice of nonrenewal of contract in the context of *Laws of 1971, c. 436 § 5* (now *N.J.S.A.* 18A:27-10 to 13 (Supp. 1972) ) effective for the first time in the 1972-73 school year. This law now requires that notice of such nonrenewal must be given nontenured teaching staff members by April 30, if they are not to be reemployed in a succeeding year. Specifically, the law now provides:

“ ‘Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next



succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.' ”

With reference to this statute the Commissioner said in *Margaret A. White*:

“\*\*\* In the judgment of the Commissioner, *N.J.S.A.* 18A:27-10 through 13, which became effective September 1, 1972, provides an exception to the appointment provisions of the hereinbefore cited statute *N.J.S.A.* 18A:27-1. Prior to the enactment of *N.J.S.A.* 18A:27-10 through 13, no statutory authority existed as grounds for the automatic contract renewal which petitioner seeks in the instant matter. Since the Board's actions which petitioner contests occurred in March, April and May of 1972, petitioner does not have the retroactive benefit of the provisions of *N.J.S.A.* 18A:27-10 through 13, which became effective September 1, 1972.

“It is clear in the instant matter that the Board, for whatever reasons, did not hold to its policy which required written notice by March 1st to those teachers who were not to be reemployed for the following year. The Commissioner determines that, absent the statutory authority pursuant to *N.J.S.A.* 18A:27-10 through 13, which was not effective at the time of the Board's actions, *ante*, the Board is not compelled to grant petitioner reemployment for the 1972-73 school year. The failure of the Board to conform to its policy in this instance does not affect the Board's obligation to employ nontenure teaching staff members in accordance with *N.J.S.A.* 18A:27-1.\*\*\*” (at pp. 264-265)

The Commissioner's determination in the matter, *sub judice*, is the same with respect to the Board's Policy (P-9) on notice of contract nonrenewal – the policy was *ultra vires* and the Board's compliance is not mandatory.

There remains, in the instant matter, a necessity to discuss petitioner's contentions that she was entitled, again according to the terms of the Board's Policy (P-9), to a statement of reasons and an adversary hearing at the time subsequent to the Board's decision that her contract would not be renewed for the 1971-72 school year. There is also a contention by petitioner that there is a grievance herein which should be adjudicated through the usual grievance procedure.

Such contentions have been discussed by the Commissioner on a number of prior occasions. *Florence Fitzpatrick v. Board of Education of the Borough of Wharton, Morris County*, 1970 S.L.D. 149; *Henry R. Boney v. Board of Education of the City of Pleasantville and Robert F. Wendland, Superintendent of Schools, Atlantic County*, 1971 S.L.D. 579; *Joseph Dignan v. Board of Education of the Rumson-Fair Haven Regional High School*, 1971 S.L.D. 336.



In *Fitzpatrick, supra*, the Commissioner was similarly concerned with contentions that petitioner was entitled to a "statement of reasons" for a "non-continuation" of employment and to a "hearing" concerned with such "reasons." He also discussed in that decision the application of grievance procedures to such disputes. Specifically, in these regards, the Commissioner said:

\*\*\*\* It is well established that until tenure rights accrue, probationary employees cannot enforce a demand for a statement of reasons for non-continuation of employment or for a hearing thereon. *Zimmerman v. Newark Board of Education*, 38 N.J. 65, 70 (1962); *Ruch v. Greater Egg Harbor Regional High School District*, 1968 S.L.D. 7, appeal dismissed State Board of Education 11, affirmed Superior Court, Appellate Division, March 4, 1969. Termination of probationary employment is not subject to challenge unless patently arbitrary or the result of unlawful discrimination. There is no such clear showing herein. \*\*\*\* (at p. 151)

And at page 152:

\*\*\*\* The Commissioner has already ruled that petitioner had no entitlement to the formal hearing she demanded. Nor, in the Commissioner's judgment, was the matter of nonrenewal of petitioner's contract as principal a grievable issue. In so holding, the Commissioner does not denigrate the validity or the importance of grievance procedures. Such accepted and understood means of settling problems which arise with respect to terms and conditions of employment are essential. But failure to renew an agreement does not fall within the ambit of a grievance procedure. Application of grievance procedures to a failure to renew the employment of a probationary employee is an exercise in futility. *Eastburn v. Newark State College, et al.* 1966 S.L.D. 223, 224 (State Board of Education, 1966.) Even so, respondent did grant petitioner an opportunity to be heard which petitioner refused. The Commissioner finds that although the grievance procedure was not applicable to the controversy herein, respondent did in fact permit petitioner to be heard, and her refusal to go forward was at her own peril. \*\*\*\*

In *Henry R. Boney, supra*, the Commissioner also considered contentions similar to those raised herein, and discussed at length the employment rights of tenure and nontenure teachers and the application to such rights of grievance policies and procedures. He said, with respect to employment rights:

\*\*\*\* The applicable statute, N.J.S.A. 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status. \*\*\* It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements. \*\*\*\* (at pp. 585-586)

With respect to grievance policies, the Commissioner said, at pp. 586-587:

“\*\*\* The existence of a formal grievance policy is not to be construed as a means to circumvent the intent of the Legislature as expressed in the school laws. The Appellate Division of the Superior Court of New Jersey thoroughly reviewed and clarified the Tenure Employees Hearing Act in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 N.J. Super. 404 (App. Div. 1965). Judge Carton, writing for the Court, stated that:

“ ‘\*\*\*The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background. \*\*\* (at p. 410)

“ ‘\*\*\*The Tenure Employees Hearing Act \*\*\* establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under Title 18.\*\*\* (Id. at p. 411)

“ ‘\*\*\* Formerly all phases of the hearing and decision making function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to ‘decide \*\*\* all controversies and disputes arising under the school laws.’ (R.S. 18:3-14) [now N.J.S.A. 18A:6-9] (Id. at p. 411)

“ ‘Now the Commissioner conducts the initial hearing and makes the decision. \*\*\* (at p. 411)

“ ‘ There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to the limited function. Thus the Legislature has transferred from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.\*\*\*’ (Id. at p. 412)

“Judge Carton also stated the purpose of this legislation as follows:

“ ‘\*\*\* The main purposes of that law [L. 1960, c. 136] were two-fold. The first was to eliminate the vice which inhered in the former practice of the board’s being at one and the same time investigator, prosecutor and judge. \*\*\* (at p. 413)

“ \*\*\* The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which ‘tears the community apart’ and ‘disrupts the orderly conduct of local school affairs.’ \*\*\*” (*Id.* at p. 414)

“The Court also clarified the status of *R.S. 18:6-20* and *R.S. 18:7-58* [now *N.J.S.A. 18A:25-1, 27-1, 33-1, 34-1*]. The Court stated the following:

“ \*\*\* These companion sections of \*\*\* the School Law provide that no principal or teacher shall be appointed, transferred or dismissed, no policy fixed, and no course of study shall be adopted or altered, nor textbook selected except by a majority vote of the whole board. (*Id.* at p. 416)

“ ‘ \*\*\* These provisions still have efficacy insofar as teachers under contract or nontenure are concerned. Authority for the dismissal of these teachers, as well as for the performance of the other acts listed therein, must still be sought under these general provisions of the School Law. \*\*\*’ (*Id.* at p. 416)

“In the judgment of the Commissioner, the utilization of a grievance policy for adjudication of the action taken by this local board under statutory authority creates two evils. In the first instance, this procedure would create an instant tenure status not intended by the Legislature. Next, the resort to the hearing before the local board on such a matter would create the vice of having a local hearing, which the Legislature sought to eliminate in controversies involving employees whose tenure status is threatened. In the matter of *In Re Fulcomer, supra*, as was stated, *ante*, the Commissioner holds that such rights are not granted by statute and cannot be acquired by indirection through grievance procedures or agreements. \*\*\*” (*Emphasis in text.*)

Similarly, in the matter *sub judice*, the Commissioner rejects those contentions of petitioner which aver that she is entitled to a statement of reasons for nonrenewal of her contract or an adversary type hearing, and that disputes with respect to such asserted rights should properly be considered as justifiable under the Board’s grievance policies. The Commissioner holds a contrary view.

In summation, the Commissioner finds no merit in the instant Petition, since it is grounded on Board policies which the Commissioner finds are *ultra vires* and a nullity in the broad context of the law as it existed in the year 1971-72. Accordingly, the instant Petition is dismissed.

COMMISSIONER OF EDUCATION

May 29, 1973

**Kay Minelli,**

*Petitioner,*

*v.*

**Board of Education of the City of Trenton,  
Mercer County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Kay Minelli, *Pro Se*

For the Respondent, McLaughlin, Dawes, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner complains that the Board of Education of the City of Trenton, hereinafter "Board," unlawfully discriminates against her by refusing to provide transportation for her son to a nonpublic high school, although such transportation is alleged to have been provided other pupils attending that same facility. At this juncture, petitioner demands a reimbursement of her transportation cost for the 1972-73 school year. The Board denies petitioner's claim of discrimination and asserts, without elaboration, that the Commissioner lacks jurisdiction to hear and determine the issues herein.

A hearing in this matter was conducted on March 15, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

During August 1972, petitioner was informed by the Board that her son was ineligible for free bus transportation to and from St. Anthony's High School, Hamilton Township, where he is enrolled. The Board asserts that this determination was made because petitioner's residence is within 2.5 miles of St. Anthony's. The Board states that its policy in regard to free transportation requires a pupil in grades nine through twelve to live 2.5 miles or more from school. (Tr. 48, 78) The hearing examiner points out that this policy is consistent with that required for seventy-five percent State reimbursement of transportation expenses. (*N.J.S.A. 18A:58-7*)

Petitioner argues, however, that according to the route she uses to St. Anthony's, the distance is over 2.5 miles which entitles her son to free transportation. Petitioner does concede, however, that the route the Board uses is the shortest between her home and St. Anthony's. (Tr. 93) Moreover, petitioner avers that other pupils who attend St. Anthony's and who live closer to the School, received free transportation during the 1972-73 school year. (Tr. 16-18) In further support of her claim of discrimination, petitioner cites an inter-school busing program operated by the Board, among the public schools, wherein distance for the participating pupils is less than 2.5 miles.

The Board's transportation specialist, hereinafter "specialist," testified that as the result of the closing of Cathedral High School, certain problems emerged regarding the issuance of free bus tickets to nonpublic school pupils. At the time the announcement was made that Cathedral would cease operation in June 1972, the Board had already accepted and made decisions on applications for free transportation for the 1972-73 school year to Cathedral High School. After the closing announcement was made, and it was clear that pupils would not be attending Cathedral High School, the specialist testified that all the applications had to be again reviewed to determine distances between residences and the Immaculate Conception School, the facility to which the pupils had originally been transferred. However, during the summer of 1972, the specialist was then notified that the pupils were to be assigned to either St. Anthony's or the Notre Dame facility. Once again the applications had to be reviewed for distances between each applicant's residence, and either Notre Dame or St. Anthony's, depending upon where each pupil had been assigned. With September fast approaching, the specialist testified, he determined that every pupil entitled to free transportation would receive it even if in his haste to accomplish that goal some would receive free bus tickets, even though not eligible. It appears that close to forty tickets were issued to pupils whose residences were not 2.5 miles or more from St. Anthony's School. (P-3) To correct such errors, the specialist averred, he continuously checked home-to-school distances of those receiving free transportation. When he discovered pupils who were receiving free transportation to which they were not otherwise entitled, he revoked their bus tickets. It appears from the testimony that the tickets erroneously issued to pupils in September 1972, and listed in P-3, *ante*, were revoked on March 30, 1973. (Tr. 37, 56-57)

In regard to petitioner's assertion concerning the inter-school busing program, the specialist explained that because of overcrowded conditions at Gregory Street and Cadwalder Schools, two of the Board's public elementary schools, certain pupils, upon their arrival at those schools, are then bused to other facilities in the City to lessen the crowded conditions. (Tr. 49, 53)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

In regard to the Board's allegation that the Commissioner is without authority to determine the matter, *sub judice*, the Commissioner does not agree. In numerous past instances the Commissioner has decided questions regarding pupil transportation. The quasi-judicial function of the Commissioner of Education is set forth in *N.J.S.A.* 18A:6-9, which reads in part as follows:

"The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws \*\*\* or under the rules of the state board or of the commissioner."

The primary issue in the instant matter is whether the Board violated the provisions of *N.J.S.A. 18A:39-1* which provides in part:

“Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, *including the transportation of school pupils to and from school other than a public school* \*\*\*.” (*Emphasis supplied.*)

In *McCanna et al. v. Sills et al.*, 103 *N.J. Super.* 480 (*Ch. Div.* 1968), the Court defined the term “remote” as used in *N.J.S.A. 18A:39-1* and applied specifically to pupils of private schools:

“\*\*\* no child who attends a private school, profit or non-profit, is entitled to transportation if he lives (a) within 2 miles of the school and is in an elementary grade; (b) within 2.5 miles of the school and is in a secondary grade \*\*\*.” (at p. 489)

The New Jersey State Board of Education, in its definition of “remote” for purposes of transportation and reimbursement, has consistently held that “remote” means a distance of two and one-half miles for high school pupils, and two miles for elementary pupils. Such distance is to be measured by utilizing the shortest distance from the pupil’s home to his assigned school by an accessible public road or highway. See *Jerome Trossman et al. v. Board of Education of the Borough of Highland Park, Middlesex County*, 1969 *S.L.D.* 61; *N.J.A.C.* 6:21-1.3.

In the instant matter, petitioner in her own testimony agrees that the route utilized by the Board is the shortest distance between her residence and St. Anthony’s High School, and that such route is less than 2.5 miles. Accordingly, the Commissioner finds and determines that the Board had no legal obligation to provide free transportation to petitioner’s son, nor did it violate its own policy regarding transportation of high school pupils, *ante*.

As to petitioner’s claim that other pupils living closer to St. Anthony’s received free bus tickets to that facility for at least seven months of the 1972-73 school year, the Commissioner observes that this fact is supported by the record. However, petitioner has presented no convincing proof that the Board acted in a deliberately discriminatory manner in this regard. Rather, the specialist’s testimony is convincing that in his haste to provide free bus tickets to all eligible pupils, some tickets were distributed and since rescinded, it is noted, to pupils residing less than 2.5 miles from the nonpublic schools. Although the Commissioner recognizes the atmosphere of uncertainty in which the transportation specialist had to work during the summer of 1972 regarding the reassignment of Cathedral High pupils, he cannot condone any action which creates issues such as that controverted herein. This Board of Education, and all local boards of education in New Jersey, are cautioned to implement transportation policies in a careful and precise manner.

Finally, in regard to the inter-school busing program, *ante*, the Commissioner finds from the record before him that this program transports certain elementary school pupils from the allegedly overcrowded Cadwalder and Gregory Schools to other facilities, which is within the discretionary authority of local boards of education. (*N.J.S.A.* 18A:39-1.1) The Commissioner cannot find that the existence of this elementary pupil transportation policy sustains a charge of discrimination by the Board for petitioner's high school-aged pupil.

Accordingly, for the reasons stated herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 30, 1973

**Board of Education of the Township of Little Egg Harbor,**

*Petitioner,*

*v.*

**Boards of Education of the Township of Galloway,  
City of Atlantic City, Township of Marlboro,  
Freehold Regional High School District and the Bureau of  
Children's Services, Department of Institutions and Agencies,  
State of New Jersey,**

*Respondents.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, James L. Wilson, Esq.

For the Respondents, Walter S. Jeffries, Esq., Board of Education of the Township of Galloway; Lawrence Milton Freed, Esq., Board of Education of City of Atlantic City; DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel), Board of Education of the Township of Marlboro; Cerrato & O'Connor (Dominick A. Cerrato, Esq., of Counsel), Board of Education of Freehold Regional High School District; George F. Kugler, Jr., Attorney General (Joan W. Murphy, Deputy Attorney General, of Counsel), Bureau of Children's Services.

Petitioner, the Board of Education of the Township of Little Egg Harbor, appeals to the Commissioner of Education to determine which one of the several respondent boards of education is responsible for the payment of tuition for A.S., a minor and former pupil in petitioner's school district, who is presently enrolled in a program of special education in a nonpublic school situated in the Township of Marlboro, Monmouth County.

Each of the respondent boards of education denies that it is responsible for the payment of tuition for the special education which A.S. is receiving in the nonpublic school. The Bureau of Children's Services, hereinafter "Bureau," is retained as a party to these proceedings chiefly for discovery purposes. The Bureau is paying only for the maintenance of A.S.

Petitioner prays for relief in the form of an Order by the Commissioner of Education designating one of the respondent boards of education to assume the payment of tuition for A.S. for the 1970-71 school year and thereafter.

This matter is submitted on a stipulation of facts for Summary Judgment by the Commissioner. All parties were given the option of submitting Briefs, and four of the boards have exercised this option. The relevant material facts are essentially undisputed, and the matter herein controverted is basically an issue of law.

A review of the history of the status of the pupil is necessary for an understanding of the issue.

During the 1969-70 school year, A.S. resided with both of her parents in Atlantic City and was enrolled in the eighth grade of one of the public schools of that school district. A.S. received a hearing in Juvenile and Domestic Relations Court, December 18, 1969, as the result of a complaint filed by school officials. A case worker from the Bureau appeared with A.S. at this hearing, because of the child's complaint that she was abused at home by her father. (Exhibit P-2) The Court found A.S. to be a juvenile delinquent and instructed her parents to cooperate with the Bureau in locating a suitable placement for her. The child's parents executed an agreement with the Bureau on December 18, 1969, which states, *inter alia*, the following:

"I hereby request the Bureau of Children's Services to place my child [A.S.] in foster care or a group setting until I can assume my full responsibility. I understand I am not surrendering my parental rights.

In requesting placement of my child(ren), I understand that the Bureau of Children's Services will assume responsibility for my child(ren) in accordance with the provisions of NJRS 30:4C-1 *et seq.* \*\*\*\*" (Exhibit P-2)

This agreement also authorizes the Bureau to provide and consent to any operation or medical treatment for the child, and requires that the parent agree not to remove the child from foster care until he has discussed such action with the agency. (Exhibit P-2) This type of voluntary agreement is authorized by N.J.S.A. 30:4C-11, which states in pertinent part the following:

"Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Bureau of Childrens Services by a parent or other relative



of such child, by a person standing in loco parentis to such child, by a person or association or agency or public official having a special interest in such child or by the child himself, seeking that the Bureau of Childrens Services accept and provide such care or custody of such child as the circumstances may require.\*\*\*

“Upon receipt of an application as provided in this section, the Bureau of Childrens Services shall verify the statements set forth in such application and shall investigate all the matters pertaining to the circumstances of the child. If upon such verification and investigation it shall appear (a) that the welfare of such child will be endangered unless proper care or custody is provided; (b) that the needs of such child cannot properly be provided for by financial assistance as made available by the laws of this State; (c) that there is no person legally responsible for the support of such child whose identity and whereabouts are known and who is willing and able to provide for the care and support required by such child; and (d) that such child, if suffering from a mental or physical disability requiring institutional care, is not immediately admissible to any public institution providing such care; then the Bureau of Childrens Services may accept and provide such care or custody as the circumstances of such child may require.\*\*\*”

By the language of the aforementioned agreement, the care and custody of A.S. were surrendered to the Bureau by her parents.

In accordance with *N.J.S.A. 30:4C-29.1*, the father of A.S. executed an acknowledgement of responsibility for the support of his child on January 8, 1970, whereby he agreed to contribute financially the sum of eighty dollars per month toward the care and maintenance of A.S., so long as the child would remain under the jurisdiction of the Bureau. (Exhibit P-6)

Effective December 18, 1969, the Bureau temporarily placed A.S. in a foster home in Pleasantville, New Jersey, where she was enrolled in the public schools. (Exhibit P-2)

On January 22, 1970, A.S. was placed in another foster home situated in the Township of Little Egg Harbor. The Board of Education of Little Egg Harbor operates public school facilities for grades kindergarten through six, and is a sending district to Southern Regional Junior-Senior High School, which includes grades seven through twelve. On January 26, 1970, this child was enrolled in the eighth grade in the Southern Regional High School District, where she remained until the close of the 1969-70 school year.

A psychological examination was secured by the Bureau on August 27, 1970, in order to determine whether the best future plan for this child would be either another foster home placement or a residential placement with long-range therapy. The results of the examination indicated that a residential school, which could provide a structured environment and therapy would be most appropriate for A.S. (Exhibit P-2)

On September 1, 1970, A.S. left the foster home without permission, but on the following day she telephoned the Bureau offices and reported her action. She was instructed to surrender herself to the local police, who subsequently delivered her to the Ocean County Juvenile Shelter, and a juvenile delinquency complaint was signed against her by the Bureau. A hearing was conducted for A.S. by Juvenile and Domestic Relations Court on October 7, 1970, and the Order of this Court continued her case for nine months. The Court retained A.S. in the Ocean County Juvenile Shelter. (Exhibit P-1) The Bureau secured an evaluation of A.S. by a child study team, and she was subsequently classified on December 14, 1970, as emotionally disturbed and socially maladjusted and recommended for residential placement in a suitable special education program in accordance with the provisions of *Chapter 46 of Title 18A, Education*. On January 4, 1971, the Bureau secured her enrollment as a ninth-grade pupil in a residential, nonpublic school situated in the Township of Marlboro, Monmouth County. She successfully completed the ninth grade and was promoted to the tenth grade on June 18, 1971. (Exhibit P-7) At this juncture, all of the parties to these proceedings deny responsibility for the tuition costs for the special education program, which A.S. is presently receiving in the nonpublic school.

An examination of several statutory provisions is helpful in the instant matter. *N.J.S.A. 30:4C-2* defines care, custody, guardianship, foster parent and foster home as follows:

\*\*\*\* (c) The term ‘*care*’ means cognizance of a child for the purpose of providing necessary welfare services, or maintenance, or both.

“ (d) The term ‘*custody*’ means continuing responsibility for the person of a child, as established by a surrender and release of custody or consent to adoption, for the purpose of providing necessary welfare services, or maintenance, or both.

“ (e) The term ‘*guardianship*’ means control over the person and property of a child as established by the order of a court of competent jurisdiction, and as more specifically defined by the provisions of this act.\*\*\*

“ (h) The term ‘*foster parent*’ means any person other than a natural or adoptive parent with whom a child in the care, custody or guardianship of the Bureau of Childrens Services is placed by said bureau, or with its approval, for temporary or long-term care, but shall not include any persons with whom a child is placed for the purpose of adoption.

“ (i) The term ‘*foster home*’ means and includes both private residences and institutions wherein any child in the care, custody or guardianship of the Bureau of Childrens Services may be placed by the said bureau or with its approval for temporary or long-term care, and shall include any private residence maintained by persons with whom any such child is placed for adoption.\*\*\*\*”

(*Emphasis ours.*)

The term "foster parent" is also defined in substantially identical language by *N.J.S.A. 30:4C-26.4, 30:4C-26.6 and 30:4C-27.1*.

The term "foster home" is defined likewise in essentially similar language in *N.J.S.A. 30:4C-26.1*.

It is clear that A.S. is in the care and custody of the Bureau in accordance with the voluntary surrender agreement of December 18, 1969, under the authority of *N.J.S.A. 30:4C-11*. The documentary evidence before the Commissioner discloses that A.S. was placed with a foster parent in a foster home in the Little Egg Harbor School District. Thereafter, she was placed in an institution; namely, the Ocean County Juvenile Shelter. Following the classification of A.S. as a handicapped pupil, she was placed by the Bureau in the residential, nonpublic school in the Township of Marlboro, which is a foster home as defined by *N.J.S.A. 30:4C-2 and 30:4C-26.1*. A.S. is currently residing in this institution, which is providing an appropriate special education program and therapy for her.

The Commissioner takes notice of the fact that the Bureau places many children, who are circumstanced as defined in *N.J.S.A. 30:4C-11*, in foster homes throughout the various municipalities of this State. Such children are eligible to attend the public schools of the district in which their foster home is situated. The statutory authority which enables the Bureau to make such placements is *N.J.S.A. 30:4C-26*, which states, *inter alia*, the following:

"Whenever the circumstances of a child are such that his needs cannot be adequately met in his own home, the Bureau of Childrens Services may effect his placement in a foster home, with or without payment of board, or in an appropriate institution if such care is deemed essential for him. \*\*\*

"Whenever the Bureau of Childrens Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county for all purposes, and he shall be entitled to the use and benefit of all health, educational, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county. \*\*\*"

The Legislature has clearly expressed the intention to provide a free public education for all the children within this State. This intention is stated in the school law. *N.J.S.A. 18A:38-1* reads as follows:

"Public schools shall be free to the following persons over five and under 20 years of age:

"(a) Any person who is domiciled within the school district;

"(b) Any person who is kept in the home of another person domiciled

within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term;

“(c) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

“(d) Any person for whom the bureau of children's services in the department of institutions and agencies is acting as guardian and who is placed in the district by said board.”

In the instant matter, it has been shown that the Bureau has not been granted guardianship of A.S., with respect to subsection (d) of *N.J.S.A.* 18A:38-1 cited above.

*N.J.S.A.* 18A:38-2 makes extensive provision for a free public education for children who are nonresident in a school district, but are placed in homes or institutions within a school district either by a court of competent jurisdiction or by an agency or society incorporated in this State for the purpose of caring for indigent, neglected or abandoned children. This statute reads as follows:

*“Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state or by any society, agency or institution incorporated and located in this state having for its object the care and welfare of indigent, neglected or abandoned children, or children in danger of becoming delinquent, or any person who is a resident in any institution operated, by any such society, agency or corporation, on a nonprofit basis, whether or not such other person, society, agency or institution is compensated for keeping such person; but no district shall be required to take an unreasonable number of persons under this section except upon the order of the commissioner issued in accordance with rules established by the state board.” (Emphasis ours.)*

In the case of *Child Care Center of Farmingdale v. Board of Education of Howell Township, Monmouth County*, 1967 *S.L.D.* 30, dismissed, Appellate Division, Superior Court, September 11, 1967, the Commissioner cited *R.S.* 18:14-1e, now *N.J.S.A.* 18A:38-2, as authority for requiring the local Board of Education to accept forty-four children residing in the private, nonprofit institution, as pupils in the public schools of the district. It is noteworthy that

most of the 151 children resident in the Center were from New York City. In that case the Commissioner also reminded local boards of education of the provisions of *N.J.S.A. 18A:38-2.1* which reads as follows:

“Whenever the commissioner shall determine, upon application of a board of education made in accordance with rules established by the state board, that there are in a school district an unreasonable number of persons, described in subsection d. of section 18A:38-1 or section 18A:38-2, applying for admission to the schools of the district, he may order the district to accept such pupils, in which case he shall approve and grant to the district special state aid in such amount as he shall determine in accordance with rules adopted by the state board.”

In the somewhat similar case of *St. Joseph's Village for Dependent Children v. Board of Education of the Borough of Rockleigh, Bergen County*, 1967 S.L.D. 301, the Commissioner directed the Rockleigh Board, which did not operate its own public school, to pay tuition to the Board of Education of Northvale, the receiving district, for the elementary school attendance of children resident in the nonprofit institution. The Commissioner reiterated the controlling statutes cited in *Child Care Center of Farmingdale, supra*, as the basis for decision in *St. Joseph's Village, supra*.

Subsequent to *St. Joseph's Village, supra*, the Legislature enacted L. 1968, c. 340, § 1, supplementing art. 1, c. 58, Title 18A as *N.J.S.A. 18A:58-5.5*, effective November 13, 1968, which reads as follows:

“Whenever any person is placed in accordance with subsection (d) of section 18A:38-1 or section 18A:38-2, in the home of a resident of a school district which does not operate any schools, and which sends all its school age children to schools in another district, the Commissioner of Education may approve and grant to the sending district special State aid in such amount as he shall determine in accordance with rules adopted by the State Board of Education.” (Compare: *N.J.S.A. 18A:38-2.1*)

Provision is found in the school law for the payment of State aid to local school districts for pupils who reside in homes or institutions located on property owned by the State. *N.J.S.A. 18A:58-5.1* states as follows:

“Every school district shall be entitled to special additional state aid pursuant to this chapter if its average daily enrollment consists of ten or more pupils certified to the commissioner by the district with the approval of the county superintendent, to be living in the district as residents on property owned by the state which is not taxable. This article shall not apply to school districts which receive from the state or any of its political subdivisions or agencies, a fixed amount in lieu of taxes.”

*N.J.S.A. 18A:58-5.2* further provides that this additional State aid shall be calculated as follows:

“For each such pupil residing on property owned by the state the amount of such special additional State aid so payable to the district shall be the difference between the cost per pupil for current expenses excluding transportation, and the aid per resident pupil, to which the district is entitled.”

In the recent case of *Board of Education of Passaic in the County of Passaic et al. v. Board of Education of Township of Wayne et al.*, 120 N.J. Super. 155 (Law Div. 1972), the Court dealt with the problem of determining the responsibility for the costs of a program of education for children residing in the Children’s Shelter of Passaic County, established by the Board of Chosen Freeholders under N.J.S.A. 9:12A-1. The Court found none of the hereinbefore cited statutes applicable. The Court determined that the statutory language of N.J.S.A. 9:12A-1 itself established that the funds for the operation of the Shelter, encompassing the educational program conducted therein, are to be provided by the Board of Chosen Freeholders of Passaic County. In addition, the Court ordered that prior tuition payments made by various school districts which had pupils in attendance at the Shelter, were to be refunded. In reaching its decision, the Court rejected the argument that the Shelter children were nonresidents of the local school district wherein the Shelter is located and therefore the local district was entitled to receive tuition payments under the various provisions of N.J.S.A. 18A:38-1 *et seq.* as a receiving district. The Court stated that:

“\*\*\* the defendants have not demonstrated that the abandoned or neglected children housed at the shelter have any other residence than that of the shelter. Secondly, the educational program at the shelter does not constitute a ‘public school of the receiving district.’ Although the program is conducted under the auspices of the Wayne School board, it cannot be said to be a school of just one district since it is controlled by the county and has been funded by various municipalities within the county. Due to these factors, this court holds that the educational program at the shelter does not constitute a public school of the Wayne School District and as such the sending school districts are under no obligation to pay tuition for the children attending the program at the shelter.\*\*\*” (at p. 161)

The Court noted that N.J.S.A. 18A:47-1 *et seq.*, which is restricted to schools for dependent and delinquent children, was not applicable due to the fact that the abandoned or neglected children housed at the Shelter were not adjudged juvenile offenders. This same reasoning was applied to the contention that N.J.S.A. 18A:46-1 *et seq.*, which deals with schools for handicapped children, controls such a situation. The Court rejected as repulsive the argument that the Shelter children should be classified as “socially maladjusted,” and thus handicapped, merely because the children were abandoned or neglected by their parents. The Court ordered “\*\*\* that all previously paid tuition assessments be returned, and that the Passaic County Board of Chosen Freeholders is to provide free education to the children housed at the county shelter.” (at p. 164)

The Commissioner has reviewed *Passaic, supra*, in detail because it has

created new law in New Jersey, even though the conclusions stated herein are not particularly applicable to the instant matter.

In the instant matter, the Commissioner has shown that the pupil, A.S., is resident in an institution which is a foster home as defined by *N.J.S.A.* 30:4C-2 and 30:4C-26.1, and is operated on a nonprofit basis as required by *N.J.S.A.* 18A:38-2. As a resident of the municipality wherein the foster home institution is situated, she is entitled to the use and benefit of all *public* facilities in the same manner and extent as any other child resident in the municipality. *N.J.S.A.* 30:4C-26 The administrators and staff of this nonprofit institution stand *in loco parentis* to A.S. in the same manner as would a foster parent. *N.J.S.A.* 30:4C-2 and *N.J.S.A.* 30:4C-26.4, 26.6, 27.1; *St. Joseph's Village, supra*; *Child Care Center of Farmingdale, supra*.

A.S. is entitled to attend the *public* schools of the school district wherein she is resided by virtue of her placement in the foster home institution by the Bureau, which is entrusted with the care and custody of her person. The municipality where she is resided is the Township of Marlboro, Monmouth County, which is coterminous with the school district. The Board of Education of Marlboro Township operates public schools only for grades kindergarten through eight. For grades nine through twelve, Marlboro Township is a constituent of the Freehold Regional High School District. If the best educational plan for A.S. would be enrollment in a regular high school program of studies, she is entitled to attend one of the high schools operated by the Freehold Regional Board of Education.

The novel problem presented by this case derives from the fact that A.S. is classified as a handicapped child under *N.J.S.A.* 18A:46-1 *et seq.*, and is enrolled in an appropriate program of special education in a nonprofit, nonpublic school which requires the payment of tuition. The enrollment of A.S. in this special education program was made by the Bureau under direction of the Court, and none of the respondent boards participated in this selection of her educational placement in the nonpublic school as required by *N.J.S.A.* 18A:46-14g, *post*.

At this point a review of the applicable statutes of *Chapter 46 of Title 18A*, Education, is in order. *N.J.S.A.* 18A:46-13 reads in pertinent part:

"It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under this chapter except those so mentally retarded as to be neither educable nor trainable. The absence or unavailability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this chapter. \*\*\*"

Classifications of handicapped children for whom these facilities and programs must be provided include "emotionally disturbed" and "socially maladjusted." *N.J.S.A.* 18A:46-8 The facilities and programs of education required under *Chapter 46* shall be provided by one or more of the means set forth in *N.J.S.A.* 18A:46-14, including:



“\*\*\* g. Sending children capable of benefiting from a day school instructional program to privately operated nonprofit day classes, in New Jersey or an adjoining State or a nearby State and within 400 miles of Trenton or, with the approval of the commissioner to meet particular circumstances, at a great distance from Trenton, the services of which are nonsectarian whenever *in the judgment of the board of education with the consent of the commissioner* it is impractical to provide services pursuant to subsections a,b,c,d,e, or f otherwise\*\*\*.” (*Emphasis ours.*)

In the judgment of the Commissioner, this above-cited subsection of *N.J.S.A. 18A:46-14* clearly refers to enrollments and placements made by the local board of education with the consent of the Commissioner.

The particular fact which makes this case novel is that no local board of education, including respondent boards, placed A.S. in the special education program in the nonpublic, nonprofit school. This placement was performed by the Bureau.

As has been shown, the Bureau may place children in foster homes or in an institution under authority of *N.J.S.A. 30:4C-11*, but the statute is silent regarding the placement of children classified as handicapped, in programs of special education in nonpublic, nonprofit schools. *N.J.S.A. 18A:38-2* specifically states that children placed in a school district by a court or an agency which cares for indigent, neglected or abandoned children are entitled to attend the public schools without cost. This statute is also silent regarding the placement of a child in a program of special education in a nonpublic, nonprofit school.

The only statutory provision of *N.J.S.A. 18A:46-1 et seq.* which the Commissioner finds applicable to the particular question regarding the payment of tuition for the special education program of A.S. is the following paragraph of *N.J.S.A. 18A:46-14*:

“\*\*\* Whenever any child shall be confined to a hospital, convalescent home, or other institution in New Jersey or an adjoining or nearby State and is enrolled in an education program approved under this article, the board of education of the district in which the child is domiciled shall pay the tuition of said child in the special education program.\*\*\*”

In the above-cited paragraph of *N.J.S.A. 18A:46-14* the meaning of the word “confined” is not crystal clear. Confinement in a hospital or convalescent home usually means confinement as the result of one’s own illness. To interpret the meaning of the phrase “or other institution,” it is necessary to apply the rule of *ejusdem generis* as set forth by the New Jersey Supreme Court in the case of *Denbo et al. v. Moorestown Township et al.*, 23 *N.J.* 476 (1957). Then Chief Justice Vanderbilt cited *Studerus Oil Co. v. Jersey City*, 128 *N.J.L.* 286, 291 (*Sup. Ct.* 1942), at page 482 as follows:

“\*\*\* It is the long settled rule (*ejusdem generis*) in the construction of statutes that when general words \*\*\* follow specifically named things of a



particular class \*\*\*, the general words must be understood \*\*\* as limited to things of the same class, or at least of the same general character. *Livermore v. Board of Chosen Freeholders of Camden*, 31 N.J.L. 507, 511, 512 [E. & A. 1864]. Cf. *Curtis & Hill &c., Co. v. State Highway Commission*, 91 N.J. Eq. 421 (at pp. 429, et seq.); 111 Atl. Rep. 116 [Ch. 1920].\*\*\*”

The phrase “or other institution” accordingly is to be considered of the same general character as the terms “hospital” and “convalescent home” which immediately precede it in the statute. Therefore, under this interpretation of N.J.S.A. 18A:46-14, the local board of education of the child’s domicile would be required to pay tuition for the child’s special education program during the period of confinement in such an institution.

This conclusion that the school district of the child’s domicile is responsible for the child’s tuition, regardless of whether it placed the child, is strengthened by an examination of the hereinbefore cited paragraph of N.J.S.A. 18A:46-14 beginning with “Whenever” which, prior to its amendment by L. 1970, c. 256, § 1, included the ending phrase “upon determination, that it is advisable for the child to be so confined.” The removal of this ending phrase of the paragraph clearly removed, from the board of education of the child’s domicile, the exclusive right to determine the advisability of the placement or confinement in a “hospital, convalescent home, or other institution.” This interpretation follows the well-established principle that it is necessary to examine the law as previously stated in order to determine the meaning of amendatory legislation. *Hasbrouck Heights Hospital Assoc. v. Borough of Hasbrouck Heights*, 15 N.J. 447 (1954); *Asbury Park Press v. City of Asbury Park*, 19 N.J. 183 (1955). Also, a statute must not be construed so that the amendments thereof will be rendered futile if that result can be avoided. *Melvin S. Evans et al. v. Burt J. Ross*, 57 N.J. Super. 223, 229 (App. Div. 1959)

In the Commissioner’s judgment, the term “confinement” as used above in N.J.S.A. 18A:46-14 does not broadly extend to court-ordered confinement of a child in a correctional or detention institution or to the general placement by an agency of an abandoned or neglected child, who is not a handicapped child, in an “institution” as that term is used in N.J.S.A. 18A:38-2. However, when the Juvenile and Domestic Relations Court orders that an emotionally disturbed or socially maladjusted child be “placed” in a residential institution, and the Bureau is directed to find a suitable placement in such residential institution, this “placement” may then be considered a form of confinement, and the Commissioner so holds.

In the instant matter, A.S. is residing in the institution for the primary purposes of receiving long-range therapy and of having a foster home. The needed therapy is not physical but psychological in nature, since her handicap is classified as emotionally disturbed and socially maladjusted. In the regard the “institution” wherein she resides meets the definition of that term in N.J.S.A. 18A:46-14 as previously stated. Also, A.S.’s placement in this residential

institution is a form of "confinement," as this term has been herein defined in regard to *N.J.S.A. 18A:46-14*.

The next question is that of her domicile. The cited paragraph of *N.J.S.A. 18A:46-14* states that:

\*\*\*\* the board of education of the district in which the child is domiciled shall pay the tuition of said child in the special education program\*\*\*\*."

In previous instances, the Commissioner has been called upon to determine the domicile of parties in order to ascertain the appropriate school district to be attended. *Laufer et al. v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County*, 1970 S.L.D. 424; *Rutgers, the State University et al. v. Board of Education of the Township of Piscataway, Middlesex County*, 1963 S.L.D. 163; *Board of Education of Borough of Franklin v. Board of Education of the Township of Hardyston et al.*, 1954-55 S.L.D. 80

The courts of this State have determined that every person is deemed to have a domicile somewhere under all circumstances and conditions, and that a person may have several residences or places of abode, but can have only one domicile at a time. In *State v. Benny*, 20 *N.J.* 238 (1955), then Chief Justice Vanderbilt, writing for the Court, stated the following at page 251:

\*\*\*\* It is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home,' *Stout v. Leonard*, 37 *N.J.L.* 492 (*E. & A.* 1874); *Cromwell v. Neeld*, 15 *N.J. Super.* 296 (*App. Div.* 1951).

\*\*\*\*Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile.\*\*\*\*"

The Court cited Mr. Justice Heher, in *State v. Garford Trucking Inc.*, 4 *N.J.* 346 (1950), where he said at page 353:

\*\*\*\*'Domicile' and 'residence' are not convertible terms, although they are sometimes used interchangeably in legislative expressions. The polestar in each case is the intention of the lawmaking authority. *E.g.*, *Brown v. Brown*, 112 *N.J. Eq.* 600 (*Ch.* 1933). See 28 *C.J.S.* 7, 14.\*\*\*\*"

*N.J.S.A. 18A:1-1* provides, *inter alia*, that:

\*\*\*\* 'Residence' means domicile, unless a temporary residence is indicated\*\*\*\*."

In *Mansfield Township Board of Education v. State Board of Education*, 101 N.J.L. 474 (Sup. Ct. 1925) the Court stated at page 478 that:

“\*\*\* The permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own. Considerable force is derived by this view from the provisions of the School law relating to compulsory education of children in our public schools. Thus, for instance, section 153 of the School law (4 Comp. Stat., p. 4775) [now N.J.S.A. 18A:38-25] provides, that every parent, guardian or other person having control of a child between the ages of seven and seventeen years, inclusive, shall cause such child to regularly attend a day school, &c. The succeeding section 154 [now N.J.S.A. 18A:38-31] defines, in a measure, the character of the control of the child, by providing that any parent, guardian or other person having the legal control of any child who shall fail to comply with the provisions of section 153, &c. So, that it is clear that the persons who are designated by the statute upon whom the duties outlined by it rests are parents, guardians or persons having legal control of the child. \*\*\*

“\*\*\* The phrase ‘other persons having legal control’ would manifestly include foster parents who have lawfully adopted children, or those to whose care and custody children are committed by operation of law, &c. By applying the maxim *noscitur a sociis* to the phrase used, the persons indicated by the sections, as those having legal control, must have the legal status of parent or guardian.

“\*\*\* A child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated. *Its residence under the School law follows that of its parent or guardian or other person having legal control of it.*\*\*\*” (Emphasis ours.)

The Commissioner takes notice that the statutes referred to above, now N.J.S.A. 18A:38-25 and 31, contain the phrase: “Every parent, guardian or other person having custody and control of a child\*\*\*,” which has remained unchanged since the amendment of L. 1903, (2d Sp. Sess.) c. 1, art. XV, § 153, p. 59 by L. 1914, c. 233, § 2, p. 457.

The unique feature of the instant matter is that the handicapped pupil, A.S., is for all purposes, a resident of an institution which is her foster home. Consequently, as has been shown, she is entitled to attend the Freehold Regional School District. Assuming *arguendo* that this school district were conducting a special education program for emotionally disturbed and socially maladjusted children, A.S. would also be entitled to enrollment in such a program, and there would be no question of payment of tuition since the cost would be paid by the Freehold Regional School District. However, the decision as to whether A.S. would derive the greater benefit from attending the special education class in the controlled environment of the residential institution, which is also providing an appropriate program of therapy for her, instead of being enrolled in a special class for the emotionally disturbed and socially maladjusted in the public high

school, would only be made by the Bureau with the advice of a child study team.

For the purpose of providing a free public education, the statutes *N.J.S.A.* 30:4C-26, *N.J.S.A.* 18A:38-1 and 18A:38-2 treat the residence of a child in a foster home as a domicile, and accordingly provide a free public education. In the case of *Board of Education of Passaic, Passaic County et al. v. Board of Education of the Township of Wayne et al., supra*, the Court rejected the argument that children residing in the County Shelter were in fact domiciled in other school districts.

A recent decision of the New Jersey Supreme Court concerning the issue of domicile is *Worden et al. v. Mercer County Board of Elections*, 61 N.J. 325 (1972). That case involved an action brought by college and university students against a county board of elections, seeking to establish students' rights to register and vote in their college and university communities. In its exhaustive review of the concept of domicile, the Court stated, *inter alia*, the following:

“\*\*\* if a student asserts that his plans as to future residence are uncertain but that he considers the college town his home for the present and has no intention of returning to his parents' home, he will 'be allowed by the courts in most states to vote in his college town.' 31 *Ohio St. L.J.* at 714; *Annot.*, 98 *A.L.R.* 2d 488, 497-498 (1964); *Annot., supra*, 44 *A.L.R.* 3d at 826-29. Although this action is taken without abandonment of the domicil requirement it may have pertinence to the growing recognition that *domicil is not a unitary concept and that its application may vary in different contexts*. See Reese, 'Does Domicil Bear a Single Meaning?', 55 *Colum. L. Rev.* 589 (1955); Weintraub, 'An Inquiry. Into the Utility of 'Domicile' as a Concept in Conflicts Analysis,' 63 *Mich. L. Rev.* 961, 983-86 (1965); *Restatement (Second) Conflict of Laws* § 11, comment o at 47-50 (1971); cf. *Gladwin v. Power*, 21 *A.D.* 2d 665, 249 N.Y.S. 2d 980, 982 (1st Dept. 1964); *In re Jones' Estate*, 192 *Iowa* 78, 182 N.W. 227, 229 (1921). (*Emphasis ours.*)

"In his discussion of domicil, Professor Weintraub has noted that, while articulating the same technical definition of domicil, courts may vary its meaning 'by shifting the emphasis to one or another element of the definition or by drawing different reasonable inferences from essentially the same fact pattern.' 63 *Mich. L. Rev.* at 984. Earlier, Professor Reese had expressed the thought that since courts are desirous of attaining the right result in the individual case it would be 'surprising if they did not take advantage of the flexibility in application of the rules of domicil to achieve this end.' *Colum. L. Rev.* at 596-97.\*\*\*" (at 343-44)

The Court observed the distinction between the interpretation of domicile in regard to the voting rights of college students as compared to the requirement for the payment of tuition. The Court stated:

“\*\*\* The college student voting cases cited by Singer, *supra*, 31 *Ohio St.*

*L. J.* at 714, may point in similar direction [that the same concept of domicile will not inevitably be the same in different areas of law] although it may be assumed that the same courts would adopt a stricter approach when confronted with out-of-state students claiming local college residences, not for voting purposes, but for purposes of preferential tuition treatment or the like. Cf. *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd* 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971); *Thompson v. Board of Regents of University of Neb.*, 187 Neb. 252, 188 N.W. 2d 840 (1971)\*\*\*.” (at p. 344)

In *N.J.S.A.* 18A:46-14, the Legislature has seen fit to use the specific term domicile in the hereinbefore cited paragraph which requires that:

“\*\*\* the board of education of the district in which the child is domiciled shall pay the tuition of said child in the special education program\*\*\*.”

Assuming *arguendo* that the Commissioner would determine the domicile of A.S. to be the domicile of her father in accordance with *Mansfield Township, supra*, such a determination would be at variance with the previously cited statutes *N.J.S.A.* 30:4C-26, *N.J.S.A.* 18A:38-1 and 18A:38-2, and the practices thereunder. The problem of providing a crystal-clear instruction for determining the financial responsibility for tuition payments for foster children placed in a variety of nonpublic special education programs, as well as clarifications of *N.J.S.A.* 18A:46-14, is a task which can only be accomplished by the Legislature in the first instance, and by the Judiciary in the second. The problem is of some proportions. For instance, the Commissioner notices that the present total number of pupils classified as handicapped, who are enrolled in special classes in nonpublic institutions is 3,096. Of this total 1,796 or fifty-eight per cent are classified as emotionally disturbed or socially maladjusted. The number of emotionally-disturbed pupils enrolled in special classes in residential non-public institutions is presently 865, with 701 in out-of-state institutions and 164 in institutions within New Jersey.

The payment of tuition for the special education programs of those pupils among the 3,096 in nonpublic institutions, placed by local boards of education, poses no problem. But in a large number of individual cases, such as the instant matter, a child classified as handicapped is placed by the Bureau from a foster home, a residential center operated by the Bureau, a children's shelter, or a State institution, to a special education program in a residential nonpublic institution. A further complication is that in many instances the child is either a ward of the State or is in the care and custody, or possibly guardianship, of the Bureau. It is not uncommon for a child to be placed in a series of foster homes and institutions. Also, the determination of the domicile of either parent of the child is sometimes a virtually impossible task. In many instances, parents are either separated or divorced and are domiciled in different communities. Parents may also move out of this State, be deceased, or change their residence several times within a brief period. Accordingly, the application of traditional rules and definitions, in order to determine the domicile of a particular handicapped child,

requires a search through a seemingly endless labyrinth with fruitless or at best disappointing results. It is administratively unmanageable. All of these complexities are indicators of the need for legislative action to provide additional guidelines for the agencies which are serving the unfortunate handicapped children within this State.

In the instant matter, the Commissioner must determine the domicile of A.S. within the framework of the previously cited authorities and in accord with sound educational policy. The primary concern in this case is the welfare of the child, particularly her continuance in the special education class and program of structured therapy. The second concern is the application of a reasonable administrative rule for the determination of the domicile of A.S. and many similarly-situated handicapped children, to insure the payment of necessary tuition and thus provide continued stability for the educational process.

In the judgment of the Commissioner, the following rule will be reasonably applied to the determination of the domicile of A.S. and other similarly-circumstanced children:

The domicile shall be the last local school district where the child resided for a substantial period of time with a parent, guardian, or a person acting in *loco parentis*, or in a foster home, other than a public or private residential institution, where the child was statutorily entitled to attend the public schools of the district. "Substantial" shall mean six months or more. If the child did not reside in any such district for a period of six months, the district of domicile shall be that of longest residence.

In establishing the above-stated definition and rule, it is necessary to exclude residence in a public or private institution. Otherwise, a local school district which contains within its boundaries an institution such as the State Home for Boys, Jamesburg, the Yardville Youth Reception and Correction Center, State Home for Girls, Trenton, or the Training School for Boys, Skillman, quite possibly could be required to bear a very large cost of special education tuition for pupils placed by the Bureau in residential nonpublic institutions. Such a state of affairs would thrust an unreasonable financial burden upon the taxpayers of a local school district so circumstanced. It is also necessary in the above-stated definition to refer to the "last local school district" where a child resided, for the same reasons. In the instant matter of A.S., her present residence in the nonpublic institution, which is a foster home as was previously stated, cannot be determined as her domicile. To do so would create the same evil whereby all other pupils similarly situated would be considered domiciled in the same nonpublic residential institution, and the Board of Education of the Freehold Regional High School District would then be required to assume an unreasonable burden of special education tuition cost. Under the above-stated rule, a residential institution will never be the domicile in any instance.

In the instant matter, the Commissioner has applied the aforementioned rule, and finds and determines that the Board of Education of the Township of

Little Egg Harbor is responsible for the payment of tuition for the program of special education being received by A.S. under *N.J.S.A. 18A:46-14*.

The Commissioner is constrained to point out that this decision does not apply to the many instances where local boards of education, pursuant to *N.J.S.A. 18A:46-14g*, have formally placed resident handicapped children in special classes in nonpublic institutions within this State or out-of-state, either with or without the assistance of the Bureau. In every instance where a handicapped pupil is presently placed in a residential institution and the local board of education has formally approved the payment of the special education tuition for the pupil, that school district will continue to be construed as the domicile of such pupil regardless of the rule of domicile established in this case. Any prospective application of the aforementioned rule to such instances as stated above would create administrative chaos and would seriously undermine the stability of the educational program received by handicapped children. Also, the 701 handicapped pupils presently placed in out-of-state resident institutions, under *N.J.S.A. 18A:46-14g*, are clearly residents of New Jersey, and the responsibility to pay for their special education remains with each local board of education which has heretofore formally approved the payment of tuition for such special education and thereby acknowledged the local domicile of the child.

In the instant matter, having found that the domicile of A.S. is within the Little Egg Harbor School District, the Commissioner orders that that Board of Education pay the 1970-71 tuition fee for A.S. forthwith, and arrange with the institution to pay the tuition fees for the school years thereafter until her special education is naturally terminated.

COMMISSIONER OF EDUCATION

June 12, 1973



“W.S.,”

*Petitioner,*

*v.*

**Board of Education of the East Windsor Regional School District,  
Mercer County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion**

For the Petitioner, Selecky & Scozzari (John A. Selecky, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

W.S., a sixteen-year-old boy enrolled as a pupil in the East Windsor Regional Schools, was suspended from school attendance by school administrators and subsequently expelled by action of the East Windsor Regional Board of Education, hereinafter “Board,” on April 18, 1973. He appeals to the Commissioner of Education to order the Board to set aside its expulsion action and readmit him as a full-time pupil in its schools. At this juncture, however, petitioner requests home instruction be provided him by the Board pending a determination on his appeal. The Board contends that its expulsion action was justified and was taken only after serious deliberation, according to law, and prays the Commissioner not to interfere with its action.

Oral argument on the Motion for interim relief in the form of home instruction was heard on May 29, 1973, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On March 26, 1973, the Board afforded W.S. a hearing into charges brought against him by school administrators. Such charges included writing a threatening note to the assistant principal which contained obscene language; threatening to harm Hightstown High School; and defacing and damaging lavatory walls in the high school. Both W.S. and his parents were notified by the Superintendent of Schools on March 13, 1973 of the hearing date and the charges against him. Additionally, the Superintendent also notified W.S. of the witnesses to appear against him, as well as his right to be represented by counsel. The hearing examiner points out that although W.S. is now represented by counsel, he appeared at the Board’s hearing with only his parents.

Five members of the Board were present at the hearing. A report was presented to the entire Board supporting the Superintendent’s recommendation of expulsion and the entire record of the proceeding was made available to the whole Board. It is noted here that one member of the panel which heard the



charge dissented from supporting the expulsion recommendation. The Board, on April 18, 1973, voted to expel W.S. from further school attendance.

During oral argument on the Motion, *sub judice*, petitioner, in support of his prayer for immediate relief, presented no charges that the Board acted illegally or arbitrarily, nor did he charge that any of his rights to due process were violated. The Board asserts that its actions were not arbitrary nor capricious, and that it acted only after serious and thoughtful deliberation.

The hearing examiner finds that the Board did, in fact, afford due process to petitioner herein. He further finds the hearing process conducted by the Board to be consonant with guidelines established in *Scher v. West Orange Board of Education*, 1968 S.L.D. 92, affirmed State Board of Education, September 4, 1968 and in *R.R. v. Board of Education of the Shore Regional High School District*, 109 N.J. Super. 337 (Ch. Div. 1970). Accordingly, finding no defect in the Board's procedure herein, the hearing examiner recommends that the Motion *pendente lite* be denied. This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner as set forth above and the record in the instant matter. He concurs with the recommendation of the hearing examiner.

At this juncture, the Commissioner sees no reason why he should substitute his judgment for that of a local board of education and accordingly the Motion herein is denied.

COMMISSIONER OF EDUCATION

June 14, 1973

“R.K.,”

*Petitioner,*

*v.*

Board of Education of the Township of Lakewood,  
Ocean County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Barry D. Goldman, Esq.

For the Respondent, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

Petitioner, a tenth-grade pupil in respondent's high school, was expelled from school by resolution of the Board of Education of the Township of Lakewood, hereinafter "Board," adopted December 11, 1972. He requests that home instruction and supplemental instruction be granted him *pendente lite*, and that he be reinstated in the Lakewood School District under the provisions of *N.J.S.A. 18A:46-13 et seq.*

This matter is submitted to the Commissioner on the pleadings, exhibits and Briefs of counsel.

Petitioner was suspended from school on November 8, 1972 for allegedly using profanity, striking a teacher, defiance of school authorities, threatening a teacher with a club and continued and willful disobedience, pursuant to *N.J.S.A. 18A:37-2*.

A hearing before the Board was granted petitioner on November 27, 1972 at which time he was represented by counsel. Following that hearing he was expelled by resolution of the Board adopted December 11, 1972.

Petitioner avers that he was not afforded a fair hearing in that he was not informed of the specific nature of the charges against him and given a fair opportunity to make his defense. Therefore, he avers he was denied his right to procedural due process. Specifically, he objected to the school administration's reporting of a long history of his disciplinary infractions to the Board. He stated that the report went back to 1963, and that the school administration had no personal knowledge as to its accuracy. He avers further that he did not know prior to the hearing that he was being tried for those alleged offenses, and he objects to them as hearsay.

Petitioner does not deny that he was suspended on November 8, 1972 for the reasons stated, *ante*; however, with regard to a charge of striking a teacher,

he modifies the specific language of the Board regarding that incident, which occurred in the school auditorium and which led to his suspension as follows:

“\*\*\* Mrs. [B.G.], High School teacher \*\*\* reported that during an assembly period \*\*\* [R.K.] started to leave the auditorium. \*\*\* [R.K.] started swinging when she tried to get him back to his seat. He hit her in the chest with his fist.

“[J.L.], [a] teacher \*\*\* witnessed the \*\*\* incident and went to Mrs. [B.G.’s] aid. He subdued [R.K.] and took him to [the principal’s] office. \*\*\* [R.K.] threatened ‘to get’ [J.L.].\*\*\*

“[R.K.] \*\*\* would not stay in [the principal’s office] \*\*\* and left the building.\*\*\* [L]ater [R.K.] returned with a club threatening to get [J.L.] and Mrs. [B.G.].\*\*\*

“[R.K.] \*\*\* said he did not remember coming back into the building with the club [and] said he ‘blacked out.’ \*\*\* ” (Board Minutes of Expulsion Hearing, November 27, 1972)

Elsewhere, R.K. describes the club as a “stick” and admits only that he had some bodily contact with Mrs. B.G.

R.K. argues that expulsion is an inappropriate remedy which will cause him irreparable harm.

The Board avers that the incidents which occurred in the auditorium and thereafter, coupled with the long list of R.K.’s prior school discipline record (Assistant Principal’s Exhibit) are sufficient to justify his expulsion from school. The Board avers further that R.K. was afforded his right to procedural due process since he was present at the hearing with his parents and his attorney. The Board avers, also, that R.K. was allowed to cross-examine all of the witnesses presented and to produce his own witnesses as he saw fit.

The record shows that after R.K.’s suspension from school on November 6, 1972, an assistant principal notified his parents in writing of his many discipline infractions and also that the school administration would recommend his expulsion by the Board. Thereafter, at the Board meeting of November 20, 1972, petitioner’s counsel was given a week’s adjournment to prepare his defense, prior to the meeting of November 27, 1972, which culminated in petitioner’s expulsion.

R.K. was referred to the school district’s Child Study Team midway during the 1970-71 school year, which resulted in certain recommendations to improve this pupil’s behavior and academic performance. On October 3, 1972, the Child Study Team conferred with the Ocean County Probation Department concerning R.K., and in a report dated April 4, 1973, the Child Study Team stated that planned additional contact with R.K. by members of the Child Study Team was made impossible due to R.K.’s excessive absenteeism and frequent

suspensions. R.K.'s mother arranged for him to be examined by a psychiatrist on November 13, 1972, following his suspension on November 8, 1972. The Board avers that this psychiatric report of R.K.'s examination, dated March 13, 1973, and submitted in evidence to the Commissioner, was never presented to the school administrators or the Board.

The Board resolution which called for petitioner's expulsion also provided for his reinstatement as follows:

“\*\*\* That the said student shall have the right to make subsequent application to the Board of Education for attendance at special classes or educational facilities upon sufficient medical and psychological proof that attendance at such special classes or educational facilities will be for the best interest for said student and the school system.\*\*\* ”

The guidelines for a hearing prior to an expulsion action were stated by the Commissioner in *Scher v. Board of Education of West Orange*, 1968 S.L.D. 92. In that decision the Commissioner quoted from *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W. 2d 822 (1942), *cert. den.* 319 U.S. 748 (1943) as follows:

“\*\*\* ‘We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. He cannot claim the privilege of cross-examination as a matter of right. The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him.’ \*\*\*”

Applying these principles to the instant case, it is clear that the Board has complied with the essential elements of due process in its action expelling this pupil. R.K.'s claim that his right to procedural due process was denied is therefore without merit.

The Commissioner observes, however, that the Board's reference to R.K.'s lengthy history of severe discipline problems, coupled with the findings of R.K.'s psychiatrist, shows evidence of a personality disorder which may require medical treatment and special attention. The Commissioner notices, also, that it is the duty of a local board of education to classify and provide for pupils who show evidence of emotional disturbance or social maladjustment. *N.J.S.A.* 18A:46-6, 8, and 11. Although the record shows some involvement by the Child Study Team, there is no evidence that petitioner was evaluated in order to determine whether he should be classified according to the statutes. Further, it appears that petitioner's examination by his psychiatrist was made as the result of his parents' efforts, and was not initiated by the school authorities.

Finally, the Board resolution of December 11, 1972, *ante*, allows petitioner to apply for limited reinstatement.

In *Scher, supra*, the Commissioner commented as follows:

“\*\*\* The Commissioner notes, also, that it is not only within the authority but it is also the duty of a local board of education to administer the procedures for diagnosis and classification of pupils who give evidence of emotional disturbance or social maladjustment. *N.J.S. 18A:46-6, 8, and 11* Pupils may be refused admission to, or be excluded temporarily from school for a reasonable time pending such examination and classification. *N.J.S. 18A:46-16* In this case, respondent has taken the position that petitioner’s continued presence in the school would constitute a hazard to the physical well-being of himself, his fellow students and the school personnel. The Board asserts also that its psychiatrist, who had examined petitioner previously when he was in sixth grade, had advised that petitioner not be readmitted until a reexamination is made. Under such circumstance the Commissioner holds that respondent’s requirement of a mental health evaluation is a proper exercise of its statutory authority.\*\*\*  
(at p. 96)

And,

“\*\*\* Termination of a pupil’s right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board’s decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation. In the case under review, the Commissioner calls attention to the fact that although the Board ordered an evaluation of petitioner by its mental health team, it made its determination with respect to his status before such an examination and the recommendations emanating therefrom could be accomplished. The Commissioner suggests that the decision should have been left open until after it had received the results of the examinations and the recommendations made by the examiners.\*\*\*”  
(at pp. 96-97)

The Commissioner finds that the matter herein is similar and that the Board expelled R.K. without securing a prior evaluation by its Child Study Team and an examination by its school psychiatrist.

The Commissioner determines that the procedures followed by the Board to expel R.K. from school were consistent with law; however, the Board is directed to have R.K. evaluated by its Child Study Team, including examination by its school psychiatrist. The Commissioner directs that the Board be guided by these examinations and recommendations in taking further action regarding R.K., in accordance with the Board's resolution of December 11, 1972, *ante*.

Petitioner's request for reinstatement in school is denied. This matter is remanded to the Board for further action as directed.

COMMISSIONER OF EDUCATION

June 19, 1973

"K. C." by her guardian "D. C.,"

*Petitioner,*

*v.*

Board of Education of the Borough of Collingswood and  
Walter C. Ande, Superintendent of Schools,  
Camden County,

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioner, Tomar, Parks, Seliger, Simonoff & Adourian (David Jacoby, Esq., of Counsel)

For the Respondent, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner appeals a final failing grade of "F" given her for a course in Art in the ninth grade, and avers that her first marking period grade, "A," should be averaged with her final marking period grade, "F," so that the resultant mark should be a passing grade and not the failing grade of "F" which she received.

Respondents, Board of Education of the Borough of Collingswood, hereinafter "Board," and the Superintendent of Schools, Walter C. Ande, filed Motions to Dismiss and for Summary Judgment by the Commissioner, and questioned the jurisdiction of the Commissioner to revise the grades of a pupil which have been given by the school teacher and the administration.

This matter is submitted to the Commissioner on the letter-briefs and exhibits of counsel.

Petitioner contends that on the basis of the grades received in the Art course, an "A" and an "F," a passing average was achieved. She alleges that the final grade, "F," given her by the teacher is not in accordance with Board policy for averaging grades and the results of that "F" grade were in part as follows:

1. At the last hour she was denied the right to stand with her class at the ninth grade graduation exercises.
2. She has been deprived of a diploma from the Collingswood Jr. High School.
3. She has been deprived of a "Certificate of Admission" to the Collingswood High School.

Petitioner argues that this "F" grade in Art is a total departure from her past excellent scholastic record and is largely due to personal problems and pressure which were made known to respondents and her Art teacher.

She avers that she made her grievance known to her teacher and respondent, but that she has been unable to secure any satisfaction from them, despite Board policy which reads in part as follows:

\*\*\*\* When a pupil fails, a teacher should be able to satisfy parents who ask or are invited for interviews.\*\*\* " (Teachers' Handbook, at p. 24)

She argues, also, that her grade of "F" is an abuse of professional discretion by her Art teacher.

Petitioner contends that the Student's Handbook, dealing with the marking system of the Collingswood Jr. High School and requiring that two points be accumulated during the fifth and sixth marking periods, is only applicable to major course work and not elective courses such as Art. Therefore, she avers that the two-point requirement is inapplicable in the present situation. However, she argues later that the mechanics of averaging grades as set forth in the Teachers' Handbook ("A=4; B=3; C=2; D=1"), although designed as a guide for "major courses," reflect the spirit and philosophy of the Board's policy. She avers that such averaging of grades should be used in arriving at her final grade by adding "A" (4) to "F" (0), dividing by two, and arriving at a resultant passing grade.

Petitioner prays that she now be given a passing grade in the Art course, and that the appropriate Certificate of Admission to the Collingswood High School be issued forthwith.

The Board argues that the instant matter is moot, because petitioner was admitted to Collingswood High School without impediment. The Board avers that petitioner has been given the opportunity to make up the Art course which

she failed, and that the make-up work will not affect her status in the High School. Regarding its grading policy, the Board states that petitioner's suggestion to average her "A" and "F" grades is a non sequitur, in that the Teachers' Handbook does not give the grade of "F" any place in the averaging of grades. Moreover, argues the Board, the Teachers' Handbook explains further, that even though a pupil may acquire the six required points to pass a subject, he may still fail if he "gives up," and that its policy in this regard does not differentiate between major and elective courses.

The Board's Motion to Dismiss and for Summary Judgment is based solely on its claim that the Commissioner lacks jurisdiction to revise a pupil's grades. However, the Commissioner does not deem the issue herein, to be whether or not he has jurisdiction to revise petitioner's grades, but rather, whether or not the Board adhered to its own policy in giving petitioner her final Art grade. For this reason, respondent's Motion to Dismiss and for Summary Judgment is denied.

Neither does it appear necessary that this matter go further for more formal proofs as to petitioner's allegations or the Board's position with respect to the implementation of its own grading policy. The record as submitted is sufficient for determination of the entire matter under consideration.

The Commissioner notes that petitioner has been admitted to the High School and that she has been offered an opportunity to make up the course she failed. For whatever reasons petitioner was given the failing grade in Art, the Board has that ultimate authority through its grading policy as implemented by its teachers and the school administration, provided that policy is reasonable and nondiscriminatory. The Commissioner notes further that the policy as set forth in the Teachers' Handbook states that:

"Pupils are to be marked in relation to standards set by the teacher for the particular subject being taught.\*\*\*" (at p. 24)

Grading policies are established by local boards who must by law make rules and regulations "\*\*\*\* for the government and management of the public schools\*\*\*." *N.J.S.A. 18A:11-1* See *Dawn Minorics v. Board of Education of the Town of Phillipsburg*, 1972 S.L.D. 86.

Petitioner argues on the one hand that the Board policy as stated in the Student's Handbook with respect to grading pupils, refers only to major courses. However, on the other hand, she argues that its policy as set forth for major courses in the Teachers' Handbook reflects its "spirit and philosophy"; therefore, the same criteria should be used in determining her final Art grade by averaging her marks.

The Commissioner holds that since petitioner argues that the Board policy with respect to grades is applicable only to major courses, she cannot also argue that the same policy should be used in determining her Art grade by averaging her marks.



Petitioner argues that the Board's policy, *ante*, states that: "\*\*\*\* when a pupil fails, a teacher should be able to satisfy parents who ask or are invited for interviews.\*\*\*" However, the Commissioner is of the opinion that it is impossible to satisfy all requests for explanations of grades, and that the Board's policy states that "\*\*\*\* a teacher should be able \*\*\*," not *must*. "\*\*\*\* be able to satisfy parents \*\*\*." Even if it were so stated, such a result would be impossible.

There is no statute nor State Board of Education requirement for the issuance of a diploma upon completion of grade school or junior high school. Nor is there any such requirement for the issuance of a certificate of admission to high school.

Therefore, the Commissioner finds the following:

1. The Board policy on grading is reasonable and the grade given petitioner was not conceived in violation of its policy.
2. There is no allegation by petitioner, nor is there any finding by the Commissioner that petitioner's Art grade is discriminatory or uniquely applied to petitioner.
3. Petitioner has been offered an opportunity to make up the course she failed.
4. There is no showing of irreparable harm since petitioner was admitted to the High School despite her lack of a certificate of admission.

The Commissioner deplores the determination by school officials that denied petitioner the opportunity to participate in her ninth grade graduation exercises, if that denial were based solely on her failing Art. If there were other reasons, they have not been stated. However, it is now too late to offer any relief with respect to the "graduation" exercises.

The Commissioner notes the absence of any explanation why a diploma was not awarded petitioner. Nor was there any exhibit submitted to show the Board's qualification requirements for the issuance of a ninth grade diploma.

Since petitioner was obviously promoted to the Collingswood High School, the Commissioner directs the Board to issue her the same kind of diploma awarded all ninth graders who "graduated", or in the alternative, explain why petitioner does not qualify for the diploma.

The Commissioner retains jurisdiction in this matter pending the outcome of this directive; however, in all other respects the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 20, 1973

**Nicholas P. Karamessinis,**

*Petitioner,*

*v.*

**Board of Education of the City of Wildwood,  
Cape May County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Cook and Knipe (Thomas P. Cook, Esq., of Counsel)

Petitioner, a nontenured teaching staff member employed by the Board of Education of the City of Wildwood, hereinafter "Board", alleges that he was improperly and illegally relieved of the obligation to perform his duties as the Board's Superintendent of Schools. He requests the Commissioner of Education to restore him to active employment in such duties forthwith. The Board maintains that its actions controverted herein were properly founded on express contractual terms and principles of law, and it advances a Motion for Summary Judgment.

A hearing on the Motion was conducted on April 5, 1973 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Briefs of counsel were filed subsequent to the hearing.

The report of the hearing examiner is as follows:

Petitioner was initially employed by the Board as Superintendent of Schools for the 1971-72 school year. A subsequent contract for this employment (R-1) was then executed by the parties "\*\*\*\* for a period of One Year commencing September 1, 1972, through August 31, 1973.\*\*\*\*" This document (R-1) also contained a termination clause which reads as follows:

"\*\*\*\* This contract may be terminated by mutual agreement of the parties, or by written notice of termination by either party to the other no later than March 31, 1973, termination to be August 30, 1973.

"Lack of such notice shall automatically extend this contract for a like period.\*\*\*\*"

However, petitioner avers that:

"\*\*\*\* Upon his return from vacation on Labor Day [1972] he found a notice in his mail calling a special meeting [of the Board] to be held on

September 6 to discuss the option on the Superintendent's contract. Since the school year was very soon to open, petitioner was mystified by the action and went to the home of the President of the Board to discuss the proposed special meeting.\*\*\*" (Brief on Behalf of Petitioner, at p. 2)

Petitioner also maintains that:

\*\*\*\* The President informed petitioner that the Board was dissatisfied with a number of actions taken by petitioner wherein he had not sought Board approval, none of which dealt with any major educational matters.\*\*\*" (Brief on Behalf of Petitioner, at p. 2)

Subsequently, petitioner states he requested a meeting with either the personnel committee of the Board, or the entire Board, prior to any action concerning his status, but maintains that this request was not granted. This contention is nowhere denied by the Board.

Thereafter on September 6, 1972, the Board met and adopted the following resolution:

"WHEREAS the employment contract of Nicholas P. Karamessinis, as Superintendent of Schools of Wildwood, New Jersey, expires August 31, 1973, with termination August 30, 1973;

BE IT RESOLVED that the said contract of Nicholas P. Karamessinis not be renewed at the expiration of its term, and;

BE IT FURTHER RESOLVED that as of this date, September 6, 1972, the said Nicholas P. Karamessinis be relieved of all duties as Superintendent of Schools, and;

BE IT RESOLVED that a copy of this Resolution be given to Nicholas P. Karamessinis as notice of the action of this Board."

The Board Secretary has certified that this motion was "\*\*\*\* passed at a Special Meeting, City of Wildwood Board of Education, Wednesday, September 6, 1972." (R-2) It is noted by the hearing examiner, that while petitioner was "relieved of all duties" subsequent to September 6, 1972, he has continued to receive all of his contracted salary to the present day.

This concludes a recital of the factual data within which the contentions of the parties are framed.

At this juncture the Board moves for Summary Judgment on the grounds that there is no substantial issue of material fact and that, therefore, it is entitled to judgment thereon as a matter of law. Petitioner, while stipulating the basic facts as reported *ante*, maintains that the Board's action controverted herein was illegal in that it represented "public business" accomplished at a "private session." This avowal is contained in the Petition of Appeal (at p. 2) and must be viewed as a factual contention which the Commissioner must consider.

Additionally, petitioner appears to raise a second factual issue in his Brief (at pp. 3-4) which is not raised specifically in the Petition of Appeal. This issue consists of petitioner's contention that the Board's action of September 6, 1972 to terminate petitioner's service was a predetermined action, a *fait accompli*, which precluded any opportunity for deliberation or public participation.

With respect to the instant Motion, the two contentions, *ante*, are the only ones posing a dichotomy of view concerning factual data. The argument on legal issues is more extensive.

On the one hand, in this regard, the Board avers that it acted in the matter, *sub judice*, within "\*\*\*\* the legal authority vested in it by N.J.S.A. 18A:27-9 and pursuant to the terms of the contract.\*\*\*\*" (Board's Brief in Support of Motion to Dismiss Complaint, at p. 2) The cited statute provides:

"If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with the board of education, it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder."

In the Board's view, if this primary argument is valid, other contentions propounded by petitioner are not material to the case. In support of this view the Board cites *Ramo v. Board of Education of the Borough of Hopatcong*, 1972 S.L.D. 469; *Branin v. Board of Education of Middletown*, 1967 S.L.D. 9; and *Gager v. Board of Education of Lower Camden County Regional High School District No. 1*, 1964 S.L.D. 81.

On the other hand, petitioner argues, in effect, that the Board meeting of September 6, 1972, was a "caucus" meeting at which no official action was legally possible. He then cites *Cullum v. Board of Education of North Bergen*, 15 N.J. 285 (1954) and *Thomas v. Board of Education of Morris Township, Morris County*, 1963 S.L.D. 106, *affd.* State Board of Education 1964 S.L.D. 188, *affd.* 89 N.J. Super. 327 (App. Div. 1965), *affd.* 46 N.J. 581 (1966) in support of the view that the Board's action of September 6, 1972 in such a meeting was illegal, since public officials must transact their business in the light of public scrutiny, which a caucus meeting does not afford.

Petitioner also avers that the Board's action on September 6, 1972 to terminate his employment is contrary to the statute N.J.S.A. 18A:25-7 which provides that:

"Whenever any teaching staff member is required to appear before the board of education \*\*\* concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment \*\*\* then he shall be given prior written notice of the reasons for such meeting \*\*\* and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

In petitioner's view he was required to be at the meeting of September 6, 1972, but was given no reason for the meeting or an opportunity to be represented.

Additionally, petitioner raises the question of whether or not the 1972 Board had the power in September 1972 to decide on petitioner's employment status for the subsequent year, after the official life of the 1972 Board will have expired. In this regard he invokes the recent decisions *Board of Regents v. Roth*, 92 S. Ct. 2701 (1972) and *Perry v. Sindermann*, 92 S. Ct. 2694 (1972) and avers:

“\*\*\* that where there are indications of serious charges for nonrenewal of a contract, it may well be that a school employee is entitled to reasons for such nonrenewal.\*\*\*”

The Board, while maintaining it had the legal authority as stated *ante*, to take the action which is herein controverted, and that all of its actions were in conformity with statute and contract, also contests petitioner's other avowals and claims. Specifically, the Board groups its contentions in four principal arguments which are summarized below together with accompanying citations:

1. An employing board of education has no responsibility to give reasons or afford a hearing when it chooses to exercise a notice clause in a contract of employment with one of its employees. *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962); *Donaldson v. Board of Education of North Wildwood*, 115 N.J. Super. 228 (App. Div. 1971); *Ruch v. Greater Egg Harbor Regional Board of Education*, 1968 S.L.D. 7, affd. Sup. Ct. (App. Div. 1969); *Ramo v. Board of Education of Hopatcong*, 1972 S.L.D. 469; *Branin v. Board of Education of Middletown*, 1967 S.L.D. 9.
2. The instant Petition advances no fact to support the “bald conclusion” of petitioner that the termination of his employment by the Board (on September 6, 1972) was public business accomplished at a private session and thus illegal. The mere assertion of such a legal conclusion is not sufficient to state a cause of action. *South Plainfield Education Association and Marilyn Winston v. Board of Education of South Plainfield*, 1972 S.L.D. 323; *Ruch v. Board of Education of Greater Egg Harbor Regional High School District*, 1968 S.L.D. 7.
3. The Petition does not allege a violation of N.J.S.A. 18A:25-7 as one of the bases for this litigation, but in any event, petitioner was not “required” to attend the meeting of the Board on September 6, 1972 although he knew well in advance that the meeting would be held and for what purpose it was called.
4. This case is not the type wherein a Board is barred from reaching ahead to make decisions which do not need to be arrived at until a new Board has taken office, since the Board “\*\*\* evidently had good justification and need \*\*\*” to do what it did herein and when its relationship with the

Superintendent proved to be incompatible, the Board “\*\*\* merely exercised a right which the Superintendent has already agreed to \*\*\*.” The Board argues further that such actions have a presumption of validity. *Cf. Knipple v. Board of Education of Egg Harbor Township*, 1971 S.L.D. 210.

In summary, the questions posed here for determination by the Commissioner are simply stated as follows:

1. Are there factual matters outstanding which bar a disposition of this matter on the Motion for Summary Judgment?
2. If there are not, were the Board’s actions controverted herein a proper and legal exercise of its corporate discretion?

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and determines that there are no factual determinations that are outstanding for decision in this matter. Although petitioner presses a claim that the Board’s meeting of September 6, 1972, was a “private” caucus meeting, such a contention is contradicted convincingly, in the judgment of the Commissioner, by the Board Secretary’s certification that the meeting was a “Special Meeting” and by petitioner’s own recital that he found a notice in his mail “\*\*\* calling a special meeting \*\*\*” when he returned home from vacation in September 1972.

Thus, it logically appears that the requirements for such a meeting as enunciated by the rule of the State Board of Education have been met. These requirements are contained in the administrative code as *N.J.A.C. 6:3-1.9* as follows:

“In every school district of the State it shall be the duty of the secretary of the board of education to call a special meeting of the board whenever he is requested by the president of the board to do so or whenever there shall be presented to such secretary a petition signed by a majority of the whole number of members of the board of education requesting the calling of such special meetings.”

While all meetings of local boards of education are required by statute to be “public” meetings (*N.J.S.A. 18A:10-6*), there is no requirement that such meetings must be publicly advertised in advance or that persons other than members of the local board of education must be present to make the meeting official and legally correct.

In the instant matter, the Board Secretary has certified that the Board’s meeting of September 6, 1972, was a “special meeting.” Petitioner himself characterized it as such. These pronouncements, in the Commissioner’s judgment, attest properly to the fact, absent an offer of proof that the meeting was faulty or incorrect in certain specific ways. There is no such offer herein.

The Commissioner also holds, that petitioner cannot, at this juncture, advance a proper claim that the Board was precluded from acting on September 6, 1972 with regard to petitioner's contract because its action had been predetermined or decided privately in advance. The Petition is devoid of an offer of proof to this effect and, in fact, the Petition *per se*, neglects entirely to even state the claim.

Thus, the Petition, and the Motion with respect to it, stand on a set of facts which are clear.

The principal fact is that petitioner and the Board agreed in 1972 to a contractual arrangement, with an option available to each of the parties, that the contract between them could be "terminated" by "written notice" of such termination by "either party" if notice was given "no later than March 31, 1973." Since the "notice" to which the contract referred was given by the Board well prior to that date in its resolution (R-1) of September 6, 1972, and since such resolution was properly adopted by the Board in a meeting which the Commissioner has determined was legally correct, there is no relief which the Commissioner can afford at this juncture. The Board did nothing herein which petitioner had not agreed it could do, when he affixed his signature to the employment contract, which was equally binding on each of the parties.

This holding is directly parallel to that of the Commissioner in *Ramo, supra*, wherein it was held that a sixty-day notice clause in a contract of employment was a stated term which could be invoked by a local board of education with propriety, and without a formal statement of reasons for the action, or a hearing thereon. Specifically, in this regard, the Commissioner said, at pp. 473-474 that a determination of the Commissioner:

"\*\*\* that petitioner's contract was legally terminated according to one of its stated terms — is also grounded on previous decisions of the Commissioner and the Courts. *Sue S. Branin v. Board of Education of the Township of Middletown, Monmouth County, and Paul F. Lefever, Superintendent*, 1967 S.L.D. 9; *Gager v. Board of Education of Lower Camden County Regional High School District No. 1*, 1964 S.L.D. 81, *Amorosa v. Board of Education of Jersey City*, 1964 S.L.D. 126. These decisions distinguish and define the terms 'dismissal' and 'termination' with specific pertinence to the employment and contractual rights of teaching staff members who have not acquired the protection of tenure.

"Thus, in *Sue S. Branin, supra*, the Commissioner held that a teacher may not be "\*\*\* summarily dismissed without notice and good cause \*\*\*" (at page 10) (*Emphasis supplied.*) but that contracts may be terminated according to their stated terms "\*\*\* for any reason or no reason.\*\*\*" (at page 11) Specifically, the Commissioner quoted from *Amorosa, supra*, as follows:

" ' \*\*\* In *Gager v. Board of Education of Lower Camden County Regional High School District*, decided May 11, 1964, for example,

the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to respondent in the instant matter; it could have, *for any reason or no reason*, given petitioner 60 days' notice in writing of its intention to terminate his contract, and pursuant to R.S. 18:13-11.1, elected not to have him teach during the period of notice. The Commissioner recognizes the possibility of circumstances constituting good cause within the contemplation of R.S. 18:13-11, *supra*, under which the summary dismissal of a teacher could be upheld.' (*Emphasis supplied.*)

"and, then summarized the distinctions between 'dismissal' of teaching staff members and 'termination' of their contractual employment in the synopsis that followed:

" 'Thus 'dismissal' as used in R.S. 18:13-11 contemplates that 'good cause' must exist therefor. Termination -- which is equally available to both employee and employer -- may be for any reason.'

"In the instant matter, petitioner was clearly not 'dismissed' in violation of a contractual clause on November 15, 1971. Instead, on that date the Board chose to invoke a clause of a contract 'available to both employee and employer,' and terminated her employment with compensation according to the contract's terms payable for a 60-day period thereafter. At the time of this action the Board was under no legal compulsion to provide a hearing, although it did meet with petitioner, or to advance stated reasons for the action it took.\*\*\* "

The holding of the Commissioner, *ante*, that the Board's action herein was a legal exercise of its own discretion grounded on a specific contract between the Board and petitioner is not disturbed by an invocation of the statute N.J.S.A. 18A:25-7, or by claims that the Board reached forward beyond its own official life to take an action it was not required to take. However, some discussion of these claims is now required.

The statute of reference requires "prior written notice" to "teaching staff members" when the local board of education plans to discuss "any matter" which might affect continuation of such staff member in his "office, position or employment." It also states that such a staff member shall be "entitled" to have a person "of his own choosing" represent him at the time of such discussion. However, a weighing of this statute in the context of the circumstances herein provides no grounds, in the Commissioner's judgment, for censure of the Board, or any reason to abort the action that it took on September 6, 1972. Petitioner admits that he had knowledge of the meeting well in advance and the Petition states no claim that he was prevented from having a representative present with him when the meeting was held.



Claims that the Board improperly reached forward to take an action it was not required to take, or that petitioner had an entitlement to a statement of reasons or a hearing before the Board acted are, in the judgment of the Commissioner, also lacking in merit. The contract between the parties expressly contained a clause providing for "termination" and a "termination" date, and an exercise of such an option must of necessity carry with it the possibility of a decision that the contract would not be renewed.

Finally, it has long been held by the courts and by the Commissioner that, in New Jersey, probationary teaching staff members have no entitlement, when their contracts are not renewed, to a statement of reasons for the nonrenewal or to a hearing, absent a showing that the local board of education acted to deny employment for reasons proscribed by statutory or constitutional prescription. As the Commissioner recently stated again in *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County*, 1973 S.L.D. (decided May 3, 1973):

“\*\*\* This principle has been enunciated by the courts in several cases. In *Zimmerman v. Newark Board of Education*, 38 N.J. 65 (1962), the Supreme Court quoted from *People v. Chicago*, 278 Ill. 318, 116 N.E. 158, 160 (1917) to illustrate the ‘historically prevalent view’ as follows:

“ ‘\*\*\* A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ (sic) any applicant for any reason whatever or for no reason at all.\*\*\*’  
(*Emphasis supplied.*)

“However, the Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of a board of education. But,

“ ‘\*\*\* Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit.\*\*\*’ (*Ibid.*, at p. 71)

“In the matter of *Katz v. Board of Trustees of Gloucester County College*, 118 N.J. Super. 398 (Chan. Div. 1972), the petitioner was a college instructor who was not offered his fourth or tenure contract, nor was he given reasons for his nonrenewal. The Court held that:

“ ‘\*\*\* To require the board to refute plaintiff’s proofs of his teaching ability is to require it to give reasons, a requirement which would unduly restrict its discretionary function.\*\*\*’ (at p. 409)

“And,

“ ‘Inherent in our legislatively enacted tenure policy is the existence of a probationary period during which the board will have a chance

to evaluate a teacher with no commitment to reemploy him.’ (at. pp. 409-410)

“And elsewhere,

“ ‘To require such dismissals to be subject to procedures for tenure teachers would be costly and against the public policy of New Jersey. It would effectively amend our laws by judicial fiat. We will not take this step. Until our Supreme Court or the Supreme Court of the United States determines otherwise, we hold that it is the prerogative of a board of trustees to discontinue the employment of a nontenured teacher at the end of his contract with or without reason.’ ” (at p. 410)

“Petitioner cites *Board of Regents v. Roth*, 92 S. Ct. 2701; and *Perry v. Sindermann*, 92 S. Ct. 2694, to support her claim; but the Commissioner determines that although these cases qualify the principle set forth in *Zimmerman and Katz*, they show only that petitioner has not been denied any of her rights.’ ” (White, *supra*, at p. 11)

The Commissioner’s holding in the matter, *sub judice*, is the same and is founded similarly on the decisions of *Roth, supra*, and *Sindermann, supra*, and decisions of the New Jersey courts and the Commissioner as cited. It is noted here by the Commissioner that the petitioner in *Roth* was also aggrieved because his contract was not renewed and he invoked the Fourteenth Amendment of the U.S. Constitution in support of an argument that such nonrenewal was a denial of his rights to “liberty” and property. However, the Court held, with respect to an alleged denial of liberty, that:

“ ‘ ‘ ‘ ‘ It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.’ ” (Roth, *supra*, at p. 2708)

Further, the Court discussed the matter of employment as a “property” right and said:

“ ‘ ‘ ‘ ‘ To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.’ ”

The matter, *sub judice*, is set in the context of such elucidation. However, the Commissioner holds that petitioner’s “legitimate claim of entitlement” herein is to a fulfillment of all the stated terms of his contract for the 1971-72 school year, but that such entitlement does not extend beyond the conclusion of that year to embrace a continuing right to employment in school year 1972-73.

Accordingly, having found no factual matters outstanding herein which require determination, and finding no infringement of petitioner’s legitimate

claims of entitlement, the Commissioner determines that the Board's action in terminating petitioner's active service was correctly based upon a provision of his contract of employment, and that such action was otherwise a proper exercise of the Board's discretion. Therefore, the Commissioner accedes to the Motion advanced by the Board. The Petition is dismissed.

COMMISSIONER OF EDUCATION

June 27, 1973

**Nicholas P. Karamessinis,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the City of Wildwood,  
Cape May County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, June 27, 1973

For the Petitioner-Appellant, Nicholas P. Karamessinis, *Pro Se*

For the Respondent-Appellee, Cook and Knipe (Thomas P. Cook, Esq., of Counsel)

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

December 5, 1973

Pending before Superior Court of New Jersey

**Frances Licato,**

*Petitioner,*

*v.*

**Patrick J. Crilley, Robert J. Hoffman  
and Frank Cirigliano,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Albert L. Ichel, Esq.

For the Respondent, Alan J. Guttermann, Esq.

Petitioner, a resident of South Plainfield, Middlesex County, charges that three members of the South Plainfield Board of Education hereinafter "Board," were improperly engaged in certain campaign activities prior to their election to seats on the Board in February 1972, and that their actions since that time have been at various times both improper and illegal. She requests the Commissioner of Education to render a judgment to this effect and to instruct respondents to cease and desist from such alleged improprieties in the future. Respondents deny all allegations of impropriety and have advanced a Motion to Dismiss the Petition on the principal grounds that the Commissioner lacks jurisdiction to adjudicate the matter, and there is no relief that he can afford. An oral argument with respect to the Motion was conducted on April 18, 1973 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner.

Briefs have also been filed in support of and opposed to the Motion. The report of the hearing examiner is as follows:

The instant Petition was filed in the Division of Controversies and Disputes on November 8, 1972, but was delayed in adjudication to allow respondents time to secure the services of counsel. The Motion to Dismiss was filed *pro se* on March 13, 1973, prior to the engagement of counsel; thereafter, the present counsel was retained by respondents for preparation of the Brief and the oral argument which followed on April 18, 1973.

In summary, the Petition advances two kinds of allegations:

1. Allegations with respect to certain campaign activities which allegedly preceded the 1972 election of respondents to the South Plainfield Board of Education and;
2. Allegations with regard to respondents' actions since that time.

The allegations with respect to campaign activities are that:

1. In 1971, respondents were organizers and/or members and officers of a "Concerned Citizens Committee," hereinafter "Committee," which petitioner labels as a "special interest" group;
2. Respondents and the Committee employed a law firm to present their views to the South Plainfield Board in support of a teaching staff member of the South Plainfield Board; namely, Harry Lobby, who was involved in a controversy with the Board at the time;
3. Respondents became candidates for the South Plainfield Board in the 1972 election;
4. Respondents engaged in "improper" and "illegal pre-election activities."

This last facet of the charge is specifically concerned with campaign literature. According to petitioner, the literature was paid for by the New Jersey Education Association, hereinafter "N.J.E.A." and

"\*\*\* was all sent out as one package and apparently as a joint effort.\*\*\*" (Petition of Appeal, at p. 4)

It is assumed by the hearing examiner that the allegedly "joint effort" refers to an effort by the Committee and by the N.J.E.A. to elect respondents to membership on the South Plainfield Board, although this is nowhere clearly stated.

However, petitioner finds the appearance of a "conflict of interest" in the alleged association of the two groups since members of a local board must negotiate with employee representatives. She avers there was an additional conflict of interest in that, at the time subsequent to the election, respondents

"\*\*\* still had not severed their relationship or membership in the special interest group \*\*\* which then had a case pending concerning Harry Lobby against the Board of Education." (Petition of Appeal, at p. 5)

It is noted here by the hearing examiner that respondents were all elected to the South Plainfield Board in the February 1972 election, and have continued to serve on the Board since that time.

Petitioner avers that subsequent to such election, respondents engaged in further allegedly illegal or improper activities; namely,

1. They called an "illegal meeting" of the Board in March 1972 which met in a private home without the Superintendent of Schools;
2. They issued disruptive "minority board reports."

Petitioner also avers that Respondent Crilley:

1. As a Board member, participated in negotiating sessions in which his spouse was involved on the other side as President of the Secretarial Association;
2. Turned over confidential personnel files to persons unauthorized to have or review them.

The prayer of petitioner is that respondents:

“\*\*\* be directed to sever and terminate their interests in any special interest group which is involved in or supporting litigation concerning the board, that they be directed to refrain from calling and conducting meetings of the Board of Education in violation of the state statute; that they be directed to refrain from issuing ‘minority board reports,’ that respondents be directed to disqualify themselves with regard to contract negotiations wherein they are required to negotiate with groups headed by members of their own family and that said respondents be admonished not to turn over confidential school files to unauthorized persons and that the Commissioner take such further action against respondents as would be appropriate of the acts aforesaid.” (Petition of Appeal, at pp. 8-9)

Respondents jointly and separately avow by affidavit that they had no knowledge of the campaign literature to which petitioner refers. They also state that the meeting to which petitioner objects was approved by the whole Board by a vote of seven to one, and they deny that any of their activities or actions could be construed to be conflicts of interest. Respondent Crilley separately avows that he did meet with representatives of the Secretarial Association as one of five members of the Board, and he did ask questions, but that he

“\*\*\* did not vote on any matter then or ever in which I have had or may have had a conflict of interest with my position as a member of the Board of Education.\*\*\*” (Affidavit of Patrick J. Crilley, at p. 4)

Respondents contend that such allegations are incorrectly founded on hearsay evidence, rather than the personal knowledge of petitioner and that

“\*\*\* Personal knowledge must be the criterion of a petition, otherwise, anyone could verify a petition as has been done here.” (Brief of Respondents, at p. 3)

In respondents’ view, the Petition is therefore a “sham” when viewed in the context of the rules of the Division of Controversies and Disputes, (*N.J.A.C.* 6:24-4) for

“\*\*\* Although the format of verification has been satisfied, the intent and purpose of the rule have been demeaned.\*\*\*” (Brief of Respondents, at p. 1)

Additionally, respondents deny all of the claims which the Petition advances and submit two principal arguments in support of the instant Motion to Dismiss. These arguments are that the allegations herein do not rise to the level necessary to be considered as charges which arise under the school laws (*N.J.S.A. 18A*); and in any event, they fail to state a claim upon which relief may be granted.

With respect to the first argument — that the Commissioner lacks jurisdiction — respondents cite the provision of *N.J.S.A. 18A:6-9* which provides:

“The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.”

Subsequently, respondents aver that the instant Petition is “\*\*\* conspicuous with its absence of any allegations or charges of violation of specific school laws \*\*\*”, “although the Petition does invoke *N.J.S.A. 18A:12-2* in its introductory recital. (Brief of Respondents, at p. 4) This statute provides that “No member of any board of education shall be interested directly or indirectly in any contract with or claim against the Board.” However, in respondents’ opinion nothing which is alleged herein could be considered a violation of such a statutory prescription since

“\*\*\* Petitioner does not charge that respondents, while members of the Board of Education were interested in any contract with or claim against the Board \*\*\*” (Brief of Respondents, at p. 5)

except by “\*\*\* inferences and by innuendo \*\*\*.” Respondents note, additionally, that there is no allegation that Respondent Crilley ever voted in a formal meeting on a contract in which he had a “direct or indirect” claim. They also maintain that any assertion by petitioner that respondents “called” an illegal meeting of the Board cannot be given credence because respondents comprised a minority of three in a total Board membership of nine at the time the alleged illegal meeting was held.

Indeed, respondents state:

“\*\*\* assuming the truthfulness of each and every allegation of the petition, no improper or illegal conduct can be discerned.\*\*\*” (Brief of Respondents, at p. 7)

Additionally, they observe that even if the issuance of “minority reports” was a violation of school law, which is denied, the issue is moot since respondents are now members of a majority group on the Board.

With respect to the charge that Respondent Crilley circulated confidential documents, respondents avow:

“\*\*\* There is no assertion that the matters he may have disclosed were properly classified as confidential or that the contents thereof were official documents.\*\*\*” (Brief of Respondents, at p. 8)

In support of their argument that the Commissioner does not have authority to decide disputes which do not arise in the context of school law, respondents cite *Rainer's Dairies v. Board of Education of Collingswood*, 1967 S.L.D. 260 and *Padukow v. Board of Education, Township of Jackson*, 1967 S.L.D. 251; reversed State Board of Education, 1968 S.L.D. 263; *affd. Sup. Ct., (App. Div.)* 1968 S.L.D. 266. Further, respondents cite *John N. Harvey v. Board of Education of the Township of Brick*, and *Ross W. Smith, Ocean County*, 1971 S.L.D. 144, in support of an argument that the Commissioner does not view cases involving allegations of conflict of interest as within the scope of the school laws subject to the jurisdiction of the Commissioner. They also cite *Singer v. Sandall et al.*, 1971 S.L.D. 594, and *Boult and Harris v. Board of Education of Passaic*, 1939-49 S.L.D. 7 as foundation for an opinion that the Commissioner will not substitute his judgment for that of members of local boards of education, absent a shocking abuse of discretion. These two latter decisions contain the following sentence with respect to the “responsibility” of local boards of education:

“\*\*\* boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.\*\*\*” (*Boult, supra*, at p. 13)

In their avowal that petitioner has failed to state a claim on which relief can be granted, respondents state that petitioner's prayer herein (recited *ante*) is of an “injunctive and equitable” nature with regard to issues which are either already moot, pose no discernible illegality, or provide no grounds for action. They cite *Jones v. Kolbeck*, 119 N.J. Super. 229 (*App. Div.* 1972) as a case which clearly stated that the holding of public office does not require complete severance of ties with associations or organizations; but, in any event, respondents aver:

“\*\*\* there is no allegation or assertion that respondents are interested in any organization which still has a case pending, or is still a litigant in a position adverse to the Board.\*\*\*” (Brief of Respondents, at p. 11)

Petitioner's Answering Brief avers that the claims advanced by the Petition do constitute a controversy which is justifiable under the school laws (N.J.S.A. 18A) and that the Petition “\*\*\* satisfies all requirements of the notice as required by the due process of the New Jersey and the U.S. Constitution.\*\*\*” (Petitioner's Answering Brief, at p. 1)

She cites *Buren v. Albertsen*, 22 A. 1083, 54 N.J.L. 72, cited “with approval” in *Swede v. Clifton*, 125 A. 2d 870, to buttress an argument that an election dispute is a controversy under the school law and that the issues raised by the Petition in this regard which involve the “\*\*\* violation of the election laws \*\*\*” are clearly within the jurisdiction of the Commissioner. Further,



petitioner states there is a fact issue to be determined with respect to whether or not respondents maintained their membership in the Committee after they became members of the South Plainfield Board and whether or not they have continued, together with the Committee, in support of Harry Lobby in his continuing suit against the Board. If it is determined that such was the case, petitioner avows that

“\*\*\* Respondents have violated the provisions of *N.J.S. 18A:12-2*.\*\*\*”  
(Petitioner’s Answering Brief, at p.3)

Petitioner also suggests that with respect to Respondent Crilley and the alleged negotiation with his spouse on matters of personal interest,

“\*\*\* that the proofs in this matter may very well disclose that he also voted on this subject as well as negotiated with his own wife concerning the same. \*\*\*” (Petitioner’s Answering Brief, at p. 4)

Contrary to respondents’ interpretation of *Boult and Harris, supra*, it is petitioner’s view that:

“\*\*\*the Commissioner has the right to act concerning the actions of Board members where the said action constitutes an abuse of their discretion in a shocking manner.\*\*\*” (Petitioner’s Answering Brief, at p. 3)

Petitioner further maintains that there is a fact question outstanding with relationship to the controverted “meeting” of the Board in March 1970; specifically, whether or not it was an “informal gathering” or an “illegal meeting.” In this view, a determination in this regard may be made only at a time subsequent to presentation of proofs.

Finally, petitioner advocates that certain proofs offered in a hearing on the merits of the Petition, *Board of Education of the Township of South Plainfield v. Robert Jarrett*, abandoned by the Board in an action of April 17, 1973, be incorporated by reference as conduct adjudged improper and illegal. In conclusion, petitioner requests dismissal of the Motion and an “early hearing.”

The hearing examiner believes the parties to this dispute have set forth their respective views summarized *ante*, in adequate detail. But, he observes that it is true, as respondents maintain, that the Petition is devoid of specific charges that any of the respondents ordered, paid for, or caused to be delivered, the campaign literature to which petitioner objects. The charge seems to be that the N.J.E.A. did, but that there was a “joint effort” in this regard which somehow involved respondents or members of the Committee. However, the hearing examiner opines that the allegation *per se* is so amorphous with respect to respondents’ participation in the joint effort, that a hearing on the merits of the charge would be impossible without a delineation of the charge on remand. The hearing examiner also opines that such a remand for delineation would be an exercise in futility in the absence of a determination that the “joint effort” could be adjudged illegal even if true. The hearing examiner, for the reasons

cited by respondent, cannot so judge it, and in the time frame of this decision, he recommends dismissal of this phase of the Petition rather than a remand for delineation.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and is in agreement that the imprecise and indefinite nature of the charges against respondents with respect to the 1972 election campaign should be dismissed forthwith. The Commissioner is also constrained to observe that the charges are unaccompanied by any offer of proof that the alleged irregularities changed the outcome of the election. In the absence of such an offer of proof, the alleged irregularities would provide no cause to vitiate the election or provide the possibility of other relief which the Commissioner could grant at this juncture.

However, the Commissioner on a previous occasion has had cause to consider allegations similar to those which are implied but nowhere directly stated in the Petition, *sub judice*. Specifically, *In the Matter of the Annual School Election Held in the Township of Dover, a Constituent District of the Toms River Regional School District, Ocean County, 1967 S.L.D. 52*, with reference to the support of candidates by a "political organization," the Commissioner quoted the Court in *Botkin v. Westwood, 52 N.J. Super. 416, 431 (App. Div. 1958)* as follows:

“\*\*\* The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations\*\*\*.” (at p. 54)

However, the Commissioner in that instance found no reason to set aside the election and cited *In the Matter of the Annual School Election Held in the Southern Regional High School District, Ocean County, 1964 S.L.D. 47, 48*, saying:

“\*\*\* If the mere assertion that a political organization had supported a particular nominee were enough to void an election, it would be a simple matter \*\*\* to eliminate an opponent by arranging to have a political group endorse him and thereby give him the kiss of death.\*\*\*” (at p. 48)

While it is true the allegations herein do not concern a political organization but an organized teachers' group, the analogy is clear, and such allegations could not be the ultimate reason for setting aside an election or otherwise censoring candidates in an election for seats on local boards of education. The candidates are responsible to the electorate for their actions and it is the electorate, not the Commissioner, which must make the judgment with regard to such propriety. In the matter *sub judice*, the electorate did choose respondents for seats on the South Plainfield Board of Education. In 1973 the electorate spoke again in support of respondents and their work on the Board.

In such a situation, how can it be argued that the Commissioner (in the absence of precise allegations which if found true in fact would constitute illegality under the school laws) should interpose a judgment that the voters of South Plainfield have refused to make; namely, that respondents' actions have represented an improper exercise of discretion? The Commissioner holds that it cannot be so argued, and he finds nothing herein which would justify his intervention.

There are, of course, other allegations herein concerned with the conduct and discretion of respondents and the South Plainfield Board — but respondents and the Board are not responsible to the Commissioner for such conduct or use of discretion, but to the electorate they represent.

On a previous occasion in *Angelina Kock Downs et al. v. Board of Education of the District of Hoboken*, 1938 S.L.D. 515; affd. State Board of Education, 1938 S.L.D. 519; affd. N.J. Supreme Court, 1938 S.L.D. 528; affd. E. & A., 1938 S.L.D. 531, the State Board of Education had reason to consider the matter of "motives" which actuated members of local boards of education. It said in this regard:

"\*\*\* 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.

" ' So long as a \*\*\* board of education \*\*\* acts within the authority conferred upon \*\*\* it by law, the courts are without power to interfere with, control or review \*\*\* its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof \*\*\*, 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.' 56 C.J., page 342. Citing numerous authorities.

" '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 vs. Springfield, etc. Union Free High School Dist.* 186 Wis., 342; 202 N.W. 788. \*\*\*\*)' (at p.526)

Such principles are still valid today and have been set forth in other decisions of the Commissioner.

Thus, in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County*, 1967 S.L.D. 125 the Commissioner discussed his "quasi-judicial" powers to decide controversies and disputes under the school laws and he said:

"The Commissioner of Education has supervision over all of the public schools of the State and he is required to make certain that the terms and

policies of the school laws are effectuated. *Laba v. Newark Board of Education*, 23 N.J. 364 (1957); R.S. 18:3-7. He is also vested with quasi-judicial powers to hear and decide controversies and disputes which arise under the school laws. R.S. 18:3-14. However, such powers are not without bounds, for:

“ \*\*\* The School Law vests the management of the public schools in each district in the local boards of education. and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.’ *Kenney v. Board of Education of Montclair*, 1938 S.L.D. 647, affirmed State Board of Education, 649,653.\*\*\*” (at p. 127)

Further:

“\*\*\* it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. *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 (E. & A. 1947) \*\*\*.” (at p. 127)

The charges herein other than those involving election campaign activities are clearly, for the most part, that respondents abused their rights to exercise discretion: either jointly or singly, that they decided to issue, and did issue, minority board reports; circulated a document labeled “confidential”; called a meeting of the board. But, in the context of the opinions, *ante*, such actions by local board members are not subject to review by the Commissioner under the school laws for the reasons cited, *ante*, and there is no code of ethics embedded in other statutory prescription which is applicable.

Other charges herein are charges involving conflict of interest. In this regard the Commissioner said in *Harvey, supra*, that such charges could not be held up to scrutiny in the context of school laws because there are none except the statute which prohibits a direct or indirect interest by board members in a “contract with or claim against the board.” (N.J.S.A. 18A:12-2) The allegations herein cannot be held, in the Commissioner’s judgment, to be covered by such a prohibition. They are, instead, the kinds of allegations which were considered in *Harvey, supra*, wherein it was said:

“\*\*\*The Commissioner observes that the Legislature could, in its wisdom, define in precise form the guidelines that should govern the conduct of all civil service workers and members of government at all levels. However,

there has been little legislative action in this regard, and none with regard to the specific conflicts alleged herein. Instead, the Legislature has preferred to rely on judicial guidelines and the so-called 'common law' generally said to be applicable in such matters. This law recognizes prohibitions against 'biased decision makers,' and at the same time holds that all public service should be free of even the taint of double standards. However, there is little guidance from the 'common law' to be found for adjudication in peripheral areas. *Pressey v. Hillsborough Township*, 37 N.J. Super. 486; *Zell v. Borough of Roseland*, 42 N.J. Super. 75; *Aldom v. Roseland*, 42 N.J. Super. 502. As applicable to school board members, the common law requires exclusive loyalty to the public and no mingling of the exercises of self-interest with the duties of the board.

"However, in the absence of more precise legislative guidelines and because, as noted, the courts have traditionally been the arbiters of such disputes, the Commissioner leaves to the courts a determination of the allegations contained in Count I of this petition. It is observed that petitioner cites the case of *Russell v. Bendixen*, decided by the Commissioner January 12, 1970, in advancing the argument that the Commissioner has taken jurisdiction in the past over issues such as those contained herein. The argument is not without merit in the absence of knowledge of the circumstances of that decision. However, it is stated here for the record that that decision ensued at the request of the parties following a common agreement that no conflict existed. It is not a substantial base on which to rest a consideration of the issues raised herein. \*\*\*" (at pp. 9-10)

Subsequently the Commissioner declined jurisdiction in *Harvey, supra*, on the ground there was no relief he could afford.

Accordingly, for the reasons stated *ante*, the Commissioner finds no reason to proceed further with the instant Petition. The complaints it recites are imprecise with respect to alleged campaign activities and otherwise do not pose the possibility of relief. Subsequent allegations are similarly deficient in this regard and therefore the Motion before the Commissioner at this juncture is granted.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1973

**In The Matter Of The Annual School Elections  
Held In The School District Of The City Of  
Lambertville and In The South Hunterdon  
Regional High School District, Hunterdon County.**

**COMMISSIONER OF EDUCATION**

**Decision**

Pursuant to letter requests filed by Edward J. Carmody and Joseph F. Shanahan, alleging certain irregularities in the conduct of the annual school elections held on February 6, 1973 in the South Hunterdon Regional High School District, and on February 13, 1973 in the City of Lambertville School District, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education, at the State Department of Education, Trenton, on March 8, 1973. The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct at the elections by some of the challengers are as follows:

Edward J. Carmody and Joseph F. Shanahan, hereinafter "complainants," aver specifically that:

1. Certain challengers at both elections made lists of those voting and carried them out of the polling places with them.
2. The lists compiled at the February 6, 1973 school board election were used by the challengers for their own private purposes to solicit votes for persons they favored as board members at the February 13, 1973 school board election.

Complainants pray that:

1. The Commissioner finds that it is improper to take challenger lists out of the polling place and that any such lists should be destroyed;
2. That the February 13, 1973 election be declared null and void, if in fact their allegations are true;
3. That the Commissioner order the postponement of taking office by any of the candidates at the February 13, 1973 election until the result of this inquiry is announced;
4. That the Commissioner order all school boards in the State to give instructions to their election workers which will insure that these alleged irregularities will not be repeated in the future.

The two complaints are combined as one because the Lambertville School District is a part of the South Hunterdon Regional High School District for grades nine through twelve, and the same complainants, challengers, and similar charges of irregularities are present in both school board elections.

Gary W. Warford, Samuel J. Warford, Jr., and George W. Rainforth, hereinafter "challengers," deny that they committed the irregularities as alleged. The challengers admit compiling and taking out of the polling place a list of names of voters they knew had not cast ballots, for the purpose of encouraging them to go to the polls and vote.

The challengers allege that it is Complainant Shanahan who was in violation of *N.J.S.A. 18A:14-17*, since he, too, was a challenger for a candidate and did not wear a mark of identification as required by statute. They allege, also, that testimony educed at the inquiry shows that Complainant Shanahan admitted copying names from the official poll list.

Several witnesses testified at the inquiry; none saw any lists removed from the polling place. Nor did either complainant see the challengers take a list from either polling place.

Complainant Shanahan admitted in his testimony that he did not wear his challenger's button.

The hearing examiner finds that there was no evidence educed through the testimony of witnesses, nor was there offered any list allegedly compiled at the elections showing that the challengers committed the alleged offenses.

Absent any proof, whatsoever, by complainants, and finding no violations by the accused as the result of his inquiry, the hearing examiner concludes that the allegations cannot be supported and recommends that they be dismissed. This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings therein.

The Commissioner has commented previously on the compilation and use of lists made at the polls by challengers, and observes that the powers of challengers, as specified in *N.J.S.A. 18A:14-18*, are as follows:

"Each challenger may in the polling district for which he is appointed:

"a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of the voting machine is closed, and ask all necessary questions to determine this right; and

"b. Be present while the votes are being counted, in such position that he can observe the marking on the ballots but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof."

Nowhere in the statute is a challenger given or denied the authority to



make, what is in essence, a duplicate poll list. However, the Commissioner addressed this question *In the Matter of the Annual School Election Held in the School District of the Borough of Watchung, Somerset County, 1972 S.L.D. 225*, affirmed State Board of Education, 231.

In that decision, the Commissioner quoted from *In the Matter of the Annual School Election Held in the Town of Newton, Sussex County, 1967 S.L.D. 28*, as follows:

“\*\*\* The election officials at one of the polling places admitted that they kept a list of voters as they appeared to cast their ballots. The keeping of such a list was requested by a member of the board of education. It was intended to be used as a check of voters who had not yet appeared with the apparent purpose of urging them to go to the polls to vote. Members of the election board stated that this had been a common practice in previous elections.

“It appears that the list in question was not used in this election. When the propriety of keeping such a list was questioned by one of the challengers, it was not collected by the person who had requested it and the list was evidently discarded. Petitioner makes no complaint that the list was used or that it prejudiced the results of the election. His asserted purpose in raising the issue is to determine the propriety of the compilation of such a list by the election officials in order to quiet the question in future elections.

“The Commissioner knows of no statute or rule on this specific point. If the purpose of such a list is to encourage as large a turnout of the voters as possible, its motivation cannot be questioned. However, it appears to the Commissioner that the preparation of such a list is more properly the function of appointed challengers than of election officials. The election officials have specific statutory duties to perform which require their full attention and concern. Because of the need to perform their assignments with the utmost care and attention to all the niceties of proper election procedure, the election board should not concern itself with the preparation of voter lists or other ancillary activities but should leave such chores to properly designated challengers. It is also essential that persons appointed to conduct elections avoid even the appearance of partiality or prejudice with respect to any candidate or question to be voted on. For these reasons that (sic) [the] Commissioner suggests that election officials would be well advised to refrain from involvement in any procedures other than those required for the proper conduct of an election, however meritorious their purpose may be.” (at pp. 28-29)

In *Watchung, supra*, the Commissioner commented that the legislative intent is that after an election the *official poll list* should no longer be available to the general public. *N.J.S.A. 18A:14-62* That official poll list is compiled primarily for the purpose of comparing signatures at school elections, and to be reviewed by the Commissioner or his designee on occasions when official recounts of votes cast at, or formal inquiries into, such elections are directed.



In addition, the Commissioner commented that any further use of a list of voters' names, subsequent to the closing of the polls after a school election, would be improper and a usurpation of the authority given to challengers pursuant to *N.J.S.A. 18A:14-18*. The Commissioner determined, therefore, that any other compiled lists should be destroyed.

The Commissioner notes the similarity of one aspect of this complaint, the handling of nonofficial poll lists, and similar complaints that the Commissioner has reviewed in detail in *Newton* and *Watchung*, *supra*, and the New Jersey Superior Court's decision (*App. Div.*) in *Shanahan v. New Jersey State Board of Education*, 1972 S.L.D. 690.

The Superior Court decision in *Shanahan*, denying him the right to use the official poll list for electioneering was the basis for the Commissioner's decision in *Watchung*. In *Watchung* the Commissioner quoted *Shanahan* as follows:

“\*\*\* The Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*, declares it to be public policy of this State that public records shall be readily accessible for examination by citizens of this State, with certain exceptions, for the protection of the public interest. One of the exceptions is where the examination of the record is governed by another statute. *N.J.S.A. 47:1A-2*.

“ *N.J.S.A. 18A:14-61* and *62*, which pertain to elections of members of a board of education, provide that immediately following an election the poll lists, ballots and tally sheets shall be placed in a sealed package and delivered to the secretary of the board of education. The secretary shall, within five days after the date of the election, forward the sealed package to the county superintendent who shall preserve the records for one year.

“ ‘We conclude that *N.J.S.A. 18A:14-61* and *62* clearly fall within the meaning of ‘any other statute,’ one of exceptions set forth in the Right to Know Law. The legislative requirement that the poll lists shall be *sealed* and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election.’ (*Emphasis supplied.*) \*\*\*” (at p. 230)

Although reasoning and logic lead the Commissioner to the conclusion that if the official poll list, compiled pursuant to statute, must be sealed and kept secret, then no copies or compilations of lists of voters' names which are tantamount to poll lists, may be kept or used after the close of the polls.

However, the Commissioner has reviewed his earlier decision in *Watchung*, *supra*, with respect to his directive that after an election, lists compiled by challengers be destroyed. That directive was based on the Superior Court

decision in *Shanahan, supra*, which denied Shanahan the right to use the official poll list for the purpose of electioneering. Although a logical extension of the *Shanahan* decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the *Watchung* decision, that such a directive is unenforceable.

There is no practical way to supervise the collection or destruction of unofficial lists of voters' names and any attempt at enforcement would result in meaningless litigation.

The lists in contention may be distinguished by the fact that the official poll list is a compilation of the signatures of voters; whereas any list compiled by a challenger is only that person's construction of the names of those who voted.

The Commissioner determines that a remedy which is not enforceable cannot be applied; therefore, he overrules that portion of his decision which calls for destruction of unofficial lists of voters' names compiled by challengers.

The Superior Court decision in *Shanahan*, therefore, will not be extended by the Commissioner of Education to apply to unofficial lists of voters' names.

In all other respects the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1973

**In The Matter Of The Annual School Elections Held  
In The School District Of The Borough Of Watchung  
And In The Watchung Hills Regional High School District,  
Somerset County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Robert J. Cornell, *Pro Se*.

For the Respondent, Robert J. T. Mooney, Esq.

A letter complaint was filed by Robert J. Cornell, hereinafter "complainant," on January 25, 1973, alleging that there was a failure on the part of the Board of Education of the Watchung Hills Regional High School District, hereinafter "Board," to comply fully with the Commissioner's decision of May 11, 1972. *In the Matter of the Annual School Election Held in the School District of the Borough of Watchung*, affirmed State Board of Education, 1972 S.L.D. 231 An inquiry into the complaint was held at the State Department of Education, Trenton on February 6, 1973 the day of the Regional High School election by a hearing examiner appointed by the Commissioner.

Subsequently, complainant filed two letter requests alleging certain irregularities in the conduct of the annual school elections held on February 6, 1973 in the Watchung Hills Regional High School District, and on February 13, 1973 in the School District of the Borough of Watchung. Mrs. Jacqueline C. Post also filed a complaint concerning irregularities at the Borough of Watchung School District election on February 13, 1973. Thereafter, an inquiry was conducted on the alleged irregularities in the office of the Somerset County Superintendent of Schools on March 14, 1973 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The inquiries held on February 6, 1973, and on March 14, 1973, will be treated as one, since they are concerned with the same kinds of specific complaints of election irregularities. The announced results of the election of school board members were not challenged; however, specific allegations of improper conduct at the elections by some of the challengers, and alleged improper advice given to election board workers by Board officers were as follows:

1. The Secretary-Business Manager of the Watchung Hills Regional High School District Board of Education and the Secretary-Business Manager of the Borough of Watchung School District, instructed the judge of the election and the poll workers that challengers at the polls could make a list of people voting and use it for whatever purpose they chose.
2. A challenger at the February 6, 1973 election compiled such a list.
3. Two challengers at the February 13, 1973 election compiled such a list.

4. Mrs. Post complained that she chose not to vote because she refused to have her name put on an unofficial list of voters' names.

Complainant prays that the Commissioner verify these complaints and take appropriate steps to insure that these irregularities do not continue in future elections.

Both Boards admit that there is a close relationship between them in that they are both represented by the same attorney; that the same election procedures were followed by both Board Secretaries; and that those procedures were adopted upon their attorney's advice based upon his interpretation of applicable law and the Commissioner's decision in *Watchung, supra*.

The Board of Education of Watchung Hills Regional High School District was not a litigant in *Watchung, supra*. On instructions from the Board attorney, the Board Secretary-Business Manager did not instruct the election workers to deny the use of lists of voters' names compiled by challengers.

The Board of Education of the Borough of Watchung, also does not interpret the Commissioner's decision in *Watchung, supra*, to mean that challengers are not entitled to make and use lists of voters who voted at the annual school election. Rather, the Board argues that the Commissioner's decision states that election officials may not make a list of voters *other than the official poll list*.

Mrs. Post's complaint was not denied.

Complainant's basic charge, with respect to the compilation and use of a list of voters' names made by a challenger, was corroborated by one of the challengers. Mrs. Dorothy Hovi, a Board member and challenger at the school elections, testified that she made a list of names of voters who cast their votes at the annual school election. She, also, presented that list of names for examination by the hearing examiner. She testified further that her interpretation of the Commissioner's decision in *Watchung, supra*, was that challengers were not directed to destroy lists of names they compiled as complainant avers.

Petitioner's complaint was corroborated also by an official statement issued by the Watchung Board on January 18, 1973 in which that Board interpreted the Commissioner's decision in *Watchung, supra*, to read that challengers could make and use their own list of voters' names.

The specific issue herein disputed is whether or not challengers have the authority to make and use lists of voters names, during and subsequent to an annual school election.

The powers of challengers are specified in N.J.S.A. 18A:14-18, as follows:

"Each challenger may in the polling district for which he is appointed:

- a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of the voting machine is closed, and ask all necessary questions to determine this right; and
- b. Be present while the votes are being counted, in such position that he can observe the marking on the ballots but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof."

The Commissioner addressed the general question of compiling lists of voters' names and the compilation and use of official poll lists in prior decisions; specifically, *Watchung, supra*.

\* \* \* \*

The Commissioner has read the report and the findings of the hearing examiner and notes the similarity of this complaint with another filed this year from another school district and with others filed on similar complaints in prior years.

Specifically, the Commissioner has reviewed in detail the handling of nonofficial poll lists *In the Matter of the Annual School Election Held in the Town of Newton, Sussex County*, 1967 S.L.D. 28, and quoted from the Superior Court (App. Div.) decision in *Shanahan v. New Jersey State Board of Education*, 1972 S.L.D. 690, in his decision on *Watchung, supra*.

The Commissioner quoted from *Newton* as follows:

"\*\*\* The election officials at one of the polling places admitted that they kept a list of voters as they appeared to cast their ballots. The keeping of such a list was requested by a member of the board of education. It was intended to be used as a check of voters who had not yet appeared with the apparent purpose of urging them to go to the polls to vote. Members of the election board stated that this had been a common practice in previous elections.

"It appears that the list in question was not used in this election. When the propriety of keeping such a list was questioned by one of the challengers, it was not collected by the person who had requested it and the list was evidently discarded. Petitioner makes no complaint that the list was used or that it prejudiced the results of the election. His asserted purpose in raising the issue is to determine the propriety of the compilation of such a list by the election officials in order to quiet the question in future elections.

"The Commissioner knows of no statute or rule on this specific point. If the purpose of such a list is to encourage as large a turnout of the voters as possible, its motivation cannot be questioned. However, it appears to the Commissioner that the preparation of such a list is more properly the

function of appointed challengers than of election officials. The election officials have specific statutory duties to perform which require their full attention and concern. Because of the need to perform their assignments with the utmost care and attention to all the niceties of proper election procedure, the election board should not concern itself with the preparation of voter lists or other ancillary activities but should leave such chores to properly designated challengers. It is also essential that persons appointed to conduct elections avoid even the appearance of partiality or prejudice with respect to any candidate or question to be voted on. For these reasons the Commissioner suggests that election officials would be well advised to refrain from involvement in any procedures other than those required for the proper conduct of an election, however meritorious their purpose may be.\*\*\*" (at pp. 28-29)

In *Watchung*, the Commissioner commented that the legislative intent is that after an election, the *official poll list* should no longer be available to the general public. *N.J.S.A. 18A:14-62*

That official poll list is compiled primarily for the purpose of comparing signatures at school elections, and to be reviewed by the Commissioner or his designee on occasions when official recounts of votes cast at, or formal inquiries into such elections, are directed.

Additionally, the Commissioner commented that any further use of a list of voters' names, subsequent to the closing of the polls after a school election, would be improper and a usurpation of the authority given to challengers pursuant to *N.J.S.A. 18A:14-18*. The Commissioner determined, therefore, that any other compiled lists should be destroyed.

The Superior Court decision in *Shanahan*, denying him the right to use the official poll list for electioneering was the basis for the Commissioner's decision in *Watchung*. In *Watchung* the Commissioner quoted *Shanahan* as follows:

\*\*\*\* "The Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*, declares it to be the public policy of this State that public records shall be readily accessible for examination by citizens of this State, with certain exceptions, for the protection of the public interest. One of the exceptions is where the examination of the record is governed by another statute. *N.J.S.A. 47:1A-2*.

" '*N.J.S.A. 18A:14-61 and 62*, which pertain to elections of members of a board of education, provide that immediately following an election the poll lists, ballots and tally sheets shall be placed in a sealed package and delivered to the secretary of the board of education. The secretary shall, within five days after the date of the election, forward the sealed package to the county superintendent who shall preserve the records for one year.

" 'We conclude that *N.J.S.A. 18A:14-61 and 62* clearly fall within the meaning of 'any other statute,' one of exceptions set forth in the Right to

Know Law. The legislative requirement that the poll lists shall be *sealed* and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. (sic) He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election.' (*Emphasis supplied.*) \*\*\*\*" (at p. 230)

Although reasoning and logic lead the Commissioner to the conclusion that if the official poll list, compiled pursuant to statute, must be sealed and kept secret, then no copies or compilations of lists of voters' names which are tantamount to poll lists, may be kept or used after the close of the polls.

In *Watchung*, the Commissioner directed "\*\*\*\* that any such list compiled be destroyed." (at p. 230)

However, the Commissioner has reviewed his earlier decision in *Watchung* with respect to his directive that after an election, lists compiled by challengers be destroyed. That directive was based on the Superior Court decision in *Shanahan, supra*, which denied Shanahan the right to use the official poll list for the purpose of electioneering. Although a logical extension of the *Shanahan* decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the *Watchung* decision, that such a directive is unenforceable.

There is no practical way to supervise the collection or destruction of unofficial lists of voters' names and any attempt at enforcement would result in meaningless litigation.

The lists in contention may be distinguished by the fact that the official poll list is a compilation of the *signatures* of voters; whereas any list compiled by a challenger is only that person's construction of the names of those who voted.

The Commissioner determines that a remedy which is not enforceable cannot be applied; therefore, he overrules that portion of his decision which calls for destruction of unofficial lists of voters' names compiled by challengers.

The Superior Court decision in *Shanahan, supra*, therefore, will not be extended by the Commissioner of Education to apply to unofficial lists of voters' names.

The complaint is dismissed and the results of the school board elections held in the Borough of Watchung and the Watchung Hills Regional High School District, on February 6 and February 13, 1973, will stand as announced.

COMMISSIONER OF EDUCATION

June 29, 1973

Mr. and Mrs. Lawrence E. Smith,

*Petitioners,*

*v.*

Board of Education of the Township of Gloucester,  
Camden County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Mr. and Mrs. Lawrence E. Smith, *Pro Se*

For the Respondent, Maressa, Shoemaker and Borke (Joseph A. Maressa, Esq., of Counsel)

Petitioners, parents of a first-grade child who attends the Gloucester Township Public Schools, allege that the Board of Education hereinafter "Board," has improperly denied them reimbursement for expenses they incurred transporting their daughter to and from special education classes during the 1971-72 school year.

The matter has been submitted to the Commissioner on the pleadings, stipulations and Briefs of both parties.

During the 1971-72 school year, petitioners' daughter was a first-grade pupil enrolled in the Chews Elementary School, and she attended a special education class in the district's Grenloch Elementary School three half-days per week.

Petitioners aver that during August 1971, they were asked by the Board to provide transportation for their child from the Chews Elementary School to the Grenloch Elementary School and home on Monday, Wednesday and Friday afternoons. It is further alleged that the request for transportation made by the Board was said to be a temporary arrangement until such time as transportation could be provided by the Board.

Petitioners maintain that, had they acquiesced to the Board's request, their child "\*\*\*\* would not be provided with the special education that she required.\*\*\*\*" (Petition of Appeal, at p. 2) Therefore, petitioners assert that under those circumstances, the agreement to provide transportation between the two schools and home was involuntary and made under duress.

During June 1972, petitioners requested remuneration for transportation expenses incurred, citing *N.J.S.A. 18A:39-1*. Petitioners argue that because they live remote from the schoolhouse, the Board has the obligation to provide their daughter with transportation to and from school pursuant to *N.J.S.A. 18A:39-1* which reads as follows:



“Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.

“When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed \$150.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive \$150.00 or an amount computed by multiplying \$0.8333 times the number of school days remaining in the school year at the time of registration, whichever is the smaller amount. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized, shall be prorated by the regional district among the constituent districts on a per pupil basis after approval of such cost by the county superintendent. This section shall not require school districts to provide any transportation to pupils attending a school other than a public school where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of this Title or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

“Nothing in this section shall be so construed as to prohibit a board of

education from making contracts for the transportation of pupils to a school in an adjoining district when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

“Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to chapter 46 of this Title.”

They also argue that:

“\*\*\* ‘remote from the schoolhouse’ shall mean 2½ miles or more for high school pupils (grades 9-12) and 2 miles or more for elementary pupils (grades K-8), except for pupils suffering from physical or organic defects.\*\*\*” (*N.J.A.C. 6:21-15*)

Petitioners argue also, that even if their child is not entitled to transportation pursuant to *N.J.S.A. 18A:39-1*, she is entitled to transportation pursuant to *N.J.A.C. 6:28-3.20* which reads in part as follows:

“(a) The board of education shall furnish daily transportation within the State to all children classified as handicapped who shall qualify therefor pursuant to law and State regulations and shall furnish such transportation for a lesser distance to any handicapped child upon the recommendation of the basic child study team or school physician subject to the approval of the chief school administrator of the district and the county superintendent of schools.\*\*\*”

Petitioners pray that the Commissioner direct the Board to reimburse them in the amount of \$150, which is the amount paid to parents of private school pupils pursuant to *N.J.S.A. 18A:39-1*.

The Board does not deny that it asked petitioners to provide the transportation described, *ante*, and avers that petitioners were informed of this fact when they requested transportation in August 1971.

The Board argues, however, petitioners’ child has not been classified as a handicapped child pursuant to *N.J.S.A. 18A:46-1 et seq.*; therefore, she is not entitled to those provisions, nor is she eligible to invoke the provisions offered handicapped children pursuant to *N.J.A.C. 6:28-3.20 et seq.*

There is no claim by petitioners that their child has been classified as a handicapped child by the Board; however, their own private medical examinations show that their child is indeed handicapped.

It appears to the Commissioner that although petitioners’ child was not classified as a handicapped child, the Board clearly agreed that she could attend its Grenloch Elementary School on Monday, Wednesday and Friday afternoons for the purpose of participating in special education classes.

At this juncture, the Commissioner is constrained to comment on petitioners' request for reimbursement for transportation of their child and the intent of *N.J.S.A. 18A:39-1* as it relates to the payment of moneys to certain parents of nonpublic school pupils.

It is indisputable that it is the Board's responsibility to provide transportation for petitioners' child who lives remote from the Chews Elementary School where she is enrolled. It appears that the Board complied with this part of the State's transportation mandate, but it cannot reimburse petitioners for their child's transportation expenses in the amount of \$150 when it clearly has no statutory authority to make monetary compensation to the parents of public school pupils pursuant to *N.J.S.A. 39-1* or any other statute.

The Board is restricted in making such payments within the provision of the statute to the parents whose child "\*\*\*\* shall be eligible to receive said amount toward the cost of his transportation to a qualified school *other than a public school.*\*\*\*\*" (*Emphasis supplied.*) *N.J.S.A. 18A:39-1* Therefore, the Commissioner finds the argument advanced by petitioners in this instance is without merit.

The Commissioner finds further that petitioners' child was never classified as handicapped pursuant to *N.J.A.C. 6:28-1.2 (b)* which states:

"\*\*\*\* Determination that individual children are so handicapped and recommendation for appropriate program and/or placement shall be the function of the basic child study team employed by a local board of education."

Therefore petitioners' child is not eligible for transportation afforded to children classified as handicapped pursuant to *N.J.S.A. 18A:46-23*. The Commissioner concludes from the record submitted that petitioners' allegations cannot be supported by State law or the regulations of the State Board of Education. Although the Commissioner does not condone the Board's allowing petitioners to transport their child to another school in the district for the purpose of attending special education classes and later transporting her home, he finds no violations herein of any statute or State Board of Education rule.

Nor can the Commissioner determine from the record whether or not the child study team has had an opportunity to conduct an evaluation of petitioners' child; therefore, he directs the Board to have petitioners' child evaluated by its child study team and be guided by its recommendations in establishing a sound educational program to meet her needs.

Except for the Commissioner's directive with respect to the pupil's evaluation by the child study team, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 3, 1973

**Lewis Moroze,**

*Petitioner,*

*v.*

**Board of Education of the Essex County Vocational  
School District, Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Morton Stavis, Esq.

For the Respondent, Essex County Law Department (Felix A. Martino, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the Essex County Vocational School District, hereinafter "Board," for the three academic years 1968-69, 1969-70 and 1970-71, alleges that the Board refused to reemploy him for the 1971-72 academic year for discriminatory reasons arising from his teaching activities which emphasized the history, culture, and contributions of black persons to American civilization. Petitioner alleges that the Board's refusal to reemploy him for the foregoing reasons was arbitrary and capricious and in contravention of the educational policy of this State and the Fourteenth Amendment to the Constitution of the United States.

The Board denies that it engaged in any unconstitutional discrimination against petitioner, and further denies each and every allegation set forth in the Petition of Appeal.

Petitioner prays for relief in the form of an Order of the Commissioner of Education reinstating him in his teaching position. The Board requests that the relief sought by petitioner be denied and that the Petition be accordingly dismissed.

Testimony and documentary evidence were adduced at a hearing conducted at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner on October 19 and 21, 1971, and November 10 and 11, 1971. Subsequent to the hearing, counsel filed Briefs and Rebuttal Briefs. The New Jersey Education Association filed a Brief *amicus curiae*.

The report of the hearing examiner is as follows:

Petitioner was employed as a teacher by the Board for the academic years 1968-69, 1969-70 and 1970-71. (Exhibit P-1) During the 1968-69 academic year, he was assigned to teach ninth grade pupils United States History and English (Exhibit R-13) at the Bloomfield School. This assignment was for one

academic year since petitioner was temporarily replacing a teacher on leave of absence. Teacher evaluation ratings were made regarding petitioner's performance on November 15, 1968, and April 15, 1969, by the school principal. (Exhibits R-1A, 1B) The principal evaluated petitioner's performance as above average on November 15, 1968, and included the following comment:

"Mr. Moroze indicates all the qualities of a good teacher and in fact is rated above the average as a result. There is no question that he is a desirable teacher and should be considered if a permanent vacancy occurs. He has been able to acquire the loyalty and respect of his students and as a teacher on a one year assignment is exceptional.\*\*\*" (Exhibit R-1A)

Petitioner's evaluation dated April 15, 1969, also rated his performance as being above average and included the following comment by the principal:

"Mr. Moroze has done a good job of teaching and is quite cooperative with the principal. He still needs to devote more time to the organization of the class and better housekeeping." (Exhibit R-1B)

For the 1969-70 academic year, petitioner was assigned to the Newark Vocational Technical High School, hereinafter "Newark School." His teaching assignment included a tenth grade social studies course entitled Problems in Public Affairs (Exhibits R-14, R-17), tenth grade English A, Oral and Written Expression (Exhibits R-14, R-18), twelfth grade English B, a course designed to serve the general purpose that literature courses serve in the academic high school (Exhibits R-14, R-19), and several classes of developmental reading. (Exhibit R-14) Petitioner's 1970-71 teaching assignment was virtually the same as his 1969-70 schedule. (Exhibit R-15)

The principal of the Newark School testified that in September 1969, when petitioner was assigned to that school, he took petitioner to his assigned classroom. There, the principal stated, he showed petitioner copies of the syllabi, which the principal referred to as monographs, for the courses of study in English A, Oral and Written Expression (Exhibit R-18), English B, Literature and Library Readings (Exhibit R-19), and Social Studies (Exhibit R-17), and explained to petitioner how the monographs were to be used. (Tr. IV-28-29) According to the principal, he told petitioner that the monographs listed the textbooks and approved reference books, and were to be used as a guide for planning teacher lessons. (Tr. III-54) The principal also testified that all teachers received copies of the teachers' handbook (Exhibit R-5), and that at the beginning of each academic year, he reviewed the contents of the handbook at a faculty meeting. The principal stated that one of the requirements he discussed with the faculty was the preparation of daily lesson plans. (Tr. III-62-63) For the class in Developmental Reading, the principal stated, there was no formal monograph, since this course was based upon the S.R.A. reading laboratory, which contains instructions for teaching procedures. The principal testified that he referred petitioner to the former teacher of this course for any additional assistance he might require. (Tr. IV-34) Although there was no monograph for Developmental Reading, the principal testified, there was a course of study outline. (Tr. III-120)

The principal further testified that he visited petitioner's English A class during October 1969, and, when he discovered petitioner was not following the course monograph, he again advised petitioner that he was to follow the monograph in planning his teaching assignments. (Tr. III-55) According to the principal, petitioner admitted to him on this occasion that he was not using the course monograph. (Tr. IV-29) (Tr. III-125-129)

In November 1969, the principal issued petitioner his initial teaching performance evaluation in which the principal rated petitioner's performance as satisfactory. (Exhibit R-1C) According to the principal, he conferred with petitioner regarding the initial evaluation, and at that time he discussed petitioner's failure to follow the course monograph. (Tr. III-130)

The vice-principal testified that in December 1969, a pupil, G.C., came to his office and complained that petitioner was teaching only black history in his class instead of all the scheduled subject matter. Also, the vice-principal testified that G.C. objected to petitioner constantly talking about police brutality in the inner city and referring to policemen as pigs. The vice-principal stated that this pupil, G.C., is a member of the civilian auxiliary police control and has as his work objective a police career. (Tr. IV-48-49) The vice-principal further testified that he had a conference in his office with petitioner and G.C., and at that conference, petitioner explained to G.C. that black experience was needed by G.C. to build a positive black image of himself. Also, the vice-principal stated, petitioner explained that in using the word pig, he was only using the vernacular. (Tr. IV-50) The vice-principal testified that he subsequently reported this incident to the principal, and he advised the principal that he believed the matter to be settled. (Tr. IV-50)

In January 1970, following the school vacation, the vice-principal testified, he saw G.C. in the school corridor and asked him if the problem regarding his class with petitioner was now settled, and G.C. replied negatively. The vice-principal stated that he requested G.C. to come to his office to talk with him, and that when G.C. came to his office, he stated that petitioner was still teaching black history and that he still objected to it. The vice-principal testified that he reported this conversation with G.C. to the principal. (Tr. IV-58)

The principal testified that in January 1970, he again received complaints from pupils that petitioner was still teaching black history instead of the subject matter he was scheduled to teach. When the principal visited petitioner's class in January 1970, he testified, petitioner told him that he was not using the course monograph (Tr. IV-31), and the principal personally advised petitioner at that time to follow the monograph. (Tr. III-59, 133-134) (Tr. IV-31)

The vice-principal testified that on March 11, 1970, several eighth grade pupils, who were enrolled in petitioner's Developmental Reading course, visited his office and complained that petitioner was requiring them to purchase a paperback book for this course. The vice-principal stated that he informed the pupils they would not be required to purchase the paperback book, and that he would discuss this matter with the principal. (Tr. IV-59) According to the

vice-principal, several of these pupils also complained that petitioner was teaching black history in the Developmental Reading course, and they requested transfers to another class. At that time, the vice-principal testified, there was no other class in developmental reading, which he told the pupils, and he explained to them that they would have to remain in petitioner's class because they needed developmental reading. (Tr. IV-60) The vice-principal testified that he had a conference with petitioner regarding this matter of the paperback book, which was *From Slavery to Freedom* by John Hope Franklin, wherein he asked petitioner whether he understood that pupils could not be required to purchase learning materials, since all such materials had to be supplied by the Board. According to the vice-principal, petitioner stated that the pupils had misunderstood him, and that they did not have to buy the book, since he was merely encouraging them to do so. (Tr. IV-60) Under cross-examination, the vice-principal testified that based upon his experience of having taught Developmental Reading for eight years, he believed that the book *From Slavery to Freedom* was far too advanced for the Developmental Reading Course. (Tr. IV-72-74).

The principal also testified that he visited petitioner's tenth grade English A class on March 12, 1970, as the result of pupil complaints made to the vice-principal. In this class, the principal testified, petitioner was supposed to be teaching English A, Oral and Written Expression, but instead was using the book *From Slavery to Freedom*. The principal stated he had no prior knowledge that petitioner intended to use this book. (Tr. III-59) As the result of this incident, the principal sent a memorandum to petitioner dated March 12, 1970 (Exhibit P-3), which reads as follows:

"As I explained to you before, in our classes we use the monograph as a guide in covering the subject matter in the various areas of the curriculum. My observation of your class today indicates you have not followed my suggestion.

"I suggest that in the future you use the monograph and the textbooks that are approved in the various areas. Reference books appear on the approved list."

The principal testified under cross-examination regarding this incident that he instructed petitioner to use the textbook and to follow the monograph, and that pupils had registered complaints that they were obliged to buy the Franklin book. (Tr. III-135)

In March 1970, the principal issued petitioner his second teaching performance evaluation in which the principal rated petitioner's performance as less than satisfactory. (Exhibit R-1D) The principal wrote the following comments on this second evaluation report:

"Mr. Moroze seems to be interested in teaching. However, he has had many instances where students have demonstrated a dislike for him and his attitude regarding some of the social problems of the day. Personally I have advised him to follow the monograph as a guide in his teaching, and



sometime after found him and his class using a book entitled 'From Slavery to Freedom' without my knowledge, in an English class. Students had copies of the book and it was being used as a text. This is contrary to good teaching procedures, and it is not a single teacher's prerogative to select texts for his class." (Exhibit R-1D)

The vice-principal testified that during October 1970, petitioner sent a pupil, A.L., from his class to the vice-principal's office with a referral form. (Exhibit R-6) Written on this form, in petitioner's handwriting, were the following comments:

\*\*\*\* [A.L.] is emotionally immature. I have patiently dealt with his constant talking and unconscious insubordination.

"Today he kept talking incessantly and refused to stop. He needs psychological help. It may be combined with problem of pill taking.

"L. Moroze"

The vice-principal testified that the pupil, A.L., brought this referral form to him, unfolded. According to the vice-principal, he objected very strongly to petitioner regarding his actions, because, in his judgment, comments such as those written by petitioner should not be sent with the pupil to the vice-principal. The vice-principal stated that such confidential information should either be given to him within the confines of his office or by means of a sealed envelope. (Tr. IV-53-54)

The principal testified that on November 13, 1970, petitioner called a pupil, R.B., out of the print shop and that when he returned to the shop, he placed a piece of paper petitioner had given him on the teacher's desk. The print shop teacher sent this paper (Exhibit R-3) to the principal. (Tr. III-67) This paper is a three-page news release from the New Jersey Committee to Free Angela Davis, and identifies petitioner on page one as co-chairman of the committee. The principal testified that he called the pupil, R.B., to his office and discussed the incident with him in the presence of the vice-principal. According to the principal, the pupil told him and the vice-principal that:

\*\*\*\* Mr. Moroze got him outside the classroom and told him he had leadership qualities and why wait until he was older. Now is the time, now was the time to demonstrate his leadership qualities, and he [petitioner] discussed this particular paper with him. \*\*\*\*" (Tr. III-68)

The principal stated that he discussed this incident with petitioner, and that petitioner did not deny giving the news release to the pupil. As a result of this incident, the principal sent the following memorandum (Exhibit P-5) to petitioner, under date of November 23, 1970, with a copy to the Superintendent:

"I was very much concerned with your actions on Friday, November 13th, when you asked to have a student excused from his shop so that he could



talk to you in the hall. At this time you proceeded to give him a letter with advice pertaining to some non-school activity of a political nature. As I have explained to you before, during the hours of your employ here you are to follow the course outline approved by the board of education for your class.

“Apparently you have not profited by my previous counsel as demonstrated by your actions in this recent case. I consider such actions that are in violation of my authority as principal to be insubordinate in nature. May I again suggest you stick to the subject for which you are engaged to teach, and not create student problems as happened in this case.”

The principal issued petitioner his third teaching performance evaluation (Exhibit R-1E) on November 24, 1970, wherein he rated petitioner as 2.62 on the scale where 2.0 represents Weak and 3.0 is Average. The following comment was written by the principal:

“Mr. Moroze still has not listened to my counsel regarding what he discusses with students. He seems to be conducting some kind of crusade in his personal life that he brings into the school. A recent issue caused a serious student problem and created a faculty disturbance.”

The vice-principal corroborated the testimony of the principal regarding the incident with R.B.

The principal also testified that he visited petitioner’s English class on March 11, 1971 to make an observation. He testified that he approached petitioner at the beginning of the class period and asked petitioner to show him the section in the monograph that he was using for the lesson. The principal stated that petitioner did not even have his monograph, so he handed petitioner his copy. According to the principal, petitioner fumbled through the monograph from beginning to end and finally admitted that he was not using it and that the principal “had him.” (Tr. III-60) (Tr. IV-45) The principal also asked petitioner for his lesson plan, he said, and petitioner did not have one. (Tr. III-61) All teachers are required to have a lesson plan book and to keep lesson plans, according to the principal. Under cross-examination, the principal testified that on no occasion did petitioner ever have his monograph available, and that he could never show the principal from what section he was teaching in the monograph, or that he was using it at all. (Tr. IV-18-20, 26)

Regarding the occasion of the March 11, 1971 observation, the principal testified that when he seated himself in the rear of the classroom, petitioner went to the filing cabinet and removed tactics cards, which he distributed to the pupils. (Tr. III-61) The principal stated that this teaching device is intended for use in developmental or remedial reading classes by individual pupils, and is not intended for general class use in an English class. (Tr. III-117-118)

The vice-principal testified that petitioner misused passes or permission slips, which were to be used to permit pupils to travel from one part of the

school to another without violating school rules. Petitioner, said the vice-principal, would use these passes for disciplinary purposes to send pupils to the office, and would sometimes write notes on the bottom or back of the passes. On at least one occasion, the vice-principal stated, petitioner wrote a note regarding a pupil having a psychological problem. (Tr. IV-54-55) The vice-principal stated that he discussed both the improper use of the passes and the comments thereon with petitioner, but that petitioner continued this improper practice. (Tr. IV-55)

The vice-principal also testified that school policy, as stated in the teachers' handbook, required all teachers to collect written absence excuses from pupils and to send them to the office for filing. Failure of pupils to bring in absence excuses results in pupils being required to report at the close of the school day for discipline. (Tr. IV-63) (Exhibit R-5) According to the vice-principal, by February 1971, petitioner had presented only five absence excuses for two hundred absences by his homeroom pupils. (Tr. IV-64)

The vice-principal also described an incident which occurred during February 1970, when he met two pupils from petitioner's class in the corridor. One pupil, R.W., was holding his eye and complained that he had been hit with a wad of paper. The vice-principal sent R.W. to the school nurse and then to his office. The second pupil, B.C., told the vice-principal "\*\*\*\* I'm not staying in that class. I just got hit in the head with a milk carton.\*\*\*\*" (Tr. IV-61)

Under date of February 10, 1971, the principal sent a memorandum (Exhibit P-4) to the Superintendent, which contained his recommendations regarding petitioner. The memorandum is reproduced in its entirety as follows:

"As we are approaching the time when it is necessary to inform those teachers who are not on tenure as to whether we intend to rehire them for the coming school year, I am recommending that we do not rehire Mr. Moroze. In the two years we have employed Mr. Moroze in the Newark school, I have had many problems with him.

"As for student relations, we have found through the Guidance and Vice-Principal's office that many students do not like him. We have on record where he kicked one student in the rear end. His discipline in general has been poor. Students have complained about not learning in his room because of noise.

"I have had several instances in the past two years where Mr. Moroze has been insubordinate. Last year we had complaints that he was teaching subject matter not in conformance with the outline for his assigned area. I spent considerable time with him and informed him he was to use the assigned monograph as a guide. He insisted on teaching History when his classes were in U.S. Government, English Literature and Developmental Reading. We later had a complaint from a student that Mr. Moroze was discussing History in a Reading class. Another student asked to be transferred because Mr. Moroze spent too much time on History in English or Government classes.

"I supervised one of his classes in which he was teaching black history in an English class, from a textbook entitled 'From Slavery to Freedom'. Each student had a copy which Mr. Moroze purchased by collecting money from students without any approval of his superiors. Again he was warned with a letter.

"This year he involved a student in an incident as explained in my letter to him dated November 23, 1970, a copy of which you have.

"Unless he is supervised or feels he is observed, he omits the morning exercises (flag salute) on many occasions.

"I feel we would be doing our students and our system an injustice if we placed this man on tenure. He does not get along well with many of his colleagues; he is not a good team worker." (Exhibit P-4)

The principal testified in regard to the flag salute that on at least one occasion he was outside of petitioner's classroom during the homeroom period and that he did not hear the required flag salute as part of the opening exercises. (Tr. IV-45-46)

The principal issued the last teaching performance evaluation regarding petitioner on April 25, 1971 (Exhibit R-1F), which was 2.64 or unsatisfactory. The principal added the following comments on this report:

"Mr. Moroze is still having discipline problems in his classes. Students have requested transfers because the classes are noisy and several have been hit with flying objects. One student was hit in the eye with a piece of thrown paper and had to be sent to the nurse. Mr. Moroze constantly sends students to the office without a referral slip. He does not follow school rules and regulations. He is still not following our monograph as a guide. In a recent observation he had no lesson plan for an English class. His lesson consisted of using a developmental reading Tactics Card. Students who came to class late without an excuse did not report back at 3:15 P.M. as per regulations. Since September in his home room class, for a total of 202 days absence by various students, he has collected only 5 absence excuses." (Exhibit R-1F)

Petitioner received a written communication under date of February 19, 1971 from the Superintendent of Schools (Exhibit P-2), which notified him that no action would be taken to reemploy him for the 1971-72 school year, and that his contract would expire by its terms on June 30, 1971.

The vice-principal also gave testimony regarding an incident, which occurred on the last day of school preceding the Easter vacation. The pupils were assembled in the auditorium to view a film, and the vice-principal observed petitioner seated in the extreme rear row of seats with his homeroom class. The vice-principal stepped out of the auditorium, but then heard petitioner talking so he reentered. He found petitioner approximately one-third of the distance down

the aisle making a speech regarding his failure to secure reemployment. The vice-principal's testimony continues as follows:

“\*\*\* he [petitioner] was talking about some of the people that were backing him in the struggle with the Board of Education. So, I shouted out Mr. Moroze, this is an assembly and is to show a film, and I started to walk toward him, and he continued his speech, and I continued shouting. Then, the kids started getting in on it. So, he gave up and walked back to his seat, and on the way by me as he passed me, he says you are a fascist pig.\*\*\*” (Tr. IV-57-58)

The vice-principal testified that when petitioner was being given his teacher performance evaluation by the principal, he was also in the office and that he said to petitioner:

“\*\*\* Mr. Moroze, about you calling me a fascist pig, I would like to discuss it with you.\*\*\*” (Tr. IV-58)

According to the vice-principal, petitioner's reply was as follows:

“\*\*\* I believe I have no comment to make on that.\*\*\*” (Tr. IV-58)

A custodian employed at the Newark School testified on behalf of the Board regarding an incident which took place with petitioner on June 18, 1971. According to this witness, several pupils came to him in the corridor and asked him whether he had keys to the parking lot, because petitioner had told them that all custodians had such keys. The custodian answered affirmatively, and the pupils then asked whether the custodians “come and go” as they pleased. The custodian replied that he only left the building for lunch between 10:30 and 11:30 A.M. The pupils then remarked that there were stickers pasted on Mr. Moroze's car windows. The custodian said that he looked out the cafeteria window and observed stickers pasted on the windshield of petitioner's automobile. The custodian believed that the stickers read “Newark Tech wants Moroze,” and he testified that these stickers were pasted on the walls all over the school.

The custodian inferred that petitioner had accused him of placing the stickers on petitioner's car windows, so he went to speak to him. He said that he asked petitioner whether he had made such an accusation and petitioner denied it. According to the custodian, petitioner told him to bring back the pupils, but the custodian replied that if petitioner denied making the accusation, there was no need to question the pupils. The custodian described this conversation with petitioner as “heated.” The custodian testified further that as he turned and walked away, petitioner called him a white pig and a white racist. (Tr. II-101-102) At that instant, the custodian stated, two men, Mr. Melillo and Mr. Monahan, restrained him because he started to advance angrily upon petitioner. The custodian testified that he then calmed himself and remarked that petitioner called himself an educator, and that he, the custodian, never used words like that in his lifetime. According to the custodian, petitioner merely laughed and the custodian walked away. (Tr. II-121-122) The custodian testified that he made an

affidavit regarding this incident, shortly thereafter, and gave it to the principal. (Tr. II-124)

Petitioner's version of the incidents described by the Board's witnesses differs sharply. Although he does admit that some actually took place, he totally denies others.

In regard to the course of study monographs, petitioner's testimony was that these are "mechanical" documents, which did not meet the special needs of the pupils, and that he found it necessary, therefore, to supplement them with other books and teaching materials. Petitioner admitted making a public statement regarding the course monographs as follows:

\*\*\*\* I publicly referred to the fact that its [the monograph] weaknesses on the question of including Black experience and Black studies in essence was racism.\*\*\*\* (Tr. I-48-49)

This statement was reported in a newspaper article on March 16, 1971, although petitioner claims he was somewhat misquoted. (Tr. I-49, 52)

Although extensive testimony was provided by both the school librarian and the principal regarding the number of library books, films, filmstrips and other teaching materials relating to black history and culture, which were available for use in the Newark School, petitioner testified that he was not aware of the existence of these teaching materials. The school librarian had previously testified that petitioner had never asked him to order any books for inclusion in the school library. (Tr. III-49) A list of book acquisitions concerning black history and culture for the school library since 1967 was received in evidence. (Exhibit R-4)

Petitioner testified that he could not recall the principal's discussion with him in October 1969, regarding the use of the monograph. (Tr. I-86) He also could not recall any discussion with the vice-principal in December 1969, concerning the complaint by a pupil regarding petitioner's teaching. (Tr. I-86) Petitioner did recall the March 1970 incident concerning the use of the Franklin book, but he testified that he was using the book to arouse pupil interest and increase vocabulary and also using it as a bonus to teach pupils regarding the role of black persons in American history. Also, he stated that he merely used the book as a supplemental resource and not a textbook. (Tr. I-88) Petitioner said that he had purchased copies of this book with funds collected from pupils.

In regard to the incident with R.B., petitioner testified that he asked to speak to this pupil in the hallway outside of the pupil's classroom to discuss a poem the pupil had written and read aloud in petitioner's class. Petitioner testified that during his discussion with the pupil, R.B., he gave him a copy of the news release (Exhibit R-3), but he denied soliciting the pupil's support of involvement in that activity. From petitioner's testimony, it is unclear as to what was discussed between R.B. and petitioner regarding the news release. (Tr. I-71-74) (Tr. IV-158-159) At the close of the school day when the incident

with R.B. occurred, the vice-principal testified, R.B. was suspended by the principal for calling the vice-principal a fascist pig. (Tr. IV-87, 156)

Petitioner admits addressing the assembly of pupils regarding the status of his employment, but he denies having called the vice-principal a fascist pig. (Tr. I-77, 99)

In regard to the testimony that petitioner had only secured 5 written absence excuses from a total of 202 absences by his pupils, petitioner testified that he had no idea what percentage of absence excuses he had secured. Under cross-examination petitioner stated the following:

“I fought for them and got in as many as I could, and insisted as much as I could in getting the absent slips.” (Tr. I-92) (Tr. IV-162)

Petitioner also testified, in regard to the required flag salute, that “\*\*\* in my homeroom the flag was saluted.\*\*\*” (Tr. I-45)

Petitioner’s version of the incident concerning the stickers pasted on the windshield of his car and the subsequent encounter with the custodian differs from the custodian’s testimony in several respects. Petitioner admits bringing the stickers into the school (Tr. I-79), but he denies calling the custodian a white pig and a white racist. (Tr. I-78) According to petitioner his statement was as follows:

“\*\*\* I said my kind of feeling was a fascist pig might have done something like that.” (Tr. I-96)

Petitioner dismissed the incident with the pupil, G.C., with the following statement:

“\*\*\* The administration knows that this student is a psychotic student who is obsessed with the military, who has been told by the police not to wear a uniform at that particular time because he wasn’t authorized.\*\*\*” (Tr. I-100)

During his cross-examination testimony, petitioner stated that he did have a conference with the vice-principal and G.C. regarding G.C.’s complaint that petitioner was emphasizing police brutality and calling policemen pigs. However, petitioner could not recall the exact substance of the conference other than that he questioned G.C.’s absences from classes, and that G.C.’s complaint may have been concurrent with that problem. (Tr. I-82) In his rebuttal testimony, petitioner stated that a conference was held involving G.C., the vice-principal and him and that the problem was resolved. (Tr. IV-152)

A guidance counselor employed by the Board testified that on one occasion, three pupils came to the guidance office and asked to be transferred from petitioner’s class because petitioner was constantly complaining about his failure to secure reemployment. (Tr. I-141-144) This counselor also testified that

some pupils complained about the circulation of petitions in the school, which were concerned with petitioner's employment. (Tr. I-142-143)

Petitioner admitted under cross-examination that he did distribute flyers or leaflets to the pupils in the school after he was notified that he would not be reemployed. (Tr. I-65-66) When asked whether these leaflets were intended to solicit the assistance of pupils on his behalf, petitioner replied:

"Public support or attendance at a hearing or something like that." (Tr. I-70)

In regard to the use of lesson plans, petitioner testified that he knew of no requirement by school policy that he must prepare lesson plans. (Tr. I-63) He testified that he did prepare lesson plans for the substitute teacher when he was absent from his duties. (Tr. IV-149) His testimony was that he did not have lesson plans as such, written up in a "mechanical" way, but that he did make plans for the day. (Tr. IV-148-149) Under cross-examination, the following question was posed to petitioner:

"Q. Did you have a lesson planbook for your English courses that you followed?

"A. No." (Tr. I-63)

Petitioner also testified regarding the instance when the principal visited his class while the Franklin book was being used. According to petitioner, the principal told him (petitioner) that he was pro-black, and that he (petitioner) asked what that meant. Petitioner testified to the following discussion with the principal:

\*\*\*\* He said, let us put it this way. You are a white Uncle Tom. And then continued to discuss on the black people saying that they are always complaining about slavery and that I certainly know, referring to me, that I should know as an historian that there was slavery in Africa.\*\*\*\* (Tr. IV-146)

Petitioner further testified that the principal then told him to adhere to the monograph in "that mechanical way." (Tr. IV-146)

In regard to the pupil referral form (Exhibit R-6), petitioner testified that he did not give it to the pupil, but took it to the office himself. The next question and answer was as follows:

"Q. Well, would you hand to a student a statement that he needs psychological help that may be combined with a problem of pill taking?

"A. It strikes me that a teacher who would do that would need psychological help. I would never do anything like that." (Tr. IV-150)



Petitioner testified next regarding his use of pupil passes or permission slips. The following is petitioner's testimony:

"Q. Did you ever on such a pass slip refer to the need of a student for psychological help?

"A. Well, I'll restrain myself, no, just no.

\* \* \*

"Q. You certainly would never tell a student that he needed psychiatric help?

"A. I can't picture myself putting on a slip that a student needed psychological help and asking him to go to the office." (Tr. IV-154-155)

Subsequently, petitioner identified three pupil passes (Exhibit R-23), which contained statements written in his handwriting. One, dated March 9, 1971, contained the statement: "Keep him for the period." The second pass, dated April 9, 1971, stated: "Let him sit there." Petitioner testified that this was a practice he followed. (Tr. IV-178) The third pass, dated March 9, 1971, contains the statement: "\*\*\*\*[J] is not feeling well physically or psychologically. He refuses to communicate." The two passes containing the date of March 9, 1971, indicate the time when each pupil was sent from petitioner's social studies class as 12:02 and 12:08 p.m.

In regard to the use of the monograph, petitioner was questioned as to why he did not follow the instructions, which he was given on several occasions. Petitioner's answers were as follows:

"A. I think it's a crime to follow orders that are improper and unconstitutional.

"Q. By your own determination?

"A. By my own interpretation of the monograph and educational practices.

"Q. So, that then it would be fair to say that you did what you thought you felt you wanted to do regardless of what you were told to do by your superiors, is that what happened?

"A. I felt not obligated to follow instructions that were illegal, improper, and unconstitutional." (Tr. IV-175)

Thirteen pupil witnesses testified on behalf of petitioner. The testimony of these pupils may be summarized by the statement that they liked petitioner, were never offended by him, and that they enjoyed and profited from his teaching.



The Board offered in evidence copies of eight letters written by the principal to various publishers of textbooks requesting sample texts and materials, which integrate the role of black persons in United States history and government. (Exhibit R-8-9) Also, purchase order forms for reference books, film strips and sound film strips of a similar nature were marked in evidence. (Exhibits R-10-12)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

In this case petitioner served as a teacher in respondent's school district under three successive contracts of employment, covering the academic years of 1968-69, 1969-70 and 1970-71, respectively. His contract was not renewed by the Board; therefore, he was not reemployed for the 1971-72 academic year. Admittedly, petitioner did not acquire a tenure status.

The status of nontenure teachers in this State has been clearly set forth by the New Jersey Supreme Court. In *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962), cert. den. 371 U.S. 956, 83 S. Ct. 508 (1963), the Court quoted the historically prevalent view expressed in *People ex rel v. Chicago*, 278 Ill. 318, 116 N.E. 158, 160, L.R.A. 1917E, 1069 (Sup. Ct. 1917) as follows:

"A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.\*\*\*" (at p. 70)

The Court further stated that today these powers of local boards of education are limited by the Fourteenth Amendment of the United States Constitution, the New Jersey Constitution, the Teachers' Tenure Act, and by other statutory provisions, such as the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (formerly N.J.S.A. 18:25-1 et seq.). Having noted these exceptions, the Court stated:

\*\*\*\*Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit.\*\*\*\*  
(Id., p. 71)

See also *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 115 N.J. Super. 228 (App. Div. 1971); *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7, appeal dismissed State Board of Education 1968 S.L.D. 11, affirmed New Jersey Superior Court, Appellate Division, March 24, 1969.

In the matter herein controverted before the Commissioner, petitioner alleges that constitutional discrimination of the sort proscribed by the aforementioned authorities was the basis for his non-reemployment. Particularly, petitioner charges that his teaching activities, which emphasized the history, culture and contributions of Blacks to American civilization, brought him into conflict with school administrators, who denounced and forbade these practices, and therefore concocted sham reasons for not recommending his reemployment. Petitioner relies, *inter alia*, upon Joint Resolution No. 11, L. 1967, approved by the Legislature December 12, 1967, and subsequent requirements by the Commissioner and the State Board of Education for the inclusion by local boards of education of appropriate textbooks, teaching materials, reference and resource materials in their high school curricula to assure the fair and accurate depiction of the role of black persons in the history of the United States.

The Commissioner is asked to determine whether, as petitioner alleges and has sought to prove, the non-reemployment of petitioner violated his rights under the United States Constitution, the New Jersey Constitution, or statutes implementing the latter.

A similar issue was raised before the Court in *Katz v. Board of Trustees of Gloucester County College*, 118 N.J. Super. 398 (Chan. Div. 1972). In that case, the Court stated that: (at pp. 401-402)

“\*\*\* It can no longer be maintained that teachers ‘shed their constitutional rights to freedom of speech at the schoolhouse gate.’ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Their exercise of First Amendment rights will generally not warrant their dismissal. *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) \*\*\*”

Although in *Katz, supra*, plaintiff alleged that his activities as a leader of the local faculty association caused discrimination and reprisal by the Board in the form of non-retention, the aspect of charged infringement of constitutional rights is similar in the instant matter. As the Court stated in *Katz*, at p. 403:

“\*\*\* While the law may be simply stated, its application to the instant controversy is more difficult.\*\*\*”

This same statement is applicable to the matter now before the Commissioner.

The Commissioner has carefully scrutinized the voluminous record of testimony and the many exhibits in this case. In the judgment of the Commissioner, petitioner has failed to carry the weight of proof necessary to overturn the presumption of correctness of the Board's action in deciding not to reemploy him. No concrete evidence appears in the findings and the total record to support a determination that his failure to be reemployed constituted a

penalty or reprisal by the Board. On the contrary, the record discloses numerous instances where petitioner was deficient as a teacher. It appears that petitioner simply decided that since his purpose to introduce black studies into every aspect of his curricular responsibilities was salutary, he could abandon the prescribed curriculum guides. Efforts by the school administrators to require petitioner to adhere to a more organized planning of his lessons, based upon curricular guides, were met with adamant resistance from petitioner. In the Commissioner's judgment, petitioner could have secured his objectives, which were educationally salutary, had he been willing to follow school policies and to work cooperatively with the school administrators. Instead, petitioner assumed the unyielding position that he was "\*\*\*\* not obligated to follow instructions that were illegal, improper and unconstitutional.\*\*\*" (Tr. IV-175) From a review of the record, the Commissioner finds that petitioner's credibility is at times questionable. His strong assertion that he would not make reference to a pupil's need for psychological help on a permission form given to a pupil is directly contradicted by the physical evidence of just such a practice on his part. (Exhibit R-23)

From a careful consideration of the findings and the total record in the instant matter, the Commissioner determines that petitioner's allegations are without merit and his stated cause of action is groundless.

The Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

July 20, 1973

**Joseph Banick,**

*Petitioner,*

*v.*

**Board of Education of the Township of Riverside,  
Burlington County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Law Offices of James Logan, Jr. (Robert A. Durand, Esq., of Counsel)

For the Respondent, Christopher N. Peditto, Esq.

Petitioner, a tenured teacher employed by the Riverside Board of Education, hereinafter "Board," appeals from an action of the Board which denied him a salary increment for the school year 1970-71. Petitioner was thereafter placed on the proper step of the salary guide for the school year 1971-72; therefore, only the salary increment for the school year 1970-71 is in dispute. Petitioner prays that the Commissioner direct the Board to pay him the salary increment and longevity pay denied him, and also interest on the money withheld, plus counsel fees and costs.

It was agreed at a conference on September 29, 1972, that the matter would be submitted for adjudication by the Commissioner on the pleadings and Briefs of counsel. Petitioner, who filed ten days late on October 25, 1972, attached three exhibits to his Brief: a salary guide, 1969-70; a salary guide, 1970-71; and a letter dated July 9, 1970 from the Board Secretary informing him that the Board voted to withhold his increment. The Board filed its Answer to the Petition of Appeal; however, it has not filed its Brief which was due two weeks following receipt of Petitioner's Brief (November 15, 1972). Counsel for the Board was sent a letter on April 12, 1973, which reads as follows:

\*\*\*Dear Mr. Peditto:

\*\*\*

"We have had several phone conversations about your late Brief in the above-entitled matter. By letter of February 15, 1973, we enclosed a copy of Mr. Durand's letter and again requested your Brief.

"Unless your Brief is filed in this office within the next ten days, the Commissioner will render his decision on the basis of the record before him.\*\*\*"

Despite several attempts to obtain the Board's Brief, there has been no further contact with Board counsel since the letter of April 12, 1973, *ante*, and no Brief has been filed by the Board.

Petitioner has not objected to the delays in completion of the record; however, he did inquire as to the status of the instant matter by letter of February 5, 1973.

The Commissioner determines that more than five months' time has been afforded the Board to file its Answering Brief and that no further requests for an extension of time have been made. The Board has not offered any reason for not filing its Brief, nor has it answered the letter of April 12, 1973, *ante*. The Commissioner determines that the Board has had more than a reasonable amount of time in which to file its Brief and notes the absence of any reason for not filing or requesting an extension of time. Therefore, the Commissioner will examine the merits of this matter on the record before him on April 22, 1973.

Petitioner received a salary of \$10,100 plus \$100 longevity pay, for a total of \$10,200, for the school year 1969-70. He was notified by letter of July 9, 1970, that he would be paid the same salary (\$10,200) for the 1970-71 school year. That letter indicated that the Board made its determination as to petitioner's salary based on the recommendations of two of its administrators.

Petitioner avers that his proper placement on the 1970-71 salary guide would be on the Master's Degree level at a salary of \$11,200 plus \$100 longevity pay, for a total salary of \$11,300. He avers that he was not notified prior to the Board's determination, made known to him by letter of July 9, 1970, that his increment would be withheld, nor was he given an opportunity to meet with the Board to explain why his increment should not be withheld prior to the Board's action.

Petitioner argues that the salary guide does not establish any reasons for the withholding of an increment, and that his meeting with the Board, *after* it voted to withhold his increment was a denial of due process because he was not afforded a prior opportunity to be heard. Moreover, petitioner alleges that the Board ratified its action (referred to in the letter of July 9, 1970, *ante*) and notified him on January 14, 1972; but, prior to that time he had received no notice of the outcome of his meeting with the Board.

The Board does not deny withholding petitioner's increment on the recommendation of its administrators, nor does it deny that petitioner was not given an opportunity to be heard prior to its determination to withhold his increment. The Board relies on *N.J.S.A. 18A:29-14* to support its determination to withhold the increment in contention.

*N.J.S.A. 18A:29-14*, amended by *L. 1968, c. 295* reads as follows:

"Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both,

of any member in any year by a recorded roll call majority vote of the full membership of the board of education. 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 member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.”

In the absence of a Brief by the Board, and noting the Board’s reliance on *N.J.S.A. 18A:29-14*, the Commissioner is constrained to decide the instant matter in the same manner that he has decided several recent cases dealing with the withholding of salary increments.

The Commissioner determines that the authority of a board to withhold a teacher’s increment is well established. *Kopera v. West Orange Board of Education*, 1958-59 *S.L.D.* 96, affirmed State Board of Education 98, remanded to Commissioner of Education, 60 *N.J. Super.* 288 (*App. Div.* 1960), decided by the Commissioner of Education, 1960-61 *S.L.D.* 57, affirmed by the New Jersey Superior Court, Appellate Division, January 10, 1963; *Van Etten and Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 *S.L.D.* 120; *Durkin et al. v. Board of Education of the City of Englewood*, 1971 *S.L.D.* 654

The Commissioner commented as follows in *Durkin*:

“\*\*\* In *Van Etten and Struble v. Frankford, supra*, the Commissioner made it clear that salary guides, and the increment policies associated with them, must stand on their own terms as they are clearly and precisely stated. He also said that local boards could attach ‘additional provisions’ as corollary conditions to such guides and that these provisions could then be used to temper full salary guide implementation. Subsequent to this decision and the other mentioned previously, the Commissioner decided in the case of *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, decided by the Commissioner on October 21, 1971, that the Board in that instance also had no corollary conditions stated in a contract or an explicit written policy that tempered the stated terms of a salary guide and that the guide, therefore, should be implemented according to its terms.\*\*\*” (at p. 657)

In the instant matter, no evidence is presented that the Board had any policy whatsoever providing for the withholding of a teacher’s increment, nor are there attached to its salary guide corollary conditions, which could be used to thwart its full implementation. Although the Board has the authority to adopt a salary policy including provisions found in *N.J.S.A. 18A:29-14*, it has

not done so in a manner which would permit the withholding of teachers' increments. Its reliance on *N.J.S.A. 18A:29-14* is therefore, unfounded.

The Commissioner has previously decided that *N.J.S.A. 18A:29-14* is not applicable to a local district's salary guide if its guide is higher than the State minimum salary guide of which *N.J.S.A. 18A:29-14* is a part. *Zelda Goldberg v. Board of Education of West Morris Regional High School District*, 1964 S.L.D. 174; *Forsyth v. Board of Education of Freehold*, 1955-56 S.L.D. 77; *Colangelo v. Board of Education of Camden*, 1956-57 S.L.D. 62, affirmed State Board of Education 66; *Greenway v. Board of Education of Camden*, 1939-49 S.L.D. 151, affirmed State Board of Education 155, affirmed 129 N.J.L. 46 (*Sup. Ct.* 1942); 129 N.J.L. 461, 462-463 (*E. & A.* 1943); *Offhouse et al. v. Board of Education of Paterson*, 1939-49 S.L.D. 81, affirmed State Board of Education January 3, 1973

The Commissioner concludes, therefore, that the law is unequivocal in that the interpretation of *N.J.S.A. 18A:29-14* does not apply in the instant matter where the Board's salary policy is higher than that established as the State minimum guide.

However, even if an appropriate salary policy had been adopted, such authority to withhold increments cannot be wielded so as to deny a teacher the basic elements of fair play. The Commissioner commented in *J. Michael Fitzpatrick v. Board of Education of Montvale*, 1969 S.L.D. 4, as follows:

“\*\*\* The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.\*\*\*” (at p. 7)

The record shows that the Board acted on the recommendation of its administrators to withhold petitioner's salary increment and that his first knowledge of this recommendation came at the same time that he received notice of the Board's action. Under these circumstances and the cases cited, the Commissioner must find that the Board's action was unreasonable, illegal and it will be set aside.

The Commissioner has previously discussed requests for interest on moneys withheld, as related to actions wherein appellants have sought back pay in appeals against boards of education, and the Commissioner has previously determined that there is no provision in the statutes for payment of interest on moneys withheld. In the case of *Fred Bartlett, Jr. v. Board of Education of the Township of Wall*, 1971 S.L.D. 163, affirmed by the State Board of Education November 3, 1971, the Commissioner said:

“\*\*\* Nothing in the cases cited by petitioner over-rides the principle enunciated by the Commissioner in *Romanowski v. Jersey City Board of Education*, 1966 S.L.D. 219, in which the Commissioner said at p. 221:

“ \*\*\* there is no statutory authority for a board of education to pay interest as damages.

“ ‘ It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. *Brophy v. Prudential Insurance Co. of America*, 271 N.Y. 644, 3 N.E. 2d 464 (Ct. App. 1936). ’ *Consolidated Police etc., Pension Fund Comm. v. Passaic*, 23 N.J. 645, 654 (1957)\*\*\*.” (at p. 165)

Petitioner’s request for payment of interest, is therefore, denied.

Nor can there be found any precedent or statutory authority for awarding counsel fees and costs as claimed by petitioner.

In *Bartlett, supra*, the Commissioner held as follows:

“\*\*\* The Commissioner has already treated this problem in *Romanowski, supra*, and in *David v. Cliffside Park Board of Education*, 1967 S.L.D. 192, in which the Commissioner said at p. 194-195: “\*\*\* that claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute.”\*\*\*” (Emphasis supplied.)

Finding no authority for the payment of interest, counsel fees or costs, petitioner’s requests are, therefore denied.

However, the Commissioner determines that petitioner’s salary increment was improperly and illegally withheld by the Board for the school year 1970-71. The Commissioner directs the Board, therefore, to pay petitioner the amount of \$1,100, the amount which was illegally withheld from him for the school year 1970-71.

COMMISSIONER OF EDUCATION

July 27, 1973



**Joel and Marleen Hoffman,**

*Petitioners,*

*v.*

**Board of Education of the Township of Cherry Hill,  
Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioners, Ballen, Batoff & Laskin (Arthur E. Ballen, Esq., of Counsel)

For the Respondent, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Petitioners, parents of a third grade pupil enrolled in the Cherry Hill Township School District allege that an administrative ruling approved by the Cherry Hill Township Board of Education, hereinafter "Board," is arbitrary, capricious and discriminatory, as it causes their daughter, who is within easy walking distance of the Bret Harte School to be reassigned and "bused" to another elementary school within the District. Petitioners charge that this ruling has been uniquely applied to their daughter and not to other children similarly situated. The matter is submitted for Summary Judgment and argued on the pleadings, affidavits, exhibits and the Board's Brief. Petitioners did not file a Brief, although they were granted extensions of time to do so.

Since the 1972-73 school year has now ended, and the record before the Commissioner indicates that petitioner's child will be assigned to the Bret Harte School under the provisions of a new school attendance area plan adopted by the Board for the 1973-74 school year, the issue herein may be considered moot.

Although the Commissioner does not generally adjudicate moot issues, the question of the authority of local boards of education to adopt rules providing for changes in school assignments of pupils is one that frequently arises. Therefore, the Commissioner will depart from his usual practice and rule on the issue controverted herein for the future guidance of this and other local boards of education. *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County*, decided by the Commissioner March 20, 1973.

Many of the relevant facts are not in dispute and are stated as follows:

Petitioners purchased a home located at 1809 Fireside Lane, Cherry Hill, in May 1972. Petitioners made arrangements to enroll their infant daughter in the third grade of the Bret Harte School, which is located approximately one and one-half blocks from their residence, for the 1972-73 academic year. On or about September 5, 1972, petitioners were notified by the principal of the Bret

Harte School that their daughter would be bused to the Johnson School as the result of a revised school attendance area plan for the 1972-73 academic year. This revision of the school attendance area was caused by an overcrowded condition in the Bret Harte School.

The initial determination as to which particular pupils would be reassigned to the Johnson School was made by the principal of the Bret Harte School, and this determination was subsequently approved by the Superintendent of Schools and the Board for the 1972-73 academic year.

In the revised plan for 1972-73, it was determined that all new enrollees who would normally attend the Bret Harte School from a designated geographical portion of that school's attendance area, would be reassigned and bused to the Johnson School. These new enrollees consisted primarily of children from families which had either recently purchased a newly-erected home or an existing home in the designated portion of the Bret Harte School attendance area. Two exceptions were provided for by the 1972-73 revised plan. One exception provided that if a family had a child already attending the Bret Harte School, a new enrollee from that family would also be permitted to attend the Bret Harte School. The second exception provided that the parents of children enrolling in kindergarten would have the option of selecting either the Bret Harte School or the Johnson School for 1972-73.

Petitioners contend that they purchased a home in an older section of the Bret Harte School attendance area, and that under the Board's 1972-73 revised plan, their daughter is discriminated against by virtue of the fact that she is the only child residing on that block of Fireside Lane who is being bused two and six-tenths miles to the Johnson School. Petitioners allege that irreparable harm is inflicted upon their daughter, since she cannot associate throughout the school year with children who are her neighbors on the same block or in the immediate vicinity, but who attend the Bret Harte School. Accordingly, say petitioners, their infant daughter has relatively little opportunity to form friendships with the neighboring children who attend the Bret Harte School.

The Board admits that petitioners' daughter is the only child residing on Fireside Lane who is required by the 1972-73 revised attendance plan to be bused to the Johnson School. However, the Board points out that forty-five pupils, including petitioners' daughter, residing in the designated geographical portion of the Bret Harte School attendance area, are required to attend the Johnson School. The Board states that the specifically designated geographic area in the revised 1972-73 attendance plan was chosen because it is an area in which new homes are being constructed. The Board concedes that there are previously-constructed homes within the designated area, one of which is occupied by petitioners. However, the Board asserts that the greater number of families residing within the designated area occupy newly-erected homes, and that these families never had their children enrolled in the Bret Harte School.

The Board contends that it has properly established a specific school attendance area with known boundaries, and that it has also established rules

and regulations which apply to all of the school children who reside within that designated area. The Board argues that it cannot establish a policy which will individually treat each pupil within the school district, such as petitioners' daughter, in order that everyone will be satisfied with the designated school attendance area.

The narrow issue now before the Commissioner is whether the Board's revised school attendance area policy for 1972-73 was arbitrary, capricious, and discriminatory against petitioners' daughter.

The Commissioner is constrained to point out that the authority of local boards of education to draw school attendance area boundaries is well established. *N.J.S.A. 18A:11-1*; *Pierce v. Union District School Trustees*, 46 N.J.L. 76 (Sup. Ct. 1884); *Citizens of the Town of Harrison v. Board of Education of the Town of Harrison*, 1938 S.L.D. 643 (1921); *Edward Clausner et al. v. Board of Education of the Township of Millburn, Essex County*, 1938 S.L.D. 645 (1936); *John A. Kenny et al. v. Board of Education of the Town of Montclair, Essex County*, 1938 S.L.D. 647 (1934), affirmed 1938 S.L.D. 649 (1936); *Marguerite Edwards v. Board of Education of Atlantic City*, 1938 S.L.D. 683 (1923), affirmed 1938 S.L.D. 685 (1923); *Leonard Greensberg et al. v. Board of Education of the Township of Teaneck, Bergen County*, 1962 S.L.D. 163; *Leona Rutherford et al. v. Board of Education of the Borough of Maywood, Bergen County*, 1963 S.L.D. 129; *Dudley R. Morean, III, et al. v. Board of Education of the Town of Montclair, Essex County*, 1963 S.L.D. 154, affirmed 1964 S.L.D. 173, affirmed 42 N.J. 237 (1964); *Kenneth Alnor et al. v. Board of Education of the Township of Wayne, Passaic County*, 1965 S.L.D. 115; *Rudolph Scolpino et al. v. Board of Education of the Township of Teaneck, Bergen County*, 1965 S.L.D. 152; *Magdalene Lichtenberger v. Board of Education of the Borough of Maywood, Bergen County*, 1966 S.L.D. 163; *David K. Stratton et al. v. Board of Education of the Township of Berkeley Heights, Union County*, 1966 S.L.D. 73; *S.J. Marcewicz et al. v. Board of Education of the Pascack Valley Regional High School District, Bergen County*, 1972 S.L.D. 619

In *Marcewicz, supra*, the Commissioner stated the following in regard to school attendance areas:

“\*\*\* It is the Board alone which is empowered by *N.J.S.A. 18A:11-1* to make rules for its own ‘government’ and the ‘government’ of the public schools entrusted to its supervision, and the Commissioner determines that the Board’s decision controverted herein was not contrary to its own rules in this regard.\*\*\* (at p. 625)

and,

“\*\*\* While it is true that some inequity may exist at the present time, the question may also be posed — Is there ever an enrollment assignment plan that is perfectly balanced, a plan where no iota of inequity exists? While it is clear that the answer to such a question is a negative one, it is equally

clear that every situation which involves the assignment of pupils to one school or another requires careful and constant scrutiny to avoid the possibility of an imbalance which is clearly detrimental to the interests of all.\*\*\*\*” (at p. 626)

In *Thomas v. Board of Education of Morris Township*, 89 N.J. Super. 329 (App. Div. 1965), the Court stated as follows:

“\*\*\*\* 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 Twp.*, 73 N.J. Super. (App. Div. 1962); *Schinck v. Board of Ed. of Westwood Consol. School Dist.*, 60 N.J. Super. 448 (App. Div. 1960).\*\*\*\*” (at p. 332)

In the record before the Commissioner in the instant matter, there is no proof that the Board’s action in establishing the 1972-73 school attendance area policy was arbitrary, capricious or discriminatory; therefore, petitioners’ allegations are wholly without merit, and the Commissioner so holds.

The Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

July 27, 1973

**In The Matter of the Tenure Hearing of Dale Miller,  
School District of the Borough of Manville,  
Somerset County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board of Education, Edward B. Goorno, Esq.

For the Respondent, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

Charges of conduct unbecoming a teacher and corporal punishment were certified to the Commissioner of Education against Dale Miller, a tenure teacher, who has been employed for seven years by the Board of Education of the Borough of Manville. The Complainant Board of Education certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A hearing on the charges was held in the office of the Somerset County Superintendent of Schools, Somerville, on May 4, 1973 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The Superintendent of Schools prepared two separate charges which will be discussed *seriatim*.

#### CHARGE NO. 1

“On January 14, 1970 Dale Miller, an employee of the Board of Education of the School District of the Borough of Manville, did in violation of N.J.S.A. 18A:6-1, commit an assault and battery upon [D.W.], a student at the Roosevelt Elementary School. The said Dale Miller grabbed said student, forcefully held him, and then having seated the student on the stage of the building, struck the student in the face with his open hand, forcing the back of the student's head to strike against the wall behind him, thus demonstrating conduct unbecoming a teacher.”

Respondent admits that he struck the pupil, but denies that he caused his head to strike the wall. Both parties stipulate that D.W. is a handicapped child; that he is confined in the Annandale Reformatory; that he is unavailable to testify and that he would testify that respondent struck him.

Respondent regrets having struck D.W. and admits that he should not have done so; however, he moved to dismiss Charge No. 1 on the grounds that he had already been reprimanded for that incident by the Board and that he had been provoked into striking D.W. when the pupil called him an obscene name.

#### CHARGE NO. 2

“On February 14, 1973, the said Dale Miller, then an employee of the Board of Education of the School District of the Borough of Manville at the Alexander Batcho Intermediate School, did while so employed and in the course of his employment, encourage, invite and permit two of his students, namely [M.Z.] and [A.J.] to engage in a personal fight in the school gymnasium; following said fight, said students informed the said Dale Miller that they would continue their fight after school hours; said Dale Miller took no further steps to avoid any further conflict between the boys, failed to report said incident to his school principal, and made no effort to contact the parents of either of said boys, demonstrating a lack of professional judgment, and as a result of which said boys did in fact engage in further altercations following school hours; all of which is conduct unbecoming a teacher in the public schools.”

With respect to the specific allegations in Charge No. 2, the testimony revealed the following:

The two boys became involved in a fight after some “horsing around” during class. Respondent stopped their fight, which occurred near the end of the

class period, and dismissed the class to the locker room. On the way there, the two boys started fighting again. Respondent again stopped their fight and directed the boys and the class back to the center of the gymnasium where there were mats on the floor. Respondent told both boys that they should not fight; that fighting was not the way to settle an argument and that he wanted them to get fighting out of their minds and not continue it after school. He then permitted the boys to engage in a "slap fight" (open hands) on the mats while the class watched. Respondent testified that he permitted this slap fight in that controlled situation so that the boys could resolve their differences in his presence. He testified further that he did this so that he could see that neither boy would be hurt and he felt that by doing so they would not fight after school.

The two boys corroborated respondent's testimony and testified that after the slap fight they had no intention of continuing after school; however, their classmates "egged them on" after school and they did resume their fight outside.

No complaint was brought against respondent by the boys or their parents and both boys testified that they liked respondent and said that he was a good teacher.

Respondent avers that in any event, the penalty imposed by the Board is greatly disproportionate to the admitted offenses.

The Board avers that respondent exercised poor judgment in handling the matters and that the incidents show his lack of professional judgment which constitutes conduct unbecoming a teacher. The Board testified also that Charge No. 2 constitutes corporal punishment by the teacher.

The hearing examiner notes that both charges have been found essentially true in fact; however, it has not been shown that respondent deliberately tried to cover up the incident in Charge No. 2 by not reporting the incident; rather, he attempted to resolve the matter in his own way and thought that he had done so. Respondent, also, regrets that he did not take an affirmative action by notifying the principal and the parents so that the boys would not continue their fight.

Respondent argues that he was suspended without pay on March 20, 1973, prior to the certification of the charges with the Commissioner on April 6, 1973, in violation of *N.J.S.A. 18A:6-14* which reads in part as follows:

"Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay\*\*\*."

and also, *N.J.S.A. 18A:6-16* which reads in part as follows:

"Upon receipt of such a charge and certification, or of a charge lawfully made to him, the commissioner or the person appointed to act in his behalf in the proceedings shall examine the charges and certification\*\*\*."

These charges were delivered by hand to respondent after being voted by Board resolution on March 19, 1973. They were mailed to the Commissioner of Education on March 20, 1973, the date of respondent's suspension without pay, and received by the Commissioner on April 6, 1973.

The record shows also, that respondent received a copy of these charges from the Board, through the mails, on March 22, 1973, and that these charges were in fact mailed to the Commissioner on March 20, 1973; therefore, the hearing examiner finds that the Board complied essentially with the mandates of *N.J.S.A.* 18A:6-14 and 16, and that slow mail service must be blamed for their arriving seventeen days later in the Commissioner's office.

On May 22, 1973, the Board notified the Commissioner by letter that it had reinstated respondent in his teaching position effective May 9, 1973. Therefore, respondent was suspended without pay by the Board for a period of fifty consecutive days (one and two-thirds months).

**This concludes the report of the hearing examiner.**

\* \* \* \*

The Commissioner has read the report and findings of the hearing examiner and concurs therein.

In the first instance, the Commissioner is constrained to comment upon the Board's action reinstating respondent fifty days subsequent to suspending him, pending a determination of the charges certified against him to the Commissioner.

It is clear that a board may suspend a teacher with or without pay, once charges are certified to the Commissioner. *N.J.S.A. 18A:6-14* However, a local board may not suspend a teacher with payment of a fraction or portion of his pay. *Robert H. Beam v. Board of Education of Sayreville*, decided by the Commissioner on March 20, 1973.

The Commissioner is constrained to point out that local boards of education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie*, 3 N.J. 17 (1949); *N.J. Good Humor Inc. v. Bradley Beach*, 124 N.J.L. 162 (E. & A. 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 N.J. Super. 524 (Law Div. 1949) In regard to the instant matter, the Legislature empowered local boards of education by N.J.S.A. 18A:6-14 with the authority to “\*\*\*suspend\*\*\* with or without pay \*\*\*.” In the judgment of the Commissioner, neither this Board nor any other local board of education may modify the precise requirements of N.J.S.A. 18A:6-14. *Beam v. Savreville*, *supra*

The amendment of *N.J.S.A.* 18A:6-14 by *L.* 1971, c. 435, §2, effective



February 10, 1972, removed the words “\*\*\* pending final determination of the same [charges], and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension.” The purpose of this removal can be clearly seen when the present wording of the statute is read in its entirety as follows:

“Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.”

The amendment of *N.J.S.A. 18A:6-14* added a provision for the payment of full salary after 120 calendar days following the certification of the charges to the Commissioner, providing the determination has not been made after the passage of said 120 calendar days. The person charged, under these circumstances, still does not receive the full salary for said 120 days, pending a final determination by the Commissioner in his favor, or pending a final appeal in his favor from an adverse determination. The statute also makes provision for the mitigation of any earnings “\*\*\* from any substituted employment assumed during such period of suspension.\*\*\*” In sum, the thrust of the statute as amended, provides that any tenured employee against whom charges are certified may be deprived of only full salary for a total of 120 days, regardless of the length of time of his suspension, pending determination of the original hearing or an appeal therefrom. Therefore, the removal from and amendment to *N.J.S.A. 18A:6-14* by *L. 1971, c. 435, § 2* did not empower local boards to set the length of time of the period of suspension with or without pay, and the Commissioner so holds. The suspension without pay will be in every instance run for at least 120 calendar days if the matter is not decided, or if the charges are not withdrawn during that time. On the 121st day, full salary will be resumed for the suspended employee. *N.J.S.A. 18A:6-14* In the judgment of the Commissioner, this construction of the statute is reasonable and comports with the true intent of the law. In *Alexander v. N.J. Power and Light Co.*, 21 N.J. 373 (1956), the Court stated: (at p. 378)



“\*\*\* The statute is to receive a reasonable construction, to serve the apparent legislative purpose. The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the rationale of the expression. The words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms. The particular words are to be made responsive to the essential principle of the law. When the reason of the regulation is general, though the provision is special, it has a general acceptance. The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. The will of the lawgiver is to be found, not by a mechanical use of particular words and phrases, according to their actual denotation, but by the exercise of reason and judgment in assessing the expression as a composite whole. The indubitable reason of the legislative terms in the aggregate is not to be sacrificed to scholastic strictness of definition or concept.\*\*\*”

In the instant matter, the Board action reinstating respondent after fifty days was outside the authority granted it by *N.J.S.A. 18A:6-14*, and was therefore *ultra vires*. A suspension, with or without pay, which is imposed following the certification of charges to the Commissioner clearly must extend to the final determination of the charges by the Commissioner or to an adjudication of an appeal therefrom.

Sound educational policy supports this construction of the law. Local boards of education are not to utilize the suspension provision of *N.J.S.A. 18A:6-14* as a means for imposing their own penalties. This clearly occurs when a local board, as in the instant matter, first suspends a teacher without pay, and, after the passage of a period of days, fifty in this case, decides to lift the suspension and reinstate the charged teaching staff member with pay. The Commissioner alone is empowered to assess a penalty, after a finding which warrants a penalty. In *Henry R. Boney v. Board of Education of the City of Pleasantville et al., Atlantic County*, 1971 S.L.D. 579, the Commissioner cited the decision of the Appellate Division of the New Jersey Superior Court in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 N.J. Super. 404 (App. Div. 1965) wherein the Court thoroughly reviewed and clarified the provisions of the Tenure Employees Hearing Act. The Court pointed out that, under the new law, the Commissioner conducts the initial hearing and makes the decision. The limited function of the local education board was described as follows: (at p. 412)

“\*\*\* There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than preliminary review of the charge and the required certification to the Commissioner. *Their participation in such proceedings is specifically confined to the limited function.* Thus the Legislature has transferred from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in

the first instance. His jurisdiction in all such cases is no longer appellate but primary.\*\*\*” (*Emphasis ours.*)

This sound policy thus totally bars a local board from involvement which would constitute, in effect, the setting of its own penalties by imposing varying lengths of suspensions without pay upon different employees.

With respect to Charges Nos. 1 and 2, the Commissioner notes that corporal punishment has been prohibited in New Jersey public schools by statute since 1867. *N.J.S.A. 18A:6-1* 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\*\*\*.” (*Emphasis supplied.*)

The Commissioner determines that Charge No. 2 does in fact constitute corporal punishment by the respondent within the meaning of the statutory language. Specifically the words, “cause to be inflicted,” are applicable to the teacher’s attempt to have the boys settle their differences in his presence. It did not work.

With respect to acts of corporal punishment by teachers, the Commissioner commented *In the Tenure Hearing of Thomas Appleby*, 1969 *S.L.D.* 159 as follows:

“\*\*\* While the Commissioner understands the exasperations and frustrations that often accompany the teacher’s functions, he cannot resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A. 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186 The Commissioner said further, *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (*App. Div.* 1967), decided by the Commissioner 1967 *S.L.D.* 215,

“ \*\*\* that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for,

nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen' \*\*\*. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.'

"Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.' *In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra.* \*\*\*" (at pp. 172-173)

In the *Fulcomer* case, *supra*, it was the Commissioner's ultimate determination that the single established incident of improper conduct was insufficient to warrant dismissal of the teacher from his position. 1967 S.L.D. 215, 219 In the instant matter it has been established that there were two instances of corporal punishment. In *Redcay v. State Board of Education*, 130 N.J.L. 369, 371 (*Sup. Ct.* 1943), *affd.* 131 N.J.L. 326 (*E. & A.* 1944), it was held that:

“\*\*\* Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.\*\*\*” (130 N.J.L. 371)

In the instant matter, the Commissioner finds and determines that respondent did commit corporal punishment as stated in Charges Nos. 1 and 2. It has not been shown that respondent has demonstrated that he is unfit to teach. However, he has exercised poor judgment in both instances, *ante*, which the Commissioner cannot condone.

In the consideration of an appropriate penalty *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County*, 1972 S.L.D. 535, the Commissioner stated the following:

“\*\*\* respondent has suffered the mental anguish of \*\*\* a hearing which could result in the loss of his livelihood. In addition, respondent's professional reputation has been damaged, and he will be required to exert himself to reestablish his reputation and standing because of his error.\*\*\*” (at p. 542)

The above-cited statement from *Kittell, supra*, applies equally herein.

The Commissioner concludes after careful consideration that summary dismissal of respondent is an unnecessarily harsh penalty, and is not warranted. For the foregoing reasons, the Commissioner determines that an appropriate

penalty for petitioner will be the loss of his salary increment for the 1973-74 academic year, in addition to the loss of salary previously withheld during his suspension from March 20, 1973 through May 8, 1973. The Commissioner orders, therefore, that respondent be reinstated to his position as a teacher with a tenure status in the School District of the Borough of Manville, Somerset County, and further, that he be paid a salary during the 1973-74 academic year which shall be the same as he received for the 1972-73 academic year.

COMMISSIONER OF EDUCATION

July 30, 1973

**Donald P. Boublis,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Hawthorne,  
Passaic County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION ON MOTION

FOR SUMMARY JUDGMENT

For the Petitioner, Cole, Geaney and Yamner (John J. Byrne III, Esq., of Counsel)

For the Respondent, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (George T. Tierney, Esq., of Counsel)

Petitioner, a nontenured teaching staff member employed by the Board of Education of the Borough of Hawthorne, hereinafter "Board," left his employment with the Board in December 1971 for active military service. He alleges that at the completion of such service he was denied reemployment in his former position and that such denial constitutes a contravention of the statutory prescription in this regard. His prayer at the present juncture is a judgment to this effect and a reinstatement forthwith. The Board denies that its actions controverted herein were in violation of law and avers its obligation to petitioner has been fulfilled.

By agreement, this matter is submitted on the pleadings for Summary Judgment. However, an oral argument, and testimony concerned with peripheral matters, was conducted by a hearing examiner appointed by the Commissioner on December 4, 1972 at the State Department of Education, Trenton.

Subsequent thereto, the hearing examiner disqualified himself from further involvement in the litigation, and the responsibility for the report which follows was assigned to another hearing examiner of the Division of Controversies and Disputes, State Department of Education by the Assistant Commissioner in charge of the Division. It is the report of this hearing examiner which follows:

Petitioner was employed by the Board as a teacher for the first time during the 1971-72 school year. His contract of employment for that year was executed July 13, 1971, and extended from the first day of September 1971 to June 30, 1972.

Pursuant to the contractual terms, petitioner did in fact begin work in September 1971 as a teacher of social studies in grades seven and eight at the Lincoln School, Hawthorne, and continued in such employment to the date of December 27, 1971. During all of that time he possessed a standard teaching certificate as a "Teacher of Social Studies" (P-4), and he was evaluated on one occasion by school administrators.

The report of this evaluation (P-3) contains 18 marks in a column designated "Good" and 4 marks on the borderline between that column and one which indicated a "Need for Improvement." The following suggestions were noted for improvement:

- "1. Varying 'pressure' in classroom presentation to emphasize a particular part.
- "2. Modulate voice.
- "3. Slower speech pattern.
- "4. Limit the goals of a particular lesson and emphasize selected goals.
- "5. Develop a more positive teacher/pupil relationship by positive reinforcement."

Additionally, the report (P-3) contained this comment:

"Mr. Boublis is particularly knowledgeable in the are (sic) [area] of his specialization — Social Studies, and highly motivated. He has taken the imiative (sic) to discuss methods of improving his teaching."

Despite the generally favorable evaluation, however, according to testimony of the Superintendent of Schools, it was subsequently decided that petitioner's contract would not be renewed for the 1972-73 school year. Nevertheless, it is stipulated that on December 14, 1971, the Board did approve a military leave of absence for petitioner which was to extend from December 27, 1971 to April 27, 1972. The letter to petitioner from the Superintendent of Schools which announced the Board's action in this regard is dated December 15, 1971 and it contains this sentence:

“This leave has been granted with prejudice and will permit your return to your position at the Lincoln School at the conclusion of the period of military service.” (Petition of Appeal, Exhibit B)

Thereafter, petitioner did enter active military service and continued in such service until April 13, 1972. On that date he was released from active duty and received a discharge characterized as “honorable.” (P-6)

On that date, also, in response to a request from petitioner dated March 21, 1972 for an extension of his leave until June 5, 1972, the Superintendent of Schools addressed a letter to petitioner concerning such request. The letter (P-5) said:

“\*\*\* I am pleased to notify you that the Hawthorne Board of Education, at its regular monthly meeting held on Tuesday, April 11, 1972, approved your request for an extension of your military leave of absence from April 28, 1972 to June 5, 1972.

“I hope that you will find the decision of the Board of Education beneficial in the fulfillment of your future plans.”\*\*\*”

Subsequently, on April 30, 1972, petitioner was informed by the Superintendent that his contract as a teacher would not be renewed for the 1972-73 school year and on May 5, 1972, petitioner addressed the following letter to school officials:

“\*\*\* Justice is treating everyone with fairness and due respect. Presently I am serving in the United States Army, to fulfill my obligation to my country.

“On Sunday morning April 30, 1972, while still in service, I was informed by Dr. Nazzari that my contract would not be renewed for the following September.

“My evaluation for the period in which I taught at Lincoln School, a mere sixty nine (sic) school days, is favorable and it is signed by Dr. Nazzari and Dr. Ingemi. I am attaching a copy herewith.

“I am not asking for a renewal of my contract but I would like the Board of Education to consider the image they have made for themselves. How will the students at Lincoln School feel when they learn that their teacher was denied to return to his position because he served his country? I think that this decision is contrary to the ideals that we try to instill in the students.

“Do you think you have shown me justice?\*\*\*”

Thereafter, following the termination of his extended leave, petitioner attended a conference with the Superintendent on June 5, 1972, and was told

by that official that he would be transferred to "Hawthorne High School from Lincoln School." (See a document dated December 5, 1972, hereinafter designated as "R-2," which contains a record of petitioner's work assignments during June 1972.) The document R-2 also contains an explanatory remark with regard to such transfer; namely,

\*\*\* No assignment made because of time factor.\*\*\*

On the day following the conference, *ante*, specifically on June 6, 1972, petitioner reported to the high school and, again according to R-2, he was assigned to coverage of two driver education classes. Other definite assignments for petitioner in June 1972 included coverage of classes in English (on June 7) and of physical education (on June 8). Subsequent to the assignment of June 8, however, petitioner "Called in sick" on all the remaining school days of the month through June 21, 1972. On the last day of school, June 22, 1972, the Board maintains he "Did not report and did not call in." (R-2) (The hearing examiner notes that petitioner contests the Board's avowal that he "did not call in sick" on June 22, 1972 while agreeing with the rest of the recital (of R-2) concerned with his employment status in June 1972. His contention, and his agreement, in these regards is contained in a letter sent to the Division of Controversies and Disputes, State Department of Education, on January 3, 1973. In this letter, counsel for petitioner expressly states:

"The only exception to the report (R-2) is the fact that Mr. Boublis did call in on the last day of school.\*\*\*")

Thus, it is noted by the hearing examiner, that there is some controversy over whether or not petitioner did in fact "Call in sick" on June 22, 1972; but, in the context of this dispute, it is clearly a peripheral matter which can be held in abeyance pending a decision by the Commissioner on the broader issues here involved.

This completes the recital of facts which serve to underlie the present controversy. In petitioner's view they show that:

\*\*\* In breach of its \*\*\* promise to reinstate the petitioner in his prior position, and in direct violation of *N.J.S.A.* 18A:6-33 and *N.J.S.A.* 18A:4A-2 , [sic] (C. 18:4A-1 to 4 incl.)\* \*\*\* the respondent Board has arbitrarily, capriciously and discriminatorily failed and refused to reinstate the petitioner. On the contrary, the respondent merely hired the petitioner for the month of June, 1972, as a substitute teacher at Hawthorne High School, and has refused to rehire petitioner in any capacity thereafter." (Petition of Appeal, at pp. 2-3)

---

\*The statute of reference is included in a section of "Acts Saved From Appeal," page 377, third volume, Title 18A, *Laws of 1944 - c. 226* (C. 18:4A-1 to C. 18:4A-4 incl.) — now *N.J.S.A.* 18A:6-33.)



The statutes of reference on which the Board relies are cited in their entirety as follows:

*N.J.S.A. 18A:6-33:*

“Tenure, pension and other employment rights in military and naval service saved.

“L. 1944, c. 226, p. 765, entitled, ‘An act concerning persons holding certain offices, positions and employments in the public school system of this state who, after July 1, 1940, have entered or hereafter shall enter the active military or naval service of the United States or of this state, in time of war or emergency, or for or during any period of training or pursuant to or in connection with the operation of any system of selective service or who, after July 1, 1940, have entered or hereafter, in time of war or emergency, shall enter the active service of the women’s army corps, the women’s reserve of the naval reserve or any similar organization authorized by the United States to serve with the army or navy, and to provide for and protect their rights to employment, reemployment and tenure in both offices, positions and employments and the rights, privileges and benefits of certain of them in any pension, retirement or annuity fund of which they were or are members in good standing at the time of entering such service, and repealing ‘An act concerning the holders of offices, positions and employments, in the public schools of this state, concerning reemployment, acquisition of tenure and protecting pension rights when the holders of such offices, positions or employments enter the military or naval services of the United States, and supplementing Title 18 of the Revised Statutes,’ approved May 19, 1941 (*P.L.* 1941, c. 134), as said title was amended by *chapter* 119 of the *Laws* of 1942 (*P.L.* 1942, c. 119),’ approved April 21, 1944 (*P.L.* 1944, c. 226), as said title was amended by *chapter* 91 of the *Laws* of 1951, and *L.* 1951, c. 91, is saved from repeal. [This act provides for leave of absence to join military or naval service of the United States after July 1, 1940 and saves their tenure, pension and other employment rights.]”  
*Laws of 1944 Chapter 226: (C. 18:4A-1 to C. 18:4A-4 incl.)*

---

\*The statute of reference, Footnote *supra*. Third volume 18A: at p. 377.

\*“1. Every person holding office, position or employment other than for a fixed term or period in the public school system of this State who, after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the Women’s Army Corps, the Women’s Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be entitled to all of the benefits and be subject to all



of the terms and conditions of chapter one hundred nineteen of the laws of one thousand nine hundred and forty-one as amended and supplemented, except that if and in event that during his said leave of absence the salary of any such person was or shall be increased, or salary increments arising from the carrying out of a scale of salary increments in full force and effect applying to all persons employed in the same classification as such person, were or shall be granted, which such person would have enjoyed had he not entered such service, such person after resuming his said office, position or employment shall be entitled to said increased salary and shall be entitled to the benefit of said increased salary during his said leave of absence if his leave of absence was or is granted with pay.

"2. Every person holding office, position or employment for a fixed term or period under the government of any school district of this State or in any public education institution under the control of the Commissioner of Education or the State Board of Education, who, after July first, one thousand nine hundred and forty, has entered or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the Women's Army Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service. If any such person shall be incapacitated by wound or sickness at the time of his discharge from such service, his leave of absence shall be extended until three months after his recovery from such wound or sickness, or until the expiration of two years from the date of his discharge from such service, whichever shall first occur.

"In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into such service. Such person shall be entitled to resume the office, position or employment held by him at the time of his entrance into such service; provided he shall apply therefor before the expiration of his leave of absence; and provided, he shall be honorably discharged from such service, and shall be entitled to continue in such office, position or employment for a period of time equivalent to that part of the term or period for which he was employed, which had not expired at the time of his entering into such service and shall be re-employed in such office, position or employment for such additional period, if any, as when added thereto shall equal one year from the date of his resumption of such office, position or employment and in any such case the period of employment served in said school district or public educational institution before entering such service and after his resumption of said office, position or employment shall be counted in determining his right to tenure

in said office, position or employment in the same manner as though they had not been interrupted by his said leave of absence and if and in event that during his said leave of absence any such person's salary was or shall be increased or if salary increments arising from the carrying out of a scale of salary increments in full force and effect applying to all persons employed in the same classification as such person, were or shall be granted, which such person would have enjoyed had he not entered such service, such person after resuming his said office, position or employment shall be entitled to said increased salary and shall be entitled to the benefit of said increased salary during his leave of absence if his leave of absence was or is granted with pay. Upon resumption of his office, position or employment the service in such office, position or employment of the person temporarily filling the same shall immediately cease.

“3. Any person holding any office, position or employment in the public school system of this State who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter the active military or naval service of the United States or the active service of the Women's Army Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy and who, at the time of such entry was or is a member in good standing of any pension, retirement or annuity fund, shall retain and have all of the rights, benefits and privileges in said pension, retirement or annuity fund prescribed by chapter two hundred fifty-two of the laws of one thousand nine hundred and forty-two as amended and supplemented and shall be subject to all the conditions and provisions thereof except that if and in event that during his said leave of absence the salary of any such person was or shall be increased or if salary increments arising from the carrying out of a scale of salary increments in full force and effect in the school district or public educational institution in which such person was employed and applying to all persons so employed in the same classification as such person, were or shall be granted, which such person would have enjoyed had he not entered such service, his right to participate in the benefits of said pension, retirement or annuity fund and the amount of contributions required by said act to be made to said pension, retirement or annuity fund shall be calculated on the basis of such increased salary.

“4. The act entitled ‘An act concerning the holders of offices, positions and employments in the public schools of this State, concerning re-employment, acquisition of tenure and protecting pension rights when the holders of such offices, positions or employments enter the military or naval services of the United States, and supplementing Title 18 of the Revised Statutes,’ approved May nineteenth, one thousand nine hundred and forty-one (*P.L.* 1941, c. 134), as said title was amended by chapter one hundred nineteen of the laws of one thousand nine hundred and forty-two (*P.L.* 1942, c. 119) is repealed.”

Petitioner's view that the Board did not comply with the provisions of the

statutes of reference is not shared by the Board. To the contrary, the Board avers that it complied fully with statutory prescription by “\*\*\* re-employing (sic) Petitioner for the remaining term of his employment contract.” (Board’s Answer, at p. 2. See also Tr. 58)

Additionally the Board avers that:

1. Petitioner is estopped from seeking reemployment for the 1972-73 school year because he told the Board in his letter of May 5, 1972 (reproduced, *ante*) that he “\*\*\* is not seeking a renewal of his contract.” (Board’s Answer, at p. 2)
2. A decision by the Board to restore petitioner to the same position he had when he left for military service “\*\*\* would disrupt the student-teacher relationship which developed when the Respondent employed another teacher to replace Petitioner during his leave of absence.” (Board’s Answer, at p. 2.) (See also Tr. 59)
3. Petitioner had failed to meet Board standards “\*\*\* and was justly denied re-employment (sic) for a further term beyond the expiration of his original contract.” (Board’s Answer, at p. 3)

Thus, the contentions of the parties herein are concisely stated and rest on varying interpretations of statutory prescription contained in the Education Law (*N.J.S.A.* 18A) and in practical considerations.

There remains one other argument of peripheral interest and import which has not been discussed, *ante*, by the hearing examiner. This argument is concerned with the divergence of view on how petitioner’s assignment during the period June 6-22, 1972, may be categorized.

On the one hand, in this regard, petitioner maintains he was not restored to his position as a social studies teacher upon his return from military service, but given instead assignments as a “substitute.” The Board maintains, however, that he was “\*\*\* returned to his position as teacher in the Hawthorne School system \*\*\*” (Tr. 44) even though, according to the Superintendent, he was assigned to “\*\*\* No particular class \*\*\*.” (Tr. 45) It is the opinion of the Superintendent that such assignment was not that of a “substitute,” but that of a “\*\*\* regular replacement for teachers who were absent \*\*\*.” (Tr. 46)

Finally, the hearing examiner observes that at the conference of counsel held prior to the hearing, *ante*, it was agreed that the sole issue to be decided by the Commissioner in this matter is whether or not

“\*\*\* the Board of Education of the Borough of Hawthorne [did] violate the provisions of *N.J.S.A.* 18A:6-33 in regards to the employment status of petitioner?”

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and it is noted that the Commissioner is asked in the matter controverted herein to set a certain set of facts in the context of a statute promulgated by the New Jersey Legislature as *Chapter 226, Laws of 1944* and included in the Education Law as *N.J.S.A. 18A:6-33*. Particularly, we are concerned with that second section of the statute which is applicable to those employees holding “\*\*\*\* office, position or employment for a fixed term \*\*\*” in a “\*\*\*\* school district of this State \*\*\*\*” who subsequently enter the “\*\*\*\* active military or naval service of the United States.\*\*\*” The basic material fact in the instant matter is that petitioner was an employee of the Board engaged in work for a “fixed term” of one year when he entered active military service in December 1971. Therefore, the second paragraph of the statute is directly applicable to him.

However, the Commissioner believes that it is necessary to view the statute in a relevant historical context to ascertain its true meaning today. Its interpretation by the Commissioner cannot rest in a vacuum, nor does it.

It rests instead on a series of enactments by the U.S. Congress with respect to the reemployment of veterans returning to civilian life from active military service. According to the volume *American Law of Veterans*.<sup>1</sup>

“\*\*\* Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Congress has attempted to remedy this evil. It has recognized that such competition is not part of a fair and just system. Accordingly, it has enacted legislation designed to minimize, in so far as possible, the sacrifices of those who entered the armed forces, by assuring them that their jobs, their pay, and their status with their employers should be secured to them in their absence against replacement by substitutes\*\*\*.” (at p. 188)

The legislation of reference was the Selective Training and Service Act of 1940. Generally, this legislation extended rights to reemployment in positions held by veterans with the Federal government prior to military service, and such rights were also assured with respect to “private” employment. However, the benefits of the Act did not apply to persons who, prior to military service, were employed by any State or political subdivision thereof, although the Act did declare it to be the “sense” of Congress that such persons should be restored to their former positions or to positions of like seniority and pay.

Generally, too, the rights to reemployment established by the Act were contingent on only three qualifications; namely:

1. satisfactory completion of service in the armed forces;
2. ability to perform the duties of the former position, and;

---

<sup>1</sup>*American Law of Veterans*, Rochester, New York, The Lawyers Co-operative Publishing Co., 1946.

3. making application within the prescribed time.

Specifically, Section 8 of the Selective Training and Service Act of 1940, as Amended, provided that:

“\*\*\* c. Any person who is restored to a position in accordance with the provision of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within *one year* after such restoration.” (Emphasis supplied.)

The similarity of the legislation enacted by the New Jersey Legislature to that of the U.S. Congress is clear and unambiguous. *N.J.S.A.* 18A:6-33 also provides that those who have “\*\*\* entered or hereafter shall enter \*\*\*” military service shall be granted a leave of absence from their “position” or “employments” by “\*\*\* any school district of this State \*\*\*.” It further provides that, upon discharge from military service, the leave of absence may be continued “\*\*\* for a further period of three months \*\*\*,” but that if the veteran applies for reinstatement prior to discharge he shall be entitled to “resume” his former “position” or “employment” subsequent to the date of discharge. The statute also states that the veteran

“\*\*\* shall be entitled to continue such office, position or employment for a period of time equivalent to that part of the term or period for which he was employed, which had not expired at the time of his entering into such service and shall be re-employed (sic) in such office, position or employment for such additional period, if any, as when added thereto shall equal one year from the date of his resumption of such office, position or employment\*\*\*.” (Emphasis supplied.)

The legislative intent in New Jersey to protect the veteran is thus clearly expressed and unambiguous and a direct parallel to the expressed intent of the U.S. Congress. Both the Federal and State laws rest, in the Commissioner’s judgment, on the premise that the basic freedoms which we in the United States enjoy, were not idly won or easily preserved and that those who have won them or helped to preserve them should not be penalized, but rewarded, for their deeds. Consequently, the Commissioner believes that disputes such as the matter herein controverted should be adjusted and adjudged in a spirit of “fair play.”

As was stated in the U.S. Government’s “Local Board Memorandum No. 190,” March 1, 1944, as reproduced in *Veteran’s Rights and Benefits*<sup>1</sup>:

---

<sup>1</sup> Erana, M.A. and Arthur Symons, *Veteran’s Rights and Benefits*, Harrisburg, Pa., The Military Service Publishing Co., 1945.

“\*\*\* It is obvious that misunderstandings and disputes will sometimes arise between the returned veteran and his former employer in respect to reinstatement. The condition of both will necessarily change, and in some instances in many respects. Whether such changes are sufficient to deprive a veteran of the rights which Congress meant to confer must, of necessity, depend on the facts in each case. It is anticipated that the employer will meet the problem in a *spirit of fair play* and in appreciation of the sacrifices made by the veteran and that he will not take advantage of any *technicality* in order to evade his responsibility to the veteran.\*\*\*” (at p. 176) (*Emphasis supplied.*)

It is noted here by the Commissioner that the legislation enacted by both State and Federal governments omits entirely any distinction between those who enter service voluntarily (enlist), or those who enter as the result of selective service induction. It is sufficient if the person is, ultimately, a “veteran.” In this regard, the *American Law of Veterans*, *op. cit.*, in its supplement, at page 37, includes this notation:

“\*\*\* Section 9 of Public Law No. 759, 80th Congress, June 24, 1948, has been held to extend reemployment rights to all reserves who enter active duty irrespective of whether they do so voluntarily or involuntarily. But reservists called to active duty solely for the purpose of training are not on active duty within the meaning of these statutes.” CCH Lab L Rep 11 14,044 \*\*\*”

In the context of the recital, *ante*, the facts of the instant matter are clear and may be stated within the framework of law to lead to certain very basic conclusions; namely,

1. Petitioner was called to active duty in the reserves for an extended period of military service beginning in December 1971;
2. In April 1972 petitioner left such military service and was entitled, at that juncture or within three months thereafter, to resume his employment with the Board pursuant to *N.J.S.A. 18A:6-33*;
3. Following such resumption (June 6, 1972), petitioner was entitled to continue in the Board’s employ for a total period comprising “one year.”

The Commissioner so holds. The Commissioner holds, additionally, that petitioner’s letter of May 5, 1972, was not a renunciation of rights he possessed to a year of employment at that juncture. The Board was obligated to employ him in the same “position,” or in one directly comparable and parallel to it, which he had held as an employee of the Board prior to his leave for military service which began in December 1971.

Any other decision herein, the Commissioner opines, would be contrary to clear statutory prescription and in direct dichotomy with the spirit of fair play which the Commissioner holds should be displayed in such instances.

Two questions remain for consideration; namely,

1. Whether or not, at the time of his discharge from military service, petitioner had satisfied the statutory requirement (*N.J.S.A. 18A:6-33*) that he “\*\*\* apply \*\*\* before the expiration of his leave of absence \*\*\*” for reinstatement in the “\*\*\* office, position or employment \*\*\*” he had held as an employee of the Board prior to the time he entered military service in December 1971, and;
2. Whether or not, if he had so reapplied, he was restored to such “office, position or employment” subsequent to the time of his discharge for the remainder of the term of his contract then in effect.

The Commissioner observes, with respect to the first question, that the statutory requirement contained in *N.J.S.A. 18A:6-33* concerning a veteran’s right to employment in his former position is that he “apply.” There is no specification that such application must be made in writing and there is no statutory bar to an oral understanding which may be held to suffice as a properly tendered application.

In this context, a pragmatic assessment of the undisputed facts herein, provides ample proof, in the Commissioner’s judgment, that petitioner at the time of his discharge in April 1972, had complied with the statutory requirement that he “apply” for reinstatement in his former “office, position or employment.” The Board knew he was returning.

Proof of this fact is that on April 13, 1972 – the date of petitioner’s discharge – he was informed by letter of the Superintendent (P-5) that his “military leave” had been extended to a specific date – June 5, 1972. Thereafter, without protest that petitioner’s application for reemployment had been faulty, the Board accepted him back and assigned him work which the Board regarded as comparable in responsibility to that which he had formerly performed. Accordingly, in this respect, the Commissioner finds for petitioner.

The Commissioner also finds, however, that petitioner was not restored in June 1972, as the statute *N.J.S.A. 18A:6-33* requires, to the “office, position or employment” he held prior to his entry into military service in December 1971, but to a lesser position as a substitute teacher, and that his assignments during June were inconsistent with his certification as a teacher of social studies.

While this finding is firm and unequivocal, the Commissioner opines that it would cause no concern or reason for censure if the Board had then restored petitioner to his full statutory entitlement in September 1972. This is so since there were good, practical reasons which could temporarily justify such assignments as the Board gave petitioner at the end of the school year in June 1972.

However, the Board then neglected to comply with that statutory mandate which clearly and explicitly provides that persons returned from military service



shall not only be entitled to "resume" the "office, position or employment" which they held prior to such military service, but also shall be entitled to

"\*\*\* continue in such office, position or employment for a period of time equivalent to that part of the *term or period* for which he was employed, which had not expired at the time of his entering into such service and shall be *re-employed* in such office, position or employment *for such additional period*, if any, *as when added thereto shall equal one year* from the date of his resumption of such office, position or employment \*\*\*." (*Emphasis supplied.*)

Accordingly, the Commissioner holds with respect to the instant matter, that petitioner was entitled on June 6, 1972 to resume his employment in his position as a social studies teacher in Hawthorne and to "continue" in that employment for the remaining term of his contract through June 30, 1972. Additionally, the Commissioner holds that petitioner was entitled to be reemployed for an "additional period" at the beginning of the school year in September 1972; which period, when added to the time of his service in June 1972, would comprise a total employment of one year from the date of June 6, 1972, on which date petitioner had been available to resume his position with the Board.

Having held in this manner and having previously held that petitioner was never afforded an opportunity to resume an appropriate employment with the Board, it is finally determined that as of the date of June 6, 1972, petitioner had, and retains to this date, a vested right for such employment with the Board for a full term of "one year," and may not be dismissed from such employment absent an affirmative future showing that petitioner's performance of his teaching duties during that one year represents "good cause" for such dismissal. (See *N.J.S.A. 18A:6-30.1*; *Nicholas P. Karamessinas v. Board of Education of the City of Wildwood, Cape May County*, decided by the Commissioner June 27, 1973; *Sue S. Branin v. Board of Education of the Township of Middletown, Monmouth County* and *Paul F. LeFever, Superintendent*, 1967 S.L.D. 9; *Gager v. Board of Education of Lower Camden County Regional High School District No. 1*, 1964 S.L.D. 81.)

Accordingly, the Commissioner directs the Board to reemploy petitioner as a teacher of social studies for a full period of "one year" beginning on September 1, 1973, and to continue him in such employment at a salary comparable to that of other teachers similarly situated and to afford him all other benefits which are due, mitigated only by those sick leave benefits already paid during the month of June 1972.

COMMISSIONER OF EDUCATION

August 2, 1973



**In the Matter of the Application of Almeida's  
Construction Company, Inc., for Renewal of Qualification as Bidder.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Alfred L. Nardelli, Esq.

For the Respondent, Lum, Biunno & Tompkins (John P. Croake, Esq., of Counsel)

Almeida's Construction Company, Inc., hereinafter "respondent corporation," submitted an application pursuant to *N.J.S.A. 18A:18-10* and *N.J.A.C. 6:22-7.1(k)*, for renewal of its classification to be qualified to submit bids to local boards of education in New Jersey on public work contracts in excess of \$10,000.

On or about March 8, 1973, Lino De Almeida, president of respondent corporation, was indicted by a Federal Grand Jury, United States District Court for the District of New Jersey, Criminal No. 140-73, on six counts of alleged violations of the Internal Revenue Code, 26 U.S.C. § 7206(1), in that said Lino De Almeida allegedly did willfully and knowingly make and subscribe and cause to be made and subscribed, United States Small Business Corporation Income Tax Returns (Form 1120-S) for respondent corporation, and Joint Income Tax Returns for the calendar years 1966, 1967 and 1968, which were verified by written declarations that they were made under the penalties of perjury and which were filed with the Internal Revenue Service, which said income tax returns he did not believe to be true and correct as to every material matter.

This matter is now before the Commissioner of Education as the result of an Order by the Commissioner dated May 24, 1973, (Exhibit R-1) wherein the application of respondent corporation for renewal of its classification qualification to bid on public work projects by local boards of education, was denied pending formal hearing, as the result of the hereinbefore stated indictment and consequent reflection on the responsibility and integrity of respondent.

A formal hearing was conducted on June 20, 1973 by a hearing examiner appointed by the Commissioner, in the Division of Controversies and Disputes, State Department of Education, Trenton. The report of the hearing examiner is as follows:

Lino De Almeida testified that he is the president and treasurer of respondent corporation, and he is also president and treasurer of the corporation's board of directors. Lino De Almeida and his brother, Arlindo De Almeida, each own fifty percent of the stock of respondent corporation. (Tr. 7) Lino De Almeida is involved in the daily management of the corporation, which is his sole means of earning a livelihood. (Tr. 12)

Counsel for respondent explained that section 7206 (1) of the Internal Revenue Code, 26 U.S.C., states in essence that where an individual willfully makes and subscribes a tax return which he believes to be false, he is guilty of a felony and subject to imprisonment for three years or a fine of \$5,000, or both. The aforementioned indictment, counsel stated, centered primarily on three areas: (1) the exclusion of certain gross receipts from income in the amount of \$60,000 during calendar year 1966, (2) the inclusion of certain unsubstantiated travel and entertainment expenses during the calendar years 1966 through 1968, and (3) a mathematical computation error of \$50,000 in the determination of gross income. (Tr. 14-16)

Counsel for respondent explained that the first problem, *ante*, was created by a method of bookkeeping which failed to properly identify receipts of returned bid securities which were not properly income. The second problem, *ante*, was also caused by less than adequate bookkeeping, and the third problem, *ante*, was a mathematical error made by the individual who made the computation. Counsel explained these matters to clarify the point that the indictment, *ante*, does not allege political payoffs, kickbacks to officials or other serious fraud. Counsel further explained that respondent corporation is organized as a sub-chapter S corporation, which means that it is taxable as a partnership. As a result, if respondent corporation's income tax return was incorrect, the responsibility is upon the stockholders just as though they were partners. (Tr. 16-17) From this, stated counsel for respondent, came the indictment of Lino De Almeida, to which he has pleaded not guilty.

The next witness for respondent was Louis G. Boscia, the comptroller and a member of respondent corporation's board of directors. The comptroller joined the corporation during October 1969, having been previously employed for eighteen years by the Internal Revenue Service. In his last position he was one of three operating division chiefs for the New Jersey area of the Internal Revenue Service. (Tr. 20) The comptroller testified that when he entered the corporation he found the bookkeeping and accounting systems "\*\*\*\* wholly inadequate, poorly put together, and lacking good control.\*\*\*\*" (Tr. 21) According to the comptroller, his recommendations for a totally new bookkeeping system were approved by the two principal stockholders and were inaugurated. Also, the comptroller testified that an accurate system for substantiation of all expenses was installed, and an experienced firm of certified public accountants was retained. The comptroller testified that the corporate income tax returns for respondent corporation for the years 1969, 1970, 1971 and 1972 have in no way been challenged or audited by the Internal Revenue Service. (Tr. 24)

Respondent submitted into evidence a document (Exhibit P-1) listing thirty-four projects which respondent corporation has undertaken for public agencies from 1968 through 1973. Of these thirty-four, seven are for the New Jersey Transit Authority, twenty-five are for the Port of New York Authority, one is for the Township of Edison, and one is for the Board of Education of North Brunswick, New Jersey. The project for the North Brunswick Board of Education was certified as satisfactorily completed on September 15, 1972. (Exhibit P-2)

Under date of May 9, 1973, respondent corporation was approved as a bidder for the Division of Building and Construction, Department of the Treasury, State of New Jersey, for projects totaling \$2,680,200 (Exhibit P-3), until December 31, 1973. Under date of November 15, 1972, respondent corporation was approved as a bidder by the New Jersey Department of Transportation for drainage projects, class "L," in amounts from \$4,000,001 to \$6,000,000. This approval will expire November 30, 1973. (Exhibit P-4) The comptroller testified that following the filing of respondent corporation's application in September 1972, the Department of Transportation sent an auditor to the corporation's office where he spent several days auditing the corporation's statements. Also, the comptroller stated that a second auditor from the Department of Transportation visited respondent corporation during May 1973, and checked the ownership of all equipment listed by respondent in its application for classification. (Tr. 32)

The comptroller testified that presently he controls the bookkeeping, accounting, fiscal controls and general administration of the corporation, while the two De Almeida brothers control the general management and make policy decisions regarding purchasing equipment, selecting jobs upon which bids will be submitted, setting salaries and determining the number of employees to be hired. According to the comptroller, he knows of no instance of unfavorable recommendation by a client of the corporation since he has been with respondent corporation. (Tr. 34-35)

For the record, counsel for the State explained that the New Jersey Department of Transportation is awaiting the outcome of this hearing before making a decision regarding the classification of respondent corporation. (Tr. 36)

A senior accountant for the firm employed by respondent corporation testified regarding the scope of their audit procedures, and also complimented the excellent fiscal control exercised over the corporation by its comptroller. (Tr. 39-40)

The testimony of Arlindo De Almeida established that he exercises equal control over policy making and general management of the corporation. (Tr. 42-43) This brother testified that respondent corporation, which was formed in 1959, has had no adverse reports regarding its performance from any client. (Tr. 43, 46) This testimony was corroborated by Lino De Almeida. (Tr. 47-48)

Counsel for respondent corporation, sworn as a witness, testified that he was assured by the United States attorney that the indictment, *ante*, was based only on alleged tax violations and on no other reasons such as bribery or kickbacks. (Tr. 50-51)

In summary, counsel for respondent corporation stated that the genesis of the indictment, *ante*, is found in the calendar tax years of 1966, 1967 and 1968, starting seven years ago. In the intervening years, he argues, respondent corporation has not been audited, investigated nor charged with any violation by

the Internal Revenue Service. Therefore, respondent avers, there is nothing before the Commissioner to show any shred of irresponsibility or lack of moral responsibility from 1969 through the present, on the part of respondent corporation.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The Commissioner notices that a substantial period of time has elapsed since the years for which violations have been cited in the aforementioned indictment, namely 1966, 1967 and 1968, and that in the intervening years, respondent corporation has completed a substantial volume of public work projects, with no evidence of any adverse report concerning the quality of the work performed. The Commissioner also finds significant the fact that no audits nor investigations have been performed by the Internal Revenue Service, of respondent corporation's records for the 1970, 1971 or 1972 calendar years. Nor have any violations been alleged against respondent corporation for the inclusive years 1970 through 1972. On the contrary, the record before the Commissioner substantiates the conclusion that respondent corporation's fiscal management has been sound and well-controlled since 1969. By comparison, the circumstances which existed in *Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471 (1971) are clearly distinguished. In that case the New Jersey Supreme Court held that the Commissioner of Transportation did not act unreasonably when he suspended classifications for bidding of the appellant corporation on the basis of an indictment which charged that the corporate contractor's majority stockholder conspired with another to bribe a State police officer to intercede improperly on the stockholder's behalf with respect to still another indictment charging the stockholder with assault and battery upon a police officer and with obstructing the officer in the performance of his duties.

In the instant matter, the Commissioner finds and determines that the weight of the evidence supports the determination that Almeida's Construction Co., Inc., be approved as a qualified bidder to local boards of education in New Jersey, on public work contracts in excess of \$10,000, pending the final outcome of the hereinbefore mentioned indictments.

The Commissioner orders that classification of respondent corporation be renewed in accordance with this decision, and the rules and regulations pertaining to such classification.

COMMISSIONER OF EDUCATION

August 2, 1973

**Julia Anne Sipos, Marian E. Kline, Esther M. Kormondi,  
Pauline Zorella, and Mary F. Simmons,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Manville,  
Somerset County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision for Summary Judgment**

For the Petitioners, Scerbo, Glickman & Kobin (Jack L. Wolff, Esq., of Counsel)

For the Respondent, Weiss, Ehrlich & Goorno (Edward B. Goorno, Esq., of Counsel)

Petitioners, originally and individually, filed separate Petitions of Appeal before the Commissioner of Education in which identical claims against the Manville Board of Education, hereinafter "Board," were asserted, all of which contained similar prayers for relief. Petitioners are school nurses who allege the Board has violated the provisions of Assembly Bill No. 623, *Chapter 29, Laws of 1972*, supplementing *Title 18A, N.J.S.A.*, hereinafter "the Act," and as interpreted by the Commissioner of Education in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County*, 1972 S.L.D. 577. The Board denies the allegations of the applicability of the Act in the matter, *sub judice*, and prays that the Commissioner dismiss the individual Appeals filed herein.

At this juncture, petitioners moved for consolidation of their Appeals, while simultaneously moving for Summary Judgment in their favor. Oral argument on petitioners' Motions was heard at the State Department of Education, Trenton, May 8, 1973 by a hearing examiner appointed by the Commissioner. A Memorandum of Law was filed by petitioners in support of their Motion for Summary Judgment. The report of the hearing examiner is as follows:

Essentially, the major element in each of the individual Appeals filed is that petitioners are persons employed as school nurses by the Board. With the exception of Petitioner Marian E. Kline, each of the remaining four possesses a standard school nurse's certificate and three of these hold a bachelor's degree, while the fourth — Julia Anne Sipos — possesses a master's degree. All five petitioners aver that the Board refuses to comply with the provisions of the Act, which action has caused them to be improperly compensated at a lower rate for the 1972-73 school year than that required. The hearing examiner points out that Petitioner Kline does not possess a bachelor's degree and is the holder of a provisional school nurse's certificate pursuant to *N.J.A.C. 6:11-6.53* (Provisional school nurse certificate).

In regard to petitioners' Motion for Consolidation, it is observed through the verified Petitions, that the claims therein involve common questions of law and that a joint determination would avoid unnecessary costs and delay in the adjudication of all the alleged disputes between petitioners and the Board. Accordingly, the hearing examiner recommends the consolidation of the Appeals, *sub judice*, pursuant to the provisions of R.4:38-1.

Petitioners argue that they are entitled to Summary Judgment against the Board pursuant to R. 4:46-2 and quote, therefrom in pertinent part, as follows:

“\*\*\* if the pleadings \*\*\* together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.\*\*\*”

Relying on *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67, 74 (1954), petitioners aver that their case clearly demonstrates that there are no genuine issues of material fact herein, and accordingly, the Commissioner is bound by his earlier decision in *Lenahan v. Lakeland Regional Board of Education*, *supra*.

The Board, however, in its pleadings, asserts that the Act arbitrarily negates the right of a local board of education to negotiate with school nurses regarding salaries; that the Act is not applicable for those school nurses who were offered and accepted salaries prior to July 1, 1972; that because the Act is retroactive, it is unconstitutional; that the electorate has defeated the proposed school budget for the past nine years which is perceived by the Board to be a mandate not to expend excessive amounts of money; that the Board did not provide funds in the 1972-73 school budget for such an expense; that petitioners do not perform any teaching functions and should, therefore, not be compensated on the same level as teachers; that school nurses are restricted by Education Law, Title 18A, in their functions, thereby reducing the major function of the position to record keeper and tester.

Petitioners to the contrary, reject the aforementioned arguments as invalid and assert that this Board, as well as all boards of education throughout the State, are compelled to compensate school nurses on the same salary guide as are teachers, and according to individual training levels and experience. Furthermore, petitioners state that the effective date of the Act is July 1, 1972, notwithstanding earlier agreed-to salary terms by school nurses.

Finally, petitioners conclude by asserting that Summary Judgment in their favor should be granted because of the Act, the Commissioner's decision in *Lenahan*, *supra*, and the absence of any genuine issue of material fact.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner as set forth above and concurs in his recommendation regarding petitioners' Motion for Consolidation.

Assembly Bill No. 623 was signed into law on June 9, 1972, as *Chapter 29, Laws of 1972*, supplementing *Title 18A, N.J.S.A.* On November 15, 1972, the Commissioner rendered a decision regarding the interpretation of the Act in *Lenahan v. Lakeland Regional Board of Education, supra*. The Commissioner is constrained to observe the many similarities between the matter, *sub judice*, and the *Lenahan* case. It was alleged in *Lenahan*, that because a school nurse does not teach, such a person may not be considered a teaching staff member. The Commissioner held otherwise when he observed:

“\*\*\* a school nurse, by statute, is considered a teaching staff member. *N.J.S.A. 18A:1-1* provides *inter alia*, that:

“ ‘\*\*\*‘Teaching staff member’ means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school \*\*\* and includes a school nurse.’ (*Emphasis supplied.*)

“The Commissioner discerns no distinction between a school nurse who, in fact, teaches and one who does not. While it is recognized that a school nurse who has received a ‘school nurse certificate’ pursuant to *N.J.A.C. 6:11-6.51* is authorized to teach first aid, home-nursing and areas related to health, such assignment is wholly within the authority of local boards of education. See *N.J.S.A. 18A:40-1* and *N.J.A.C. 6:29-3.2* In the Commissioner’s view, therefore, a school nurse with an appropriate certificate is a teaching staff member as defined in *N.J.S.A. 18A:1-1, supra*, whether or not the school nurse does, in fact, teach.\*\*\*”

Furthermore, the Commissioner determined the intent of the Legislature regarding the Act when he stated:

“\*\*\*Accordingly, the Commissioner determines that the legislative intent of the Act is as follows: a school nurse holding a standard nurse certificate and a bachelor’s degree, or an academic degree higher than a bachelor’s, shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor’s degree, is to be compensated according to the non-degree teachers’ salary guide in effect in each respective district. If a non-degree teachers’ salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor’s degree.\*\*\*”



In regard to the effective date of the Act, the Commissioner also held in *Lenahan*:

“\*\*\* The Legislature of New Jersey has the power to alter contracted obligations of local school boards with private parties, so long as the change is assented to by the private parties. *City of Worcester v. Worcester Consolidated R.R. Co.*, 196 U.S. 539, 551-52 (1905); *City of Trenton v. State of New Jersey*, 262, U.S. 182 (1923). In the instant matter, the Commissioner finds it reasonable to assume that school nurses assent to modifications of their contractual rights. Therefore, the Commissioner determines that school nurses who possess standard school nurse certificates, and who are presently working under contracts executed prior to the effective date of this Act, shall be paid ‘according to the provisions of the teacher’s salary guide’ in the manner expressed herein.\*\*\*”

The Commissioner hastens to point out that the Act specifically provides for a school nurse who holds “\*\*\* a standard school nurse certificate\*\*\*” and not for the holder of any other school nurse certificate. Therefore, because Petitioner Kline is not a holder of the required certificate, by exclusion, she is not eligible for the benefits of this Act.

However, Petitioners Sipos, Kormondi, Zorella, and Simmons are holders of the appropriate standard school nurse certificate.

Therefore, absent evidence of issues of genuine material fact in the instant matter, Summary Judgment is hereby granted those four petitioners. The Board is ordered to place Julia Anne Sipos, Esther M. Kormondi, Pauline Zorella and Mary F. Simmons on the proper level and step of the teachers’ salary guide in accordance with their training and experience for the 1972-73 school year. This Order is effective as of the effective date of petitioners’ duties for the 1972-73 school year, and, furthermore, such Order is wholly dependent upon such action being consonant with the Federal Economic Stabilization Program Regulations. Guidance in that regard should be secured by the Board from the District Director, Internal Revenue Service, Newark, New Jersey.

COMMISSIONER OF EDUCATION

August 6, 1973



**Board of Education of the Township of South Harrison,**

*Petitioner,*

*v.*

**Township of South Harrison, Gloucester County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Cresse & Carr (Warren H. Carr, Esq., of Counsel)

For the Respondent, Boakes, Lindsay and Smith (John J. Lindsay, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of the Township Council of South Harrison, hereinafter "Council," certifying to the Gloucester County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1973-74 school year than the amount proposed by the Board which was defeated by the voters. The facts of the matter were adduced at a hearing conducted on May 14, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Additionally, both parties submitted documents supporting their respective positions. The report of the hearing examiner follows:

Council, after reviewing the budget with the Board, made its determination and certified \$219,519 to the Gloucester County Board of Taxation, a reduction of \$17,800 from the amount proposed to be raised by local tax levy. Meetings between the Board and Council and the Gloucester County Superintendent of Schools failed to resolve the issue, and the Board appealed to the Commissioner to restore the funds deleted by Council so that it could operate an adequate system of education for the pupils of the school district.

Council suggested that economies could be effected in the following items without harm to the educational process:

<b>Current Expense Items</b>	<b>Budgeted by Board</b>	<b>Suggested by Council</b>	<b>Reduction</b>
Additional Teacher	\$ 8,800	- 0 -	\$ 8,800
New Bus	9,500	500	9,000
<b>TOTALS</b>	<b>\$18,300</b>	<b>\$500</b>	<b>\$17,800</b>

*Item – Additional Teacher*

The Board proposed hiring an additional first grade teacher at a salary of \$8,800. There are presently twenty-nine pupils in kindergarten (in two sessions) who will be entering first grade. The Board argues that classes of that size in first grade deprive pupils of the sound education and attention they need. The Board testified that it has reason to believe that one additional pupil will be entering the first grade in September 1973, and that it is quite possible that a few more will enroll.

Council argues that the twenty-nine pupils actually enrolled comprise a normal class size and that one more pupil will not significantly affect either the first grade program, or the attainment of the pupils.

Although there is no conclusive research on optimum class size for elementary school pupils, the experience of educators has shown that smaller classes greatly enhance the learning environment, thus enabling more pupil-teacher contact which in turn helps develop the self-image of pupils. Class size must also be considered with respect to the intellectual-emotional needs of pupils and type of learning desired.

Educators' experience in this State for more than 100 years has demonstrated that there is a greater variety of instructional methods used in smaller classes and that the more desirable educational teaching practices tend to be lost when classes increase in size. In the instant matter, the testimony shows that the Board has determined that a large class size in first grade will not be thorough nor efficient in quality for its first graders.

The *Report of the State Committee to Study the Next Steps of Regionalization and Consolidation in the School Districts of New Jersey*, April 2, 1969, Appendix C, Part I reads as follows:

“\*\*\* In order to provide the necessary instruction needed by each pupil, the maximum class size should be 25 pupils\*\*\*.” (at p. 3) (*Emphasis supplied.*)

In the hearing examiner's judgment, lower elementary grade classes sufficiently limited in numbers will provide a better opportunity for a more reasonable amount of attention by the teacher to the individual needs of the pupils – especially those in the very early grades.

The hearing examiner recommends, therefore, that the Commissioner restore the \$8,800 for this line item.

*Item – New School Bus*

The Board proposed the purchase of a new school bus for \$9,500 to replace a 1965 model bus which has traveled approximately 84,000 miles. It argues that frequency-of-repair costs coupled with the age of the bus make it unreliable and that it should be replaced. The Board spent \$546.60 in repairs in 1972 and \$226.90 in repairs in 1973 on the bus which it wishes to replace.

Council argues that it is allowing \$500 for repairs on the old bus, and that it does not need to be replaced now.

The hearing examiner notes that the bus has not been shown to be a hazard, nor has it been shown to the Gloucester County Superintendent of Schools, who is in charge of inspecting school buses, or any State inspection agency, that the bus is, in fact, unsafe.

He recommends, therefore, that the \$9,000 reduction in this item be approved.

The following table shows the contested budget items as recommended by the hearing examiner:

Current Expense Item	Amount of Reduction	Amount Restored	Amount Not Restored
Additional Teacher	\$ 8,800	\$8,800	- 0 -
New Bus	9,000	- 0 -	9,000
TOTALS	\$17,800	\$8,800	\$9,000

There was a separate question on the ballot, also rejected by the voters, to raise \$10,000 by local taxation to offset the Board's deficit spending. The Board testified that it had exhausted its current expense account and had to pay its continuing bills by using monies previously set aside for debt service. The Board seeks, therefore, to have \$10,000 restored to it to replenish the debt service account.

The hearing examiner finds no legal authority for a board of education to expend debt service monies for current expenses. Monies certified for debt service can only be used for the purpose of paying the Board's bonded indebtedness -- this is an obligation the Board must meet. The hearing examiner recommends that the Board be directed to replace the exact amount removed from its debt service account -- approximately \$10,000 -- (Tr. 4) with funds to be taken from current expense.

\* \* \* \*

The Commissioner has read the report, findings and recommendations of the hearing examiner and concurs therein.

The Commissioner determines that an additional \$8,800 is necessary for the maintenance and operation of a thorough and efficient system of public schools in the Township of South Harrison for the 1973-74 school year. He directs, therefore, that an additional sum of \$8,800 for current expense be added to the earlier certification made to the Gloucester County Board of Taxation and raised for school purposes for the 1973-74 school year.

The Commissioner finds, also, an unauthorized expenditure of debt service monies which must be replaced immediately. He directs the Board therefore, to use its current expense money to restore the exact amount removed from its debt service account – approximately \$10,000. (Tr. 4)

The Board is directed, also, to seek methods authorized by the education statutes to raise any additional monies it needs to operate the school district for the 1973-74 school year.

COMMISSIONER OF EDUCATION

August 8, 1973

**Evan Goldman, and others similarly situated and the  
Bergenfield Education Association,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Bergenfield,  
Bergen County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

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

Petitioner Goldman, a teacher who is president of the unincorporated Bergenfield Education Association, hereinafter "Association," together with two hundred and seventy teaching staff members and thirty-six janitors, all of whom are members of the Association and employed by the Board of Education of the Borough of Bergenfield, hereinafter "Board," allege that the Board acted improperly by refusing to pay petitioners for two days of service beyond the ending date of the 1970-71 academic year in June 1971, as set forth in the school calendar. The Board answers that its action requiring petitioners to report for duty for two days beyond the ending date of the 1970-71 academic year, as set forth in the school calendar, was legal and proper by virtue of the fact that petitioners had engaged in a strike on January 20 and 21, 1971, thereby causing the closing of the public schools on those two days with a resulting loss of pupil instruction time.

Petitioners pray for relief in the form of an Order of the Commissioner of Education directing the Board to reimburse them for two days of salary in the total amount of \$32,136.45.

This matter is submitted for Summary Judgment by the Commissioner. The stipulation of relevant facts in the form of exhibits submitted by the parties obviates the need for plenary hearing. Both parties filed Briefs, and oral argument was heard on July 19, 1972, by a hearing examiner appointed by the Commissioner, in the Division of Controversies and Disputes, State Department of Education, Trenton. The transcript of the oral argument is contained in the record before the Commissioner.

The relevant material facts are not in dispute. This controversy is grounded in incidents which originally took place during the month of January 1971, and thereafter.

The Association had secured, from the Board, recognition as an appropriate employee unit for the purpose of conducting collective negotiations with the Board concerning salary and other benefits, in accordance with *N.J.S.A. 34:13A-1 et seq.* Negotiations between the Association and the Board commenced following the opening of the 1970-71 academic year, and by January, 1971, had not borne fruit in the form of final agreement.

It is not disputed that petitioners, 307 in number, did not report for duty on January 20 and 21, 1971.

The Board immediately instituted suit against petitioners in the New Jersey Superior Court, Chancery Division, Bergen County. The verified complaint and order to show cause (Exhibit R-4) together with the affidavit (Exhibit R-5) of the secretary-business administrator of the Board were filed on January 21, 1971. The complaint requested injunctive relief based upon the facts stated therein. The complaint included, *inter alia*, a statement that on or about January 19, 1971, Petitioner Goldman caused to be printed in the *Bergen Record*, a newspaper of general circulation in Bergen County, a notice which concluded with the statement: "It is with much regret that we inform you that the membership of the Bergenfield Education Association will not be in school tomorrow, Jan. 20, 1971." A copy of said notice is attached to the verified complaint. (Exhibit R-4) The order to show cause recited reasons for the need for preliminary injunctive relief, and such relief was granted by the Court for the period ending January 29, 1971. Petitioners returned to their duties of employment on Friday, January 22, 1971, although instruction of pupils, which had ceased for January 20 and 21, 1971, did not resume until Monday, January 25, 1971.

On February 8, 1971, an interlocutory restraining order (Exhibit R-1) was issued by the Court which stated, *inter alia*, the following:

\*\*\*\* the defendants [petitioners and others], their agents, servants and employees, and all persons acting in behalf of or in concert or participating with the said defendants or any of them, are hereby restrained and enjoined until final hearing or further order of this Court from, directly or indirectly, by any manner or means:

“(a) Causing, encouraging, sanctioning, carrying on, or participating in any way in any strike, work stoppage, slow down or other impediment to work, against the plaintiff [Board], or by any employee or employees of the plaintiff.\*\*\*”

At the regular pay period for petitioners, which was February 19, 1971, the Board deducted an amount equal to two days of salary for each of the two hundred and seventy-one teaching staff members and thirty-six janitors, respectively, for the days which they did not report for duty, namely January 20 and 21, 1971.

The Association filed its Answer (Exhibit P-1) to the verified complaint following service upon counsel for the Board on March 8, 1971.

On July 19, 1971, the Court issued an Order of Dismissal (Exhibit R-2) of the Board's suit, with the consent of both parties, on the grounds that all matters at issue had become moot.

The school calendar for the 1970-71 academic year was originally adopted by the Board on April 14, 1970. (Exhibit J-1) According to this calendar, orientation meetings for teachers new to the school district were held September 2, 1970, and general faculty meetings were held Tuesday, September 8, 1970. The first day of instruction for all pupils was Wednesday, September 9, 1970. The 1970-71 school calendar also provided that the last day of instruction for pupils was Friday, June 25, 1971. In total, the 1970-71 school calendar provided for 183 days of instruction for the pupils of the Bergenfield School District.

The following statement is printed at the bottom of the 1970-71 school calendar (Exhibit J-1):

“\*\*\* To Staff Members: The Calendar may be extended beyond June 25 should unforeseen circumstances require it. Therefore, no plans which cannot be changed should be made prior to June 30.”

A memorandum issued to the high school faculty under date of May 10, 1971 (Exhibit J-2), which sets forth instructions for the last week of school, discloses that the 1970-71 school calendar remained unchanged in regard to the June 25, 1971, closing date.

The Board admits that its practice, prior to the 1970-71 academic year, was to shorten the academic year by any number of school days in excess of 180 days, providing that the days in excess of 180 were not lost due to the closing of school because of bad weather or some other emergency. For example, during the 1969-70 academic year, when the school calendar provided for 183 days of instruction, one day of instruction was lost when the schools were closed because of a snow storm, and the Board subsequently shortened the academic year by two days, leaving 180 actual days of pupil instruction.

At this juncture, petitioners allege that since the Board had deducted two

days of salary from them for their absences on January 20 and 21, 1971, then the Board's failure to shorten the school year by two days in June 1971, in accordance with previous practice, was illegal and improper and required petitioners to perform duties without pay for two extra days. Petitioners argue that their rights have been violated by the Board, and that the Board is now required to pay each of petitioners two days of salary in the total sum of \$32,136.45.

In a previous decision, *Evelyn Borshadel et al. v. Board of Education of the Township of North Bergen, Hudson County*, 1972 S.L.D. 353, the Commissioner adjudicated an issue which is pertinent to the instant matter. In *Borshadel* twenty-two members of the school district's clerical and secretarial staff absented themselves from their duties on a given day, and the Board secured preliminary injunctive relief which restrained petitioners from any strike, work stoppage, slowdown, boycott or impediment to work. The restraint against petitioners in *Borshadel* was made permanent by a final order of the Court, to which petitioners consented. The North Bergen Board in *Borshadel* deducted one day of salary from each of petitioners as the result of their one day of absence. The Commissioner's determination was stated as follows:

“\*\*\* It is clear that the pleadings did raise the issue as to whether an illegal work stoppage was engaged in by petitioners on June 12, 1970, and that a continuation of this action was threatened. It must be presumed that on these grounds the temporary restraint was obtained by the Board, since no other allegations were raised in either the verified complaint, the Superintendent's affidavit or the order to show cause. Petitioners received their opportunity to convince the court that no illegal work stoppage had occurred on June 12, 1970, or was threatened thereafter, and thus to defeat the injunction. Instead, petitioners consented to a final judgment which made the restraint permanent. Such a judgment is conclusive of all matters properly belonging to the subject of the controversy and within the scope of the issues; namely, the fact of a work stoppage on that named date, so that petitioners were required to make the most of their defense, bringing forth all their facts, grounds, reasons or evidence in support of it, on pain of being barred from showing such matters in a subsequent action. 50 C.J.S., *Judgments* § 716, and cases cited.

“From this evidence before the Commissioner, it must logically be concluded that the issue, whether petitioners' absence from duty on June 12, 1970, constituted an illegal work stoppage, was raised and adjudicated on the merits by the Superior Court. Therefore, the Commissioner finds and determines that the doctrine of collateral estoppel or estoppel by verdict bars petitioners from again litigating this issue. *Harris v. Washington*, 92 S. Ct. 183 (1971); *Public Service Electric and Gas Co. v. Waldroup*, *supra*.

“Considering the illegal absence of petitioners on June 12, 1970, as an adjudicated fact, and the Commissioner so holds, the Board of Education had no authority of law to remunerate petitioners an amount of one day's

wages for such illegal absence. *Florence P. Greenberg v. Board of Education of the City of New Brunswick, Middlesex County*, 1963 S.L.D. 59. At this point, petitioners' cause of action stated herein dissolves because the fact which required the Board of Education to deduct one day's salary from petitioners' respective wages had been adjudicated adversely to petitioners.\*\*\*\*" (at p. 360)

The Commissioner is constrained to cite the opinion of the New Jersey Supreme Court in *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 53 N.J. 29 (1968) in regard to the question of strikes by public employees, including employees of local boards of education. Chief Justice Weintraub, writing for the Court, stated at pp. 36-38, *inter alia*, that:

“\*\*\*\* It has long been the rule in our State that public employees may not strike. \*\*\* And we have rejected the notion that public employees may resort to strike because they think their cause is just or in the public good. \*\*\* Defendants deny there was a 'strike.' They seek to distinguish the usual concerted refusal to work from what transpired here. \*\*\* But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employments in any mode or by obstructing access to the labor market. Government may not be brought to a halt. So our criminal statute, N.J.S. 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspire 'to commit any act' for the 'obstruction of \*\*\* the due administration of the laws' are guilty of a misdemeanor.

“Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function.\*\*\*\*”

In the instant matter, it is clear that petitioners were engaged in a strike against the Board, the duration of which was two days. The courts of this State do not issue an interlocutory injunction unless the plaintiff's asserted rights are clear as a matter of law, and unless plaintiff demonstrates the probability of sustaining irreparable harm. *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 N.J. Eq. 299 (E. & A. 1878); *General Electric Co. v. Gem Vacuum Stores*, 36 N.J. Super. 234, 236 (App. Div. 1955); *Accident Index Bureau, Inc. et al. v. Male et al.*, 95 N.J. Super. 39, 50 (App. Div. 1967), affirmed 51 N.J. 107 (1968), appeal dismissed 89 S. Ct. 872, 393 U.S. 530, 21 L. Ed. 2d 754; *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 96 N.J. Super. (Chan. Div. 1967), affirmed 53 N.J. 29 (1968) *supra* Petitioners do not dispute the fact that their two-day absence from duty was, in fact, a strike.



Considering the illegal absence of petitioners on January 20 and 21, 1971, as a fact, and the Commissioner so holds, the Board of Education had no authority of law to remunerate petitioners the amount of two days' wages for such illegal absences and failure to render services. *Greenberg v. Board of Education of the City of New Brunswick*, *supra*; *Borshadel*, *supra*. Such a payment would constitute a gift of public monies for services not rendered. *Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County*, 1972 S.L.D. 606

The precise issue before the Commissioner is whether the Board, by not shortening the school calendar by two days, an admitted practice in preceding years, thus required petitioners to perform duties for two extra days, for which petitioners now claim compensation.

To resolve this dispute, it is necessary to examine the relationship of the Board and its employees, particularly teaching staff members, to the school calendar.

In *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County*, 1971 S.L.D. 246, the Commissioner reviewed in detail the purpose of the school calendar and the statutes *in pari materia* relating thereto. The Commissioner stated the following (at pp. 251-252):

“\*\*\* The whole of these parts clearly indicates that the Legislature has provided for: (1) a defined school year, (2) the adoption of a school calendar, (3) a minimum number of 180 days of operation of public schools in order for a local board to receive an apportionment of state aid, and (4) compulsory school attendance with penalties for the violation thereof. These statutes *in pari materia* serve the State policy and the deeply-rooted purpose of the law to provide for, ‘\*\*\* a thorough and efficient system of free public schools for the instruction of all the children in the State\*\*\*’

“These statutory provisions are *in pari materia*, and as stated by Judge Lewis in *Porcelli v. Titus*, *supra*, at p. 309:

“ ‘\*\*\* it is axiomatic that such enactments are to be construed together ‘as a unitary and harmonious whole, in order that each may be fully effective.’ *Clifton v. Passaic County Board of Taxation*, *supra*, 28 N.J., at 421. Accord, *Brewer v. Porch*, 53 N.J. 167, 174 (1969).’ \*\*\*”

Each district board of education in this State bears the responsibility to conduct the schools within its charge in the best interests of the children to be served. *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County*, 1968 S.L.D. 62, affirmed 1968 S.L.D. 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969 This overriding purpose of the public schools is clearly expressed in *Bates v. Board of Education*, 72 P. 907 (Calif. Sup. Ct. 1903), *McGrath v. Burkhard*, 280 P. 2d 864 (Calif.

App. 1955), quoted with approval in *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 1968 S.L.D. 225, 229, affirmed by State Board of Education April 2, 1969, affirmed 108 N.J. Super. 301, 312 (App. Div. 1969), *cert. denied* 55 N.J. 310 (1970):

“ \*\*\* The public schools were not created, nor are they supported for the benefit of the teachers therein \*\*\* but for the benefit of the pupils and the resulting benefit to their parents and the community at large.\*\*\* ’ ”

As the Commissioner stated in *Moldovan, supra*, a local board of education has the authority and the required duty to adopt a school calendar as part of the instructional plan which will best serve the interests of the children attending the public schools within the district. The statute, N.J.S.A. 18A:36-2, confers a specific duty upon all local boards of education that may not be either countermanded or surrendered by agreement. N.J.S.A. 18A:36-2 reads as follows:

“The board of education *shall determine* annually the dates, between which the schools of the district shall be open, in accordance with law.”  
(*Emphasis supplied.*)

In *Moldovan, supra*, the Commissioner further stated the following:

“\*\*\* The school calendar is in essence the prescribed time schedule for effectuating the instructional plan for the school year. Except as provided for by N.J.S.A. 18A:25-3, *supra*, the calendar is binding upon all employees of the school district, but does not limit the particular days or the number of days that the local board of education may require various employees or groups of employees to report for duty. For example, the Commissioner notices that, in many school districts, teachers as well as other employees are required to perform duties and services on days which are designated by the school calendar as vacation days for the pupils.\*\*\*”  
(at p. 253)

In the instant matter, the calendar adopted by the Board for the 1970-71 academic year provided for one orientation day for teachers beginning service within the school district, and also provided one day for general faculty meetings prior to the opening day of school for pupils. The Commissioner takes notice that this is a long-established practice in public school districts, and that the holding of professional workshops, seminars and other similar meetings is a beneficial and necessary function to assist members of the teaching staff to better perform their duties.

The Commissioner observes that the 1970-71 school calendar contained notice that the Board might find it necessary to extend the calendar until June 30, 1971. In actual fact, the Board did not find it necessary to make such an extension of the 1970-71 school calendar. In the judgment of the Commissioner, this Board or any local board of education in similar circumstances, may extend a school calendar to June 30, or require the presence and services of its

employees until June 30, because, as in this case, the employees have been formally employed by contract for the period of time up to and including June 30.

Petitioners' argument that their agreement with the Board required them to perform services for only 180 school days is groundless and their claim that the Board owes them each two days of salary is without merit.

The Commissioner is also constrained to comment concerning the Board's admitted practice, prior to 1970-71, of shortening the school calendar by any days in excess of 180, providing these days were not lost for instruction due to the closing of the schools because of bad weather or other emergencies. While the practice has not been uncommon, the Commissioner regards it as no more palatable because of this fact, and he has consistently expressed such a view in the past.

Stated affirmatively, the Commissioner believes that a school calendar, once adopted by official action of a board of education, should remain as the prescribed timetable for effectuating the instructional plans of the school district for the academic year that follows, and it should not be aborted merely because the bare minimum of 180 days has been achieved. The goal should be not a minimum expenditure of time but a maximum effort toward full educational opportunity for every pupil in the State.

For the reasons stated herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 8, 1973

Charles Coniglio,

*Petitioner,*

*v.*

Board of Education of the Township of Teaneck,  
Bergen County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Paul Giblin, Esq.

For the Respondent, Irving C. Evers, Esq.

Petitioner, a teacher with a tenure status, alleges that the Board of Education of the Township of Teaneck, Bergen County, hereinafter "Board," improperly withheld one-half of the salary increment to which he was entitled by the Board's salary policy for the 1971-72 academic year. The Board answers that its action withholding one-half of petitioner's salary increment for 1971-72 was proper and in accordance with all legal requirements.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education, in the office of the Bergen County Superintendent of Schools, Wood-Ridge, on October 6, 1971, and May 15, 1972. Thereafter, both counsel filed Memoranda of Law in lieu of Briefs. The report of the hearing examiner is as follows:

Petitioner was originally employed by the Board as a permanent substitute for the 1960-61 academic year, and his assignment was to the high school. For 1961-62 and 1962-63 petitioner was employed to teach English and American History. He acquired a tenure status during the 1963-64 academic year and continued to perform the same teaching assignment. From 1964-65 through 1970-71 petitioner was assigned to teach American History in the high school. Twenty evaluation reports of petitioner's teaching performance, dated from March 1, 1961 to March 1, 1971, were received in evidence. (Exhibit R-7)

The Superintendent testified that, based upon evaluation reports of petitioner's performance during the 1968-69 academic year, the Board intended to withhold petitioner's salary increment for the 1969-70 academic year. According to the Superintendent, the principal of the high school at that time amended his recommendation regarding withholding petitioner's 1969-70 increment, and this persuaded the Board to approve the granting of the increment. (Tr. I-99) The Superintendent sent the following communication to petitioner under date of July 1, 1969:

\*\*\*\* 'I'm sure you were pleased to learn that the Board of Education on the basis of Dr. Hendry's recommendation has, in effect, reversed its

decision to withhold your annual increment and adjustment. This was the result of concentrated effort on your part to improve. The Board noted and asked me to call to your attention Dr. Hendry's observation that while your teaching is not completely satisfactory, this action would have considerable motivational value. The Board urges you to continue this kind of progress.' \*\*\*" (Tr. I-100)

The Superintendent testified that three other members of the administrative staff disagreed with the former principal's change of recommendation, but the Superintendent weighed the various professional judgments of the four administrators and his judgment was that petitioner should receive the benefit of the doubt. (Tr. I-101) The Superintendent stated that although he believed the granting of the 1969-70 salary increment would motivate petitioner, at no time did he or the members of the administrative staff indicate to petitioner that they were satisfied with his teaching. (Tr. I-101-102)

At an unspecified time during the latter part of the 1970-71 academic year, petitioner was notified by the Superintendent that the recommendation to withhold petitioner's salary increment for the 1971-72 academic year would be made to the Board. Petitioner filed a formal grievance and was given the opportunity to be heard first by the principal and then by the Superintendent of Schools, in accordance with the Board's grievance policy. (Exhibit R-3) Following a review of this issue, the Superintendent addressed a communication to petitioner under date of May 27, 1971, which stated, *inter alia*, the following:

\*\*\*\* After a thorough review of the information presented by all parties at the grievance hearing and the information sent to me since then, combined with a review of your total record, it is my judgment that your grievance be denied and that the recommendation that your increment and adjustment be withheld stand.\*\*\*

"It is clear that you accept suggestions in a positive manner, but sufficient change does not then take place. You are on the sixth year training level at maximum salary and yet the pattern of suggestions and weaknesses written this year and in past years, including but not limited to excessive use of the rote learning approach with over-dependence on the text book, are those that one might expect to hear about an inexperienced teacher.

"I must make it clear in rejecting your grievance, that marked improvement must take place before March 1, 1972 when you will be reevaluated. The responsibility that is entrusted to us as teachers of our youth is one that requires a higher level of competence than you have demonstrated.

"Finally, I am sure you realize that you may appeal this decision to the Board of Education.\*\*\*\*" (Exhibit R-4)

Following receipt of the Superintendent's communication dated May 27, 1971 (Exhibit R-4, *ante*), petitioner addressed a letter to the Secretary of the

Board of Education dated June 7, 1971 (Exhibit P-1), wherein he requested to present his arguments to the Board, regarding the recommendation to withhold his 1971-72 salary increment. On Thursday, June 24, 1971, petitioner presented his case to the Board. (Exhibit R-5) By letter dated July 1, 1971, the Board Secretary notified petitioner of the Board's decision. This letter states in pertinent part the following:

“\*\*\* 1. That you [petitioner] will receive one-half of your 1971-72 salary increment/adjustment. 2. As Mr. Killory indicated to you in his letter of May 27, 1971, ‘marked improvement must take place before March 1, 1972 when you will be reevaluated. The responsibility that is entrusted to us as teachers of our youth is one that requires a higher level of competence than you have demonstrated.’ In other words, the Board is putting you on notice to prove yourself now as a competent teacher.”\*\*\* ” (Exhibit R-6)

The minutes of the meeting of the Board of Education held June 30, 1971, disclose the unanimous vote by the Board to withhold one-half of petitioner's increment, in the amount of \$719, for the 1971-72 academic year. (Exhibit R-2)

Schedule D of the Board's 1971-72 salary policy for teaching staff members (Exhibit R-1) contains, *inter alia*, the provision that:

“\*\*\* 3. Salary increments and/or adjustments shall be awarded on the basis of satisfactory service and shall not be considered automatic.”\*\*\*”

Extensive testimony was provided by a teaching staff member on behalf of petitioner, regarding the various strengths and weaknesses reported in the twenty evaluation reports of petitioner's teaching performance. (Exhibit R-7)

The former president of the Board testified regarding the chronology of events concerning the Board's rejection of Petitioner's grievance and the voting to withhold a salary increment from petitioner.

During the hearing, counsel for petitioner stipulated that the school administrators performed the function of making formal observations of petitioner's teaching performance and preparing the written evaluation reports, in a manner which was not arbitrary, capricious nor unreasonable. Counsel for petitioner also filed a Motion for Summary Judgment in favor of petitioner.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

Issues concerning the withholding of salary increments of teaching staff

members by local boards of education have been decided by the Commissioner in numerous past instances. *Norman A. Ross v. Board of Education of the City of Rahway, Union County*, 1968 S.L.D. 26, affirmed by State Board of Education 1968 S.L.D. 29; *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County*, 1969 S.L.D. 4; *Alvin F. Applegate v. The Board of Education of the Freehold Regional High School District, Monmouth County*, 1969 S.L.D. 56; *James J. Opekin v. Board of Education of the Township of Jefferson, Morris County*, 1970 S.L.D. 134; *John Sousa et al. v. Board of Education of the City of Rahway, Union County*, 1970 S.L.D. 140; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 S.L.D. 120; *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County*, 1971 S.L.D. 127; *Anthony G. Pekich v. Board of Education of the City of Bridgeton, Cumberland County*, 1971 S.L.D. 254, affirmed by State Board of Education 1971 S.L.D. 258; *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, 1971 S.L.D. 484; *Robert C. Van Allen v. Board of Education of the Borough of Metuchen, Middlesex County*, 1971 S.L.D. 589; *Thomas R. Durkin et al. v. Board of Education of the City of Englewood, Bergen County*, 1971 S.L.D. 654; *Barry Kotler v. Board of Education of the Borough of Manville, Somerset County*, 1972 S.L.D. 196; *Mabel Clark v. Board of Education of the Borough of East Paterson, Bergen County*, 1972 S.L.D. 251, affirmed State Board of Education June 3, 1973; *Rose Franco v. Board of Education of Plainfield, Union County*, 1972 S.L.D. 327; *Anne Curran Brooks v. Board of Education of the Township of Teaneck, Bergen County*, 1972 S.L.D. 378; *Charles Gersie v. Board of Education of the City of Clifton, Passaic County*, 1972 S.L.D. 462; *Herman Scherman v. Board of Education of the City of Rahway, Union County*, decided by the Commissioner February 7, 1973; *Elizabeth Aikens v. Board of Education of the Borough of East Paterson, Bergen County*, decided by the Commissioner February 9, 1973; and *Arnold Sroka et al. v. Board of Education of the Township of Jackson, Ocean County*, decided by the Commissioner May 25, 1973

In the instant matter, the record before the Commissioner discloses petitioner's stipulation that the school administrators performed the formal observations of petitioner's teaching performance and prepared the written evaluation reports thereof in a manner which was not arbitrary, capricious nor unreasonable. This stipulation concludes all controversy relating to the facts.

The narrow issue in this matter, therefore, becomes a question of law; namely, was the action of the Board in withholding one-half of petitioner's 1971-72 salary increment a legal action.

A review of the pertinent law is necessary for the determination of the issue herein controverted.

Numerous issues concerning the withholding of a salary increment by a local board of education were decided in the well-known case of *Kopera v. West Orange Board of Education*, 1958-59 S.L.D. 96, affirmed State Board of Education, 1958-59 S.L.D. 98; remanded to Commissioner of Education, 60

*N.J. Super.* 288 (*App. Div.* 1960), decided by the Commissioner of Education, 1960-61 *S.L.D.* 57, affirmed by Superior Court, Appellate Division, January 10, 1963.

In *Kopera, supra*, the Board had adopted a policy as part of its salary schedule which stated *inter alia*, that:

“\*\*\* ‘All increases on all guides will be based on meritorious service. Favorable reports by the superintendent and those charged with supervisory responsibility, and approval by the Board of Education are a prerequisite to the granting of all increases in salary.’ \*\*\*” (60 *N.J. Super.*, at p. 291)

Judge Gaulkin, expressing the opinion of the Appellate Division, stated the following:

“\*\*\* We hold that it is lawful and reasonable for West Orange to require ‘favorable reports by superintendents and those charged with supervisory responsibility and approval by the Board of Education [as] a prerequisite to the granting of all increases in salary.’ \*\*\*” (*Ibid.*, at p. 294)

The Court in *Kopera, supra*, quoted the original decision of the Commissioner in that case, wherein he stated:

“\*\*\* A board of education is certainly within its statutory authority if it establishes satisfactory performance as a criterion for advancement in salary. Indeed, a board is given specific authority to deny a statutory increment under the minimum salary laws ‘\*\*\* for inefficiency or other good cause.’ \*\*\*” *N.J.S.A.* 18:13-13, 7 [now *N.J.S.A.* 18A:29-13, 14 and 15] \*\*\*” (*Ibid.*, at p. 295)

In reply to petitioner’s contention in *Kopera, supra*, that the Board had not properly adopted the policy statement regarding the withholding of increments, *ante*, the Court determined that:

“\*\*\* West Orange would still have the right, even in the absence of a written rule, to refuse a raise or an increment to a poor teacher, *N.J.S.A.* 18:13-13.7 [now *N.J.S.A.* 18A:29-13, 14, and 15] recognized that right and regulated its use in connection with employment increments or adjustment increments under *L.* 1954, c. 294, as amended by *L.* 1957, c. 153\*\*\*.” (*Ibid.*, at p. 298)

The Court explained the rationale for this statutory provision as follows:

“Tenure is a status, a protection, not a contract. *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944). As a status, tenure protects all teachers who have it, the merely adequate as much as the excellent. However, that does not give all the same rights to increase or promotion. As was said in *Redcay, supra*, at page



370 of 130 *N.J.L.*, ‘The system cannot function except by the services of capable and efficient principals and teachers,’ and local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination; and they have the right to adopt any reasonable means toward that end.’” (*Ibid.*, at p. 298)

The Court remanded *Kopera, supra*, for hearing by the Commissioner to determine

“\*\*\* (1) whether the underlying facts were as those who made the evaluation [of petitioner] claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon the appellant.’” (*Ibid.*, at pp. 296-297)

The statutory authority referred to by the Court in *Kopera, supra*, which enabled a local board of education to reward capable and efficient teachers, previously was *N.J.S.A. 18:13-13.7*, and is now *N.J.S.A. 18A:29-13, 14, and 15*. The pertinent portion is *N.J.S.A. 18A:29-14* which reads as follows:

“Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. 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 member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.”

The enactment of the Legislature of *L. 1965, c. 236*, embodied in the school law as *N.J.S.A. 18A:29-4.1*, added another dimension to the status of salary policies and the relationship thereto of the statutory authority for local education boards to withhold salary increments. *N.J.S.A. 18A:29-4.1* reads as follows:

“A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such

policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.”

In the case of *Norman A. Ross v. Board of Education of the City of Rahway, supra*, the Board had a traditional policy of limiting adjustment increments to a new salary guide for any teacher to \$600 per year. The Commissioner determined that the Board erred in not expressing its practice in a statement of policy. The Commissioner stated that:

“\*\*\* Only by expressly so stating its practice could all know of it and be equally bound by it, including the voters, the municipal governing body, or the Commissioner, each of whom conceivably could be involved at some point in fixing the amounts to be raised by local taxation to support the school budget, including the salary policy.\*\*\*” (at p. 28)

The Commissioner also determined in *Ross, supra*, that the Board’s salary policy was contractual in nature. The Commissioner pointed out that prior to enactment of L. 1965, c. 236 (N.J.S.A. 18A:29-4.1), many decisions of the Commissioner, the State Board of Education and the courts had held that salary policies and schedules were not contractual, and a local board of education could not bind succeeding boards to such policies. See *Greenway v. Board of Education of Camden*, 129 N.J.L. 461 (E. & A. 1943). However, N.J.S.A. 18A:29-4.1 specifically provides, *inter alia*, that:

“\*\*\* Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy.\*\*\*”

Thus, the holding of the Court of Errors and Appeals in *Greenway, supra*, that a local salary policy could not bind succeeding boards, was specifically altered by legislative enactment.

A brief review of the salary increment cases decided by the Commissioner since *Ross, supra*, will be useful to clarify the status of present policies regarding the withholding of increments.

In *Fitzpatrick v. Board of Education of Montvale, supra*, the Commissioner decided an issue which arose when the Board withheld petitioner’s salary increment without prior notice. In that case petitioner was advised of the Board’s action after the fact, and was subsequently given the reasons for the action. The Commissioner reversed the Board’s action and stated, *inter alia*, the following:

“\*\*\* The Commissioner cannot support respondent’s action in this case.

Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.\*\*\*” (at p. 7)

In *Applegate v. Board of Education of Freehold Regional High School District*, *supra*, it was held that the Board did not follow its own salary policy for the withholding of an increment, and the Board’s action was therefore set aside.

In *Opekin v. Board of Education of Jefferson Township*, *supra*, the Board’s withholding of a salary increment from petitioner was found to be a proper exercise of its discretionary powers in accordance with its salary policy. The Commissioner held that petitioner’s argument that the procedures for withholding an increment prescribed by *N.J.S.A. 18A:29-14* were not followed was without merit, because the Board’s salary guide was in excess of the minimum salaries required under the law.

In *John Sousa et al. v. Board of Education of the City of Rahway*, *supra*, the Commissioner held that since the same circumstance existed as in *Ross*, *supra*, the same conclusion applied, and therefore fifty-two of fifty-five petitioners were entitled to their improperly-withheld increments.

In *Van Etten and Struble v. Board of Education of Frankford Township*, *supra*, the Commissioner found that the Board had negotiated a salary guide for teaching staff members, but had failed to attach to the guide “\*\*\* such provisions or conditions \*\*\* whereby increments are conditional upon recommendations from the Superintendent or from others\*\*\*.” The Commissioner observed that for the prior year, the Board had adopted such a policy. The Commissioner also pointed out that although it was held in *Opekin*, *supra*, that *N.J.S.A. 18A:29-14* did not apply in instances where the existing salary policy exceeded the minimum set forth in *N.J.S.A. 18A:29-6 et seq.*, the Board could adopt the provisions of *N.J.S.A. 18A:29-14* or a variation thereof, as its policy for the withholding of salary increments, as part of its salary guide policy. In *Van Etten*, *supra*, the Commissioner stated that the Board could adopt such an increment withholding policy for future implementation, even after the decision was rendered in that case. The Board’s action withholding a salary increment from petitioners, absent a policy, was set aside.

In *Brasher v. Board of Education of Bernards Township et al., supra*, the Board withheld a salary increment without a policy, and therefore the action was set aside by the Commissioner.

In *Pekich v. Board of Education of the City of Bridgeton, supra*, the Commissioner found that the Board had not properly followed its own policy for the withholding of an increment from petitioner, and the Board's action therefore was set aside.

In *Lewis v. Board of Education of Wanaque, supra*, the Board withheld a salary increment from petitioner in the absence of a policy authorizing such a practice. The Commissioner held that the issue was rendered *res judicata* by *Ross, supra*; *Van Etten, supra*; and *Brasher, supra*. Accordingly, petitioner's salary increment was restored.

In *Van Allen v. Board of Education of Metuchen, supra*, it was held that a policy which provided for the withholding of salary increments from teachers also applied to principals and other members of the administrative staff, by virtue of the fact that salaries for administrative staff members were related to and dependent upon the salary guide policy for teachers through the application of a ratio policy for administrators.

In *Durkin et al. v. Board of Education of the City of Englewood, supra*, the Commissioner held that the Board had acted within its authority and according to its policy in withholding a salary increment from each of petitioners.

In *Kotler v. Board of Education of Manville, supra*, a withheld salary increment was restored to petitioner because the Board had withheld the increment without having a policy stating that it reserved the right to take such action.

In *Clark v. Board of Education of East Paterson, supra*, the Commissioner determined that the Board action withholding petitioner's salary increment was proper, and was done under the authority of a broad, but applicable board policy.

In *Franco v. Board of Education of Plainfield, supra*, it was determined that the Board acted on reasonable grounds and within the authority of its policy in withholding a salary increment from petitioner.

In *Brooks v. Board of Education of the Township of Teaneck, supra*, the Commissioner found that the Board had a policy for withholding salary increments, and reasonable grounds for such action in regard to petitioner.

In *Charles Gersie v. Board of Education of the City of Clifton, supra*, the Commissioner held that the Board had set the salary for a vice-principal for 1971-72 by the adoption of a salary guide, which was effective July 1, 1971, and therefore the Board's action of November 20, 1971, to withhold the

vice-principal's salary increment for 1971-72 was a subsequent reduction which was untimely and *ultra vires*. Accordingly, the Commissioner ordered the Board to restore the vice-principal to the salary position which he was originally designated to receive for 1971-72.

In *Herman Scherman v. Board of Education of the City of Rahway, supra*, the Commissioner repeated his determination in *Van Etten, supra*, and *Brasher, supra*, that N.J.S.A. 18A:29-14 could not be relied upon by the Board as sole authority for withholding a salary increment from petitioner, a tenured principal. The Commissioner held that the Board's administrative salary policy for 1971-72, which contained no provision for withholding a salary increment, had not expired on June 30, 1972, since the new administrative salary guide for 1972-73 was not adopted until sometime during August 1972, and therefore the 1971-72 policy was controlling and prohibited the withholding of petitioner's salary increment for the 1972-73 school year. Petitioner was accordingly moved up one step on the 1971-72 salary guide, but because the 1972-73 salary guide contained a provision for withholding increments, petitioner was not placed upon the appropriate step of the new 1972-73 salary guide.

In *Aikins v. Board of Education of East Paterson, supra*, which was a case closely related to *Clark, supra*, the Commissioner set aside the Board's action withholding petitioner's salary increment on the grounds that no cause for such action was established by the Board in contradiction to the Superintendent's recommendation, and petitioner was never given any indication that such an action would be taken by the Board.

In *Sroka et al. v. Board of Education of Jackson Township, supra*, it was held that the Board's action withholding salary increments from three petitioners was based upon reasonable grounds, and was done within the authority of a broad but applicable board policy. The Commissioner pointed out that the form of board policy under which the action was taken was not the desirable policy for this purpose.

It is clear from this review of the law and prior decisions that a local board of education may not rely solely upon the statute N.J.S.A. 18A:29-14 for authority to withhold a salary increment or adjustment increment or both from a teaching staff member. Each local board may adopt the provisions of N.J.S.A. 18A:29-14, or a variation thereof, as its policy for the withholding of salary increments, as part of its salary guide policy. The Commissioner holds that local boards of education possess the authority to at any time adopt such a policy, by virtue of the legislative authority bestowed upon them by N.J.S.A. 18A:29-14. The Commissioner previously stated this determination in *Van Etten, supra*, and in a memorandum to all local superintendents of schools in this State, dated March 19, 1971, which was distributed together with the Commissioner's decision in *Brasher, supra*. The memorandum, *ante*, stated in pertinent part the following:

“\*\*\* If the withholding of increments is considered a useful and equitable technique to insure the maintenance of a reasonable standard of

performance, a local board should promulgate as part of its salary guide those conditions and procedures by which such a withholding of increment may take place.\*\*\*”

The Commissioner observes that local boards of education are agencies of the State and possess only those powers that are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Ringlieb v. Parsippany-Troy Hills Township*, 59 N.J. 348 (1971); *Palisades Properties v. Brunetti*, 44 N.J. 117 (1965); *Roselle v. Public Service Electric and Gas Co.*, 35 N.J. 358 (1961); *Bucino v. Malone*, 12 N.J. 330 (1953); *Fred v. Mayor and Council, Old Tappan Borough*, 10 N.J. 515 (1952); *Edwards v. Mayor and Council of Moonachie*, 3 N.J. 17 (1949); *N.J. Good Humor, Inc. v. Bradley Beach*, 124 N.J.L. 162 (E. & A. 1939) Such powers can neither be increased nor diminished except by the Legislature. *Talty v. Board of Education, Hoboken*, 10 N.J. 69, 71 (1952); *Burke v. Kenny*, 6 N.J. Super. 524 (Law Div. 1949), affirmed 9 N.J. Super. 160 (App. Div. 1950) A local board of education, like a municipality, “\*\*\* may not contradict a policy the Legislature establishes.\*\*\*” *Summer v. Teaneck Township*, 53 N.J. 548, 554 (1969)

When a local board of education does adopt a policy for the withholding of salary increments, either by adopting the provisions of N.J.S.A. 18A:29-14 or a variation thereof, it cannot adopt a policy which is not within the bounds of N.J.S.A. 18A:29-14. This statute makes no provision for the withholding of a portion or a fraction of an increment. Accordingly, any policy adopted by virtue of the authority of this statute may not provide for the withholding of a portion or fraction of an increment.

In the case of *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County*, decided by the Commissioner July 30, 1973, it was held that the Board, having once suspended respondent following the certification of charges against him, violated its authority under N.J.S.A. 18A:6-14 by reinstating him prior to a determination by the Commissioner. In *Robert Beam v. Board of Education of Sayreville*, decided by the Commissioner March 20, 1973, the Commissioner held that a board may suspend a teacher with or without pay, once charges are certified to the Commissioner; however, a local board may not suspend a teacher with payment of a fraction or portion of his pay.

The principle stated in *Miller, supra*, and *Beam, supra*, is applicable to a policy adopted by a local board of education for the withholding of salary increments or both, under the authority of N.J.S.A. 18A:29-14.

In the instant matter, the Board had adopted as part of its salary guide policy, a policy authorizing the withholding of salary increments and/or adjustment increments. (Exhibit R-1) However, the Commissioner finds and so holds, that the Board's action withholding one-half of a salary increment for petitioner for 1971-72 was outside the authority of its policy and the authority granted it by N.J.S.A. 18A:29-14 for the adoption of such a policy, and was therefore *ultra vires*.

Accordingly, for the reasons hereinbefore stated, the Commissioner directs the Board of Education of the Township of Teaneck, Bergen County, to restore to petitioner at the next regular pay period, the amount of salary increment withheld from him for 1971-72.

Nothing in this decision is to be construed to prohibit the Board from withholding a full salary increment, or adjustment increment, or both, from any teaching staff member under a policy such as described in this decision, and for appropriate reasons.

COMMISSIONER OF EDUCATION

September 11, 1973

**In the Matter of the Tenure Hearing of Richard Royer,  
School District of the Township of Brick,  
Ocean County.**

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Anton & Ward (Donald H. Ward, Esq., of Counsel)

Charges that Richard Royer, a teacher under tenure, hereinafter "respondent," demonstrated unbecoming and unprofessional conduct were certified to the Commissioner of Education by the Board of Education of the Township of Brick, Ocean County, hereinafter "Board." Upon receipt of the certification of the charges, on November 21, 1972, and proof of service of a copy of the charges and certification upon respondent, the hearing examiner assigned to this matter, on behalf of the Assistant Commissioner in charge of the Division of Controversies and Disputes, directed respondent to file Answer to the charge if he wished to enter a defense thereto. No answer nor communication having been received, a second letter was sent to respondent by the hearing examiner on January 23, 1973, requesting Answer to the charge if defense thereto was to be entered.

Finally, a hearing date on the charge was set down for July 18, 1973, at the office of the Ocean County Superintendent of Schools, Toms River, and respondent was so notified. On July 12, 1973, a letter was received from Daniel S. Popovitch, counsel to respondent's wife, in which it is asserted that:

\*\*\*\* Mr. Royer has absented himself from the country since November 4, 1972. Mrs. Royer [respondent's wife] does not intend to enter any appearance on his [respondent's] behalf at the tenure hearing scheduled for July 18, 1973.\*\*\*\*



The hearing was conducted by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The record shows that respondent, who was assigned as a sixth grade teacher at the Veterans Memorial Middle School, has absented himself from his teaching duties since November 6, 1972. Despite the efforts of the assistant superintendent of schools, who testified for the Board at this hearing, to determine through respondent's wife, the reason for his absence and, moreover, his whereabouts, no communication, verbal or otherwise, has been received from respondent since November 6, 1972.

Accordingly, on November 15, 1972, the Board adopted a resolution pursuant to the provisions of *N.J.S.A. 18A:6-11* certifying to the Commissioner the following two specific charges against respondent:

*"CHARGE 1:* Due to your absence from your teaching duties without notification to the Board of Education, commencing on November 6, 1972 up to and including the date of the within Resolution, you have committed conduct unbecoming a teacher by such unlawful absence and by said failure of notification. In absence of any lawful excuse or defense, and your willful and continued absence, you so continue to be guilty of unprofessional conduct.

*"CHARGE 2:* You have ceased to perform your duties and in accordance with *N.J.S.A. 18A:26-10*, said conduct having commenced on November 6, 1972 and continuing to date, you are, therefore, guilty of unprofessional conduct and, pursuant to said statute, your certificate may be suspended by the Commissioner of Education upon receiving notice thereof, and said certificate may be suspended for a period not exceeding one year in the absence of any valid and lawful excuse or defense."

Concomitant with the Board's resolution certifying the charges, respondent was suspended without pay.

The Board asserted at the hearing that although it was aware of the provisions of *N.J.S.A. 18A:26-10* which allows for teacher certificate suspension when "Any teaching staff member employed by a board of education, who shall \*\*\* cease to perform his duties \*\*\* [the person] shall be deemed guilty of unprofessional conduct \*\*\*," it chose, in the instant matter, to certify tenure charges pursuant to *N.J.S.A. 18A:6-10* because the dismissal of respondent is sought.

While acknowledging that as of July 18, 1973 — the date of hearing into this matter — respondent has made no motion to secure compensation pursuant to *N.J.S.A. 18A:6-14* pending a determination by the Commissioner in this matter, counsel for the Board requests that the Commissioner in this matter, counsel for the Board requests that the Commissioner arrive at a determination as to which party caused the delay in these proceedings for purposes of *N.J.S.A. 18A:6-14*. At this juncture, it is pointed out that, in an effort to provide



respondent every opportunity to defend against the charges, *sub judice*, the hearing examiner, on his own motion, continually extended time in the interest of receiving some communication from respondent regarding this matter. However, this effort was unsuccessful. Thus, the lapse of time between November 6, 1972, the date the charges were received at the Division of Controversies and Disputes, and July 18, 1973, the date of the hearing into such charges cannot, in the hearing examiner's judgment, be chargeable to the Board for purposes of *N.J.S.A.* 18A:6-14.

Finally, the assistant superintendent testified that respondent's abrupt departure from his teaching duties created a situation which interfered with the orderly processes of education, and specifically, with the educational program of respondent's sixth grade pupils.

In the absence of any testimony to the contrary, the hearing examiner finds that by respondent's refusal to acknowledge his responsibilities as a teacher to the Board and, more importantly, to his pupils by his failure to report for his assigned duties since November 6, 1972, he has demonstrated conduct unbecoming a teacher which, by its nature, is unprofessional conduct.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner as set forth above, and concurs in his findings and recommendations therein.

It is observed that *N.J.S.A.* 18A:6-14 provides, *inter alia*:

“\*\*\* if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary \*\*\* of such person shall be paid beginning on the hundred twenty-first day\*\*\*.”

Although the Commissioner generally refrains from addressing potential issues as requested by the Board regarding *N.J.S.A.* 18A:6-14, in this instance he will. However, it should be clearly noted that he is not rendering a declaratory or summary judgment to either party regarding the application of that law to the instant matter. The limited issue to be addressed is whether the lapse of time between the receipt of certification of the charges and the issuance of the Commissioner's determination is, in any fashion based on the record, chargeable to the Board of Education. The Commissioner holds that such a lapse of time is not chargeable to the Board. Rather, the time was appropriately used by the hearing examiner to secure a response from respondent herein in what now may be categorized as a futile effort.

In regard to the specific charges herein, the Commissioner observes that the Board grounds *Charge 2, ante*, on *N.J.S.A.* 18A:26-10 which provides:

“Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.”

In the Commissioner’s judgment, the obvious intent of this statute is to guarantee boards of education a period of time to arrange for a suitable replacement for *nontenured* employees who, for whatever reason, wish to terminate employment. In that situation, the exact time allowed a board to find a replacement is that which is required by the terms of the contract.

Similarly, *N.J.S.A.* 18A:28-8 deals with the amount of notice time a *tenured* employee must give his employing board prior to the severance of employment. The requirements of that statute are as follows:

“Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.”

The single distinguishing feature between *N.J.S.A.* 18A:26-10 and 18A:28-8 is that the former addresses the requirements for a nontenured teaching staff member regarding a notice of intention to resign, while the latter specifically requires at least sixty-days’ notice to the employing board by a tenured teaching staff member. (See *Josephine De Simone v. The Board of Education of the Borough of Fairview, Bergen County*, 1966 S.L.D. 43.) Both statutes authorize boards of education to waive the notice clause in employment contracts with nontenured employees, as well as the sixty days minimum required for tenured employees. And, both statutes provide, if proper notice is not given the employing board of education, the teaching staff member “\*\*\* shall be deemed guilty of unprofessional conduct \*\*\*.” The Commissioner may, should that situation emerge, suspend the teaching staff member’s certificate for a period not to exceed one year.

Accordingly, while the Board grounded *Charge 2, ante*, on *N.J.S.A.* 18A:26-10, instead of *N.J.S.A.* 18A:28-8, because respondent herein holds a tenure status in its employ, such course of action, while technically inaccurate, is not, in the Commissioner’s judgment, fatally defective.

In regard to the merits of the instant charges, the Commissioner cannot condone the behavior of any teaching staff member as manifested herein. Respondent’s total disregard of his responsibility as a teacher and, subsequently, his responsibility to his pupils, is sufficient to cause his employment with the Board to be forfeit.

The Commissioner finds and determines the charges of unbecoming

conduct and unprofessional conduct to be true in fact and sufficient to warrant the dismissal of Richard Royer from his employment with the Brick Township Board of Education as of the date of his suspension. Furthermore, the Commissioner also finds and determines that Richard Royer's unbecoming conduct as found herein is sufficient to cause his certificate to be revoked for a period of one year beginning from the date of this decision.

COMMISSIONER OF EDUCATION

October 10, 1973

**In the Matter of the Tenure Hearing of Sally Williams,  
School District of Union Township, Union County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

For the Respondent, Rothbard, Harris and Oxfeld (Emil Oxfeld, Esq., of Counsel)

Written charges against respondent, a teacher with a tenure status, including corporal punishment, conduct unbecoming a teacher, intimidating and threatening pupils, using profanity and other charges related to respondent's performance of her teaching duties, were certified to the Commissioner by the Board of Education of Union Township, hereinafter "Board," by resolution dated September 1, 1971. A copy of the charges and the resolution were mailed to respondent by the Board on September 2, 1971. The complainant Board certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A hearing on the charges was conducted at the office of the Union County Superintendent of Schools, Westfield, March 28, 29, May 9, 11, July 14, September 20, and October 24, 1972, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The Superintendent of Schools prepared twelve separate charges against respondent which will be discussed *seriatim*. He prepared two supplemental charges of insubordination which were later certified to the Commissioner by resolution of the Board on December 21, 1971, and mailed to respondent on December 22, 1971. To avoid confusion these additional charges will be numbered No. 13 and No. 14.

At the beginning of the hearing, the Board offered a Motion to strike the defenses and pleadings of respondent for failure to answer interrogatories as

agreed between counsel at the conference held November 22, 1971. Respondent argued that the Board also, had not complied wholly with the agreement to answer interrogatories; that she did answer some of them and that most of the information requested by the interrogatories is known or should be known by the Board. (Tr. I-3-14)

Counsel further agreed that, if necessary, they would attend another conference with the hearing examiner for the purpose of having certain interrogatories examined and answered. However, no such conference was requested by either party; therefore, the hearing examiner recommends that the Motion to strike the defenses and pleadings of respondent be denied. (Tr. I-13-14)

Most of the charges by the Board arise as a result of alleged incidents between respondent and her "trainable" pupils, their parents and resultant confrontations with her supervisors. The other charges against respondent result from a psychiatric examination ordered by the Board which was given at the New Jersey State Diagnostic Center at Menlo Park on August 5, 1971, and her later refusal to submit to another medical examination.

None of the trainable pupils testified. The hearing examiner finds that a description of "trainable" pupils is necessary to show why no such testimony was adduced and to explain why it was necessary to rely on testimony offered by parents, teachers and others involved with the trainable pupils.

Handicapped children are defined in *N.J.S.A.* 18A:46-1 as follows:

"As used in this chapter a handicapped child shall mean and include any child who is mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped."

*N.J.S.A.* 18A:46-8 requires that all handicapped children are to be identified, examined and classified

\*\*\*\* under one of the following categories: mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped."

A sub-category of mentally retarded pupils is defined in *N.J.S.A.* 18A:46-9 as follows:

\*\*\*\* b. Trainable mentally retarded children, who are so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self-help, of communicating satisfactorily, or participating in groups, of directing their behavior so as not to be

dangerous to themselves or others and of achieving with training some degree of personal independence and social and economic usefulness within sheltered environments\*\*\*.”

The particular trainable pupils in the class discussed herein were fourteen years of age and older and their physical and mental capabilities, as described by the director of student personnel services, are summarized as follows: (Tr. II-260-269)

The trainable category of pupils is identified by an I.Q. level of approximately twenty to fifty. The I.Q. levels of some of the pupils in respondent's class were so low that they could not be measured. Trainable pupils need a great deal of personal assistance. For example, some of them never learn to tie their shoelaces or go unaided to the boys' lavatory or the girls' lavatory. The director testified further that trainable pupils cannot think abstractly and cannot make up stories which are lies, because they are unable to fabricate such stories. (Tr. II-263)

An example of the abilities of these particular trainable pupils was given by explaining the professional working relationship between respondent and one of her colleagues who ran the “shop” program. The shop teacher, working with the pupils in putting together a booklet of five or ten pages, would coordinate his lesson plans with respondent's, so that respondent could help the pupils grasp the concept of a booklet of five or ten pages. (Tr. II-260-269)

Pupils are also taught “survival language,” which can best be described as the recognition of key words, such as: exit signs, danger, stop, go, months of the year and holidays. These pupils are also taught to know their own names, and if able to write, to attempt to write them. Even though a pupil is unable to read the word “exit,” the pupil should be taught cognition of the letters “e-x-i-t,” so that he/she could learn how to leave a building. (Tr. II-264)

For these reasons and because of the description and examples of the trainable pupils as reported herein, there was tacit agreement at the hearing that it would be unwise to attempt to elicit pupil testimony.

This understanding was also addressed in respondent's Brief as follows:

“\*\*\* As a result of the fact that many of the charges deal with alleged misconduct against the children and as a result of the fact that the Board chose not to call the children in the first instance to testify, we are forced to rely upon a good deal of hearsay evidence, in that the testimony consisted of statements allegedly made by the children to third persons, be they parents or other teachers.

“On behalf of Mrs. Williams, the writer frankly, as stated over and over again in the hearings, was reluctant to subpoena any of the children because of his serious doubts as to (1) their competency as witnesses; and (2) the total undesirability, if not inhumanity, of attempting to subject

these children to an adversary proceeding and examination, cross-examination, and the like.

“We must, therefore, keep in mind that we are dealing with testimony which, if offered directly, might not have been competent, for it would certainly be most difficult to demonstrate that any of these children understood the nature of an oath or were mentally qualified to give testimony, and the trier of fact, in this case the hearing officer, has not made a preliminary decision as to whether any of these children would have been competent witnesses. (See *Lobiondo v. Allan* 132 N.J.L. 437, 40 A. 2d, 810 (1945)).\*\*\*\*” (Respondent’s Brief, at pp. 2-3)

The Board’s program for its trainable pupils included a joint arrangement with the Board of Education of Roselle Public Schools. The joint arrangement was that Roselle would teach the younger trainables and that the fourteen-year-old and older trainables would be taught in the Union School System. (Tr. II-262) This arrangement and the resultant correspondence between the schools of Union and Roselle explain the use of later testimony from teaching staff members employed by the Board of Education of Roselle. (Tr. II-155, 166) Additionally, the trainable program in Union Township was offered to the parents of trainable children who lived in school districts other than Roselle, and some of those parents testified. (Tr. I-60, Tr. II-261)

#### CHARGE NO. 1

“On or about May 27, 1971, you did intentionally, and wrongfully assault and strike a student named \*\*\* [C.M.] inflicting corporal punishment in violation of law, causing injury on the infant pupil.”

C.M.’s mother testified that respondent had slapped her child and that C.M. had complained off and on that “she [respondent] hit me.” C.M. was then eighteen or nineteen years old. (Tr. I-134-139) Testimony by C.M.’s mother and other teacher witnesses was that, although C.M. could hardly talk at all, he could make his wants and needs known to them. (Tr. II-177, 237) His mother specifically testified that C.M. could say “she,” although he could not say respondent’s name. Therefore, respondent’s testimony that C.M. could not talk at all, is refuted by the testimony of his mother and some of his teachers. (Tr. VII-809, 811)

C.M.’s mother testified that she visited the bus which C.M. customarily rode to school and questioned the pupils about C.M.’s complaint that he had been struck. She testified that she did this because she thought that other pupils had been hitting C.M. (Tr. I-93) She identified three pupils on the bus by name and indicated that they, among others, had also named respondent as the person who had struck C.M. (Tr. I-96, 136)

The circumstances leading to this charge are that on the day in question, C.M. was dismissed with the other pupils by respondent from her classroom to go to their next class in the gym. A physical education teacher testified that he found C.M. shortly thereafter, crying near the gym door and was told by one of

the pupils that “the teacher” had struck C.M. (Tr. II-123) Two other physical education teachers testified that they too had observed C.M. crying and sobbing and that several pupils told each of them that respondent had struck C.M. (Tr. II-226-234) Both a physical education teacher and a shop teacher testified that they then raised C.M.’s shirt and observed that C.M. had marks of skin discoloration on his body. (Tr. II-229-230, 235)

Two parents also testified that their own children had told them that respondent had been hitting C.M. (Tr. II-209, 214-215) (Tr. IV-500-501)

Respondent denies ever striking C.M. Her version of the alleged incident is that she dismissed her pupils to go to gym, and nothing untoward had happened in her classroom. She found C.M. shortly thereafter, in the director of special services office, where she had been summoned. Respondent testified as follows:

“\*\*\* A. When I got there I saw \*\*\* [C.M.] sitting there, and I said to him hell, man; what are you doing here, and he was crying. I said now who hit you? I said have you been in a fight, and I put my arms around him and he was still sobbing. So at that time Mr. Moretti opened the door and told me to bring \*\*\* [C.M.] in. So \*\*\* [C.M.] and I went in, and he said to me, he says Sally, he says you have the most peculiar way of getting out of things I ever saw in my life. I said to him what are you talking about. Are you accusing me of striking \*\*\* [C.M.]? He said yes. You hit him. He said you hit him. I said I hit him? I said I don’t know anything about it.

“Q. Did you say anything to \*\*\* [C.M.]?

“A. So I said to \*\*\* [C.M.], I said \*\*\* [C.M.] who hit you. So \*\*\* [C.M.] can’t talk. I said point to the person that hit you. Take me to the person and point. So he just stood there. So I went back to my classroom, and left \*\*\* [C.M.] in Mr. Moretti’s office. \*\*\*” (Tr. VI-676-677)

Respondent suggests that perhaps C.M. was struck by another pupil after he left her class and before he arrived in the gym. She testified further as follows:

“\*\*\*Q. Mrs. Williams, why did you assume that he had been hit at all?

“A. He was crying. He just don’t cry for nothing.

“Q. Well, why did you assume he had been hit?

“A. He had to be hit. Somebody hit him. He wouldn’t just cry. Who wouldn’t assume that? I would assume, and you would, too.

“Q. Because he was crying he was hit?

“A. Certainly.

“Q. Isn’t it a fact that he cried from other things, also?



“A. I never saw him cry for anything else.\*\*\* ” (Tr. VII-799)

She testified also that any teacher who stated that C.M. had reported being struck by his teacher “\*\*\* would be lying because \*\*\* [C.M.] can’t talk.” (Tr. VII-797)

Having observed the demeanor of the witnesses as they testified, the hearing examiner is convinced by the weight of credible evidence that respondent struck C.M. in her classroom as charged.

C.M. was struck as shown by the marks on his body, and respondent does not dispute the fact that he was struck. However, her supposition that he was struck after leaving her class and before entering the next, possibly by another pupil, is totally unsupported by any facts or witnesses. The hearing examiner does not believe that these trainable children, who told several of their teachers that respondent struck C.M., could conspire to relate such identical stories. Nor does he believe that these pupils could have conspired to inform C.M.’s mother at the bus stop that respondent struck C.M. (Tr. II-263) In addition, two parents, each having a pupil in respondent’s class, testified that their children had told them that respondent struck C.M. (Tr. II-209, 500)

The hearing examiner recommends, therefore, that the Commissioner determine that respondent struck C.M. as charged, in violation of the corporal punishment statute, *N.J.S.A. 18A:6-1*, which reads 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 \*\*\*.”

## CHARGE NO. 2

“Contrary to professional responsibility, you have frightened, and instilled fear, in pupils in your classroom. You have done this by intimidating and threatening the pupils. These pupils include \*\*\* [L.H.] and \*\*\* [C.M.].”

C.M.’s mother testified that C.M. did not want to go to school because he was being hit and that she thought other pupils were hitting him. She said he would not prepare for school in the morning and he tried to cry to show her he didn’t want to go to school. It was his demonstrated fear of school that caused her to question C.M.’s classmates on the school bus and later decide to confer with respondent about C.M. (Tr. I-93-94, 99)

This testimony when coupled with the finding in Charge No. 1 is sufficient for the hearing examiner to conclude that C.M. was in fact afraid to attend school.

The parents of L.H. testified that their daughter, then seventeen, is orthopedically handicapped and mentally retarded. She has had several major operations to reshape her legs. She is now able to walk with difficulty, but she



needs occasional help. They testified that she became reluctant to go to school, although she did attend regularly. (Tr. III-385-389)

The director of special services for the Roselle Schools wrote to the director of special services of the Union Township Schools, to inform him concerning three complaints from Roselle parents about respondent's class in Union. The parents of C.M. and L.H. who reside in Roselle, requested their director to transfer their children from respondent's class. The other complaint was from a parent who said he found respondent asleep when he visited her class. This parent also complained that respondent had not taught his son the reading of signs as had been recommended by the Evaluation Center of Newark State College. (P-4)

C.F.'s mother testified that her daughter had been struck and had her hair pulled by respondent. She testified also that C.F. had witnessed C.M., L.H., and R.B. being struck by respondent. (Tr. IV-493-522) Her testimony was that C.F. told her that she had seen these children struck several times and that she, C.F., had been struck several times. She testified, also, that C.F. could not tie her sneakers for gym and that respondent refused to help C.F. because she said that "\*\*\*\* She was not a maid to these children \*\*\*." (Tr. IV-494)

She testified also as follows:

\*\*\*\* A. There were many times she would come home and she would tell me that, you know, Mrs. Williams either pushed her, or pulled her hair, smacked her in the face, and many times, with other children she would be sitting at the table eating supper, and she would start telling, you know what happened today, and then she'd hold her mouth, and I'd say well what happened, and she'd say I can't tell you because Mrs. Williams is going to kill me. And I'd leave her, because I know that she would tell me in a few minutes, anyhow, what happened, and she would tell me. Oh, I'll tell you, she says, you know what happened? Mrs. Williams pushed so and so, or hit so and so, or threw them out of class, or what have you.\*\*\*\* (Tr. IV-496-497)

\*\*\*\* A. Well, I know \*\*\*\* [C.F.] — and there was another big incident as far as I'm concerned, with \*\*\*\* [C.F.], that she had to stay in the corner for days on end, and Mrs. Williams had told \*\*\*\* [C.F.] that she wasn't going to get out of the corner until she stopped bothering her every morning, can I get out of the corner; I will be good today? She told her when you stop asking me, and it got to a point when Mrs. Williams told \*\*\*\* [C.F.] you will get out of the corner; I would like to see your mother, and at that time I had no way of coming in, and I didn't put much stock in it. I figured tomorrow she'll let her out of the corner, tomorrow she'll let her out of the corner, and it got to a point where she didn't, so I contacted, again, Mr. Lupidas (sic), and he made an appointment. He said he would take me, and he would go with me, and he would discuss it. When we got there Mrs. Williams out and out refused to let Mr. Lupidas (sic) in on the conference. I was quite disturbed, because I had a feeling he

should hear what I had to say, and I wanted him to know what she had to say. When I spoke to her at that time, I approached her in reference to, you know, handling the child, pushing her or hitting her, and she out and out told me \*\*\* [C.F.] was a liar, and that all these children lie, and I told her that \*\*\* [C.F.] does not lie. I can't account for anybody else, but I know that \*\*\* [C.F.] does not lie.

“Q. How do you know that?

“A. Because even in the house, like asking her to do something a little off color, anything, you know if I tell her to answer the phone and tell her to say I'm not home she will not do it. I guess she just can't comprehend it.” (Tr. IV-497-498)

Respondent denies the allegations, *ante*, and characterizes the pupils' statements to their parents as unrealistic. Respondent's Brief (at p. 17) indicated that the parents of severely handicapped children have great anxieties; and that C.F. had a “lively imagination” and her stories were “uncritically accepted” by her parent.

One parent identified respondent as an ideal teacher for her son, D.W. She said that D.W. never had any trouble with respondent and that he referred to her as his girlfriend. (Tr. VI-651-653)

Although some of the testimony, *ante*, indicates additional instances of corporal punishment by respondent, it is supported only by the testimony of C.F.'s mother. Nor did the Board, in Charge No. 2, accuse respondent of corporal punishment as testified, *ante*. Therefore, there is no finding of corporal punishment with respect to Charge No. 2.

The hearing examiner finds, however, that the repetitious testimony of several parents, that their children feared respondent, adequately supports the charge. Although a substitute teacher witness testified that she believed respondent had a very good relationship with her pupils, and that they missed respondent when she was absent, the weight of the believable testimony is that several of the children were reluctant to go to respondent's class. (Tr. I-79-80, 94-95; Tr. II-209, 386, 397; Tr. IV-496-497)

The hearing examiner recommends that the Commissioner find respondent did in fact intimidate and instill fear in her pupils as related in Charge No. 2.

### CHARGE NO. 3

“On or about May [ ], 1970, you used profanity and showed disrespect for a parent of a pupil. Specifically, you told Mrs. \*\*\* [C.M.] that you did not have to take any shit and what the hell was wrong with the child.”

C.M.'s mother testified that she met with respondent when C.M. began attending the Union Schools, and respondent did not want C.M. in her class. She

testified that respondent complained that she would not tolerate C.M.'s wetting in his pants and that she started using profanity and said "\*\*\*\* She wasn't a damn chambermaid. She didn't know what the hell was wrong with him. She didn't have to take that shit." (Tr. I-122, 90-91) She testified further that in May 1971, she met with respondent concerning the reports she had received of C.M. being struck and her conversation, *ante*, with respondent about C.M. a year earlier. At this meeting, she avers that respondent denied using any profanity at their meeting the year before. She then testified that "\*\*\*\* after knowing what the teacher had said, and then she would stand to my face and say she didn't say it, I said well this is it. [C.M.] won't go there.\*\*\*\*" (Tr. I-95) She testified further that respondent said "\*\*\*\* that for all she cared I could take \*\*\*\* [C.M.] out of school, and keep him out, and I could go write to Trenton, go to Trenton about it." (Tr. I-97) C.M.'s mother removed her son from the school for the remainder of the school year. (Tr. I-144)

Respondent denies using profanity as charged, but admits meeting with C.M.'s mother and asserts that they discussed his personal problems in her class. Specifically, she testified that "\*\*\*\* [C.M.] was sick, and masturbating himself to sleep, and urinating, and he never would ask to go to the lavatory.\*\*\*\*" (Tr. VI-666) She testified also that:

\*\*\*\*A. When he came to school he was wet. So, that is when I proceeded to question her, to ask her was he toilet trained, and she says yes. He was toilet trained. And I said well, why is it that he wets his clothes? Why is it that he masturbates like he does? So she says I don't know. He doesn't do it at home. And there was no argument. That is what it was. We just let the answer go.\*\*\*\*

Although the hearing examiner notes that C.M.'s mother removed her son from school for what she believed to be good reason, neither her testimony, *ante*, nor the testimony of respondent was corroborated by other witnesses; therefore, the hearing examiner believes that respondent is entitled to the benefit of any doubt and he recommends that Charge No. 3 be dismissed.

#### CHARGE NO. 4

"On February 9, 1971, you left your room unattended without any teacher in control. On this occasion, you absented yourself for 10 minutes, thereby engaging in unbecoming conduct and violating law and Board policy."

Respondent does not deny that she was approximately ten minutes late to class; rather, she asserts that she had good and sufficient reason for not being in her classroom at the prescribed time.

In her Answer respondent stated that she had become ill in the classroom and vomited. She avers she then left the room long enough to go to the bathroom, clean herself and return. However, she also testified that because it was a rainy, snowy morning, she was delayed in traffic and late for school; and

when she arrived, the director and the children were in her classroom. (Tr. VI-674)

Later, she testified that she became ill in the classroom “*after noon*” and left to clean herself and return. (Tr. VI-680) (*Emphasis supplied.*)

In her direct testimony, respondent replied as follows to her counsel’s question:

“\*\*\* Q. Now Sally, you testified, in connection with the February 9, 1971 episode, that that was the occasion when you came late to the class. In your answer you said that that was an occasion when you became ill, in the classroom. Do you remember which one it was, on February 9?

“A. Yes; I was ill. I didn’t finish that statement.

“After I left Mr. Moretti’s office this morning I got sick in class. That was after noon. I got sick, and I upchucked in class, and I went out to the teachers’ room, which is next door. So when I got back to clean myself up, when I got back Mr. Moretti was in the classroom. He said where have you been. I said Mr. Moretti, I’m sick. I upchucked. He said if you’re sick, you stay home. I says I didn’t get sick home. I got sick here.\*\*\*”

The Board did not specify which law respondent violated nor did it quote the Board policy requiring employees to report to work on time. Suffice it to say, however, that all teachers are properly required to report to work at their assigned time.

The hearing examiner finds that the credible testimony supports the charge. If she were in fact ill in the afternoon as she testified, then her testimony regarding her lateness to school in the morning is totally unsupportable. Respondent’s answers are conflicting. The hearing examiner finds that respondent has no accurate recollection of the incident that permits a finding that the Board’s charge is in error. He recommends, therefore, that the Commissioner determine Charge No. 4 to be true as set forth by the Board.

#### CHARGES NOS. 5 and 6

“On October 9, 1970, you left your classroom unattended and unsupervised, thereby engaging in unbecoming conduct and violating law and Board policy.

“On October 9, 1970, you were insubordinate to your Director and you, in fact, threatened him by saying ‘I’ll get you.’ You further failed to follow his direction that you immediately return to your classroom that you had left unsupervised, thereby engaging in unprofessional conduct, being insubordinate, and violating law and Board policy.”

These charges are similar and will be considered together. Respondent denies leaving her classroom unsupervised and further denies threatening her director. She avers that she sent the boys to the boys' lavatory and the girls to the girls' lavatory and visited the director's office briefly during that time. She then returned to her classroom. She avers that this is the usual practice and that the children are not accompanied to the lavatory; rather, they go and return on their own.

She admits that the director ordered her to return to her classroom; in fact, she testified that he yelled at her to return. (Tr. VII-824-829, 836)

The director testified as follows:

“\*\*\* it was after the second note was sent to her that I was on the phone talking with Dr. Caulfield (sic) and she burst into the office, visibly upset, and was speaking in a very loud voice. She seemed to be agitated to the point where she was pointing her finger at me and saying things like I will get you, and made some derogatory remarks about my wife, and the way I was treating her, and I don't remember the language.

“And since I was on the phone, I just said to her in the tone of voice which I am speaking now, get back to your class, and I said that three or four or five or six times. And I eventually had to put the phone down, because Dr. Caulfield (sic) and I were talking, and he said what's going on, and you could hear the activity, and I said I am sorry, but Mrs. Williams is here. I will have to call you later, and I put the phone down.

“And finally she backed off, and went back to class\*\*\*.” (Tr. II-255-256)

Respondent testified that she visited the director's office and was able to determine that he was talking on the phone to Dr. Caulfield, an assistant superintendent of schools in the district. Her testimony is as follows:

“\*\*\*A. He asked me what I wanted, and I asked him why he was picking on me. I said why is it that everything I do you send me little notes, and they are not nice notes. I said how J.B. made the same mistake that I made. I said now, you put J.B.'s attendance cards in his mail box. You sent mine back to me. Now, if you're going to correct one teacher, why don't you correct both? Now this is what I told him.

“Q. And what did he say to you?

“A. He told me to get back to my classroom. I didn't say anything. He said I better get back to my classroom. I told him stop yelling at me. I'm not your wife, neither your children. I said that for a point.

“Q. All right; regardless of why, this is what you said to him. Now, did you at any time threaten him by saying I will get you?

“A. No; I didn’t say that. I didn’t tell him that I was going to get him. I told him that I was going to see that he would stop yelling at me and treating me like a dog, and walking all over me. He had to stop.

“Q. All right; did you eventually – did you go back to your classroom?

“A. I went back to my classroom.

“Q. What did you do about the children? How did you get them back?

“A. Three girls were in the outer office. When we got back there the boys came in later. There were no one in the classroom. (sic)\*\*\*\*” (Tr. VI-673-674)

Dr. Caulfield, who was talking to the director on the telephone when respondent entered the director’s office, testified as follows:

“\*\*\*A. I called him. He answered the phone. We exchanged a few words. There was shouting in the background. I asked what it was. He said it’s Mrs. Williams. I continued the conversation, attempted to; the shouting continued. I could hear him say go back to your classroom; go back to your classroom. It continued. It continued; he said I will have to call you back, and we terminated the conversation.\*\*\*” (Tr. IV-523)

Other testimony, related to the physical design of the building and the proximity of respondent’s class to the lavatories and to the director’s office, leads the hearing examiner to conclude that any lack of supervision by respondent in this instance was minimal. He finds that the conduct of pupils to and from the lavatories as described by respondent was a routine procedure, except for respondent’s visit to the director’s office as detailed, *ante*. Testimony of other teachers shows that pupils walk to other classrooms and lavatories unsupervised. One teacher said C.M. was able to make him understand that he wanted to go to the lavatory, and he permitted C.M. to go. (Tr. II-241-242)

The hearing examiner recommends, therefore, that Charge No. 5 be dismissed.

With regard to Charge No. 6, the hearing examiner is constrained to observe the time, place and manner of the discourse that took place between respondent and the director in his office.

The record shows that respondent was upset and angry after receiving a second note that day from the director, instructing her to correct a mistake on a report. It was at that point in time that she entered his office to “\*\*\* tell him what I [she] had to tell him\*\*\*.” (Tr. VII-835) Respondent believed she was being harassed and treated differently from other teachers. (Tr. VII-830-835) In the hearing examiner’s judgment, the record does not show that respondent was being harassed and treated differently from other teachers.

#### CHARGE NO. 7

“On December 5, 1968, you were insubordinate and unprofessional in that you refused to have a conference with a set of parents in the presence of your Director, Mr. Frank Moretti.”

#### CHARGE NO. 8

“In November, 1968, you did intentionally strike a pupil \*\*\* [R.B.], thereby inflicting corporal punishment in violation of law.”

These charges are related and will be discussed together. The insubordination charged in No. 7 arises out of the events charged in No. 8; therefore, Charge No. 8 will be discussed first.

Respondent denied striking R.B. and testified that J.E. a classmate, hit him. She testified that because of that incident she called the parents of both pupils and invited them in for a conference. She testified further that she had a successful conference with J.E.'s mother, and as a result of that conference, there were no more incidents of J.E. hitting R.B.

She testified also that when R.B.'s mother and father arrived, she noticed an air of hostility about them because they refused to shake her hand. She testified that R.B.'s mother told her that she had made a formal complaint to the director because respondent had hit her son. Respondent testified specifically as follows:

“\*\*\* A. He was present, sitting right there. So, by them being so hostile when they entered the room, and when she said her child didn't lie, I didn't know what the whole thing was all about until she told me. Then, I asked Mr. Moretti would he please step out. I wanted to talk to the parents alone.

“Q. What did Mr. Moretti say?

“A. Just give me a few minutes — Mr. Moretti said to me that he was not going any place. He was going to sit here, and hear and see what was going on, and what I was doing. So at that point I said there was no point of my continuing this conference. I said to Mr. and Mrs. \*\*\* [B.] if you all come back another time, you will be in a much better frame of mind, and we can talk, but as it is now I don't see where we can accomplish anything. Mr. Moretti says get on with the conversation. You're not going to have these people come back, all the way from wherever this — they came from, and you not have a conference with him — with them. I said to Mr. Moretti, I said the conference is yours. He says it is not mine. It is yours. I said Mr. Moretti, the conference is yours. The reason I said that is because he had given those people ammunition, no matter what I said wouldn't have made any difference, at all. There was no protection that he protected me from those people. Now, had I known that Mr. \*\*\* [B.] had registered a complaint against me I would have been aware of what was going to happen.

“Q. Well, you said you had notified the [B.’s] to come to school.

“A. Come to school to see me as a parent, in a teacher’s conference, just as I just wanted to talk to her about her child, and I just wanted to meet them.” (Tr. VI-661-662)

R.B.’s father testified that his son told him respondent had slapped him because he couldn’t tie his shoes. (Tr. I-64) The father corroborated respondent’s testimony that she would not continue the conference with the director present, and stated further that respondent was not polite to the director. He testified specifically that if “\*\*\* the director didn’t get out then she [respondent] would leave\*\*\*.” (Tr. I-62-63)

R.B.’s mother testified that she told the director that she “\*\*\* was quite shocked by the display of temper on Mrs. Williams’ part, and after seeing how angry and how unglued she could become, that I thought it was quite possible that she did lose her temper and strike him.” (Tr. I-86) R.B.’s parents then kept him out of school for one week before permitting him to return.

The hearing examiner observes that support for this charge is found in the testimony of R.B.’s parents who assert that they believed their son when he told them he had been slapped by respondent, and that R.B. had reported being hit by pupils in the past, but he had never before said that a teacher had hit him until this incident, *ante*. (Tr. I-87-88)

Further support comes from C.F.’s mother, who also testified that her daughter had reported to her that she saw R.B. and others struck by respondent many times. (Tr. IV-496-505).

The hearing examiner determines that the circumstantial evidence from the testimony of R.B.’s parents and C.F.’s mother supports the conclusion that respondent did in fact strike R.B. as charged. Further, respondent’s defense, that R.B. was struck by J.E., is not supported by her confusing testimony.

Respondent’s testimony is, that after J.E. struck R.B., she called J.E.’s mother to come “\*\*\* to school tomorrow morning \*\*\*” to have a conference and that “\*\*\* Mrs. [E.] promised me that she would take care of [J.E.] \*\*\*.” (Tr. VI-656-657) Mrs. E. was not brought in to corroborate this statement, nor was there offered an affidavit or other evidence to corroborate the purpose of that conference with J.E.’s mother. However, even if the conference proceeded as described by respondent, *ante*, her subsequent testimony relating to the scheduling of the meeting with R.B.’s parents is neither logical nor clear. It reads as follows:

“\*\*\*Q. Now, did you, on that same day, have a visit from [R.B.’s] parents?

“A. Yes. That same day I did.



“Q. Did you know that they were coming to the classroom?

“A. I knew they were coming, because I set up the appointment for her to come the day before, but she couldn’t make it, and I set the appointment up for the previous day, and that was the day that I set the conference for.

“Q. So that you had originally set up the appointment for [R.B.’s] parents to come before [R.B.] and [J.E.] had not yet had this episode, or had they?

“A. Yes, because [R.B.] hit – [J.E.] hit [R.B.] that day, before I had the conference, if I’m not mistaken, with Mrs. [E.], and then I told [R.B.] – I told [J.E.] that I was going to send for his parents, and I did.

“Q. I’m asking you did you say that on the same day you had the conference with Mrs. [E.] you also had a meeting with [R.B.’s] parents?

“A. That is right. That is right. I did.

“Q. And I asked you whether you knew that [R.B.’s] parents were coming to visit. You said you had – you did, rather.

“A. I did. I did.

“Q. When had you notified them, if you had, to come?

“A. Previous to that I notified them.

“Q. I see. Well, now, at the time you notified [R.B.’s] parents to come had [R.B.] and [J.E.] already had this altercation?

“A. They had.

“Q. They had?

“A. They had.

“Q. Okay. Were [R.B.’s] parents – and I hope I’m pronouncing their name correctly. [Pronunciation]

“\*\*\* [Pronunciation]

“Q. When they came to your classroom were they alone?

“A. No.

“Q. Who was with them?

“A. Mr. Moretti.” (Tr. VI-658-659)

If, in fact, J.E. had hit R.B. as respondent testified, and she called J.E.'s mother that night to come in for a conference the next day, then she could not have notified R.B.'s parents in time for a conference on the same day as she testified. Her testimony that "\*\*\*\* I set up the appointment for her [R.B.'s mother] to come the day before, but she couldn't make it, and I set the appointment up for the previous day, and that was the day that I set the conference for \*\*\*," is unintelligible. (Tr. VI-658) Further, if R.B.'s parents had the conference, as respondent testified, on the same day that J.E.'s mother had hers, respondent's testimony that they were notified the day before, but couldn't make it, is all the more confounding. (Tr. VI-658-659) Additionally, the director testified that he actually set the date for the parent conference and respondent's invitation was extended to R.B.'s parents because all teachers were required to have at least one parent conference during the year. (Tr. III-321-323)

On the basis of the believable testimony, the hearing examiner recommends, therefore, that the Commissioner determine that respondent hit R.B. as alleged in Charge No. 8.

In regard to Charge No. 7, respondent does not deny that she refused to have the conference with R.B.'s parents in the director's presence, but denies being insubordinate. She testified that his presence at the conference was another form of harassment and that he did not sit in on conferences with other teachers. (Tr. VI-660-662)

In the judgment of the hearing examiner, respondent was insubordinate as charged.

#### CHARGE NO. 9

"You no longer have the capacity to be a teacher in the school system operated by this Board of Education, as demonstrated by the existence of psychiatric and psychological examinations and evaluations of you resulting from the examination and testing administered to you at the New Jersey State Diagnostic Center commencing on or about August 5, 1971."

On the basis of the original charges filed against respondent, the Board ordered her to submit to a psychiatric examination at the State Diagnostic Center at Menlo Park to determine her continued fitness to teach. The Board furnished the examining psychiatrist with a comprehensive file of respondent's record which he reviewed before he examined her. He testified that he assumed all of the allegations in her file were true and that his examination was for the purpose of finding the reasons for her actions. (Tr. IV-484)

Respondent visited a psychiatrist of her choice to guard against the possibility of an exclusive finding by the Board-appointed psychiatrist. The testimony shows that the two psychiatrists agreed on some specific phases of their respective examinations and disagreed on others. However, neither determined that respondent was unfit to teach. The Board-appointed psychiatrist concluded, as a result of his examination, that possibly rest and psychotherapy would be best for respondent. (Tr. IV-467-468) Her own

psychiatrist found no reason why she could not return to the classroom immediately.

N.J.S.A. 18A:16-2 provides that:

“Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

“Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.”

The hearing examiner finds that no conclusive evidence was adduced to show that respondent was mentally unfit to teach; therefore, he recommends that Charge No. 9 be dismissed.

Although respondent testified that she had not seen the Board's charges against her prior to September 14, 1971 (Tr. VI-700-702), the testimony of her psychiatrist discloses that he was aware of the charges and, therefore, it raises a question concerning her credibility with respect to this allegation. (Tr. IV-548-549) Her psychiatrist testified that he and respondent discussed her seeking legal counsel. He also wrote the Commissioner of Education on September 9, 1971, and recommended “\*\*\* treatment rather than dismissal\*\*\*,” indicating that he had knowledge of the charges prior to September 14, 1971. He could only have learned of those charges through information supplied by respondent, since the record discloses he had no contact with the Board, but he did talk to respondent during August. He testified also that respondent called him and requested that he write the letter to the Commissioner, *ante*, when she learned she could not resume her teaching duties in September. From this sequence of events it must be logically concluded that respondent knew about the charges, or that they would be filed with the Commissioner, prior to September 14, 1971. (Tr. VI-548-549, 560) Respondent testified, also, that the psychiatrist at Menlo Park read some of the charges to her when she visited him on August 5, 1971. (Tr. VI-691-694)

#### CHARGE NO. 10

“On June 18, 1971, you acted unprofessionally and in violation of your responsibility in stating you wished one of your pupils, [C.F.], had stayed home and not come to school on the stated date.”

This charge is a result of a memo sent to the director of special services in Roselle by a school social worker who transported C.F. to respondent's classroom on June 18, 1971. C.F. had missed her bus ride to Union and when

she was escorted into respondent's classroom by the social worker, respondent allegedly said "[C.F.] couldn't you have stayed home today.\*\*\*" This comment disturbed the social worker so that she reported the incident to the director of special services in Roselle who asked her to write it in a memo. (P-6)

Respondent denies making the comment, *ante*, and testified that she made up a little nursery rhyme about C.F.'s late entrance to her classroom. (Tr. VI-682) She testified further that C.F. had two seizures the day before and that ordinarily a child so affected should remain at home on the following day; therefore, she didn't expect C.F. in class but was happy to see her. (Tr. VII-759-762) Respondent testified as follows regarding her "nursery rhyme":

"\*\*\* I looked at [C.F.] and said to her, I said you used to come at nine o'clock. Now you come at ten. So how do you do, and that was all that was said.\*\*\*" (Tr. VI-682)

There is no additional testimony to corroborate the allegations made by the school social worker. However, even if respondent's version, as testified, *ante*, is accepted as true, it is the hearing examiner's opinion that the "rhyme" is sarcastic.

Sarcasm, which may be defined as a cutting rebuke or a caustic remark directed at the weakness of its victim, has no legitimate standing as a teaching tool. (*Webster's Third New International Dictionary*) The hearing examiner does not believe that the pupils in this trainable class could understand respondent's "rhyme." However, even if they could, respondent's "rhyme" cannot be construed to be instructive, informative, entertaining or helpful to C.F. or the other pupils in any way.

The hearing examiner concludes that respondent's comment made pursuant to Charge No. 10 was sarcastic and unprofessional, and he recommends that the charge be sustained.

#### CHARGE NO. 11

"On June 23, 1971, you absented yourself from your classroom, leaving it unsupervised, thereby engaging in unbecoming conduct and violating law and Board policy."

Respondent testified that she did leave her class on that date to visit the office to secure a cumulative record card. She said her class was orderly and the pupils did not want to accompany her because they were listening to music. Knowing she would be gone only a few minutes, she left the classroom. She testified that as she turned the corner to walk up the hallway she saw "\*\*\* Dr. Lawrence and Mr. Holly, I said oh my God. There ain't no point in me turning around now." (Tr. VI-679) Therefore, she continued to the office, picked up the record card, and then returned to her classroom. She testified that she was gone about five minutes, and nothing unusual happened in her classroom during her absence.

The director testified that the rule of the Board is that teachers of special education pupils, especially, were never to leave their pupils unsupervised, and that in the event it became necessary for the teacher to leave the classroom for any reason, a replacement for that class could be easily arranged. (Tr. II-257-258)

There was no denial of the existence of such a Board rule; in fact, respondent's testimony, *ante*, indicates her awareness that she had improperly left her class unsupervised.

#### CHARGE NO. 12

"On May 28, 1971, you intentionally filed a false and untrue report with the Board of Education in that you falsely accused a parent, Mrs. [C.M. ], of cursing you and attempting to assault you, thereby acting in an unprofessional manner."

The false report referred to is respondent's letter (P-II) and her testimony (Tr. VI-678) which accused C.M.'s mother of cursing and threatening to assault her when they met, after respondent was accused of striking C.M.

Although C.M.'s mother denied cursing or threatening respondent, there is no corroboration to support the testimony of either C.M.'s mother or respondent.

The hearing examiner recommends that this charge be dismissed.

#### CHARGE NO. 13

"On or about November 23, 1971, Mrs. Sally Williams intentionally failed to follow an order and directive of the Board of Education requiring her to be examined by Dr. David Fink, thereby being insubordinate."

#### CHARGE NO. 14

"On or about November 23, 1971, Mrs. Sally Williams intentionally and willfully chose to disregard a directive of the Board of Education that was issued pursuant to law, thereby showing disrespect for the Board of Education and violating the law."

These charges will be discussed together because they relate to a single incident.

The hearing examiner observes that the Board resolution certifying these charges is dated December 21, 1971, almost three months after the first twelve charges were certified. Respondent had been suspended from her employment since the beginning of the school year and had already submitted to the psychiatric examination ordered by the Board (Charge No. 9), which commenced in August 1971. In addition, she visited a psychiatrist of her choice for an additional analysis.

*N.J.S.A.* 18A:16-2 gives the Board the authority to order psychiatric examinations whenever, in its judgment, it would appear to be necessary. However, it appears to the hearing examiner that the Board ordered the second psychiatric examination because it was not satisfied with the first. The hearing examiner reaches this conclusion because respondent did not teach for the Board between the time the original and supplemental charges were filed; therefore, the Board could not have ordered the second examination on the basis of new information gleaned from her employment during her suspension, and no evidence was offered regarding respondent's activities outside the classroom that would relate to her employment.

Under the specific circumstances relating to these charges, the hearing examiner recommends that they be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and has also reviewed the exceptions to the hearing examiner's report filed by counsel for both parties.

The Commissioner takes notice of respondent's objection to the references regarding the handicapped pupils' communications, and will comment further upon the problem of securing the testimony of children classified as trainable mentally retarded under *N.J.S.A.* 18A:46-9, *post*.

Both the reference by respondent to the time period covering the events specified in the charges and the testimony of the substitute teacher (Tr. V - 594-617) have been reviewed by the Commissioner. The essence of the testimony of the substitute teacher is that at no time did the trainable pupils in respondent's class express resentment or hostility against respondent in the presence of the substitute teacher.

The Commissioner has also carefully reviewed respondent's exception concerning the testimony provided by one witness in regard to Charges Nos. 2 and 12. Finally, the Briefs of the parties have been reviewed by the Commissioner.

Although the Board moved to strike the pleadings and defense of respondent at the beginning of the hearings, the Commissioner finds that neither party complied in full with their mutual agreement to answer interrogatories. Also, the hearing examiner set forth a procedure at the initial hearing which would have enabled counsel to issue certain interrogatories. (Tr. I - 7, 10) No request to follow that procedure was pursued; therefore, the Board's Motion, *ante*, is denied. Additionally, Charges Nos. 3, 5, 9, 12, 13, 14 are dismissed on the basis of the report and recommendations of the hearing examiner.

### CHARGES NOS. 1, 8

These are charges of corporal punishment and the Commissioner determines that respondent struck the pupils as charged.

Corporal punishment of pupils has been prohibited in New Jersey public schools by statute since 1867. *N.J.S.A. 18A:6-1* However, with allegations of corporal punishment, the Commissioner has always been mindful that the testimony of children must be examined with great care. The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education, 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (*App. Div.* 1967), decided by the Commissioner 1967 *S.L.D.* 215:

“ \*\*\* It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.’ *Palmer v. Board of Education of Audubon*, 1939-49 *S.L.D.* 183, 188.\*\*\*” (at p. 161)

In the instant matter, there was no testimony by children against respondent. However, there is overwhelming support of the charges by the testimony of the parents regarding the incidents reported to them by their children. Also, the testimony of teachers, concerning their pupils' reports to them, supports that of the parents. This is convincing, in the Commissioner's judgment, to sustain the hearing examiner's findings of the truth of the charges.

### CHARGES NOS. 2, 10

With regard to Charges Nos. 2 and 10 the Commissioner finds that respondent's actions did intimidate some of her pupils and that she did employ sarcasm. The Commissioner commented in *Palmer, supra*, at p. 187 as follows:

“Educators stress the fact that the concomitants of learning are important as well as the learning itself. A pupil not only learns subject-matter, but he learns to like or dislike it. He forms attitudes. His emotional life is affected. Regardless of how efficient a teacher is in teaching subject-matter and skills, she is not justified in doing so at the cost of unnecessary emotional upsets. Good mental hygiene is important in child growth and promotes intellectual achievement.

“A good teacher can exercise better control and show better results in the pupils' acquisition of subject-matter than can the teacher who resorts to ridicule and sarcasm. Lack of respect for the personality of the child produces inefficiency.\*\*\*”

In the instant matter it has been shown in Charge Nos. 1, 2, 8 and 10 that a pattern of conduct by respondent caused intimidation, and apprehension, if not fear, in some of her pupils.

*In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 S.L.D. 159, the Commissioner said:

“\*\*\* While the Commissioner understands the exasperations and frustrations that often accompany the teacher’s functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 S.L.D. 185, 186\*\*\*.” (at pp. 172-173)

and:

“\*\*\* Thus, when teachers resort ‘to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.’ *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, *supra*. \*\*\*” (at p. 173)

With respect to Charges Nos. 4 and 11, the Commissioner determines that respondent left her class unsupervised for a limited time during those school days.

Although it is impossible to spend every minute with the pupils in a classroom, it is certainly expected that teachers must exercise continuous control over their classes by their physical presence.

The hearing examiner found that respondent’s defense to Charge No. 4 was unsupportable. Respondent does not deny the allegations of Charge No. 11; rather, she attempts to rationalize her actions. The Commissioner determines that respondent did not avail herself of the opportunity to secure a replacement and that she was aware that she should not leave her class unsupervised.

These charges of conduct unbecoming a teacher are, therefore, sustained.

With respect to Charge No. 6, the Commissioner determines that the manner in which respondent entered her supervisor’s office to complain about being harassed, the time she selected to go there, between classes, and her own testimony, *ante*, regarding this incident, provide sufficient evidence to support the charge of insubordination.

With respect to Charge No. 7, the Commissioner determines that respondent was insubordinate by refusing to conduct the conference as directed.



Her supervisor had been contacted by R.B.'s parents and it is the Commissioner's judgment that the supervisor had good reason and the authority to be present. Moreover, the record respecting Charge No. 7 discloses sufficient reason for the supervisor to be present at the conference. He was concerned about the allegation of corporal punishment by R.B.'s parents. The record, therefore, does not support respondent's claim that she was being harassed.

With regard to the testimony of the director of pupil personnel services about the mental capabilities of trainable children, and educators' knowledge of the abilities of these children, the Commissioner determines that it would have been improper to try to elicit their testimony at the hearing. Therefore, the record as developed relies in part on hearsay testimony, without which, it would have been impossible to develop several of the Board's charges.

The Commissioner is constrained to observe that much of the evidence herein adduced through the testimony of parents and teachers, is hearsay and circumstantial. It is understandable that no attempt was made to secure testimony from the trainable pupils in the matter, *sub judice*.

The Commissioner is very much aware of the mental capabilities of trainable children. Any attempt to elicit competent testimony from these pupils would have been emotionally distressing, and would have inflicted unnecessary anguish and suffering on the minds of these pupils. Trainable pupils are unable to properly understand or cope with formalized questions of the type that would have to be posed in an adversary hearing. The Board's determination not to seek their testimony was a sound educational decision which prevented further hardship on these unfortunate pupils. Therefore, the Commissioner agrees with the hearing examiner's decision to permit this hearsay testimony in order to make his final determinations and recommendations.

In *State v. Graziani*, 60 N.J. Super. 1 (App. Div. 1959); affirmed 31 N.J. 583 (1960); cert. denied 303 U.S. 830 (1960), the Court quoted from *State v. Greenberg*, 105 N.J.L. 383, 385 (E. & A. 1928), when it held that "\*\*\*\* circumstantial evidence is often 'more certain, satisfying and persuasive than direct evidence.' " See also, *State v. Carbone*, 10 N.J. 329, 339 (1952); *State v. Corby*, 28 N.J. 106, 119 (1958); *State v. Fiorello*, 36 N.J. 80 (1961). In *Graziani*, the Court also held that:

"The probative value of circumstantial evidence is determined by the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life.\*\*\*\*" (at p. 13)

In the instant matter there is an abundance of circumstantial evidence from which the Commissioner can draw the reasonable inference that respondent committed the offenses as detailed in Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11.

The Commissioner holds that the record herein discloses a pattern of conduct by respondent which is unprofessional and constitutes unbecoming

conduct for a teacher. Specifically, respondent has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore, respondent must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

Such a conclusion is consistent with many previous decisions of the Commissioner. *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County*, 1971 S.L.D. 284; *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, Gloucester County*, 1971 S.L.D. 387; *In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, Burlington County*, 1966 S.L.D. 77, affirmed State Board of Education, affirmed New Jersey Superior Court, 1967 S.L.D. 351; *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick, Ocean County*, 1972 S.L.D. 387, affirmed State Board of Education April 4, 1973 (reversed in part on the question of retroactive applicability of L. 1971, c. 435, 502)

In one of the cases, *ante*, *Francis Bacon*, the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that the teachers had demonstrated unfitness for the positions they held, and in *Bacon* the Commissioner quoted *Redcay v. State Board of Education*, 130 N.J.L. 369, 371 (1943), affirmed 131 N.J.L. 326 (E. & A. 1944) to buttress this position. The Court in that decision said:

“\*\*\* Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is *best evidenced by a series of incidents*. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.\*\*\*” (*Emphasis supplied.*) (at p. 371)

In the proven charges herein, in the Commissioner’s judgment, are “the series of incidents” referred to in *Redcay*, which are the best evidence that respondent should be dismissed.

Accordingly, having found Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11 to be true in fact and having determined that they are sufficiently serious to warrant respondent’s dismissal from her position as a teacher in the Union Township School System, the Commissioner hereby dismisses respondent as of the date of her suspension.

COMMISSIONER OF EDUCATION

October 10, 1973

**Robert F. X. Van Wagner,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Roselle,  
Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

For the Respondent, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Board of Education of the Borough of Roselle, Union County, hereinafter "Board," avers that his service with the Board has earned him a tenure status in the position of Superintendent of Schools. The Board contests the avowal, with respect to petitioner's claim of tenure in that position, while agreeing that he does have tenure in the district. In the Board's view, petitioner has a tenure status as Assistant Superintendent of Schools.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Union County Superintendent of Schools, Westfield, on July 5, 1973. Memoranda of Law were filed subsequent to the hearing by respective counsel. The report of the hearing examiner is as follows:

The basic facts on which the arguments herein are founded are not in controversy. They are stated concisely as follows:

1. Petitioner holds an administrative certificate which is required of those appointed to the position of Superintendent of Schools. He has held such certificate since the day he started his work for the Board on January 5, 1970.

2. Petitioner's service as an employee of the Board has been continuous from January 5, 1970 to the present time. His contracts of employment (PR-7) stated that he was employed:

- (a) as Assistant Superintendent from January 5, 1970 to June 30, 1970;
- (b) as Acting Superintendent from July 1, 1970 to June 30, 1971;
- (c) as Superintendent of Schools from July 1, 1971 to June 30, 1972;
- (d) as Superintendent of Schools from July 1, 1972 to June 30, 1973.

However, it is noted here that this last contract of petitioner, *ante*, was purportedly aborted by action of the Board on March 13, 1973. (PR-8) This action consisted of a Motion advanced at a public meeting of the Board which proposed:

“\*\*\* that Dr. Robert F.X. Van Wagner, Superintendent of Schools, resume the position of Assistant Superintendent of Schools effective May 1, 1973 \*\*\*.” (PR-8)

The Motion was approved by a vote of six to three.

It is further noted here, that from the time petitioner assumed the duties of Acting Superintendent of Schools on July 1, 1970, to the time he relinquished responsibility for such duties on May 1, 1973, subsequent to the Motion of the Board, *ante*, on March 13, 1973, the duties were performed solely by petitioner. This is so, since the prior Superintendent had resigned effective June 30, 1970. Additionally, it is noted that the Board never filled the position of Assistant Superintendent of Schools, subsequent to the time it appointed petitioner as Acting Superintendent of Schools, effective July 1, 1970.

Thus, certain interpolations of the stipulated employment status of petitioner recited, *ante*, may be summarized as the basis for an understanding of the contention of the parties herein. These are as follows:

1. Since petitioner was a twelve-month employee of the Board, and since he began work as a teaching staff member in the Board's employ on January 5, 1970, he acquired a tenured status in the district at the close of the school day on January 4, 1973, pursuant to the statute *N.J.S.A. 18A:28-5* which provides:

“The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurse, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:

- (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of four consecutive academic years;

provided that the time in which such teaching staff member has been employed as such 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 or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent, or as a school nurse, school nurse supervisor, head school nurse, chief school nurse, school nurse coordinator, or as the holder of any position under which nursing services are performed in the public schools.”

2. Petitioner’s service up to and including January 4, 1973, had included a period of two years and six months during which he had actually performed the duties of Superintendent of Schools, (one year as Acting Superintendent of Schools and one and one half years as Superintendent of Schools).

3. Petitioner’s service as Superintendent of Schools, subsequent to January 4, 1973, and before May 1, 1973, added almost four months to his former service in the position. Thus, on May 1, 1973, petitioner had already acquired tenure as an employee of the Board, and had served two years and ten months of a total service of approximately three years, and four months, in a position requiring him to perform duties as Superintendent of Schools.

The contentions of the parties in the instant matter are grounded in these facts and interpolations. The contentions are basically concerned with the interpretation of the statute *N.J.S.A. 18A:28-6* which provides:

“Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

“(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

“(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

“(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

“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 teaching staff members, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.”

Thus, the facts of petitioner’s employment by the Board, which are enunciated, *ante*, and the statutes of pertinence herein have been set forth. The contentions of the parties with respect to such facts and statutes are contained in the Memoranda of respective counsel for the Commissioner’s perusal. These contentions are concerned with one primary issue; namely, whether or not petitioner has accrued a tenure status as Superintendent of Schools as the result of his service in the employ of the Board.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and takes notice that no exceptions have been filed to the hearing examiner’s report by the parties to this dispute.

The Commissioner is asked herein to assess the facts of petitioner’s employment by the Board in the context of clear and precise statutory prescription as contained in *N.J.S.A.* 18A:28-5. Specifically, we are concerned with that portion of *N.J.S.A.* 18A:28-6 which sets forth the requirements of tenure accrual for those “teaching staff members,” who are “transferred or promoted,” while such staff members are “under tenure” or are eligible to obtain tenure.

However, the initial primary question for determination is the meaning of the phrase “eligible to obtain tenure.” This is so because petitioner was not “under tenure” when he was first appointed to the position of Acting Superintendent of Schools in July 1, 1970, and accordingly the statute *N.J.S.A.* 18A:28-6 can only be made applicable to him if, at that time, he was “eligible to obtain tenure.” What is the precise meaning of the word “eligible?”

*Black’s Law Dictionary* 612 (rev. 4th ed. 1968) contains this definition of the word:

“ELIGIBLE.

Fit to be *chosen*. State ex rel. Sundfor v. Thorson, 72 N.D. 246, 6 N.W. 2d 89, 92, 143 A.L.R. 599. Capable of serving, legally qualified to serve. State v. Johnson, 123 S.C. 50, 115 S.E. 748, 749. Capable of *being chosen*, as a candidate for office.\*\*\*” (*Emphasis supplied.*)

and this definition of “eligibility”:

“ELIGIBILITY. Proper to be chosen; To *be chosen*; qualified to *be elected*; legally qualified. \*\*\* A word which, when used in connection with an office, where there are no explanatory words indicating that it is used with reference to the time of election, may be deemed to refer to the *qualification to hold the office* rather than to be elected.\*\*\*” (*Emphasis supplied.*)

The Commissioner notices that the definitions of both words are couched in terms of future circumstances — “Fit to *be chosen*,” “qualified to *be elected*,” “capable of serving.” In such a context, how may petitioner’s service with the Board be viewed? Were his service qualifications dated from July 1, 1970, and his other qualifications, such as to make him “eligible” to obtain tenure as Superintendent of Schools in Roselle at some future date if, eventually, he were to complete a “period of employment of two consecutive calendar years” as Superintendent of Schools?

In this regard, the Commissioner finds for petitioner, since on July 1, 1970, he had assumed a new responsibility as Superintendent of Schools — a responsibility given to him by an explicit Board action — and was properly certified at that time to perform the duties of the office. Thus he was “eligible to obtain” tenure at a future date after compliance with any of the three time sequences which the statute, *N.J.S.A. 18A:28-6*, sets forth (i.e. two consecutive calendar years)

Having found that petitioner was “eligible to obtain tenure,” there remains a question as to whether or not he did in fact obtain it not only in the district as a teaching staff member, but in “another position” as Superintendent of Schools. In this regard, the Commissioner also finds for petitioner on the grounds that:

1. On January 4, 1973, petitioner completed the three calendar years which entitled him to tenure as a teaching staff member in the employ of the Board pursuant to *N.J.S.A. 18A:28-5*;
2. On January 4, 1973, petitioner had more than satisfied the requirement of “two consecutive calendar years” in the “new position” to which he was promoted by the Board effective July 1, 1970, and thus had a tenured entitlement to such position (Superintendent of Schools) pursuant to *N.J.S.A. 18A:28-6*.

These findings as set forth, *ante*, are a rejection of those arguments advanced by the Board that the requirements for a tenure status precisely stated in *N.J.S.A. 18A:28-5* must be met *before* the provisions of *N.J.S.A. 18A:28-6* can be held to be applicable. In the Board’s view:

“\*\*\* the two year period, *without prior tenure*, affords no statutory tenure to Petitioner as Superintendent.\*\*\*” (*Emphasis supplied.*) (Post-Hearing Memorandum of Respondent, at p. 4)

However, the Commissioner holds to the contrary — that the time period toward tenure in a specific position to which a nontenured teaching staff member is “promoted” or “transferred” begins to toll at the time of such promotion or transfer and runs from that time forward, until such time as the staff member has fulfilled the precise requirements of *N.J.S.A. 18A:28-5* for a general tenure in the school district and, at that time, or subsequently, has fulfilled one of service requirements of *N.J.S.A. 18A:28-6*. The Commissioner holds that a staff member has achieved a tenure status in the position to which he was promoted or transferred when he/she has acquired a tenure status first as a teaching staff member under *N.J.S.A. 18A:28-5*, and simultaneously under *N.J.S.A. 18A:28-6*. Thus, when a person at the same time — concurrently is appointed as a teaching staff member for one year, and is subsequently properly promoted to another position for two consecutive years, he would acquire a tenure status under both *N.J.S.A. 18A:28-5* and 6 at the same time.

The Commissioner determines that the two statutes, *N.J.S.A. 18A:28-5* and *N.J.S.A. 18A:28-6*, must be read *in pari materia*, and that the prescriptive mandate of the second statute is triggered at the time when the precise requirements of *N.J.S.A. 18A:28-5* have been met. If, at that time, the teaching staff member has completed the service requirements of both statutes, he has achieved not only a general tenured status as a teaching staff member, but also a tenured status to his position. He has served an adequate probationary period. As the Court said in *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962):

“\*\*\* The objectives [of the tenure statutes] 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.\*\*\*” (at p. 71)

This view is founded on a careful reading of the last paragraph of *N.J.S.A. 18A:28-6* wherein it is clearly stated that the statute’s provisions are applicable to nontenured teaching staff members as well as to those who have acquired a tenured status. Specifically, the Commissioner refers to that portion of the statute (*N.J.S.A. 18A:28-6*) which provides that, in the event employment in a “new position” is terminated:

“\*\*\* before tenure is obtained therein, if he then has tenure in the district \*\*\* such teaching staff member shall be returned to his former position.\*\*\*” (*Emphasis supplied.*)

In the Commissioner’s judgment, the “if” which the statute contains is a clear reference that the statute is applicable to nontenured as well as tenured teaching staff members who are “transferred” or “promoted” in the course of their employment. Thus, the Board’s argument, *ante*, is, in the Commissioner’s view, a specious one.

Finally, it is noted that the Board avers:



“\*\*\* On the facts, Petitioner clearly performed as Acting Superintendent and as Assistant Superintendent. Thus, he has no right to claim the “Acting” period as tenure time.\*\*\*” (Post-Hearing Memorandum of Respondent, at p. 6)

This argument is founded on the Board’s statement that it needed time to make a “deliberate choice” of a person to serve as Superintendent of Schools and there was no obligation:

“\*\*\* to immediately make an appointment to its highest administrative position.\*\*\*” (Post-Hearing Memorandum of Respondent, at p. 6)

The Board further avers that:

“\*\*\* Tenure status can only be achieved by performing the duties of the position under contract to perform in the statutory category. (sic) *Canfield v. Bd. of Ed. of Pine Hill*, 97 N.J. Super. 483 (App. Div. 1967) (Dissenting opinion which was adopted by Supreme Court in 51 N.J. 400 (1968), \*\*\*” (Post-Hearing Memorandum of Respondent, at p. 6)

However, in the Commissioner’s view, such arguments are faulty and they neglect a consideration of certain important facts which cannot be ignored herein; namely,

1. From July 1, 1970 to May 1, 1973 – a period of two years and ten months – petitioner served continuously in the performance of duties as Superintendent of Schools.
2. During that period, the Board had contracted with petitioner as “Superintendent of Schools” on two different occasions for the years 1971-72 and 1972-73.

Such facts, in the Commissioner’s judgment, attest to the conclusion that petitioner’s year of service as “Acting Superintendent” during school year 1970-71 had been adjudged satisfactory. Accordingly, in the Commissioner’s judgment, it is fallacious for the Board to argue that one year should be excised from petitioner’s credited service accrual as Superintendent because the title the Board gave him during that year was not that of Superintendent of Schools.

“\*\*\* Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title.\*\*\*”

*N.J.A.C. 6:3-1.10 (f); August Lascari v. Board of Education of Lodi, Bergen County*, 1954-55 S.L.D. 83, aff’d. State Board of Education October 11, 1954, aff’d. 36 N.J. Super. 426 (App. Div. 1955)

The Commissioner takes notice that the record in this matter is devoid of concrete documentary or testimonial evidence that the Board made any effort to

secure applicants and interview them in order to select a new Superintendent of Schools. It is therefore reasonable to assume that, absent any attempt by the Board to choose a candidate other than petitioner for this position, the Board was satisfied with his performance of the duties of the office. Under these circumstances, the Commissioner cannot agree that petitioner was merely temporarily filling the position in an acting capacity for the entire 1970-71 school year. There is no evidence before the Commissioner that anyone other than petitioner performed the duties of Superintendent of Schools during the 1970-71 school year. The Commissioner, therefore, finds and so holds that petitioner was not merely serving in an acting or temporary capacity as Superintendent of Schools during the 1970-71 school year, and accordingly this time must be counted toward petitioner's service as Superintendent under N.J.S.A. 18A:28-6.

The facts in this matter provide conclusive proof that petitioner served as the Board's Superintendent of Schools for the time specified by the statute N.J.S.A. 18A:28-6 as necessary for a tenure accrual in a position to which he was promoted on July 1, 1970.

The Commissioner so holds and he believes that any other determination would constitute a circumvention of the provisions of N.J.S.A. 18A:28-6 which is precisely set forth.

As the Commissioner said in *Ann A. Quinlan v. Board of Education of the Township of North Bergen, Hudson County*, 1959-60 S.L.D. 113:

"The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion.\*\*\* The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor.\*\*\*\*" (at p. 114)

(See also *Cecelia Barnes et al. v. Board of Education of the City of Jersey City, Hudson County*, 1961-62 S.L.D. 122; *Giannino v. Board of Education of Paterson*, 1968 S.L.D. 160; *John A. Brunner v. Board of Education of Camden*, 1959-60 S.L.D. 155; *Sullivan v. McOske*, 84 N.J.L. (E. & A. 1913). )

Accordingly, having found that petitioner was eligible to attain tenure in a position as Superintendent of Schools pursuant to the provisions contained in N.J.S.A. 18A:28-6, and that as of the date of January 4, 1973, he had attained a tenure status as a teaching staff member in the employ of the Board and also a tenure status in his position of Superintendent of Schools, the Commissioner determines that the Board's action removing petitioner from such position as of May 1, 1973, was illegal and a nullity. Therefore, the Commissioner directs that petitioner be returned to the position of Superintendent of Schools forthwith, and that he be afforded all the emoluments to which he may be entitled retroactive to that date.

COMMISSIONER OF EDUCATION

October 10, 1973

**Adam W. Martin,**

*Petitioner,*

*v.*

**Board of Education of the City of South Amboy,  
Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, George G. Gussis, Esq.

For the Respondent, Hutt & Berkow, (George J. Otlowski, Jr., Esq., of Counsel)

Petitioner, formerly employed as principal of the H. G. Hoffman High School by the Board of Education of the City of South Amboy, hereinafter "Board," alleges that he was unjustly terminated in his employment and thereby deprived of a tenure status, and, in addition, was improperly compensated during his last year of employment by the Board.

The Board denies that its action terminating petitioner's employment was improper in any respect and counterclaims that petitioner should be required to reimburse the Board the sum of sixty days' salary for which petitioner rendered no services.

Petitioner prays for relief in the form of an Order of the Commissioner of Education reinstating him to his former position as high school principal and directing the Board to compensate him for all salary withheld as a result of the Board's action which terminated his employment.

The stipulation of all relevant material facts by the parties to this dispute obviates the necessity for plenary hearing. Both parties submitted Briefs, and oral argument was heard by a hearing examiner appointed by the Commissioner on March 20, 1973 at the State Department of Education, Trenton. The transcript of the oral argument is included in the record before the Commissioner.

The relevant facts are as follows: At a special meeting of the Board, held November 27, 1968, the Board, by recorded roll-call vote, appointed petitioner to the position of high school principal at a salary of \$14,500 for the 1968-69 school year prorated from the actual beginning date of employment until June 30, 1969. (Exhibit R-1) A written contract of employment was executed by the parties, dated December 2, 1968, which contained, *inter alia*, the following provision:

\*\*\*\* 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, but that in the absence of any provision herein for a definite number of days' notice the contract shall run for the full term named above.\*\*\*" (Exhibit P-1) (*Emphasis in text.*)

Petitioner's appointment was also acknowledged by a letter dated November 27, 1968. It is stipulated that petitioner actually began his employment with the Board on January 15, 1969.

Petitioner continued in his position as high school principal for the 1969-70 school year, but no written contract was executed by the parties as had been done for the previous year. It is stipulated that the only evidence of petitioner's appointment for the 1969-70 school year is that contained in the minutes of the Board meeting held July 23, 1969. (Exhibit P-2) These minutes disclose that the Board, by a recorded roll-call unanimous vote, set petitioner's salary for the 1969-70 school year at \$15,500.

For the 1970-71 school year, petitioner was again appointed as high school principal, but no written contract was executed by the parties as had been done for 1968-69. The minutes of the Board meeting held July 22, 1970, disclose petitioner's appointment for the 1970-71 school year by the recorded roll-call vote of the majority of the full membership of the Board, at the salary of \$17,050. (Exhibit R-2) A communication under date of July 22, 1970, from the Board President to petitioner, acknowledged petitioner's appointment and salary for the 1970-71 school year retroactive to July 1, 1970. (Exhibit P-3)

For the 1971-72 school year, petitioner was reappointed as high school principal, but again no written contract of employment was executed by the parties. The sole evidence of petitioner's appointment for the 1971-72 school year is contained in the minutes of the regular meeting of the Board held June 23, 1971. (Exhibit P-4) These minutes disclose that petitioner was appointed as high school principal for the 1971-72 school year at the annual salary of \$18,755, by a recorded roll-call unanimous vote of the Board.

During the month of October 1971, petitioner and the Board conferred at informal meetings on several unspecified dates, during which petitioner was requested to resign his position as high school principal, but petitioner was not informed of any reasons for the request. Petitioner refused to submit his resignation.

The minutes of the special meeting of the Board held November 12, 1971, disclose a recorded roll-call vote of the four members of the Board who were present, "\*\*\*\* to immediately terminate the employment of Mr. Adam W. Martin, Principal of H. G. Hoffman High School, with pay for sixty days.\*\*\*\*" (Exhibit P-5)

This concludes the recitation of the facts in the instant matter.

\* \* \* \*

In this case, the precise issues for determination by the Commissioner are these: Did or did not the Board act in a legal and proper manner in terminating petitioner's employment on November 12, 1971; and, is petitioner entitled to monetary compensation for the period from November 12, 1971 through June 30, 1972.

In the first instance, the assumption is, that if the Board improperly terminated petitioner, then he is entitled to reinstatement and would accordingly have acquired a tenure status.

Local boards of education have the authority to employ and dismiss teaching staff members as an exercise of discretion. The controlling statute is *N.J.S.A. 18A:16-1* which provides, *inter alia*, as follows:

"Each board of education \*\*\* shall employ and may dismiss \*\*\* such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment."

The acquisition of a tenure status by teaching staff members, including principals, is controlled by the requirements set forth in *N.J.S.A. 18A:28-5*, which provides in pertinent part as follows:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses \*\*\* shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause \*\*\* after employment in such district or by such board for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year \*\*\*."

The Supreme Court of this State in *Zimmerman v. Board of Education of the City of Newark et al.*, 38 N.J. 65, 75 (1962), *cert. denied* 371 U.S. 956, 83 S. Ct. 508 (1963), expressed the principle that "\*\*\*\* it is axiomatic that the right of tenure does not come into being until the precise conditions laid down in the statute have been met.\*\*\*" The Court stated the historically prevalent view from *People ex rel. v. Chicago*, 278 Ill. 318, 116 N.E. 158, 160, *L.R.A.* 1971 E, 1069 (*Sup. Ct.* 1917) concerning the employment and dismissal of nontenured school personnel as follows:

"\*\*\* A new contract must be made each year with such teachers as (the board) desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.\*\*\*" (38 N.J., at p. 70)

The Court further stated that today these powers of local boards of education are limited by the Fourteenth Amendment of the United States Constitution, the New Jersey Constitution, the Teachers' Tenure Act, and by other statutory provisions, such as the Law Against Discrimination, *N.J.S.A. 10:5-1 et seq.* (formerly *N.J.S.A. 18:25-1 et seq.*) Having noticed these exceptions, the Court stated:

“\*\*\* Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit.\*\*\*” (*Ibid.*, at p. 71)

See also *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 115 *N.J. Super.* 228 (*App. Div.* 1971); *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7, appeal dismissed State Board of Education 1968 *S.L.D.* 11, affirmed New Jersey Superior Court, Appellate Division, March 24, 1969.

In the matter herein controverted before the Commissioner, petitioner does not allege that constitutional discrimination of the sort proscribed by the aforementioned authorities was the basis for his dismissal by the Board on November 12, 1971.

It is clear, therefore, in the Commissioner's judgment, that absent any allegation and proof thereof that the Board's action terminating petitioner's employment in the middle of the school year was discriminatory or in violation of petitioner's constitutional rights, the Board's action was legal and proper, and the Commissioner so holds. Accordingly, petitioner did not and could not acquire a tenure status.

The second issue of the instant matter concerns the question, whether petitioner is entitled to monetary compensation for the period from November 12, 1971 through June 30, 1972.

As has been stated, petitioner had no written contract with the Board for the school year period July 1, 1971 through June 30, 1972, but the fact is clear that the Board appointed petitioner by a unanimous roll-call vote, as principal of the high school for the 1971-72 school year at the salary of \$18,755. (Exhibit P-4) Absent a written contract containing a notice clause, such as petitioner had for his original 1968-69 school year appointment (Exhibit P-1), petitioner was entitled to anticipate employment for the entire 1971-72 school year. A decision of the New Jersey Supreme Court is applicable to this issue in the instant matter.

In *Canfield v. Board of Education of the Borough of Pine Hill*, 1966 *S.L.D.* 152, affirmed State Board of Education April 5, 1967, affirmed 97 *N.J. Super.* 483 (*App. Div.* 1967), reversed 51 *N.J.* 400 (1968), the Supreme Court adopted the reasoning expressed in the dissenting opinion of Judge Gaulkin of the Appellate Division, holding as follows:

“\*\*\* If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be difficult when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most, damages for the breach of the contract, but not to tenure.

“\*\*\* But here we are concerned not with the contract or its breach, but with the status of the plaintiff — i.e., tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning.\*\*\*” (97 N.J. Super., at pp. 492-493) (*Emphasis ours.*)

The Commissioner finds and so holds that the principle enunciated above in *Canfield, supra*, is controlling in the instant matter. Petitioner is entitled to receive the amount of salary which he would have been paid between November 12, 1971, and June 30, 1972, had his employment not been terminated by the Board. The Commissioner, therefore, orders the Board of Education of the City of South Amboy, Middlesex County, to pay to Adam W. Martin the aforementioned sum of money, less the amount previously paid to him for sixty days following his termination, and mitigated by any amount of salary earned by petitioner in any full-time employment between November 12, 1971 and June 30, 1972.

COMMISSIONER OF EDUCATION

October 12, 1973

**“T.A.” by her parent and natural guardian,**

*Petitioner,*

*v.*

**Boards of Education of the Township of Edgewater Park and  
the City of Burlington, Burlington County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Hyland, Davis and Reberkenny (John S. Fields, Esq., of Counsel)

For the Respondent (Burlington), John E. Queenan, Jr., Esq.

For the Respondent (Edgewater Park), Ernest A. Ferri, Esq.

Petitioner is a resident of Edgewater Park Township, Burlington County, whose fifteen-year-old daughter, hereinafter “T.A.,” is enrolled in Burlington City High School, the receiving facility for Edgewater Park pupils. For what is asserted to be good reason and just cause, petitioner demands that an alternative educational program be provided for his daughter in lieu of her continued enrollment in Burlington City High School. In addition, petitioner prays that the Commissioner of Education permanently enjoin both Boards of Education named herein from taking legal action against him as the result of his daughter’s absence from school. The Burlington City Board of Education, hereinafter “Burlington Board,” denies the existence of a reasonable basis for such alternative education and prays that the Commissioner sustain its action in this matter and order the return of T.A. to its high school. The Edgewater Park Board of Education, hereinafter “Edgewater Park Board,” by way of Cross-claim in its formal Answer, prays that the Commissioner dismiss it as a party in this action for failure by petitioner to state a cause of action against it. Petitioner filed a Motion for Interim Relief pending a determination on the issues herein. Although oral argument on the Motion was heard on December 7, 1972 at the Department of Education, Trenton, a decision was withheld in lieu of an accelerated plenary hearing.

Hearings in this matter were conducted on December 18 and 19, 1972, at the office of the Burlington County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Briefs of counsel were subsequently filed. The report of the hearing examiner is as follows:

A sending-receiving agreement (RB-6) exists between the Edgewater Park Board and the Burlington Board whereby the latter is to provide the educational program for all pupils of Edgewater Park Township enrolled in grades nine through twelve.



T.A., a resident of Edgewater Park, was in her first days of attendance at the high school as a ninth grade pupil. It is alleged that on the morning of September 13, 1972, at approximately 8:00 a.m., she was attacked by an unknown person in the high school building and rendered unconscious for an undetermined period of time. Approximately eight days thereafter, T.A. found an anonymous note of a threatening nature in her locker. These incidents combine to form the basis for the Petition herein. It is averred that as a result of T.A.'s experiences, *ante*, she cannot attend the high school with a reasonable assurance of personal safety.

T.A. began her attendance at the high school on September 6, 1972. On the morning of September 13, 1972, she left her home for school at approximately 7:15 a.m. She walked a short distance to her girl friend L.K.'s house, and both girls then proceeded to the school bus stop where they arrived at or about 7:25 a.m. At the bus stop were two other pupil acquaintances of T.A.'s, R.W. and J.R. All three pupils testified that when they saw T.A. that morning she bore no visible marks or bruises. L.K.'s mother, who had also seen T.A. when she arrived to meet L.K., corroborated the pupil's testimony regarding T.A.'s appearance as did M.T., a fifteen-year-old pupil, who had been on the school bus when T.A. and her friends boarded it.

From the testimony of the pupils, the hearing examiner finds that the school bus arrived at the rear of the high school at approximately 7:50 a.m. After debarking from the bus, T.A. paused for a few moments to chat with other friends and then proceeded alone into the school building. Because her first class did not begin until 8:15 a.m. and because she was not very familiar with the floor plan of the high school, T.A. testified, she decided to look around the building. (Tr. I-43) According to T.A.'s testimony, she entered the building alone to the right of the boys' gymnasium on the first floor of the high school building. (RB-5) Proceeding through a short corridor and past the boys' locker room, she then turned right and walked through another corridor — this time passing three classrooms on the right-hand side. Coming to a corner of the building, T.A. proceeded through the fire doors towards stairway number four to go to the second floor, an admittedly heavily-traveled stairway. It is at this juncture, she asserts, that she was grabbed by an unknown and unidentifiable person from behind by both arms and that “\*\*\* somebody hit me in the stomach and that’s when everything just got dizzy and I just blacked out. \*\*\*” (Tr. I-44) She further testified that when she regained consciousness, she was lying alongside the stairway. She picked up her pocketbook and went to the nurse's office. She walked through a corridor, passing seven classrooms, plus a storage room; she turned left and walked through another corridor, passing two classrooms, a library, another classroom, and the faculty room, and finally arrived at the nurse's office. She testified that she then explained to the nurse what had happened.

The school nurse testified that T.A. came to her office at 8:24 a.m. and explained that “\*\*\* somebody had grabbed her and hit her on the face by Stairway Number Three \*\*\* I [the nurse] \*\*\*question[ed] her a little bit about where the exact location was \*\*\* and she assured me it was Stairway Number Three. \*\*\*”. (Tr. I-20)

The school nurse further testified that although T.A. was composed, coherent, and not visibly upset or shaken, (Tr. II-22) she did have a bruise under her right eye and on her left jaw. The nurse then took T.A. to the principal of the high school who questioned T.A. about the alleged attack. It was at this time, the nurse testified, that T.A. initially complained about being punched in the stomach. T.A. testified that she believed the principal thought she was lying because he asked her several questions about her boyfriend. On the basis of those questions, T.A. concluded that the principal believed that her boyfriend perpetrated the attack on her and *this*, she said, made her upset. (Tr. I-48) At the close of the conversation, the principal gave T.A. a pass to return to class. Instead of returning to class, however, T.A. called her mother who came to school to take her home. Her mother testified that her daughter's face was beginning to discolor and that T.A. was crying at that time. (Tr. I-41) Upon her arrival at home, T.A. avers, a black and blue bruise began to appear on her stomach, and she experienced pain in that area. Her father reported the incident to the Burlington City Police the same day. T.A.'s statement to the police was received in evidence. (RB-2) In addition, one of the investigating officers testified at the hearing on behalf of the Board. Furthermore, two photographs of T.A. taken by her mother two days after the incident, were accepted in evidence. (P-2) It is noted by the hearing examiner that both photos depict darkened areas around the right eye and lower left jaw. She was taken to the Rancocas Valley Hospital, Willingboro, at 9:55 a.m. that day, where an attending physician diagnosed her bruises as "\*\*\*\* contusions of the face and abdomnal (sic) wall \*\*\*," (P-4) She was further advised to see her own family physician, which she did the next day. (P-5) While T.A. remained home from school, her mother attended the Edgewater Park Board meeting on Monday evening, September 18, 1972. As the result of the Board's encouragement, T.A. returned to school the following Thursday, September 21, 1972. J.R., in an effort to insure T.A.'s safety, (Tr. I-125) accompanied her to school on the bus and walked to her locker with her. When T.A. opened her locker, she found the following anonymous note: (P-1)

"You better watch your step because I have kids after you [.] We got you once and we will get you again [.] Get it. [?]"

T.A. went to the office with J.R. to report this incident. Although T.A. testified that the secretary told her that the principal, the assistant principal, and a Mr. Burr were not available (Tr. I-53), J.R. on cross-examination testified that neither he nor T.A. spoke with the secretary. (Tr. I-128) On the contrary, J.R. asserts that when they reached the office, there were other pupils there so they left. (Tr. I-128) T.A. then called her mother because she was afraid to remain in school (Tr. I-54, 83), and J.R. went to class. T.A. has not returned to school since that day because she and her parents fear for her safety. (Tr. I-103) (Tr. II-7)

The hearing examiner points out that the Superintendent of Schools of Edgewater Park submitted a report of this incident to his Board (P-8) on October 5, 1972, after conferring with the Superintendent of the Burlington City School District. T.A.'s parents requested the Edgewater Park Board to

provide home instruction for T.A., (P-3) which request has not been granted. (Tr. I-109) A second request for an alternate educational program for T.A. was made on her behalf to the Edgewater Park Board on October 12 1972. (P-12) This request was rejected by the Board at a special meeting conducted on October 20, 1972. (P-6) That same evening the Edgewater Park Board determined that it expected T.A. to be in attendance at the Burlington City High School regularly and would so inform the Burlington Board. Additionally, the Edgewater Park Board also determined that there was a need for more effective communication between the superintendents of both school districts. On October 18, 1972, the principal of the high school notified T.A.'s parents to return her to school (RB-3), and on October 23, 1972, a second notification was sent to the parents to have T.A. return to school. (RB-4)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and takes notice that neither party to this controversy has filed exceptions to the hearing examiner's report.

The Commissioner will first consider the arguments set forth in the Briefs submitted by the parties.

Petitioner argues in his Brief that T.A. and her parents have a constitutional right to expect a free public education in an atmosphere of safety, free of physical danger to life and limb, and cites *Pingry Corporation v. Hillside Township*, 46 N.J. 457 in regard to the primacy of education. Anything less, it is asserted, falls short of the pupil's right to a thorough and efficient education as provided by the New Jersey Constitution, Art. VIII, Sec. IV. Arguing that neither of the named Boards herein took any effective action to insure the security of pupils at the high school, petitioner cites *Jackson v. Hankinson*, 51 N.J. 230 (1968) and *Titus v. Lindberg*, 49 N.J. 66 (1967). (Petitioner's Brief, at page 7) In *Jackson*, the Court held that school authorities are obligated to take reasonable precautions for the safety and well-being of pupils, while *Titus* held that a building principal must exercise his duty of supervision not only during school hours, but even earlier if pupils are assembled. Petitioner further argues that notwithstanding the civil liability nature of these two cases, the principles articulated therein are equally applicable to the case at bar; namely, that petitioner's daughter has the right to be educated free from physical danger.

Pointing to New Jersey's neighboring State of Pennsylvania, petitioner cites an appeal to that State's Commonwealth Court, *School District of the City of Pittsburgh v. Zebra*, 287 A. 2d 870 (Pa. 1972) and likens the issue therein to the matter *sub judice*. The Commissioner notices that this case was originally heard before the Pennsylvania Common Pleas Court, at no. 433, January Term 1972, which granted a preliminary injunction against the Pittsburgh Board of Education from transferring certain pupils from one facility to another under an intradistrict reorganization plan. That Court acted upon evidence that numerous acts of extortion, threats, assaults, intimidation, and harassment of the pupils

had taken place at the newly-assigned facility. Petitioner's referenced *Pittsburgh* case is the Pittsburgh Board of Education's appeal to that injunction which was upheld by the Pennsylvania Commonwealth Court.

Petitioner asserts at page nine of his Brief, that two reports, P-9 and P-10 which were submitted to the Edgewater Park Board by its Superintendent regarding Burlington City High School student disturbances, show incidents similar to those described in the *Pittsburgh* case. He further argues that the "\*\*\*\* substantive principle \*\*\*\*" is the same in the matter *sub judice* as in the *Pittsburgh* case. Even though the Commissioner finds that the incidents described at P-9 (dated November 22, 1971), and P-10 (Undated) (Tr. I-149, 152) received appropriate administrative action as described therein, those incidents, by themselves, still do not measure up to the situation existing at the Knoxville School in the City of Pittsburgh at the time of the *Pittsburgh* case. There, an entire seventh grade initially enrolled in another facility had been reassigned to the Knoxville facility, and, at the beginning term at Knoxville, the Commonwealth Court found, at p. 872, that the record from the lower Court supported a finding of "\*\*\*\* conditions existing at Knoxville were a serious threat to the health and safety of *all* the plaintiff's children.\*\*\*\*" (*Emphasis supplied.*)

Moreover, the Common Pleas Court's preliminary injunction in the *Pittsburgh* matter was reversed by the Pennsylvania Supreme Court at *Robert Zebra et al. v. School District of the City of Pittsburgh, Appellant*, 296 A. 2d. 748 (1972) when the Court held, at p. 752:

"The assignment of school students to classes in a particular building within the school district is a task to which school boards are particularly well suited. In recent years the assignment has become even more complex as considerations of racial balance have been added to the other factors of distance and space available. Judicial interference with this procedure must be strictly limited to instances of bad faith, abuse of discretion or illegality. The lower court erred in granting the preliminary injunction. The plaintiffs did not demonstrate either a clear right to immediate relief or that irreparable harm would result if their children were returned to Knoxville under the conditions that existed at the time of the hearing; nor did they show any improper action by the school board.

"The decree of the Common Pleas Court of Allegheny County is reversed and the preliminary injunction appealed from is vacated."

Petitioner argues that because the Edgewater Park Board contracted to send its high school pupils to Burlington City, (RB-6, *ante*) neither the rights of petitioner's daughter nor the responsibilities of that Board have been altered or diminished. A board of education, as pointed out by petitioner, has the responsibility to designate a high school facility to receive its pupils when it does not have such facilities. *N.J.S.A. 18A:38-11* Although the Edgewater Park Board sends its pupils to Burlington City, petitioner argues that the Edgewater Park Board continues to be responsible, under the present circumstances, to provide an alternative school program for T.A.

Petitioner asserts that the Commissioner of Education himself has postulated the doctrine that in instances where a definite educational benefit will accrue to a pupil, he will intervene in a decision of a local board of education. Petitioner, in praying that the Commissioner order that an appropriate alternative form of education be provided for T.A., cites *Board of Education of Glen Gardner v. Board of Education of Hampton*, 1949-50 S.L.D. 37. Applying the doctrine of equitable principles as enunciated by the Court in *Evaul v. Board of Education of the City of Camden*, 35 N.J. 244 (1961) and as applied by the Commissioner in *Lichtenberger v. Board of Education of Maywood*, 1966 S.L.D. 163, petitioner argues that because the equities in this matter weigh heavily in favor of petitioner, the application of that doctrine herein would allow the Commissioner to judiciously grant the relief requested while restricting the determination solely to this case. Thus, petitioner asserts, no precedent would be set which would lead to parents' choosing educational facilities for their children.

Petitioner refutes respondents' argument, that relief should not be granted him because this would create subsequent innumerable claims for similar relief, as wholly without merit. Citing *Immer v. Risko*, 56 N.J. 428 (1970), *Smith v. Brennan*, 31 N.J. 353 (1960) and *Falzone v. Busch*, 45 N.J. 559, petitioner argues that our courts have overturned old precedent and created new causes of action without regard for alleged administrative burdens.

The Edgewater Park Board avers that its refusal to grant home instruction or other form of alternative education was a proper exercise of its discretionary authority and cites *Lichtenberger v. Board of Education of Maywood*, *supra*, in support thereof. This Board asserts that there was insufficient basis to support petitioner's request for an alternative educational program. It avers that it was not in a position to determine whether petitioner's daughter could receive proper supervision to insure her safety because the Burlington Board alone has the duty of reasonable care and supervision of all pupils attending its schools. Furthermore, the Edgewater Park Board asserts there is no evidence in the record, which could lead to the conclusion that the events, *sub judice*, manifest a situation of inherent inequality of educational opportunity, a withholding of the democratic and educational advantages of a heterogeneous pupil population, or the deprivation of either equal protection of the law, or of the right to a free public education and cites *Marion v. Board of Education of the Town of Montclair*, 42 N.J. 237 (1964). Finally, the Edgewater Park Board asserts that it relies upon proper supervision, custody, and control of its pupils while under the supervision of the Burlington Board, and that any failure in that regard rests wholly with that Board of Education. Accordingly, the Edgewater Park Board respectfully requests its dismissal as party respondent.

The Burlington Board argues that cases cited in support of petitioner's argument are not on point, specifically, *Titus v. Lindberg*, *supra*, because it involves a negligence action. It is admitted, however, that the education of children is of primary importance as pointed out in *Pingry Corporation v. Hillside Township*, *supra*, cited by petitioner.

The Burlington Board cites two cases – *In the Matter of “G” v. Board of Education of the City of Union, Hudson County*, 1967 S.L.D. 6, and *In the Matter of “MF” v. Board of Education of the Township of Springfield, Union County*, 1967 S.L.D. 195. The Commissioner determined in both cases that boards of education have the responsibility of providing an education to children in their districts, and that although parents have the right to place their children in a nonpublic school, they may not, by unilateral action, require the local board of education to assume the cost of that choice.

Citing *Lichtenberger v. Board of Education of Maywood, supra*, the Burlington Board avers that the record in the instant matter fails to support the allegation that similar incidents involving assaults on pupils occurred at the Burlington City High School since the time of the incident, *sub judice*. Furthermore, this Board asserts that it and the Edgewater Park Board have agreed to a sending-receiving relationship which is binding upon both parties until severed by permission of the Commissioner of Education pursuant to N.J.S.A. 18A:38-21 *et seq.* Accordingly, it prays that the Commissioner not interfere with this mutual agreement. For the record, the Commissioner points out that that relationship is currently the basis of formal litigation before the Commissioner and is entitled: *Burlington City Board of Education v. Edgewater Park Board of Education*. The dispute therein centers around the payment of tuition. It is asserted by petitioner, however, because that referenced litigation is currently in process, both named Boards herein have refused to take “\*\*\* any corrective action on behalf of [T.A.] for fear of prejudicing their respective positions in said contractual dispute \*\*\*.” (Petition of Appeal, Second Count, at p. 7) The Commissioner finds such argument unsupported by the record herein.

In his Reply Brief, petitioner avers that the issue at hand goes far beyond the issue litigated in both *In the Matter of “G”*, *supra*, and *In the Matter of “MF”*, *supra*. Petitioner does not question the quality of the educational program offered by the Burlington Board. He does, however, take issue with his daughter’s being required to attend the high school under the threat and risk of physical harm. Therefore, petitioner concludes, cases relating to the discretion of a local board with respect to the content of its educational program are not relevant to the instant matter.

From the testimony educed at the hearings as well as the documentary evidence submitted, it is clear that petitioner’s daughter was physically assaulted on the morning of September 13, 1972. The assault apparently took place between 7:50 a.m., the time the school bus arrived at the rear of the high school, and 8:24 a.m., the time T.A. reported to the nurse’s office. However, there is no testimony nor evidence to conclusively show that the bruises were inflicted upon her by a pupil of Burlington City High School, or, in fact, that such bruises were inflicted inside the school at stairway number four or stairway number three as later reported to the school nurse by T.A. The record is void of testimony from any of T.A.’s peers or teachers that they witnessed, at any time, either a covert or overt act of intimidation or threat towards T.A. regarding her physical safety. How or why or by whom the assault took place and, in fact, where it took place in this matter is not, in the Commissioner’s judgment, sufficiently documented



to warrant a finding, based on the incident herein, which would substantiate petitioner's claim that by attending Burlington City High School she would be subject to "\*\*\*\* continued threats to her health and safety \*\*\*." (Petitioner's Brief, at p. 14)

A brief recital of petitioner's prayers for relief will assist to place this matter in its proper perspective. Initially, petitioner moved for interim relief in the form of appropriate home instruction. As reported earlier, the Commissioner's decision on that Motion was withheld in lieu of an accelerated plenary hearing. Secondly, petitioner requests that the Commissioner permanently enjoin both named Boards herein from instituting prosecution regarding the absence of T.A. from Burlington City High School. Thirdly, petitioner requests that a permanent educational program, other than that located at the Burlington City High School, be provided T.A. Lastly, petitioner requests such other relief as the Commissioner may deem appropriate.

Consequently, the Commissioner is called upon to decide three issues; namely, whether or not

1. the Edgewater Park Board is properly a party respondent in this matter;
2. the compulsory school attendance law, *N.J.S.A. 18A:38-25*, should be applied in regard to T.A.;
3. T.A. should be provided an educational program apart from that being offered at her assigned school of Burlington City High School.

In regard to the Edgewater Park Board's relationship to the Burlington Board *vis-a-vis* their sending-receiving agreement (RB-6, *ante*) and its resulting responsibilities, the Commissioner observes that in *Board of Education of the Borough of Lawnside v. Board of Education of the Borough of Haddon Heights, Camden County*, 1971 *S.L.D.* 365, it was held, *inter alia*;

"\*\*\*\* the primary issue of this case is whether or not the board of education of a sending district has any entitlement to exercise an independent appellate judgment on the propriety of the actions of another board of education to whose care it entrusts students pursuant to a contracted agreement. The Commissioner has searched the statutes and can find no right imbedded in law or in reason that would support such a finding.

"To the contrary, the statute, *N.J.S.A. 18A:11-1* provides that:

'*The board shall \*\*\* make \*\*\* rules for \*\*\* its own government and the transaction of its business and for the government and management of the public schools \*\*\*.*' (*Emphasis supplied.*)

“Thus, it is clear only *one* board is entitled to make rules for the government of its schools, and the Commissioner opines that it is unreasonable to assume that two boards have the power to pass judgment in instances where alleged violations of the rules promulgated by the one board have been broken. Such an administrative requirement, in the Commissioner’s judgment, would be unwieldy and cumbersome. Since such a requirement is not statutory and since the Commissioner opines that it is unreasonable, any claim to the right to exercise it is clearly *ultra vires*. \*\*\*” (at pp. 367-368)

In the instant matter, the Edgewater Park Board argues that the Burlington Board alone has the responsibility to insure the security of pupils it sends to Burlington City High School. As pointed out in *Lawnside, supra*, the Commissioner can find no right imbedded in law or in reason that would allow or require the sending board, in this case the Edgewater Park Board, to assume the responsibility of adopting security policies in regard to the receiving district facility, here the Burlington City High School.

In regard to the charge the Edgewater Park Board failed to provide an alternative educational program for T.A., there is no question that the legal responsibility to provide an education for pupils in each school district lies with the local board of education of that district. *N.J.S.A.* 18A:38-1 provides, in pertinent part:

“Public schools shall be free to the following persons over five and under 20 years of age:

(a) Any person who is domiciled within the school district \*\*\*.”

However, in the instant matter, the Edgewater Park Board, lacking high school facilities of its own, entered a sending-receiving relationship (RB-6, *ante*) with the Burlington Board pursuant to its authority at *N.J.S.A.* 18A:38-11. Through that agreement, the Burlington City High School became *the* designated high school facility for Edgewater Park high school pupils. Therefore, the Edgewater Park Board retains fiscal responsibility pursuant to *N.J.S.A.* 18A:38-19 of providing continued access to an educational program for its pupils through the payment of tuition costs to the Burlington Board (RB-6), while the Burlington Board accepts the programmatic responsibility of providing the actual education program to said pupils. While the recently cited *Lawnside* matter had to do with the sending Lawnside Board of Education protesting disciplinary measures taken against pupils it sent to the receiving facility of the Borough of Haddon Heights, the Commissioner’s determination there is analogous to the dispute herein. Specifically, at page 8, the Commissioner held:

“\*\*\* respondent [the Borough of Haddon Heights Board of Education] has accepted petitioner’s students into its system, and the students so enrolled are *clearly responsible only to respondent \*\*\*.*” (*Emphasis supplied.*) (at p. 368)

Accordingly, it is the Commissioner’s view, that in the first instance, when a



pupil no longer can benefit from the program being offered at a receiving facility, as alleged herein, it is the receiving board's responsibility — in this case, the Burlington Board — to make that determination. To hold otherwise would vitiate the provisions of *N.J.S.A. 18A:38-8 et seq.* which governs sending-receiving relationships that exist among school districts in New Jersey by allowing sending districts, in wholesale fashion for whatever reason, to withdraw their pupils from a receiving facility. Thus, *N.J.S.A. 18A:38-13* provides that once a sending-receiving relationship has been established it shall not be "changed or withdrawn" except for "good and sufficient" reason as follows:

"\*\*\* No such designation of a high school \*\*\* made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications."

While a receiving board is also precluded from terminating an existing relationship with a sending district except as provided by law, it does possess, by virtue of its agreement with a sending board, the responsibility to fulfill the legislative mandate at *N.J.S.A. 18A:33-1* which requires, *inter alia*:

"Each school district shall provide, for all children \*\*\* who \*\*\* are permitted to attend the schools of the district pursuant to law, suitable educational facilities including \*\*\* courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years, either in schools within the district \*\*\* or as provided by article 2 of chapter 38 [*N.J.S.A. 18A:38-8, et seq.*] of this title \*\*\*." (*Emphasis ours.*)

Accordingly, having found no viable grounds herein to sustain an action against the Edgewater Park Board, its Motion that it be dismissed as party respondent is hereby granted.

Having reviewed the report of the hearing examiner and the record in the instant matter, the Commissioner finds and determines that there is insufficient evidence herein to substantiate petitioner's claim regarding the possibility of continued threats to T.A.'s health and safety. While the Commissioner abhors situations as described herein, he can find no basis to intervene. In discussing his "quasi-judicial" powers to decide controversies and disputes under school law, the Commissioner pointed out in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County*, 1967 S.L.D. 125 that: (at p. 127)

"The Commissioner of Education has supervision over all of the public schools of the State and he is required to make certain that the terms and policies of the school laws are effectuated. *Laba v. Newark Board of Education*, 23 N.J. 364 (1967); R.S. 18:3-7. He is also vested with quasi-judicial powers to hear and decide controversies and disputes which arise under the school laws. R.S. 18:3-14 However, such powers are not without bounds, for

“ \*\*\* The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.’ *Kenney v. Board of Education of Montclair*, 1938 S.L.D. 647, affirmed State Board of Education, 649, 653.”

As far back as 1946, in *Boult and Harris v. Board of Education of Passaic*, 1939-49 S.L.D. 7, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (*Sup. Ct.* 1947), 136 N.J.L. 521 (*E. & A.* 1947) it was held that it is not a proper exercise of the Commissioner of Education’s judicial function to interfere with local boards of education in the management of their schools unless they violate the law, act in bad faith, or abuse their discretion. Furthermore, it was pointed out that it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.

The relief requested herein is predicated on T.A.’s fear for her physical safety which, she alleges, violates the constitutional mandate to provide a thorough and efficient system of free public schools, found at New Jersey Constitution, *Art. VIII, Sec. IV*. Notwithstanding the reality of T.A.’s fears (and it is not unreasonable to believe that many pupils for extremely diverse reasons, have real or imagined fears of school or certain subjects of study), the final determination to be made is whether such fear truly interrupts the pupil’s learning process. In this matter, that determination is uniquely that of the Burlington Board.

The Commissioner observes from the report of the hearing examiner that two requests were presented to the Edgewater Park Board on behalf of T.A. for an alternative educational program. As pointed out earlier, such requests more properly should have been made to the Burlington City Board of Education. Although not presented as an issue herein, the Commissioner knows of no reason why the Burlington Board could not determine in accordance with *N.J.S.A. 18A:46-6* whether the fear allegedly instilled in T.A. from her experiences described herein truly interrupts her learning process. That law provides, *inter alia*:

“Each board of education shall identify and ascertain \*\*\* what children between the ages of five and 20 in the public schools of the district \*\*\* cannot be properly accommodated through the school facilities usually provided because of handicaps.”

The New Jersey State Board of Education defined “handicapped child” at *N.J.A.C. 6:28-1.2* as:

“(a) A child shall be considered handicapped \*\*\* when he is impaired physically, emotionally, intellectually or socially to such extent that without the aid of special facilities, special professional staff \*\*\* special

methods of instruction he would not, in the judgment of the child study team, be expected to function educationally in a manner similar to that of children not so impaired.

“(b) Determination that individual children are so handicapped and recommendation for appropriate program and/or placement shall be the function of the basic child study team employed by a local board of education.”

Clearly, then, the determination of whether T.A.’s fear is so great, as to require an alternative educational program, is within the prescribed authority of the Board.

Accordingly, petitioner’s request for the Commissioner to order an alternative form of education is hereby denied.

The Commissioner is concerned that T.A. has not attended school since September 21, 1972 on the basis that she fears for her safety. While the record, *sub judice*, reflects that T.A. reported to the school nurse’s office, and later to the Rancocas Valley Hospital, with bruises and contusions on September 13, 1972, *ante*, and that on September 21, 1972, an anonymous note was found by T.A. in her locker, *ante*, the determination as to whether the fear emerging from such events warrants an alternative program rests, as already noted, with the Burlington Board. Consequently, the Commissioner will refrain from granting injunctive relief to petitioners herein, regarding their responsibility in terms of compelling school attendance. It is pointed out to the parents of T.A. that *N.J.S.A. 18A:38-25* provides, *in toto*:

“Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.”

Therefore, while the Burlington Board has the responsibility to provide a suitable program for T.A., the parents of T.A. are reminded that they have the responsibility to compel her regular attendance pursuant to *N.J.S.A. 18A:38-25*. The Board is also reminded of its responsibility to *N.J.S.A. 18A:38-27*, should T.A.’s parents fail to cause her regular attendance. While the parents have every right to have T.A. attend school elsewhere – a school of their choosing – by exercising that right they must be prepared to assume whatever financial obligation is entailed. T.A., however, is eligible to attend Burlington City High School for she was not suspended nor expelled.

Finally, the Burlington County Superintendent of Schools is requested to consult with the appropriate Burlington City High School officials in a mutual effort to minimize the possibility of similar situations occurring in the future.

Having found no basis to support petitioner's prayers for relief, herein, the Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

October 17, 1973

Nancy Weller,

*Petitioner,*

*v.*

Board of Education of the Borough of Verona,  
Essex County,

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, Booth, Buermann & Bate (George H. Buermann, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Board of Education of the Borough of Verona, hereinafter "Board," is supported by the Verona Education Association, hereinafter "Association," of which she is a member, in her allegation that a change in her teaching assignment and in the assignments of other teaching staff members was made unilaterally by the Board and, in the context of existing law, is illegal. She requests the Commissioner to render a judgment to this effect. The Board maintains that its action controverted herein is properly grounded in statutory and constitutional prescription.

Immediately subsequent to the filing of the instant Petition, petitioner also filed a Motion for Interim Relief, *pendente lite*. Argument on this Motion was heard by a hearing examiner appointed by the Commissioner of Education at the State Department of Education, Trenton, on February 27, 1973. The report of the hearing examiner is as follows:

The Petition herein and the subsequent Motion for Interim Relief were followed in a proper time sequence by the Answer of the Board in response to the allegations which the Petition contained. Thereafter, a hearing on the Motion was scheduled for February 27, 1973, as reported, *ante*.

However, at the hearing, at a time subsequent to petitioner's argument on the Motion, it was determined there were no facts in contention herein, and that the matter could be submitted for Summary Judgment on the pleadings and Briefs, and/or arguments of counsel. The question at that point in the hearing was whether or not to proceed with the Motion for Interim Relief or, in the alternative, to proceed to a consideration of the merits of the Petition as the result of joint Motions for Summary Judgment.

It was finally agreed that the Petition would be considered on its merits for Summary Judgment. Subsequently, petitioner rested her case on arguments advanced at the hearing, although these arguments were, in effect, later supplemented by a letter in lieu of Reply Brief dated March 29, 1973. This letter is hereinafter designated P-3. The Board filed a Memorandum of Law on March 23, 1973.

Thus, petitioner's submission for Summary Judgment is, in part at least, contained in the transcript of the hearing, *ante*, which was conducted in terms of a Motion for Interim Relief. Accordingly, transcript designations in this report refer to the record of that hearing.

The basic facts pertinent to this dispute may be briefly stated as follows:

Prior to the 1972-73 school year, petitioner and all other high school English teachers in the employ of the Board, had been assigned no more than four English classroom teaching periods per day. Additionally, such teachers were assigned two periods of other duty per day and had one period which was free for lesson preparation.

However, in the late winter and early spring months of 1972, petitioner was informed by the school administration that the number of teaching classes assigned to her and to other English teachers for the 1972-73 school year might be increased to a total of five. Thereupon, she and other teachers and the Association protested the proposed change and proceeded to file a grievance in the manner outlined in an "Agreement between the Board of Education of Verona \*\*\* and the Verona Education Association," (P-2) hereinafter "Agreement," which was in effect for the 1971-72 school year. This Agreement, which became, in effect, an adopted policy of the Board, provided, *inter alia*, for advisory arbitration as the final step in the submission of grievance issues.

The Agreement also provides (Article 4) that a joint "Educational Council" shall "advise and consult" with the Board on a number of matters including the matter of "teacher assignment." Article 9 provides that:

"All teachers shall be given written notice of their tentative class and/or subject assignments, building assignments for the forthcoming year not later than the last day of school in June.\*\*\*"

There are no other directly applicable references in the Agreement to the matter of teacher assignment.

Nevertheless, petitioner as noted, *ante*, proceeded through the grievance procedure which the Agreement contained, to advance a claim that any unilateral action by the Board or its administrators to increase the "number" of teaching assignments, was illegal in the context of existing statutory law and particularly in view of the enactment of *Chapter 303, Laws of 1968 (N.J.S.A. 34:13A-5.3)* which provides *inter alia* that:

\*\*\*\* Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.\*\*\*\*

Ultimately, the grievance initiated by petitioners proceeded to a submission for arbitration before an arbitrator appointed by the American Arbitration Association, and this individual found on July 17, 1972, in an advisory arbitration award (P-1), that:

\*\*\*\* the question as to whether the Board violated Chapter 303, Section 7, paragraph 3 is properly before this Arbitrator, and this issue is arbitrable \*\*\*." (at p. 5)

The arbitrator also found that, although

\*\*\*\* it may very well be that the reasons [for the proposed changes in assignment] are legitimate, in the best interests of the pupils and the teachers, and further the cause of education in Verona\*\*\*\*," (at p. 11)

the Board had no right under *Chapter 303* to

\*\*\*\* unilaterally modify a working condition.\*\*\*\*" (at p. 12)

Thereupon, the arbitration award directed a stay in \*\*\*\* the implementation of the increased teaching load pending negotiations between the parties \*\*\*." (at p. 12)

Nevertheless, thereafter, in September 1972, the Board ignored this directive and did effect a change in the assignments of petitioner and other English teachers in its employ as originally announced, and the instant Petition was brought before the Commissioner.

Petitioner states that:

\*\*\*\* the legislature has enacted Chapter 303 of the Laws of '68 which applies to all employer-employee relations in public employment\*\*\*\*," (Tr. 7)

and

\*\*\*\* has especially mentioned that it shall apply to school districts \*\*\*." (Tr. 7)

Petitioner further states that *Chapter 303*:

“\*\*\* has provided regulations for bargaining representatives to bargain with the public agency involved and to reach collective bargaining agreements\*\*\* ” (Tr. 7)

and argues that a change in “working conditions” of employment must be negotiated with such employee representatives before the changed working conditions are established.

In petitioner’s view, the matter of teaching assignments per day is such a “working condition,” and she maintains that these assignments must not, by statutory prescription, be altered by unilateral action of a local board, but can only be changed by board action which follows negotiation. In petitioner’s words:

“\*\*\* once these working conditions have been established and agreed upon, they shall not be changed without the consent of both parties and that here the Board of Education in defiance of the objections and refusal of consent has compelled these English teachers to have those teaching periods.\*\*\*” (Tr. 9-10)

This contention is specifically founded on that paragraph of *Chapter 303, Laws of 1968, (N.J.S.A. 34:13A–5.3)* quoted, *ante*.

The Board maintains that the issue in this matter is whether the Board has statutory authority to establish the teaching assignments of its teaching staff, or whether such assignments must be negotiated as a “term and condition” of employment in accordance with *N.J.S.A. 34:13A-1 et seq.*

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, including the Memoranda of Law filed by both parties. The Commissioner notices that no exceptions to the hearing examiner’s report were filed by the Board, and, although an extension of time was granted petitioner until September 21, 1973, no exceptions were filed by petitioner as of October 26, 1973.

The Commissioner will first consider the arguments set forth by both parties to this dispute.

The Board, in its Memorandum of Law, postulates four principal points; namely,

1. The Board has “\*\*\* exclusive power and vested authority to determine the number of teaching periods a teacher will teach in a school day.\*\*\*” (Memorandum of Law of Respondent, at p. 2)

2. The Agreement recognizes “teaching hours” and “teaching load” as the exclusive right of the Board.

3. *N.J.S.A.* 34:13A-8.1 limits the scope of *Chapter 303, Laws of 1968* in that it provides that no provision of the law “\*\*\* shall \*\*\* annul or modify any statute or statutes of this State.”

4. The Board determined in this matter that the interests of pupils would best be served by a five-period, rather than a four-period day.

These points receive quite extensive elaboration in the Board’s Memorandum.

With respect to the Board’s first point, it avers that its authority exercised herein is found in both constitutional and statutory mandate. It cites *Art. VIII, Sec. IV, Par. 1* of the New Jersey Constitution, which states:

“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”

The Board’s citations of statutory significance are those wherein the Legislature granted local boards certain rule-making powers (*N.J.S.A.* 18A:27-4 and *N.J.S.A.* 18A:11-1), which, in the Board’s view, “\*\*\* cannot be delegated to another body or be subject to negotiation.\*\*\*” In support of this view, the Board quotes from a recent decision in Pennsylvania, *The Pennsylvania Labor Relations Board v. Nazareth Area Education Association*, *PERA-C-1884—C 8/10/72* wherein it was said:

“\*\*\* ‘. . . neither the teacher nor the board, nor both combined, can circumvent by contract, or otherwise, the statutory right of the board to control the allocation of teachers’ time including the allotment thereof to actual classroom teaching or the preparation for the same. This policy-making function of the school board must be exercised in the best interests of the children and must foster a more effective and efficient educational system.’ ” (at p. 4)

The Board’s second point avers that the Agreement contains no guarantee of teaching assignments or period load despite the fact that such provisions were discussed prior to the time the Agreement was executed. Thus, the Board argues that it is clear that the Board retained to itself the “\*\*\* management rights vested in it by Title 18A \*\*\*.” (Memorandum of Law of Respondent, at p. 5)

The Board’s third point represents a position directly at odds with the position of petitioner. On the one hand, the Board argues that its powers, which are derived from *N.J.S.A.* 18A and expressly granted, are in no way annulled or modified by the passage of *Chapter 303, Laws of 1968*. The Board later states:

“\*\*\* The enactment of *N.J.S.A.* 34:13A-8.1, in limiting the scope of Chapter 303, affirms that not all terms and conditions of employment or



rule modifications are subject to negotiation.\*\*\*” (Memorandum of Law of Respondent, at p. 7)

On the other hand petitioner avers in her letter in lieu of Reply Brief (P-3) that:

“\*\*\* these assertions by the Board of Education are 100% incorrect \*\*\*”

and further states that:

“\*\*\* It was only because Chapter 303 thereby *modified* the rights theretofore held by the board of education that it negotiated with the education association on terms and conditions of employments, etc.\*\*\*” (*Emphasis in text.*)

The Board’s fourth point is concerned with the reasons for its action herein. It states that the assignment schedule for English teachers was altered:

- (a) to reduce the average size of English classes from 25 to 20;
- (b) to equalize assignments throughout the district; and
- (c) to secure better and more efficient staff utilization.

It is noted that the Commissioner is required herein to decide a controversy involving a factual situation and legal arguments pertinent thereto that have already been considered by an arbitrator at the final level of the grievance process. However, the instant Petition is not an appeal from the ultimate decision of the arbitrator (P-1), but a request, in effect, that the Commissioner direct compliance by the Board with what the arbitrator could only recommend as the result of advisory arbitration.

This recommendation was that the Board stay

“\*\*\* the implementation of the increased teaching load pending negotiations between the parties on this matter.\*\*\*” (P-1, at p. 12)

The Commissioner observes that this recommendation followed an initial conclusion by the arbitrator that the matter before him was a grievance which was arbitrable in the context of the Agreement between the parties. The Commissioner holds to the contrary; the matter herein is clearly a controversy under the school laws and was improperly placed in advisory arbitration in the first instance.

The Commissioner holds, additionally, that the Board erred by its failure to restrain the arbitration proceeding at the time it commenced. A controversy such as this, which involves the assignment of classes to teachers and the number of pupils for optimum class size, is clearly one which reaches to the heart of the educational process and requires an educational judgment which the Commissioner alone is required to exercise in the first instance by the laws of

this State. (See *Board of Education of the Township of Rockaway, Morris County v. Rockaway Township Education Association and Joseph Youngman, New Jersey*, 120 N.J. Super. 564 (Chan. Div. 1972). )

Therefore, the Commissioner assumes an original jurisdiction in the matter, *sub judice*, and will consider the Petition on its merits in the context of applicable law and sound educational policy. The law which is pertinent to this controversy is partly contained in the Education statutes (N.J.S.A. 18A), but there is a larger parameter of law which must also be considered — that which is set forth in the New Jersey Constitution, decisions of New Jersey Courts, and prior decisions of the Commissioner and the State Board of Education. Additionally, as petitioner maintains, there is the statutory prescription contained in the New Jersey Employer-Employee Relations Act. (N.J.S.A. 34:13A-1 *et seq.*)

Of primary importance in the matter, *sub judice*, are certain of the statutes contained in the school law. These statutes require the Commissioner to determine “\*\*\* without cost to the parties, all controversies and disputes arising under the school laws\*\*\*,” (N.J.S.A. 18A:6-9) and they confer certain mandatory powers and duties on local boards of education.

Specifically, in this latter regard, N.J.S.A. 11-1 states that:

“The board shall —

“a. Adopt an official seal;

“b. Enforce the rules of the state board;

“c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation and conduct and discharge of its employees, subject, where applicable, to the provisions, of Title 11, Civil Service, of the Revised Statutes; and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.”

The Commissioner takes notice that a local board’s responsibility for the “government and management” of its public schools is complete and unfettered by qualification.

A second pertinent statute is equally as explicit in its provision that a local board of education may determine the “employment, terms and tenure of employment” of those whom it chooses to employ. This statute, N.J.S.A. 18A:27-4, provides in its entirety:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

Thus, it may be clearly seen that the school laws promulgated by the Legislature of this State, pursuant to the constitutional mandate that there shall be a “free” and “thorough and efficient” system of public education, have conferred a responsibility for the management of the public schools of the State on local boards of education comprised of elected or appointed representatives of the people. Indeed, if *N.J.S.A. 34:13A-1 et seq.* had not been enacted by the Legislature, it is fair to assume that the prerogative of local boards to manage and govern the schools of this State would be unchallenged. However, *N.J.S.A. 34:13A-1 et seq.* requires that the “terms and conditions” of employment for all public employees be negotiated, and the challenge to the unilateral authority of local boards is implicit in the phrase.

This fact poses the questions with respect to the matter, *sub judice*:

1. Is the assignment of teachers in the public schools to a schedule of classroom duties within the school day a “term and condition” of employment?
2. If such “assignment” is not a “term and condition” of employment subject to negotiation, is it to be considered a matter for the exercise of the discretion of local boards of education within the broad parameters of specific authority conferred on local boards to manage the schools of their respective districts?
3. Is the number of pupils assigned to the various classes a “term and condition” of the employment of those who teach them?
4. What educational expertise must be brought to bear on such questions?

Additionally, the question of what precedents have meaning in arriving at a determination must be considered.

The Commissioner has assessed these questions and states his basic conclusions as follows:

1. The responsibility for managing the public schools of the State is no less a responsibility of local boards of education because of the passage of the New Jersey Employer-Employee Relations Act.
2. One important and unabridged specific responsibility of such

management responsibility is that of staff scheduling and the assignment of classroom and extra classroom duties. *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus and George Hodgins, Superintendent of Schools of the Borough of Paramus, Bergen County*, 1968 S.L.D. 62, affd. State Board of Education February 5, 1969, dismissed Appellate Division, Superior Court, September 8, 1969.

3. Local boards of education have the responsibility and the authority to determine the number of pupils to be scheduled in the several classes which comprise the curricular program of the public schools in their charge. This determination must be made in the best interests of the pupils in every instance.

4. Such basic prerogatives may not be shared, delegated or usurped.

The initial finding, *ante*, is founded on the decision of the Court in *Porcelli v. Titus*, 108 N.J.Super. 301, 309 (App. Div. 1969), affd. N.J. (1970), wherein it is stated that the statutes contained in Title 18A and those contained in Title 34 should be viewed “\*\*\* as a unitary and harmonious whole, in order that each may be fully effective \*\*\*,” and on that provision of the New Jersey Employer-Employee Relations Act wherein it is expressly stated that nothing contained in the Act shall be construed to:

“\*\*\* annul or modify any statute or statutes of this State.”

In the Commissioner’s view, the statutes in N.J.S.A. 18A are so explicit with respect to their delegation of authority, that they take preference over the more general provision of the New Jersey Employer-Employee Relations Act.

It is a recognized principle of law that a specific delegation of authority by statute takes precedence over the provisions of a statute more general in nature. *Hackensack Water Co. v. Division of Tax Appeals*, 2 N.J. 157 (1949) Thus, the duty imposed on local boards by N.J.S.A. 18A:11-1 and 27-4 — to manage or govern the schools of the State — is so specific that the mandate of the New Jersey Employer-Employee Relations Act, that local boards must negotiate “terms and conditions” of employment with their employees, cannot intrude on such a duty or take precedence over it. The Commissioner so holds.

The necessity remains, however, for a local board of education to negotiate appropriate “terms and conditions” of employment with those persons whom it employs. This mandatory requirement stands side by side with the local board’s unfettered prerogative to manage and govern its schools, and an inspection of the rights involved gives the appearance of conflict.

Indeed, for lack of a definition of terms, there has been conflict in this regard, which persists to the present day.

However, while the Commissioner in *Board of Education of the Town of Newton v. Newton Teachers’ Association, Sussex County*, 1970 S.L.D. 444 said that he could not, in that case,

“\*\*\* produce a decision interpreting the phrase ‘terms and conditions of employment’ in a way that would have universal application to all of the groups covered by the legislative enactment [of Chapter 303, Laws of 1968]\*\*\*,”

it was subsequently stated that this declaration was limited in scope. Specifically, in this regard, the Commissioner said in *Newton*, at p. 447, that he must:

“\*\*\* point out the limited nature of this decision. In it he is declaring that he cannot assume jurisdiction over the interpretation of a law which is not a school law. He is not declining jurisdiction over those decisions of boards of education which may, as a result of negotiation, be in direct dichotomy with the school laws as embodied in *N.J.S.A. 18A*. He refers in particular to those laws that confer specific powers on boards of education that may not be abrogated nor usurped by agreement. *Clinton Smith et al. v. Board of Education of the Borough of Paramus and George Hodgins, Superintendent of Schools of the Borough of Paramus, Bergen County*, 1968 *S.L.D.* 62, 64.\*\*\*”

Subsequent to the *Newton* decision, the Commissioner has, on three occasions, found it necessary to examine actions of local boards of education which were taken as the “result of negotiations” pursuant to the mandate of the New Jersey Employer-Employee Relations Act. Each of these actions was examined in the context of clear prescription contained in Title 18A, Education.

The first of these matters, *Marjorie B. Hutchenson v. Board of Education of the Borough of Totowa, Passaic County*, 1971 *S.L.D.* 512, was concerned with a sick leave policy which the Board had negotiated with its employees. The Commissioner found that the policy was in direct conflict with certain statutory language concerning sick leave policies and thus was *ultra vires*.

Other matters which have required an examination of a local board’s action in the context of the Education statutes (Title 18A) were *Dignan v. Board of Education of Rumson-Fair Haven Regional High School*, 1971 *S.L.D.* 336; *Boney v. Pleasantville Board of Education*, 1971 *S.L.D.* 579; and *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County*, 1971 *S.L.D.* 246. In these decisions the Commissioner held that statutory rights could not be acquired by indirection through grievance procedures or negotiated agreements. In *Moldovan, supra*, the Commissioner determined that the formulation of a school calendar was not negotiable since local boards of education have the duty to devise a school calendar which is in the best educational interest of pupils. The determination was grounded in the totality of the statutory scheme devised by the Legislature for the management of the public schools and in particular on the specific statute, *N.J.S.A. 18A:36-2*, which provides that:

“The board of education shall determine annually the dates, between which the schools of the district shall be open, in accordance with law.”

The Commissioner then said in *Moldovan*, at page 252, that:

“\*\*\* In *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County*, 1968 S.L.D. 62, affirmed State Board of Education 1968 S.L.D. 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969, the Commissioner has held that any agreement between a local board of education and representatives of its employees, whatever it may be labeled, cannot constitute a surrender by the board of education of its responsibility to conduct the schools within its charge in the best interests of the children to be served. This overriding purpose of the public schools is clearly expressed as follows in *Bates v. Board of Education*, 72 P. 907 (Calif. Sup. Ct. 1903), *McGrath v. Burkhard*, 280 P. 2d 864 (Calif. App. 1955), quoted with approval in *Victor Porcelli, et al., v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 1968 S.L.D. 225, 229, affirmed by State Board of Education April 2, 1969, affirmed 108 N.J. Super. 301, 312 (App. Div. 1969), cert. den. 55 N.J. 310 (1970):

“ ‘\*\*\* The public schools were not created nor are they supported for the benefit of the teachers therein \*\*\* but for the benefit of the pupils and the resulting benefit to their parents and the community at large. \*\*\* ’ ”

The decision of the Commissioner in *Moldovan* and the other decisions cited, *ante*, were set forth in full cognizance of the New Jersey Employer-Employee Relations Act and in the context of the Education statutes, and the Commissioner held in each instance that the negotiation privilege may not intrude on clear statutory authority or render it a nullity.

These views are reinforced by a reading of the opinion of the Supreme Court of New Jersey in a matter wherein the Court concluded that strikes by public employees are proscribed. *Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970) In that decision the Court stated:

“It is crystal clear that in using the term ‘collective negotiations’ the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee.\*\*\* And undoubtedly they were conscious also that *public agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects.\*\*\**” (at p. 440) (*Emphasis supplied.*)

In the Commissioner’s view, the matters of teacher assignment and class size are prime examples of “subjects” over which the local boards of the State must maintain exclusive control. They cannot “\*\*\* abdicate or bargain away\*\*\*” their discretion in this regard, nor may they make “\*\*\* binding contractual commitments \*\*\*” to dilute their authority for the “government

and management” of the schools in so far as their authority embraces such matters. They are so clearly vital to the efficient operation and government of public school programs as to obviate the necessity for a lengthy explanation.

Suffice it to say here that, in the Commissioner’s judgment, boards of education must, of course, negotiate with their employees all of those salary and other benefits of direct or indirect compensation in return for their services or employment. However, such negotiations, which are required, cannot be held to abrogate those rights and duties given to local boards by the Education statutes. (Title 18A) The rights of employer and employee are mutually exclusive, and to view them accordingly is to view the body of statutory law contained in the Education statutes and in the New Jersey Employer-Employee Relations Act as a “unitary and harmonious whole.” *Porcelli, supra; Rockaway, supra*

Such a conclusion, in the Commissioner’s judgment, is in the interest of a thorough and efficient statewide system of education. While upholding the Board’s entitlement as an employer to assign and schedule its employees, the Commissioner is constrained to observe that there is no evidence herein to show the Board abused its discretion in this instance.

Prior to the change of assignment controverted herein, petitioner and other English teachers in the employ of the Board were assigned 100 pupils in four class periods per day. Subsequently, the number of pupils assigned to each teacher remained constant, but class size was reduced for the benefit of all of the pupils of the system. As the Court said in *Bates v. Board of Education, supra*, the public schools are intended primarily “\*\*\* for the benefit of pupils \*\*\*.” The controversy herein is directly founded on a decision of the Board made in the pupils’ behalf. However, while there is benefit to the pupils affected by the Board’s action, it is difficult to find that such benefit is at the expense of petitioner or other teachers similarly situated. Their teaching day has not been lengthened — it has been restructured — and the Board and school administration gave notice of the contemplated change well in advance of the effective date when the change was to take effect.

The Commissioner has in the past had occasion to discuss such restructuring or rescheduling of teachers in their assignments within or without the school day. Particularly in *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County, 1965 S.L.D. 18*, the Commissioner was concerned with the right of a football coach to continue in his coaching assignment and with a claim to tenure entitlement in such position. The Commissioner classified the claim as one of “\*\*\* over-protection \*\*\*,” and he spoke in support of a flexible approach to the scheduling of teachers in their assignments in the interest of the welfare of children. Specifically, he said:

“\*\*\* 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." (at p. 21)

These principles advanced by the Commissioner in *Dallolio* have an applicability to the instant matter. The scheduling of teachers must not be so rigid as to "stultify" either the teacher or the program, and the Board's statutory right to assign teachers "\*\*\*\* as it sees fit \*\*\*\*" is a proper exercise of discretion in the absence of clear evidence that such action was discriminatory in its application or otherwise unreasonable. There is no such evidence herein.

Accordingly, the Commissioner finds no merit in the instant Petition. The Petition is dismissed.

COMMISSIONER OF EDUCATION

October 31, 1973



**Leonard V. Moore, Charles R. Driggins, Marcia Romanansky  
and Dorothy Pfarrer,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Roselle,  
Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioners, Rothbard, Harris and Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, John Cervase, Esq.

Petitioners are three former nontenured employees and one current tenured employee of the Board of Education of the Borough of Roselle, hereinafter "Board," who are supported by the Roselle Education Association in their prayer for reinstatement in the positions they held in the Roselle School District prior to June 30, 1971.

A Motion for *pendente lite* relief and reinstatement of petitioners was denied by a decision of the Commissioner of Education rendered October 4, 1971. Thereafter, five days of hearings were held during the next twelve months before a hearing examiner appointed by the Commissioner. In addition, many documents were submitted in evidence by parties and counsel filed Briefs subsequent to the conclusion of the hearings.

One of the petitioners, currently in the employ of the Board, was the high school principal who had a tenure status as vice-principal and was demoted by the Board from the position of high school principal to vice-principal. The other three petitioners were the nontenured vice-principal of the high school and two nontenured teachers who were not reemployed by the Board for the 1971-72 academic year.

The principal alleges that the Board's action demoting him to his former position of vice-principal, in which he had a tenure status, was illegal and improper. The other three petitioners allege that the Board's failure to reemploy them was illegal and improper on the grounds that they were denied constitutional and statutory rights by virtue of the fact that the Board refused to furnish reasons for not reemploying them and also refused to allow their representative to speak on their behalf at a public meeting.

Petitioners assert that they were reemployed for 1971-72 by formal action of the Board at a special meeting held June 21, 1971, and that the Board's

subsequent action rescinding their contracts of employment at a special meeting held June 30, 1971, was illegal.

The Board denies this allegation, and avers that its special meeting held June 21, 1971, was improperly noticed and is, therefore, a nullity. (Tr. VI-5) The Board, therefore, avers that no action taken at its June 21, 1971 special meeting was official, and thereafter it voted officially at its June 30, 1971 special meeting to reconsider all the actions taken at the prior meeting, including the 1971-72 appointments of all four petitioners.

Ninety-day extensions of the contracts of the aggrieved petitioners were granted by the Board on June 30, 1971. The Board avers that the ninety-day extensions were granted only under duress and were caused by threats and acts of physical violence against Board members by citizens of the community who were in attendance at the Board meeting held June 30, 1971.

Although the Board did previously award contracts to petitioners at its special meeting held June 21, 1971, it gave petitioners no reasons for its subsequent change of attitude at the June 30, 1971 meeting; however, at the Commissioner's hearings, the Board did attempt to show that the decision to demote the high school principal was based, at least in part, on his failure to make a proper report directly to the Superintendent of Schools relating to a drug incident which involved one of its high school pupils. Testimony was adduced that there was an alleged "slapping" of a senior girl by the vice-principal. Additional testimony indicated that various Board members had learned that some teachers, parents, and pupils were dissatisfied with the two teachers. However, this testimony was not corroborated, and no names of any complainants were given. These reports about petitioners to Board members allegedly occurred between June 21, 1971, and June 29, 1971. One Board member testified that the Superintendent was directed to eliminate the names of petitioners from his personnel recommendation report to be submitted for approval by the Board on June 30, 1971. (Tr. V-45-66)

The Board does not deny that it would not let petitioners' representative speak in their behalf at its meeting on July 13, 1971, but argues that petitioners' representative was not a resident of Roselle and therefore had no right to speak. (Tr. VI-17-18)

The facts gleaned from the record are all related to four public meetings held by the Board between June 17, 1971, and July 13, 1971, *seriatim* as follows:

1. *Special Meeting – June 17, 1971 (P-11)* The Board postponed its agenda which required, *inter alia*: (1) approval of contracts for personnel as listed by the Superintendent and business manager; and (2) approval of administrative salaries and positions.
2. *Special Meeting – June 21, 1971 (R-5)* The Board, *inter alia*, approved contracts for all personnel as listed by the Superintendent and business

manager. The Board also approved salaries with increases for Petitioners Moore, as high school principal, and Driggins as vice-principal.

3. *Special Meeting – June 30, 1971 (P-2)* On the advice of counsel, the Board, *inter alia*, declared the previous meeting of June 21, 1971 (R-5), illegal because of improper notice given to one of its members; demoted Petitioner Moore to the position of assistant principal; and resolved not to renew the contract of the other three petitioners. After a heated exchange with the audience, the Board then approved ninety-day contract extensions for the four petitioners.

The Board acknowledged member Collins' request to take a new vote on the one item involving a consulting firm which was also passed at the special meeting of June 21, 1971. (P-2)

4. *Regular Meeting – July 13, 1971 (R-7)* The Board, *inter alia*, voted to approve the minutes of the special meetings held on June 17, 1971 (P-11), June 30, 1971 (P-2), and to "accept" the minutes, as corrected, of the special meeting held on June 21, 1971. (R-5) (R-7)

Regarding the meeting of June 17, 1971, the Board Secretary testified that he was directed by the Board President after that meeting, to notify the Board members that another special meeting would be held on June 21, 1971. (Tr. IV-46) (He testified earlier that he did not remember exactly what day he was directed to notify the membership.) (Tr. IV-31) He testified, also, that the notice which was sent out contained a typographical error in the date, stating that the special meeting would be held on June 28, 1971, instead of June 21, 1971.

The Board Secretary gave conflicting testimony regarding how the Board members learned of the error in the notice, and that the correct meeting date was June 21, 1971. On the one hand, he testified that the Board members learned by word of mouth, through the Superintendent's office and his office, that the meeting would be on the 21st and not the 28th. He testified, also, that he personally informed some members that the meeting would be held on the 21st. (Tr. III-75-76) However, he countered later, with testimony, that he did not find out about the error in the notice until the "22nd or 23rd." (Tr. IV-53, 55-56)

The hearing examiner finds it incredible that the Board Secretary did not know about the error in the notice dated June 18, 1971, which stated that the next special meeting of the Board would be held Monday, June 28, 1971. (That Monday was June 21, 1971.) He testified that seven of the Board members found out either through contact with the Superintendent's office, his office *and himself*, even though he did not know the notice was incorrect until after the meeting of June 21, 1971. (Tr. IV-53, 55-56)

The Board member who missed the special meeting held June 21, 1971, testified that he received the written notice which gave the meeting date

incorrectly, and learned of the error by telephone conversation with another Board member approximately 6:00 p.m. or 6:30 p.m. on the same night of the June 21, 1971 meeting. (Tr. IV-103) However, he was unable to attend because of a prior commitment.

At the special meeting held June 30, 1971, the Board voted to reconsider the one business item of the June 21, 1971 meeting concerning the hiring of a consulting firm. That item was revoted. The Board also voted to approve the list of teachers to be awarded contracts, which was revised by the administration on June 29, 1971, to exclude the names of the two teachers, Petitioners Pfarrer and Romanansky. The Board also voted to demote the principal to the position of vice-principal, and voted also not to renew Petitioner Driggins' contract as vice-principal.

The Board avers that at that point in its meeting, the crowd went wild, took over the meeting, physically and verbally abused some of its members and the Board attorney, and made threats to some of them. The Board avers also that it lost control of the microphones and was unable to recess or adjourn, and that calm was somewhat restored some two to two and one-half hours later by a policeman who then controlled a microphone. It avers, also, that order was restored only after the Board passed a motion to extend petitioners' contracts for ninety days. Thereafter, the crowd of approximately 250 persons left the meeting, but about thirty persons remained in the audience. The Board then continued in public session and completed approximately twenty more items of business, lasting about one and one-half hours before adjourning.

On July 8, 1971, the Board met with each of the petitioners individually to discuss their employment status under the ninety-day contract extensions granted by the Board on June 30. Thereafter, at the regular meeting held July 13, 1971, the Board passed a resolution rescinding the ninety-day contract extensions granted to petitioners, because they were awarded under duress and coercion, and removing Petitioners Moore and Driggins "from their positions as of August 13, 1971." (R-7, at p. 8) At the same meeting on July 13, 1971, the Board took the following action:

\*\*\*\* Mr. Everett moved, seconded by Mrs. Solujich to accept the minutes of the June 21st meeting. The motion was passed 6-1; Mr. Sakala opposed. Mr. Sakala questioned Mr. Cervase as to the legality of the June 21st meeting since the notice was dated June 28th. *Mr. Cervase [Board attorney] stated that it could be legal if no Board member challenged it. Mr. Murphy asked that Mr. Cervase's answer be added to the minutes.* Also, on page 3381 regarding Mr. Klutkowski, Mr. Sakala voted yes. Minutes were accepted as corrected.

"Mr. Everett moved, seconded by Mrs. Solujich to accept the minutes of June 30th, pages 3383-3386 with a correction on pages 3386, paragraph 6, 'following actions' should read 'following exceptions.'

"On page 3385, Mr. Sakala questioned 'coercion and pressure from the

crowd' and asked it be stricken from the minutes. Also on page 3385, Mr. Sakala questioned the motion to extend the contracts for two teachers, Mrs. Romanansky and Pfarrar (sic), plus Mr. Moore and Mr. Driggins for 90 days and the Board to have a meeting with the four persons involved with proper representation.

"The minutes of the June 30th meeting were approved 6-1; Mr. Sakala opposed.\*\*\*" (*Emphasis supplied.*) (R-7, at p. 7)

The former principal and the two teachers argue also that the ninety-day employment approved by the Board on June 30, 1971, was sufficient in length to bring them under the protection of tenure. No such claim is made by Petitioner Driggins, the former vice-principal, who had served only about fifteen months in the school system.

The two teachers, Romanansky and Pfarrer, completed three contractual academic years with the Board on June 30, 1971. Petitioner Moore, the former principal, has tenure as the vice-principal and he argues that upon transfer or promotion, tenure occurs after two years in a new position. *N.J.S.A. 18A:28-6*. Therefore, he argues, the extension of his contract for ninety days on June 30, 1971, when added to his service as acting principal from September 1, 1969 to October 15, 1969, and principal from October 15, 1969 to June 30, 1971, is sufficient to bring him under the protection of tenure as high school principal.

The Board argues that Petitioner Moore, as a nontenured principal, received a statement of employment in error (P-1), instead of a contract, which is always offered to nontenured employees. The statement of employment has no termination clause. The hearing examiner concludes that Petitioner Moore should have received a contract instead of a statement of employment. However, no contract, per se, was issued and no termination clause is found in the statement of employment (P-1), under which he was offered employment beginning July 1, 1971.

The essential issues requiring determination by the Commissioner are as follows:

1. Was the special meeting held June 21, 1971, a legal meeting; and if so, what rights, if any, did petitioners acquire as a result of that meeting?
2. Could the Board legally rescind its action taken at the June 21, 1971 special meeting?
3. Was the Board's action at the special meeting held June 30, 1971 with respect to petitioners, caused by duress and coercion of the crowd?
4. Were any rights denied petitioners because their representative was not permitted to speak in their behalf?

Submitted in evidence by petitioners are contracts awarded to the former

vice-principal, Mr. Driggins, dated June 22, 1971, for the school year beginning July 1, 1971, and terminating June 30, 1972, at a salary of \$17,408 (P-4); the teacher, Mrs. Pfarrer, dated June 22, 1971, for the academic year beginning on September 1, 1971, and terminating June 30, 1972, at a salary of \$9,773 (P-8); the teacher, Mrs. Romanansky, dated June 25, 1971, for the academic year beginning on September 1, 1971, and terminating on June 30, 1972, at a salary of \$11,378 (P-9); and a statement of employment which is not dated, awarded to the former principal, Mr. Moore, for the school year beginning July 1, 1971, and terminating June 30, 1972, at a salary of \$20,942. (P-1)

Petitioners contend that the contracts, *ante*, which they signed, are valid contracts which had been signed by the Board Secretary prior to being signed by petitioners. After the contracts were signed by petitioners, they were returned to the Board Secretary's office. The Board contends, however, that the contracts were not completely executed because they had not been signed by the Board President and therefore were not in full force and effect.

Petitioners argue, however, that the Board awarded these contracts to petitioners at its special meeting held June 21, 1971 (R-5), and that the President of the Board cannot negate the action of the entire Board by refusing to sign contracts that were properly executed in all other respects.

At the special meeting of the Board held June 30, 1971, the Board took the following action with respect to the four contracts, *ante*:

“\*\*\*Mr. Everett moved, seconded by Mrs. Solujich that the 1971-72 Salary List revised June 29, 1971, which represents a correct and verified list be approved as indicated with the following exceptions [minutes as corrected at July 13 meeting]:

“Mrs. Nugent is resigning. Mrs. Pfarrer (sic) and Mrs. Romanansky's contract not renewed. Miss Rice is retiring.  
Mrs. Holzenthaler, maternity leave (not to exceed two years).

“Mr. Sakala requested a separation of the motions and in his opinion declared Item #2 on the agenda illegal as he did not relinquish the floor. The Chair refused a separation of motions. Motion passed, Mr. Sakala voted 'No.'

“Mr. Everett moved, seconded by Mrs. Nowakowski approval of administrative salaries and positions as indicated on the list with the following exceptions:

“Mr. Moore be re-assigned (sic) as Assistant Principal.  
Mr. Driggins' contract not be renewed.

“After a great and lengthy discussion (after coercion and pressure from the crowd, the Board was forced to pass the motion) Mr. Collins made the following motion, seconded by Mrs. Solujich:

“Motion to extend the contracts for two teachers, Mrs. Romanansky and Mrs. Pfarrer, plus Mr. Moore and Mr. Driggins, for 90 days and the Board to have a meeting with the four persons involved with proper representation. The motion passed unanimously.\*\*\*” (P-2)

Although the Board admits granting a ninety-day extension of the contracts to the four petitioners, it avers it did so only under duress and coercion of the audience at its June 30, 1971 meeting. The Board later filed criminal charges against some of the persons at that meeting. The Board presented several witnesses who testified that they had no choice but to extend the contracts at the meeting held June 30, 1971, *ante*. Some of them testified that they were fearful of their safety because of the threatened violence of the crowd. The Board President (then a Board member) testified, however, as follows:

“\*\*\* Yes. As I said before, I suggested to the Board President to offer them anything because of our acting under duress. So, we decided to give them a 90-day extension, knowing full well we would rescind it.\*\*\*” (Tr. VI-26)

He testified also that:

“\*\*\* I was not physically threatened nor was I pushed. I just sat back and took in the entire proceedings with contempt.\*\*\*” (Tr. VI-23)

With respect to the conduct of the audience at the meeting of June 30, 1971, the Board has attempted to establish that the proceedings that evening were completely out of their hands and beyond their control and the control of the police. However, the hearing examiner finds particularly pertinent the comments of the Judge who heard the case against those persons who had criminal charges filed against them as a result of the meeting of June 30, 1971. He commented in part as follows after hearing several days of testimony: (P-15)

“\*\*\* In fact, it appears that on the night of the 30th of June, much of the chaos was contributed in fact by the Board itself. I cannot understand why the chair did not adjourn the meeting when it appeared out of hand, or call upon the assistance of the police to either maintain order or assist the Board in leaving the room. To permit a police officer to take over the meeting, arrange a compromise, and then go on with the meeting is certainly abrogating one's legal responsibility, and, thereafter, two weeks later, to rescind everything that was done, was certainly an unfair imposition upon the public.

“\*\*\* Again, the Board could have adjourned so long as they themselves heard the motion and made the decision — regardless of the audience — and could have implemented the decision with the aid of the police officers on duty.

“\*\*\* I am satisfied behind (sic) a reasonable doubt that the Board itself



was as disturbing an influence at its own meeting as the public in their participation. It seems that the meeting, and I use the word rather loosely, was a shouting match involving both sides of the table. With respect to the interesting conflict between informational minutes and minutes, the evidence does pose some serious questions which may be of interest to a Grand Jury. A reading of them leads me to believe that the meeting had some lengthy discussions and there is added in parenthesis 'after coercion and pressure' from the crowd the Board was forced to pass the motion, and this was added. But thereafter there follows approximately twenty paragraphs of the work completed by the Board that night after the motion to extend the contracts for ninety days, and nowhere is there a request for a recess or adjournment throughout these minutes, the official minutes of the Board, except at the very end of the additional twenty paragraphs, or at the end of the Board meeting that night.

“\*\*\* It is certainly appalling that the affairs of such important bodies as the Board of Education, charged with the responsibility of seeing to the education of our youth are handled in such an irresponsible and conflicting manner.

“This trial has established that a community has been polarized as the result of actions by nine people, nine people who took an oath of office to support the constitution of these United States and this State. It appears to this court that the confusion that seems to surround this Board cannot be solved in a criminal court. I leave that to the electorate.

“\*\*\* It is therefore the decision of this court that the charges emanating out of the disgraceful meeting conducted by the Roselle Board of Education on the night of June 30th, 1971, should result in all of these defendants being found not guilty.\*\*\*” (P-15)

It has been established that one of the prerequisites for calling a special meeting of a board is proper notice to each of the board members. *Cullum v. Board of Education of North Bergen Township*, 27 N.J. Super. 243 (App. Div. 1953), 15 N.J. 285 (1954) The call or notice of a meeting is reported in 78 C.J.S. § 123 as follows:

“\*\*\*As a general rule, which, in some jurisdictions, has been enacted into an express statutory requirement, a proper call or notice of a meeting of a board of education, or of directors, trustees, or the like, of a school district or other local school organization, *must be given or communicated to each member of such board in advance of such meeting, in order to render proceedings had thereat valid*, and a want of such notice to any member who does not attend the meeting will invalidate the action taken, except that in the case of regular meetings, the time and place of which are fixed by statute or by a rule of the board, all must take notice thereof, and no express notice is required. *However, the general rule has been qualified in some cases, which hold that want of notice to a member will not invalidate action taken by the board where he is absent from the state and*



*would not have been able to attend the meeting even if notice had been given him. Moreover, even where it is required by statute to be given, it may be waived by the persons entitled to receive it; and where all the members of a board are present and participate in a meeting thereof, they may take official action, and the fact that no notice of such meeting was given, or no formal call was issued, or that the notice or call was irregular or insufficient, is immaterial to the validity of the proceedings. The mere presence at the place of meeting of a member to whom no notice has been given does not waive the requirement of notice or validate action attempted to be taken at such meeting, where he is present for another purpose and does not participate in the meeting. Where notice of a board meeting is defective, such defect can be cured and the action taken rendered valid by the action of the board at a subsequent proper meeting.\*\*\*"* (at p. 913) (*Emphasis supplied.*)

Additionally, N.J.A.C. 6:3-1.9 reads as follows:

"In every school district of the State it shall be the duty of the secretary of the board of education to call a special meeting of the board whenever he is requested by the president of the board to do so or whenever there shall be presented to such secretary a petition signed by a majority of the whole number of members of the board of education requesting the calling of such special meeting."

The record shows that each Board member received a copy of the June 18, 1971 notice which incorrectly stated that a meeting would be held on June 28, 1971. (R-8) The record shows also that every Board member learned before the meeting on June 21, that there would be a meeting on that date and not on June 28 as the notice indicated. Board member Collins admitted learning of the meeting between 6:00 p.m. and 6:30 p.m. on June 21, 1971, but stated that he was unable to attend. He did not protest the continuance of the meeting. *Cullum v. Board of Education of North Bergen, supra* Rather, he asked at the June 30, 1971 meeting (R-6) for a new vote on an item unrelated to the matter pertaining to these four petitioners. Thereafter, the minutes of the June 21, 1971 meeting were accepted at the regular meeting held on July 13, 1971. (R-7)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. The Commissioner has also reviewed the exception to the hearing examiner's report filed by the Board, and takes notice that although petitioners were granted an extension of time until September 28, 1973, no exception or reply to the hearing examiner's report has been filed as of October 16, 1973.

In the first instance, the Commissioner is asked to determine the right of an individual to speak at a public meeting of the Board. The Commissioner has

previously held that there is no requirement in law for such an opportunity for public participation in school board matters; however, the opportunity for citizens to make statements serves many useful purposes. It lies within the discretion of the presiding officer, in accordance with the bylaws of the Board, to make decisions which he deems necessary to guide, control or even limit public participation. *Hockenjos and Howard v. Board of Education of the Township of Jefferson, Morris County*, 1967 S.L.D. 280; affirmed State Board of Education 1968 S.L.D. 261 In the instant matter, there is no allegation that residents of Roselle were denied the right to speak, but rather that a representative for petitioners, who is not a resident, was denied the opportunity to speak in their behalf.

The right of a teacher's representative to speak in their behalf has been established by the Commissioner in *Janice Bello v. Board of Education of the Borough of Haledon, Passaic County*, 1966 S.L.D. 1; affirmed State Board of Education, April 5, 1967. In that decision the Commissioner commented as follows with respect to a non-resident's right to speak at a budget hearing:

“\*\*\*The Commissioner finds that the sense and interpretation of the expression ‘other interested persons’ as used in R.S. 18:7-77.2, which best comports with the legislative intent is that which would include teachers employed in the district whether resident or non-resident therein. Such teachers are therefore entitled to present objections and to be heard with respect to the budget presented at the hearing required by the statute.

“Since the teachers may be heard, it follows from the provision of the New Jersey Constitution, *supra*, that they may be heard through the medium of their chosen representatives. Respondent's brief recites the history of the development of Paragraph 19 of Article I at the Constitutional Convention of 1947, pointing out that the provision therein for persons in public employment granted them the same right to organize and present their proposals and grievances that is available to persons in private employment. Inherent in this right, as explicitly set forth in the Constitution, is the right to be heard ‘through representatives of their own choosing.’ The Commissioner can find no basis for any limitation on the nature of such representation as respondent argues. The term ‘representatives of their own choosing’ allows great latitude of choice. For instance, the Commissioner observes that in *Title 34--Labor and Workmen's Compensation* of the Revised Statutes, the Legislature defined ‘representative’ for the purpose of the Labor Mediation Act (R.S. 34:13A-1 *et seq.*). While recognizing that this act has no bearing upon the rights of persons in public employment (see *Perth Amboy Teachers Association, et al. v. Board of Education of Perth Amboy*, decided by the Commissioner December 4, 1965), the Commissioner finds in this definition an indication of legislative intent applicable to the instant case:

“ ‘The term ‘representative’ is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a

representative need not be limited in membership to the employees of, the employer whose employees are represented.' R.S. 34:13A-3 (d)\*\*\*"

Even though that decision spoke exclusively about a budget hearing, the Commissioner determines that the same principles apply herein, and that since the Board gave the citizens an opportunity to speak pursuant to the guidelines mentioned in *Hockenjos, supra*, it was then obligated to allow the teachers' representative to speak even though he was a non-resident of the school district.

The Commissioner determines that the special meeting of the Board held June 21, 1971, was a legal meeting. Each Board member was notified and none protested about that meeting. In fact the minutes of that meeting were accepted by the Board. (R-7) See *Cullum, supra*.

Despite the Board's action on June 30, 1971 (R-6), wherein petitioners' contracts were first revoked and then extended by ninety days, petitioners acquired vested rights to those contracts pursuant to the Board's action at the meeting of June 21, 1971. Those contracts (and statement of employment to Petitioner Moore) are not defective because they are not signed by the Board President. *N.J.S.A.* 18A:27-5 reads as follows:

"Every contract between a board of education which has not made rules governing such employment and any teaching staff member shall be in writing, in triplicate, signed by the president and secretary of the board of education and by such person."

However, that statutory language is directory rather than mandatory. Clearly the legislative intent was not to grant a veto power to the Board President wherein he could frustrate the will of the Board simply by refusing to sign a contract.

The Commissioner holds, therefore, that the contracts issued by the Board in the instant dispute, are binding, and that petitioners are entitled to an appropriate remedy.

The record indicates that the Board never attempted to terminate the 1971-72 contracts awarded petitioners. Rather, it simply declared the meeting of June 21, 1971, illegal, and took another vote on the appointment of teachers on June 30, 1971, which, they allege, eliminated petitioners from their earlier appointments and award of contracts. (R-6)

Having determined that the meeting of June 21, 1971, was a legal meeting and that the contracts awarded at that time were fully binding on the parties, the Commissioner further determines that the action of the Board on June 30, 1971, (R-6) with respect to the nonrenewal of petitioners' contracts, was a nullity.

In essence, the Board's action taken on June 30, 1971, constitutes a rescission of the contracts of employment which had been approved by the Board

on June 21, 1971 at a special meeting which was a legal and proper meeting. This act of rescission was improper, and the Commissioner so holds. *Marion S. Harris v. Board of Education of Pemberton Township*, 1939-49 S.L.D. 164 (1938); *Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County*, 1961 S.L.D. 189; *Anthony Amorosa v. Board of Education of the City of Jersey City, Hudson County*, 1964 S.L.D. 105; *Leon Gager v. Board of Education of the Lower Camden County Regional High School District No. 1, Camden County*, 1964 S.L.D. 81; *James Docherty v. Board of Education of West Paterson, Passaic County*, 1967 S.L.D. 297

Under the terms of the contracts to Petitioners Romanansky (P-9), Pfarrer (P-8), and Driggins (P-4), each could have been given thirty-days' notice and terminated according to the terms of his/her contract. This was never accomplished; therefore, Petitioners Romanansky, Pfarrer and Driggins are entitled to their full salary under the terms of their individual 1971-72 contracts, less mitigation of monies earned by them in other employment during the dates specified on those contracts.

Petitioner Moore, also, is entitled to compensation for the period July 1, 1971 through June 30, 1972 at the rate specified in his statement of employment issued by the Board as \$20,942, less the salary he actually earned as vice-principal of the high school. Moore's continued assignment as vice-principal, or his reassignment to any other position may be made by the Board, subject, of course, to the applicable statutes and certification requirements.

However, none of the petitioners has earned a tenure status. See *Canfield v. Board of Education of the Borough of Pine Hill*, 1966 S.L.D. 152, affirmed State Board of Education April 5, 1967; affirmed 97 N.J. Super. 483 (App. Div. 1967); reversed 51 N.J. 400 (1968). Quoting from the reasons expressed in the dissenting opinion of Judge Gaulkin, Appellate Division, the Supreme Court held that:

“\*\*\* If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most, damages for the breach of the contract, but not to tenure.

“\*\*\* But here we are concerned not with the contract or its breach, but with the status of the plaintiff-i.e., tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be

trapped into tenure by the construction of words which neither party expected to have that meaning.\*\*\*" (97 N.J. Super., at pp. 492-493)

The Board has attempted to show that its action on June 30, 1971 with respect to the award of ninety-day extensions to petitioners, was caused by duress and coercion. It is clear from the Judge's opinion, *ante*, that the meeting of June 30, 1971, was a disorderly and "disgraceful" public meeting. (P-15) The Judge's opinion, delivered after hearing many witnesses and several days of testimony, concluded that the Board could have adjourned the meeting and left the room with the assistance of the police, and the Commissioner adopts the finding of the Judge.

However, even assuming that the Board could not adjourn, as it claims, the Commissioner has already decided that the ninety-day extensions to petitioners' contracts voted on June 30, 1971, are a nullity because the June 21, 1971 meeting was a legal meeting; and that the contracts awarded at that meeting are binding on the Board.

In summary, the Commissioner finds that the Board improperly rescinded petitioners' contracts for 1971-72, wherein all petitioners acquired vested rights to salaries voted them by the Board at its special meeting held June 21, 1971.

Except for the Order, *ante*, directing that proper compensation be paid to petitioners by the Board, the Petition is otherwise dismissed.

COMMISSIONER OF EDUCATION

October 31, 1973

**Greta Chappell, individually and as guardian of Muriel Chappell,  
an infant, Lloyd S. Kelling and Helen T. Kelling, individually  
and as guardians of Stephen Kelling, an infant, Roger Mazzella,  
individually and as guardian of Joyce Mazzella, an infant,  
Jersey City Education Association, a Nonprofit Corporation  
of the State of New Jersey, Hillside Education Association,  
a Nonprofit Corporation of the State of New Jersey, and  
Plainfield Education Association, a Nonprofit Corporation of the  
State of New Jersey, and Flory Naticchia,**

*Petitioners,*

*v.*

**Commissioner of Education,**

*Respondent.*

## **COMMISSIONER OF EDUCATION**

### **DECISION**

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, George Kugler, Attorney General (Morton I. Greenberg, Assistant Attorney General, Gordon J. Golum, Deputy Attorney General)

### **HEARING EXAMINER REPORT**

Petitioners, parents of pupils attending certain public schools in New Jersey and corporate representation of specifically named teacher groups, aver that tests developed through the initiative of the State Department of Education and administered to most of the State's pupils in grades four and twelve on November 14, and 15, 1972, cannot be adjudged as valid tests. Accordingly, petitioners request the Commissioner to refrain from any dissemination of such test results, and they petition the Commissioner to consider their proofs and arguments in support of this view.

A hearing on the merits of this Petition was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on March 26, 1973, and continued thereafter on April 2, 3, 4, 5 and 6, 1973. Briefs were subsequently filed by counsel for petitioners and for respondent. The report of the hearing examiner is as follows:

This matter comes before the Commissioner as the result of a decision of the Superior Court of New Jersey, Chancery Division, Mercer County, which held that petitioners should exhaust the administrative remedies available to them prior to Court consideration of the verified Complaint presented to the Court. This Complaint is attached to the instant Petition as Exhibit A, and the

combined Complaint and Petition appeal from actions of the State Department of Education, the Commissioner, and the State Board of Education in the preparation and administration of a statewide testing program.

Thus, it is readily apparent, as counsel for petitioners correctly observed in his opening statement at the hearing, *ante*, (Tr. I-12) that the forum of consideration herein is a “\*\*\* peculiar kind of proceeding \*\*\*” (Tr. I-12), since the Commissioner’s office is, in effect, hearing an appeal from its own action. However, as noted, *ante*, the forum for the appeal was determined by the New Jersey Superior Court, and the merits of the matter now stand as a public record. The hearing examiner believes that this record is a rather complete exposition of fact and respective views.

The hearing examiner’s report will be contained within the following outline format:

- I. The Educational Assessment Program
  - (a) Preparatory Phases
  - (b) Test Administration-Results
  - (c) Proposed Dissemination of Results
- II. Contentions of the Parties
- III. Testimony and Other Pertinent Evidence
- IV. Findings and Recommendations

## I

### THE EDUCATIONAL ASSESSMENT PROGRAM

#### A. *Preparatory Phases*

The testing program of the State Department of Education is known as the Educational Assessment Program, hereinafter “E.A.P.,” and according to a brochure (R-9) circulated by the Department in September 1972:

“It was developed to continue the work of the ‘Our Schools’ Project.” (at p. 4)

This project was initiated by the Department for three principal purposes:

- “(1) to determine statewide goals for the educational system in New Jersey
- “(2) to assess the status of education in New Jersey relative to these goals, and
- “(3) to recommend projects and programs which will bring New Jersey education closer to these goals.” (at p. 4)

At its conclusion, the "Our Schools" Project did result in a concrete action; namely, the adoption by the State Board of Education of a set of educational goals on April 12, 1972.

Prior to that date, however, and the adoption which finalized the first phase of the "Our Schools" Project, the State Department of Education had been proceeding with implementation of plans necessary to the initiation of a second phase — an assessment of students in relationship to established goals. This second phase actually began on June 1, 1971, with the appointment of Dr. Gordon Ascher to perform duties as the Department's first Director of Educational Assessment. (Dr. Ascher has a Bachelor's Degree in Sociology, a Master's Degree in Humanities and a Doctorate in Education (educational measurement and statistics). Prior to his appointment by the Department of Education, he had been in charge of the administrative research section at the office of the Board of Education, New York City.) (Tr. II-3-4) From that date forward to November 14, 1972, the plans for the State's initial effort in a program of educational assessment moved from abstract idea to concrete proposal and emerged in the form of specific test material to be administered, graded and assessed.

During the period from June 1971 to November 1972, it was necessary to determine what subject matter should be tested, and at what grade levels, and to formulate topical specifications within each subject matter which could serve as the basis of a request for proposals from professional firms engaged in test preparation. Additionally, during this period it was necessary to institute a training program for the teachers who would administer the tests and to develop regulations to guide the dissemination of the test results.

The initial decision made by the Department of Education, with the approval of the State Board of Education, was that all pupils of the State in grades 4 and 12 should be tested in two of the most basic of all subject matter areas; namely, reading and mathematics. There followed the development of a set of technical specifications, which were intended to be used as the basis of a document requesting proposals from companies or organizations skilled in test preparation. This document (P-1) was prepared by the Department of Education (Tr. I-18-19), and on May 10, 1972, was sent to a number of prospective bidders; specifically, Educational Testing Service of Princeton, New Jersey (Tr. I-20); McGraw-Hill Publishing Company (Tr. I-20); Houghton Mifflin Publishing Company (Tr. I-20); Harcourt, Brace and Jovanovich Publishing Company (Tr. I-21); and a "number of other firms." (Tr. I-21) The document (P-1) states that:

\*\*\*\* All replies must be received no later than 4:45 p.m. on May 24, 1972.\*\*\*\*

It also specifies five major developmental tasks to be performed by the successful contracting firm, lists a number of advisory councils which were to be consulted, and details all of the many facets of test development, administration, scoring and analysis.



Thereafter, prior to the specified deadline date for submission of proposals, two proposals were received by the State Department of Education. (Tr. I-29) One of these proposals was from the Educational Testing Service, and the other was from the California Test Bureau of McGraw-Hill. (Tr. I-29) (R-3)

Each of the proposals was accompanied by cost data. The cost of the proposal from Educational Testing Service was \$225,342 (R-2), while the proposal from McGraw Hill, which is contained in a "Budget Estimate" section (R-3), was listed as \$327,662.98. A third company, Houghton Mifflin, indicated in a letter to the State Department of Education (P-7) that the "time limits" contained in the request for proposals (P-1) were such as to preclude a "quality program," and that it could not, therefore, submit a bid proposal.

The two bids that were received were promptly submitted to a committee of approximately twelve persons within the State Department of Education (Tr. II-16), and thereafter the committee met and "\*\*\*\* considered ten different points about each proposal \*\*\*." (Tr. II-16) Subsequently, according to the testimony of the Director of the program:

"\*\*\*\* Educational Testing Service was recommended by this committee\*\*\*\*" (Tr. II-16)

as the company to which the contract for test development should be awarded. Educational Testing Service is a national nonprofit educational organization with broad experience in the development and administration of testing programs, e.g. Graduate Record Examinations, College Board Examinations, Law School Admission Examinations. (Tr. V-7-9)

There followed meetings with county leaders on May 31, and June 1, 1972, and on June 5 and 6 these county leaders met with school district representatives in all of the twenty-one counties of the State. Approximately 1,200 teachers, administrative staff personnel and members of the respective county offices attended the meetings on June 5 and 6, 1972, to discuss test "specifications." The teachers who were present had specific knowledge of curriculum content matter in reading and mathematics through the third grade and through grade 11. (It is noted here that the tests were to be given very early in the 1972-73 school year to the fourth and twelfth-grade pupils – at a time when the learnings and skills acquired through grades three and eleven were the acquisitions most pertinent to the testing procedure.)

The discussions at the meetings of June 5 and 6, 1972, were concerned with test specifications in the context of the skills and competencies, which had actually been taught or developed in each of the school districts represented. (Tr. I-88) However, some of those present understood that the thrust of the meeting was to determine what "should" have been taught. (Tr. III-15) The test specifications determined at those meetings to be noted as appropriate or inappropriate are those contained in four "Draft" lists of "topics to be considered." (pp. 3-6) Specifically, each person in attendance at the meetings was asked to rate curriculum topics on machine-scored rating forms as

appropriate to the testing process according to the following scale: (R-5)

- “A: Essential that it be included on the test
- “B: Desirable that it be included on the test
- “C: Acceptable but not necessary that it be included on the test
- “D: Inappropriate and should *not be* included on the test” (*Emphasis ours.*)

The purpose of this rating process according to the State Director of the program was to “\*\*\* provide a list of curriculum topics \*\*\*” (Tr. I-94) around which a test could be built.

Subsequent to the county meetings of June 5 and 6, the State Department of Education and Educational Testing Service, hereinafter “E.T.S.”, processed the machine-scored rating forms on which information regarding the pertinence of topics had been scaled as noted, *ante*, and then devised a second draft of topic specifications. (R-4) This second draft was sent to approximately 9,000 classroom teachers and other educators in the State on or about June 12, 1972 (Tr. I-90) (Tr. II-83), and thereafter approximately 8,000 responses were returned. (Tr. II-24) Of these returns approximately 6,400 were usable and were received in time for use in the winnowing process.

At this point in time, June 1972, there was still no test *per se*, but a kind of consensus as to which topical skills or learnings – specifications – were subject to testing procedures. Test development within the E.T.S. organization followed.

As the first step in this development, four advisory review committees were formed by E.T.S. (Tr. II-28), and test item writers began to compose specific test questions within the broad parameters set forth in the list of most commonly accepted test specifications.

Thereafter, test items were subject to further committee review, and a first draft of the test was field tested on July 27, 1972, with summer school students in Atlantic City. (Tr. II-31) This test draft was later submitted for scrutiny with regard to appropriateness to a meeting of a minority groups advisory council on August 14, 1972 (Tr. II-32), and a subsequent revised draft was again reviewed by this council on August 25, 1972. (Tr. II-33) According to the Director of the State E.A.P.:

“Every recommendation that this council made was put into effect.” (Tr. II-33)

It is noted by the hearing examiner that members of the minority groups council had been selected by a broadly based needs assessment advisory council, representing the interests of parents, students and teacher groups (Tr. II-32)

### B. *Test Administration Results*

Subsequently, E.T.S. completed its test revisions and in early November 1972, a “practice” test to familiarize students with test format was administered to all pupils in grades 4 and 12. (Tr. IV-13) Thereafter, the main tests were administered on November 14 and 15, 1972 to 112,176 pupils in grade 4 (98.9% of the total enrolled in the State) and to 89,590 pupils in grade 12 (93.2% of those enrolled). (Tr. I-103) While the adequacy or validity (See section IV for definition of “validity.”) of the test is a subject of controversy herein, the testimony reflects general agreement that the tests were not “difficult,” but constituted tests requiring minimal achievement in reading and mathematics. (Tr. IV-53, Tr. IV-94, Tr. VI-29) The hearing examiner finds no evidence to the contrary. In the words of one expert witness, Dr. Henry Dyer, retired, in this regard:

“\*\*\* the test analyses show that half the children got at least 70 per cent of the items right; and in most of the literature on the subject, this would be regarded as an easy test.” (Tr. IV-94)

The test was also adjudged to be “reliable” (Tr. III-48, Tr. I-44, Tr. IV-89) in the sense that it measured skills and learnings – specifications – in “\*\*\* a consistent sort of way.” (Tr. IV-90) (Note that Exhibit P-2 with regard to “reliability” states):

“Estimates for Grade 4 tests are .95, Reading, and .93, Mathematics. Grade 12: .93, Reading, and .95, Mathematics.” (at p. 2)

The measurement of reliability was the Kuder-Richardson formula 20. (Tr. I-44) (For definition of “reliability” see section IV.)

However, the “validity” of one test – that in twelfth-grade math – was the subject of contention by one witness for petitioners, who maintains that as many as twenty-five of the eighty-five questions in math at that grade level should “\*\*\* be put out \*\*\*.” His principal concern, however, was with the release of data to the public. (Tr. III-57) This concern is shared by petitioners generally in the context of the recital which follows.

### C. *Proposed Dissemination of Test Results*

The basic regulations (R-10) governing the dissemination of test results and the interpretation of test data are contained in the revised “Rule in Statewide Assessment” adopted by the State Board of Education on March 7, 1973. (*N.J.A.C. 6:39-1.1 et seq.*) The pertinent sections of the Rule (*N.J.A.C. 6:39-1.2 and 1.3*) provide:

“6:39-1.2 (a) Notwithstanding N.J.A.C. 6:3-1.3, individual student data shall be released only to a pupil, his parent or legal guardian, and school personnel and school officials deemed appropriate by the Commissioner.

“(b) The State Department of Education shall produce and distribute to chief school administrators as uninterpreted reports: a classroom report for the teacher; a school report for the school principal; a district report for the district superintendent or chief school administrator; and a county report for the county superintendent.

“(c) The State Department of Education shall provide an interpreted geographic regions report and an interpreted State report to the State Board and the Commissioner of Education.

“(d) Each of these reports shall consist of report forms and interpretive aids approved by the Commissioner.

“(e) Reports shall be distributed to local boards, as indicated in (b), (c) and (d) above, in such a manner as to provide a 60-day period from receipt of all standard reports for analysis of data and for the development of additional essential interpretive material by the local board pursuant to 6:39-1.2. During this period such material shall not be available for public distribution.

“(f) Following a 60-day analysis period, reports indicated in subsections (b), (c) and (d) above, excepting classroom and individual pupil reports, shall be made available to the public; provided, however, that no reports shall be released unless they are accompanied by interpretive materials approved by the Commissioner.

“(g) The Commissioner, with the approval of the State Board of Education, may make exceptions to the above regulations with respect to special reports requested by local school districts.”

“6:39-1.3 (a) Local District Boards of Education shall interpret the results of all data within 60 days of receipt of all standard reports by the district superintendent or chief school administrator.

“(b) Local District Boards of Education shall involve the district superintendent or chief school officer in the interpretation of the district report; the school principal in the interpretation of the school report; and the classroom teacher in the interpretation of the classroom report.

“(c) The State Department of Education will provide technical assistance in the development of essential interpretive material by local districts.

“(d) The State Department of Education may provide interpretations for local, regional and State use.

“(e) No individual member, officer or employee of any board of education shall be subject to disciplinary action solely upon the basis of information produced by statewide assessment.”

It is noted here by the hearing examiner that this rule of the State Board envisions the preparation, and a limited dissemination, of individual pupil data (“a”, *ante*) and data concerning individual classroom results (“b”, *ante*). However, according to testimony, the State Department of Education has not proposed in the first year of the Educational Assessment Program to develop material listing:

(a) Individual scores of students

(b) Compiled results by individual classrooms — although the test results established by individual classrooms will be identifiable to certain professional staff members other than classroom teachers within individual schools through use of a two-digit code. (Tr. I-66) (Tr. II-69)

According to testimony, and pursuant to the rule of the State Board of Education recited, *ante*, the dissemination of other compiled test results and corollary explanatory or interpretive data will occur in a three-phased program. This program (Tr. IV-5 through 13) consists of:

Phase 1. — A release of computer print-out sheets containing raw data of test results in the form of an item analysis by individual school and school district. (R-14, P-9) (Tr. IV-II)

Phase 2. — A release of a State summary report — containing the same kind of information as contained in the Phase 1 report, *ante* — pertinent to statewide results, but also containing “other groupings.” (Tr. IV-II)

Phase 3. — A release of research and reference material concerned with certain variables and the relationships of such variables to the achievements which the tests purport to measure.

A more specific description of these three phases of the dissemination is now in order so that the dispute, *sub judice*, may be set in a proper context.

#### *Phase 1*

Prior to the planned release of raw test score data (Phase 1), each of the districts of the State was asked to respond to a survey listing topical specifications around which the test was constructed (See R-15, “Test Results and Their Use,” at page 12.) Examples of such specifications in math at the fourth-grade level are:

- “1. Addition of two 2-digit numbers involving carrying.
- “2. Subtraction of two 2-digit numbers involving borrowing.”

Specifically, the requested response of the districts was an indication as to whether or not the district:

“\*\*\* attempts to teach that specification at some time prior to the test period.” (R-15, at p. 12)

The purpose of this response, according to the State Director, was to allow local school districts:

“\*\*\* to increase the validity of the test by casting out [test] items which measure specifications not relevant to that district.\*\*\*” (R-15, at p. 12)

Again, according to the State Director:

“\*\*\* Because New Jersey exercises very little control over local curriculum decisions and because a uniform Statewide test is necessary, L.E.A.’s [Local Education Agencies] must have an opportunity to adjust their test results to compensate for differences between the L.E.A.’s curriculum and the Statewide consensus of curriculum objectives [specifications] measured by the test.\*\*\*” (R-15, at p. 12) (Tr. IV-22 through 37, Cross-Examination)

The compensation “\*\*\*for differences between the L.E.A.’s curriculum and the Statewide consensus of curriculum objectives measured by the test\*\*\*” is contained in applicable computer print-outs as part of the raw data which was subsequently to be released. (R-14) This data for an individual school as evidenced by R-14 includes a complete compilation of test results for each item or test question. It is detailed by the total number of students tested and sets forth the number who answered correctly and the percentage relationship of this correct response to the total number who took the test.

Thus, for example, in one of the 12th grade math printouts (R-14), there is a notation that 203 pupils were tested, and the subsequent recital is as follows:

Computation With Whole Numbers

	Item 1	Item 2	Item 5 etc.
Number Correct	190	183	129
Per Cent Correct	93.6	93.1	63.5

Another series of computer print-outs, however, qualifies or delineates the results for 12th grade math in terms of the pupil answers to four questions contained on the back page of the test booklet (P-9) as follows:

“(A) I have taken mathematics courses since the eighth grade.

“(B) I have only taken mathematics courses such as general mathematics, basic mathematics, or business mathematics.

“(C) I have taken college preparatory mathematics such as algebra and geometry for 2 years or less.

“(D) I have taken college preparatory mathematics courses for more than 2 years.”

This series of computer print-outs is made for each of four groups. As an example, one such print-out (R-14) is headed "Students Responding A" and contains information that six students from this school were in that category and thereafter an item analysis of their responses to test questions are as follows:

Computation With Whole Numbers

	Item 1	Item 2	Item 5
Number Correct	6	6	1
Per Cent Correct	100.0	100.0	16.7

Thus, in summary, Phase 1 in the dissemination of test results is a release to school districts of raw data that lists the number of correct responses to test questions and translates that number to a percentage of those who took the test. Additionally, in mathematics at the 12th grade level there are four different compilations of test results pertinent to educational preparation in the subject.

It is noted that the State Board of Education rule (R-10) requires release or distribution of the "standard data" of Phase 1 by "local boards" at the end of the sixty-day period following receipt of such data (Tr. IV-13) with accompanying "interpretive material."

*Phase 2*

Phase 2, as noted, *ante*, is concerned with the release and dissemination of the same kind of data as reported in Phase 1 with respect to individual test items, but the compilation of results is a statewide compendium. Further, however, according to testimony of the State Director (Tr. IV-12), there may be other groupings of test results in terms of a number of variables – by county, median income, socioeconomic status, class size, pupil-teacher ratio, race, teacher experience, non-graded classes, etc. (Tr. I-107)

Again, as in Phase 1, such "standard data" as that contained in Phase 2 of the dissemination of test results would not, under the rules of the State Board of Education, be released or published by local boards until sixty days after receipt of such data by the districts to allow for development of interpretive material.

*Phase 3*

Phase 3 embraces "\*\*\*\* a more statistical approach, in terms of looking at the relationships between certain variables and achievement \*\*\*\*" according to testimony of the State Director of the Educational Assessment Program. (Tr. IV-12) He also indicated that information collected from "census data, etc." might be given to the districts in this phase and that certain "statistical methods" might be employed to assist local districts to use and implement test results and to move forward in the development of local hypotheses as a foundation for certain changes in instructional approaches. (Tr. IV-13)

This then, in outline form, is the actual and/or proposed Educational Assessment Program of the State Department of Education as contained in testimony at the hearing, *ante*, or in the documents which were admitted at the

hearing as evidential. Generally speaking, the Petition herein does not require a finding of fact with respect to the program *per se*.

It does require, instead, the exercise of certain powers of judgment in response to the questions:

- (a) Is there a need for a state Educational Assessment Program?
- (b) Was the instant controverted program developed too hurriedly?
- (c) Does the program constitute a valuable measurement of educational goals?
- (d) Is the proposed dissemination of test results properly cognizant of the rights of pupils, teachers and the State citizenry generally?

Such questions are the subjects of principal concern in the consideration of the contentions of the parties which follows.

## II.

### Contentions of the Parties

Petitioners acknowledge that there are educational problems in the State of New Jersey and that there is “\*\*\* grave dissatisfaction with the educational system in our country, in our State and in practically every school district. It is obvious.” (Brief of Petitioners, at p. 4) However, petitioners contend that a “solution” to such dissatisfaction would seem to be a marked increase in school facilities “\*\*\* and the number of teachers with a significant decline in the teacher-pupil ratio.” (Brief of Petitioners, at p. 4) Instead of such a solution, however, petitioners aver that the State has, through the testing program herein controverted, mounted a quest “\*\*\* for the educational golden apples of the Hesperides” (Brief of Petitioners, at p. 5) in an effort to find a “cure all” for educational problems “\*\*\* without a significant increase in expenditure.” (Brief of Petitioners, at p. 5) Nevertheless, petitioners maintain that they are not contesting the legitimate State concern “\*\*\* in seeing that the best educational results are obtained from whatever financial resources are available \*\*\*.” (Brief of Petitioners, at p. 6)

What petitioners aver they do contest is any idea that the testing program will demonstrate why “\*\*\* school districts failing in achieving their educational goals have failed, why those achieving their educational goals have succeeded and which school district may act as a model for some other.” (Brief of Petitioners, at pp. 7-8) In this view of petitioners, failure to attain the total goals of the Educational Assessment Program is not necessarily a determination that the school system has failed, although dissemination of test results may lead, in some cases to this conclusion, and may result, in petitioners’ opinion, in a subsequent hunt for scapegoats to be punished. Petitioners find support for the idea that such accountability is envisioned herein in that phrase of the State Board Rule (*N.J.A.C. 6:29-1. 3(c)* ), which states:



“No individual member, officer or employee of any board of education shall be subject to disciplinary action *solely* on the basis of information produced by statewide assessment.” (*Emphasis supplied.*)

While urging the view that a multiplicity of reasons may be the causative factors leading to poor test results, thereby negating the idea that school systems and/or teachers should be held accountable for their learning product, petitioners also cite the decision of Judge Botter in *Robinson v. Cahill*, 118 N.J. Super. 223, aff'd. 62 N.J. 473 (1973), in support of a thesis that:

“\*\*\* the quality of education is primarily dependent on the expenditures of funds.” (Brief of Petitioners, at p. 9)

Much of petitioners' argument in support of the view that test results should not be disseminated as planned is founded on avowals that the tests: (1) are not truly reflective of the ideas of the State's teachers; (2) were devised hurriedly by E.T.S. without a proper opportunity for other companies to provide meaningful proposals; (3) were given a cursory hurried review by the minority group's council; (4) may be used for “teaching”; (5) were not administered, nor are they to be interpreted by those most familiar with the programs which were tested; (6) were not originally advertised as criterion-referenced tests, but norm-referenced tests, and, in any event, as the result of interpretive data, the practical effect herein is that of a norm-referenced test.

All of these avowals are developed at length in petitioners' Brief, and some discussion of them is now in order.

Petitioners' avowal that the testing program, as it finally emerged, was not reflective of teachers' views is grounded on the fact that after the twenty-one county meetings of June 5 and 6, 1973, and a subsequent mail response from teachers concerned with test specifications, there was no further review by teachers of the test that was finally approved and administered to pupils on November 14 and 15, 1973. Petitioners aver:

“\*\*\* there is no way of knowing whether a single specification which a majority of the teachers wanted included in the tests were actually included in the tests. Ultimately the redrafting of the actual questions took place in such a manner that the final result obviously bore little resemblance to the initial questionnaire which was examined by the teachers at the county meetings.” (Brief of Petitioners, at p. 18)

In this regard, the hearing examiner observes that the initial “questionnaire” to which petitioners refer was one wherein teachers were asked to consider the relevancy of topic “specifications” in terms of what had actually been taught (“should” have been taught). The only review of specific test items or questions was that of the minority groups advisory council on the two occasions which the hearing examiner detailed, *ante*.

This review by the minority groups council was alleged to be in

petitioners' words a "\*\*\*\* kind of tokenism which characterizes the entire design of the tests \*\*\*\*" and further:

"\*\*\*\* Neither the teachers at large, nor the community, nor the students, nor minority groups, nor even the so-called technical advisory council played any really significant part [in test development].\*\*\*\*" (Brief of Petitioners, at p. 21)

Such arguments are, of course, concerned with test development and the tests *per se*.

Other of petitioners' arguments, as itemized, *ante*, are devoted to what might be labelled post-test consequences. One of the envisioned consequences herein is a possibility that students may be tracked or channelled into various corridors of learning by the mere publication of test results. While acknowledging that there is to be no release of the results of test data on individual students in the first year of the program, petitioners postulate the question: "\*\*\*\* Who is to say that they will not be ascertained at some future time?\*\*\*\*" (Brief of Petitioners, at p. 32) If such individual results are ultimately released, petitioners state:

"\*\*\*\* It is fairly obvious that in some communities there can be a great outcry after the release of this information for a separation of students into fast learners and slow learners, especially if, by some comparative basis, it would seem as though the local district were not doing so well-or there can be some demand for ethnic reorganization because of the alleged slowing down of the educational process for some children by the inclusion of others, the kind of diatribe that is not unknown to our culture.\*\*\*\*" (Brief of Petitioners, at p. 31)

The argument over whether or not the tests of the Educational Assessment Program are criterion-referenced tests, as the State Department now avers they are, or norm-referenced tests, as petitioners contend they were referred to, is a peripheral argument, but it was addressed in both the testimony and in petitioners' Brief. (Brief of Petitioners, at p. 15) in petitioners' view the State Department of Education has termed these tests criterion-referenced tests – the measurement of specific learning skills rather than a determination of relationship with regard to an average norm – in order to lend credence to the testing program as a whole. However, the confusion concerning this point is understandable.

This is so since the State Department's own publication "Questions and Answers on Education Assessment" (one of three booklets comprising R-9) contains this question and answer: (at p. 7)

"Are these tests norm referenced? The initial testing in the Educational Assessment Program will be conducted with norm-referenced tests. Basically, a norm-referenced test requires comparison of an individual student's score to the score of a group to which that student may belong."

The Commissioner of Education, respondent in this matter, avers that the tests in controversy herein are valid tests which measure “\*\*\* to a large degree what is being taught in the public schools of this State \*\*\*” and the results “\*\*\* should be released \*\*\*.” (Brief of Respondent, at p. 15) His argument in support of this view is advanced in six points as follows:

“Point I – Institution of the 1972 Achievement Tests and dissemination of the Results is in Conformity with Title 18A of the New Jersey Statutes and Regulations of the State Board of Education.

“Point II – The Statutory and Common Law Right of the Public to have access to Public Records Mandates that the Score Reports be Released.

“Point III – No Constitutionally Protected Right of Privacy has been invaded by the November 1972 Statewide Achievement Tests.

“Point IV – The Development and Institution of a Statewide Testing Program by the Commissioner and State Board of Education is not a matter subject to Collective Negotiation with Local Education Associations Pursuant to Chapter 303 of the Laws of 1968.

“Point V – Petitioners have failed to Establish that the Statewide Achievement Tests Discriminate Upon the Basis of Race or any Other Impermissible Basis.

“Point VI – Petitioners Lack Standing to Assert Certain of the Issues Raised in the Petition.”

These arguments are treated fully in respondent’s Brief (at pp. 17-51) and are summarized below as he summarized them at pages 15-16:

“The record developed in the instant hearing clearly establishes that the results of the statewide achievement tests in reading and mathematics administered in November 1972 should be released in accordance with N.J.A.C. 6:39-1 et seq. Clear statutory authority exists for development of a statewide testing program (N.J.S.A. 18A:4-24). The Right to Know Law and the common law ensure public access to the score reports unless the public interest necessitates otherwise. While confidentiality might be justified upon a finding that release of the score reports would be detrimental to the interests of students or education generally, the record could not support such finding.

“On the contrary, the record indicates that the broad teacher involvement in the development of the statewide achievement tests resulted in tests which measure to a large degree what is being taught in the public schools of this State. The hearing demonstrated the concerted effort to eliminate racial and cultural bias in the testing program and the absence of support for a finding that the release of the test results will be harmful to minority groups or poor students. Similarly, the record does not justify a finding

that petitioners' constitutionally protected right of privacy would be infringed by release of the score reports. Since individual student scores obtained in the November 1972 tests are not to be reported to school districts, there can be neither invasion of privacy nor tracking of students. The informational needs of the State and local school bodies, moreover, outweigh whatever interest petitioners may have in confidentiality. If the score reports are misused by districts, teachers or students may seek appropriate relief from the Commissioner or the courts.

"While release of test results may cause controversy, such possibility does not justify nonrelease of the information. In a democratic society many government actions create controversy. If government refrained from action where there existed the possibility of controversy, it would be immobilized.

"The Commissioner and the State Board of Education had no obligation to negotiate with collective bargaining agents of teachers before development and introduction of this statewide testing program. In the first instance, it should be noted that no employer-employee relationship exists between the Commissioner and State Board of Education and local education associations. Furthermore, the introduction of a testing program is not a term and condition of employment subject to negotiation but instead is a prerogative within the discretion of the Commissioner and State Board of Education."

The statute of reference, on which respondent relies for the Commissioner's authority to institute a statewide testing program, is *N.J.S.A. 18A:4-24*, which provides:

"The Commissioner, shall by direction or with the approval of the state board, whenever it is deemed to be advisable so to do, inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries and such other information with regard thereto as the state board may require or as he shall deem proper, but nothing in this section shall affect the right of each district to prescribe its own rules for promotion."

However, respondent finds reinforcement for the Commissioner's authority in this regard in those decisions of the courts, which have held that even in an absence of specific statutory prescription, the Commissioner has a broad supervisory responsibility, under the Constitution of New Jersey, to guarantee a "thorough and efficient" system of education. *Board of Education of Elizabeth v. City Council of Elizabeth, Union County*, 55 N.J. 501 (1970); *Board of Education, East Brunswick Township v. Township Council, East Brunswick*, 48 N.J. 97 (1966); *Jenkins v. Township of Morris School District and Board of Education*, 58 N.J. 483 (1971)

Additionally, respondent notes the observation of the Court in *Robinson v. Cahill*, 118 N.J. Super. 223, 247 (Law Div. 1972), aff'd 62 N.J. 473 (Sup. Ct. 1973).

“ \*\*\* The Commissioner of Education does not systematically test achievement levels of students although he is authorized by N.J.S.A. 18A:4-24 to do so in order to ascertain the ‘thoroughness and efficiency’ of any public school. The Commissioner apparently hears about certain problem schools from county superintendents who know where the trouble spots are. High School programs are approved by the Department of Education, and these schools are examined by state teams every five years. However, there is no published general evaluation of the condition of education in New Jersey. One may wonder why this is so when we are dealing with the most important function of our government, spending over \$1.7 billion per year on our most valuable asset, the children of this State. An evaluation system can readily be devised. Each school could be required to administer tests and submit reports of some uniform type so that comparisons could be made. \*\*\* ”

Respondent also avers that records, such as the test results controverted herein when they are “required” to be made, (N.J.A.C. 6:39-1 *et seq.*) must be classified as “public records” by the definition contained in N.J.S.A. 47:1A-2, which delineates such “public records” as:

“\*\*\* all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof \*\*\*.”

Therefore, in respondent’s view, such records are subject to public inspection by statutory prescription unless specifically excluded from the operation of the law. (N.J.S.A. 47:1A-2) Further, respondent argues, there is a broader, more inclusive entitlement of access to public records which is contained in the “common law.” Specifically he avers:

“\*\*\* The common law right is broader than the statutory right which is limited by the definitions and exemptions appearing in the statute. *Irval* cited (61 N.J. at 375) with approval the case of *Josefowicz v. Porter* 32 N.J. Super. 585 (App. Div. 1954) where a public record is defined for purposes of the common law as:

“ ‘ \*\*\* one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are \*\*\* that it be a written

memorial, that it be made by a public officer, and that the officer be authorized by law to make it \*\*\* 32 N.J. at 591.’ ”

“Thus, upon a showing of the requisite interest a citizen has access to considerable governmental information under the common law. However, the interest of a citizen in having access to records may be balanced against the public interest in maintaining the confidentiality of such public records. If the latter interest outweighs the former the records may be held confidential. *Irval, supra*, 61 N.J. at 375.” (Brief of Respondent, at pp. 25-26)

While maintaining that test results should be considered as “public records” subject to inspection, and that it is desirable that such results should be disseminated according to rules of the State Board of Education (*N.J.A.C. 6:39-1 et seq.*), respondent also avows that there is no substantial invasion of privacy in the proposed dissemination. In his view:

“Certainly the requirement that a child take a test represents no infringement of a constitutionally protected right of privacy. Government may properly gather statistical data or information from its citizens if reasonably related to legitimate governmental purposes.” (Brief of Respondent, at pp. 31-32)

In support of this view, respondent cites a number of cases in which the matter of privacy was at issue. *United States v. Rickenbacher*, 309 F. 2d. 462 (2d Cir. 1963), *cert. den.* 371 U.S. 962 (1963), *cf. Anderson v. Sills*, 56 N.J. 210, 229 (1970); *Hamilton v. N.J. Real Estate Commission*, 117 N.J. Super. 345 (App. Div. 1971); *State v. Kabayama*, 98 N.J. Super. 85 (App. Div. 1967), *aff’d.* 52 N.J. 507 (1968); *McGovern v. Van Riper*, 140 N.J. Eq. 341 (Chan. Div. 1947); *Cortese v. Cortese*, 10 N.J. Super. 152 (App. Div. 1950); *State v. Lutz*, 57 N.J. 314 (1971)

Respondent also disputes any avowal that:

“\*\*\* the development and initiation of a statewide testing program [would] be an appropriate subject for collective negotiation pursuant to Chapter 303 of the Laws of 1968 for this is a matter of fundamental educational policy which is subject to unilateral action by the State Board of Education pursuant to its statutory duties, powers and responsibilities.” (Brief of Respondent, at p. 38)

In support of this view, and an argument that a public employer “\*\*\*\* cannot legally bargain away the essential management prerogatives vested in it by law, respondent cites *Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970) and says, further, that:

“Although Chapter 303 of the Laws of 1968 encourages parties to negotiate with respect to terms and conditions of employment, it

expressly provides that it shall not be construed to 'annul or modify any statute or statutes of this State.' \*\*\*" (Brief of Respondent, at p. 42)

Respondent's fifth point of argument, *ante*, is an avowal that the assessment program controverted herein "\*\*\*\* will not place some sort of abstract stigma" upon certain students. (Brief of Respondent, at p. 47) This avowal is founded on the fact that in the first year of the program individual results will not even be tabulated on an individual basis. However, respondent maintains that even if they were:

\*\*\*\* the law does not in any event protect pupils or groups of pupils from whatever abstract and hypothetical unpleasantness may be associated with test scores which they or other members of our society may regard as less than distinguished. It protects pupils only from having educational opportunities foreclosed to them because of their race, income or other invalid grouping." (Brief of Respondent, at p. 48)

Respondent maintains that the hearing, *ante*, failed to produce any evidence that efforts made by the State Department of Education to eliminate bias in the tests were unsuccessful and that absent such evidence, there is no relief required at this juncture in this regard.

Finally, respondent avers that in the absence of evidence or testimony that any of the petitioners are members of a minority group, they lack standing to raise claims of racial discrimination. However, he argues that the Commissioner may, nevertheless, consider such claims:

\*\*\*\* by virtue of his mandate to insure the provision of a thorough and efficient education for students of this State\*\*\*\*." (Brief of Respondent, at p. 51)

Briefs of petitioners and respondent were filed simultaneously in this matter, and subsequently thereafter a Reply Brief was filed by petitioners, which was a rebuttal to the six points of argument raised by respondent. However, the bulk of petitioners' rebuttal is devoted to argument that:

(a) the dissemination of test results in the manner outlined by respondent is not a required obligation or protected privilege under statutory provisions of the "Right to Know Law" or of common law;

(b) *Chapter 303, Laws of 1968* is involved herein because:

\*\*\*\* whether the dissemination of these results will lead to more or less accountability, whether the dissemination of these results will lead to changed conditions in the classroom, whether or not the dissemination of these results will lead to productivity requirement and salary ramifications, it is fairly obvious that we are talking about the stuff out of which the conception of 'terms and conditions of employment' are involved.\*\*\*\*" (Reply Brief of Petitioners, at p. 20)



Petitioners' principal contention in reply to respondent's argument that the public has a right to know the test results derived from the assessment program is that in dealing with such results:

“\*\*\* we are dealing with a value judgment, an evaluation about which there may be considerable confusion and controversy.\*\*\*” (Petitioners' Reply Brief, at p. 6)

In petitioners' view, the kind of record encompassed by the Right to Know Law is the record of a “fact” and not the kind of test result as herein, where there is a question as to whether or not the tests *per se* are valid or reliable. Petitioners maintain:

“\*\*\* All of the cases cited by respondent deal with situations in which persons sought information in State files which the state or some division thereof sought to prevent. We are not dealing with that situation here. We are dealing with the affirmative actions of the State Department of Education in compiling certain criteria, some within the control of the school district, and others conceded to be beyond the control of the school district, in conjunction with the test results for the alleged educational benefit of the school district and the community as a whole. This is a far different cry from anything involved in the ‘Right to Know Law.’ \*\*\*” (Petitioners' Reply Brief, at pp. 4-5)

and further, as example:

“\*\*\* No one disputes the right of the Labor Department's release of cost of living information, because this engenders controversy as to whether the administration's anti-inflation program is working. \*\*\* the material released is not subject to controversy. What is subject to controversy is whether that factual material demonstrates the wisdom, or the lack thereof, of a governmental policy. What is released is information. The interpretation thereof is left to the public \*\*\* What respondent proposes to release is the interpretation – its own interpretation of the material – as though they were indisputable. This, then, becomes not information, but misinformation.” (Petitioners' Reply Brief, at pp. 7-8)

Petitioners' main Brief did not argue at length the issue of whether or not the procedures in this case violated the provisions of *Chapter 303, Laws of 1968*, the New Jersey Employer-Employee Relations Act. However, the Reply Brief argues in some detail that:

[a] “\*\*\* conditions of employment \*\*\* may be materially affected by the results of the testing program.\*\*\*” (at p. 16)

[b] “\*\*\* The Commissioner's actions, however, have interfered herein with the responsibility for conduct of the local school program and \*\*\* are interfering with the relationship between the local school boards and the majority representatives of their employees.” (at p. 17)



[c] “\*\*\* It is as much an unfair labor practice for the Commissioner’s office to interfere with the collective bargaining relationship between the local school districts and their employees so as to prevent negotiations, as it is for the local school district offices to refuse to negotiate with the majority representatives\*\*\*.” (at p. 18) (See also Tr. I-4.)

### III.

#### Testimony and Other Evidence

Petitioners called a total of ten witnesses for testimony at the hearing, *ante*, and included, as one of this total, the State’s Director of the Educational Assessment Program, hereinafter “E.A.P.” Six of the other witnesses were teachers in the public schools of the State, one witness was a named representative to the minority council, and another witness was the sales representative of a publishing company. A college professor, who is an expert with respect to testing or assessment programs generally, also testified. A summary of this testimony is now in order, but it is noted here that much of the recital, *ante*, concerned with the test development is founded in the testimony of the E.A.P. Director, as it was elicited by petitioners on direct examination.

The one witness who testified with respect to the request for proposals was a “Regional Test Coordinator for the Hope [Houghton] Mifflin Publishing Company,” who was offered as a witness, according to counsel for petitioners, in support of a view that the E.A.P. was “invalidly devised.” (Tr. II-95) The offering of such testimony was the subject of objection by respondent on the grounds that it was not relevant to the principal issues raised by the pleadings, but the testimony was allowed by the hearing examiner as pertinent within the general framework of the total proposed testing program. (Tr. II-97)

In any event, the witness testified that he had met with the State’s E.A.P. Director in early February 1973 (Tr. II-97) to discuss a forthcoming “request for proposals,” hereinafter “R.F.P.,” and had discussed the matter with the Director on “numerous” other occasions prior to the time, in May 1973, when the requests were sent out by the State Department of Education for consideration by interested companies. (Tr. II-98) He also stated that his company had received the R.F.P. on “May 15, 1972.” However, by a letter dated May 22, 1972 (P-7), the company indicated that it could not “submit a bid” because of “reservations” concerning the time limits allowed for the preparation of such proposals. (As noted, *ante*, the R.F.P.’s were sent out to interested companies on May 10, 1972, with a return date of May 24, 1972.)

The member of the minority groups advisory council, who testified on petitioners’ behalf, said he had been unable to attend the first meeting of the council (Tr. II-107) and had been told by the State E.A.P. Director subsequently that it was felt the absence precluded future contribution to the work of the council. (Tr. II-108)

Most of the teachers who testified spoke with reference to the meetings conducted by the State Department of Education in early June 1973, which

were concerned with topic specifications, and three of the six testified concerning their understanding of the testing program's purpose. In general, these three testified that they thought they were to review topic specifications in terms of what "should" have been taught instead of what had "actually" been taught in the programs in reading and mathematics in their respective school districts (Tr. II-112, Tr. III-21, Tr. III-27) However, one of the three teachers found difficulty in the subsequent administration of the test to fourth grade children in November 1973. Specifically, she said in this regard:

"On the day of the test I administered the fourth level mathematics test. I found that some of the children had difficulties because of their reading abilities, there — some of them their (sic) lack of knowledge of spatial relationships, and some of them had great difficulty in getting the answers in the little boxes, because of their lack of small muscle coordination, which is quite common at this age level." (Tr. III-17)

Another of the group of three teachers stated that she got "angrier and angrier" when asked to comment on the matter of topic specification because she felt a great need for "diagnostic help" with reference to the reasons "why" children fail to function or learn according to expectation, and had little need for a new test of the level of functional performance. She felt she already knew this from prior use of standardized tests. (Tr. III-28)

There was also testimony from two teachers that they were told that the tests herein controverted were "norm reference" tests rather than criterion-referenced tests (Tr. III-33) (Tr. III-12), and one of these teachers testified that she did not believe it important to establish any kind of a "norm" or grade level standard. (Tr. III-11)

A sixth teacher, Mr. John Herman, who testified on behalf of petitioners, is a candidate for a doctorate at the University of Delaware. He indicated that he had a "lot of experience" with the type of test herein controverted and "some familiarity with testing in general." (Tr. III-35) This teacher had administered the test in mathematics at the level of grade 12, and he stated that the test:

"\*\*\*\* lacks content validity up and down the line, when you try to take a look at the curriculum of the twelfth grade.\*\*\*\*" (Tr. III-37)

He indicated that as many as forty of the eighty-five test questions in twelfth-grade math would have to be "cast out" in his district to insure a true test of "minimal" achievement in mathematics. (Tr. II-38) Later he indicated that a total of only twenty-five questions would have to be cast out to insure a valid test of minimal achievement. (Tr. III-50) He does agree that the test is "reliable." (Tr. III-38)

While questioning the "validity" of the test, this witness also questioned the proposed manner of dissemination of the test results and stated that he believes that release of the data as outlined, *ante*, in three phases will result in a misunderstanding by the public. (Tr. III-55)

However, he avers:

“This test that was run in New Jersey was a darn good pilot test \*\*\* but I don’t see that the raw data that is available now, without the Phase II package and without knowing the strength of the correlations, really merit going out and being subject to the public for examination.” (Tr. III-44)

and further:

“Phase I and II should come out as a package, in my opinion.” (Tr. III-58)

This witness also indicated that he would prefer specific tests for each of the subjects, which as a group comprise “mathematics,” rather than one test, as that herein, which measures knowledge of all of the principal subject areas but permits a “casting out” of those questions asked of individual students which are not commensurate with background and experience. (Tr. III-63-65) (See P-9, Section I, question 7.)

Petitioners’ final witness, Dr. Frederick Davis, Professor of Education at the University of Pennsylvania, operates a “Center for Research and Evaluation” at the University (Tr. III-76) and is a consultant to other universities with respect to psychometric programs. His testimony at the hearing was concerned primarily with the dissemination of test results and the likelihood that such dissemination as herein proposed by the State Department would result in a “danger of misinterpretation.” (Tr. III-84) In respect to such possible danger, he testified:

“\*\*\* I would say the biggest dangers come not in presenting factual material that describes what happened, but rather in the interpretations that attempt to explain why there are differences \*\*\* between different districts, perhaps districts that have the same non-manipulable characteristics such as racial composition and economic status, et cetera. And as soon as one begins to use those data to explain the test scores, especially comparative test scores among different districts, then the danger of misinterpretation to the public, and by the public is, it seems to me, increased very greatly.” (Tr. III-85)

This witness suggested that proposed interpretive data for release be referred to persons not involved in the test program for an objective review. (Tr. III-87) He also testified that the general quality of test items “\*\*\* fall within a professional range\*\*\*,” (Tr. III-88) although he felt that the items could have been arranged in a way to provide “\*\*\* more practical application\*\*\*.” (Tr. III-88) (Note: R-12 is a list of people in New Jersey comprising the Technical Advisory Council which did examine the tests herein controverted. It is represented that the Council found the tests satisfactory.) (Tr. III-97)

Thus, a review of the testimony offered on behalf of petitioners shows that most witnesses who appeared testified concerning the events of a period that might be labeled pretest — a period which comprised the time when the test

was referred to companies for bid proposals, when topic specifications were under review and when test items were checked for bias. There was no specific testimony, that the hearing examiner can discern, on test validity or reliability at the fourth-grade level or with respect to reading at the twelfth-grade level. The testimony of petitioners with respect to dissemination of test results was limited in scope to the two witnesses as reported, *ante*, and one of those witnesses, Mr. John Herman, appeared to question the timing rather than the substance of the information proposed for release to the public. (Tr. III-58)

The testimony of those witnesses, who appeared in support of the position of the State Department of Education in this matter, was concerned primarily with the tests *per se* — their validity, reliability, usefulness — and with the disseminating of test results. This testimony was elicited from a total of nine witnesses and included additional testimony from the State E.A.P. Director.

The testimony of Dr. Ernest R. Duncan was relative to the tests of mathematics at the fourth and twelfth-grade levels. Dr. Duncan has been a teacher at almost every grade level from “\*\*\* kindergarten through graduate school\*\*\*” (Tr. IV-51) and is senior author of a widely known and used mathematics textbook. Additionally, for some years he has held a responsibility with the Mathematics Education Institute at Rutgers University. (Tr. IV-59)

Dr. Duncan testified that he regarded each of the mathematics tests as:

“\*\*\* an adequate test of minimal achievement,” (Tr. IV-53)

and he offered the opinion that even though there is no statewide curriculum in mathematics, there is a basic level of competency, a norm, which may be tested. (Tr. IV-55) In this regard he states that the norm:

“\*\*\* is reflected \*\*\* in textbooks which are used in the State; and, quite obviously, these textbooks are aimed at a particular standard, and I think this is the kind of understanding I have of a norm.” (Tr. IV-55)

He also agrees with a statement that norms for minimal achievement levels in mathematics are developed to some practical degree, at least, by mere existence of textbooks which are widely used within New Jersey (Tr. IV-56) although levels of achievement vary widely. (Tr. IV-68).

Dr. Duncan also stated that he believes that the dissemination of the results of the tests in mathematics would be generally useful and helpful to the professional community, school administrators, teachers, the public and parents. (Tr. IV-62-63) He especially approves of the test format used in the E.A.P., and particularly that part of the test which identifies test items and classifies them within broader topic specifications. (Tr. IV-69) His response to the question:

“\*\*\* You think that this is a valuable test?”

was:

“Yes; indeed.” (Tr. IV-70)

Dr. Duncan does state, however, that certain correlates to test results — *i.e.*, ethnic composition, economic achievement, etc. — may cause some invidious comparisons. (Tr. IV-74)

A second expert witness, Dr. Henry Dyer, testified with respect to the craftsmanship of the tests as viewed by one versed in test construction.

Dr. Dyer attained his Doctorate in Educational Measurements and Statistics at Harvard University in 1941, and, subsequently, for a ten-year period, was responsible for the operation of Harvard's Office of Tests. Thereafter, he served as Associate Director of the College Entrance Examination Board, and then as Vice President for research at Educational Testing Service (Tr. IV-82), until his retirement in June 1972. He states that he did not participate in the writing of the tests, *sub judice*, and that he saw them for the first time in the summer or early fall of 1972. (Tr. IV-85)

Dr. Dyer's opinion with respect to the quality of the tests in the E.A.P. was given as follows:

“\*\*\* I think they are of very high quality. I have looked at a lot of tests in my time, and I would say that these are, what I would say, very well crafted questions.” (Tr. IV-86)

He also stated that the reliability of the tests was, in his opinion, “\*\*\* Unusually high.” (Tr. IV-89) and he offered the view that the information developed from the tests was “\*\*\* very significant to the public.” (Tr. IV-90) He evidently founds this latter view on a belief that the tests controverted herein provide “\*\*\* diagnostic information \*\*\* which will help the public understand just what it is that the schools are teaching.” (Tr. IV-91)

Dr. Dyer also stated he was a “little appalled” by the schedule for test development, but that he is “\*\*\* surprised how good\*\*\*” the tests are. (Tr. IV-93) Additionally, Dr. Dyer regards the fact that school districts can “cast out” those test items they find irrelevant in the context of individual curriculum as of “\*\*\* enormous significance.” Specifically, he said:

“\*\*\* I think this is a strong plus for the test because it does provide a high degree of flexibility in the way individual districts, individual schools can report — can use results for their own information.” (Tr. IV-95)

However, Dr. Dyer, like Dr. Duncan, also feels that some kinds of interpretive data are subject to misinterpretation by the public (Tr. IV-109) and can lead to division and polarization. He testified additionally that the test answer sheets were very inadequate “\*\*\* too faint and too small,” (Tr. IV-111) but that in view of the test results which indicate the tests were fairly “easy”, it would appear that the difficulties had been overcome. (Tr. IV-113)

Dr. Evelyn Slobojian, a teacher in the graduate programs at Glassboro State College, who also serves as chairman of the College's Reading and Speech Correction Department, was respondent's third witness with regard to test validity. The following testimony expresses her viewpoints with respect to just what the reading tests measure:

"Q. Would you say that the fourth grade reading test measures what is being taught at the beginning of the fourth grade in the public schools of New Jersey?

"A. No, I would say it is measuring what has been taught up to that point.

"Q. \*\*\* And what do you say with respect to the twelfth grade reading tests?

"A. I would say that the twelfth grade reading test is measuring the same thing, it's an attempt at determining how these twelfth graders have acquired the reading skills that have been taught to them through their school experiences both in the subject of reading as it is taught in the elementary grades and as it is developed through the process of reading all the way through the grades." (Tr. VI-28-29)

Dr. Slobojian also expressed the view that the tests of the E.A.P. are especially valuable in that they measured identifiable skills and do not result in a "norm" reference wherein specific measures of skill development (within the whole context of what is known as "reading") are obscured. (Tr. VI-35, 37) Additionally, she believes the tests can be "very valuable," if presented to school personnel and parents in the "right way" (Tr. VI-50), and she averred that, as a result of her contacts with teachers, she knows that teachers "\*\*\*\* are waiting to get the results \*\*\*\*\* of the tests \*\*\*\*\* so that they can work on them now." (Tr. VI-50)

Other witnesses brought by respondent testified, in effect, as rebuttal witnesses with respect to the testimony of witnesses for petitioners, which was concerned with the preliminary phases of test development. Thus, there was a whole day of testimony from professionals employed by E.T.S. and by a member who had served on a Test Review Committee. One of the professionals employed by E.T.S. testified with respect to work of the Minority Advisory Council, and a member of this council also testified.

The member of the Minority Advisory Council who testified was Dr. Milton N. Silva, and he stated that it is his opinion that the group had sufficient time to perform its review function. (Tr. VI-8) His detail of the membership of the Council included the fact that there were representatives of the Puerto Rican and Black Communities and that approximately fifteen persons attended the first meeting. (Tr. VI-3, 18) He also stated that, to the best of his knowledge, there were no teachers in the group. (Tr. VI-18) Dr. Silva also discussed the outcome of the Committee work in this manner: (Tr. VI-13-14)

“Q. I see. So that you would say that as a result of the work of this committee there was [sic] some rather significant changes in the tests?

“A. Yes, sir.

“Q. The tests as drawn, originally drawn, demonstrated a considerable amount of what, in your professional expert opinion, would be cultural bias?

“A. It did so.

“Q. And then you and your colleagues endeavored to eliminate that or check it to the best of your ability?

“A. Yes.”

The professionals employed by E.T.S. stated that they had few complaints with reference to children's physical response to the test or that the answer sheets were too faint (Tr. VI-89), and they indicated that teachers' comments had been helpful in formulating the final list of topic specifications on which item selection was based. (Tr. V-18, 57) One witness also testified as to the kinds and numbers of changes made by E.T.S. in response to recommendations of the Minority Groups Advisory Council. (Tr. V-29, 59)

This concludes an outline summary of the testimony of witnesses for respondent. In the judgment of the hearing examiner, the most pertinent part of this testimony, in relationship to test validity and reliability and with regard to the proposed dissemination of information, was offered by the three witnesses whose testimony was summarized initially herein.

There was no testimony concerned with the matter of how test results such as these can or should be used with respect to teacher accountability, except that offered by the State E.A.P. Director on cross-examination. He stated in this regard that he is “aware” of the fact that the tests could be “misused” (Tr. I-137), but he minimizes this possibility with respect to individual teacher accountability on the grounds that the tests were given early in the school year. (Tr. I-136)

#### IV.

##### Findings and Recommendations

The hearing examiner conceives his role herein as one of assessment of the proofs offered in support of the Petition in terms of certain specific issues; namely,

(a) Are the tests of the E.A.P. valid useful tests which measure important skills which the schools of the State have commonly taught?

(b) Are the tests of the E.A.P. reliable tests?



(c) If they are valid and reliable tests, are there other factors which should influence a consideration with regard to the dissemination of test results?

In addition to these issues for which the hearing examiner believes he has a responsibility as a finder of fact, there are, of course, those issues of a legal nature which may be derived from a review of the contentions of the parties reported in section II, *ante*, but the hearing examiner believes that he has no authority to determine such matters, and he leaves such assessment and review to the Commissioner in the context of the total recital.

The initial determination of the hearing examiner is that the tests of the E.A.P. are valid, useful tests of minimal skills in reading and mathematics at the fourth and twelfth-grade levels in terms of the definition of "validity" contained in Norville Morgan Downie's book, *Fundamentals of Measurement*, at page 92:

"Different test theorists and test users have proposed various definitions of validity. An early, and still useful, one is that a test is valid to the extent that it measures what it was built to measure.\*\*\*"<sup>1</sup>

A second definition of test "validity" is contained in the book, *Measurement and Evaluation in Psychology and Education* by Robert L. Thorndike and Elizabeth Hagen<sup>2</sup>, as follows:

"\*\*\* The effectiveness of the test in representing, describing or predicting the attribute that the user is interested in.\*\*\*" (at p. 655)

In such a context of definition, the testimony at the hearing may be put in proper perspective, and it is noted by the hearing examiner that such testimony appears conclusive with respect to test validity. Witnesses for the State Department testified as reported, *ante*, that even in the absence of a statewide curriculum, there were minimal skills commonly taught and learned throughout the State and that the tests herein controverted measured them well.

In the judgment of the hearing examiner, such testimony was nowhere rebutted at the hearing by those elements of testimony relevant to individualized instruction or the testimony with regard to mathematics at the twelfth-grade level. The hearing examiner concludes that a testing program of minimal achievement is not inconsistent with any particular method of instruction or grouping of children and that a testing program cannot be ruled invalid because it attempts to tailor the reporting of test results to pertinent academic experiences of pupils.

With respect to the E.A.P. program as a total effort, the hearing examiner observes that it is a program which is very limited in scope. The tests which it contains are "easy" tests of very basic, but very essential, subject matter, and it

---

<sup>1</sup>*Fundamentals of Measurement*, Norville Morgan Downie, Oxford University Press (1967)

<sup>2</sup>*Measurement and Evaluation in Psychology and Education*, Robert L. Thorndike and Elizabeth Hagen, John Wiley and Sons, Inc. (1969).



can form only a small part of what should be the total process of evaluation of pupil progress. There is no attempt herein, that the hearing examiner can discern, to do other than what local school districts are already doing in many ways. The attempt is to supplement such efforts.

Norman E. Gronlund of the University of Illinois considers such a “total evaluation” process in his book, *Measurement and Evaluation in Teaching*<sup>1</sup> and states, at page 269:

“\*\*\* The school-wide program of standardized testing constitutes only a small part of the total evaluation program of the school. To measure adequately the diverse instructional goals and to serve the many uses for which objective information is needed in the school, a variety of evaluation methods is required. Teacher-made achievement tests, anecdotal records, performance ratings, sociometric techniques, and similar informal methods of appraisal both supplement and complement standardized test results. Ideally, the school-wide testing program should be planned in conjunction with the total evaluation program of the school so that the role of standardized testing is viewed in proper perspective.\*\*\*”

Certainly viewed in such a context of the total evaluation process the “school-wide program” to which Mr. Gronlund refers can gain from the “state-wide program” and be enriched by it. The two kinds of programs are not mutually exclusive, but the service which the State Department has here attempted to provide does provide a “broader base.”

Mr. John T. Wahlquist, in his book, *Administration of Public Education*,<sup>2</sup> also addresses the advisability of an expansion of the horizon of local perspective — specifically through the provision of certain services by state government. He states:

“\*\*\* attention should be directed to the responsibility of the state in providing certain of those educational services directly which the local educational units cannot themselves provide. These services frequently require a broader base than that of the local district, even though local districts are adequate.\*\*\*” (at p. 74)

Having found the evidence to support a conclusion that the tests of the E.A.P. are valid tests and having concluded that they are useful, the hearing examiner also determines that the tests of the E.A.P. are “reliable” in the sense that they are consistent measurements.

Reliability, too, has various definitions, and one such definition is that of Robert L. Thorndike and Elizabeth Hagen in their book, *Measurement and Evaluation in Psychology and Education*, *ibid.*:

---

<sup>1</sup> *Measurement and Evaluation in Teaching*, Norman E. Gronlund, MacMillan Co. (1967)

<sup>2</sup> *Administration of Public Education*, John T. Wahlquist, Ronald Press Co. (1952)

“\*\*\* The accuracy or precision with which a measure based on one sample of test tasks at one point in time represents performance based on a different sample of the same kind of tasks or a different point of time or both. Accuracy may be expressed by a reliability coefficient or by the standard error of measurement.\*\*\*” (at p. 653)

In *Measurement and Evaluation in Teaching*, *ibid.*, Norman E. Gronlund states:

“\*\*\* Reliability (1) provides the consistency which makes validity possible, and (2) indicates how much confidence we can place in our results. \*\*\*” (at p. 100)

In this context of definition, the testimony at the hearing was that the tests of the E.A.P. are reliable measurements even though, because of a prior lack of evidence to this effect, the State Department of Education had determined that the results of testing with respect to individual students would not be released in the first year of the E.A.P. There was no contrary evidence at all with respect to reliability.

The most controversial issue of those to be considered by the hearing examiner is concerned with dissemination of information with regard to test results. While there appears to be a unanimity of view that test results may properly be released to professionals in the school districts, such unanimity is not present with respect to other aspects of the proposed dissemination. There is a question about both the timing of the release of various raw data and great cautionary reserve about the release of interpretive data. There also appears to be great concern by petitioners about how test results may be used against individual teachers.

The hearing examiner finds it most difficult to evaluate the merits of interpretive material, which may be released to the public subsequent to the time when “raw scores” are to be released. Such material is not complete in documentary form, and the hearing examiner cannot be sure from testimony just what kinds of releases are possible or probable. It appears, in fact, that there is no definite proposed program in this regard at this juncture, but instead a range of possibilities, *i.e.*, data with regard to socioeconomic correlations, class size, race, age of school buildings, pupil-teacher ratio, teacher salaries, etc.

However, because of the long delay in release of test results occasioned by this Petition and because of the imminence of a second series of tests as a part of the E.A.P. in 1973, the hearing examiner believes that interpretive reference data should be reappraised at this juncture in the suitability of the time frame.

Further, in view of the cautions generally expressed at the hearing with respect to interpretive data, the hearing examiner believes that the suitability and the usefulness of some data which is available should be reexamined and that a definite, proposed schedule of such releases should then be announced.

The hearing examiner also offers the opinion that the timing of the releases of raw data pertinent to the district, county and State levels should be reappraised at this juncture and perhaps consolidated as one release.

The fears of petitioners with respect to teacher accountability are more tangible than those concerned with release of interpretive data, since rules of the State Board of Education contained in *N.J.A.C. 6:39-1.3 (e)* provide, as noted, that:

“No individual member, officer or employee of any board of education shall be subject to disciplinary action solely upon the basis of information produced by statewide assessment.”

The implication is clear to petitioners that “disciplinary action” charges can perhaps be invoked against individuals as one element of a proceeding that might involve charges of inefficiency, unbecoming conduct, insubordination, etc. because of the E.A.P.

The hearing examiner is in sympathy with this view, and he understands the fear. He concludes that the phrase “solely on the basis of” contained in the State Board rule was designed as a protection for school personnel and not a threat to their welfare, but that only the implied threat is clearly stated.

The hearing examiner further concludes that the phrase is most unfortunate in that even if it is held that teachers or school personnel as individuals should be held accountable for test results, it can hardly be imagined that a fourth-grade teacher should bear such responsibility when, as here, the pupils in her charge have been with her for a period of only two months of their total time of forty-two months in school. The ramifications at the twelfth-grade level are even more obvious.

The hearing examiner believes that possible use of these test results for disciplinary action of any kind is a misuse of the testing purpose and a distortion of the specific objectives of the E.A.P. which is to measure the specific skill development of pupils. This is particularly true since the tests were given in the fall of the year – a good time for a test to measure skills, but a poor time to measure teacher effectiveness. Norman Gronlund states in his book, *Measurement and Evaluation in Teaching*, *ibid.*:

“\*\*\* In addition to the other considerations in planning a school testing program, a decision must be made concerning the best time of the year to give the tests. Spring testing is most frequently favored where the emphasis is on evaluating the effectiveness of the school program and where the results are to be used in sectioning classes for the following year. For most instructional purposes, however, spring testing leaves much to be desired. The results are obtained too late in the school year for classroom planning and too late to correct learning weaknesses revealed by the tests. *Fall testing provides teachers with up-to-date information for planning the year's work, for grouping within the class, and for guiding and directing*

*the work of individual pupils. Fall testing also avoids the two most common misuses of standardized testing – grading pupils and evaluating teachers.\*\*\*” (Emphasis supplied.)*

It is also interesting to note that John Wahlquist in his book, *The Administration of Public Education, op. cit.*, considers achievement tests in relationship to teacher evaluation. His views are expressed in this way:

“The use of tests in the evaluation of teaching efficiency is probably justifiable from the theoretical viewpoint, but the process is seldom carried out in practice. Teachers resent the method because they feel compelled to restrict their curriculum planning and activities to the material which may possibly come out in the tests.\*\*\* [They] believe it is the only defense against an unjust system. Unless the evaluations are based on a scientific equating of student groups, the teachers have just cause for criticism. Such an evaluation should only be carried out when the differences between student groups are positively known and when their degrees of achievement can be definitely prognosticated. \*\*\*” (at pp. 191-192)

For the reasons expressed by these writers and because of his own views previously expressed, the hearing examiner recommends consideration of the deletion of that phrase contained in *N.J.A.C. 6:39-1.3 (e)*, which is considered by teachers to constitute an implied threat to their welfare. While the hearing examiner believes the E.A.P. could not practically be employed as a disciplinary action, the phrase implies by indirection that it can be so employed, and the grievance is real.

Finally, the hearing examiner observes that he has not treated those proofs of petitioners concerned with teacher participation in the months of test preparation – proofs offered in support of a view that a test improperly devised could not be a valid test – or other proofs pertinent to that period. In this regard, it must be noted that teachers were requested by the State Department of Education to evaluate test specifications in what was, for them, the busiest clerical-duty period of the entire school year. Accordingly, their annoyance was understandable. However, in the hearing examiner’s judgment, there is no concrete evidence that such annoyance had an appreciable effect on test validity. The fact is that thousands of teachers did take the time from busy schedules to respond, and their combined response was a weighted factor in final test formulation.

It does seem apparent, however, that future requests for such opinions or evaluations from teachers should be suitably addressed to time periods more conducive to reflection than the first two weeks of June. The E.A.P. will be considerably enhanced in the context of such consideration.

It is also evident that there was a misunderstanding, at least by some persons, of the true purpose of the work of evaluative groups on June 5, and 6, 1972, and as the hearing examiner observed, *ante*, the State Department of Education has variously labeled the tests of the E.A.P. as “norm-referenced” and

“criterion-referenced” tests. However, such misunderstandings, when viewed in the total testimony of the hearing, do not, in the judgment of the hearing examiner constitute reason to label the tests as unreliable or invalid.

It can probably also be successfully argued that the time which was given to testing companies to prepare test proposals was too abbreviated. It appears to the hearing examiner that this is so. However, the brief time allowance had no practical exclusionary effect since two companies submitted complete proposals.

In summary, the hearing examiner finds:

1. The tests controverted herein are valid, useful tests of certain basic skills according to all the evidence that has been adduced.
2. The tests are reliable measures of what they purportedly examine.
3. The proposed dissemination of test results should proceed forthwith with respect to all raw data scores, but consideration should be given at this juncture to a consolidation in the release of such scores.
4. The proposed dissemination of interpretive reference data should be specifically detailed and announced. The cautionary admonitions in this regard should constitute a part of the total process of consideration.
5. The final section of the rules of the State Board of Education (*N.J.A.C. 6:39-1 et seq.*) which pertains to disciplinary action is a source of legitimate complaint in the judgment of the hearing examiner and should be considered for deletion at an early date.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the entire record in the matter of *Greta Chappell et al. v. Commissioner of Education*. In addition he has reviewed the exceptions to the hearing examiner's report filed in accordance with *N.J.A.C. 6:24-1.16* by counsel for both parties.

The Commissioner takes notice of respondent's listing of factual errors adduced from the hearing examiner's report. Those errors are listed as follows:

Frontispiece. Morton I. Greenberg, erroneously listed as a Deputy Attorney General, should be listed as an Assistant Attorney General.

Page 10. While the test indicates that Atlantic City was the sole field testing location, the transcript (Tr. II-31) indicates that Atlantic City is an example of one of the field test locations.

Page 22, line 10, and line 13 should read 1972 instead of 1973.

Page 36, line 19 and line 22 should read 1972 instead of 1973.

Petitioners have brought no factual errors in the hearing examiner's report to the Commissioner's attention. Their exception document reiterates the position taken during the entire proceedings. They indicate their belief that the hearing examiner in this matter has failed to deal appropriately with certain issues raised in their arguments. The Commissioner finds the 62-page report of the hearing examiner to be an analytical document reflecting experience and *independent* judgment.

The Commissioner has examined the Briefs, exhibits and transcripts in this matter and holds that the hearing examiner has summarized them accurately and fairly. The Commissioner is confident that the record in this matter is complete and readily available for judicial review. Accordingly, he finds that no further hearing or oral argument is necessary or required.

In response to petitioners' suggestion (Petitioners' Exceptions to the Hearing Examiner's Report, at p. 4) that the absence of extensive teacher participation in the development of the 1973 E.A.P. is evidence that the "\*\*\*\* Department of Education is retreating from the claims that it originally advanced on behalf of this testing program\*\*\*\*," the Commissioner finds the E.A.P. to be an important component of the content of an educational program. Accordingly, departmental efforts towards the involvement and cooperation of teachers and professional staff members is a significant enterprise meriting continuation and improvement. The Commissioner also notes petitioners' exception comments (Petitioners' Exceptions to the Hearing Examiner's Report, at p. 5) regarding the selection process for teacher involvement in the planning of the E.A.P. The Commissioner understands that the teachers who participated in this process were selected by local school administrators as those being most knowledgeable of each school's curriculum program in the areas to be tested. The Commissioner finds and determines that this was a rational basis for selection.

The Commissioner is constrained to deal separately with a major concern expressed by petitioners in the following language:

\*\*\*\* While noting that individual scores were to be ascertained, he seems satisfied with the notion that they would remain in a non-disclosable form. In an era in which grand jury minutes, income tax returns and private conversations with the President of the United States are taped and available, the notion of privacy must certainly undergo a more rigid scrutiny than has been demonstrated here.\*\*\*\* (at pp. 7-8)

While the Commissioner agrees with petitioners as to the importance of privacy in the management of test data, he believes that the State Board of Education has made reasonable and adequate provision for this matter in *N.J.A.C. 6:39-1.2* which reads in relevant part:

\*\*\*\* individual student data shall be released only to a pupil, his parent or legal guardian, and school personnel and school officials deemed

appropriate by the Commissioner.\*\*\*\*” R. 1972 d. 187, eff. Sept. 22, 1972. As amended, R. 1973 d. 72, eff. March 13, 1973.

The Commissioner notes that the E.A.P. tests, *sub judice*, have been found to be valid, useful and reliable, and that the hearing examiner recommends the raw scores derived therefrom to be released forthwith. The Commissioner accepts this recommendation and directs that all raw scores of the E.A.P. tests with respect to school, district, county and state level be released for district review on November 20, 1973. The Commissioner directs that the release date of November 20, 1973, be followed with public release sixty (60) days thereafter, pursuant to the rules of the State Board of Education. (*N.J.A.C. 6:39-1 et seq.*)

The recommendation of the hearing examiner in support of this direction is buttressed by a recent decision of the Superior Court of New Jersey, Appellate Division, in which the Court reversed the Commissioner’s decision in *Citizens for Better Education et al. v. Board of Education of the City of Camden and Dr. Charles Smerin, Superintendent of Schools, Camden County*, 1971 S.L.D. 644; *aff’d* State Board of Education, June 7, 1972. In that case the Commissioner had held that certain test records, which were not required by law to be made, were not “public records” subject to inspection pursuant to the so-called Right to Know Law. (*N.J.S.A. 47:1A-2*) With respect to those specific test results, the Court held to the contrary and respondents were ordered by the Court:

“\*\*\*\* to permit petitioners to inspect and copy reports or such portions thereof as reveal the results of city-wide standardized achievement tests by *grade and school*, as sought in their petition\*\*\*.” (at p. 7) (*Emphasis supplied.*)

The Commissioner holds that the planned program of dissemination of tests results as reported, *ante*, is in substantial conformity with this court decision. Consequently, the rules appearing in *N.J.A.C. 6:39-1.1-1.3* are in full force and effect notwithstanding the decision of the Court, *supra*. These rules read in relevant part as follows:

“\*\*\*\* 6:39-1.2 Dissemination of Information

“(a) Notwithstanding N.J.A.C. 6:3-1.3, individual student data shall be released only to a pupil, his parent or legal guardian, and school personnel and school officials deemed appropriate by the Commissioner.

“(b) The State Department of Education shall produce and distribute to chief school administrators as uninterpreted reports: a classroom report for the teacher; a school report for the school principal; a district report for the district superintendent or chief school administrator; and a county report for the county superintendent.

“(c) The State Department of Education shall provide an interpreted geographic regions report and an interpreted State report to the State Board and the Commissioner of Education.



“(d) Each of these reports shall consist of report forms and interpretive aids approved by the Commissioner.

“(e) Reports shall be distributed to local boards, as indicated in (b), (c) and (d) above, in such a manner as to provide a 60-day period from receipt of all standard reports for analysis of data and for the development of additional essential interpretive material by the local board pursuant to 6:39-1.2. During this period such material shall not be available for public distribution.

“(f) Following a 60-day analysis period, reports indicated in subsections (b), (c) and (d) above, excepting classroom and individual pupil reports, shall be made available to the public; provided, however, that no reports shall be released unless they are accompanied by interpretive materials approved by the Commissioner.

“(g) The Commissioner, with the approval of the State Board of Education, may make exceptions to the above regulations with respect to special reports requested by local school districts.\*\*\*” R. 1972 d. 187, eff. September 22, 1972. As amended, R. 1973 d. 72, eff. March 13, 1973.

The Commissioner has also accepted that recommendation of the hearing examiner regarding the planned release of interpretive reference data subsequent to, or correlated with, the release of the basic data concerned with test results, and has reviewed all the ramifications that release of such reference data may have. The Commissioner believes that reference data including, but not limited to, the following warrants release. Accordingly, he directs that the following data be composed and prepared for appropriate release:

Summary Reports for:

1. The State
2. State Geographic Regions (Northeast, Northwest, Southeast, Southwest)
3. District Type (Urban Center, Urban-Suburban, Urban Center-Rural, Suburban, Suburban-Rural, Rural, Rural Center, Rural Center-Rural)
4. County (21 Reports)

Correlative Data with respect to:

1. Class Size
2. Student Time (Day/Periods)
3. Enrollment
4. Teacher Experience (No. of Years)
5. Age of School Building
6. Pupil/Teacher Ratio
7. Teacher Experience (Degree Held)
8. Sex
9. Number of Books in School Library



10. Non-Graded Classes/Open Classrooms
11. Number of Graduates Entering Higher Education
12. Number of Instructional Rooms
13. Subject Offerings:
  - A. Number of Credits Required for All Pupils by Subject Area
  - B. Total Number of Courses Offered in Subject Area
14. Total Number of Graduates
15. Number of Administrators and Supervisors
16. Number of Teachers (Total Number)
17. Special Services Personnel (Total Number)
18. Nonprofessional Assistants (Total Number)
19. Median Income
20. Per-Pupil Expenditure

Finally, the Commissioner has noted the recommendation of the hearing examiner which concerns the possibility that E.A.P. tests may be the cause of disciplinary action against individuals because of a provision contained in the New Jersey Administrative Code. This matter will be referred to the State Board of Education for review at an early date. The referral will be accompanied by a recommendation that *N.J.A.C. 6:39-1.3 (e)* be deleted, since it appears from petitioners' arguments that such provision constitutes an unnecessary, although unintentional, provocation in the total context of the assessment program.

The Petition of Appeal considered herein is otherwise dismissed.

COMMISSIONER OF EDUCATION

November 2, 1973

**Greta Chappell, individually and as guardian of  
Muriel Chappell, an infant, Lloyd S. Kelling and Helen T. Kelling,  
individually and as guardians of Stephen Kelling, an infant,  
Roger Mazzella, individually and as guardian of Joyce Mazzella,  
an infant, Jersey City Education Association, a Nonprofit  
Corporation of the State of New Jersey, Hillside Education  
Association, a Nonprofit Corporation of the State of New Jersey,  
and Plainfield Education Association, a Nonprofit Corporation  
of the State of New Jersey, and Flory Naticchia,**

*Petitioners-Appellants,*

*v.*

**Commissioner of Education,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, November 2, 1973

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld,  
Esq., of Counsel)

For the Respondent-Appellee, George F. Kugler, Jr., Attorney General  
(Gordon J. Golum, Deputy Attorney General)

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

April 3, 1974

Pending before Superior Court of New Jersey

**In the Matter of Charles H. Knecht & Sons, Inc.,  
Qualification as Bidder.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Alfred L. Nardelli, Esq., Deputy Attorney General

For the Respondent, Joseph R. Wyatt, II, Esq.

Charles H. Knecht & Sons, Inc., hereinafter "respondent corporation," is a classified bidder pursuant to *N.J.S.A. 18A:18-8 et seq.* and *N.J.A.C. 6:22-7.1(i)*, prequalified to submit bids to local boards of education in New Jersey on public work contracts in the amount of \$2,500,000. (Exhibit S-3)

On or about June 12, 1973, respondent corporation was indicted by a Federal Grand Jury, United States District Court for the District of New Jersey, Criminal No. 374-73 (Exhibit S-2), on one count of alleged violation of the Internal Revenue Code, 26 U.S.C. § 7206 (1), and Title 18, United States Code § 2, in that respondent corporation allegedly did willfully and knowingly make and subscribe a United States Corporation Income Tax Return for the fiscal year ending August 31, 1969, which was verified by a written declaration that it was made under the penalties of perjury and which was filed with the District Director for the Internal Revenue District of New Jersey, and which said income tax return, respondent corporation did not believe to be true and correct as to every material matter. Respondent corporation entered a plea of guilty to the aforementioned indictment, charging a violation of the Internal Revenue Code, 26 U.S.C. § 7206 (1), and Title 18, United States Code § 2.

This matter is now before the Commissioner of Education as the result of an Order by the Commissioner dated July 20, 1973 (Exhibit S-1), wherein respondent corporation is required to show cause why its prequalification classification as bidder on public work contracts should not be revoked pursuant to *N.J.S.A. 18A:18-8 et seq.*, as the result of the hereinbefore stated indictment and guilty plea and consequent reflection on the responsibility and integrity of respondent corporation.

A formal hearing was conducted on August 10, 1973, by an authorized representative of the Commissioner. The record in this matter, including the transcript and documentary evidence, has been reviewed by the Commissioner. The relevant material facts are not disputed.

On April 2, 1973, in response to a subpoena (Exhibit P-2) served upon respondent corporation, Harry C. Knecht, president of respondent corporation, met with the Chief of Special Prosecutions of the United States Attorney General's office in Newark. As the result of that conference, Mr. Knecht signed an affidavit which included, *inter alia*, the following statements: He is president of respondent corporation which is engaged as a contractor in the heating, air conditioning, and sheet metal business. On or about August 12, 1969, he

attended a dinner at the Cherry Hill Inn at the request of a contractor he had known for many years. Mr. Knecht was told by this contractor that the dinner was being promoted by the then, general manager of the Cherry Hill Inn to support the gubernatorial campaign of the then, Congressman Cahill, and he was asked to bring a check for \$1,000 as a campaign contribution. During the course of the dinner at the Cherry Hill Inn, the persons in attendance publicly announced who they were and stated the amount of money they were contributing to the campaign. Mr. Knecht was told to make his check payable to Writers Associates, a firm which was doing public relations and advertising for the gubernatorial campaign. Mr. Knecht wrote a check on the account of respondent corporation to Writers Associates in the amount of \$1,000. Thereafter, he caused this \$1,000 disbursement to Writers Associates to be deducted as an advertising expense on the records of respondent corporation, knowing that it was not an advertising expense, but was, in truth, a political contribution. Although Mr. Knecht knew that it was unlawful to treat a political contribution as a business expense, he caused this entry to be made in the records of respondent corporation in an effort to conceal this disbursement from the attention of the Internal Revenue Service. (Exhibit P-1) (Tr. 7-8)

On June 22, 1973, Mr. Knecht, as president and corporate officer on behalf of respondent corporation, entered a plea of guilty in the United States District Court. As of this date, no sentence has been handed down by the Court. Mr. Knecht is a member of the Board of Directors of respondent corporation, and owns thirty-four percent of the stock, but holds no office on the Board of Directors. (Tr. 10) According to Mr. Knecht, respondent corporation made no other contributions to the aforesaid campaign. (Tr. 12)

Respondent corporation was started as a family business in 1942, and was incorporated in 1955. (Tr. 9) Mr. Knecht testified that with the single exception of this conviction for an income tax violation, neither respondent corporation nor any of the officers or stockholders have ever been convicted of any other crime. (Tr. 12)

Since August 12, 1969, the date of the campaign fund-raising dinner, respondent corporation has been a classified bidder prequalified to submit bids on public work contracts. Respondent corporation has been performing work primarily on public projects such as building programs at various State colleges and public school buildings. According to Mr. Knecht, respondent corporation has not received any complaints from any public agencies regarding the satisfactory completion of any work contracts. (Tr. 18-19) Nor has respondent corporation ever been disqualified from bidding on any public work contracts in the State.

The Commissioner notices that respondent corporation's classification as a prequalified bidder for local board of education projects expires December 23, 1973, and will be subject to review for renewal at that time. (Exhibit S-3)

The record is clear in the instant matter, that with the exception of this one incident of violation of income tax laws, respondent corporation has a

seemingly unblemished record of satisfactory performance in the field of public work projects. It is noteworthy, in the Commissioner's judgment, that the indictment charged only the filing of a false tax return, and there is no question of a conspiracy to avoid federal laws.

The circumstances of this case are clearly distinguishable from the case of *Trap Rock Industries, Inc. v. Kohl*, 63 N.J. 1 (1973) where elements of conspiracy and bribery were found. The Commissioner believes that the president of respondent corporation's action in providing a full affidavit of admission to the indictment was an act of integrity, clearly demonstrative of the president's willingness to acknowledge the wrongful act and accept the consequences.

The Commissioner finds and determines that the evidence in the instant matter supports the conclusion that Charles H. Knecht & Sons, Inc. should not be disqualified as a bidder to local boards of education on public work contracts in New Jersey. When the present classification expires on December 23, 1973, respondent corporation may apply for renewal in accordance with rules and regulations pertaining to such classification.

COMMISSIONER OF EDUCATION

November 12, 1973

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick,  
Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION  
DECISION ON MOTION**

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent, City of New Brunswick, Franklin F. Feld, Esq.

For the Respondent, Milltown Board of Education, Sailer and Fleming  
(Russell Fleming, Jr., Esq., of Counsel)

For the Respondent, Board of Education of the Township of North  
Brunswick, Borrus, Goldin & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent, Township of North Brunswick, Mayo, Lefkowitz &  
Shihar (Ralph Mayo, Esq., of Counsel)

The North Brunswick Board of Education by letter of September 11, 1973, sought an immediate hearing on its application to withdraw its tenth-grade students from New Brunswick High School and have them attend a new school facility in North Brunswick. This Board had sought by earlier Petition to withdraw its 10th grade students as of the 1972-73 school year. The Commissioner, on his own motion, had called for argument on this prior application in July 1972, and rendered a decision in August 1972, denying the relief sought. The denial was based on the unreadiness of the North Brunswick facilities as well as the undesirability of interrupting a continuous educational process. The Commissioner retained jurisdiction stating that the sending-receiving relationship should continue as it was until the Commissioner's further order. In September 1972, North Brunswick filed another Petition seeking the early termination of the sending-receiving contractual relationship between North Brunswick and New Brunswick; part of the relief sought in this latter Petition was the early withdrawal of 10th grade pupils. The September 11, 1973 letter of the North Brunswick Board called for hearing on the Petition "[b]ecause of the availability of the North Brunswick Township High School at this time."

In response to North Brunswick's letter request, a hearing was held on September 19, 1973 before a hearing officer appointed by the Commissioner. At that time evidence was produced and arguments offered on the question of the withdrawal of North Brunswick's 10th graders. Each of the parties to the main litigation was present and heard: North Brunswick Board of Education, New Brunswick Board of Education, Milltown Board of Education, and the City of New Brunswick.

The North Brunswick Board states that the crucial new fact that should lead to a different result at this point in time is the readiness of the new North Brunswick school facility. According to representations made at the hearing, the school is presently housing North Brunswick's seventh, eighth, and ninth grades, a total of 1,031 students. It is asserted that, while the completed school will be able to accommodate 1,600 to 1,700 students, in its present state of readiness it can hold satisfactorily 1,365.

The number of North Brunswick tenth-grade students presently attending New Brunswick High School is 234. As alternatives to the withdrawal of North Brunswick students only, the North Brunswick Board indicates that it will also accept 50 (alternative 1) or, as a further alternative, 100 New Brunswick minority students (alternative 2). North Brunswick's 234 plus New Brunswick's 100 plus the 1,031 seventh, eighth, and ninth graders already at the school totals the 1,365 that North Brunswick asserts is the maximum number that can be accommodated at present.

The impact of the withdrawals upon the racial balance at New Brunswick High School is asserted to be as follows: withdrawal of North Brunswick students only would change the present 60-40 white to non-white ratio to 55-45; withdrawal of 50 non-white New Brunswick students in addition would yield a 57-43 percentage ratio; withdrawal of 100 non-white New Brunswick students would yield a 59-41 ratio.

The sending-receiving contract between New Brunswick and North Brunswick ends in June 1974. In support of its request for early termination of that contractual relationship respecting 10th graders, the North Brunswick Board refers to other factors besides the readiness of the new school. It asserts that the New Brunswick High School is overcrowded and that the withdrawal sought will better utilize both the new school and the New Brunswick High School. In particular, it would permit elimination of the present double sessions at New Brunswick High School.

The North Brunswick Board also cites instances of disruption and school closings and asserts that tension and fear exists at New Brunswick High School. The Board further alleges that because of the failure of the New Brunswick Board to provide adequate facilities and supervision, the New Brunswick Board is not providing a thorough and efficient system of education for North Brunswick students and, therefore, grounds exist for early termination. Finally, the North Brunswick Board asserts that the welfare of the students in all districts demands that the best use of all facilities be made, and the best use is to permit North Brunswick students to withdraw.

The Board of Education of New Brunswick and the City of New Brunswick together argue against the withdrawal of North Brunswick students. They rely on the integrity of the contractual relationship and say that a decision permitting the withdrawal of North Brunswick students would be determinative of the main case.

They defend the education being provided at the New Brunswick High School, pointing to the record of college admissions of New Brunswick High School graduates. In addition, they note the quality of the new administration and the improvement in the record of disturbances. They liken New Brunswick's problems to those generally experienced by center cities and assert that a separation will deprive both groups of students of the advantage inherent in a fully integrated educational experience.

The New Brunswick Board states that reversion to single sessions at the High School would not be possible unless at least 300 to 350 students were withdrawn. Although preferring the status quo, the Board suggests that, if any tenth grade students are to be withdrawn from New Brunswick High School, then *all* tenth grade students should be withdrawn.

The New Brunswick Board of Education makes the point that the application by North Brunswick for immediate withdrawal of its tenth grade is untimely. It states that such application should have been pressed before budgets were set, teachers hired, materials supplied and the school year prepared for.

The Board of Education of Milltown takes a position supporting the withdrawal of the North Brunswick 10th grade so long as its own 9th and 10th grades would be given permission to withdraw to the school of their own choice. If not, the Milltown Board prefers to maintain the status quo.

Since the hearing, the hearing officer has directed qualified representatives of the Department of Education to make independent analyses regarding the capacities of both the new facility and the New Brunswick High School and regarding the essential programmatic aspects of both schools. Those reports are attached hereto as Appendixes A and B.

Upon the review of the materials contained in the record and in the annexed reports of the Department of Education, the hearing officer makes the following findings of fact:

1. Procedurally, the question of the withdrawal from New Brunswick High School of 10th grade students is properly before the Commissioner for determination.

2. New Brunswick High School presently houses 1,879 students from New Brunswick, North Brunswick and Milltown. The numbers attending are in excess of its recommended operating capacity of 1,469. (Tr. 11) The school is on double session. The breakdown of students by grade and race is shown in Appendix C.

3. The racial composition of New Brunswick's High School is 60% white and 40% non-white. The racial make-up by municipality and grade is shown in Appendix C.

4. Withdrawal of all North Brunswick's 10th graders only would change the racial balance of the school to 55%-45%. Under North Brunswick's proposed alternative 1 (50 New Brunswick black students also withdrawn) the ratio would be 57-43. Under their alternative 2 (100 New Brunswick black students also withdrawn) the ratio would be 59-41.

5. The 10th grade ratios under the three alternatives would be as follows:

	<b>North Brunswick withdrawn</b>	<b>Alternative 1</b>	<b>Alternative 2</b>
New Brunswick High School	37-63%	43-57%	53-47%
North Brunswick School	96-4%	79-21%	67-33%

6. If the entire tenth grade were transferred to the North Brunswick school, the ratio of white to non-white students remaining at New Brunswick would remain 60-40%. If Milltown ninth graders were also withdrawn, the ration would be 59-41%.

7. If only North Brunswick tenth graders were permitted to withdraw the racial makeup of the North Brunswick school would be 96% white and 4% non-white. With 50 New Brunswick black students added the North Brunswick school would have a ratio of 93-7%. With 100 New Brunswick black students added, it would become 89-11%. If the entire tenth grade were sent to the North Brunswick school, the ratio would become 84-16%. The addition of the Milltown ninth grade changes the ratio by less than one-half of one percent.



8. There have been disruptions at New Brunswick High School and school closings as there have been a number of schools in the State. There has been a beneficial change in the situation of the school in the past year. Some degree of undesirable racial tension seems, nevertheless, to persist with an attendant adverse impact on the educational processes.

9. There would be undisputed advantages if New Brunswick High School could return to single session as the result of a reduction in the overcrowding conditions.

10. The North Brunswick School is now ready to accommodate 1,597 students using a formula of calculation that yields a number 20% less than actual capacity. This "functional capacity" will be 1,697 when the final details of construction are complete. The facility is clearly underutilized.

11. In June of 1971, the Board of Education of New Brunswick brought an Order to Show Cause why the North Brunswick Board should not be enjoined from receiving, accepting and opening bids for the construction of their new high school facility. Upon consent of the parties the Commissioner on June 21, 1971, allowed the bids to be received but temporarily enjoined the awarding of contracts and the commencement of construction, without the specific subsequent approval of the Commissioner. *All parties then consented to the lifting of all restraints regarding the award of bids and the commencement of construction upon: (1) the specific recognition by the Board of Education of North Brunswick that a racial balance problem existed at New Brunswick High School; and (2) the representation by the Board of Education of North Brunswick that use of the contemplated North Brunswick facility to help alleviate that problem would be seriously explored.*

The North Brunswick Board passed the following resolution on July 13, 1971:

"In consideration of the approval by the State Commissioner of Education to this Board to award construction contracts for the North Brunswick Township High School in accordance with the bids received, the North Brunswick Township Board of Education recognizes that racial imbalance is a problem in the New Brunswick High School and that the North Brunswick Township Board of Education will work actively with the New Brunswick and Milltown Boards of Education toward an equitable solution thereof in the utilization of the proposed North Brunswick Township High School facility."

The restraints were removed, by the Commissioner's Order of July 14, 1971, which noted that the bids would be awarded without prejudice to the final determination regarding the use of the new facility.

Consistent with the above facts it is the recommendation of the hearing officer that the following students be permitted to withdraw from New Brunswick High School to attend the new North Brunswick school facility:

1. All North Brunswick 10th grade students currently enrolled in New Brunswick High School whose parents or guardians so elect.

2. All Milltown 9th and 10th grade students currently enrolled in New Brunswick High School whose parents or guardians so elect.

3. As many New Brunswick 10th grade students currently enrolled in New Brunswick High School, whose parents or guardians so elect, as the Board of Education of New Brunswick shall determine.\*

It is further recommended that the Boards of Education of New Brunswick, North Brunswick and Milltown be directed to immediately work out an arrangement whereby the North Brunswick Board shall have responsibility for the operation of a secondary program for the students assigned to North Brunswick pursuant to this recommendation. In working out this agreement, which shall be reduced to writing and submitted to the Commissioner no later than December 3, 1973, the parties shall take into consideration the existing staff contracts and fiscal constraints. In the event that the three boards of education cannot work out satisfactory arrangements as to the personnel, materials, supplies, equipment, transportation and so forth necessitated by the Commissioner's decision by December 3, 1973, then the Commissioner shall direct the parties to accomplish the transition as best he sees fit.

It is further recommended that the Board of Education of North Brunswick be directed to expedite completion of the building and delivery of all basic equipment so that the school may be fully operable and able to accommodate its full potential of students.

It is further recommended that the Commissioner's decision be an interim order only and shall be without prejudice to the outcome of the litigation among the parties that is presently pending before the Commissioner. In this way the ultimate question of racial balance within and among the three school districts may be reserved for final determination after full hearing and upon the submission of legal briefs.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, the responses to that report filed by each of the five parties, and the record in the instant matter.

---

\*It is noted that the maximum possible enrollment pursuant to this recommendation is 1636 which is 39 over the functional capacity reported by Irving M. Peterson. In my judgment this possibility is tolerable for the following reasons: (1) pupils in special programs can be expected to remain in New Brunswick High School for those programs; (2) the actual capacity is 20% greater than the "functional capacity"; and (3) the ultimate functional capacity is 1697 and, according to the statements made at the hearing, the full capacity of the building will shortly be available.

The narrow issue to be decided by the Commissioner at this juncture is whether or not the application by the North Brunswick Board of Education for the transfer of its tenth-grade pupils should be granted, and whether or not the concurrent application by the Milltown Board of Education, for the transfer of its ninth and tenth-grade pupils, should be granted.

The relevant facts set forth in the report of the hearing examiner need not be repeated. It will suffice to say that the responses to the hearing examiner's report, which were filed by the five parties in this matter, generally reinforce their respective positions as argued at the hearing held September 19, 1973.

As background for the narrow issue now before the Commissioner, several observations are of value.

In the first instance, the narrow issue herein controverted is an interim problem, clearly delimited from the larger case which has been in litigation for over seventy hearing days, with additional hearing sessions still to be concluded.

Secondly, although a somewhat similar application by the Boards of Education of North Brunswick and Milltown for the transfer of pupils from the New Brunswick High School was previously denied by the Commissioner on August 10, 1972 (*Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick, Middlesex County*, unpublished Decision on Motion, decided August 10, 1972), the facts now before the Commissioner disclose a significant change in circumstances, particularly in regard to the availability of high school facilities within the School District of North Brunswick.

Thirdly, a paramount factor in this dispute is that the New Brunswick High School is presently operating on a two-session basis as the result of overcrowding.

In numerous previous instances, the Commissioner has been called upon to decide questions concerning the transfer of pupils attending an overcrowded high school operating on a two-session basis, within the framework of a sending-receiving relationship. See, for example: *Board of Education of the Township of Frankford v. Board of Education of the Town of Newton, Sussex County*, 1939 S.L.D. 653 (decided January 23, 1935); *Board of Education of the Township of Green v. Board of Education of the Town of Newton, Sussex County*, 1939 S.L.D. 656 (decided January 7, 1937); *Board of Education of the Borough of Middlesex v. Board of Education of the Borough of Dunellen*, 1939 S.L.D. 658 (decided June 21, 1934), affirmed State Board of Education 1939 S.L.D. 660 (November 3, 1934); *Board of Education of the Township of South Brunswick v. Board of the Borough of Princeton and Board of Education of the City of New Brunswick*, 1939 S.L.D. 663 (decided April 2, 1936); *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County*, 1959-60 S.L.D. 159; *Board of Education of the Borough of Allenhurst v. Board of Education of the City of Asbury Park, Monmouth County*, 1963 S.L.D. 167; *Board of Education of the Borough of*

*Allenhurst v. Board of Education of the City of Asbury Park, Monmouth County*, 1964 S.L.D. 110; *Board of Education of the Borough of Deal v. Board of Education of the City of Asbury Park, Monmouth County*, 1964 S.L.D. 111; *Board of Education of the Borough of Interlaken, Monmouth County*, 1964 S.L.D. 115; and *Board of Education of the City of Asbury Park v. Boards of Education of the Shore Regional High School District, Borough of Deal and Borough of Interlaken, Monmouth County*, 1971 S.L.D. 221.

New Brunswick High School presently has on roll a total of 1,879 pupils in grades nine, ten, eleven, and twelve, including its resident pupils and those received from the North Brunswick and Milltown School Districts. (Appendix C) This number is in excess of the functional capacity of the New Brunswick High School, which is reported as 1,447 by the Facility Planning Services of the State Department of Education. As was previously stated, this school is operating on a two-session basis.

The high school facility in North Brunswick is clearly under-utilized at this time. The present functional capacity of this schoolhouse is 1,597, and upon total completion, the functional capacity will be 1,697. (Appendix A) This schoolhouse presently accommodates North Brunswick's seventh, eighth and ninth-grade pupils in the total number of 1,031.

The Commissioner's statement regarding double sessions in *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County*, *supra*, is applicable to the instant matter, as follows:

“\*\*\*The Commissioner is aware that, in recent years, many factors (often unforeseeable and beyond local control) have operated to force high school districts to organize their program on a double session basis and that most of them are making diligent efforts to develop facilities which will permit a return to the more complete and adequate educational opportunities possible in a one-session day. That this is so establishes even more reason for the Commissioner to exercise his discretion carefully to avoid any impending or harmful effects that might be incurred by a change of designation, no matter how temporary. At the same time, the Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconvenience which are placed on pupils, homes and staff, the Commissioner deplors the necessity to resort to a double session organization. For this reason, in his judgment, requests for changes of designation which will permit the pupils involved to attend school on a one-session basis should be approved unless it can be shown that the benefits to the pupils will be overbalanced by the harm done to the receiving district by their withdrawal.\*\*\*” (at pp. 162-163)

Notwithstanding the above-cited statement, the Commissioner is consistently reluctant to approve any change of designation of a substantial number of pupils, either permanently or temporarily, during the course of a school year. The obvious reason for this position is that a dislocation of a number of pupils involves changes in scheduling of pupils and staff, transportation and financial arrangements, which usually cannot be successfully planned and implemented except in advance of the succeeding school year.

In this regard, the exceptions to the hearing examiner's report filed by the New Brunswick Board describe for the first time in a specific manner the serious financial problems which could confront New Brunswick if the recommendations contained in the hearing examiner's report were implemented.

These financial problems include, *inter alia*, the loss of tuition payments from its sending districts, which have been anticipated as revenue for the 1973-74 school year, unanticipated increased costs for bus transportation to accommodate New Brunswick pupils who would be transferred to the North Brunswick High School for the remainder of the 1973-74 school year, increased per pupil costs for this school year, and possible unanticipated tuition payments to North Brunswick for the remainder of the 1973-74 school year.

The Commissioner is aware of the above-stated financial problems which could beset the New Brunswick Board as the result of a transfer of pupils at this time, and is constrained to state that if he approves any transfer of pupils in this matter, such approval would only be granted under a plan which would minimize the possible financial losses and increased costs of the New Brunswick School District.

In the instant matter, the North Brunswick Board has given assurances that it is prepared to accommodate on short notice, the 234 North Brunswick pupils in the tenth grade and an additional 100 New Brunswick pupils also enrolled in the tenth grade. According to the North Brunswick Board, the availability of sufficient school facilities to adequately provide an appropriate educational program, in addition to its willingness to make the necessary arrangements with the New Brunswick Board, make the proposal for a transfer of the aforementioned pupils feasible, practical and advantageous, for pupils at this time.

The Commissioner has reviewed all the relevant facts, weighed the arguments propounded by the various parties, and evaluated whether the possible benefits to the pupils would be overbalanced by any harmful effects that might be incurred by a change of designation of pupils at this time. Also, the Commissioner has considered whether any action on his part to change pupil designations would be prejudicial to any, several, or all of the school districts and municipalities participant to the larger pending case of which this is only a part.

The Commissioner finds and so holds that, under the specific circumstances of this particular matter, a change of designation of pupils which

will provide both a resumption of a normal school day with the attendant full educational opportunities thereby provided, in the New Brunswick High School, and also a more complete utilization of the North Brunswick High School, will best serve the interests of all of the pupils, their parents and the communities at large.

In order to accomplish these salutary objectives, the Commissioner must modify several of the recommendations of the hearing examiner.

In the judgment of the Commissioner, the transfer of pupils on a voluntary basis, as recommended by the hearing examiner, would not guarantee that a sufficient number would voluntarily request a transfer so as to insure that the New Brunswick High School would return to a normal school day. Also, it could reasonably be assumed that some curricular offerings could not be continued in New Brunswick High School since the remaining number of enrolled pupils would be too few to justify the cost. For example, if only two or three tenth-grade pupils remained in a second year foreign language class as the result of voluntary transfers, the New Brunswick Board would be in the untenable position of having to continue the instruction of these pupils at prohibitive cost.

If the Commissioner were to agree to a voluntary transfer plan, such a decision would require the condition that sufficient pupils elect to transfer to insure the important objective that the New Brunswick High School would return to a normal school day. That condition would effectively remove most of the element of choice sought to be gained by means of a voluntary transfer plan, because the overwhelming majority of the total tenth-grade enrollment would have to volunteer in order to insure that the New Brunswick High School would return to a normal school day. The Commissioner cannot approve any plan which would not guarantee a return to a normal school day in the New Brunswick High School, because such a defect would, in the Commissioner's judgment, create sufficient chaos in the daily instructional program of the affected children to overbalance any advantage gained by a more complete utilization of the North Brunswick High School facility.

The Commissioner determines that the best means to accomplish the above-stated objective is to transfer the entire tenth grade, consisting of 234 North Brunswick pupils and 338 New Brunswick and Milltown pupils, with certain exceptions considered, *post*, to the North Brunswick High School. This will provide an enrollment of approximately 1,603 pupils in the North Brunswick High School, a number only six (6) greater than the present functional capacity of that schoolhouse. The enrollment of the New Brunswick High School will then be approximately 1,307, which is below the functional capacity of 1,447, thus assuring a normal school day program in that high school.

The Commissioner takes notice that, although the New Brunswick Board prefers no transfer of pupils at this time, in the alternative, it suggests that the entire tenth-grade enrollment be transferred instead of a portion thereof.

This solution also includes the additional advantage of maintaining the status quo regarding the positions of the various litigants in the main issues of this case.

Since the transfer of the entire tenth grade will alleviate the overcrowding of the New Brunswick High School and effectuate a greater utilization of the North Brunswick High School, the Commissioner finds no reason to approve the transfer of the Milltown Board's ninth-grade pupils.

The exceptions of certain pupils, hereinbefore mentioned, will consist of those presently enrolled in the tenth grade in New Brunswick High School, who are receiving an educational program which cannot be provided during the 1973-74 school year by the North Brunswick High School. This factor will reduce, by a relatively small number, the total number of tenth-grade pupils who will be transferred to the North Brunswick High School. The Commissioner is aware of the fact that approximately seventy (70) North Brunswick tenth-grade pupils and approximately seventy-one (71) Milltown tenth-grade pupils are presently enrolled in nonpublic schools. In the judgment of the Commissioner, it is reasonable to assume a small likelihood, that all of these nonpublic school, tenth-grade pupils would transfer in midyear to the North Brunswick High School.

From the record before him, the Commissioner finds that the parties to these proceedings are relatively close to agreement regarding the numbers of pupils which each of the respective high schools can accommodate.

Accordingly, for the reasons stated above, the Commissioner directs the following:

1. All tenth-grade pupils presently enrolled in the New Brunswick High School will be transferred to the North Brunswick High School, excepting those pupils presently receiving an educational program which cannot be provided in the North Brunswick High School during the 1973-74 school year.

2. The Boards of Education of the City of New Brunswick, Township of North Brunswick and Borough of Milltown, shall submit to the Commissioner no later than December 31, 1973, a suitable plan, in writing, to effectuate this interim decision. This plan will include, but not be limited to, all arrangements for pupil programming, assignment and supervision of teaching staff members, distribution of equipment, instructional materials and supplies, pupil transportation and financial matters. This written plan must be designed to minimize the amount of financial loss and increased costs to the New Brunswick School District. The written plan will also include the earliest possible, mutually agreeable date that the Boards can implement this interim decision, which date shall be no later than the beginning date for the second semester of this 1973-74 school year. This written plan shall guarantee all existing employment rights of all teaching staff members presently employed by the respective Boards of Education of the City of New Brunswick and the Township of North Brunswick.



3. The Board of Education of the Township of North Brunswick will make every effort to expedite the completion of the new schoolhouse, including delivery of all equipment items, in order that this facility will be fully operable at the earliest possible date.

4. In the event that the Boards of Education of the School Districts of New Brunswick, North Brunswick and Milltown fail to agree upon satisfactory arrangements in their written plan, as hereinbefore directed, the Commissioner will review the areas of disagreement and direct the Boards to implement this interim decision in accordance with sound educational procedures which he will set forth, including possible postponement of the implementation date.

The Commissioner is constrained to state that this decision constitutes an interim order only, and nothing contained herein shall prejudice the interests of the parties in regard to the final determination of the larger issues in this case.

COMMISSIONER OF EDUCATION

November 30, 1973

**Board of Education of the Borough of Stratford,**

*Petitioner,*

*v.*

**Borough of Stratford and County Board of Taxation,  
Camden County,**

*Respondents.*

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Stephen M. Gretzkowski, Jr., Esq.

For the Respondents, Bennie & Sarubbi (John R. Bennie, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Stratford, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for current expense purposes and capital outlay expenditures for the 1973-74 school year than the amounts proposed by the Board in its budget which was defeated by the voters. The matter was referred to the Commissioner for adjudication in March 1973.

A hearing in this matter was held on August 13, 1973 before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:



At the annual school election of February 13, 1973, the voters rejected the Board's proposal to raise \$851,529 by local taxes for current expenses and \$5,720 for capital improvements of the school district in the 1973-74 school year. The budget was then sent to Council for its determination of the amount to be raised to provide a thorough and efficient school system.

After a review of the budget, and consultation with the Board, Council made its determination and certified the sums of \$790,979 for current expense costs and \$3,260 for capital improvement costs to be funded by local taxes in the 1973-74 school year. This was a reduction of \$60,550 in current expenses and \$2,460 in capital improvements from the amounts of the Board's proposal. As part of its determination, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program. A listing of those reductions is as follows:

Chart I		Board Proposal	Council's Determi- nation	Proposed Reduction
J110b	Bd. Secy.-Sal.	\$ 11,547	\$ 11,147	\$ 400
J110b.1	Bd. Secy.-Clerk-Sal.	2,000	1,700	300
J110f	Supt.-Sal.	21,438	20,820	618
J110f.1	Supt.-Secy.-Sal.	8,182	8,000	182
J110e	Legal Servs.	1,800	1,000	800
J130d	School Elections	800	600	200
J130m	Printing	1,500	500	1,000
J211	Principals-Sals.	34,656	33,849	807
J213	Teachers-Sals.	713,949	690,000	23,949
J213.1	Substitutes, Aides-Sals.	28,000	25,000	3,000
J213.3	Curriculum Const.-Sals.	3,000	- 0 -	3,000
J215	Principals-Secys-Sals.	19,634	18,601	1,033
J215.1	Part-time Clerks-Sals.	1,700	1,500	200
J230a	Library Books	6,430	4,000	2,430
J230c	Audiovisual	7,590	3,500	4,090
J240	Teaching Supplies	26,339	24,000	2,339
J250b	Travel Expense	850	600	250
J250c	Misc. Expense	5,350	4,200	1,150
J410a	Nurses-Sals.	21,060	19,821	1,239
J420b	Nurses-Travel Exp.	250	- 0 -	250
J420c	Misc. Expense-Health	250	150	100
J520c	School Trip Exp.	5,600	5,000	600
J550a	Gasoline	1,300	1,000	300
J630	Heat	10,000	9,000	1,000
J640d	Telephone	3,300	3,000	300
J650c	Grounds Maint.	300	250	50
J720b	Contr. Services-Bldgs.	19,150	13,950	5,200
J720c	Repair of Equip.	2,850	2,000	850
J730c	Instr. Equip.	5,738	4,000	1,738
J740a	Upkeep of Grounds	300	250	50
J740b	Building Repairs	3,200	2,500	700
J740c	Misc. Expense	925	500	425
J830a	Rental	2,000	- 0 -	2,000
Subtotals - Current Expense		\$970,988	\$910,438	\$60,550

**CAPITAL OUTLAY**

L1220c	Site Improvement	\$1,500	\$ 500	\$1,000
L1230c	Remodeling	1,885	1,000	885
L1240g	Equip-Maint.	1,575	1,000	575
Subtotals – Capital Outlay		\$4,960	\$2,500	\$2,460
Totals – Current Expense and Capital Outlay		\$975,948	\$912,938	\$63,010

The hearing examiner will make recommendations with regard to each of the reductions noted, *ante*. However, prior to a discussion of specific budget details, the hearing examiner believes that a review of the status of appropriation balances is in order.

In this regard, the documentation in evidence at the hearing, *ante*, shows that on June 30, 1972, a total of \$112,866.92 was available for use by the Board as a current expense balance. Of this amount, \$45,000 was appropriated for the 1972-73 budget, leaving a free, unappropriated balance of \$67,866.92. June 1973 figures show that this balance has been increased by \$4,479, which was the amount unexpended from the 1972-73 budget, and that a total of such balances on June 30, 1973, was \$72,345.96. Of this amount, \$40,000 was appropriated by the Board to the 1973-74 budget, leaving a free balance of \$32,345.96, which is available for Board use at the present juncture.

Such a sum, the hearing examiner believes, is not an unreasonable amount, but in fact, a minimal sum, and he notes it is considerably below that which existed for use by the Board just two years ago.

Having considered these facts, the hearing examiner recommends that the unappropriated free balance be undisturbed by any part of the instant adjudication, so that it may serve as an available contingency to be used by the Board if needed.

As an additional prefatory comment, it is noted that the Board has negotiated and contracted salaries with all of its various employees. However, Council contends that certain of these are unreasonable and excessive; namely, those of Board Secretary, clerks, Superintendent, secretaries, principals, teachers, substitutes, aides, and nurses.

Disputes of this kind have frequently been addressed in other budget decisions, but it has been consistently held by the Commissioner and the courts, that the discretion to make such salary determinations as those herein controverted, belongs to local boards of education and may not be usurped. In *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon*, 1971 S.L.D. 76, 78, the Commissioner reaffirmed the principle previously stated in *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick*, 1968 S.L.D. 168, 172 as follows:

“\*\*\* It is clear that the funds necessary to the implementation of salary

*policies* adopted by a board of education must be provided and are not subject to curtailment. *N.J.S.A. 18A:29-4.1*. See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park*, 1967 S.L.D. 117.\*\*\*” (*Emphasis supplied.*)

*N.J.S.A. 18A:29-4.1* plainly states:

“A board of education \*\*\* may adopt a salary policy, including salary schedules for all full-time *teaching staff members* \*\*\*. Every school budget adopted, certified or approved by the board, the voters of the district the board of school estimate, the *governing body of the municipality* or municipalities, or the commissioner, as the case maybe, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.” (*Emphasis supplied.*)

A teaching staff member is defined in *N.J.S.A. 18A:1-1* as follows:

“\*\*\* ‘Teaching staff member’ means a member of the professional staff of any district \*\*\* holding office, position or employment of such character that the qualifications \*\*\* require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment\*\*\*.”

In the context of the foregoing data, the hearing examiner’s recommendations concerning the proposed reductions of salaries of certificated personnel will be that the judgment of the Board be sustained.

The hearing examiner notes that there are thirty-six line items in dispute herein, and he makes recommendations to the Commissioner in the following manner: narrative form for certain items which are of major importance; chart form for other items, including those pertaining to teaching staff salary matters of reference, *ante*.

#### *J110e Legal Services-Reduction \$800*

Council contends that the 1972-73 budget of the Board shows a surplus of \$1,300 in this account. The June 30, 1973 financial sheet, however, shows no such surplus but an expenditure of \$1,800, equal to the exact amount budgeted for the 1972-73 school year and again for 1973-74. The hearing examiner finds this to be a reasonable figure and recommends restoration of \$800.

Summary:	Reduction by Council	\$800
	Amount Restored	\$800
	Amount not Restored	— 0 —

#### *J130m Printing-Reduction \$1,000*

Council contends that funds were budgeted and unspent in this sub-account to the extent of \$1,000 in 1972-73. The Board asserts, however, that a K-12 election to form a regional district (now under study) would necessitate printing communications to inform the public. The hearing examiner

recommends, in view of the uncertainty of such an election, that the reduction be sustained.

Summary:	Reduction by Council	\$1,000
	Amount Restored	— 0 —
	Amount not Restored	\$1,000

*J213 Teachers-Salaries-Reduction \$23,949*

The documentation of the parties with respect to this account is at first glance confusing since, in order to provide a common base for comparison purposes herein, the Board has adjusted its statement of expenditures for the 1972-73 school year downward as the result of a change in accounting practice. However, subsequent to the time of this alteration, the Board asserts its budgeted figure in 1972-73 for regular teachers' salaries was \$667,250, and it proposed to expend \$713,949 for this purpose in 1973-74. The Board states that this increase in planned expenditure is necessary to provide funds for salary increases (budgeted by the Board at 5.5%) and for a needed remedial reading teacher.

However, at the time of budget formulation, the Board had not reached an agreement concerning salary matters with its teaching staff and, in fact, the agreement which has now been reached with the staff, demands a larger amount of expenditure than the Board had originally anticipated. This expenditure, according to testimony at the hearing, *ante*, is at this juncture, programmed at \$705,000, with one teacher yet to be employed, and without budgeted funds for the new position of remedial reading teacher.

Nevertheless, Council contends that this account may be reduced since the Board had a surplus of \$7,421.60 within the account at the termination of the 1972-73 school year, and since past and projected enrollment declines provide the justification for elimination of two teaching positions.

The hearing examiner has carefully reviewed the testimony with respect to these conflicting points of view and particularly the facts pertinent to pupil enrollment. Such facts show, in the judgment of the hearing examiner, that the enrollments in two grade levels, and the sectioning pertinent thereto, are very near to a level where reductions in the number of class sections could be effected without harm to the educational program. (See enrollment report of the Superintendent, grades three and four, which shows enrollment totals of 85 and 84, apportioned in each instance to four sections.) However, the hearing examiner believes that the Board's determination in this regard is not unreasonable and that its responsibility for the efficient "management and government" of the school district (*N.J.S.A. 18A:11-1*) has been responsibly exercised. Accordingly, the hearing examiner finds for the Board, herein, while recommending that the Board carefully monitor such enrollment apportionments in future years.

Having reached this conclusion, the hearing examiner further concludes that the Board's budgeting for the regular teachers it proposes to employ in

school year 1973-74 is barely appropriate to the need, and that the reduction proposed by Council would not allow the Board sufficient funds for the maintenance of its system of education as presently constituted.

Accordingly, the hearing examiner recommends full restoration of Council's reduction for regular teachers to be employed by the Board during school year 1973-74; but, that in the context of a referendum defeat, no funds from this account, or by transfer, be apportioned to a new position of remedial reading instructor.

Summary:	Amount of Reduction	\$23,949
	Amount Restored	\$23,949
	Amount not Restored	— 0 —

*J213.1 Substitutes, Aides-Reduction \$3,000*

The Board, in anticipation of stable pupil enrollments during school year 1973-74, and planning the employment of an identical number of regular teachers, but cognizant of new obligations to provide a substitute for a teacher on sabbatical leave, proposed a small increase of \$1,300 in this account. Council, on the other hand, proposes to reduce this line item appropriation for substitutes from \$28,000 to \$25,000 — a sum which is \$1,692.50 below actual expenditures for substitutes in school year 1972-73.

Such proposed reduction, in the context of the precedent, appears to the hearing examiner to be unrealistic. Accordingly, he recommends that the reduction be restored in full.

Summary:	Reduction by Council	\$3,000
	Amount Restored	\$3,000
	Amount not Restored	— 0 —

*J213.3 Curriculum Construction-Salaries-Reduction \$3,000*

The Board proposed this budget item to compensate certain teachers during the summer months of 1973 and 1974 for preparing curricula for non-graded primary classes at the Yellin School. The Board contends that this will improve education when implemented in 1974. The hearing examiner recognizes the desirability of upgrading curricula, but finds, in this matter, that such study as herein proposed is not mandatory, and cannot be classified as essential. Therefore, in the face of the budget defeat by the voters, the hearing examiner recommends that the reduction be sustained.

Summary:	Reduction by Council	\$3,000
	Amount Restored	— 0 —
	Amount not Restored	\$3,000

*J215 Principals-Secretaries-Salaries-Reduction \$1,033*

Council contends that the increase in this budget item from \$17,631 to \$19,634 is excessive. However, a review of the Board's actual expenditure during the 1972-73 school year shows that a total of \$18,610 was actually expended

from the account. The Board's salary policy with regard to salary increments is clearly consistent with this figure, and accordingly, the hearing examiner recommends full restoration of those funds excised herein by Council.

Summary:	Reduction by Council	\$1,033
	Amount Restored	\$1,033
	Amount not Restored	- 0 -

*J230a Library Books - Reduction \$2,430*

Council maintains the increase in this account from the 1972-73 budgeted figure of \$3,880 to the budgeted figure of \$6,430 in 1973-74 would be excessive. The Board asserts, however, that there is an unusual expense to be incurred, herein, as the result of a decision by the Borough of Stratford to withdraw from participation in the program and service formerly provided by the county library. This decision, the Board now avers, necessitated an action to return all county library books to the county library or to pay for them if lost.

In this regard, the Board states it has an outstanding bill of \$543.94 to be paid for lost books, and that it has also spent \$664.43 to purchase books needed to serve as replacements for those returned.

Because of this testimony and cognizant of the inflated costs of books, the hearing examiner recommends restoration to the Board of \$1,000 of the amount determined as an appropriate reduction by Council, but that \$1,430 of such reduction be sustained.

Summary:	Reduction by Council	\$2,430
	Amount Restored	\$1,000
	Amount not Restored	\$1,430

*J230c Audiovisual-Reduction \$4,090*

Council notes that a surplus of \$362.49 remained in the Board's account for audiovisual materials at the end of the 1972-73 school year, and it recommends an expenditure of \$3,500 for the 1973-74 school year. Such sum would represent an increase of \$375. The hearing examiner recognizes the desirability of an encouragement of staff to utilize new teaching materials, but finds an increase of over 140% untenable in the face of the budget defeat by the voters at the February referendum, and he recommends that the reduction by Council be sustained in full at \$4,090.

Summary:	Reduction by Council	\$4,090
	Amount Restored	- 0 -
	Amount not Restored	\$4,090

*J240 Teaching Supplies-Reduction \$2,339*

Council notes a surplus of \$2,339 in the Board's account for teaching supplies on June 30, 1973, and recommends increasing the 1972-73 budgeted amount of \$23,851, slightly, to \$24,000. The Board asserts it needs a larger increase, to \$26,339, but, aside from noting increased costs of supplies, presents no convincing proof of need justifying an increase in the line item of 30% over

1972-73 expenditures. Accordingly, the hearing examiner recommends that the reduction of \$2,339 be sustained.

Summary:	Reduction by Council	\$2,339
	Amount Restored	— 0 —
	Amount not Restored	\$2,339

*J250c Miscellaneous Expense-Reduction \$1,150*

Council notes a surplus within this account of \$2,016.19 on June 30, 1973. The Board contends it plans to spend \$150 per teacher for innovative ideas. While the hearing examiner believes such an expenditure would be commendable, he cannot recommend such finding as essential for the maintenance of a thorough and efficient educational system in Stratford. Accordingly, he recommends that Council's reduction be sustained.

Summary:	Reduction by Council	\$1,150
	Amount Restored	— 0 —
	Amount not Restored	\$1,150

*J630 Heat-Reduction \$1,000*

Council recommends a budgeted figure of \$9,000, an amount less than the actual expenditure of \$9,201.08 incurred by the Board for heat expense in 1972-73. The Board feels that abrupt increases in fuel costs necessitate budgeting \$10,000. The hearing examiner concurs with the Board's view in this regard, and recommends restoration of \$1,000 as essential to the Board's use in heating its schools during the 1973-74 school year.

Summary:	Reduction by Council	\$1,000
	Amount Restored	\$1,000
	Amount not Restored	— 0 —

*J720b Contracted Services-Building-Reduction \$5,200*

The Board proposes certain expenditures herein with regard to its Princeton School; namely, repairs of the front entrance (\$1,750), addition of new lighting to meet recommended lumens in classrooms (\$4,000), renovation of ceilings (\$1,000), and replacement of wooden frame windows with aluminum ones (\$8,000). The building is an old one and the Board regards each expenditure as essential. The Board further states that the foregoing is part of an ongoing program to upgrade the school, and testimony in this regard is supported by pictures which were submitted in evidence at the hearing, *ante*. Such pictures, even standing alone as evidence, in the judgment of the hearing examiner, attest to the necessity for the upgrading and renovation proposed. Although the hearing examiner recognizes the logic of Council, wherein it states that the replacement of window sashes could be accomplished over a two-year period, he finds that the budgeting of \$19,150 is not excessive or unreasonable in view of the evident need and he recommends restoration of \$5,200.

Summary:	Reduction by Council	\$5,200
	Amount Restored	\$5,200
	Amount not Restored	— 0 —

***J730c Instructional Equipment-Reduction \$1,738***

The Board seeks, within this account, to add such items as ½" videotape recorder and numerous audiovisual machines. The hearing examiner does not question the desirable educational outcomes which could be effected through wise use of such media, but he does not categorize as essential such additional expenditures as herein programmed. He does believe, however, that in face of the defeat of the budget at the polls, such advances must be limited.

Accordingly, he recommends that Council's reduction of \$1,738 be sustained.

Summary:	Reduction by Council	\$1,738
	Amount Restored	— 0 —
	Amount not Restored	\$1,738

***J830a Rental-Reduction \$2,000***

At a time subsequent to the hearing, *ante*, Council and the Board came to an agreement with respect to the proposed expenditures from this account, and it is stipulated, at this juncture, that Council has abandoned its opposition to the Board's asserted need for the full budgeted amount. Accordingly, the hearing examiner recommends full restoration.

Summary:	Amount of Reduction	\$2,000
	Amount Restored	\$2,000
	Amount not Restored	— 0 —

***L1220c Site Improvement-Reduction \$1,000***

In view of Council's contention that the \$500 budgeted in 1972-73 within this account was completely unspent, and because of a lack of convincing evidence that there is a need for the money budgeted by the Board for the school year 1973-74, the hearing examiner recommends sustaining the reduction of \$1,000.

Summary:	Reduction by Council	\$1,000
	Amount Restored	— 0 —
	Amount not Restored	\$1,000

The following chart presents the further recommendations of the hearing examiner.

CHART II

Account Number	Item	Reduction by Council	Recommended for Restoration	Not Recommended for Restoration
<b>CURRENT EXPENSE</b>				
J110b	Bd. Secy.-Sal.	\$ 400	\$ 400	\$ — 0 —
J110b.1	Bd. Secy.-Clerk-Sal.	300	— 0 —	300
J110f	Supt.-Sal.	618	618	— 0 —
J110f.1	Supt.-Secy.-Sal.	182	182	— 0 —
J130d	School Elections	200	— 0 —	200



J211	Principals-Sals.	807	807	- 0 -
J215.1	Part-time Clerks.-Sals.	200	- 0 -	200
J520b	Travel Expense	250	- 0 -	250
J410a	Nurses-Sals.	1,239	1,239	- 0 -
J420b	Nurses-Travel Exp.	250	250	- 0 -
J420c	Misc.-Expense-Health	100	- 0 -	100
J520c	School Trip Exp.	600	- 0 -	600
J550a	Gasoline	300	- 0 -	300
J640d	Telephone	300	300	- 0 -
J650c	Grounds Maintenance	50	50	- 0 -
J720c	Repair of Equip.	850	450	400
J740a	Upkeep of Grounds	50	50	- 0 -
J740b	Building Repairs	700	700	- 0 -
J740c	Misc. Expense	425	- 0 -	425
Subtotals - Current Expense		\$7,821	\$5,046	\$2,775
<b>CAPITAL OUTLAY</b>				
L1230c	Remodeling	885	245	640
L1240g	Equip.-Maint.	575	575	- 0 -
Subtotals - Capital Outlay		\$1,460	\$ 820	\$ 640
Totals - Current Expense and Capital Outlay		\$9,281	\$5,866	\$3,415

The following chart summarizes the hearing examiner's recommendations:

### CHART III

#### CURRENT EXPENSE

Account Number	Item	Council's Reduction	Amount Restored	Amount Not Restored
J110e	Legal Services	\$ 800	\$ 800	\$ - 0 -
J130m	Printing	1,000	- 0 -	1,000
J213	Teachers-Sals.	23,949	23,949	- 0 -
J213.1	Substitutes, Aides-Sals.	3,000	3,000	- 0 -
J213.3	Curriculum Constr.-Sals.	3,000	- 0 -	3,000
J215	Principals-Secys.-Sals.	1,033	1,033	- 0 -
J230	Library Books	2,430	1,000	1,430
J230c	Audiovisual	4,090	- 0 -	4,090
J240	Teaching Supplies	2,339	- 0 -	2,339
J250c	Misc. Expense	1,150	- 0 -	1,150
J630	Heat	1,000	1,000	- 0 -
J720b	Contr. Services-Bldgs.	5,200	5,200	- 0 -
J730c	Instr. Equip.	1,738	- 0 -	1,738
J830a	Rental	2,000	2,000	- 0 -
	Chart II	7,821	5,046	2,775
Subtotals - Current Expense		\$60,550	\$43,028	\$17,522

#### CAPITAL OUTLAY

L1220c	Site Improvement	1,000	- 0 -	1,000
	Chart II	1,460	820	640
Subtotals - Capital Outlay		\$ 2,460	\$ 820	\$ 1,640
Grand Totals - Current Expense and Capital Outlay		\$63,010	\$43,848	\$19,162

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record, the report of the hearing examiner, and considered the recommendations and findings contained therein. He concurs with the total determination contained in the report of the hearing examiner. He finds that the sum of \$43,028 must be added to the amount previously certified by Council to be raised for the current expenses of the school district; and that the sum of \$820 must be added to the amount previously certified by Council to be raised for capital outlay of the school district of Stratford, in order to provide funds to maintain a thorough and efficient system of education in the public schools of the district of Stratford for the school year 1973-74. He therefore directs the Council of the Borough of Stratford to add, to the previous certification to the Camden County Board of Taxation of \$790,979 for the current expenses of the school district, the amount of \$43,028, so that the total amount of the tax levy for current expenses for 1973-74 shall be \$834,007. Additionally, the Commissioner directs Council to add to the previous certification of \$3,260 for capital outlay of the school district the amount of \$820, so that the total amount of the tax levy for capital outlay for 1973-74 shall be \$4,080.

COMMISSIONER OF EDUCATION

December 4, 1973

**In the Matter of the Special School Election  
Held in the West Morris Regional School District,  
Morris County.**

**COMMISSIONER OF EDUCATION  
DECISION**

The annual results of a special election held on September 25, 1973 in the West Morris Regional High School District, authorizing the Board of Education, hereinafter "Board," to undertake certain capital improvement projects and to expend therefor a sum not to exceed \$2,350,000, which sum was proposed to be raised through the issuance of bonds in that amount, were as follows:

Voting District	Place	Proposal			Absentee	
		Yes	No	Void	Yes	No
No. 1	Chester Twp.	104	480		1	
No. 2	Mendham Borough	97	178	14	2	
No. 3	Mendham Twp.	66	133		1	1
No. 4	Mendham Twp.	30	55	1		
No. 5	Mt. Olive Twp.	521	147			
No. 6	Mt. Olive Twp.	211	58			2
No. 7	Mt. Olive Twp.	317	106			
No. 8	Washington Twp.	68	175			
No. 9	Washington Twp.	40	124			
Subtotals		1454	1456	15	4	3
Absentee		4	3			
Grand Totals		1458	1459			

Subsequent to the election, the Commissioner of Education received a request from Muriel S. Wolfe, Secretary of the Board, for a recount of the ballots cast. The request was made on behalf of the Board. Thereafter, a recount was authorized by the Commissioner and was conducted by a representative, appointed by the Commissioner, at the office of the Morris County Superintendent of Schools, Morris Plains, on October 5, 1973.

At the conclusion of the recount, with 147 ballots reserved for determination by the Commissioner, the tally of uncontested ballots stood as follows:

	PROPOSAL	
	Yes	No
Ballots Recounted	1373	1402
Absentee	4	3
Totals	1377	1405

The 147 contested ballots have been separated into twenty-two (22) exhibits by agreement of the respective parties present at the recount, and a

description of each of these exhibits is set forth as follows in narrative form for consideration by the Commissioner. The Commissioner's representative has also set forth his recommendations.

*Exhibit A – Thirty-Six (36) Ballots*

Twenty-one of the ballots in this exhibit have marks in the proper squares to the left of the word "no" and fifteen ballots contain marks to the left of the word "yes". All marks are substantially a "cross" or "plus" within the square; but in each instance, there is a double or triple line reiteration.

The hearing examiner has researched previous decisions with respect to the deficiencies noted herein and recommends that all of these ballots be counted. This recommendation is founded on a series of prior decisions by the Commissioner in this regard. *In the Matter of the Ballots Cast at the Special School Election in the Township of Tewksbury, 1939-49 S.L.D. 96; In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County, 1960-61 S.L.D. 170; In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County, 1969 S.L.D. 44* In this latter decision, the Commissioner said, with respect to similar marks:

“\*\*\* It is the Commissioner's judgment that these votes must be counted. Although the marks are poorly and crudely made, they are substantially those required by R.S. 19:16-3g which provides in part as follows:

“ ‘If the mark for any candidate or public question is substantially a cross x, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be \*\*\*.’

“Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish the ballots.\*\*\*” (at pp. 45-46)

The recommendation herein is similarly grounded.

Summary of Recommendation:    Add to Tally  
    Yes – 15  
    No – 21

*Exhibit B – Four (4) Ballots*

All of these ballots, from three different polling places, have the designated cross, plus, or check within the proper square, but they are marked or marked over, by the use of two writing instruments – pen and pencil.

The hearing examiner recommends that these ballots be counted. As the Commissioner said *In the Matter of the Recount of the Ballots Cast at the Annual School Election in the Borough of Watchung, supra*:

“\*\*\* Although R.S. 18:7-32 refers to the use of black ink or black pencil in making the required kind of mark, the Commissioner in his determination of election contests has always held that this is directory and not mandatory legislation. Support for this holding is found in Title 19, which, while not binding in school elections, has been looked to for guidance by the Commissioner in deciding disputed elections. The relevant excerpt of R.S. 19:16-4 states: ‘*No ballot shall be declared invalid by reason of the fact that the mark made with ink or the mark made with lead pencil appears other than black.*\*\*\*’ (*Emphasis supplied.*) (at p. 171)

Summary of Recommendation:    Add to Tally  
   Yes — 4  
   No — 0

*Exhibit C – Six (6) Ballots*

Five of these ballots have marks identified at the recount by agreement as “stars.” Each of the stars is within the proper designated box.

The Commissioner’s representative has carefully examined the ballots herein and believes they must be counted. Each of them does contain a check as part of the total pattern and the total pattern of each ballot may be considered an idiosyncrasy of the voter and not an attempt to distinguish the ballot. However, the Commissioner said *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Sayreville, Middlesex County, 1951-52 S.L.D. 47*:

“\*\*\* It is quite common to find in recounting ballots that the voters express certain idiosyncrasies. It is the opinion of the Commissioner that these marks were not intended to identify the ballots.\*\*\* (at p. 48)

Accordingly, the recommendation herein is that these ballots be counted.

Summary of Recommendation:    Add to Tally  
   Yes — 1  
   No — 5

*Exhibit D – Nine (9) Ballots*

Eight of the ballots herein have the requisite check, plus, or cross in the designated square to the left of the word “no,” and one ballot contains a cross to the left of the word “yes.” However, all ballots contain some indication of erasure, either within the designated square or outside it.

The Commissioner’s representative recommends that all of these ballots be added to the tally, since the erasures, herein in contest, were clearly minor and provide no indication that there was an attempt to identify or distinguish the ballot. *In Re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, Monmouth County, 1955-56 S.L.D. 108; In the Matter of the Recount of Ballots Cast in the Annual School Election in the*

*Township of East Greenwich, Gloucester County, 1953-54 S.L.D. 108; In Re East Rutherford Annual School Election, 1938 S.L.D. 183*

Summary of Recommendation:    Add to Tally  
  Yes — 1  
  No — 8

*Exhibit E — One (1) Ballot*

This ballot is an art design in the form of a cross, and for the reasons expressed with regard to Exhibit C, *ante*, the Commissioner's representative recommends that it be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 0  
  No — 1

*Exhibit F — Eleven (11) Ballots*

These eleven ballots all contain marks that constitute a cross, plus or check in the appropriate square; but, additionally, each mark has certain deviations of line, or extra faint lines which, by agreement, the group present at the recount characterized as "squiggles."

However, the deviations are so minor and so clearly inadvertent, that the Commissioner's representative finds no reason to believe there was any attempt to identify or distinguish the ballots. Accordingly, he recommends that all eleven ballots be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 4  
  No — 7

*Exhibit G — Eight (8) Ballots*

All of these ballots contain checks that are properly made and substantially within the appropriate square, but in each instance, the check is "backward." Nevertheless, the Commissioner's representative believes the intent of the respective voters is clear and he recommends that all ballots be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 6  
  No — 2

*Exhibit H — Twelve (12) Ballots*

All of the ballots in this exhibit are deficient in one principal respect — none of them contains a mark in the appropriate square to the left of the words "yes" and "no."

Accordingly, the Commissioner's representative recommends that the

ballots not be added to the tally since there are no marks “\*\*\*substantially within the square\*\*\*” as required by statute. *N.J.S.A. 19:16-3g In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, supra*

Summary of Recommendation:	Add to Tally
Yes —	0
No —	0

*Exhibit I – Two (2) Ballots*

One of these ballots contains six more or less straight lines and no line intersects any other. The other ballot contains approximately twenty-three more or less straight lines connected in a pattern of continuous flow. In the judgment of the Commissioner’s representative, neither ballot can be held to contain an appropriate “cross (x) or plus (+) or check (✓)” to the left of the words “yes” or “no” imprinted on the ballot.

Accordingly, the Commissioner’s representative recommends that these ballots be removed from consideration as additions to the tally.

Summary of Recommendation:	Add to Tally
Yes —	0
No —	0

*Exhibit J – Seven (7) Ballots*

All of these ballots contain double marks or joined cross marks probably as the result of hasty writing. However, in the judgment of the Commissioner’s representative, there is no attempt herein to identify or distinguish the ballots, and the ballots must be added to the tally. *In Re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation:	Add to Tally
Yes —	3
No —	4

*Exhibit K – One (1) Ballot*

This one ballot contains a properly made x in the appropriate square before the imprinted word “no” and additionally three small lines which underline the “no.” However, the Commissioner’s representative finds no reason to justify a finding that the extra marks were intended to identify or distinguish the ballot, and he recommends that it be added to the tally. *In Re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation:	Add to Tally
Yes —	0
No —	1

*Exhibit L – One (1) Ballot*

This ballot contains a proper cross in an appropriate square before the imprinted word “no” and another cross which bisects the “no.” However, the Commissioner’s representative finds no reason to believe the double mark was intended to identify or distinguish the ballot and he recommends that the vote be added to the tally. *In Re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation	Add to Tally
	Yes — 0
	No — 1

*Exhibit M – One (1) Ballot*

This ballot contains a properly drawn cross in an appropriate square before the imprinted word “yes” and a straight line which begins at the bottom right of the square and extends down through part of the square opposite the square to the left of the word “no.” However, the straight line has none of the appearance of a mark meant to indicate a cancelling “no” vote, and there is no reason to suppose it was anything other than an inadvertent slip of the pencil.

Accordingly, the hearing examiner recommends this ballot be added to the tally.

Summary of Recommendation:	Add to Tally
	Yes — 1
	No — 0

*Exhibit N – Thirty-Four (34) Ballots*

Each one of the ballots in this exhibit is properly marked, except that all marks are notated in green ink. However, faced with a decision concerning such use of green ink *In the Matter of the Recount of Ballots Cast at the Special School Election in the Northern Valley Regional High School District, Bergen County, 1959-69 S.L.D. 121*, the Commissioner said:

“\*\*\* The Commissioner has held consistently that ballots marked with cross (x), plus (+) or check marks (✓) in the proper square should not be voided solely because of the use of blue or blue-black ink. See *In Re Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Ocean County*, decided by the Commissioner on April 10, 1958. The marks on these ballots and on two marked in *green ink did not appear to distinguish the ballots* or to make any particular ballot other than a secret ballot by reason of the color or the marks or otherwise.”\*\*\*”  
(*Emphasis supplied.*) (at p. 122)

(See also *N.J.S.A. 19:15-3g.*)

Thereupon, the Commissioner indicated it was agreed by respective counsel that the ballots should be counted.



The recommendation of the Commissioner's representative herein is to the same effect.

Summary of Recommendation:    Add to Tally  
  Yes — 32  
  No — 2

*Exhibit O — One (1) Ballot*

This ballot contains no cross, plus or check; but, instead contains the word "yes" written in the appropriate box to the left of the imprinted word. However, it is clear that the written "yes" cannot substitute as the "proper mark" which the statute requires. *N.J.S.A. 19:16-3e* Nor can the word "yes" be conceivably held to be a mark which is substantially a cross x, plus + or check ✓." *N.J.S.A. 19:16-3g*

Accordingly, the Commissioner's representative recommends that this ballot be adjudged invalid.

Summary of Recommendation:    Add to Tally  
  Yes — 0  
  No — 0

*Exhibit P — Six (6) Ballots*

The ballots herein, and all of the ballots marked in green ink contained in Exhibit N, *ante*, were all cast in Polling District No. 5 at the referendum of September 25, 1973. These ballots of this exhibit, however, are distinguished from the ballots contained in Exhibit N, *ante*, because the markings herein are in pencil and green ink rather than in ink alone.

Nevertheless, the recommendation of the Commissioner's representative, for the reasons advanced previously, is the same; namely, that these ballots be added to the tally since there is no evidence that there was an attempt to identify or distinguish the ballots and because of the express statutory prescription,

\*\*\*\* 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.\*\*\*\* *N.J.S.A. 19:16-4*

Summary of Recommendation:    Add to Tally  
  Yes — 5  
  No — 1

*Exhibit Q — Two (2) Ballots*

Both of these ballots contain properly executed marks in the appropriate squares to the left of the word "no," but additionally, one ballot contains an appropriate straight line through the imprinted "no" and the other ballot has an erased circle around the word "no."

However, the Commissioner's representative recommends that these ballots be added to the tally for the reason expressed with regard to Exhibit D, *ante*.

Summary of Recommendation:    Add to Tally  
  Yes — 0  
  No — 2

*Exhibit R – One (1) Ballot*

This ballot contains a proper check in the appropriate box to the left of the word “no” and, additionally, a handwritten spelling of the word. However, the Commissioner's representative does not find reason to hold that the reiteration is other than a firm avowal and expressed intention and, accordingly, he recommends that the ballot be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 0  
  No — 1

*Exhibit S – One (1) Ballot*

This ballot contains a proper cross, except that the mark is heavily drawn and has the appearance of a crayon drawing on paper lying on a rough wooden surface.

The Commissioner's representative recommends, for reasons expressed with respect to Exhibit N, that this ballot be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 0  
  No — 1

*Exhibit T – One (1) Ballot*

This ballot is properly marked except that the marking is in red ink. However, for reasons expressed with respect to Exhibit N, the Commissioner's representative recommends that this ballot be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 1  
  No — 0

*Exhibit U – One (1) Ballot*

This ballot, similar to all ballots in Exhibit N, is marked in green, but with a breadth of line which indicates that the voter used a felt-tipped writing instrument. However, for the reason expressed in Exhibit N, the hearing examiner recommends that this ballot be added to the tally.

Summary of Recommendation:    Add to Tally  
  Yes — 1  
  No — 0

*Exhibit V – One (1) Ballot*

This ballot contains a proper cross in the appropriate box, except that one side of the penciled cross is over-lined with red. However, the Commissioner's representative believes there is no basis to void this ballot because of such marking, and for reasons previously expressed in Exhibit N, he recommends that this ballot also be added to the tally.

Summary of Recommendation:      Add to Tally  
    Yes – 1  
    No – 0

Thus, a summary of uncontested votes and the recommendation of the Commissioner's representative is set forth as follows:

**SUMMARY**

	<b>Add to Tally</b>	
	<b>Yes</b>	<b>No</b>
Uncontested Ballots – At Polls	1373	1402
Absentee Ballots	4	3
Exhibit A	15	21
Exhibit B	4	0
Exhibit C	1	5
Exhibit D	1	8
Exhibit E	0	1
Exhibit F	4	7
Exhibit G	6	2
Exhibit H (12 Ballots)	0	0
Exhibit I (2 Ballots)	0	0
Exhibit J	3	4
Exhibit K	0	1
Exhibit L	0	1
Exhibit M	1	0
Exhibit N	32	2
Exhibit O (1 Ballot)	0	0
Exhibit P	5	1
Exhibit Q	0	2
Exhibit R	0	1
Exhibit S	0	1
Exhibit T	1	0
Exhibit U	1	0
Exhibit V	<u>1</u>	<u>0</u>
Grand Totals	1452	1462

Voided Ballots 15 (Exhibits H and I and O)

Finally, it is noted by the Commissioner's representative, that the summary sheet and the consolidated announced results of the election herein state that 423 votes were tallied in Polling District No. 7. However, the

individual report from Polling District No. 7 attests to a total tally of only 420 votes and the Commissioner's representative confirms that figure.

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the report of his representative in the instant matter and concurs with the opinion expressed therein. Accordingly, the Commissioner finds and determines that the proposal set forth on the ballots submitted to the voters of the West Morris Regional School District on September 25, 1973, was defeated.

COMMISSIONER OF EDUCATION

December 7, 1973

**Board of Education of the Toms River Regional School District  
and Township of Dover,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Lavallette and the  
Borough of Lavallette, Ocean County.**

*Respondents.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Toms River Board, Hierung, Grasso, Gelzer & Kelahe  
(Milton H. Gelzer, Esq., of Counsel)

For the Petitioner, Dover Township, Laurence Hecker, Esq.

For the Respondent, Lavallette Board, William Miller, Esq.

For the Respondent, Lavallette Borough, Sim, Sinn, Gunning, Serpentelli  
& Fitzsimmons (Eugene D. Serpentelli, Esq., of Counsel)

Petitioners are the Board of Education of the Toms River Regional School District, hereinafter "Toms River Board," which regional school district consists of the four constituent school districts of the Township of Dover, and the Boroughs of Pine Beach, Beachwood, and South Toms River; and the Township of Dover, hereinafter "Dover Township," a municipal corporation of this State. Respondents are the Board of Education of the Borough of Lavallette, hereinafter "Lavallette Board," and the Borough of Lavallette, hereinafter "Lavallette Borough," a municipal corporation.

Petitioners contend that the Lavallette Board is responsible for assuming that portion of the school debt of the Toms River Regional School District which was a proportion of the share attributable to the constituent School District of Dover Township, by virtue of the annexation of that part of Dover Township known as West Point Island by Lavallette Borough on January 1, 1970.

Respondents Lavallette Board and Lavallette Borough deny the contention and request the Commissioner of Education to determine that neither the Lavallette Board nor Lavallette Borough has any obligation for any school debt incurred by the Toms River Regional School District prior to the annexation of West Point Island to Lavallette Borough from Dover Township.

The stipulation of relevant facts by all the parties obviates the necessity for plenary hearing. All parties agreed to move for Summary Judgment by the Commissioner. Briefs have been filed jointly by petitioners and respondents.

The facts are as follows:

In the year 1965, a number of the residents of the area known as West Point Island determined that they desired to secede from Dover Township and become annexed to Lavallette Borough. Dover Township withheld consent of this proposal and the Appellate Division of New Jersey Superior Court determined that Dover Township could not arbitrarily withhold such consent. *West Point Island Civic Association v. Dover Township Committee*, 93 N.J. Super. 206 (App. Div. 1966) The Petition of the West Point Island residents was the subject of a plenary hearing, and the final determination of the Court ordered that Dover Township affix its consent to the application by the residents for annexation to Lavallette Borough. *West Point Island Civic Association v. Dover Township Committee*, 97 N.J. Super. 549 (Law Div. 1967), affirmed 54 N.J. 339 (1969)

West Point Island was a part of Dover Township from 1767 until 1970. Dover Township occupies 44.03 square miles in Ocean County and in 1960 had a population of 17,414. Across Barnegat Bay, which is east of the mainland of Dover Township, lies West Point Island, one-half mile square. The Island is adjacent to Lavallette Borough, to the east of which is the Atlantic Ocean. (Exhibit R-1) The only means of access to the Island is a short bridge from Lavallette Borough which is one of several municipalities situated on the long bar of land which parallels the Ocean County mainland for several miles, and which is connected to the mainland by two bridges spanning Barnegat Bay. West Point Island is seven and one-half miles from the business center of Dover Township, and one must travel through Lavallette Borough and the adjoining borough, as well as through Dover Township, to reach that center. There is no schoolhouse situated on West Point Island, and none existed prior to the annexation. On January 1, 1970, the land area of West Point Island formally became part of Lavallette Borough and its citizens became residents of Lavallette Borough. Concurrently the land area of West Point Island became part of the Lavallette School District.

The Lavallette Board operates a school for pupils enrolled in grades kindergarten through eight. Resident pupils enrolled in grades nine through twelve attend Point Pleasant Beach High School on a tuition basis under a sending-receiving relationship between the Lavallette Board and the Point Pleasant Beach Board.

Under date of February 26, 1970, a joint committee of six members, appointed in accordance with R.S. 40:43-31, submitted to both the Township Committee of Dover and the Mayor and Borough Council of Lavallette its report and recommendations (Exhibit J-1), concerning the appropriate share of municipal debt of Dover Township to be borne by Lavallette Borough as the result of Lavallette Borough's annexation of West Point Island. The committee was unable to agree whether the Dover Township portion of the school debt of the Toms River Regional School District should be included in the apportionment to Lavallette Borough and Lavallette School District.

During the time that West Point Island was a part of Dover Township, the Toms River Regional School District, of which Dover Township is a constituent, incurred a substantial bonded school debt. As of September 2, 1969, the total amount of bonded school debt of the Toms River Regional School District which could be allocated to Dover Township was \$11,504,602.00. Petitioners assert that if they prevail in their arguments, the Lavallette Board would be obligated to pay \$180,939.73 to the Toms River Board.

The precise issue controverted herein is whether or not the Lavallette Board is responsible for assuming that portion of the school debt of the Toms River Board which was a proportion of the share of debt attributable to the constituent school district of Dover Township, by virtue of the annexation of the part of Dover Township known as West Point Island, by Lavallette Borough on January 1, 1970.

In the case of *Township of Bloomfield v. Mayor and Council of the Borough of Glen Ridge et al.*, 54 N.J. Eq. 276 (Chan. 1896), the Township sought an injunction restraining the Borough from interfering with the operation of a sewerage system which had been constructed by the Township; but was partially contained within the boundaries of the then, newly-formed Borough. The Court made the following comment regarding several aspects of the case:

“\*\*\*Many of the questions which spring out of the divisions of the territory of a municipality in respect to the property of the old municipality are entirely settled. For instance, it is settled that the legislature, by virtue of its control over municipal corporations, has the ability to fix the rights of the new and the old corporation in the property, and to adjust the burden of the corporate debts. *Dill. Mun. Corp.* §127.

“It is also settled that where no legislative adjustment is provided for, then the old corporation remains liable for all the debts. *Dill. Mun. Corp.* §128. It is also settled that all transitory property such as bonds, money in

sinking funds and property of that class, and all real estate that lies within the limits of the old corporation, remains the property of the old municipality.\*\*\*\*” (54 N.J. Eq., at p. 279)

The Court ultimately dismissed the complainant’s suit on the grounds that an adequate remedy would be resort to a writ of *certiorari*. The Court’s interposition of the demurrer was affirmed by the Court of Errors and Appeals, 55 N.J. Eq. 505 (E. & A. 1897).

The principle of law set forth in *Bloomfield, supra*, was relied upon in *McCully v. Tracy*, 66 N.J.L. 489 (Sup. Ct. 1901). In *McCully, supra*, the plaintiff had recovered a judgment of \$1,234.35 against the Board of Education of the Township of Ridgefield, Bergen County, on June 7, 1898, but only a portion of said judgment had been satisfied; therefore, an application for *mandamus* to the assessor and collector was made to enforce payment of the balance. The defense was that, since the rendition of the judgment, some portions of the territory of the Township of Ridgefield had been severed by legislative enactment and added to other municipalities which, it was contended, must therefore share in the payment of the judgment.

The Court stated the following:

“\*\*\*\* The legislature has power to divide municipal corporations at pleasure, and to apportion the common property and the common burdens as it may deem reasonable. *Neilson v. Newark*, 20 Vroom 246; *Commissioners v. Albany County*, 92 U.S. 307.

“In the absence of provision to the contrary the old corporation owns all the property within its limits, and is liable for the previously contracted debts. *Mount Pleasant v. Beckwith* 100 U.S. 514; *McCully v. Board of Education*, 34 Vroom 18.\*\*\*\*” (66 N.J.L., at p. 490)

A similar issue of law was raised in the case of *Board of Education of the Borough of West Paterson v. Board of Education of the Township of Little Falls, Passaic County, and the State Board of Education*, 92 N.J.L. 284 (Sup. Ct. 1918). The Court reviewed the ruling of the State Board of Education affirming the decision of the Commissioner of Education in a dispute between the two local education boards which related to the apportionment of a deficit in the school account existing at the time of the separation of West Paterson Borough from Little Falls Township. The separation took place by act of the Legislature in 1914, and the then-applicable law provided that when a new school district was created, any balance of funds remaining in the hands of the custodian of school moneys of the original school district at the end of the school year would be apportioned by the county superintendent between the school districts, in accordance with provisions of law. The Court took notice of the fact that the law referred to any balance of funds, and that no provision was made, expressly or by implication, with reference to a deficit. The Commissioner had ruled that since West Paterson would have been entitled under statute to thirty per cent of any balance, that school district was in justice required to bear thirty per cent of

the deficit and this decision was substantially affirmed by the State Board of Education.

The opinion of the Court stated, *inter alia*, the following:

“\*\*\* We think that this was error. Whatever the natural justice of the case may seem to be, it is a matter which is regulated entirely by statute, so far as there is any regulation, and where the legislature has failed to provide for a contingency such as this, it must be either regarded as a *casus omissus* or else the conclusion must be that the legislature, having contemplated the contingency of a deficit, chose to leave it where it originated, viz., as an indebtedness of the original school district.

“\*\*\* Our conclusion, on a careful examination of the statute, is that the rights and liabilities of the two districts are to be settled by a reference to the act, and that alone, and as there is no provision therein for the apportionment of a deficit, the district of West Paterson is not liable for any part thereof.\*\*\*” (92 *N.J.L.*, at 286-287)

In *Graham et al. v. the Township of Edison et al.*, 35 *N.J.* 537 (1961), the New Jersey Supreme Court decided the question as to the extent of the class then entitled to the benefit of certain school lands located almost entirely within the Township of Woodbridge, which had anciently derived from the original charter granted by the colonial proprietors to the Town of Woodbridge. The Court pointed out that New Jersey had no general statute providing for the disposition of public real property upon the creation of new municipalities out of the territory of the original town, prior to the enactment of *L. 1898 c. 15*. The Court observed that the common law rule set forth in *Laramie County Commissioners v. Albany County Commissioners*, 92 *U.S.* 307, 23 *L. Ed.* 552 (1876), and *Town of Mount Pleasant v. Beckwith*, 100 *U.S.* 514, 25 *L. Ed.* 699 (1880) was the rule adopted by the New Jersey Legislature in the 1898 statute. The Court stated that “\*\*\* the question is thereby settled in this State with respect to municipal separations after that date.\*\*\*” (35 *N.J.*, at p. 555) Both of the above-mentioned cases, *Laramie*, *supra*, and *Mount Pleasant*, *supra*, will be discussed *post*.

The question of apportionment of bonded indebtedness between two local boards of education was the subject of the case of *Board of Education of the Township of Bernards v. Board of Education of the Borough of Bernardsville*, 8 *N.J. Super.* 124 (*App. Div.* 1950). In *Bernards*, *supra*, the Borough was obligated to pay the bonded indebtedness of the high school, which was located within the Borough, and which totaled \$114,000, under the provisions of *R.S. 18:5-6*. It is noteworthy to mention that *R.S. 18:5-2* through *R.S. 18:5-10* were repealed by *L. 1953, c. 417 §16*, effective July 1, 1954. *Bernards*, *supra*, was decided by an interpretation of then *R.S. 18:5-6* and 10.

The same enactment, *L. 1953, c. 417*, which repealed *R.S. 18:5-2* through *R.S. 18:5-10*, also established *R.S. 18:5-1.1* through *R.S. 18:5-1.15*, effective



July 1, 1954, which are now *N.J.S.A.* 18A:8-4 through 18A:8-24, Article 4, Municipalities Divided Into Two or More Municipalities.

The original statutes, *R.S.* 18:15-14 through *R.S.* 18:5-17, were repealed by *L.* 1947, c. 86, which also enacted *R.S.* 18:5-17.1 through *R.S.* 18:5-17.18. These later statutes are now found at *N.J.S.A.* 18A:8-25 through 35, Article 5, Consolidated Districts.

Only three statutes, *R.S.* 18:5-11 (now *N.J.S.A.* 18A:8-3.1), *R.S.* 18:5-12 (now *N.J.S.A.* 18A:8-3.2) and *R.S.* 18:5-13.1 (now *N.J.S.A.* 18A:8-3.3) remain in substantially the same form since the original chapter 5 of Title 18.

In *Bernards, supra*, the Court pointed out that the Borough was required to assume the entire bonded indebtedness of the high school in the total amount of \$114,000 by virtue of then *R.S.* 18:5-6. The decision of the Commissioner, affirmed by the State Board of Education, apportioned the total bonded indebtedness against the Borough at \$152,019.32, and that determination was the subject of the appeal to the Appellate Division of Superior Court.

The Commissioner's determination took into account that the total indebtedness to be apportioned was \$178,000 consisting of the aforementioned \$114,000, plus \$64,000 on another schoolhouse located within the Township.

The Court noticed in *Bernards, supra*, that both *R.S.* 18:5-6 and 10 were applicable and stated the following:

“\*\*\*The situation is controlled by statute and if the apportionment is to be sustained, it can only be done by virtue of statutory authority. *Board of Education of West Paterson v. Board of Education of Little Falls*, 92 *N.J.L.* 284 (*Sup. Ct.* 1918). \*\*\*” (8 *N.J. Super.*, at p. 127)

The statute *R.S.* 18:5-10 (repealed) read as follows:

“When a part of a school district shall become a new school district or a part of another school district, the new district or the district of which it becomes a part shall assume the liability for a proportion of the indebtedness of the whole original district outstanding at the time of separation, which proportion shall be as are the ratables of the separating part of the district to the ratables of the whole original district. The value of such ratables shall be computed from the records of the tax assessor for the year next preceding the date of separation.”

The Court stated that:

“\*\*\* *R.S.* 18:5-6 and *R.S.* 18:5-10 are a part of the existing school laws and are to be reconciled if possible so as to give purposeful meaning to each.\*\*\*” (8 *N.J. Super.*, at p. 128)

The Court's construction, which gave effect to both sections of the

statute, determined that since the Borough's assumption of \$114,000 of bonded indebtedness under R.S. 18:5-6 exceeded that of the bonded indebtedness that it would necessarily have had to assume under R.S. 18:5-10, the Borough owed nothing beyond the \$114,000 to the Township.

The Court also took notice that R.S. 18:5-10 was enacted in 1931, and prior thereto, the law provided only for the assumption of the bonded indebtedness of a schoolhouse located within the area of the new school district. The Court pointed out the mischief of that state of the law by referring to *Board of Education of West Paterson v. Board of Education of Little Falls, supra*, and stated that R.S. 18:5-10 made more equitable the distribution of liabilities on bonded indebtedness.

In the instant matter, the Commissioner must follow the aforementioned authorities and make a determination based upon the existing applicable statutes which control the circumstances hereinbefore stated.

Petitioners argue that even though the provisions of R.S. 18:5-6 and 10 were repealed, existing statutes when considered *in pari materia* do provide authority for the apportionment of a share of bonded indebtedness to the Lavallette Board. These statutes are found in Article 5, Chapter 43 of Title 40, N.J.S.A. 40:43-26 *et seq.* Specifically, say petitioners, N.J.S.A. 40:43-30 and 31 are applicable.

N.J.S.A. 40:43-30 reads as follows:

"The municipality to which the territory shall be annexed, shall be liable to pay a proper proportion of the bonded and other indebtedness of the municipality of which the annexed territory formerly formed a part, which portion of such indebtedness shall be ascertained in the manner hereinafter provided."

N.J.S.A. 40:43-31 states in part that:

\*\*\*\* They [the joint committee] shall also state an account of all the debts outstanding of such municipality, and the proper proportion or share to be borne and paid by the municipality to which such territory shall have been annexed and the methods in and times at which payment thereof should be made."

Petitioners assert that the bonded indebtedness of a school district is an integral part of a coterminous municipality's indebtedness, and cite N.J.S.A. 40A:2-43, which states, *inter alia*, that:

\*\*\*\* Gross debt of a municipality shall also include that amount of the total of all the bonds and notes issued and authorized but not issued by any school district including the area of the municipality, which results from the application to such total of the ratio which the equalized

valuation basis of the municipality bears to the sum of the equalized valuation basis of each municipality in any such school district.”

Petitioners also point out that *N.J.S.A. 18A:13-26* states in part the following:

“\*\*\* the outstanding bonds and notes of a regional school district shall be a lien upon the real estate, situate in all the constituent school districts in the regional district, and the personal estates of the inhabitants of all of such constituent districts, as well as the public property of said constituent districts and of the regional district, shall be liable for the payment thereof.\*\*\*”

Petitioners acknowledge that *N.J.S.A. 18A:8-3.1* does not in itself require apportionment of the bonded indebtedness under the circumstances of this case. This statute reads as follows:

“When a municipality or a part thereof is annexed to another municipality and there is within the limits of the municipality or part thereof which is annexed, a schoolhouse or property formerly belonging to the board of education of the school district situated in such municipality, any indebtedness of such board of education for the erection, purchase, furnishing or repair of such schoolhouse or property shall be assumed by and become the obligation of the board of education of the school district of the annexing municipality.”

Petitioners contend that *N.J.S.A. 18A:8-3.1* and *N.J.S.A. 40:43-30* and 31 must now be considered *in pari materia*, just as the Court in *Board of Education of Bernards Township v. Board of Education of Borough of Bernardsville*, *supra*, considered *R.S. 18:5-6* and 10 (repealed) *in pari materia*.

As a matter of fairness, say petitioners, the Toms River Regional School District should not be burdened with that portion of bonded indebtedness which was incurred for the benefit of the residents of West Point Island, which is now a part of both Lavallette Borough and the School District of Lavallette. Petitioners further argue that judicial approval of the de-annexation of West Point Island from Dover Township was based in part on the fact that Dover Township would not be economically injured by such de-annexation. Under the present circumstances, petitioners argue, it would be incongruous to penalize Dover Township for its previous efforts to provide educational facilities for the citizens of West Point Island.

The Commissioner will first consider petitioner’s argument regarding the relationship of municipal bonded indebtedness to school district bonded indebtedness. The Local Bond Law, *N.J.S.A. 40A:2-1 et seq.*, provides the means by which the governing body of a local unit may authorize fiscal obligations through the procedure of adopting a bond ordinance. *N.J.S.A. 40A:2-2* By contrast, Type I and Type II school districts are empowered to authorize fiscal obligations defined as school bonds, which means promissory

notes and bonds authorized for school purposes. *N.J.S.A.* 18A:24-1 *et seq.* In Type II school districts a proposal to incur such obligations is authorized when adopted by resolution of the board of education and adopted by the legal voters of any Type II district, including a regional school district. *N.J.S.A.* 18A:24-10 In Type I school districts, the resolutions of the board of education and board of school estimate must be finally adopted by the governing body in the form of an ordinance. *N.J.S.A.* 18A:24-10, 21 In Type II districts having a board of school estimate, a proposal is finally adopted by resolution of the board of education and resolution of the board of school estimate. *N.J.S.A.* 18A:24-10, 12, 25, 30 Bonds or notes of a regional school district are issued in the corporate name of the district, and are authorized in accordance with the law governing the issuance of bonds by Type II districts. *N.J.S.A.* 18A:13-26; *N.J.S.A.* 18A:24-1 *et seq.* Bonds of a Type I school district are also designated as school bonds. *N.J.S.A.* 18A:24-31

The connection between school district bonds and municipal bonds is found in the statutes which provide for a limitation on the amount of indebtedness which may be incurred by any municipality and by any school district. The school law sets forth a schedule of percentage of the average equalized valuation of taxable property which is the school debt limit for various organizational forms of school districts. *N.J.S.A.* 18A:24-19 When local school districts have reached their maximum debt limitations, they may under certain conditions consume a portion of the borrowing capacity of the municipality comprised within the district. *N.J.S.A.* 18A:20, 21, 22; *N.J.S.A.* 40A:2-6, 43, 44

It is clear that the school law provides that "Each municipality shall be a separate local school district except as otherwise provided\*\*\*\*" by other portions of the school law permitting consolidation and regionalization of school districts. *N.J.S.A.* 18A:8-1 It is also clear that local school districts, even when coterminous with the boundaries of a single municipality, or of several municipalities, are separate corporate entities. *Gualano et al. v. Board of School Estimate of Elizabeth School District et al.*, 39 *N.J.* 300, 303 (1963)

Notwithstanding the hereinbefore described relationship between school debt and municipal debt, particularly regarding limitations of indebtedness, the Commissioner finds and so holds, that school district bonded indebtedness was not intended by the Legislature to be defined as the bonded indebtedness of the municipality as stated in *N.J.S.A.* 40:43-30 and 31.

The Commissioner is constrained to notice that the relief sought by petitioners in the instant matter would have been obtainable under the provision of *R.S.* 18:5-10, but the Legislature repealed that express statute by enacting *L.* 1953, c. 417, which also established *N.J.S.A.* 18A:8-4 through 24.

The Commissioner is cognizant that natural justice would appear to dictate an apportionment of the Toms River Board's bonded indebtedness to the Lavallette Board as the result of Lavallette Borough's annexation of West Point Island. However, this type of circumstance was adjudicated by the Court in *Board of Education of the Borough of West Paterson v. Board of Education of*

the Township of Little Falls, *supra*. At that time in 1918, the Court in *West Paterson* pointed out that the question was entirely controlled by statute, which failed to provide for the contingency of a deficit. Thereafter, the Legislature enacted L. 1931, c. 270 including then R.S. 18:5-10, which provided, as the Court said in *Bernards, supra*, a more equitable distribution of liabilities on bonded indebtedness. The Legislature then repealed R.S. 18:5-10 by L. 1953, c. 417. Under this state of affairs, it cannot now be assumed, as the Court observed in *West Paterson* that where the Legislature has failed to provide for a contingency such as in the instant matter, it must be regarded as a *casus omissus*. In the judgment of the Commissioner, the second of the two reasons expressed by the Court in *West Paterson* is most applicable. The second reason is that the Legislature, having contemplated the contingency, chose to leave it where it originated, as an indebtedness of the original district. The Legislature had the experience of twenty-two years between 1931 and 1953 during which time the provisions of R.S. 18:5-10 were in full force and effect. This leads to the inescapable conclusion that the legislative intention since L. 1953, c. 417 was enacted is that apportionment of school district bonded indebtedness will only take place in instances "When a municipality or a part thereof is annexed to another municipality and there is within the limits of the municipality or part thereof which is annexed, a schoolhouse or property formerly belonging to the board of education of the school district situated in such municipality\*\*\*." N.J.S.A. 18A:8-3.1 If this is the circumstance, then "\*\*\*\*any indebtedness of such board of education for the erection, purchase, furnishing or repair of such schoolhouse or property shall be assumed by and become the obligation of the board of education of the school district of the annexing municipality." N.J.S.A. 18A:8-3.1 It is stipulated in the instant matter that no schoolhouse presently exists or ever existed on West Point Island. Therefore, the Commissioner finds and determines that the aforementioned provisions of N.J.S.A. 18A:8-3.1 do not apply in this instance.

It appears that the maxim of *expressio unius est exclusio alterius* describes the result of the Legislature's actions. Since the Legislature has made specific provision for apportionment of school district bonded indebtedness under N.J.S.A. 18A:8-3.1 and the circumstances described therein, it impliedly denies any apportionment under any other circumstances which are not mentioned. *Crawford, Construction of Statutes*, (1940) Sec. 195; 50 *Am. Jur. Statutes*, Sec. 244; cf. *Gangemi v. Berry et al.*, 25 N.J. 1, 11 (1957); *Riley v. Ozzard*, 33 N.J. 529, 539 (1960) This appears to be the common sense of the situation in the instant matter.

The law regarding school bonded indebtedness has come full circle, from the absence of a statutory provision for apportionment, through a period of twenty-two years when the provision of R.S. 18:5-10 was effective, and back to the repeal of that statute, in 1953. Therefore, in the judgment of the Commissioner, the determinations of the Court in *McCully, supra*, and *Bloomfield, supra*, that the original corporation remains liable for all debts, controls the instant matter. The Commissioner notices that this conclusion has been historically expressed by the United States Supreme Court in *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151 (1907) and *Laramie, supra*. In *Laramie*, the Court stated the following:

“\*\*\*Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim.\*\*\*” (92 U.S. 307, at p. 315)

The Commissioner will next consider the second contention set forth by petitioners.

Petitioners contend that the Legislature’s authorization of de-annexation plans (*N.J.S.A. 40:43-26 et seq.*) would be violative of the New Jersey Constitution and the United States Constitution if the annexing municipality’s coterminous school district, herein the Lavallette Board, were not required to assume the annexed territory’s proportional share of the original school district’s bonded indebtedness. The New Jersey Constitution, *Art. IV, Sec. VII, Par. 3* makes the following provision:

“The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.”

The United States Constitution, *Art. I, Sec. 10* provides, *inter alia*, as follows:

“No State shall \*\*\* pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.\*\*\*”

Petitioners also cite *N.J.S.A. 18A:13-26* which states in pertinent part that:

“\*\*\* the outstanding bonds and notes of a regional school district shall be a lien upon the real estate, situate in all the constituent school districts in the regional district, and the personal estates of the inhabitants of all of such constituent districts, as well as the public property of said constituent districts and of the regional district, shall be liable for the payment thereof.\*\*\*”

In sum, petitioners contend that any construction of *N.J.S.A. 40:43-26 et seq.* which diminished a bondholder’s security under *N.J.S.A. 18A:13-26* upon a de-annexation of territory would be violative of *Art. IV, Sec. VII, Par. 3* of the New Jersey Constitution and *Art. I, Sec. 10* of the United States Constitution.

In the judgment of the Commissioner, this argument by petitioners regarding the impairment of school bonds by loss of property through de-annexation is a matter controlled by decisions of the Courts.

Petitioners cite *Mount Pleasant, supra*, in support of their impairment argument. In *Mount Pleasant* the U.S. Supreme Court clearly stated that municipalities have no claim to their existence through contracts with the state. The Court also repeated the earlier holding in *Laramie, supra*, that where a new municipality is formed from portions of an old one, the old corporation owns all the public property within her new limits, and is responsible for all debts of the corporation before the act of separation was passed, unless the legislature otherwise provides. The new municipality owns the public property which falls within its boundaries. *Laramie County* was distinguished in *Mount Pleasant* where the Court held that when a municipality is legislated out of existence, and its territory is assigned to other municipalities, the principles of equity require that its debts follow its territory and are accordingly assumed by the annexing municipalities. The Court pointed out in *Mount Pleasant* that the legislature has total authority to divide large municipalities, consolidate small ones, or to set off portions of territory from one and annex it to another, to meet the wishes of the residents or to promote the public interests. That Court stated that:

“\*\*\* it being everywhere understood that the legislature possesses the power to make such alterations and to apportion the common property and burdens as to them may seem just and equitable.\*\*\*” (100 U.S., at p. 525)

In *Graham et al. v. Edison Township et al., supra*, the New Jersey Supreme Court stated the following:

“\*\*\* It is, of course, elementary that, as part of its general authority over its creatures, the Legislature may, subject to constitutional restrictions, divide a municipality, even without the consent of the original municipality or its people, and, in connection therewith, provide for a division of the property of the original municipality between the remaining and the new municipality. *Rhyne, Municipal Law*, §2-47 (1957). \*\*\*” (35 N.J., at p. 554)

An example of a constitutional restriction on the powers of a state legislature to alter municipal boundaries is found in *Gomillion et al. v. Lightfoot et al.*, 364 U.S. 339, 81 S. Ct. 125 (1960), wherein the Court held that an action by the legislature which altered the shape of the city from a square to a twenty-eight sided figure and had as its effect the removal from the city of all but four or five of its 400 Negro voters although not removing a single white voter or resident, constituted a constitutionally proscribed discrimination against Negro petitioners and therefore was sufficient to state a cause of action.

In *Gomillion, supra*, the Court reviewed earlier cases which decided questions arising from the exercise by States of plenary powers over



municipalities. The Court stated in *Gomillion, supra*, that:

“\*\*\* the cases which have come before this Court regarding legislation by States dealing with their political subdivisions fall into two classes: (1) those in which it is claimed that the State, by virtue of the prohibition against impairment of the obligation of contract (Art. I, § 10) and of the Due Process Clause of the Fourteenth Amendment, is without power to extinguish, or alter the boundaries of, an existing municipality; and (2) in which it is claimed that the State has no power to change the identity of a municipality whereby citizens of a pre-existing municipality suffer serious economic disadvantage.\*\*\*” (81 S. Ct., at p. 128)

The Court stated the following:

“\*\*\* As to the first category, it is obvious that the creation of municipalities — clearly a political act — does not come within the conception of a contract under the Dartmouth College case. 4 *Wheat*. 518, 4 L. Ed. 629. As to the second, if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State’s exercise of its political powers.\*\*\*” (81 S. Ct., at p. 128)

In *Gomillion, supra*, the Court also stated:

“\*\*\* Further, other cases in this Court have refused to allow a State to abolish a municipality or alter its boundaries, or merge it with another city, without preserving to the creditors of the old city some effective recourse for the collection of debts owed them. *Shapleigh v. City of San Angelo*, 167 U.S. 646, 17 S. Ct. 957, 42 L. Ed. 310; *Port of Mobile v. United States ex rel. Watson*, 116 U.S. 289, 6 S. Ct. 398, 29 L. Ed. 620; *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514, 25 L. Ed. 699; *Broughton v. City of Pensacola*, 93 U.S. 266, 23 L.Ed. 896.\*\*\*” (81 S.Ct. at pp. 128-129)

It may be seen from the cases cited, that taxation, although increased as the result of alterations of the boundaries of a municipal corporation, is an effective recourse for the collection of the debts of the public corporation.

In the instant matter, the annual payment of a local school district’s bonded indebtedness is provided for by the legislative enactment of *N.J.S.A. 18A:24-57*, which reads as follows:

“The amount of interest upon any obligation issued for school purposes, and of any part of the principal thereof not provided to be paid in any other manner, falling due in any one year shall be: ~

“1. Certified to the governing body of each municipality comprising a type



I district by the clerk of the municipality for inclusion in the budget of the municipality and shall be included in the annual tax levy and shall be raised by taxation in the municipality; or

“2. Included in the budget of each type II district for such year and shall be separately certified by the secretary of the board of education to the county board of taxation of the county and in each district consisting of but one municipality, the whole amount thereof shall be raised by special tax in the district and in each district composed of more than one municipality, the amount apportioned to such municipality according to law shall be raised by special tax in the municipality.”

Therefore, the Toms River Regional School District is guaranteed the amount of funds raised by taxation, necessary to meet the annual principal and interest payments due the holders of the outstanding school bonds. The provision of *N.J.S.A. 18A:13-26*, that the outstanding bonds and notes of the regional school district shall be a lien upon the real estate and personal estates of all of the inhabitants of each constituent district, as well as the public property, and shall be liable for the payment thereof, remains in force, because the effect of the statute is to treat all of the aforementioned kinds of property, private and public, within the constituent districts as the conglomerate mass upon which the statutory scheme for school debt limitations and taxation is based. The total valuation of all property taxable for this purpose will constantly change with the addition or elimination of ratables or the revaluation of existing ratables within the constituent municipalities.

In a situation where a school district might conceivably be faced with no recourse for the payment of bonded indebtedness, a remedy would be available by resort to equitable principles in a court of competent jurisdiction. *Gomillion v. Lightfoot*, *supra* Such is not the case in the instant matter. The Toms River Board retains the schoolhouses which were constructed by means of the school bonds, and those schoolhouses are not diminished in value in today's marketplace. The Toms River Board also retains a sufficient base of ratables to be taxed for the liquidation of its bonded indebtedness. The Commissioner cannot find in the circumstances of this matter an application of the constitutional prohibition of impairment of contract as regards the school bonds of the Toms River Board.

In the judgment of the Commissioner, the rights and liabilities of the two school districts in this matter are to be settled by reference to applicable statutes which alone control the situation. *Board of Education of the Township of Bernards v. Board of Education of the Borough of Bernardsville*, *supra*; *Board of Education of the Borough of West Paterson v. Board of Education of the Township of Little Falls*, *supra*; *Graham et al. v. Edison Township et al.*, *supra*; *Gomillion v. Lightfoot*, *supra* The Commissioner finds and determines therefore, that absent a specific statutory provision requiring the apportionment of existing school district bonded indebtedness upon de-annexation of a part of a school district, such as was formerly provided by *R.S. 18:5-10* (repealed), the School District of the Borough of Lavallette is not liable for that portion of the

school debt of the Toms River Regional School District which was a proportion of the share of debt attributable to the constituent School District of Dover Township, by virtue of the annexation of the part of Dover Township known as West Point Island by the Borough of Lavallette.

The Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

December 6, 1973

**Board of Education of the Township of Colts Neck,**

*Petitioner,*

*v.*

**Mayor and Township Committee of the Township of  
Colts Neck, Monmouth County,**

*Respondents.*

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Saling, Moore, O'Mara & Coogan (Henry J. Saling, Esq., of Counsel)

For the Respondents, Stout, O'Hagan & Hertz (Robert O'Hagan, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A. 18A:22-37*, certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing held May 30, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election on February 13, 1973, the voters rejected the Board's proposal to raise, by local taxation, \$1,428,575 for current expenses and \$20,150 for capital expenditures.

Subsequently, the budget was sent to the Committee, pursuant to *N.J.S.A. 18A:22-37*, for its determination of the amount of funds required to maintain a thorough and efficient system of education.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Monmouth County Board of Taxation an amount of \$1,143,575 for current expenses, and \$20,150 for capital outlay. It is noted here that the certification constitutes a total reduction of \$285,000 from the funds proposed by the Board to be raised through local taxation during the 1973-74 school year.

Such total reduction of \$285,000 in required tax funds is appropriate in the Committee's judgment, because it avers the Board will have more revenue available than the Board had originally anticipated (\$165,000) and because, in the Committee's opinion, reductions totaling \$120,000 from the current expense proposals of the Board would not interfere with the Board's ability to conduct a thorough and efficient system of education. The total reduction in tax requirements of \$285,000 is detailed by the Committee as follows:

#### REVENUE-INCREASE ANTICIPATED

Transfer from Municipal Budget	\$115,000
Anticipated Federal Aid	<u>50,000</u>
Sub total	\$165,000

#### REDUCTION IN EXPENDITURES

Current Expenses	<u>\$120,000</u>
Subtotal	<u>\$120,000</u>
Grand Total	\$285,000

The Board contends that the determination of the Committee will leave an amount of money insufficient to provide a thorough and efficient system of education for the pupils of the school district. Accordingly, the Board appeals to the Commissioner for the restoration of these funds.

As part of its determination, the Committee suggested items of the budget wherein it was believed economies could be effected without harm to the educational program. (Exhibit R-1, Item B) The Board accepts some of these suggested reductions and in addition, proposes some reductions not previously considered by the Committee. (Exhibit P-1) These items are set forth as follows:

#### CHART I CURRENT EXPENSE

Account Number	Item	Amount Budgeted by Board	Amount Suggested by Committee	Amount of Reduction by Committee
J110b.2	Sal.-Secy. to Bd. Secy.	\$ 6,754	\$ 6,202	\$ 552 (552)*
J110d	Election	500	200	300 (140)*
J120a	Accountant	3,800	2,000	1,800
J120d	Contr. Servs.	8,500	3,000	5,500
J130a	Members-Bd. of Ed.	2,200	2,000	200
J130b	Bd. Secy's Office	1,500	1,300	200
J130d	Elections	750	600	150
J130n	Misc. Expenses	600	300	300
J211	Sals.-Principals	55,925	52,925	3,000

J213a	Sals-Reg. Tchrs.	703,575	679,806	23,769 (5,000)*
J213a.1	Tchr. Replacement	9,000	— 0 —	9,000
J213c	Sals.-Spec. Dept. Tchrs.	125,425	114,425	11,000 (1,000)*
J213.1	Sals.-Sub. Tchrs.	16,280	14,850	1,430
J213.4	Sals.-Contingency	24,950	— 0 —	24,950
J214a.1	Sals.-Sub. Librs.	660	— 0 —	660 (250)*
J214c	Sals.-Psychologist	16,000	15,000	1,000 (2,000)*
J214c	Sals.-Learn. Dis. Spec.	17,920	16,720	1,200 (250)*
J215	Sals.-Secys. & Clerical Assts.	23,210	22,660	550 (550)*
J216a	Sals.-Non-Instr. Aides	33,560	29,560	4,000 (3,000)*
J216a.1	Sals.-Non-Instr. Aides, Chap. 46	2,230	— 0 —	2,230
J220	Textbooks	19,700	— 0 —	— 0 —(500)*
J230c	A-V Materials	6,270	5,000	1,270 (350)*
J240a	Teaching Supls.- Reg. Class Supls.	20,460	17,460	3,000
J240b	Tchg. Supls.-Chap. 46	1,000	— 0 —	— 0 —(200)*
J240c	Tchg. Supls.-Music Dept.	600	— 0 —	600 (600)*
J240d	Spec. Project-Ind. Arts	2,400	— 0 —	2,400 (2,400)*
J250a	Misc. Supls.	5,700	4,100	1,600 (1,000)*
J250c	Misc. Exp.-Instr.	3,000	2,400	600 (600)*
J420c	Misc. Exp.-Health Serv.	1,250	250	1,000
J510b	Sals.-Bus Drivers	19,990	16,290	3,700
J520a	Contr. Servs. to/ from School	74,820	64,820	10,000 (5,000)*
J520a.1	Contr. Servs. to/ from Private Schools	18,000	10,000	8,000 (2,000)*
J535	Purchase-New Vehicle	9,000	— 0 —	9,000
J545	Trans.-Curric. Activs.	3,000	— 0 —	3,000 (2,000)*
J550	Trans.-Other Exps.	9,500	8,000	1,500
J610a	Sals.-Custodians	73,000	66,500	6,500 (2,000)*
J610b	Sals.-Care of Grounds	1,200	— 0 —	1,200
J630	Heat for Bldgs.	14,000	12,000	2,000
J720b	Repair-Bldgs.	6,000	4,600	1,400
J730	Purchase-Equip.	25,070	14,070	11,000 (1,200)*
J810b	Fixed Charges-Soc. Sec.	15,000	12,000	3,000 (1,000)*
J1020	Stu. Body Activs.- Other Exps.	3,175	1,175	2,000 (2,000)*
	Subtotals	\$1,385,474	\$1,200,213	\$164,561
<b>CAPITAL OUTLAY</b>				
L1220c	Impr. to Sites	\$ 5,550	\$ — 0 —	\$ 5,550 (2,000)*
L1230	Remodeling	9,100	6,600	2,500 ( 700)*
L1240h	Equip.-Food Serv.	5,000	— 0 —	— 0 —(1,000)*
	Subtotals	\$ 19,650	\$ 6,600	\$ 8,050
	Grand Totals**	\$1,405,124	\$1,206,813	\$172,611

\*Reductions suggested or accepted by the Board.

\*\*The totals of columns 2 and 3 do not total the sum of column 1 because the Board's reductions exceed those of the Committee's in some instances.

Suggested reductions in various items within the budget proposed by either the Committee or the Board which may be considered as mutually acceptable, will be reflected in a summary chart at the conclusion of this recital.

However, the hearing examiner has carefully considered the total of other budget requests made by the Board and the funds which are available in the context of economies suggested by the Committee, and he believes some prefatory comments are in order at this juncture as follows:

At a time subsequent to the time the Board formulated its budget for the 1973-74 school year, and subsequent to the February referendum in which the budget was defeated, the Committee determined it could, and would, transfer \$115,000 to the Board to be used for school purposes in lieu of taxes. Accordingly, this sum is not in dispute herein and will not be considered by the hearing examiner. However, it is obvious that an earlier decision by the Committee would have been helpful in this regard and the hearing examiner recommends that the Board and the Committee endeavor, in future years, to consolidate their thoughts with respect to such transfers of funds prior to the time when the voters of the district are asked to vote on the Board's tax requests.

Additionally, as part of its determination that \$285,000 could be deleted from the Board's tax request, the Committee decided that \$50,000 could be anticipated as federal aid. (The Board had budgeted no revenue from this source). This decision was founded on current and past experience with regard to such revenue. The Board concedes at this juncture that \$35,000 could be so anticipated, but it states that a projection of an amount greater than this sum is too speculative.

The hearing examiner believes that past and recent experience in this regard is proof that the Board's latest estimate of federal aid is still too conservative. This position is further supported by a more recent estimate of federal aid obtained by the hearing examiner from the State Department of Education, Division of Administration and Finance. Accordingly, he finds that an amount of \$45,000 might reasonably be anticipated from this source of funds. He so recommends.

Finally, the hearing examiner observes that, in reality, the total remaining sum of money in dispute in the matter, *sub judice*, is \$82,708. This is so, since the Committee reduced the amount proposed by the Board for current expenses by \$120,000, and the Board subsequently agreed to a reduction of \$37,292 from that amount. However, the hearing examiner will consider all of the Committee's suggested reductions as appropriate to the sum of \$82,708 within the parameters of the total reduction herein.

Certain facets of this dispute are concerned with projected increases in pupil enrollment in the 1973-74 school year. However, the hearing examiner has examined the testimony at the hearing, *ante*, in this regard, and determines that such growth should be projected for the 1973-74 school year at approximately 50 pupils. Accordingly, certain recommendations which follow are predicated on such an approximation, and they are contained in both narrative form with respect to certain budget proposals, and in chart form with respect to other proposals. These latter recommendations are consistent with the Commissioner's decision in the *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County*, 1968 S.L.D. 139, wherein the Commissioner said:

“\*\*\* There appears no necessity to deal *seriatim* with each of the areas in

which Council recommended reduced expenditures. The problem is one of total revenues available to meet the demands of a school system which has experienced \*\*\* growth. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.\*\*\*" (at p. 142)

Major items for analysis and consideration herein are detailed below.

*J120d Contracted Services Reduction \$5,500*

The Board proposed an amount of \$8,500 for this account. The Committee suggests a reduction of \$5,500.

In supporting its asserted need, the Board states that of the total amount it budgeted, \$6,000 is earmarked for contracted architect's fees for the Laird Road School project. (In this regard, it is observed by the hearing examiner that the project calls for the construction of a new building on land already acquired by the Board.) Such proposed construction was recently rejected by the voters of the district, but the Board is planning to resubmit the proposal to the voters during the 1973-74 school year.

In its written testimony, the Board asserts that the remainder of the \$2,500 in this account is to be used for the possible cost of one negotiations consultant, surveys ordered by the Board, and an industrial appraisal update. It is noted that no further explanation of these three potential costs was provided by the Board.

The Committee avers, in its testimony, that the Board has no need to increase this amount over the 1972-73 appropriation of \$3,000. Furthermore, the Committee contends that the \$6,000 budgeted by the Board for contracted architect's fees need only be expended if the Board severs the contract with the existing architect. This, the Committee asserts, could only be necessitated by a severe loss of faith in that person which, it avers, is unlikely. Citing certain options it feels are available to the Board with regard to alternative plans, the Committee asserts that a reduction of \$5,500 is justified.

There is also some contention by the Committee, that funds available to the Board as the result of a former bond referendum which received approval by the voters, could be used, if needed, for the architect's fee herein controverted. However, at a time subsequent to the hearing, *ante*, the Board indicated in a letter to the hearing examiner that its bonding counsel had advised the Board that:

“\*\*\* such a charge was not an appropriate charge to the 1970 proposal.\*\*\*” (Letter of the Board to the hearing examiner, dated June 12, 1973)

Even if this is so, however, the hearing examiner believes that the architect's fees herein controverted may be submitted for approval at the referendum proposed by the Board during the 1973-74 school year as an alternative to funding such fees in the current expense portion of the budget herein. In view of the defeat of this budget by the voters, and the Committee's determination, the hearing examiner recommends such an alternative course of action. Accordingly, he recommends that the reduction that the Committee proposed with respect to this account be allowed to stand.

Summary: Suggested Reduction by Committee	\$5,500
Amount of Reduction Recommended	\$5,500

*J211 and J213a.1 Salaries – Principals and Teacher Replacement*

The Committee apparently agrees with the Board's testimony, that these combined items should not be subject to a reduction of \$3,000 and \$9,000 respectively. (Exhibit R-1, Item B)

*J213a Salaries-Regular Teachers Reduction \$23,769*

The sum of \$23,769 in contention is proposed by the Board for the salaries of two additional teachers to be employed to maintain an approximate class size of twenty-five pupils. (As noted, *ante*, an increase of 50 pupils is expected in September 1973.) However, the Committee maintains that such an expenditure is not warranted in the circumstances and that no harm will be caused the district if class size is permitted to increase slightly in 1973-74.

The hearing examiner has reviewed the pertinent testimony and finds that increased enrollment in certain classes of the district will necessitate additional staffing if overcrowding is to be avoided. Accordingly, he recommends that the Board be permitted to fund such positions at a salary cost of \$9,200 per position. This salary is appropriate for a teacher with two years of experience on the Board's salary scale for teachers with a Bachelor's Degree. (Exhibit P-1)

Summary: Suggested Reduction by Committee	\$23,769
Amount of Reduction Recommended	\$ 5,369

*J213c Salaries-Special Department Teachers Reduction \$11,000*

The Board proposed to expend \$11,000 from funds in this account in order to secure the services of a half-time art and a half-time physical education teacher.

The addition of two, part-time positions in the categories listed, *ante*, would increase the total number of positions to 2.5 and 3.5 respectively. The Board avers that the additional positions are necessary in order to maintain a reasonable pupil-teacher ratio for the 1973-74 school year, but it accepts a reduction of \$1,000 in this account.

The Committee maintains that the Board's proposed increase of two part-time positions, in the special areas of art and physical education, cannot be



justified at this time. Specifically, the Committee avers that economies can be effected by the Board in this account, since the estimated increase in pupil enrollment is small enough so as not to interfere with the existing program of education in these areas for the 1973-74 school year. Therefore, it suggests that this item in the proposed budget be completely eliminated at this time, which would result in a savings of \$11,000.

The hearing examiner recommends that the Committee's suggested reduction of \$11,000 be sustained. This recommendation is grounded on the belief that the proposed expenditures for art and physical education are basically an effort to improve and expand these programs and that such improvement and expansion cannot be justified when viewed in the context of the expression of the voters at the time of the budget referendum.

Summary: Suggested Reduction by Committee	\$11,000
Amount of Reduction Recommended	\$11,000

*J213.4 Salaries – Contingency Reduction \$24,950*

The Board avers that the \$24,950 which is budgeted in this account is required to meet those unanticipated contingencies which may arise during the 1973-74 school year – particularly those contingencies which may arise as the result of salary negotiations. The Board also avers that it is not unreasonable to have approximately 1.3% of the total school budget reserved for such contingencies when the percentage is viewed in the context of the total budget.

The Committee argues that it is improper to include this line item in the budget without direct apportionment of the funds to specific line item accounts. However, the Committee concedes that, during the course of the school year, unanticipated expenses may arise and cause certain accounts to be over-expended. In that event, the Committee suggests the Board effect certain transfer between established line item accounts from actual current expense surplus, but that the entire amount proposed by the Board in this account be deleted.

The hearing examiner has deduced from the Board's written estimate (Exhibit P-4), that unexpended balances available to the Board at the end of the 1972-73 school year will amount to approximately \$14,500 – a relatively small sum. However, the hearing examiner notes that there was testimony at the hearing, *ante*, that all of the Board's salary obligations are now known, and in the absence of a clearly specified need for the sum herein controverted, the hearing examiner recommends that the Committee's reduction be sustained.

Summary: Suggested Reduction by Committee	\$24,950
Amount of Reduction Recommended	\$24,950

*J520a Contracted Services to/from School Reduction \$10,000*

The Committee's determination that \$10,000 of the total of \$74,820 budgeted by the Board in this account could be excised, without harm to the school district, is grounded on the view that proposed transportation expenditures herein should be held to a sum not in excess of 8% over the



amount expended by the Board in the 1973-74 school year. The Board at first agreed to a reduction of \$5,000 in this account, but avers that if its proposal to purchase a new vehicle is aborted, it must have this sum in contracted services.

Since the hearing examiner will recommend abandonment of plans to purchase an additional vehicle (see discussion of account J535), and since he believes the Board's testimony regarding this account otherwise established the need for the total sum the Board proposed, he recommends full restoration of this reduction at this juncture.

Summary: Suggested Reduction by Committee	\$10,000
Amount of Reduction Recommended	— 0 —

*J520a.1 Contracted Services to/from Private Schools*

The amount of \$8,000 suggested for reduction in this account by the Committee is contested by the Board, which agrees, however, according to its testimony in evidence (Exhibit P-1) that a reduction of \$2,000 is acceptable. The Board supports this contention with statements reflecting the actual cost of \$13,300 for the 1971-72 school year (Exhibit P-1, at p. 18), and estimated expenditures of \$16,475 for the 1972-73 school year. (Exhibit P-4)

The Committee argues that, according to the information it has acquired, a suggested reduction of \$8,000 is in order. (Exhibit R-1, Item B)

The hearing examiner observes, at this juncture, that the Committee's determination herein was apparently made prior to the time the Committee had an opportunity to review the calculation of unexpended balances for the 1972-73 school year. Such balances attest to the fact that the Board required more than \$16,000 for such mandated services in school year 1972-73, and in such a context the Committee's suggested appropriation of only \$10,000 is clearly insufficient.

Accordingly, the hearing examiner recommends that the Board's suggested reduction of \$2,000 be accepted, but that \$6,000 be restored for use by the Board.

Summary: Suggested Reduction by Committee	\$8,000
Amount of Reduction Recommended	\$2,000

*J535 Purchase of New Vehicle (School Bus)*

The entire \$9,000 budgeted by the Board herein has been earmarked by the Committee for elimination from this account. The Board asserts that these funds are required in order to effect economies in pupil transportation which can only be realized as it moves toward the goal of district ownership of transportation vehicles. The funds in this account are budgeted by the Board for the purchase of a new school bus, which would bring the total number of buses purchased by the Board since 1970, to four.

The Committee concedes that the Board's overall plan to acquire additional school buses in order to accomplish its goal of a district-owned pupil

transportation system is not without merit, but that such an expenditure should be deferred at this time.

The hearing examiner recommends that, in view of the constraint imposed upon spending by the voters' rejection of the Board's 1973-74 budget request, the Committee's reduction be sustained.

Summary: Suggested Reduction by Committee	\$9,000
Amount of Reduction Recommended	\$9,000

*J610a Salaries-Custodians Reduction \$6,500*

The amount disputed in this account is \$6,500. This sum has been budgeted by the Board to provide funds for one additional custodian who will be employed to help maintain the facilities at the Cedar Drive School. The Board avers that an increased use of school facilities mandates such an addition to the present maintenance staff. However, the Board does accept a \$2,000 reduction in this account.

The Committee asserts that, since no new plant facilities were added at the Cedar Drive School, the addition of another salaried custodial position by the Board is unwarranted at this time.

After a careful review of the testimony, the hearing examiner determines that the Board's request for an additional custodial position is reasonable in view of the conditions described, *ante*. Accordingly, he recommends that \$4,500 of the Committee's total suggested reduction of \$6,500 be restored to the budget, but that \$2,000 of the proposed reduction be allowed to stand.

Summary: Suggested Reduction by Committee	\$6,500
Amount of Reduction Recommended	\$2,000

*J730 Purchase of Equipment (Replacement and New) Reduction \$11,000*

For the purpose of clarification, the hearing examiner notes that beginning with the 1973-74 school year budget proposals, this account definition has been revised to include a J730c sub-account for moveable instructional and noninstructional items of equipment and furniture previously listed in the L1240 capital outlay account. It is therefore appropriate at this juncture to compare the total amounts budgeted for the 1972-73 school year in each of these accounts, with the combined amounts of the Board's budget request in the J730c account, for the 1973-74 school year as follows:

	<i>J730c</i>	<i>L1240</i>	<i>Total</i>
1972-73	—	\$13,320	\$13,320*
1973-74	\$20,570	\$ 5,000	\$25,570

\*This amount reflects the sum total of those items previously appropriated by the Board in its 1972-73 school budget in certain L1240 sub-accounts. Such items in these accounts are re-designated to be included in the J730c account in the 1973-74 school budget.

The Board avers that its budget request in this account reflects a need for instructional equipment and furnishings for two additional classrooms, as well as other instructional items required to maintain a thorough and efficient program of education for its pupils. However, the Board does agree to effect certain economies within this account, totaling \$1,200, while contesting the balance of the Committee's reduction.

The Committee contends that \$14,000 is sufficient in this account for the purchase of equipment for the continuation of the existing program.

The hearing examiner has reviewed the testimony in evidence (Exhibits P-1, P-6, and R-1) pertaining specifically to this sub-account, and finds that, in addition to the normal replacement of those items of instructional and noninstructional equipment which are required on a yearly basis, the Board's plan for two additional classrooms will make it necessary for a portion of the Committee's reduction to be restored to this account. It does appear, however, that many of the items of equipment requested by school principals on an individual school basis should be deleted as being an expansion of the existing program, which could be deferred in view of certain economies which are to be effected throughout the 1973-74 school budget. Accordingly, the hearing examiner recommends that \$4,000 of the Committee's suggested reduction in this account be sustained.

Summary: Suggested Reduction by Committee	\$11,000
Amount of Reduction Recommended	\$ 4,000

#### CAPITAL OUTLAY

L1220c	Impr. to Sites	Reduction \$5,500
L1230c	Remodeling	Reduction \$2,500

The Committee's certification of funds to be raised for school purposes to the Monmouth County Board of Taxation did not include any reduction in capital outlay items. However, the hearing examiner will consider the reductions proposed by the Committee and he recommends that those amounts, if any, which are to be sustained as reductions from the capital outlay portion of the budget be included as pertinent to the total reduction in funds to be raised by local taxation.

The hearing examiner notices that the Commissioner in *Board of Education of East Windsor Regional High School District v. Common Council of the Borough of Hightstown and the Council of the Township of East Windsor, Mercer County, 1972 S.L.D. 172*, determined that such reductions could be applied and accounted for in this manner.

The Board maintains that the Committee's suggested reductions in the capital outlay items, *ante*, are unreasonable, since these funds are needed for the repair, maintenance, and improvement of school sites. In addition, the Board asserts that a major portion of the funds budgeted for remodeling will be used to partition the cafeteria in order to make additional classroom space available.

The Committee does not agree that improvement to sites should be considered as a high priority item, and it asserts that such proposed expenditures of funds cannot be justified for the 1973-74 school year. The Committee maintains further that the amount requested by the Board for remodeling should be held at the 1972-73 budget level.

The hearing examiner recommends the reduction notated below be sustained as representing an expansion of programs which may reasonably be deferred to a subsequent school year.

#### SUMMARY

Account Number	Item	Suggested Reduction by Comm.	Amount of Reduction Recommended
L1220c	Impr. to Sites	\$5,550	\$2,550
L1230c	Remodeling	2,500	1,000
	Totals	\$8,050	\$3,550

The hearing examiner also recommends that other reductions of the Committee be determined as appropriate, or inappropriate, according to the following chart.

#### CHART 2 CURRENT EXPENSE

Account Number	Item	Suggested Reduction by Committee	Amount of Reduction Recommended
J110d	Election	\$ 300	\$ 140
J120a	Accountant	1,800	900
J130a	Members-Bd. of Ed.	200	- 0 -
J130b	Bd. Secy.'s Office	200	- 0 -
J130d	Elections	150	150
J130n	Misc. Expenses	300	150
J213.1	Sals.-Sub. Tchrs.	1,430	- 0 -
J214a.1	Sals.-Sub. Librs.	660	260
J214c	Sal.-Psychologist	1,000	2,000*
J214c	Sal.-Learn. Dis. Spec.	1,200	250
J216a	Sals.-Non-Instr. Aides	4,000	3,000
J216a.1	Sals-Non-Instr. Aides Chap. 46	2,230	- 0 -
J220	Textbooks	- 0 -	500**
J230c	A-V Materials	1,270	600
J240a	Teaching Supls.-Reg. Class Supls.	3,000	- 0 -
J240b	Teaching Supls.- Chap. 46	- 0 -	200**
J250a	Misc. Supls.	1,600	1,600
J420c	Misc. Exps.-Health Serv.	1,000	500
J510b	Sals.-Bus Drivers	3,700	3,700
J545	Trans-Curric. Activs.	3,000	3,000
J550	Trans-Other Exps.	1,500	- 0 -
J610b	Sals.-Care of Grounds	1,200	1,200
J630	Heat for Bldgs.	2,000	- 0 -
J720b	Repair-Bldgs.	1,400	- 0 -
J810b	Fixed Charges-Soc.Sec.	3,000	1,000
Subtotals - Current Expense		\$36,140	\$19,150

## CHART 2

Account Number	Item	Suggested Reduction by Committee	Amount of Reduction Recommended
L1240h	Equip-Food Servs.	\$ - 0 -	\$ 1,000**
	Subtotals - Capital Outlay	- 0 -	1,000**
	GRAND TOTALS	\$36,140	\$20,150

\*The Board agreed to a total reduction of \$2,000 in this account, instead of the suggested reduction of \$1,000 by the Committee.

\*\*The Board agreed to reduce these accounts by a sum total of \$1,700 without any formal action taken by the Committee.

In summary, the hearing examiner recommends the following disposition of the controverted accounts herein:

## CHART 3 SUMMARY-CURRENT EXPENSE

Account Number	Item	Suggested Reduction by Committee	Amount of Reduction Recommended
J120d	Contr. Servs.-Other	\$ 5,500	\$ 5,500
J213a	Sals-Reg. Tchrs.	23,769	5,369
J213c	Sals.-Spec. Dept. Tchrs.	11,000	11,000
J213.4	Sals.-Contingency	24,950	24,950
J520a	Contr. Servs. to/from School	10,000	- 0 -
J520a.1	Contr. Servs. to/from Private Schools	8,000	2,000
J535	Purchase-New Vehicle	9,000	9,000
J610a	Sals.-Custodians	6,500	2,000
J730	Purchase-Equipment	11,000	4,000
	Subtotals	\$109,719	\$ 63,819

## SUMMARY-CAPITAL OUTLAY

L1220c	Impr. to Sites	\$ 5,550	\$ 2,550
L1230c	Remodeling	2,500	1,000
	Subtotals	\$ 8,050	\$ 3,550

## CURRENT EXPENSE AND CAPITAL OUTLAY

Chart 2 Reduction-Subtotals	\$ 36,140	\$ 20,150
Amount of Reductions Mutually Agreed by the Board and the Committee	18,702	18,702
GRAND TOTALS	\$172,611	\$106,221

In summary, the hearing examiner has determined that the evidence pertinent to the dispute, herein, shows that \$106,221 may be excised from the Board's proposal with respect to current expenses and capital outlay costs of the Colts Neck School District for the school year 1973-74, but that a total of \$13,789 must be restored to the Board for such expenses. This sum, when added to the sum of \$5,000 required by the Board as anticipated revenue, results in a composite determination that an amount of \$18,789 must be added to the amount previously certified by the Committee to the Monmouth County Board of Taxation. The hearing examiner so recommends.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the above matter, the report of the hearing examiner, and the exceptions thereto filed by counsel. The Commissioner is in agreement with the findings and conclusions of the hearing examiner with one exception. He notes that the recommendation of the hearing examiner is to totally deplete the Board's contingency account for instructional salaries, J213.4. The Commissioner, recognizing that the Board has contracted substantially all funds it budgeted in this line item, and in further recognition of the severely limited, unappropriated free balance available to the Board in its current expense account, restores to the teachers' salary line item for contingency purposes, the amount of \$15,000 to insure a thorough and efficient program of education.

Finally, the Commissioner finds and determines that the amount of \$33,789 must be added to the amount previously certified by the Committee to be raised by local taxation for the current expenses of the school district of Colts Neck in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for the school year 1973-74. He therefore directs the Committee to add to the previous certification to the Monmouth County Board of Taxation for the current expenses of the school district, the amount of \$33,789, so that the total amount of the local tax levy for current expenses for 1973-74 shall be \$1,177,364.

COMMISSIONER OF EDUCATION

December 12, 1973

**Joann K'Burg,**

*Petitioner,*

*v.*

**Board of Education of the Township of Lower Alloways Creek,  
Salem County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Henry Bender, Esq.

For the Respondent, Andrew Rhea, Esq.

Petitioner, employed as a teacher by the Board of Education of Lower Alloways Creek Township, hereinafter "Board," alleges that by virtue of her years of service she acquired a tenure status which was violated by the Board through its determination not to reemploy her for the 1973-74 school year. The Board denies petitioner's claim to a tenure status and avers that its determination not to reemploy her was proper and legal.

The facts are not in dispute. This matter is submitted for determination by the Commissioner of Education on the pleadings and exhibits attached thereto, and Briefs of counsel.

Petitioner began employment with the Board as a kindergarten teacher under an emergency teaching certificate for the 1968-69 academic year. Thereafter, she was reemployed each succeeding academic year by annual contract through the 1972-73 academic year. On March 14, 1973, the administrative principal sent the following letter to petitioner:

\*\*\*\* Your teaching contract for the school year 1973-74 has not been approved by the Lower Alloways Creek Board of Education. Employment will terminate with the close of this school year.\*\*\*\* (Exhibit P-2)

Petitioner continued to perform her duties until the expiration of her employment contract on June 30, 1973. It is significant that as of the time of this notification, petitioner was still the holder of an emergency teaching certificate, but in the succeeding month of April 1973, she was awarded a standard certificate as an elementary school teacher. (Exhibit P-1)

Petitioner argues that because of her continuous employment by the Board (which, until March 14, 1973, amounted to over four and one-half academic years), during which time she held a valid and appropriate teacher's certificate, she has more than met the statutory requirements for the acquisition of tenure. Therefore, she avers that she may not be removed from her position except as provided for by law.

In regard to her years of experience, petitioner advances the position that she has accrued the necessary time for tenure by citing *Board of Education of the Township of Manchester, Ocean County v. Frederick Raubinger and Milo E. Schumacher, Jr.*, 78 N.J. Super. 90 (App. Div. 1963) and *Viemeister v. Board of Education of Prospect Park*, 5 N.J. Super. 215 (App. Div. 1949).

In regard to petitioner's emergency certificate to teach during the period from September 1968 to April 1973, she avers that such certification at that time was valid and, in fact, consistent with N.J.S.A. 18A:26-2. Furthermore, it is asserted that such emergency certification also met the statutory prescription of an appropriate certificate pursuant to N.J.S.A. 18A:27-2. The above-cited statutes provide, in pertinent part, as follows: (N.J.S.A. 18A:26-2)

"No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach\*\*\*"

and: (N.J.S.A. 18A:27-2)

"Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired."

Although petitioner does not claim that tenure accrued to her during the period of time she held an emergency certificate, she does allege that she acquired a tenure status at the precise time a standard certificate was issued to her in April 1973, while she was still employed by the Board. Therefore, she argues that her alleged tenure status cannot be abridged by this Board except as provided by law.

The Board, on the contrary, argues that because tenure is a legislative status, not contractual in nature, the precise conditions set forth by the statutes must be met before a tenure status can be acquired. *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962)

The Board contends, pursuant to N.J.S.A. 18A:28-5 (Tenure of Teaching Staff Members), that for a tenure status to accrue, a person must be a teaching staff member, and be in the employ of the board for a stated period of time. Furthermore, it is argued that N.J.S.A. 18A:28-5 excepts those from a tenure status who are not holders of proper certificates in full force and effect.

Urging that N.J.S.A. 18A:28-5 be read *in pari materia* with N.J.S.A. 18A:28-4, which excludes specifically from a tenure status those persons who do not hold an appropriate certificate, the Board asserts that the consistency of the legislative language regarding proper certificates and appropriate certificates at



*N.J.S.A.* 18A:28-5 and 18A:28-4, respectively, means that such certificates can only be permanent certificates, not an emergency certificate as held by petitioner.

In this regard, those statutes are reproduced here in pertinent part: (*N.J.S.A.* 18A:28-5)

“The services of all teaching staff members including all teachers \*\*\* excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency \*\*\* after employment in such district or by such board for:

“ (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

“ (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

“ (c) the equivalent of more than three academic years within a period of any four consecutive academic years;\*\*\*”

and (*N.J.S.A.* 18A:28-4)

“No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the state board of examiners, in full force and effect \*\*\*.”

While the Board does not deny the facts regarding petitioner’s employment, it does assert that at the precise time it notified petitioner that she would not be reemployed (Exhibit P-2, *ante*), she did not have the appropriate nor proper certificate. Accordingly, it avers that its timely notification to petitioner was consistent with its responsibilities under *N.J.S.A.* 18A:27-10. That statute reads as follows:

“On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

“a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

“b. A written notice that such employment will not be offered.”

Accordingly, in the Board’s judgment, its notification not to renew petitioner’s employment, which occurred before her acquisition of the standard certificate, prevented the acquisition of tenure. The Board further asserts that,

because boards of education in New Jersey have the right to terminate a nontenure teacher's employment, with or without reason, petitioner has no claim to continued employment with this Board and cites *Donaldson v. Board of Education of the City of North Wildwood*, 115 N.J. Super. 228 (App. Div. 1971) now pending before the New Jersey Supreme Court.

In regard to the issue of certification, the Commissioner notes that, since 1903, the State Board of Education has had the power to make and enforce rules and regulations for the examination of teachers and the granting of certification or licenses to teach. Under State Board rules and regulations, certificates are granted by the State Board of Examiners (*N.J.S.A. 18A:6-38 and Rules Concerning Teachers Certificates*), which also has the authority to revoke certificates. The *New Jersey Administrative Code, Title 6*, provides at *Subchapter 4, Types of Certificates*, the following:

6:11-4.4 Emergency certificate

“ (a) An emergency certificate is a substandard one-year certificate issued only in fields of teacher shortage as certified annually by the Commissioner of Education.

“ (b) It is issued only on application of a public school district, submitted after August 1, in which the local board of education declares its inability to locate a suitable certificated teacher.

“ (c) A current list of fields designated for emergency certification is available from the Bureau of Teacher Education and Academic Credentials or the county superintendent of schools.”

Legislative expression regarding the status of an “emergency certificate” is found at *N.J.S.A. 18A:1-1* which provides, *inter alia*:

“\*\*\*‘Teaching staff member’ means a member of the professional staff of any district \*\*\* holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a *valid and effective* standard, provisional or *emergency certificate*, appropriate to his office, position or employment, issued by the state board of examiners \*\*\*.” (*Emphasis supplied.*)

To hold, as counsel for the Board suggests, that an “emergency certificate” to teach is not a valid nor appropriate certificate, would leave the untenable alternative that the State Board of Education, through its own rules, authorizes the State Board of Examiners to issue invalid and inappropriate certificates to teach. The Board’s argument, also, would lead to the conclusion that the Legislature, through its passage of *N.J.S.A. 18A:1-1*, recognizes an invalid and inappropriate certificate. In neither instance can the Commissioner so hold. While emergency certificates are issued to those persons who meet minimal professional qualifications for the field of education, the fact is, that stated requirements are met. In addition, holders of emergency certificates are required to pursue the requirements for the standard teacher certificates as a prerequisite

to having their one-year certificates renewed by the County Superintendent at the request of the employing local board of education.

In this regard, the Commissioner has determined from his own records at the office of the Salem County Superintendent of Schools, that this Board did affirmatively seek renewal of petitioner's emergency certificate since initial employment began in 1968. Accordingly, the Commissioner determines that an "emergency certificate" is a valid and appropriate certificate to teach for the stated one-year period so indicated on its face, subject to renewal upon proper request by the local board of education.

The question of whether petitioner has or has not acquired tenure does not turn, as the Board asserts, on the date and subsequent effect of the administrative memo (P-2, *ante*) tendered her on March 14, 1973. The true test of whether a tenure status has accrued is, as articulated in *Ahrensfield v. State Board of Education*, 126 N.J.L. 543 (1941), whether the precise conditions laid down in the applicable statutes are met. In this case, the applicable statute is N.J.S.A. 18A:28-5. In this instance, these "precise" conditions are met, because petitioner has clearly served the requisite period of time in the Board's employ and acquired possession of a standard teaching certificate during the course of the academic year *while she was still employed*.

In *Zimmerman, supra*, the Court held, *inter alia*:

"\*\*\* Inherent in the tenure legislation is the policy that a board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period.\*\*\*" (at pp. 72-73)

Surely, the Board in this case, had sufficient time to determine whether petitioner met acceptable standards for continued employment in each of the five years it was required to seek renewal of her emergency certificate. For whatever reason, the Board chose to continue her employment on an emergency basis for five succeeding academic years. When the standard certificate was issued to her during her fifth year of employment, all conditions for permanent tenure were then met. From his own records, the Commissioner has determined that the standard teaching certificate was issued petitioner on April 26, 1973. Accordingly, the Commissioner finds that the administrative memo (P-2, *ante*) is of no effect, and the Board's action terminating her employment for the 1973-74 academic year is *ultra vires* and is hereby set aside.

The Commissioner orders that Joann K'Burg be immediately reinstated to her former position as a teaching staff member in the employ of the Board of Education of the Township of Lower Alloways Creek, Salem County, with all rights, benefits, and salary, less mitigation, which would be due her had her employment not been improperly terminated.

COMMISSIONER OF EDUCATION

December 12, 1973

**In the Matter of the Tenure Hearing of William Megnin,  
School District of the Township of Wayne, Passaic County.  
COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Goodman & Rothenberg (Sylvan G. Rothenberg, Esq.,  
of Counsel)

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the School District of the Township of Wayne, Passaic County, hereinafter "Board," has certified a series of four charges against respondent, a tenured teaching staff member in the employ of the Board. These charges allege that respondent has exhibited conduct unbecoming a person in his position and has been insubordinate and negligent. Respondent admits certain factual allegations which two of the charges contain but denies any intentional impropriety with respect thereto and has moved for dismissal of two other charges on the grounds that the Commissioner of Education lacks jurisdiction.

A hearing in this matter was conducted on April 30, 1973, and June 5, 1973 at the office of the Passaic County Superintendent of Schools, Paterson, by a hearing examiner appointed by the Commissioner.

The report of the hearing examiner is as follows:

Two primary charges against respondent were proffered by the Superintendent of Schools and certified to the Commissioner on January 15, 1973, pursuant to the Tenure Employees Hearing Act *N.J.S.A. 18A:6-10 et seq.* Thereafter, however, on April 14, 1973, the Board certified an amended series of charges against respondent, which contained four principal counts.

Two of the counts in the amended series were similar to the charges filed by the Board in January 1973, and were concerned with allegations that respondent absented himself from his post of duty during the Christmas vacation period of 1972. These charges will be considered as an entity *in pari materia* in the recital that follows.

The two other charges contained in the amended series of charges are concerned with allegations made against respondent in the Borough of Allendale Municipal Court. The gravamen of these charges is that respondent did on two occasions commit an atrocious assault and battery on the complainant, respondent's neighbor. Such charges will also be considered as an entity for purposes of this recital.

The four specific charges and the findings pertinent thereto are set forth below.

**CHARGE NO. 1**

"That William Megnin did knowingly and intentionally violate the policy

of the Wayne Township Board of Education in that he intentionally left school one day prior to the regularly scheduled vacation period which began on December 23, 1972. Said absence was without permission or authorization of his immediate supervisor. His absence for the date of December 22, 1972 was not contained on the personnel absentee list submitted to the administrative office.”

#### *CHARGE NO. 2*

“That William Megnin did not report back to school and assume his duties as principal of Schuyler-Colfax Junior High School at the termination of the vacation period and intentionally and wantonly failed to advise his immediate supervisor of his absence. He did not return until January 8, 1973 and was suspended by the superintendent of schools at that time.”

Respondent was first employed as a teacher by the Board in 1952. (Tr. I-21) Thereafter, he was appointed in 1957 as a vice-principal in one of the Wayne schools, and in 1960 he received another appointment as principal. His service in this latter position continued from 1960 to December 1972.

Respondent's written evaluation reports, and letters attesting to his record of achievement during those years, are uniformly commendatory or good. (R-1, R-2, R-3) (Tr. I-135) There is no evidence, in documentary form, that on any occasion during the twenty-year period of his employment until December 1972, respondent was ever absent from his post of duty without permission. As of December 1972, respondent had accumulated a total of 184 or 185 sick leave days, but he had completely utilized his vacation entitlement for the year 1972. (Tr. II-46)

Despite this latter fact, however, respondent did secure permission in December 1972 to absent himself from two days of school duties during the Christmas vacation period, and subsequently finalized his personal plans to go to Florida. He actually left for Florida at approximately noon on Friday, December 22, 1972, although school was still in session at that hour and no formal approval for such early leave had been given. (Tr. I-28)

It was respondent's testimony that when he had gone to the office of his immediate supervisor to secure such approval on December 21, 1972, “\*\*\* he [the supervisor] was not available \*\*\*” (Tr. I-30), whereupon, respondent testified, he asked the secretary to transmit his request to the supervisor and have him [the supervisor] call back “later” if there was any problem. (Tr. I-30)

Subsequently, respondent testified, he tried again to contact the supervisor (Tr. I-37), but he was not successful, and he said:

“\*\*\* I just assumed if there was a problem I would have heard from him.”  
(Tr. I-37)

He evidently inferred, at that point, that the absence of a call from the supervisor signified approval. No other alternative approval was ever sought from other school administrators who were respondent's superiors, although there was evidently opportunity for respondent to secure it. (Tr. I-38)

Respondent arrived in Florida on December 23, 1972, according to his testimony (Tr. I-43), and remained there with relatives until Sunday, December 31, 1972. On that day, he states, he left the residence of his relatives and started for home, but after traveling only forty miles

“\*\*\* The car just cut out. I shouldn't say cut out, the engine had no power.\*\*\*” (Tr. II-80)

(Later respondent testified that the “transmission seal” had broken.) (Tr. I-55) Respondent avers that he then called his relatives (Tr. II-81), who in turn arranged for a tow truck to tow the car approximately “22 miles” (Tr. I-51) to a garage for repairs. Respondent then states he returned to the home of his relatives to await the completion of repairs, and attempted on December 31, 1972, to call the vice-principal of the school to inform him of his trouble. However, he avers, he “\*\*\* didn't get through to him \*\*\*,” either that day or on January 1, 1973, and he states he was similarly unable to contact his immediate superior in the Wayne School System. (Tr. I-52-53)

Thus, when the Wayne schools opened on January 2, 1973, respondent was still in Florida and no one in the Wayne School System had been apprised of that fact. He made no further attempt to notify anyone that day, either, because he stated, he:

“\*\*\* wanted to find out what the disposition was going to be with respect to the automobile.\*\*\*” (Tr. I-54)

Similarly, on Wednesday, January 3, 1973, respondent did not initiate a contact with anyone in Wayne with respect to his absence. That evening, the vice-principal of the school in which respondent was principal, called respondent and advised him to call the Wayne Superintendent of Schools. (Tr. I-54)

Thereupon, on that evening of January 3, 1973, respondent did call the Superintendent (Tr. I-53-54) and informed him of the car trouble and also that the car had been successfully repaired that afternoon. (Tr. I-55) The Superintendent told respondent, according to a stipulation, that he was not to report to his position as principal from that day forward, but was to meet with him (the Superintendent) first. (Tr. I-92)

On January 4, 1973, respondent and his family left Florida for home and arrived there later on Friday, January 5, 1973. A meeting between respondent and the Superintendent ensued on Monday, January 8, 1973 at which time respondent was suspended from duty in his position and the instant charges were forwarded by the Superintendent to the Board. (Tr. I-63)

This concludes the chronological recital of the events which precipitated the first two charges considered herein.

At this juncture, the hearing examiner finds that there is little factual dispute with respect to the basic truth of the allegations contained in Charges Nos. 1 and 2. Respondent admits, in effect, that he had no specific affirmative permission to leave school early on December 22, 1972, and he admits that he failed to contact anyone in authority in the Wayne School System prior to the date of January 3, 1973 about a prolongation of his vacation. His justification of such failure was that he had a continuing understanding with his vice-principal with respect to just such emergencies as the one he states was forced upon him on this occasion. (Tr. I-46) However, he also stated that:

“\*\*\* If I had to do it over again, I would have done it a lot differently.\*\*\*” (Tr. I-63)

Testimony also brought out the fact that respondent's name was not included on the routine absentee lists forwarded by his office to the school district office, because the school secretary thought such absence was either excused or unverified. (Tr. I-112-114)

Finally, the hearing examiner finds that a repair bill (R-6), with the letter head designation “Walt's,” dated December 31, 1972, and marked as paid on January 3, 1973, contains an itemization of towing and car repair costs totaling \$122.72. Respondent was asked on January 8, 1973 by the Superintendent to detail in writing the reason for his prolonged absence from school duties. He did so (R-5) and concluded with this sentence:

“ I am requesting that I be allowed two personal days for Tuesday and Wednesday when the car was laid up. I do not expect to be compensated for Thursday and Friday, the two days needed to return home.”

In summary of these two charges, the hearing examiner finds it to be true in fact that, as charged, respondent:

1. Left school one day prior to the regular Christmas vacation period which began on December 23, 1972 without formal permission or authorization, and that his name was not contained on the absentee list for his school on December 22, 1972;
2. Did not return from vacation at the scheduled time on January 2, 1973, and failed to notify any school officials of his absence prior to, or on that day, or on January 3, 1973;
3. Returned to his employment on January 8, 1973, and was suspended at that time.

The question for decision by the Commissioner is what, if any, penalty should be meted out to respondent for such absence, without permission, from



his post of duty in the context of his total record of twenty years of service to the Board and in the circumstances of the personal emergency which he recites. (The recital was unrefuted at the hearing, *ante*.)

*CHARGE NO. 3*

“That William Megnin on or about November of 1972 committed an assault and battery upon one Ralph Vero, Jr. within the borough of Allendale, New Jersey, which resulted in William Megnin being named defendant in a complaint filed in the municipal court of Allendale charging him with assault and battery.”

*CHARGE NO. 4*

“That William Megnin on or about January 9, 1973 committed atrocious assault and battery upon one Ralph Vero, Jr. within the borough of Allendale, New Jersey, which resulted in William Megnin being named defendant in a criminal complaint filed in the municipal court of Allendale charging him with atrocious assault and battery in violation of *N.J.S.A. 2A:90-1*. Said complaint was referred to the Bergen County Grand Jury and is presently pending before that body.”

Respondent originally moved to strike these two charges on the principal grounds that they were not properly before the Commissioner, but before the Courts. It was represented that the alleged assaults involved no Wayne pupils, took place in a town other than the one in which respondent was employed, and that the disputes in question could be termed neighborhood altercations. It was further stated by respondent that there was a counter-complaint by him with respect to the altercations, and that consideration of the complaints by a grand jury is pending. He indicated that a decision by the grand jury might be delayed for a long period of time. In the circumstances, respondent argued, the charges do not properly rise to a controversy under the school laws so as to confer jurisdiction on the Commissioner.

The Board does not deny that the incidents comprising the subject of the charges stand as unproven allegations; but, it maintains that until a decision is reached with respect to the charges, the charges must stand. The Board offered proof of these allegations at the hearing, *ante*, and at first the hearing examiner indicated he would accept the proofs before deciding his procedural stance with respect to the Motion.

However, on the second day of the hearing, *ante*, the hearing examiner was suddenly faced with a different set of circumstances when the Board, in effect, withdrew all of Charge No. 3, since the William Megnin named in the charge was not respondent at all, but his son. (Tr. II-39-40) Thereafter, the hearing examiner said:

“\*\*\* the case, with respect to Charges 3 and 4, has been changed in my estimation now, by the fact that Charge 3 has been withdrawn. It’s no



longer a series of charges. It is one charge which is an allegation not proven. If we were to proceed with that charge, I would not expect the defendant to produce a defense. It is before the Grand Jury, therefore, at this point, I have changed my opinion on proceeding with *prima facie* evidence with respect to Charge 4\*\*\*.”

The hearing examiner then ruled that the presentation of proofs should be limited to Charges Nos. 1 and 2, *ante*, and that proofs with respect to Charge No. 4 would be held in abeyance.

This ruling was founded on the holding of the Court in *Board of Education of East Brunswick Township v. Township Council of East Brunswick Township*, 48 N.J. 94 (1966) that a controversy which does not arise under the school laws (N.J.S.A. 18A) is outside the Commissioner’s jurisdiction, even though the controversy may pertain to school personnel.

Accordingly, the hearing examiner recommends that Charge No. 4 be set aside, at this juncture, without prejudice. If, at a later date, respondent is found guilty of the offense charged against him herein, the Board is not precluded from instituting an updated charge, for consideration by the Commissioner, which embodies the Court’s findings and determinations. *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County*, decided by the Commissioner of Education, March 20, 1973

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record, the report of the hearing examiner, and the exceptions with respect thereto, as filed by counsel for respondent.

The Commissioner agrees with the recommendation of the hearing examiner that Charge No. 4 be set aside without prejudice pending determination by a court of proper jurisdiction with regard to the allegations contained therein. If, indeed, the allegations embodied in Charge No. 4 are found by the Court to be true, the Board is free to re-certify such charge at that time for consideration by the Commissioner.

There remains for determination, herein, the findings with respect to Charges Nos. 1 and 2, *ante*, that respondent did absent himself without leave from his post of great responsibility for a total of four days immediately prior to and following the school’s Christmas vacation period of 1972-73. Such findings are properly considered in the context of respondent’s long period of twenty years of service in the Board’s employ, and in cognizance of respondent’s recital of the travel emergency with which he was confronted on December 31, 1972.

However, as the Commissioner said *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 S.L.D. 302, 321 those employed in the public schools

of the State “\*\*\*are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children\*\*\*.” The Commissioner holds that such a professional status requires assiduous attention to the details necessary to warrant the trust. Such attention is shown to be lacking in the instant matter, for it is clear that respondent left his post of responsibility without specific authorization to do so. Further, he failed to return to his duties until almost a week after the date he was due to return. While the cause of the late return is understandable, the absolute failure of respondent to promptly notify anyone in authority with respect to such cause is, in the Commissioner’s opinion, reason for censure. He so holds.

There remains for determination by the Commissioner a judgment with respect to the penalty that should be assessed. The Commissioner believes that such determination should be made with full regard for respondent’s prior record as an employee of the Board. It is shown that this record extended for a period of twenty years, and was evidently not marred by the kind of carelessness with respect to detail as was exhibited herein.

The Commissioner determines, therefore, that dismissal would constitute an unduly harsh penalty for the isolated series of acts described herein. *In the Matter of the Tenure Hearing of Wardlaw Hall, School District of the Township of Cinnaminson, Burlington County, 1972 S.L.D. 485* Accordingly, the Commissioner determines that a lesser penalty shall be imposed; namely, the forfeiture by respondent of one month’s pay. He directs the Board to withhold this sum from the amount otherwise due respondent, but withheld from him subsequent to the date of his suspension. Additionally, the Commissioner directs that such compensation as is due respondent at this juncture shall be mitigated by the amount earned by respondent during the time of the suspension. Finally, the Commissioner directs the Board to return respondent to his position, forthwith, with such emolument and benefits as pertain thereto in accord with the Board’s salary policy.

COMMISSIONER OF EDUCATION

December 12, 1973

**Board of Education of the Borough of Middlesex,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Middlesex,  
Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Johnson and Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

For the Respondent, Russell Fleming, Jr., Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on June 29, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Additionally, both parties submitted supplemental evidence in writing to support their respective positions.

At the annual school election on February 13, 1973, the voters rejected the Board's proposal to raise \$2,905,821 by local taxes for current expenses. The budget was then sent to Council, pursuant to *N.J.S.A. 18A:22-37*, for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Middlesex County Board of Taxation an amount of \$2,860,821 for current expenses.

The Board contends that Council acted arbitrarily, unreasonably, and capriciously in making its determination to cut \$45,000 from the amount the Board proposed to be raised by taxation for school purposes.

Council argues that its proposed reduction is neither arbitrary, unreasonable nor capricious, and avers that it gave the Board its underlying reasons in their previous discussions. (Respondent's Answer, at p. 1) Council argues further, that the Board refused to submit to Council worksheets containing certain items of information used by the Board in making its proposed line item entries which it submitted to the voters. The Board does not deny that it would not submit certain worksheets to Council. Council's certification to the County Board of Taxation in the Board's current expense account was reduced by \$45,000; whereas its proposed reductions to the Commissioner totaled \$66,800 as follows:

Line Item	Category	Amount
J110	Assistant Superintendent	\$22,500
J130	Salary Negotiator	3,000
J212	Curriculum Coordinator	19,300
J213	Unassigned Teachers	10,000
J214	Elementary School Librarian	9,700
J215	Library Aides	2,300
	Total	<u>\$66,800</u>

Council argues that the Board specifically refused to share with it the worksheets detailing its need for expenditures in account J710-a, b, and c; however, the hearing examiner notes that Council did not suggest any economies in the J710 account. Rather, their suggested reductions were limited to the items listed in the table, *ante*. Therefore, even though the Board does not deny that it would not submit certain worksheets to Council, the J710 account was ignored when Council made its reduction.

The hearing examiner notes that Council has left for the Commissioner the task of selecting a \$45,000 reduction from the \$66,800 it suggested; whereas Council has a clear mandate to make that determination pursuant to the guidelines in *East Brunswick Board of Education v. East Brunswick Township Council*, 48 N.J. 94 (1966) which reads in part as follows:

“\*\*\* The governing body may, of course, seek to effect savings which will not impair the educational process. *But its determinations must be independent ones properly related to educational considerations* rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State’s educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient* in view of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body’s underlying determinations and supporting reasons.*\*\*\*” (*Emphasis supplied.*) (at p. 105)

The Court held also in *East Brunswick*, that the Commissioner would be “\*\*\* called upon to determine \*\*\* the strict issue of arbitrariness\*\*\*.” (at p. 107)

In a resolution (P-2) passed by Council on March 13, 1973, Council certified the amount of \$2,860,821 to the County Board of Taxation to be raised by local taxes for school purposes for the 1973-74 school year. However, in a subsequent resolution passed by Council on April 24, 1973, Council admitted that:

“\*\*\* [it] did not specify the line items in detail of the reduction in the current expense portion of the budget of the Board of Education\*\*\*.” (R-1)

Council then proceeded to justify its reduction of \$66,800 according to the table, *ante*, although only a cut of \$45,000 was actually made in the Board's budget.

Council argues also, that cuts were made in areas which it determined were not mandatory educational areas and that it "\*\*\*\* thought it appropriate to suggest several areas which, although they total more than the cut made, might be used with respect to the determination left to the School Board from which they wish the cut to occur.\*\*\* [Council] understand [s] from the Superintendent of Schools that this has been done in several instances, and it was simply an effort by us to afford the School Board some additional flexibility.\*\*\*" (Tr. 6)

In the hearing examiner's judgment, Council's actions in reducing the budget cannot be supported considering the language of the Court in *East Brunswick, supra*. Council stated in its written "Response" to the Board's statement defending its budget that:

"\*\*\*\*The Borough approached its responsibility with the serious intent of satisfying the expressed will of the voters without doing harm or injustice to the students.\*\*\*" (R-2, unp)

The hearing examiner recommends, therefore, that the entire reduction of \$45,000 be restored by the Commissioner to the Board's budget for the 1973-74 school year. This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record, the report of the hearing examiner, and the exceptions filed by counsel.

In the matter, *sub judice*, the Commissioner agrees with the hearing examiner that Council has failed to properly discharge its responsibility to set forth a detailed statement of its determination of budget reductions and supporting reasons therefor. Such procedural defeat is fatal to the judicatory process and the equitable resolution of such matters. Therefore, the Commissioner is constrained to adjure Council and all such municipal bodies to discharge their responsibility by setting forth such budgetary determinations promptly, faithfully, and precisely in the amounts of their proposed reductions of board budgets. Only under such circumstances may boards of education respond thereto in the prescribed manner before the Commissioner.

For the foregoing reasons, the Commissioner sets aside that portion of the record so encumbered with procedural defeats, and proceeds on his own Motion to make a determination with respect to the budget defeated by the voters of the Borough of Middlesex on February 3, 1973.

The Commissioner finds that the official audit of the Board's 1972-73 Current Expense Account, as filed with the Department of Education, contains a Statement of Free Appropriation Balance as follows:

Balance July 1, 1972	\$292,318.56
Additions 1972-73	<u>233,009.44</u>
Total	525,328.00
Less Balance Appropriated (1972-73 Oper.)	<u>70,000.00</u>
Balance June 30, 1973	455,328.00
Less Balance Appropriated (1973-74 Oper.)	<u>129,688.00</u>
Balance Available, July 1, 1973	\$325,640.00

The Commissioner further notes that the Board is the target of a liability suit which exceeds the amount of the Board's liability insurance by \$100,000. However, considering the uncertainty of adverse judgment in such suit, and in recognition of the will of the electorate as expressed at the polls, the Commissioner believes the amount of unappropriated balances available to the Board for current expenses for 1973-74 to be greater than that minimally necessary to properly administer its budget. With respect to such balances the Commissioner spoke in *Board of Education of Penns Grove-Upper Penns Neck v. Mayor and Council of the Borough of Penns Grove et al.*, 1971 S.L.D. 372:

“\*\*\*The Commissioner is reluctant to set rigid parameters limiting the amount of surplus to a percentage of the school budget; however, he notes with concern the practice of many boards of education in establishing and maintaining surplus to protect against all unforeseen fiscal crises. This practice in an inflationary economy, which is also troubled by unemployment and heavy competition for public funds, can be counter-productive to the ideal of a healthy school budget fully-funded and supported by municipal officials.\*\*\*” (at pp. 374-375)

Accordingly, the Commissioner finds in the instant matter that Council's certification to the County Board of Taxation reducing the Board's current expense funds by \$45,000 was not excessive in view of the substantial unappropriated balance of \$325,640 available to the Board for current expenses. The Commissioner, therefore, sustains Council's reduction, *ante*. He leaves to the Board the determination of whether all or part of such sum shall be utilized from unappropriated balances as the Board seeks to present a thorough and efficient educational program during the school year 1973-74.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 14, 1973

“W.S.,”

*Petitioner,*

*v.*

**Board of Education of the East Windsor Regional School District,  
Mercer County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Selecky & Scozzari (John A. Selecky, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

W.S., a sixteen-year-old boy enrolled as a pupil in the East Windsor Regional School District, was suspended from school attendance by school administrators and subsequently expelled by action of the East Windsor Regional Board of Education, hereinafter “Board,” on April 18, 1973. W.S. challenges the expulsion action as being too severe for the offenses committed, and requests reinstatement to school as a full-time pupil. The Board denies its expulsion action was too severe for the offenses committed, and prays the Commissioner of Education to uphold the Board’s determination in this matter.

The essential facts are not in dispute, and the matter is submitted for the Commissioner’s determination on Briefs of counsel and the entire record.

Concurrent to filing his Petition of Appeal, herein, W.S. also moved for interim relief in the form of home instruction, which was denied by written decision of the Commissioner on June 14, 1973.

The facts as enumerated by the parties are these:

During the 1972 fall semester, the lavatory walls of Hightstown High School had been defaced by some unknown person or persons. The Board asserts that such action caused substantial damage to school property, requiring cleaning and painting which otherwise would not have been necessary. (Exhibit 1) Moreover, prior to the beginning of that semester, the assistant principal of the high school received, by mail, an anonymous, obscene, and threatening communication, which was subsequently referred to the Hightstown Police Department.

Thereafter, during December 1972, a commercial establishment in East Windsor Township had its walls similarly defaced, as previously reported, *ante*, as occurring at the high school. After an investigation by the East Windsor Police, and a comparison and analysis by the New Jersey State Police of the

writings found at the high school and the commercial establishment, it was determined that the same individual was responsible for the writings in all three instances. Although the record does not clearly reflect the precise date W.S. admitted authorship to the writings on the walls at both locations, it is clear that he did admit such authorship. There is agreement between the parties that W.S. had been suspended for five days during February 1973. The Commissioner believes the reason for that suspension was that admission by W.S. of being the one who wrote on the walls. This suspension would have terminated on February 20, 1973.

On February 19, 1973, W.S. admitted authorship of the communication received by the assistant principal; whereupon W.S. was again suspended as of February 21, 1973. On March 13, 1973, the Superintendent of Schools informed W.S. and his parents that an expulsion hearing would be provided by the Board on March 26, 1973. Thereafter, the expulsion action of the Board was taken on April 18, 1973. It is also noted that the Commissioner's decision on W.S.' Motion for Interim Relief, *ante*, found that the hearing afforded W.S. on March 26, 1973, was proper and acceptable.

The sole issue now to be addressed is whether the Board's expulsion action was too severe a penalty to impose on W.S. for the acts he admitted committing.

In this regard, the Commissioner has reviewed the allegedly obscene and threatening communication sent to the assistant principal by W.S. The first part of that note states:

"On September 10, 1972, my gang will come to HHS [Hightstown High School] and demolish it. This is just a warning. If the pigs are there, we will destroy HHS the next rainy (sic), or when no pigs are there. I will destroy your car.\*\*\*" (Exhibit 2)

The substantive merit of whether W.S. had fully intended to carry out this threat need not be addressed here. However, what concerns the Commissioner regarding this portion of the note, is the affirmative act on the part of W.S., which was required to put in written form the totally negative threats as expressed therein. While the process of education requires an orderly exchange of ideas, negative and positive, such an exchange must occur within an atmosphere free from threats and intimidation. The Commissioner believes that the task of the teacher and the pupil is sufficiently complex without the added burden of carrying out such responsibility in an arena of fear and anxiety. Coupling the threat to the safety of property with the obvious reference to law enforcement officers as "pigs," leaves little room for question regarding the attitudes and values that have apparently inculcated themselves in W.S. The Commissioner places little weight on W.S.' assertion that the note was a "stupid" mistake.

The latter portion of the note contains a two-word expletive, embellished by a crude drawing of what appears to purport a person's middle finger extending away from a closed fist. Having taken the expletive and the drawing



into consideration, the Commissioner finds that W.S. desired and, in fact, succeeded in demonstrating to the assistant principal his abject disregard for him as another human being.

Lastly, the latter portion of the note contains a declaration which, on its face, is vulgar and uncouth. Furthermore, the Commissioner opines that such a gross misuse of one's ability to communicate in writing is demonstrative of the scorn that W.S. holds toward school authorities. The Commissioner does not expect relationships between pupils and teachers to be continuously serene and placid, for reasons stemming from obvious personality differences. But, under no circumstances, does the Commissioner ever intend to countenance or excuse the type of behavior manifested by W.S. in communicating the kind of insolence which he admits in this instance.

Counsel for W.S. argues that, because he was under a five-day suspension, *ante*, on February 19, 1973, for defacing school property, the Board should not have considered that behavior in its expulsion determination. But, because it did consider that prior behavior for which W.S. had already been punished, it thereby placed W.S. in the position of being punished twice for the same offense, thus violating the constitutional rights of W.S. It is noted here that specific constitutional issues have not been delineated.

However, the Board argues that because the matter, herein, is not of a criminal nature, the argument of double jeopardy is specious and cites *State v. Hoag*, 21 N.J. 496 (1956). In further support of its defense against the issue of double jeopardy, the Board looks to *Corpus Juris Secundum*, 16A part 582, at p. 633, which states:

“\*\*\* ‘A citizen’s immunity to be twice placed in jeopardy for the same offence is not generally regarded as a member of that family of fundamental rights encompassed within the protection of the due process clause of the Fourteenth Amendment.’ \*\*\*” (Board’s Brief, at p. 14)

The Commissioner notes that *Black’s Law Dictionary* 578 (rev. 4th ed. 1968) defines “double jeopardy” as:

“Common-law and constitutional prohibition against ‘double jeopardy’ refers not to the same offense *eo nomine* but to the same crime, transaction or omission. \*\*\* A second prosecution after a first trial for the same offense. \*\*\*”

There is little weight that can be placed on W.S.’ double jeopardy argument, for it was not the action of the Board which resulted in the prior suspension of W.S.; such suspension resulted from administrative action pursuant to N.J.S.A. 18A:37-4. Moreover, N.J.S.A. 18A:37-2 specifically provides for causes for suspension and expulsion of pupils as follows:

“Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over

him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.”

There is no question that W.S. admitted responsibility for writing on the walls at the high school, which required removal by school personnel. For that admission of guilt, W.S. was suspended for five days. However, near the end of that suspension, W.S. then admitted sending the note to the assistant principal. It was this latter, second admission of guilt, in the Commissioner’s judgment, that provoked the administrators to refer the total matter of W.S. and his behavior to the Board for possible expulsion proceedings. The Commissioner can find no basis to conclude that a board of education must refrain from considering prior pupil behavior precipitating an earlier suspension, which in its own right is a serious matter, when that board is considering an expulsion action instituted as the result of the pupil’s subsequent behavior, or, as in this case, subsequent knowledge of a serious misdeed already committed.

Finally, is the expulsion of W.S. too severe for his admitted transgressions? Counsel for W.S. argues that by the Commissioner’s own determination in *Scher v. Board of Education of the Borough of West Orange*, 1968 S.L.D. 92, the action of this Board must be reversed. It is further averred that W.S., for whom the Board did not seek professional evaluation, is truly sorry for his transgressions, herein, and is sincere in his desire to return to school. W.S. feels that he has been sufficiently punished by his exclusion from school thus far, and requests that he be reinstated for the completion of his education.

The Board asserts its expulsion action was not arbitrary, unreasonable, or capricious. Furthermore, such drastic action was taken only after total consideration of the writings on the wall admitted by W.S. and the threatening note to the assistant principal. Pointing to the heavy responsibilities assigned to one in such a capacity, the Board emphasizes the seriousness of such a letter in which a man is threatened and his wife villified.

In conclusion, the Board contends that, to reverse its expulsion action, would be to flaunt the will of the people as expressed through their duly elected representatives.

The Commissioner, after carefully reviewing his determination in *Scher, supra*, and after considering the constitutional provisions, *ante*, for pupils to receive a thorough and efficient education, concludes that, based on the incidents herein, W.S. has forfeited his claim to attendance at Hightstown High School. Pupils do not have an unrestrained right to attend public schools. *Eugene Kelly v. Board of Education of the City of Vineland et al.*, 1971 S.L.D. 233; *Rebecca Mayes v. Board of Education of the City of Bridgeton*, 1971 S.L.D. 575; *Scher, supra* Administrators are appointed to administer their assigned schools, and in carrying out that responsibility, are not required to tolerate behavior such as displayed by W.S. in the matter, *sub judice*.

Still, as the Commissioner noted in *Scher, supra*, at page 97:

“\*\*\*The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem.\*\*\*”

This is so, because as was noted earlier, on page 97 of the above-cited matter.

“\*\*\*While such an act [expulsion] may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large.\*\*\*”

As pointed out by counsel for W.S., there is no evidence in the record before the Commissioner, that the Board had its Child Study Team evaluate W.S., as there is no evidence regarding the Board's effort to have W.S. placed under another agency. Although the Commissioner is constrained to uphold the Board's expulsion action herein, he strongly urges this Board and all boards of education in New Jersey to utilize their own resources in arriving at solutions to behavioral problems prior to proceeding to this ultimate act. Furthermore, this Board is urged to make every possible effort to effect placement for W.S. with another agency which may be able to assist him.

Finally, having found no reason for the Commissioner of Education to set aside the expulsion of the East Windsor Board of Education regarding W.S., the Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

December 14, 1973

Francis A. Gana,

*Petitioner,*

*v.*

Board of Education of the Township of Quinton,  
Salem County,

*Respondent.*

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Tusó & Gruccio (Philip A. Gruccio, Esq., of Counsel)

For the Respondent, Hannold, Caulfield & Zamal (Martin F. Caulfield, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Quinton Township Board of Education, hereinafter "Board," was "temporarily relieved" of duties as administrative principal of the Quinton School on August 1, 1972, and directed to submit himself to an examination by a physician designated by the Board. Thereafter, on September 5, 1972, the Board adopted a resolution certifying the charge against petitioner that he had refused to submit to such an examination. The resolution contains, *inter alia*, an avowal that petitioner's alleged refusal constitutes "\*\*\*\* just cause \*\*\*\*" for his dismissal from the school system. Petitioner contests the avowal and states that his initial refusal to be examined by a physician appointed by the Board was the proper exercise of a privilege granted to him by statute, and that a subsequent examination by another physician indicates he should be restored to his position immediately with "\*\*\*\* full back pay\*\*\*\*." Accordingly, petitioner has moved for Summary Judgment on the pleadings. A hearing on his Motion was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on January 23, 1973. Briefs were subsequently filed by Counsel. The report of the hearing examiner is as follows:

This is the second of two actions brought by petitioner against the Board since April 24, 1972. On that date the Board purportedly "terminated" petitioner's services as an employee of the Board, although no charges were advanced against him. Petitioner contested the action, and the Commissioner of Education found that petitioner was a tenured employee of the Board who could not be dismissed in such a summary manner. The Commissioner directed that petitioner be restored to his position forthwith. *Francis A. Gana v. Board of Education of the Township of Quinton, Salem County*, 1972 S.L.D. 429

Thereafter on August 1, 1972, however, the Board passed a resolution (P-1) which stated, *inter alia*, that in the judgment of the Board petitioner was "\*\*\*\* evidencing deviation from normal mental health \*\*\*\*" and directed petitioner to submit himself to examination by a physician designated by the

Board. Petitioner did not comply with the directive immediately, however, and on August 22, 1972, counsel for the Board addressed the following letter to counsel for petitioner:

“\*\*\*Will you please advise me as to Mr. Gana’s intention about complying with the Board’s resolution concerning his psychiatric examination.\*\*\*”

Thereafter, on September 5, 1972, counsel for petitioner addressed an answer to counsel for the Board as follows:

“\*\*\* It is my suggestion that in order to insure the fairness of this examination, that the psychiatrist or psychiatrists to examine Mr. Gana be designated by the State Commissioner of Education and if you agree, I will contact him and request that he designate the psychiatrist.

“In the event that this is not satisfactory, I suggest that you and I have a conference to determine the ground rules of this examination.\*\*\*”

However, on the same date of September 5, 1972, but prior to receipt of counsel’s letter, *ante*, the Board passed a second resolution (P-2) which charged, in effect, that petitioner had refused to obey its directive to submit himself to the examination and that such refusal constituted just cause to warrant a dismissal or reduction in salary pursuant to *N.J.S.A. 18A:6-10 et seq.* The resolution (P-2) was then sent to the Commissioner, and petitioner was suspended without pay pending a final determination of the charges by the Commissioner. His suspension without pay lasted for a period of 120 days at which time his pay recommenced.

Subsequently, petitioner and the Board did agree on a physician to conduct the examination which the Board had mandated by its resolution of August 1, 1972 (P-1), and this examination was made on December 11, 1972. There followed a lengthy report from the physician which found, in essence, that petitioner displayed no evidence of mental incompetency or abnormality. Specifically, the physician stated in a summary of his findings that:

“\*\*\* on the basis of the facts that this man presented to me today, and on the basis of his mental and emotional reactions with me today, I can only come to the conclusion that he is mentally competent and does not manifest any clinical evidence of any abnormal mentation or emotional deviations.

“He is certainly not suffering from any psychiatric dysfunction or any personality disorder of any consequence today.\*\*\*”

The present Motion for Summary Judgment is founded on this medical opinion of the physician, and petitioner avers that he should again be restored to his position by the Commissioner and should receive back pay for all of the time he was suspended. In petitioner’s view, he is entitled to this back pay because “\*\*\* the Board acted arbitrarily and not in accordance with *N.J.S.A. 18A:16-3* which

provides alternative modes of compliance \*\*\*\*” (Brief of Petitioner, at p. 1) when the Board approved its resolution of August 1, 1972 (P-1), directing petitioner to submit himself for examination to the one physician specified by the Board.

The statute, *N.J.S.A.* 18A:16-3, must be read *in pari materia* with the statute immediately preceding it and, accordingly, both statutes are reproduced in their entirety as follows:

“18A:16-2 \*\*\* Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

“Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.

“18A:16-3 \*\*\* Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof and of all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee’s expense.”

Petitioner argues, with reference to the latter of the two statutes, that the Board’s resolution of August 1, 1972 (P-1), provided him with no opportunity for the kind of choice to which the statute refers; namely, a choice of physician “\*\*\* of his own choosing \*\*\*.” Accordingly, in petitioner’s view, the resolution (P-1) was improper on its face, and failure to follow the direction which the resolution (P-1) contained provides no basis to find that he was guilty of insubordination or that a penalty for such insubordination may be assessed against him. As authority for an avowal that, in the alternative, he is entitled to a repayment of all salaries withheld from the time of his suspension on August 1, 1972, and for 120 days thereafter, petitioner cites *N.J.S.A.* 18A:6-30 which provides:

“18A:6-30.1 \*\*\* When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it shall be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract.”

The Board admits that petitioner ultimately purged himself from a charge that he failed to follow the direction of the Board, contained in its resolution of

August 1, 1972 (P-1), to submit himself to an examination. The Board avers, however, that petitioner's delay in this regard still constitutes evidence of insubordination. In the Board's view, it had no obligation to inform petitioner of all of the statute's (*N.J.S.A. 18A:16-3*) provisions, and the delay of petitioner from August 1, 1972 to September 5, 1972 in responding to the Board's resolution (P-1), is reason enough to justify an action against him at this juncture.

The hearing examiner observes that the present dispute is thus a limited one. It is not a dispute over the contention that petitioner failed to comply with the directive of the Board — which he did, ultimately, as reported *ante* — but a dispute concerned with the alacrity with which he responded. The question, simply posed, is whether petitioner's delay in complying with the Board's directive contained in its resolution of August 1, 1972 (P-1), constitutes reason for a forfeit of all or any part of the pay which was withheld from petitioner during the period of 120 days subsequent to passage of the Board's second resolution of September 5, 1972. (P-2)

There is no question, in the judgment of the hearing examiner, with respect to the principal issue raised by the Board's resolution of August 1, 1972. This issue was whether or not petitioner evidenced deviation from normal mental health. There is nothing in the record to support such a claim and therefore the hearing examiner recommends that petitioner be restored to his position forthwith.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and concurs with the recommendation contained therein. Accordingly, the Commissioner directs the Board to immediately reinstate petitioner to his tenured position.

There remains, however, the question of whether or not petitioner's delay in responding to the Board's resolution of August 1, 1972, constitutes sufficient reason why all or any part of the compensation otherwise due him should be withheld. This question must be considered in the context of the fact that petitioner is a tenured employee of the Board and is protected in that employment by the Tenured Employees Hearing Law (*N.J.S.A. 18A:6-10 et seq.*), absent evidence that would constitute legitimate grounds for his dismissal. *Marion B. Rein v. Board of Education of the Township of Riverside*, 1938 S.L.D. 302; *In the Matter of the Tenure Hearing of Consuela Garcia, School District of Midland Park, Bergen County*, 1970 S.L.D. 335. Additionally, the matter herein is set in a time frame of midsummer, a few days after the Commissioner had restored petitioner to his tenured position on the first occasion and during the usual vacation period. *Gana v. Board of Education of the Township of Quinton, supra*

In such circumstances the Commissioner finds no reason for censure of petitioner. Such a holding gains credence from a review of the report of the

physician which refutes the judgment of the Board (contained in P-1) and finds petitioner to be mentally competent and free from abnormal manifestations.

Accordingly, the Commissioner also finds for petitioner on the second count considered herein, and directs that Francis A. Gana be paid the sum of money equal to the entire amount of salary withheld by the Board during the period of his suspension. Petitioner shall also receive all other benefits which may have been withheld by the Board as the result of his suspension.

COMMISSIONER OF EDUCATION

April 5, 1973

**In the Matter of the Tenure Hearing of Francis A. Gana,  
School District of the Township of Quinton, Salem County.**

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Hannold, Caulfield & Zamal (Martin F. Caulfield, Esq., of Counsel)

For the Respondent, Tusso and Gruccio (James J. Gruccio, Esq., of Counsel)

The Board of Education of the Township of Quinton, Salem County, hereinafter "Board," has, pursuant to statutory prescription, certified certain written charges proffered by one of its female employees against the Board's administrative principal, hereinafter "respondent," to the Commissioner of Education. In the judgment of the Board, such charges, if found true in fact, would constitute improper conduct so gross as to warrant dismissal of respondent from his tenured employment. Respondent denies all allegations of improper conduct and demands judgment to this effect.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on July 9, 10, and 11, 1973 at the office of the Cumberland County Superintendent of Schools, Bridgeton, New Jersey. Briefs were filed subsequent to the hearing by respective counsel. The report of the hearing examiner is as follows:

The allegations against respondent which are certified to the Commissioner, herein, are succinctly stated and uncomplicated, and it might, therefore, be expected that the findings with respect to such allegations might be similarly direct. However, in the opinion of the hearing examiner, the allegations and the proof offered in support thereof, must be viewed in the context of a rather long and contentious relationship between respondent and the Board in order to fairly assess them for purposes of evaluation and judgment.



Accordingly, certain historical details of this relationship, as contained in prior decisions of the Commissioner, or in testimony at the hearing, are set forth below as necessary prerequisites for a consideration of the instant charges, *per se*, which follow:

Most importantly in this regard, it is noted here, that the instant Petition is the third involving the Board and respondent in litigation before the Commissioner over a period of time which began on April 25, 1972, and has continued to the present day. In all the intervening time, respondent has been on continuous suspension from his responsibilities to perform duties as administrative principal of the Quinton School; although, as the result of the prior litigation he was technically restored to his position on two occasions by decisions of the Commissioner.

The first of these prior Petitions was occasioned by an act of the Board, wherein the Board, in disregard of the apparent tenured status of respondent and of the statutes contained in the Tenure Employees Hearing Act (*N.J.S.A. 18A:6-10 et seq.*), purportedly dismissed respondent from his employment with the Board. Thereafter, respondent initiated an action against the Board before the Commissioner, which demanded a judgment that the dismissal was an *ultra vires*, unilateral act of the Board which should be set aside. Ultimately, in July 1972, the Commissioner found that respondent was indeed entitled to the protections which the act provides for teaching staff members employed by local boards of education who have met the precise statutory requirements for the accrual of tenure (*N.J.S.A. 18A:28-5*) and that he should be restored to his position forthwith. *Francis A. Gana v. Board of Education of the Township of Quinton*, 1972 S.L.D. 429.

However, respondent was not restored to such employment. Instead, the Board resolved immediately thereafter to continue the suspension of respondent from the performance of his administrative duties and it invoked the provisions of *N.J.S.A. 18A:16-2* to require him to submit himself to an individual psychiatric examination to determine, as the pertinent statute provides, whether or not respondent showed “\*\*\* evidence of deviation from normal, physical or mental health.\*\*\*” When respondent did not comply with the Board’s requirements immediately, he was further charged with insubordination.

Ultimately, however, respondent did submit himself to an examination by a physician whose services had been mutually requested by the parties. The ensuing report stated, in effect, that respondent exhibited no signs of deviation from “\*\*\* normal, physical or mental health.\*\*\*” Thereupon, the Commissioner considered the charge that respondent had been insubordinate *in pari materia* with the physician’s report, *ante*, and again found for respondent. The Commissioner then directed, for the second time, that respondent be restored to his position of employment with the Board. *In the Matter of the Tenure Hearing of Francis A. Gana*, decided by the Commissioner of Education April 5, 1973.

However, for the second time, respondent was denied restoration to such

position, since on February 27, 1973, another employee of the Board, Mrs. Janet Hess, had presented an affidavit (P-2) to the Board which served as the basis for the Board's determination, on that same date, that the affidavit constituted a "written charge" against respondent which was "\*\*\*\* sufficient grounds and just cause to warrant a dismissal or a reduction in salary pursuant to R.S. 18A:6-10.(sic)\*\*\*\*" (Resolution of the Board, adopted February 27, 1973 (P-1) It is this affidavit (P-2) which was the subject of proofs at the hearing and which requires a finding of fact by the hearing examiner. The proofs and defenses pertinent thereto will thus be subsequently set forth. However, the hearing examiner believes that certain testimony brought forth at the hearing must first be inserted at this juncture, to complete the contextual setting for the record, within which such proofs and defenses must be examined.

This testimony of importance to the general context in which the charges herein must be examined, is that of the former solicitor of the Board and of some former members of the Board.

The Board's former solicitor, Donald Masten, Esq., a member of the New Jersey bar and former president of the Bar Association of Salem County, had served as solicitor for the Board from 1967 or 1968 (Tr. II-88) to March of 1972, at which time he terminated the relationship. His appearance and testimony at the hearing, which was voluntary and at his "own volition," (Tr. II-96) was principally concerned with a recital of the portent of a discussion he had had in "\*\*\*\* late February or early March, \*\*\*\*" (Tr. II-88) with the Board President and the Salem County Superintendent of Schools. According to Mr. Masten, these officials had requested the meeting, which was held in Mr. Masten's office, to discuss some "\*\*\*\* urgent matters. \*\*\*\*" (Tr. II-88)

One of these "urgent matters," which was the subject of discussion that evening, was the employment status of respondent herein. According to Mr. Masten, the two officials expressed a desire to "get rid" of Mr. Gana (Tr. II-91), and they indicated that:

"\*\*\*\* if we get rid of him, all our problems are solved. \*\*\*\*" (Tr. II-92)

(The "problems" of reference were evidently those connected with racial conflict, and specifically that involving the black community in Quinton, which had been experiencing a period of "unrest," in part, because of some administrative decisions of respondent.) (Tr. II-89-90)

However, following a period of probing for the reasons which could be advanced by the officials to "get rid" of respondent, Mr. Masten said that he told the officials he

"\*\*\*\* thought that their charges were totally irresponsible, unsupportable, and I, myself, surely wasn't going to sign my name to them on that basis. \*\*\*\*" (Tr. II-93)

Again, according to Mr. Masten:

“\*\*\* it was thought [by the school officials] that the colored people, at the time, were directing most of their rap against Gana, and those members of the Board who apparently supported him \*\*\* [O]ne of the easiest methods of pacifying them would be to merely get rid of the opposition. That would be Gana. That would be a good sacrificial lamb.\*\*\*” (Tr. II-94-95)

Subsequent to the referenced meeting of late February or early March 1972, Mr. Masten stated he wrote a letter to the Board and told them he

“\*\*\* thought they should obtain other counsel, because I didn’t want to in effect represent them anymore.\*\*\*” (Tr. II-93)

Certain former members of the Board also testified at the hearing and such testimony included that of a former Board President — and a member of the Board for eighteen years — who said respondent had previously enjoyed an “excellent” general reputation for truth and veracity, honesty and integrity in Quinton. (Tr. II-57) He also stated that it was his belief that “a group” of Board members had for some time sought “Mr. Gana’s hide.” (Tr. II-50) His specific words in this regard were:

“Q. Mr. Patrick, are you aware of any activities on the part of Mr. Owens [President of the Board] directed against Francis Gana?

“A. Well, there seems to be a group that are having their meetings, and there has been something going on all the time after Mr. Gana’s hide. I could size that up before I left the Board.\*\*\*” (Tr. II-50)

Testimony of certain other former Board members, called by respondent, was similar to that of Mr. Patrick and attests, in the judgment of the hearing examiner, to the great diversity of opinion in Quinton Township within which the instant charges must be considered.

However, Mr. Rodney Owens, President of the Board, testified he was not aware of any meetings called “\*\*\* to discuss Mr. Gana and ways to get rid of him\*\*\*.” (Tr. I-13) He also gave testimony concerning the meeting with the County Superintendent and the Board’s former solicitor, Mr. Masten, which had occurred in February or March 1971, and said that he had no recollection of conversation at that meeting of “\*\*\* getting rid of Mr. Gana or how you would go about getting rid of him \*\*\*.” (Tr. I-16) Additionally, he denied that he or the County Superintendent had ever said they

“\*\*\* had to quiet the people down, and one way to do it was to get rid of Mr. Gana.\*\*\*” (Tr. I-22)

The County Superintendent was not called as a witness in the case.

This concludes a preliminary recital of the events which serve as a context for the instant charges and the proofs and defenses pertinent thereto.

Such charges will now be considered *seriatim* as they are contained in the affidavit (P-2) of Mrs. Janet Hess. The affidavit is initially set forth in its entirety as follows:

“JANET HESS, of full age and being duly sworn according to law upon her oath deposes and says:

“1. I am and have been an employee of the Quinton Township Board of Education.

“2. Prior to October 20, 1971, the School Principal, Francis A. Gana, approached me several times to enter into a relationship with him.

“3. On October 20, 1971 in the afternoon he took me to the Marquette Motel and we were engaged in sexual relations.

“4. I did not reveal this to anyone for over a year.

“5. He approached me several times later to continue our relationship, but I refused. \*\*\*”

Testimony, with respect to the first paragraph, *ante*, is not in dispute, since Mrs. Hess has been an employee of the Board for a period of five years, the past four years of which, her position has been that of Cafeteria Manager. She continues actively in that employment to the present day. Neither is the statement contained in the fourth paragraph of P-2 in dispute, herein; although, the impact that the statement holds is the subject of an argument set forth in the Briefs of Counsel which are before the Commissioner.

The remaining paragraphs, second, third, and fifth, are those which require a finding of fact by the hearing examiner. Therefore, a summary of the evidence pertinent thereto, as contained in testimony and in certain documents admitted into evidence at the hearing, is set forth as follows:

“2. Prior to October 20, 1971, the School Principal, Francis A. Gana, approached me several times to enter into a relationship with him.”

Specifically, Mrs. Hess testified, these alleged approaches had been made during the six-week period of summer school session in Quinton in 1971. (Tr. I-113) She stated:

“\*\*\* He had approached me several different times and asked me to go out with him. He told me how much I wanted him, and these types of advances. \*\*\*” (Tr. I-119)

She then detailed, in her testimony, one particular incident wherein she alleged respondent called her to school on a day of the 1971 summer session after classes were adjourned and no one else was there. She said that, while walking with respondent toward what she thought was an office conference, he

stopped at a storeroom, opened the door, and told her to go in. Thereupon, she said:

“\*\*\* he exposed himself to me from his waist down.\*\*\*” (Tr. I-120)

She testified further:

“\*\*\* that he tried to persuade me to have relationships with him then, and I refused. \*\*\*” (Tr. I-123)

Later, she said:

“\*\*\* There were other times during the school year when he called me into his office and wanted me to have relationships with him there.\*\*\*” (Tr. I-125)

In reply to a further question in this regard, she alleged that such encounters occurred “\*\*\* once or twice a week \*\*\*,” (Tr. I-125) in response to requests by respondent, relayed to her via the intercom communication system. (Tr. I-126) She further alleged, that on those occasions, he also exposed himself. (Tr. I-126) Such exposure, she stated, occurred while respondent was “In his bathroom” (Tr. I-126), which was a part of the office area, and while other doors, including an unlocked door to the outer office (Tr. I-157) of the school, were closed. She also testified, that on those occasions, he “\*\*\* wanted me to have relationships with him there \*\*\*,” (Tr. I-125) but that on each occasion, she told him she would not. (Tr. I-128)

Cross-examination of Mrs. Hess developed the following testimony of relevance to the summary of testimony elicited on direct examination as separated *ante*:

1. With respect to her motives for setting forth the charges contained in the affidavit (P-2) —

“\*\*\* Q. Is it accurate to say, Mrs. Hess, that you felt that you were always put down and made to feel stupid, and that you knew nothing by Mr. Gana?

“A. Yes.\*\*\*

“Q. And you felt that Mr. Gana was taking an attitude that he knew more than you because he had a degree or something of that nature, isn’t that true?

“A. Yes.

“Q. And you resented that very deeply, didn’t you?

“A. Yes, I did.

“Q. And you do now, don’t you?

“A. Yes. \*\*\*” (Tr. I-153)

and at Tr. I-132:

“\*\*\* Q. And your purpose in signing the affidavit that you signed was to get Mr. Gana dismissed, wasn’t it?

“A. Yes\*\*\*.”

Mrs. Hess also testified she had disagreed with respondent over the “\*\*\* way that he handled [her] son’s school problem \*\*\*.” (Tr. I-131)

2. With respect to conflicts between testimony at the hearing, *ante*, and statements made by Mrs. Hess in depositions taken prior to the hearing, regarding whether or not she had related an account of irregular activities of respondent to anyone, prior to the time when the affidavit (P-2) was presented to the Board –

“\*\*\* Q. You lied under oath, you lied under oath?

“A. Yes, that’s what you’re saying.\*\*\*” (Tr. I-167)

“\*\*\* Q. But, you were lying, weren’t you?

“A. Yes, I guess I was.\*\*\*” (Tr. I-168)

Respondent, in his testimony, detailed his disagreements with Mrs. Hess, which were concerned with the education of her son (Tr. III-13-14) and her daughter (Tr. III-21) and the “great animosity” (Tr. III-8) which existed between certain members of the Board. He also stated that Mr. Owens, Board President, had said to him:

“\*\*\* ‘Your friends in Quinton are on the wrong side of the fence. If you don’t stop seeing them you will lose your job.’ \*\*\*” (Tr. III-8)

Additionally, respondent testified with regard to the “resentment” he alleged Mrs. Hess held toward him. (Tr. III-15) Respondent denied, unequivocally, that he had ever behaved in an improper manner before her. His testimony in this regard was as follows:

“\*\*\* Q. Have you ever done anything improper [with Mrs. Hess]?

“A. I have never done anything improper, made any improper advances with Janet Hess at any time at any place.\*\*\*” (Tr. III-28)

The cross-examination of respondent produced nothing of importance with specific reference to the central question and answer detailed above. If

anything, his denial of impropriety was even more firm. (Tr. III-73) However, the answer of respondent regarding matters of peripheral import to the matters under consideration herein were generally, in the opinion of the hearing examiner, unresponsive, erratic and marked by an inability to remember. (Tr. III-29-77)

The testimony of a school secretary, Mrs. Dalmah Saunderlin, also has some relevance to the charge considered herein. (Tr. II-33-45) She testified that the door between her office and that of respondent's could not, to her knowledge, be locked (Tr. II-35); and that it was a usual practice, when entering respondent's office, to "knock and walk in." (Tr. II-37) She also stated that she had never seen respondent do anything improper in all of the three years that she worked with him in the school. (Tr. II-38)

The hearing examiner has examined all of the testimony pertinent to the allegation under consideration herein, and notes that the testimony of respondent is in a direct dichotomy with that of Mrs. Hess and that the testimony of Mrs. Hess has no factual corroboration of any kind. Thus, stated in such stark terms, the hearing examiner does not find a preponderance of evidence herein which is necessary to find this specific charge as true in fact.

Such a finding could only be made, therefore, on an exercise of judgment by the hearing examiner with respect to the credibility of the witnesses.

In this regard, however, the hearing examiner is influenced by several factors to find in favor of respondent. As a first consideration, there is the apparently deep resentment and animosity between Mrs. Hess and respondent which is so evident throughout the transcript and was evident at the hearing in voice inflection. While it may be possible for amorous advances to be made in such a set of personal circumstances, the hearing examiner deems it unlikely, and improbable.

Further, the hearing examiner is persuaded by the historical background of this case and the recited atmosphere filled with hostility, and political and personal antagonism between past and present members of the Board, that a factual corroboration of the allegation of Mrs. Hess, herein, is a necessary prerequisite to a finding that such allegations are true in fact.

Accordingly, after a review of all the evidence pertinent herein, the hearing examiner finds that this allegation has not been proven to be true in fact. He recommends that it be dismissed by the Commissioner as a charge against respondent.

“\*\*\* 3. On October 20, 1971 in the afternoon he took me to the Marquette Motel and we there engaged in sexual relations.\*\*\*”

The testimony of Mrs. Hess and respondent with respect to this allegation was also directly at variance and there is no corroborating evidence that the allegation is true in fact. It is clear, however, that the portion of the allegation

which states that “\*\*\*’ he took me to the Marquette Motel \*\*\*,” is false in that Mrs. Hess testified that she and respondent each drove their own cars to the motel, and they were not personally together until such time as they arrived at that destination. (See Tr. I-106)

When asked to explain the reason why she had agreed to meet respondent at the motel on the afternoon of October 20, 1971, since she had said she refused to engage in such a relationship on other occasions, she testified:

“\*\*\* I finally thought if I go with him, he’ll leave me alone.\*\*\*” (Tr. I-128)

She also indicated that respondent had been threatening to “make it difficult for her” in her position, or with regard to her husband’s position, unless she did enter into such a relationship. (Tr. I-128)

At approximately 2:15 p.m., on October 20, 1971, according to Mrs. Hess, she and respondent arrived at the motel in separate cars. (Tr. I-106) Thereafter, she testified, respondent “\*\*\* went in and got the room \*\*\*,” (Tr. I-107) after he had entered it, she got out of her car and “\*\*\* went into that room, also.\*\*\*” (Tr. I-108) After entering the room, she testified that they had “\*\*\* relationships together \*\*\*,” later defined in her testimony as “\*\*\* sexual intercourse \*\*\*.” (Tr. I-109) Again, according to Mrs. Hess, they stayed in the room about an hour and a half. (Tr. I-109)

Mrs. Hess also testified that she had asked a friend to “pick up” her children that afternoon and “\*\*\* take them to their piano lessons for me.\*\*\*” (Tr. I-106) The friend’s testimony was not that she had taken the children to lessons in Bridgeton, but that she had picked them up at “\*\*\* Around 4:30, 5:00.\*\*\*” (Tr. I-84) She stated she remembered this incident of October 20, 1971, because later that evening, she and Mrs. Hess had journeyed to Millville to buy meat. (Tr. I-98) (The hearing examiner notes the unexplained discrepancy in pertinent testimony herein; the children of Mrs. Hess were clearly not taken to their piano lessons by Mrs. Hess, nor were they taken there by her friend, as Mrs. Hess said she had requested. Since, according to testimony, neither Mrs. Hess nor her friend took them, there is a question with regard to a need to pick them up.)

Respondent states in testimony that he has “\*\*\* never been at the [Marquette] Motel in Bridgeton, New Jersey with anyone.\*\*\*” (Tr. III-28) He further avers that, on the afternoon of October 20, 1971, according to his diary, he had been in the Magnolia Public Schools, many miles from Bridgeton, New Jersey, in conference with Mr. James B. Carden, Superintendent, and that they were engaged in a discussion of the mini-grant program and federal grants. (Tr. III-23) This testimony was corroborated by that of Mr. Carden. (Tr. II-115)

There are two other elements of testimony and documentary evidence of some relevance herein: testimony concerned with why Mrs. Hess waited for a period exceeding one year from the alleged incident of October 20, 1971 to February 27, 1973, to proffer the written charges considered herein; and



evidence concerned with whether or not the motel room (No. 8), which Mrs. Hess testified she and respondent occupied on October 20, 1971, was occupied at all.

Testimony with respect to the first of these elements of testimony was offered by Mr. Harry C. Hess, husband of Janet Hess, who stated the delay in coming forward was caused in his opinion, because he:

“\*\*\* felt that because of other things that were pending, such as the tenure and thing (sic), that there would be a possibility that the man would be dismissed from the school system, and this way no scandal or anything would arise.\*\*\*” (Tr. I-64)

Testimony was offered by a special investigator for respondent, with respect to whether or not room number eight was occupied on October 20, 1971, as alleged by Mrs. Hess herein. He said, in this regard, that he had gone to the motel, spoken with its owner (Tr. II-107), and examined the registry procedure. (Tr. II-108) He testified that he found there were ten “occupied rooms” on October 20, 1971, but that room number eight was not occupied. (Tr. II-110) He said, also, that the name Francis Gana was not registered to any room. (Note: In this regard, another document (P-5), submitted late in the hearing by the Board, does indicate that room number eight may have been occupied on that day; but, even if this is so, there is no evidence that the person or persons who occupied it were, or included, Francis Gana.)

The hearing examiner has examined all of the evidence pertinent to this third allegation (P-2), and the finding with respect to it is similar to that with respect to the second allegation; namely, that the Board has failed to produce a preponderance of believable evidence to support the third allegation. Thus, the quantum of proof is insufficient to justify a finding that the allegation is true in fact.

This finding is also grounded on the historical facts pertinent to respondent’s employment by the Board, by the absolute dichotomy of testimony of Mrs. Hess and respondent, and by the absence of any corroboration that the testimony of Mrs. Hess is true. Additionally, in the charge, herein, the hearing examiner is persuaded by the testimony of Mr. Carden, as reported, *ante*, that respondent was in Magnolia, New Jersey, on the afternoon of October 20, 1971, and therefore could not have been in a motel in Bridgeton. It is noted, also, that the discrepancy with respect to the activities of the children of Mrs. Hess on the afternoon of October 20, 1971, is a discrepancy without explanation.

Accordingly, the hearing examiner recommends that this third charge also be dismissed. His recommendation with respect to the fifth charge is the same, for exactly the same reasons as enunciated, *ante*, with respect to the second and third charges.

In summation, the hearing examiner finds the allegations against

respondent contained herein to be unsupported by a preponderance of the believable evidence, and he recommends that such charges be dismissed by the Commissioner.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner, having reviewed the record in the matter, *sub judice*, the report, findings, and recommendations of the hearing examiner, and the exceptions thereto as filed by counsel, finds and determines that petitioner has failed to prove the validity of charges of gross misconduct of respondent.

Accordingly, the Commissioner directs that the charges be dismissed and orders the Board to reinstate respondent to his administrative position with all the benefits to which he may be entitled retroactive to the date of his suspension.

COMMISSIONER OF EDUCATION

December 14, 1973

Frank A. Young,

*Petitioner,*

*v.*

Board of Education of the Township of Downe, Cumberland County,

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Shapiro, Brotman, Eisenstat & Capizola (Michael D. Capizola, Esq., of Counsel)

For the Respondent, Keron D. Chance, Esq.

Petitioner, an administrative principal, formerly employed by the Board of Education of the Township of Downe, hereinafter "Board," appeals to the Commissioner of Education to direct the Board to reimburse him for legal costs to settle a suit in equity brought against him by the Board.

There are no facts in dispute. The matter has been submitted for adjudication by the Commissioner on a joint Stipulation of Facts and Briefs of counsel.

The joint Stipulation of Facts reads in part as follows:

“\*\*\* Petitioner, Frank A. Young, was employed as Administrative Principal by the respondent Board of Education of the Township of Downe, in the County of Cumberland, from July 1, 1964 to June 30, 1966, inclusive, which employment terminated on the latter date and has not been resumed.

“During the period of employment petitioner had responsibility for management of the cafeteria account, including collection and deposit of money in connection therewith, which function was performed by the petitioner with the assistance of his Secretary, Carolyn Thomas, who was also an employee of the Board during this period of time.

“The Auditor for the School Board reported to the Board a shortage of funds in the cafeteria account and on or about October 20, 1966, the Board was advised by its Auditor that the apparent shortage (sic) in this account amounted to \$4,808.73 and this determination by the Auditor was communicated by the Board to petitioner by letter dated March 30, 1967.

“On or about July 3, 1968 a suit was commenced in the name of the Board against Frank Young and Carolyn Thomas in the Superior Court of New Jersey, Cumberland County, Law Division, Docket #L-36845-67 for money damages. Frank Young and Carolyn Thomas defended this suit and filed answers therein.

“Before trial, the suit was settled by agreement under the terms of which a total of \$1,350.00 was to be paid to the Board, with \$675.00 to be paid by Frank Young and \$675.00 to be paid by Carolyn Thomas. True and correct copies of the Complaint, Answers and Order of Dismissal filed in this suit are attached hereto and made a part of this Stipulation.

“Pursuant to the settlement agreement Frank A. Young paid to the Board \$675.00 and in connection with the defense of this action the said Frank A. Young incurred Attorney’s fees and expenses of \$1,049.30.\*\*\*”

Petitioner avers that his offer of settlement and its acceptance by the Board which terminated the litigation against him, cannot be construed as an admission of any wrongdoing; in fact, “\*\*\* the law suit was terminated with an express denial of liability by \*\*\* [petitioner], and upon terms which make clear the fact that the \*\*\* [insurance company] was unable to prove any negligence or wrongdoing on \*\*\* [petitioner’s] \*\*\* part \*\*\*.” (Petitioner’s Brief, at p. 4)

Petitioner avers further that his offer of settlement was predicated on his assumption that the pending trial in this matter would last three days and that attorney fees for that time plus the loss of three days’ pay plus other legal expenses would be too costly considering the total amount of the suit being pressed against him.

Specifically, petitioner prays, therefore, that the Commissioner: (1) direct

the Board to reimburse him in the amount of \$675.00 which amount was paid by petitioner in order to terminate the litigation against him; and (2) pay him for counsel fees in regard to this litigation which amount to \$1,000 plus costs of \$49.30.

Petitioner cites *N.J.S.A. 18A:16-6* as the statutory authority for his demand. That statute reads as follows:

“Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher, for any act or omission arising out of and in the course of the performance of the duties as such office, position, employment or student teaching, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.”

The Board asserts that petitioner’s claim for reimbursement for his expenses arising from the litigation, *ante*, cannot be legally supported by his reliance on *N.J.S.A. 18A:16-6*. The Board asserts that the statute imposes no legal obligation to reimburse petitioner, and that the Board has exercised its discretionary authority by not authorizing payment of counsel fees and expenses.

The Board further asserts that petitioner was no longer in its employ at the time litigation began; therefore, petitioner is not included in the broad protection offered by *N.J.S.A. 18A:16-6*. Nor was petitioner acting “out of and in the course of performance of the duties” of his position; rather, the allegations against him arose not because of something he should have done in his official capacity, but because of something he should not have done. “\*\*\*These allegations involved a shortage of funds. Whether this is caused by theft, mismanagement or otherwise, it was not done in the performance of his official duties\*\*\*.” (Respondent’s Brief, at p. 3)

The Board argues, also, that *N.J.S.A. 18A:16-6* which requires the Board to “\*\*\* save harmless and protect such person from any financial loss resulting therefrom \*\*\*” cannot apply in a situation where the Board itself finds it necessary to take action against a person in its employ. Such an interpretation, it avers, would preclude the Board from any remedy, for if the Board succeeds, it would be required to pay itself any damages recovered and the legal costs and expenses incurred by the defendant. Such a result, the Board argues further, would be incredible and clearly not the intent of the statute.

The Board argues finally, that good faith is essential and to “\*\*\* warrant defense at public expense it must be shown that the official was performing in good faith the duties of his office \*\*\*.” Further, the Board asserts that there

“\*\*\* is no authority for payment by the board for defense of a suit resulting purely from the personal actions of an employee\*\*\*.” (Respondent’s Brief, at p. 5)

The Board concludes that *N.J.S.A. 18A:16-6*

“\*\*\* applies only to present employees and not to former employees. It applies only to suits involving acts or omissions which arise out of and in the course of employment, but such acts or omissions must also be involved in the *performance of the duties of the office*. Acts or omissions are not within the protection of the statute if they do not relate to official duties. Personal, unauthorized acts \*\*\* are not protected \*\*\*. Good faith in the performance of an act or omission protected by the statute must be shown by the employee who claims protection of the statute [*N.J.S.A. 18A:16-6*] and seeks reimbursement for counsel fees and expenses incurred in a civil action described in the statute.\*\*\*” (Respondent’s Brief, at pp. 5-6) (*Emphasis in text.*)

The sole question posed for adjudication by the Commissioner is:

Whether or not the Board must pay petitioner’s counsel fees, costs and expenses arising out of litigation brought against him by the Board after his employment with the Board was terminated, which suit was later settled between the litigants and then dismissed in its entirety by the Court?

In the matter of *John J. Powers v. Union City Board of Education*, 124 *N.J. Super.* 590, 597 (*Law Div.* 1973), the Court held that a member of a board of education should not be “\*\*\* encouraged to engage in acts which may constitute crimes by the assurance that an acquittal on the charge will permit him to saddle defense costs upon the taxpayers of the community.\*\*\*” *Powers v. Union City* is distinguishable from the instant matter by reason of the fact that that action was brought against the Board, not by an employee, but a Board member pursuant to *N.J.S.A. 18A:12-20* which in pertinent part provides:

“Whenever \*\*\* a criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the cost of defending such action, including reasonable counsel fees and expenses, \*\*\* shall be borne by the board of education.”

In the instant matter, it is noted that *N.J.S.A. 18A:16-6* is similarly worded, except that it applies to civil actions and to petitioner who was an employee of the Board.

Also, the instant matter is on point with *Powers v. Union City, supra*, in that the plaintiffs in both cases were not found guilty of any wrongdoing. In *Powers v. Union City*, the plaintiff was acquitted by a jury on all counts of his indictment. In the instant matter, petitioner settled with the Board prior to

going to trial. In *Powers v. Union City*, the Court held, therefore, that it was “not called upon to make a finding of guilt or innocence as a precondition for application of the statute. [N.J.S.A. 18A:12-20]\*\*\*\*” (at p. 592) Nor is it necessary to make any such finding of guilt or innocence as a precondition for applying N.J.S.A. 18A:16-6 in the matter, *sub judice*.

The matter, herein, is similar to *Powers v. Union City*, *supra*, in that petitioner was charged by the Board with misuse or loss of certain school funds for which he had responsibility, and the parties settled their dispute which thereafter gave rise to the instant matter. Although there are no school law cases in this State precisely on point involving criminal or civil charges filed against an employee, a civil suit was decided in the matter of *Errington v. Mansfield Township Board of Education*, 81 N.J. Super. 414 (App. Div. 1963); reversed and remanded 42 N.J. 320 (1964). In *Errington v. Mansfield Township Board of Education*, 100 N.J. Super. 130 (App. Div. 1968), on second appeal to the Appellate Division, the Court held that board members who were sued for passing a resolution were entitled to legal defense at public expense, but former board members who were individually sued for alleged libel were not so entitled. That case involved civil litigation and, although the facts therein are dissimilar, the rationale of the Court is pertinent and reads in part as follows: (at pp. 137-138)

“The trial court emphasized the word ‘duties’ in reaching its conclusion and strictly interpreted it to exclude the adoption of a resolution to authorize the defense of a board member sued for libel. We would not construe the expression ‘in the performance of their duties’ so narrowly. Such a strict construction of ‘duties’ would exclude all tortious conduct by a board member, because it is never a ‘duty’ of a board member to commit a tort. It would also exclude all invalid resolutions because it is not a ‘duty’ of a board member to pass an invalid resolution. *The purpose of the new statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his prescribed duties.*\*\*\*\*” (Emphasis supplied.)

In *Powers v. Union City*, *supra*, the Court commented as follows:

“\*\*\*\* The federal crime upon which Powers was indicted does not necessarily require that a defendant be a public official for conviction thereunder. Nevertheless, the indictment alleges his official position as a member of the board of education, and the asserted criminal conduct under the factual context of the trial proofs did arise out of the performance of his functions as a member of the board.

“\*\*\*\* It is manifest, on the other hand, that the unlawful acts as alleged in the criminal prosecution were not encompassed within the prescribed duties of Powers as a board member. They were clearly unlawful and beyond the proper good faith performance of his public functions. The fact, however, that the alleged criminal acts were obviously beyond the

prescribed duties of a board member does not in itself immunize the board from the statutory liability; for such a construction would exclude all criminal conduct and frustrate the express intent of the legislature. *Cf. Errington v. Mansfield Tp. Bd. of Ed.*, 100 N.J. Super. 130, 137 (App. Div. 1968).\*\*\*" (at p. 595)

The Court also stated the following:

“\*\*\* No member of a board of education should be encouraged to engage in acts which may constitute crimes by the assurance that an acquittal on the charge will permit him to saddle defense costs upon the taxpayers of the community. \*\*\* [R]eimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within the legislative limitations.\*\*\*” (at pp. 597-598)

The Commissioner determines that the matter herein is similar to *Powers v. Union City*, *supra*, despite the fact that it involves an employee rather than a board member. In making this judgment, the Commissioner holds that it could not be legislative intent to authorize a Board to press litigation against an employee pursuant to N.J.S.A. 18A:16-6 and, if successful, thereafter protect that employee from any judgment made against him. Such a result would preclude the Board from any remedy, as it would be required to pay itself any damages and legal costs incurred by the defendant in such an action. The Commissioner held in *Lawrence M. Davidson v. Newark State College and Eugene C. Wilkens*, 1968 S.L.D. 12, that:

“ \*\*\* A statute will not be construed to reach an absurd or anomalous result. *Robson v. Rodriguez*, 26 N.J. 517 (1958); *Slocum v. Krupy*, 11 N.J. Super. 81 (App. Div. 1951) See also *Schumacher v. Board of Education of Manchester Township*, 1961-62 S.L.D. 175, affirmed as *Board of Education of Manchester Township v. Raubinger*, 78 N.J. Super., 90 (App. Div. 1963). In the Commissioner's judgment, petitioner's argument enlarges the statute far beyond any intent of the Legislature and would produce untenable and unreasonable results. \*\*\*” (at p. 16)

Petitioner is not entitled to recover his expenditures, plus counsel fees and costs. The fact that he settled with the Board prior to going to trial has no bearing on this determination. Nor is any judgment made, herein, as to his guilt or innocence regarding those charges made against him by the Board.

For the reasons expressed herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 20, 1973

**In the Matter of the Special School Election  
in the Township of Galloway, Atlantic County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for the passage of a school construction bond issue in the School District of the Township of Galloway, Atlantic County, at a special school election held on September 25, 1973, were as follows: (Exhibit A)

	<u>Yes</u>	<u>No</u>
Polling District No. 1 (Arthur Rann School)	163	158
Polling District No. 2 (Cologne School)	180	193
	343	351

Pursuant to a request made by Howard Kupperman, Esq., in the name of the Galloway Township Board of Education, hereinafter "Board," an authorized representative was appointed by the Commissioner of Education to recount the ballots cast on the day of the election on voting machine #91063 located in Polling District No. 1 at the Arthur Rann School. The purpose of the recount was to determine if any alleged discrepancies occurred in the recorded vote on the machine as the result of a possible mechanical failure.

The recount of ballots cast on the voting machine in question was held at the voting machine warehouse of the Atlantic County Board of Elections, Northfield, on October 4, 1973.

The Commissioner's representative reports that a recheck of voting machine #91063 totals showed the following:

**Protective Counter:**

Pre count (obtained from Inspector of Elections)	013141
Post count	<u>013469</u>
Total (difference)	328

**Public Counter:**                      Total                      326

**Column Counters:**

Yes	163
No	<u>158</u>
Total	321

The results of the totals recorded, *ante*, in the recheck of the protective



counter and the column counters agreed with the certification made by the election officials at the Arthur Rann polling place. (Exhibit B, at p. 2)

The Commissioner's representative notes, however, that the subtotals obtained from a recheck of the column counters when added together (321), resulted in seven fewer votes recorded when this number was compared with the number of persons registered to cast a ballot on the protective counter (328).

Accordingly, in order to determine if there were any mechanical defects, it was necessary for a county election official to remove the seal on the voting machine so that it could be operated.

The county election official then proceeded to demonstrate to the Commissioner's representative, and others present, how ballots were cast and recorded as the mechanical functions of the machine were tested.

As a result of this demonstration, the Commissioner's representative reports the following:

1. Each registered voter was required to present a voting authority slip to an election worker before the voter was permitted to enter the voting booth.

2. The voting machine is designed to record a tally on the protective counter after the voter enters the booth and pulls the voting lever located in front of him from right to left, which causes the curtains of the voting booth to close and locks the machine in voting position. At this juncture, it was explained that the voter must cast a ballot before the voting lever can be pushed back to its original position, thus causing the curtains to open and allowing the voter to leave the voting booth.

When this process was demonstrated by the county election worker, the machine failed to lock in voting position; therefore, the voting lever could be pushed back to its original position without a ballot cast and recorded on the column counters and public counter. Only the protective counter recorded the fact that an eligible voter had entered the voting machine for the purpose of casting a ballot.

3. A voter was not permitted to enter the voting booth until such time as the election worker determined that it was properly vacated and the voting machine was reset.

4. Voters could decide to cast their ballots for or against the public question by depressing a pointer in one of two columns designated for that purpose. All other columns on the voting machine were locked.

5. Several ballots were cast in each voting column by the county election official in order to demonstrate how the voting machine operated, and to determine whether the counters were functioning properly. Each time a ballot was cast this same procedure was followed:

(a) The voting lever was moved from right to left closing the curtains (which were draped on the top of the booth so as to allow all interested persons to observe the voting procedure). This also locked the lever in voting position.

(b) A pointer in the designated voting column was depressed.

(c) The lever was moved from left to right so that the pointer would return to its original position as the ballot was recorded on the machine just before the curtains to the booth opened.

(d) The machine was set by an election worker.

6. The first few attempts to record a vote on either the column counters or the public counter were unsuccessful. It was found that the voting lever was not locking into voting position. Each time, however, the protective counter recorded the action taken.

7. The county election official subsequently secured the lever in voting position each time a ballot was cast. At this juncture, it was observed by the Commissioner's representative that the appropriate column counters recorded the ballot as it was cast, but the public counter functioned in such a manner so as not to register each time a ballot was cast (i.e., the first two ballots cast were recorded on the "yes" column counters, but the public counter failed to move from 326 to 327 until the third "yes" ballot was cast).

8. The protective counter continued to register each time the voting machine was reset and the voting lever was moved into position.

The Commissioner's representative confirms in his findings that:

1. A mechanically defective voting lever caused seven authorized voters to enter and leave voting machine #91063 without having cast a ballot for or against the public question.

2. The tally of "yes" and "no" ballots recorded on the voting machine (321) indicated that seven fewer ballots were cast than the total number of persons authorized and registered to vote (328) on the protective counter.

3. A mechanically defective counter inaccurately recorded the total ballots cast (326). This total did not agree with the total number of authorized voters indicated on the protective counter (328) who entered the voting machine for the purpose of casting a ballot on the school construction referendum.

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the report of his representative as set forth above and notes that counsel for the Board waived his review of that

report. He finds that certain mechanical defects which occurred during the operation of voting machine #91063 placed the outcome of seven unrecorded ballots in doubt. The Commissioner finds that he is unable to make any determination with respect to these unrecorded ballots in question. However, it is noted that the school construction bond issue failed to gain voter approval by a margin of eight votes on a district-wide basis.

Accordingly, the Commissioner concludes that such defects and discrepancies were insufficiently substantive to influence the outcome of the special school election so as to prevent the free expression of the voters from being determined.

The Commissioner, therefore, concurs with and confirms the results of the election as previously announced.

COMMISSIONER OF EDUCATION

December 20, 1973

**In the Matter of the Special School Election  
Held in the School District of the Township of Frankford,  
Sussex County.**

COMMISSIONER OF EDUCATION

**DECISION**

On October 11, 1973, the Frankford Board of Education, hereinafter "Board," held a special election to authorize the expenditure of \$1,150,000 for construction of an addition to the Frankford Elementary School. The announced results were one hundred fifty-five (155) votes in favor of the proposition and one hundred forty-eight opposed (148).

Thereafter, however, pursuant to a letter request from several persons alleging irregularities in such election, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct an inquiry into the election. The inquiry was conducted by a representative of the Commissioner on November 2, 1973 in the conference room of the Sussex County Superintendent of Schools, Newton.

Petitioners pray that the Commissioner declare the October 11, 1973 election null and void and ask that he direct the election to be held again. The matter was submitted to the Commissioner at the inquiry for Summary Judgment.

The Commissioner notes that in the instant matter there are four allegations of election irregularities, and he presents his findings *seriatim* with respect thereto:

1. It is alleged that the election discriminated against senior citizens, in that the parking lot at the Frankford Elementary School polling place was inadequate because of insufficient lighting and crowded conditions resulting from certain scheduled activities; namely, P.T.A., Back to School Night, and a Book Fair.

With regard thereto, the Commissioner notes from the transcript, that the thirteen signers of the Petition and all other persons present at the inquiry were invited by the Commissioner's representative to testify. The fifteen persons choosing to testify all affirmed that they did indeed cast their votes without undue delay at the polls. No person present at the inquiry testified that he was unable to vote; albeit, one person did testify that, because of inadequate parking, one elderly gentleman whom she had driven to the polls, and who was by reason of infirmity unable to walk more than one hundred feet by himself, did not enter the building to cast his vote.

The Commissioner finds that the evidence adduced was insufficient to materially affect the results of the election, but feels constrained to reemphasize certain concerns with pertinence herein. *In the Matter of the Annual School Election Held in the School District of Manasquan, Monmouth County, 1968 S.L.D. 104:*

“\*\*\*The Commissioner is deeply concerned that in many school elections only a small percentage of the qualified voters cast their ballots on matters vitally affecting the educational welfare of the children of the State. To the end that no voter may be discouraged from exercising his franchise *because of avoidable inconvenience*, the Commissioner urges boards of education to make all reasonable preparations to provide for foreseeable voting needs.\*\*\*” (*Emphasis supplied.*) (at p. 107)

The Commissioner holds, however, that it is not a proper function of his office to direct what specific provisions shall or shall not be made for the convenience and comfort of all persons including the aged and infirm. In this regard, the discretion of local school boards must be relied upon, since

“\*\*\* The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.\*\*\*” *Kenney v. Board of Education of Montclair, 1938 S.L.D. 647, affirmed State Board of Education, 649 (at p. 653)*

Therefore, with regard to the first allegation in the instant matter, the Commissioner finds, absent statutory requirements with regard to the parking of cars, that there is no evidence of illegal action by the Board.

With respect to the scheduling of numerous activities, the Board must answer to its constituent voters, for it is well established that the Commissioner will not interfere with the discretionary judgment of boards of education unless they

“\*\*\* violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.\*\*\*” *Boult and Harris v. Board of Education of the City 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 (E. & A. 1947)

2. It is further alleged that the ballots for the election, *ante*, were faulty with respect to the proposition which they contained. Specifically, the Board had authorized an election to seek approval of an expenditure of \$1,150,000 (see P-1) for building purposes. The ballot (P-5), however, was misprinted as follows:

“\*\*\* Resolved, That

(1) The Board of Education of the Township of Frankford in the County of Sussex, is hereby authorized to construct an addition to the elementary school situated in the school district on the northeasterly corner of the intersection of Pines Road and New Jersey State Highway Route No. 206, purchase the school furniture and other equipment necessary for such addition and make the alterations of the existing building necessary for its use with such addition and to expend therefor not exceeding \$1,150.000; and

(2) In order to finance said \$1,150,000 authorized expenditure, said Board of Education is hereby authorized to issue bonds of the school district for said purpose.\*\*\*” (*Emphasis supplied.*)

(Note: The error is with respect to the imprinted figure of “\$1,150.000” in paragraph one. However, the correct sum of “\$1,150,000” is notated in paragraph two.)

With respect to the error, however, the Commissioner finds it to be of no significant consequence, since the second paragraph is correct and the proposition of expenditure is clearly set forth therein. Thus, the Commissioner is in agreement with the opinion of the Board’s bonding counsel as contained in a letter submitted at the hearing. (P-6) In this letter, counsel said:

“\*\*\* I am of the opinion that there can be no doubt as to the amount of money which the proposal set forth on the ballot authorizes the Board of Education to expend. Even if the punctuation of the amount of money as shown in the first paragraph raised any doubts, paragraph 2 refers to the same amount of money with proper punctuation and ought to be sufficient to resolve any such doubt.\*\*\*” (P-6)

As stated, the Commissioner agrees with the opinion and concludes that the error, though it did exist, was an inadvertent error in printing and not of such moment that a voter’s true intention was thwarted.

3. The third allegation is that many of the township voters did not receive a notice of the election in the mails. In this regard, however, nearly all persons who testified at the inquiry stated that they had received such notice, and some stated that they had seen it posted at the Post Office, the Township Municipal Building, or printed in the newspaper. Further testimony by the Board Secretary, as well as affidavits pertinent thereto (P-2, P-3), established that official notice was posted at eight locations in the Township and printed in the *New Jersey Herald* as required by *N.J.S.A. 18A:14-19*.

The Commissioner observes, in this regard, that the sole allegation with respect to the notice, which was presented in testimony at the inquiry, was that certain persons were said not to have received notice of the election through the mails. However, recognizing that there is no statutory requirement for mailing such notices of a school election, and in the absence of any proof of discriminatory mailing of notices by the Board, the Commissioner dismisses this third allegation as without merit and finds that the Board did meet its statutory obligation.

4. Finally, petitioners allege that

“\*\*\* the general election book was in use when it was not a Board of Election matter and without the supervision of a board member.\*\*\*”  
(Letter of Petitioners, at p. 1)

The Commissioner finds, in this regard, that the Signature Copy Register was properly procured by the Board Secretary from the Sussex County Commissioner of Registration, and that testimony at the inquiry established that the voters' signatures, as signed on the poll list, were consistently and properly compared by the election officials in accord with *N.J.S.A. 18A:14-51*. There being no evidence of irregularity presented, the Commissioner dismisses, as without merit, the fourth allegation.

In summary of the matter, *sub judice*, the Commissioner finds no evidence of statutory violation herein. Although the crowding of a parking lot may have caused some unfortunate inconvenience, the evidence does not support a conclusion that, had conditions been otherwise, the results of the election would have been different. In this regard, the courts have clearly spoken:

“\*\*\* The rule of our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.\*\*\*” (*In re Wene*, 26 *N.J. Super.* 363, affirmed 13 *N.J.* 185) (at p. 383)

Therefore, absent a showing that the will of the people was thwarted, the Commissioner affirms the previously announced results of the election, *ante*, as approved by the voters. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 20, 1973

**Board of Education of the Township of Lakewood,**

*Petitioner,*

*v.*

**Lakewood Education Association, Ocean County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**Decision**

For the Petitioner, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

The Board of Education of the Township of Lakewood, hereinafter "Board," requests that the Commissioner of Education hear and determine a controversy which has arisen with the Lakewood Education Association, hereinafter "Association," which the Board avers is a question of school law and not, as the Association contends, an arbitrable matter to be determined by the American Arbitration Association.

The cause of the controversy was the Board's decision in March 1972, that it would not offer reemployment contracts to fifteen nontenure teachers for the school year 1972-73. Thereafter, the Association filed a demand for arbitration, demanding that the matter of refusal of the Board to renew the aforementioned contracts, be the subject of arbitration according to the Agreement it entered into with the Board, containing terms and conditions of employment.

The Board advised the Association by letter and telephone that it did not consider this matter a proper subject for arbitration. The Board then filed a Petition of Appeal with the Commissioner of Education and prays for an Order enjoining the Association from proceeding unilaterally with an arbitration hearing and determining that the Board has the discretion to renew or not to renew contracts for nontenure teachers.

This controversy is submitted on the pleadings and Briefs of counsel for the sole purpose of having the Commissioner determine whether or not he has jurisdiction in the instant matter.

Both parties have agreed to stay further proceedings before the American Arbitration Association until such time as the Commissioner decides the jurisdictional question.

The Board argues that it has complied fully with Article XVI (at p. 16) in its Agreement with the Association, which provides for notice prior to April 1, and conferences, upon request, whenever any nontenure teacher is notified that he/she will not be reemployed.

The Board argues also that Article XXX (at p. 26) of the Agreement reserves its right to “determine \*\*\* personnel by which its operations are to be conducted \*\*\* and [to] exercise complete control and discretion over its organization and the technology of performing its work \*\*\*.” Therefore, the Board argues further, it is the duty of the Commissioner, and not the arbitrators, to construe the contract and determine whether or not it is arbitrable or the scope of the subject matter to be arbitrated.

The Association argues that it negotiated the terms and conditions of employment with the Board pursuant to *N.J.S.A. 34:13A-5.3 et seq.*, (The New Jersey Employer-Employees Relations Act) which provides a grievance procedure which may culminate in binding arbitration as a means of resolving disputes.

The Association argues further that the Commissioner lacks any knowledge of the facts surrounding the nonrenewal of the fifteen teachers’ contracts; furthermore, only the courts may enjoin an arbitration proceeding.

The Commissioner finds that the non-reemployment of nontenure teachers is not a proper subject for a grievance proceeding leading to arbitration. Such an issue is clearly a controversy under the school laws. Further, *N.J.S.A. 18A:4-23* states that the Commissioner shall supervise all the schools of the State and enforce the rules of the State Board of Education. Therefore, the Commissioner has jurisdiction over the instant matter.

In *Board of Education of the Township of Rockaway v. Rockaway Township Education Association*, 120 *N.J. Super.* 564 (*Chan. Div.* 1972) the Court held as follows:

“\*\*\* The Board is responsible for the production of a ‘thorough and efficient’ school system (*N.J. Const.* (1947), *Art. VIII, § IV*, par. 1) \*\*\*.”

and,

“In *Wassmer v. Board of Education, Wharton*, 1967 *S.L.D.* at 125-127, the Commissioner held that the School Law vests the management of the



public schools in each district in the local boards of education. The Commissioner stated:

“ ‘ While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it received, for it has the authority to make the ultimate determination. ’ [at 127]

“In *Porcelli v. Titus*, 108 N.J. Super. 301 (App. Div. 1970), *certif. den.* 55 N.J. 310 (1970), the following appears:

“ ‘ The public schools were not created, nor are they supported, for the benefit of the teachers therein, \*\*\* but for the benefit of the pupils, and the resulting benefit to their parents and the community at large. ’ [at 312]

“ The courts have recognized that public employees cannot make contracts with public agencies that are contrary to the dictates of the Legislature. *Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970). Nor can public agencies such as a board of education ‘abdicate or bargain away their continuing legislative or executive obligations or discretion.’ *Id.*, 440.

“ [3] It is concluded, therefore, that if the contract is read to delegate to a teacher or to a teacher’s union the subject of courses of study, the contract in that respect is *ultra vires* and unenforceable. It must therefore follow that the American Arbitration Association cannot be the sub-delegate of the Board and of the teachers. Additionally, it is to be noted that the *American Arbitration Association may be well qualified to ‘arbitrate’ compensation, hours of work, sick leave, fringe benefits and the like, but they and their panels possess no expertise in arbitrating the maturation level of a 7th grade student in the elementary schools of Rockaway Township.*

“*However, defendants who are dissatisfied with the action of the superintendent and the Board are not without a remedy. N.J.S.A. 18A:6-9 provides that the Commissioner of Education ‘shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws\*\*\*.’* On subsequent appeal, our appellate courts will have the benefit of the special experience of the administrative agencies operating in the vital area of education, especially of the young.

“Defendants’ counterclaim for specific performance and mandatory direction to plaintiff to submit to the jurisdiction and procedures of the American Arbitration Association is denied. Judgment for plaintiff on the Counterclaim.

“The restraints heretofore entered against defendants enjoining them from proceeding before the American Arbitration Association will be made permanent without prejudice to defendants’ right to proceed before the Commissioner if they so desire. \*\*\*” (at pp. 570-71) (*Emphasis supplied.*)

In the unpublished decision of *Board of Education of the Township of Ocean v. the Township of Ocean Teachers Association*, Docket No. C-4059-71, Superior Court of New Jersey, Chancery Division, Monmouth County, (September 29, 1972) Judge M. Raymond McGowan commented as follows:

“\*\*\* I can envision arbitrators all over the State of New Jersey arbitrating questions which involve perhaps more than this does, questions of education, policy, and so forth, which would create chaos and havoc if decisions were made contrary to education programs with which Boards of Education are charged with administering under the law; and it seems to me to be a much more logical and sensible approach to place such grievances, such as the one in question, in the hands of the Commissioner \*\*\*.”

and,

“\*\*\* Education is, I would say, outside of religion, perhaps, the most important function of society. It behooves us all, including courts, in my judgment, to see, insofar as it is possible to do so, that the placing of teachers’ obligations and of Boards of Education, the relationship between them, in the interest of educating the youth of this nation, should be, so far as it is practical and possible to do, done in a uniform manner, so that everybody will know what the rules are, so that you won’t have one arbitrator down in Cape May saying one thing and one arbitrator in Hudson County saying something else. It could only result in a very confused situation, as I view it. I don’t think that would be in accord with public policy.

“Accordingly, the restraint will be continued. This, of course, does not leave the defendant Molnar without remedy. He has his remedy before the Commissioner. \*\*\*” (unp)

N.J.S.A. 18A:4-23 grants the Commissioner broad supervisory authority over all State-supported primary and secondary schools. *Jenkins v. Township of Morris School District and Board of Education*, 58 N.J. 483, 507 (1971) His primary duty is to make certain that the terms and policies of the school laws are being faithfully effectuated. *Jenkins, supra*, at p. 494; *Laba v. Newark Board of Education*, 23 N.J. 364, 382 (1957) He is charged with the “overriding responsibility” of insuring that the constitutional mandate for maintenance and support of a “thorough and efficient system of free public schools” is being carried out. N.J. Const., Art. VIII, § 4, par. 1; *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 N.J. 94, 106 (1966)

The Commissioner cites the statutes and reported cases, *ante*, solely for the purpose of asserting his jurisdiction over the instant matter. There is no determination herein on the merits of the non-reemployment of the fifteen nontenure teachers. That determination will be made when and if they file Petitions of Appeal for adjudication.

Subsequent to the filing of this appeal and the court decisions cited herein, the matter of *Dunellen Board of Education and Commissioner of Education of New Jersey v. Dunellen Education Association and Public Employment Relations Commission* was decided by the New Jersey Supreme Court on November 20, 1973. In that decision, the Court stated:

“\*\*\* Thus far our Legislature has not chosen to set forth the individual subjects which are to be negotiable and has left the matter to the judiciary for case by case determination as to what are terms and conditions of employment within the meaning of *N.J.S.A. 34:13A-5.3*. But it has at the same time clearly precluded any expansive approach here by directing unequivocally that provisions in existing statutes such as our educational laws shall not be deemed annulled or modified. *N.J.S.A. 34:13A-8.1*. \*\*\*”  
(64 *N.J.* at 31)

The Commissioner determines that the matter herein is a controversy and dispute arising under the school laws, and that he has jurisdiction over the instant matter. The aggrieved teachers may, if they choose, file Petitions of Appeal with the Commissioner of Education which will be adjudicated in accordance with the school laws, and other laws and rulings respecting the rights of school employees in this State.

ACTING COMMISSIONER OF EDUCATION

December 21, 1973

**Board of Education of the Matawan Regional School District,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Matawan and  
Township Council of the Township of Matawan,  
Monmouth County,**

*Respondents.*

**COMMISSION OF EDUCATION  
DECISION**

For the Petitioner, DeMaio and Yacker (Vincent C. DeMaio, Esq., of Counsel)

For the Respondents, Pillsbury, Barnacle, Russell and Carton (William E. Russell, Esq., of Counsel)

Petitioner, the Board of Education of the Matawan Regional School District, hereinafter "Board," appeals from an action of the two governing bodies of the municipalities which constitute the regional school district, the Mayor and Council of the Borough of Matawan and the Township Council of the Township of Matawan, hereinafter "Councils," certifying to the Monmouth County Board of Taxation an amount of local tax appropriations for school purposes for the 1973-74 school year \$145,007 less for current expenses and \$5,000 less for capital outlay than the amounts proposed by the Board in its tentative school budget which was rejected by the voters.

The Board alleges that it cannot maintain the thorough and efficient system of public schools mandated by the New Jersey Constitution nor provide suitable educational facilities and programs as required by law (N.J.S.A. 18A:33-1) within the limit of appropriations certified by the Councils. The Board prays for relief in the form of an Order by the Commissioner of Education restoring the total amount of reductions made by respondents and certifying such amount to the County Board of Taxation.

Councils answer that the amounts certified by them to the Monmouth County Board of Taxation for school purposes for the 1973-74 school year are fair, adequate and more than sufficient. Councils furnished a specific statement of the underlying determination and supporting reasons for the reduction of various items in the Board's proposed 1973-74 school budget.

A hearing in this matter was conducted on May 23, 1973 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Exhibits were received in evidence at the request of the hearing examiner. Following the hearing, additional requested documentary evidence was received on May 25, 1973. The report of the hearing examiner is as follows:

The Matawan Regional School District is a Type II district having an

elected board of education. At the annual school election held February 6, 1973, the voters of the regional school district rejected proposals by the Board to raise by local taxation the sum of \$5,385,168 for current expenses for the 1973-74 school year and an amount of \$14,500 for capital outlay purposes. In accordance with *N.J.S.A. 18A:22-37*, the proposed 1973-74 school budget was delivered to the Councils of the two municipalities comprising the regional district. Subsequently, Councils conferred with the Board on March 1, 1973, and on March 5, 1973, and March 6, 1973, the two governing bodies, respectively, adopted identical resolutions certifying to the Monmouth County Board of Taxation the sum of \$5,240,161 for current expenses and \$9,500 for capital outlay. The amounts in issue are shown as follows:

	Proposed by Board	Certified by Councils	Reduction
Current Expense	\$5,385,168	\$5,240,161	\$145,007
Capital Outlay	14,500	9,500	5,000
Totals	\$5,399,668	\$5,249,661	\$150,007

An itemized list of the specific reductions recommended by the Councils is as follows:

**CURRENT EXPENSES:**

Account No.	Item	Budgeted by Board \$	Recommended Reduction by Councils \$
J100	Administration		
J110B	Sals.-Secy.'s Off.	74,280	11,000
J110F	Sals.-Supt.'s Off.	87,414	1,000
J110N	Sals.-Substitutes	7,800	1,000
J120A	Contr. Services	17,268	3,000
J120C	H.S. Planning	11,000	11,000
J130A	Bd. Ed. Exp.	2,675	352
J130B1	Secy. Trav. Exp.	650	86
J130B2	Secy. Off. Exp.	4,000	524
J130B3	Advertising Exp.	400	52
J130D	Elect. Exp.	820	108
J130F1	Supt. Travel	2,400	314
J130F2	Supt. Off. Exp.	4,300	564
J130N	Misc. Adm. Exp.	3,800	1,000
J200	Instruction		
J211	Sals.-Principals	312,306	15,000
J214B	Sals.-Guidance	129,896	20,000
J214C1	Sals.-Psychologists	40,552	1,500
J214D	Sals.-A.V. Supv.	17,566	1,000
J215C1	Sals.-Guid. Off.	24,197	6,000
J215C3	Sals.-Instr. Aides	56,494	13,000
J220	Textbooks	70,000	5,000
J230C	A-V Mats.	15,020	1,000
J240	Teaching Supls.	121,000	6,000
J240A	Spec. Ed. Supls.	2,000	500
J240B	Rem. Read. Supls.	5,000	1,000
J240C	Child Study Supls.	2,000	500
J250C1	Misc. Exp.	10,000	2,000
J250C3	Prof. Mtg. Exp.	2,500	500
J250C6	Curric. Dev.	12,500	5,000
J400	Attendance & Health		

J410A	Sals.-Nurses	102,882	25,000
J600	Operation		
J610A	Sals.-Janitors	328,320	12,000
J610A1	Sals.-Subst. Jans.	15,000	15,000
J650A	Jan. Supls.	28,200	4,000
J700	Maintenance		
J710	Sals.-Maintenance	103,995	10,000
J720A	Contr. Serv.-Grounds	10,000	1,000
J720B	Contr. Serv.-Bldgs.	26,500	2,000
J720C	Contr. Serv.-Equip.	17,300	1,000
	Subtotal – Current Expense		\$178,000
<b>CAPITAL OUTLAY:</b>			
L1220	Bldg. Sites	\$20,800	\$5,000
	Total – Reductions		\$183,000
	Less: Transportation Adjustment		-20,000
	Adjusted Total – Reductions		\$163,000

The hearing examiner's findings and recommendations in regard to the various categories of the proposed reductions are as follows:

#### *J100 Administration*

In the J110B account, the Board proposes to add the two positions of clerk typist and machine operator to the office staff of the Secretary – Business Administrator, and relies upon a consultant's report and recommendations (Exhibit P-1) to prove the necessity for the restoration of \$11,000 for this purpose. Although the consultant's report (Exhibit P-1) does establish the need for additional personnel, it is predicated on a reorganization plan which cannot be implemented at this time. The Board's 1973-74 budget documentation (Exhibit P-2) indicates the 1972-73 appropriation for J110B as \$55,400, but the 1972-73 audit report (Exhibit P-3) lists the appropriation as \$58,200, with expenditures of \$55,780.74 and a balance of \$2,419.26. If this difference is caused by a line item transfer during the 1972-73 school year, the audit report should indicate the amount transferred in a separate column, and should include a column for revised budget appropriations.

The necessity for providing at least a machine operator to assist the one trained individual presently performing this task is clear. Therefore, it is recommended that \$5,500 of the proposed reduction of \$11,000 be restored.

The suggested reductions of \$1,000 each from J110F, Salaries – Superintendent's Office and J110N, Salaries – Substitutes are recommended to be sustained, because the Board's documentation does not prove the necessity for these sums.

It is noted that J110F had a 1972-73 appropriation of \$83,274 according to the budget documentation (Exhibit P-2), but the 1972-73 audit report (Exhibit P-3) indicates \$87,874 for J110F with no evidence of a transfer to explain this discrepancy. The aforementioned statement regarding the need for additional columns to explain transfers and revised budget appropriations applies here.

As may be seen from the chart of specific line item reductions proposed by the Councils, *ante*, the Board utilizes a detailed budget breakdown with coded line items. This detailed and coded line item budget is most useful for the purpose of budget control on a monthly basis. However, the annual audit reports for 1971-72 (Exhibit P-4) and 1972-73 (Exhibit P-3), do not include the code numbers for the line item accounts, and do not agree with the detailed line items on the budget work sheets in every instance, either because of undisclosed transfers or because several line items from the Board's budget control sheet have been combined into one line item in the audit report. This practice is not necessary and, in fact, requires additional time to add and combine detailed line items, with the final result that annual expenditures as listed in the audit report cannot be accurately compared with the Board's more detailed list of budget line items. Such a time-consuming and confusing practice should be eliminated, and the Board's detailed and coded budget line items should be reported in unaltered form in the annual audit report.

In line item J120A, Contracted Services, a reduction of \$3,000 from a total of \$17,268 has been proposed. The Board also has a line item J120D1 for Contracted Services with an appropriation of \$3,850, from which no reduction is suggested. According to the Board, the major percentage of the \$17,268 in J120A is for negotiations with various employee groups. In the 1972-73 audit report, the total of \$17,368 which the Board's budget listed as J120A, \$13,718 and J120D1, \$3,650, is broken down into accounting fees, \$5,000, legal fees, \$9,582.50 and other fees \$7,132.85.

The Board's documentation and testimony regarding this item fail to prove the necessity for restoration of the sum of \$3,000, which should be sustained. It is also recommended that the Board's line item budget properly identify the contracted services accounts under the headings of accounting fees, legal fees, other fees and the like, as they appear in the 1972-73 audit report, since the present procedure is confusing.

The Board's J120C line item for High School Planning, totaling \$11,000, has been completely reduced by the Councils, on the grounds that this sum is not needed at this time to engage an architect to design plans for an addition to the high school.

The Board has secured a school building study from the Office of Field Research and Studies, Graduate School of Education, Rutgers University (Exhibit P-5), and a report from a combined school and community pupil housing committee. (Exhibit P-6) According to the Board, the present double-session program in the high school, plus predicted enrollments for future years, are compelling evidence of the need to plan a building addition to the high school. This is the same conclusion reached by the pupil housing committee (Exhibit P-6), although the school building study (Exhibit P-5) recommends the initial step of moving the ninth grade from the high school to the two middle schools. Although the enrollment facts appear to warrant an expenditure of some sort for planning purposes, the defeat of the Board's proposed budget for 1973-74 by the voters of the two municipalities clearly indicates the desire for

utmost prudence in spending. Therefore, the Board should finance its preliminary planning costs from within its existing budget allocations. Should a building referendum be passed and a bond issue be authorized by the voters, the school budget expenditures for preliminary planning may be reimbursed from the proceeds of temporary notes or the bond sale proceeds. It is recommended that the \$11,000 reduction remain undisturbed.

Councils have suggested a total reduction of \$2,000 in accounts J130A, J130B1, J130B2, J130B3, J130D, J130F1, J130F2, and a reduction of \$1,000 in line item J130N, Miscellaneous Administrative Expense. The 1972-73 audit report discloses that the J130 line items were over-expended by \$3,489.59, although the combining of many line items in the audit report prevents an analysis of actual total expenditures for each of the J130 line items listed above. It is not clear whether this over-expenditure resulted from pressing need. According to the Board's budget work sheets, the amount of \$2,675 was proposed for J130A, Board of Education Expenses, for 1973-74, although 1972-73 expenditures in this line item were \$3,439.24, an over-expenditure of \$1,439.24. The 1971-72 audit report discloses that the J130 line items were over-expended by \$3,348.49. It is recommended that these small reductions totaling \$3,000, be restored at this time, and that appropriate transfers be made during the 1973-74 school year to prevent the over-expenditure of the J130 line items and to reflect actual experience of expenditures. Budgeting for the 1974-75 school year should reflect actual needs and experience.

#### *J200 Instruction*

The reduction of \$15,000 proposed by the Councils from J211, Salaries – Principals, represents the reduction of one position or, the alternative of setting salary increases for 1973-74 at 4.5 percent instead of 5.5 percent. Actually, expenditures for 1972-73 totaled \$281,777.04 and an increase of 5.5 percent would add \$15,497.74 for a total of \$297,274.77 for 1973-74. Therefore, the reduction of \$15,000 does not disturb the allocation to fill the existing vacancy, nor does it prohibit the 5.5 percent margin for salary increases. Accordingly, the reduction should remain undisturbed.

In the J214B, Salaries – Guidance account, a reduction of \$20,000 is suggested in the form of a reduction of one guidance staff member from each of the two middle schools. At present, the total guidance staff consists of six at the high school and two at each of the two middle schools. The evidence presented justifies the necessity for the restoration of the \$20,000 in order that the same level of guidance staffing may be maintained at the middle schools during the 1973-74 school year.

In line item J214C1, Salaries – Psychologists, Councils' reduction of \$1,500 was designed to eliminate extra summer services for two psychologists, each employed on a ten-month basis. The school year has now commenced; therefore, no need is presented to justify the restoration of the \$1,500, which should remain undisturbed.



The reduction of \$1,000 in line item J214D, Salaries – Audiovisual Supervisor, would set this line item at \$16,566, which is less than the \$16,650 salary earned by this person in 1972-73. Therefore, the \$1,000 should be restored.

The suggested reduction in line item J215C1, Salaries – Guidance Office, totaling \$6,000, represents the elimination of two clerical personnel, one in each middle school, who serve the two guidance counselors in each middle school. To maintain the existing level of guidance services in the two middle schools, it is necessary that this \$6,000 be restored.

Councils have recommended a reduction of \$13,000 from line item J215C3, Salaries – Instructional Aides, for which the Board proposed the total of \$56,494. According to the Board, twenty-three part-time cafeteria aides are employed, together with four aides for special education and five to assist with instruction in two middle schools and an elementary school. Although the Board argues that all of this is necessary to provide a thorough system of education, the defeat of the school budget by the voters demonstrates a desire to reduce expenditures. Accordingly, it is recommended that \$6,500 be restored and that \$6,500 be sustained. Within this line item the Board can make necessary judgments regarding the priorities, although the aides for the special education classes appear to be the most needed.

A reduction of \$5,000 is proposed for line item J220, Textbooks. An examination of prior years' experience discloses a balance of \$3,144.47 in 1971-72 and \$10,393.22 for 1972-73. It is clear that this line item has been over-budgeted during the two prior fiscal years, and therefore the reduction should be undisturbed for 1973-74.

The reduction of \$1,000 in J230C, Audiovisual Materials, should be sustained because balances of \$1,210.02 in 1971-72 and \$7,034.68 for 1972-73 disclose over-budgeting. Likewise, the reduction of \$8,000 in J240 line items should be undisturbed because balances of \$4,605.59 in 1971-72 and \$10,021.10 in 1972-73 disclose excessive budgeting.

Reductions of \$2,000 for J250C1, Miscellaneous Expense, \$500 for J250C3, Professional Meeting Expense, and \$5,000 for J250C6, Curriculum Development, should be sustained in view of the fact that total balances remaining in the J250 account, less items for 1971-72 were \$9,931.49, and for 1972-73 were \$9,771.19.

The suggested reduction of \$25,000 from line item J410A, Salaries – Nurses, envisions removing three school nurses from the school district, which now employs one nurse for each elementary and middle school, and two for the high school. This reduction clearly would curtail the existing school health services program. Therefore, it is recommended that \$25,000 be restored.

A reduction of \$12,000 is proposed from line item J610A, Salaries – Janitors. A review of prior years' experience discloses that a balance of \$12,036.45 remained in 1971-72 and in 1972-73 there was a balance of

\$11,231.01. The evidence also discloses an unusually large number of janitorial staff, which the Board proposes to reduce for 1973-74 by two positions, and Councils suggest a further reduction of three. No hardship should result from this reduction; therefore, it is recommended that the \$12,000 reduction remain undisturbed.

Councils have suggested the elimination of the total amount of \$15,000 budgeted in line item J610A1, Salaries — Substitute Janitors. The Board claims that this is unreasonable, since it would require janitors to perform the work duties of those who are absent. Although some economy may probably be realized in this line item, it is recommended that \$12,000 of this reduction be restored and \$3,000 be sustained.

The reduction of \$4,000 proposed for line item J650A, Janitorial Supplies, would leave a balance of \$24,200 which was the amount budgeted for 1972-73. Of the 1972-73 amount, a balance of \$5,086.52 remained unexpended. It appears that the Board will have sufficient funds with \$24,200 in this line item; therefore, it is recommended that the \$4,000 reduction stand.

In line item J710, Salaries — Maintenance, a proposed reduction of \$10,000 would decrease the total available to \$93,995, which is less than the actual \$98,572.29 expended for 1972-73. Therefore, the reduction is unreasonable and the \$10,000 should be restored.

The proposed reductions of \$1,000 in J720A, Contracted Services — Grounds, \$2,000 in J720B, Contracted Services — Buildings, and \$1,000 in J720C, Contracted Services — Equipment, should be sustained, because the Board has not proven the necessity for the restoration of the \$4,000 from the three contracted services line items.

In the capital outlay account, Councils have suggested a reduction of \$5,000 from a total of \$99,500. This reduction should be sustained because the Board has not shown the necessity for the restoration of this \$5,000.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed in the following table:

Acct. No.	Title	Recommended Reduction	Amount Restored	Amount not Restored
J100	Administration			
J110B	Sals.-Secy.'s Off.	\$ 11,000	\$ 5,500	\$ 5,500
J110F	Sals.-Supt.'s Off.	1,000	— 0 —	1,000
J110N	Sals.-Substitutes	1,000	— 0 —	1,000
J120A	Contr. Services	3,000	— 0 —	3,000
J120C	H.S. Planning	11,000	— 0 —	11,000
J130A	Bd. Ed. Exp.	352	352	— 0 —
J130B1	Secy. Trav. Exp.	86	86	— 0 —
J130B2	Secy. Off. Exp.	524	524	— 0 —
J130B3	Advertising Exp.	52	52	— 0 —
J130D	Elect. Exp.	108	108	— 0 —
J130F1	Supt. Travel	314	314	— 0 —

J130F2	Supt. Off. Exp.	564	564	- 0 -
J130N	Misc. Adm. Exp.	1,000	1,000	- 0 -
J200	Instruction			
J211	Sals.-Principals	15,000	- 0 -	15,000
J214B	Sals.-Guidance	20,000	20,000	- 0 -
J214C1	Sals.-Psychologists	1,500	- 0 -	1,500
J214D	Sals.-A.V. Supv.	1,000	1,000	- 0 -
J215C1	Sals.-Guid. Off.	6,000	6,000	- 0 -
J215C3	Sals.-Instr. Aides	13,000	6,500	6,500
J220	Textbooks	5,000	- 0 -	5,000
J230C	A-V Mats.	1,000	- 0 -	1,000
J240	Teaching Supls.	6,000	- 0 -	6,000
J240A	Spec. Ed. Supls.	500	- 0 -	500
J240B	Rem. Read. Supls.	1,000	- 0 -	1,000
J240C	Child Study Supls.	500	- 0 -	500
J250C1	Misc. Exp.	2,000	- 0 -	2,000
J250C3	Prof. Mtg. Exp.	500	- 0 -	500
J250C6	Curric. Dev.	5,000	- 0 -	5,000
J400	Attendance & Health			
J410A	Sals.-Nurses	25,000	25,000	- 0 -
J600	Operation			
J610A	Sals.-Janitors	12,000	- 0 -	12,000
J610A1	Sals.-Subst. Jans.	15,000	12,000	3,000
J650A	Jan. Supl.s	4,000	- 0 -	4,000
J700	Maintenance			
J710	Sals.-Maintenance	10,000	10,000	- 0 -
J720A	Contr. Serv.-Grounds	1,000	- 0 -	1,000
J720B	Contr. Serv.-Bldgs.	2,000	- 0 -	2,000
J720C	Contr. Serv.-Equip.	1,000	- 0 -	1,000
	Subtotal Current Expense	\$178,000	\$89,000	\$89,000
<b>CAPITAL OUTLAY:</b>				
L1220	Bldg. Sites	5,000	- 0 -	5,000
	Grand Total	\$183,000	\$89,000	\$94,000
	Less: Transportation Adj.	-20,000	- 0 -	-20,000
	Adjusted Grand Total	\$163,000	\$89,000	\$74,000

### Summary

An examination of the tables, *ante*, discloses that the Councils' recommended reductions totaled \$183,000 in their Answer to the Board's Petition of Appeal. This total was reduced by the decision of the governing bodies to increase the appropriation for pupil transportation for 1973-74 by the sum of \$20,000, leaving a net total of \$163,000 in recommended reductions. This \$163,000 is in excess of the actual reductions in the local tax level voted by both Councils; namely, \$145,007 for current expenses and \$5,000 for capital outlay, for a total reduction of \$150,007. Under these circumstances, a local board of education is not required to appeal for the restoration of any moneys in excess of the actual total reduction. In the instant matter, the Board raised no objection regarding the list of recommended reductions totaling \$163,000, and chose to base its appeal on all of the line items contained within the total of \$163,000, rather than the actual reduction of \$150,007.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the findings in the report of the hearing examiner and has considered the conclusions and recommendations contained therein. No exceptions were filed within the time period provided for such response to the report of the hearing examiner. The Commissioner concurs with the total determination contained in this report and finds that the amount of \$89,000 must be added to the amount previously certified by the Councils to be raised for the current expenses of the Matawan Regional School District in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for the 1973-74 school year. The Commissioner, therefore, directs the Councils to add to the previous certification to the Monmouth County Board of Taxation of \$5,240,161 for the current expenses of the school district the amount of \$89,000, so that the total amount of the local tax levy for current expenses for 1973-74 shall be \$5,329,161.

COMMISSIONER OF EDUCATION

December 21, 1973

**In the Matter of the Special School Election  
Held in the Borough of Point Pleasant Beach,  
Ocean County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Pogarsky & McIver (Lawrence L. McIver, Esq., of Counsel)

For the Respondent, Popovitch & Popovitch (Daniel S. Popovitch, Esq., of Counsel)

For Save Our Schools, *Amicus Curiae*, Anton & Ward (Donald H. Ward, Esq., of Counsel) and Harold Feinberg, Esq.

This matter comes before the Commissioner of Education as the result of a letter of complaint sent to the Commissioner by Mrs. Leigh Millar, hereinafter "petitioner," who alleged therein that certain "fraudulent and false" literature was distributed, in the spring months of 1973 in Point Pleasant Beach, by a group known as Community Action for Responsible Education, Inc., hereinafter "CARE," and that such literature caused the defeat of a school construction proposal which was submitted in a public referendum to the voters of Point Pleasant Beach on June 26, 1973. Petitioner's letter also requested an investigation of the charges.

Pursuant to such request the Commissioner appointed a representative to conduct a hearing of inquiry. Subsequently, such inquiry was conducted by the Commissioner's representative on September 25, 1973 at the office of the Ocean

County Superintendent of Schools, Toms River. The report of the representative is as follows:

Petitioner's letter to the Commissioner which prompted the inquiry, *ante*, is reproduced in its entirety as follows:

“\*\*\*This letter comes to you from a group of concerned citizens following a meeting attended by more than thirty individuals representing service organizations, teachers, parents and taxpayers. We are appalled and dismayed by the fraudulent tactics used to defeat the school referendum in our town on June 26. Because of the deceitful and dishonest literature circulated against the school and, most particularly, because of the statement untruthfully attributed to Mr. Harold Bills, we respectfully request that you declare the June 26 election null and void.

“Due to the fact that the new high school was defeated by such a narrow margin, we feel that the defeat is directly attributable to the fraudulent and false literature distributed by the CARE group. Their callous indifference to the welfare of the children of Point Pleasant Beach is displayed in their deliberate attempt to use the state department of education to defeat the school so desperately needed in our town. These people cannot be allowed to issue untruths and claim these ‘statements’ were made by officials in your department when, in truth, they have fabricated the falsehoods for the sole purpose of misleading voters.

“We urgently request that you throw out the June 26 election. We further request that your department send a representative to Point Pleasant Beach to clarify the issues so thoroughly clouded and besmirched by these purveyors of false quotes and nebulous figures so that we can vote fairly in an untainted atmosphere.\*\*\*”

At the inquiry, petitioner offered both testimony and documentary evidence in support of her allegations. Other testimony pertinent to such allegations was offered by Mr. Harold Bills of the State Department of Education and by representatives of CARE. However, much of their testimony was concerned with the merits of certain opinions which had been held and expressed by various groups in the Point Pleasant Beach community, and the Commissioner's representative saw no need at the inquiry, and sees none now, to consider the merits of such opinions in detail. The free expression of such opinions, whatever their grounds, is not barred, but is protected by law.

Therefore, to the extent that the allegations, herein, and the proofs in support thereof, were concerned with the free expression of opinion, the hearing examiner found no need to require a defense thereto. However, the documentary evidence relevant herein does represent *prima facie* violation of law, and to this extent the Commissioner's representative found it necessary to require a defense by the CARE organization. In this regard, he stated that the defense, if one were to be offered, should be limited to certain relevant documents admitted into evidence at the hearing.

Subsequently, however, the CARE organization did not, as the Commissioner's representative said they could, request an opportunity to produce a defense with respect to the documents of reference. (P-1, 2, 3, 4) Accordingly, it must be found to be true in fact that, as alleged by petitioner, CARE did distribute such documents within the Borough of Point Pleasant Beach prior to the referendum of June 26, 1973. The Commissioner's representative so finds.

He also finds that it is true, as petitioner maintains, that all four documents (P-1, 2, 3, 4) were illegal. They failed to conform to the prescription of the statutes (N.J.S.A. 18A:14-97 and 97.2) by virtue of the fact that each document failed to include on its face the name of a "person" who acted on behalf of the CARE organization and caused the documents to be printed and distributed within the Point Pleasant Beach community. Instead, each document of the four urged a "No" vote at the referendum of June 26, 1973, and set forth certain alleged fact and opinion contained in this notation at the bottom:

"Paid for by Community Action for Responsible Education, Inc. Printed by D & P Printing - - Bricktown, N.J."

Such an attestation is clearly not the one prescribed in the statutes N.J.S.A. 18A:14-97 and 97.2, which are reproduced in their entirety as follows:

*"Printed matter used in elections to show source of payment and printer. No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published." (Emphasis Supplied.)*

*"Name and address of individual as well as association to be shown. In event that any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 18A:14-97 is to be printed, copied, published, exhibited, or distributed or the cost thereof is to be defrayed by an association, organization or committee, the name and address of the association, organization or committee may be used in compliance with the provisions of this article if there is used therewith the name of at least one person by whose authority, acting for such association, organization or committee, such action is taken." (Emphasis Supplied.)*

Accordingly, and in summation, the Commissioner's representative finds that in a period of time prior to June 26, 1973, the organization identified herein as CARE did cause to be printed and distributed within the Point Pleasant Beach School District a series of four circulars or flyers concerned with a public question which did not contain, as the law mandates "\*\*\*\* the name of at least one person by whose authority, acting for such association, organization or committee such action is taken.\*\*\*\*" N.J.S.A. 18A:14-97 He does not find that petitioner's other allegations and proofs in support thereof constitute a *prima facie* case that there were other violations of law by the CARE organization, and he recommends that these other allegations be dismissed.

\* \* \* \*

The Commissioner has reviewed the report of his representative and has noted the clear evidence of statutory violation herein which, when viewed in the context of N.J.S.A. 18A:14-104, is cause for concern. This statute provides:

"Any person violating provisions of sections 18A:14-97, 18A:14-97.1 or 18A:97.2 shall be a disorderly person and shall be punished by a fine not exceeding \$500.00 or by imprisonment not exceeding one year, or both.

"Any person violating any provision of this chapter for which no penalty is provided shall be guilty of a misdemeanor.

"Any corporation violating any provisions of sections 18A:14-99 to 18A:14-102 inclusive, shall also forfeit its charter."

Accordingly, the Commissioner directs that the evidence herein, together with the transcript in support thereof, be referred to a court of proper jurisdiction for consideration and decision with respect to the penalty, if any, which should be invoked.

COMMISSIONER OF EDUCATION

December 26, 1973

**John Cervase,**

*Petitioner,*

*v.*

**Board of Education of the City of Newark,  
Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion**

For the Petitioner, John Cervase, Esq., *Pro Se*

For the Respondent, Victor A. De Filippo (Barry A. Aisenstock, Esq., of Counsel)

Petitioner maintains that the Board of Education of the City of Newark, hereinafter "Board," allowed to be housed in the lobby of the Board of Education building in Newark, in May of 1973, an African Liberation Day display which, petitioner alleges, was un-American, inflammatory, and abrasive. He, therefore, petitions the Commissioner of Education to censure the Board for the above-named action and to order the Board to refrain in the future from permitting this display and other similar displays to be placed in public schools of the City and State.

The Board has moved to dismiss the Petition for failing to state a cause of action, for failing to join indispensable parties, for containing scandalous matter, and for being moot.

Oral argument was heard on the Motion to Dismiss by a representative of the Commissioner at the State Department of Education, Trenton, on October 30, 1973. The transcript of the oral argument is contained in the record before the Commissioner.

An initial Petition of Appeal in this matter was filed with the Commissioner on May 25, 1973. Therein, petitioner, a citizen, taxpayer, and former Board member of the City of Newark, alleged that a display celebrating African Liberation Day was authorized by the Board to be placed in the lobby of its building. In this display, petitioner maintains, was material

\*\*\*\*designed to indoctrinate public schools (sic) children in the philosophy of Leroi Jones and Stokely Carmichael who both are mad at the duly constituted government of the United States and who have preached hatred of whites and black racism.\*\*\*" (Petition of Appeal, unp)

In this regard, petitioner further alleges that:

\*\*\*\*The display includes pictures of Jones and Carmichael and pictures of



an army of black men with guns and an army of children with their hands raised in the black power salute. It in effect urges them to rise against their white oppressors and support blacks in America and Africa against American and white people.\*\*\*" (Petition of Appeal, unp)

Petitioner further stated that such a display was un-American, inflammatory, abrasive, and illegal in a public building. He attested that his letter to the President of the Board asking removal of the display had been ignored. Thereafter, petitioner prayed for relief from the Commissioner, asking that he order the removal of the display and that he censure the Board members who voted in favor of the display.

With regard to the initial Petition, *ante*, the Board, on June 6, 1973, filed with the Commissioner a Motion to Dismiss the Petition for failure to state a cause for action, for improperly-stated demands for relief, for failure to join indispensable parties, and for reasons of mootness. Oral argument was heard on the original Motion on July 30, 1973 by the Commissioner. In support of its Motion to Dismiss, the Board stated its position as follows:

“\*\*\*I am specifically moving against paragraphs three and six as not answerable due to the fact that they are demands. Clearly paragraph three states, ‘Mr. Cervase demands.’ And in number six, ‘In order to avoid irreparable damage to the mind, it is imperative that the Commissioner exercise his power,’ which, again, is a demand for affirmative action and, as such, I have no way of denying or affirming since these are demands and not properly in paragraphs of an allegation\*\*\*. ” (Tr. of July 30, 1973, at pp. 3-4)

“\*\*\*Mr. Cervase made specific allegations against two people, namely Jones and Carmichael, who are not under the control or direction or affiliation of the Board of Education of the City of Newark, making allegations about them and against them, and I have no way of replying in their behalf or before them and, therefore, I’m not properly representing them.\*\*\* ” (Tr. of July 30, 1973, at p. 8)

“I notice also that they are not named respondents in the petition. Then in order to have a rejoinder of issues properly, there must be a clarification as to how they will be brought into this action.\*\*\*” (Tr. of July 30, 1973, at pp. 8-9)

At the oral argument of July 30, 1973, which followed the first of two Motions to Dismiss, agreement was reached by counsel to the submission of an Amended Petition. In recognition thereof, on August 15, 1973, the Commissioner signed a Consent Order, as previously agreed to and signed by counsel, denying the Motion to Dismiss and directing petitioner to remove from the Petition certain paragraphs of complaint, all demands, as well as a third-party allegation in paragraph five.

Thereafter, an Amended Petition of Appeal with certain modifications was

filed with the Commissioner on August 10, 1973. However, the Board maintained that certain of the original deficiencies had not been corrected and, in recognition thereof, filed on August 30, 1973, a second Notice of Motion to Dismiss petitioner's Amended Petition. Oral argument on the second aforesaid Motion was heard by the Commissioner on October 30, 1973 at the State Department of Education, Trenton.

At this second hearing, in addition to pressing its original charge of mootness, the Board specifically objected to paragraphs five and six of the Amended Petition, alleging that these paragraphs fail to join indispensable parties. The Commissioner notes that these paragraphs, *ante*, contain, *inter alia*, the following passages:

“\*\*\*5. The display included pictures of Jones and Stokely Carmichael, *both admitted revolutionaries*\*\*\*.”

“\*\*\*6. Jones holds that black students cannot be American citizens because ‘*to be an American citizen one must be a murderer, a white murderer of black people*’... ‘*the wops and kykes and the harps have poisoned young black minds*.’\*\*\*” (*Emphasis supplied.*) (Amended Petition of Appeal, unp)

The Board, likewise, asks that paragraph six, *ante*, be struck as scandalous matter. Further, the Board entreats that paragraph seven of the Amended Petition be struck as an improper affirmative pleading, constituting *demands for relief* in that it states:

“\*\*\*In order to avoid irreparable damage to the minds of school children, it is imperative that the Commissioner of Education exercise his powers to order defendant to refrain in the future from permitting this and similar displays in public schools of the City and State and to condemn and censure defendant for having done so\*\*\*.” (Amended Petition of Appeal, unp)

Finally, the Board alleges that petitioner is seeking to compel the present Board to follow petitioner's educational philosophy.

In response thereto, petitioner denies imposing his philosophy and avers that he merely wants the Board

“\*\*\*to stick to its statutory obligation to educate children, again, I repeat, in the American way.\*\*\*” (Tr. of October 30, 1973, at p. 13)

The Commissioner finds, in summary of the matter, *sub judice*, that the display, *ante*, has long since been removed and to that extent the Petition is indeed moot. Additionally, the Commissioner finds and determines, after a careful review of the record and the transcript of oral argument on the Motion to Dismiss, that the Amended Petition is fatally defective. Such defects arise from the failure to join indispensable third parties, the inclusion of scandalous

material, and the inclusion of demands within the paragraphs of complaint. Accordingly, the Motion to Dismiss the Amended Petition of Appeal is hereby granted.

COMMISSIONER OF EDUCATION

December 27, 1973

Arthur L. Page,

*Petitioner,*

*v.*

Board of Education of the City of Trenton and  
Pasquale A. Maffei, Mercer County,

*Respondents.*

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, McLaughlin, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner, a tenured teaching staff member employed by the Trenton Board of Education, hereinafter "Board," avers that the Board has attempted to abort his tenured entitlement to continue in his employment at a salary to which he and the Board had agreed. At this juncture, he moves for Summary Judgment on the pleadings. The Board does not contest the essential facts as set forth by petitioner, but does deny that these facts are evidence of impropriety or illegality. It maintains that obligations incurred by the Board with respect to petitioner have been fulfilled.

An oral argument with respect to petitioner's Motion for Summary Judgment was held on October 25, 1973 at the State Department of Education, Trenton. This argument and the pleadings are submitted directly to the Commissioner of Education for decision.

The essential facts herein are not disputed and are set forth succinctly as follows:

Petitioner was first employed as a teacher by the Board in 1957 (R-1), and after acquiring a tenure status in this position, continued in such service to September 10, 1968. On this latter date, however, petitioner was transferred to a position entitled "Model Cities Coordinator" (P-1), and his work as Coordinator

continued to December 8, 1970 at which time he was appointed to the position "Assistant to the Assistant Superintendent in Charge of Personnel."

Petitioner continued in this position through the spring months of 1973. On June 20, 1973, petitioner received the following letter from the Superintendent of Schools: (P-7)

"\*\*\*The Board of Education has approved your employment for the school year 1973-74 at an annual salary of \$21,300, effective July 1, 1973.

"Will you please fill out the enclosed sheet and return it to the Superintendent's Office by June 29, 1973.\*\*\*" (See also P-11.)

As requested by the Superintendent, petitioner did complete a form sheet (P-8) which stated that it was his "\*\*\* desire and purpose\*\*\*" to continue in his employment with the Board for the 1973-74 school year. Therefore, on July 1, 1973, petitioner commenced the work of a new school year in the position he had held since December 8, 1970, the position of Assistant to the Assistant Superintendent in Charge of Personnel.

He continued in this work at the salary level noted in the Superintendent's letter of June 20, 1973 (P-7) until August 14, 1973. On the evening of that day, however, the Board met and by formal resolution voted to eliminate the position of petitioner, and certain other positions. This resolution, contained in the Board's minutes of the meeting (R-1), contained the following rationale:

"\*\*\*WHEREAS, the Voters and City Council of the City of Trenton have mandated that the budget for the school year 1973-74 be reduced by a sum in excess of one million dollars; and

"WHEREAS, compliance with this mandate requires that certain positions within the school system be eliminated; it is, therefore,

#### RESOLVED

"1. That the following positions in the Trenton School System be eliminated:

" (a) Assistant to the Assistant Superintendent in Charge of Personnel  
\*\*\*."

The vote in favor of the resolution was five to four.

Subsequently, by letter of August 16, 1973, the Assistant Superintendent in Charge of Personnel addressed the following letter to petitioner: (P-9)

“Mr. Arthur Page  
67 Broad Avenue  
Trenton, New Jersey

“Dear Mr. Page:

“The Superintendent has instructed me to comply with item I, D under ‘Personnel’ in Exhibit N of the Board of Education Agenda of Tuesday, August 14, 1973. The action taken by the Board of Education was in the form of resolution regarding the elimination of certain positions in the Trenton School System.

“It is my duty to inform you that the position of Assistant to Assistant Superintendent in Charge of Personnel is included among the positions eliminated. The effective date of the action was August 14, 1973.

“I ask that you confer with me in the next few days to determine your status under tenure in the Trenton School System. I would expect that appropriate placement could be determined.

“Kindly contact my office for an appointment. I expect to be at my desk on Tuesday, or Wednesday, August 21 or 22.\*\*\*”

Thereafter, on August 29, 1973, the Assistant Superintendent addressed a second letter to petitioner (P-10) which stated:

“\*\*\* Your assignment for the school year 1973-74 will be at Junior High School No. 2 in the position of Health Education teacher.\*\*\*”

Thereupon, petitioner asserts, on September 1, 1973, his salary was reduced to \$15,100, the salary appropriate for a teacher with his training and years of experience, although he chose to exercise a privilege to remain absent from such assignment because of accumulated vacation entitlement (51½ days).

Finally, in this factual recital, it is noted that, in addition to his teaching certificates (P-4, P-5, P-6), petitioner holds a certificate as a school principal (P-3) which was issued to him in August 1969, and a certificate as a school administrator (P-2), issued in February 1973. Thus, it is clear that during the years of his service as Assistant to the Assistant Superintendent in Charge of Personnel (from December 8, 1970), petitioner held a valid certificate to perform administrative duties (as a principal). No claim is made by petitioner that he has acquired any other tenure than that of a teacher, and no testimony or evidence to support such a claim is in the record before the Commissioner.

Having reviewed the basic factual situation which has resulted in the Petition, *sub judice*, the basic issue emerging from such review now remains to be stated. Concisely, this issue is whether or not the Board’s action of August 14, 1973 to abolish the position of petitioner, was a legally correct and proper

action. If it was, petitioner's subsequent transfer was also correct. If the action was not correct, it follows that petitioner's prayer to be restored to such position at the salary he previously enjoyed must be granted.

In this regard, there can be no question of the Board's legal right, under usual circumstances, to abolish the position which is controverted, herein, if the action was taken in good faith. *N.J.S.A.* 18A:28-9 provides:

"Nothing in the title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

The statute is clear and unambiguous. Pursuant to its terms, in an earlier version, the Commissioner said in *Deborah Shaner v. Board of Education of the Gloucester City*, 1938 S.L.D. 542, affirmed State Board of Education, 1938 S.L.D. 545:

"\*\*\*It is entirely within the discretion of a board of education whether a high school principal [or a Superintendent of Schools in the instant matter] should have any administrative assistants. The efficiency of the high school without an assistant principal is not an issue in this case. Less efficiency at reduced cost is permissible in situations of this kind. It may be necessary to reduce the cost of school government in many districts and boards of education should be permitted to organize their school systems to secure more economical administration; but good faith should be evident in all such instances.\*\*\*" (*Emphasis supplied.*) (at p. 543)

Thus, while the Commissioner has held in *Shaner*, that the statute (now *N.J.S.A.* 18A:28-9) conferred broad powers on local boards of education to exercise their discretion with respect to the abolishment of positions, he had also held the powers were not absolute; they were required to be exercised in "good faith" (i.e., for reasons of economy). See also *Charles R. Lawten v. Board of Education of Jersey City, Hudson County*, 1963 S.L.D. 119. It has also been established, that the payment of a lesser salary, to a person who is transferred to another position because of a position abolishment, does not amount to a salary reduction within the intent of the tenure law. *Mildred W. Potter v. Board of Education of the Township of Berkeley, Ocean County*, 1960-61 S.L.D. 167

However, while the law appears to be clear with respect to the authority of a local board of education to abolish positions in "good faith" under usual circumstances, and thereafter to transfer teaching staff members to other positions paying lesser amounts of compensation (*N.J.S.A.* 18A:28-11), the Commissioner opines that considerations other than "good faith," as narrowly defined, *ante*, may also sometimes temper the legality of the act. Thus, the Commissioner would hold as invalid the abolishment of a position wherein there

was proof that the primary reason was one proscribed by constitutional guarantees, or wherein there was involved the mandate of specific statutory prescription. A position of employment may not be abolished for the reason that the holder of the position is of a minority race or religion. A local board of education may not abolish the position of "custodian of school moneys," because the statutes mandate that the position be created. *N.J.S.A. 18A:13-14*

However, while petitioner herein invokes no such protection, and offers no proofs pertinent thereto, the Commissioner observes that there are two statutes of corollary importance to the facts, *sub judice*.

These statutes, *N.J.S.A. 18A:27-10,11*, provide a protection to nontenured employees of local boards of education which is clear and precise. Concisely stated, all such nontenured employees of a local board must be given formal written notice of their employment status by the date of April 30 in each school year. In their entirety the statutes provide:

"18A:27-10. Nontenure teaching staff member; Offer of employment for next succeeding year or notice of termination before April 30

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

"18A:27-11. Failure to give timely notice of termination as offer of employment for next succeeding year

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

The net mandate and purpose of these statutes, in the Commissioner's judgment, is that nontenure teachers must be provided with early notice of job expectancy, in order that comparable employment may be secured in the event that their contracts are not renewed.

While such rights of notice are not by direction afforded to tenured personnel, certain questions remain:

1. Are the employment entitlements to timely notice, and other prerogatives of tenured teachers of a lesser order than those of nontenured personnel?
2. Is not a tenured employee entitled also to some type of timely notice; when his very position of employment is to be abolished, in order that he might have an opportunity to search elsewhere for a position which is comparable?
3. Having once been informed by a board of education of his salary entitlement and position for a succeeding school year, and having actually begun work in such position, has a tenured employee no recourse when such position is abruptly abolished?

The Commissioner has considered such questions in the matter controverted herein, and he determines that the answers pertinent thereto are self-evident. The ultimate specific conclusions in this regard may be as concisely stated, as were the questions, in the following manner:

1. The authority of a local board of education to abolish positions of employment is statutory.
2. Such authority is not absolute, however, and may not, on all occasions and under all circumstances, be exercised in an arbitrary manner in complete disregard of those rights to timely notice with respect to future employment which are afforded to nontenured teachers by specific statutory authority; and, the Commissioner holds, to tenured employees by indirection.

In the instant matter, the facts may be assessed in the context of these conclusions and within the parameters of law.

The Commissioner has so assessed them and determines that the action of the Board herein controverted cannot be sustained on the basis of budgetary considerations (R-1), since in June 1973, the Board knew of its budgetary limitations and, despite this knowledge, in effect gave sanction to petitioner's position for another year and employed him for it at a salary commensurate with the tasks imposed. Thus, the later action of the Board in August 1973, to abolish the position, was patently frivolous, since the stated reason for the abolishment (R-1), if valid in fact, was as valid in June as it was in August.

It follows, then, that the Commissioner determines that the action taken herein by the Board was not in "good faith." Additionally, however, the Commissioner holds that even a contrary opinion in this specific regard would not obviate the harm caused by the precipitate and untimely notice which petitioner received that his position would be abolished. In the circumstances, the Commissioner holds he was entitled to a more considerate treatment (the Board could expect no less than a sixty-day notice if petitioner had resigned (*N.J.S.A.* 18A:28-8); and, therefore, should be made whole at this juncture on



these grounds alone. Accordingly, the Commissioner directs that the Board immediately restore petitioner to a position which embraces administrative duties of the kind previously performed by him, and that his salary be restored retroactive to the date of September 1, 1973, and be continued at that rate for the balance of the 1973-74 school year.

COMMISSIONER OF EDUCATION

December 27, 1973

**Board of Education of the Township of Hillside,**

*Petitioner,*

*v.*

**Township Committee of the Township of Hillside,  
Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Chamberlin & Hobbie (Gilbert Chamberlin, Esq., of Counsel)

For the Respondent, James C. Welsh, Esq.

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Committee," certifying to the Union County Board of Taxation a lesser amount of appropriations for school purposes than the amount proposed by the Board in its budget which was rejected by the voters. The matter was referred to the Commissioner of Education for adjudication on April 26, 1973.

A hearing in this matter was held on September 18, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election held February 13, 1973, the voters rejected the Board's proposal to raise by local taxation \$4,206,645 for current expenses and \$147,526 for capital outlay for the 1973-74 school year. The budget was then sent to the Committee for its determination of the amount to be raised to provide a thorough and efficient school system.

After a review of the budget and consultations with the Board, the Committee made its determination and certified the sums of \$4,012,450 for

current expense costs and \$47,526 for capital improvement costs to be funded by local taxes for the 1973-74 school year. This was a reduction in the amounts proposed by the Board to be raised by local taxes of \$194,195 for current expenses and \$100,000 for capital outlay. As part of its determination, the Committee suggested items of the budget in which it believed economies could be effected without harm to the educational program. These reductions are listed in Table I below. In the recital which follows, the hearing examiner will present *seriatim* a review of the testimony and documentation which was set forth at the hearing, *ante*, as pertinent to the various controverted accounts.

TABLE I

Acct. No.	Item	Board's Proposal	Committee's Determination	Amt. of Reduction
J110B	Board Secy.'s Office-Sals.	\$ 42,520	\$ 36,020	\$ 6,500
J110F	Superintendent's Office-Sals.	87,900	55,180	32,720
J110I	Bus. Admin. Office-Sals.	28,450	14,450	14,000
J213C	Bedside Instr.-Sals.	23,000	20,000	3,000
J213D	Supplemental Instr.-Sals.	15,750	10,000	5,750
J214D	Reading Teachers-Sals.	112,900	92,900	20,000
J215C	Other Staff Clerks-Sals.	40,125	34,125	6,000
J710B	Maintenance-Sals.	60,950	52,950	8,000
J720B	Contracted Servs.-Bldgs.	55,900	20,675	35,225
J730B	Replacement of Noninstr. Equip.	15,500	10,000	5,500
J730C	New Equipment	22,500	15,000	7,500
	Subtotals Current Expense	\$505,495	\$361,300	\$144,195
L1230C	Capital Outlay-Bldgs.	176,500	76,500	100,000
	Totals			
	Current Exp. and Capital Outlay	681,995	437,800	244,195
Current Free Unappropriated				
	Exp. Revenue Balance	- 0 -	50,000	50,000
	Grand Totals	\$681,995	\$487,800	\$294,195

*J110B Board Secretary's Office-Salaries - Reduction \$6,500*

This item was scheduled by the Board to fund a new position of assistant bookkeeper, which the Board deems necessary to establish. In this regard, the Board states that it has added no bookkeeping personnel to its business office staff since 1967, and that there is a need for backup personnel in this vital area which, the Board avers, has sustained a steadily increasing work load. The Committee notes, in this regard, that pupil enrollment has not increased and insists that the Board "hold the line" rather than establish new positions.

The hearing examiner observes that, during the period since 1967, additional personnel have been employed by the Board in other phases of school operations, and that the employment of such new personnel has imposed additional responsibilities on the office of the Board Secretary-Business Administrator, to the extent that the Board has found it necessary in the year 1972-73 to employ a person in the capacity of assistant bookkeeper on a temporary basis. Because of this fact and the evident demonstrated need, the hearing examiner recommends that the amount of \$6,500 be restored.

Summary:	Reduction by Committee	\$6,500
	Amount Restored	6,500
	Amount Not Restored	— 0 —

*J110F Superintendent's Office-Salaries - Reduction \$32,720*

This reduction involves the Board's proposal to fund two positions; namely, (1) an assistant superintendent of schools at \$26,300, and (2) an assistant administrative secretary at \$6,420.

(1) Testimony at the hearing established the fact that the Board had, in lieu of hiring an assistant superintendent of schools for the 1972-73 school year, engaged a former administrator on a consulting basis at full salary through January 31, 1973. In this regard, the Superintendent testified that he used the consultant for periods of two to three hours per week. Subsequent to the budget defeat, no person was hired for this position, a position which, except for the 1972-73 year, had been filled since 1966. The hearing examiner notes additional testimony by the Superintendent that, in the absence of an assistant superintendent, his work load has increased from its normal fifty-five hours a week to seventy or more hours each week.

The Board states in its Petition of Appeal:

“\*\*\* As a result of this situation, the Superintendent of Schools, has been obliged to assume all of the duties that normally would be delegated to the Assistant. It is impossible for one individual to perform the responsibilities of two administrators. The school system is presently feeling the effects of this vacancy.\*\*\*” (Petition of Appeal, at pp. 4-5)

The Committee avers that the schools of Hillside were operated in 1972-73 in a thorough and efficient manner, and in the absence of increased enrollment, insists again that the Board must “hold the line.”

In the context of the above-controverted matter, the hearing examiner now makes reference to a decision of the Commissioner in a similar size school district as reported in *Board of Education of the Township of Hillsborough v. Township Committee of the Township of Hillsborough*, 1971 S.L.D. 409:

“\*\*\* it is impossible to believe that he [the Superintendent] can now continue alone, assisted only by principals and an elementary supervisor, to properly coordinate and supervise a school system which has now completed a grade-level structuring from Kindergarten through Grade 12 for almost 4,000 students.\*\*\*” (at p. 412)

In addition to the relevant set of facts above and *dicta*, the hearing examiner notes the existence of seven schools within the Hillside School System. This proliferation of faculties and places of instruction, the hearing examiner believes, further emphasizes the need for administrative assistance for the Superintendent as he seeks to maintain a thorough and efficient education for the pupils of Hillside. Accordingly, the hearing examiner recommends that funds

be restored in the amount of \$13,150 to reestablish the position of assistant superintendent of schools. This sum is set forth in recognition of the time lapse necessary within the 1973-74 school year, subsequent to the Commissioner's decision, to interview and select a qualified candidate to fill the position.

(2) The Board further proposes to fund the position of assistant administrative secretary to the Superintendent. This position was first established November 8, 1972, as a full-time position. Prior to that time, a secretary from the Board's Special Services Division had worked in this capacity one-half of her daily schedule. However, an increase in the work load of the Special Services Division necessitated her reassignment to full time in that division.

With regard to the proposed position, the Committee insists that, absent an enrollment increase, "\*\*\*\* the Board of Education must learn to make do (sic) with what they have. \*\*\*\*" (Respondent's Reply to Petition of Appeal, at p. 2)

Regarding this disputed position, the hearing examiner notes the thorough documentation, by the Board, of the job descriptions and work responsibilities of both the secretary in the Special Services Division and the assistant administrative secretary to the Superintendent. He believes these are essential services and, therefore, recommends the restoration of \$6,420 to this account.

Summary:	Reduction by Committee	\$32,720
	Amount Restored	19,570
	Amount Not Restored	13,150

*J1101 Business Administrator's Office-Salaries - Reduction \$14,000*

With respect to this account, the Board documents in detail both the numerous regular duties and the increased work load of the Board Secretary-Business Administrator, during the past six years. The emphasis contained in this detail is upon his direct involvement in grievance procedures and negotiations with both professional and nonprofessional employees. The Board cites also the increased volume of financial reports concerning the special education program, the operation of an expanded transportation program, and the need for a backup person to continue the many important functions of the office in the absence of the Board Secretary-Business Administrator, because of illness or other reasons. The Board, therefore, proposes to establish the new position of assistant business administrator at an annual salary of \$14,000.

Relevant thereto, the Committee contends that clerical assistance could be increased or that a raise in salary for the Board Secretary-Business Administrator would suffice, and that this solution would place a lesser burden upon the taxpayers.

In this regard, the hearing examiner finds that the documented testimony of the Board with respect to the increases in administrative responsibilities in this office attests to the fact of such increases and the hearing examiner does not

believe that they may logically be relegated to clerical personnel. Nor does he believe that the increase in salary of the present Board Secretary-Business Administrator can in any way relieve a burden of administrative responsibility that is greater than one administrator can efficiently perform. For these reasons, therefore, it is recommended by the hearing examiner that funds be restored in the amount of \$7,000, a sum sufficient to fund this position for the portion of the 1973-74 year that will remain, subsequent to the Commissioner's decision, the interviewing of candidates, and the appointment of a qualified individual by the Board.

Summary:	Reduction by Committee	\$14,000
	Amount Restored	7,000
	Amount Not Restored	7,000

*J213C Bedside Instruction-Salaries – Reduction \$3,000*

The Board anticipates unusual expenditures beyond those normally incurred within this account, as a result of mandated home instruction costs for two expelled pupils. The Committee says only that petitioner should "hold the line."

The hearing examiner finds that there is reason to anticipate some increase in costs of home instruction herein, beyond the \$20,000 budgeted in this account in recent years. However, because of the uncertainty of a continuation of home instruction for the expelled pupils, *ante*, for the entire year, the hearing examiner recommends a limited restoration of \$1,500.

Summary:	Reduction by Committee	\$3,000
	Amount Restored	1,500
	Amount Not Restored	1,500

*J213D Supplemental Instructional-Salaries – Reduction \$5,750*

This item, as proposed by the Board, would provide \$15,750 for per diem salaries of certified teachers to provide remedial and tutorial instruction for educable, trainable, and emotionally disturbed pupils. This is an increase of \$8,750 in the amount budgeted by the Board for this purpose for 1973-74 as compared to the amount provided in 1972-73. However, \$7,800 available from E.S.E.A. funds in 1972-73 will not be available to the Board in 1973-74.

The Committee proposes that \$10,000 be budgeted, an increase of \$3,000 above the amount funded by the Board in 1972-73, from local sources.

The hearing examiner finds that the proposed overall reduction would effect a decrease of \$4,800 in funds available to the Board in 1973-74 as compared to that available in the preceding year. Such reduction would represent a 32% decrease in what the Board considers an imperative service. The hearing examiner believes this great curtailment to be excessive, and recommends a limited restoration of \$2,500 to this account.

Summary:	Reduction by Committee	\$5,750
	Amount Restored	2,500
	Amount Not Restored	3,250

*J214D Reading Teachers-Salaries – Reduction \$20,000*

The Board proposes to fund two new positions in this account. One position would be that of a second speech therapist to relieve the present alleged overload of 136 now in therapy, with a waiting list of fifteen. The second position proposed would provide an additional learning disabilities teacher consultant. The Board states that the one person now employed in this capacity is limited to testing and diagnosis, to the exclusion of consultant work with teachers, and because of the heavy case load, is limited to working with elementary pupils only.

The Committee cites declining enrollment of the pupil population as justification to resist the addition of staff members.

The hearing examiner finds that pupil enrollment has decreased from 3,767 in September of 1972, to 3,679 in September of 1973. He recognizes the desirability of the positions controverted herein for the reasons advanced by the Board, but believes that in the context of a budget defeat by the voters and the cited enrollment figures, such additional expenditures are not warranted at this time. Accordingly, he recommends that the reduction be sustained in full.

Summary:	Reduction by Committee	\$20,000
	Amount Restored	— 0 —
	Amount Not Restored	20,000

*J215C Other Staff Clerks-Salaries – Reduction \$6,000*

The Board seeks, herein, to add an additional clerk to the guidance office of the Hillside High School, which office has to date had a single clerk. This clerk alone, the Board maintains, is unable to send transcripts, transfer notices, and progress notices, update pupil files and records, arrange conferences, complete statistical reports and perform the many other essential clerical duties for an office serving a school of 1,300 pupils.

However, the Committee, noting a reduction in pupils enrolled in the district, proposes to eliminate the proposed position from the 1973-74 funding.

In this matter, the hearing examiner notes that there is a senior class of 360 pupils, and that most of these pupils require transcripts. Likewise, the numerous duties aforementioned constitute a formidable workload. In this regard, the Superintendent testified that the need for an additional clerk has existed for three years. For all of the foregoing reasons, the hearing examiner recommends to the Commissioner that the \$6,000 be restored.

Summary:	Reduction by Committee	\$6,000
	Amount Restored	6,000
	Amount Not Restored	— 0 —

*J710B Maintenance-Salaries – Reduction \$8,000*

In this account, the Board proposes to fund an additional maintenance position salary to supplement the four maintenance personnel employed

heretofore. The Board believes that the additional staff member is necessary to maintain the several elementary school buildings, all of which are over forty years old, and that, once established, the position would enable the maintenance staff to perform, at a lesser cost, certain work which must now be contracted.

In this regard, the Committee avers that “\*\*\* the line must be held\*\*\*” (Respondent’s reply to Petition of Appeal, at p. 4) in the absence of an increased enrollment.

Pertinent thereto, the hearing examiner notes the lack of specific proof by the Board that such savings in contracted services would indeed be effected, and in recognition of the budget defeat, he recommends that the reduction be sustained.

Summary:	Reduction by Committee	\$8,000
	Amount Restored	— 0 —
	Amount Not Restored	8,000

*J720B Contracted Services - Buildings – Reduction \$35,225*

The Board proposes to spend \$55,900, herein, which amount is equal to one half of that which was budgeted in 1972-73. In the Board’s planning, the following repairs and replacements would be contracted:

Entrances Replaced	\$10,600
Roof Repairs	10,000
Locker Replacement	3,100
Aluminize Roof Facies	2,800
Replace Electrical Fixtures	8,725
Other	<u>20,675</u>
Total	\$55,900

With respect to the controverted items, the Board stated that replacement of entranceways, lockers, and electrical fixtures is part of a long-range program begun seven years ago and that the replacement of electrical fixtures would be 95% completed if such work were accomplished in the 1973-74 school year.

However, the Committee differs with the Board and maintains that the works listed should be capitalized in a bond issue, together with certain other items of renovation and improvement to be named subsequently in this report.

Having reviewed the contentions of the parties, and the record pertaining thereto, the hearing examiner finds that the Board did indeed embark several years ago upon a program of upgrading and replacements of the aforementioned items on a current funding basis. In the hearing examiner’s judgment, there were no facts submitted that would indicate the Board’s plan, or the implementation thereof, was capricious or contrary to sound fiscal policy. The hearing examiner finds, too, that the average age and condition of the seven Hillside school buildings are such that an expenditure in the magnitude of that proposed by the

Board would normally be anticipated. Consequently, the hearing examiner recommends the substantial restoration of \$30,000 to this account.

Summary:	Reduction by Committee	\$35,225
	Amount Restored	30,000
	Amount Not Restored	5,225

*J730B Replacement of Noninstructional Equipment – Reduction \$5,500*

The Board substantiates its increase in this account, amounting to \$5,500 above the amount budgeted for 1972-73, by its need to replace a 1947 tractor used for grass cutting and snow plowing. This tractor, the Board states, is inefficient and parts are no longer obtainable. The Committee addresses no specific comment to this item, but once again, demands that petitioner “hold the line.”

The hearing examiner notes that expenditures by the Board from this account in each of the two preceding years approximated \$10,000. He believes that neither the replacement of a twenty-six-year-old tractor, nor the budgeting of \$15,500 for replacement of noninstructional equipment in a school district of 3,800 pupils, housed in seven school buildings, smacks of fiscal irresponsibility. Accordingly, he recommends restoration of \$5,500.

Summary:	Reduction by Committee	\$5,500
	Amount Restored	5,500
	Amount Not Restored	— 0 —

*J730C New Equipment - Reduction \$7,500*

The Committee contends that the Board spent nothing in this account in 1972-73 or previous thereto, and now seeks an increase of \$22,500. However, the Board points out that this item was formerly incorporated in L1240 for which \$45,000 was budgeted in 1972-73. (The hearing examiner notes that with the redefinition of accounts by the State Department of Education, new equipment purchases are properly made from account J730C beginning with 1973-74.) In addition, the Board observes that it has budgeted \$22,500, a 50% reduction in 1973-74 as compared to a larger figure of \$45,000 for 1972-73.

The hearing examiner believes the Board's determination, with respect to the purchase of new equipment in the year 1973-74 for a school system of the size previously noted, is reasonable. He, therefore, recommends restoration of \$7,500.

Summary:	Reduction by Committee	\$7,500
	Amount Restored	7,500
	Amount Not Restored	— 0 —

*L1230C Capital Outlay - Buildings – Reduction \$100,000*

The Board proposes, within this account, to totally renovate three lavatory rooms at a cost of \$51,360, which item is not contested by the Committee. Further, the Board intends to expend \$125,000 at the A.P. Morris School to



alter one boiler room, install two new boilers, cross-connect the new boilers with one existing boiler, and to further alter the three separate existing heating systems to provide a centralized heating system to serve the entire building. The Board verifies the four existing boilers have an average age of fifty-two years.

In this regard, the Committee does not contest the need for such improvements, but questions the immediacy of the need, charges that the Board's action is fiscally unsound, and believes that such major improvements should be incorporated with other such needs within the school system to be funded by a bond referendum.

The Board further testifies that recent comparative cost studies show the present cost of fuel per square foot in the A.P. Morris School to be 75% greater than that of the Hurden-Looker School, with its recently renovated heating system. Likewise, the Board cites the annual cost of contracted services to maintain boilers in the A.P. Morris School to be \$5,000, irrespective of time spent there by the Board's own maintenance personnel. In addition, the Board believes the delay factor inherent in the development of a comprehensive rehabilitation program of all school buildings would prove costly in a period of inflationary pressures, as would the interest costs of a bond issue. For these reasons, the Board concludes that a bond issue would be fiscally less responsible than its proposed plan of current financing.

In the matter, herein, the hearing examiner observes that there was a similar set of circumstances in *Board of Education of the City of Passaic v. Municipal Council of the City of Passaic*, 1970 S.L.D. 367, wherein the Commissioner opined:

“\*\*\* further delay \*\*\* in routine scheduled replacement of old equipment cannot be rationalized with a school system operating in an efficient manner. He also believes that such delay in instituting essential repairs and replacements can only result in unwarranted and needless additional expense to the taxpayers of the district.\*\*\*” (*Emphasis supplied.*) (at p. 370)

In the matter herein controverted, the hearing examiner finds that the replacement of boilers, *ante*, would constitute the third such major replacement of old equipment in a program begun by the Board in 1967 to upgrade the heating systems in its older schools. He finds no facts to indicate that this program has been capricious or contrary to the best interest of the taxpayers of Hillside or the pupils of the Hillside schools. The hearing examiner believes, rather, that the higher cost of fuel, continued inflation of costs of labor and equipment, and the impending threat of school shutdown in the A.P. Morris School, with its lack of a unified heating system, speak eloquently in support of both the past program of heating renovation and the proposed extension thereof in the A.P. Morris School on a current financing basis. Consequently, the hearing examiner recommends that the Commissioner restore \$100,000 to the capital outlay account.

Summary:	Reduction by Committee	\$100,000
	Amount Restored	100,000
	Amount Not Restored	— 0 —

*Current Expense Appropriation Balance – Reduction \$50,000*

The Committee, in advancing this final reduction, contends that a substantial sum carried as a surplus is a luxury which the taxpayers cannot afford and that the Board should not thrust this added burden upon them, but should appropriate \$50,000 of surplus to income in the 1973-74 budget.

In regard thereto, the Board testifies that its unappropriated current expense account balance of June 30, 1973, is equal to less than 2% of its annual current expense budget, and is barely adequate to meet the unforeseen expenditures which may become necessary in a typical school year.

With regard to such balances, the hearing examiner sets forth, herein, a brief recital of recent developments within this Board account.

The June 30, 1972, unappropriated current expense account balance was \$187,661, from which was appropriated as income to the 1972-73 budget, the sum of \$159,300, leaving an unappropriated balance of \$28,361. To this was added as of June 30, 1973, additional money unexpended from the 1972-73 current expense account, which sum increased the unappropriated current expense account balance to \$95,065. The Board proposed no appropriation from this balance to income for the 1973-74 budget.

The hearing examiner finds that the Committee's proposal, to apply \$50,000 of the aforementioned balance to income of the Board's 1973-74 budget, would leave the sum of \$45,065 for use by the Board to provide for emergency expenditures in 1973-74. This sum, he observes, is substantially larger than the \$28,368 amount available to the Board in its unappropriated current expense account during 1972-73. For this reason, the hearing examiner recommends that the reduction be sustained in full and that \$50,000 from the June 30 1973, unappropriated current balance be assigned as current expense income to the 1973-74 budget for use by the Board as it determines such use is necessary.

Summary:	Reduction by Committee	\$50,000
	Amount Restored	— 0 —
	Amount Not Restored	50,000

The recommendations of the hearing examiner for restoring all or part of the Committee's proposed reductions are shown as follows in Table II:

TABLE II

Acct. No.	Item	Reduc. by Committee	Rec. to be Restored	Rec. Not to be Res.
J110B	Board Secy's. Office-Sals.	\$ 6,500	\$ 6,500	\$ — 0 —
J110F	Super. Office-Sals.	32,720	19,570	13,150
J110I	Bus. Admin. Office-Sals.	14,000	7,000	7,000

J213C	Bedside Instr.-Sals.	3,000	1,500	1,500
J213D	Supple. Instr.-Sals.	5,750	2,500	3,250
J214D	Reading Tchrs. Sals.	20,000	- 0 -	20,000
J215C	Other Staff Clerks-Sals.	6,000	6,000	- 0 -
J710B	Maintenance-Sals.	8,000	- 0 -	8,000
J720B	Contracted Servs.-Bldgs.	35,225	30,000	5,225
J730B	Replmt. of Noninstr. Equip.	5,500	5,500	- 0 -
J730C	New Equipment	7,500	7,500	- 0 -
	Subtotals Current Expense	<u>144,195</u>	<u>86,070</u>	<u>58,125</u>
L1230C	Capital Outlay-Bldgs.	<u>100,000</u>	<u>100,000</u>	<u>- 0 -</u>
	Totals Current Exp. and Capital Outlay	244,195	186,070	58,125
	CURRENT EXPENSE			
	Free Unappropriated Revenue Balance	<u>50,000</u>	<u>- 0 -</u>	<u>50,000</u>
	GRAND TOTALS	<u>\$294,195</u>	<u>\$186,070</u>	<u>\$108,125</u>

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto filed by the Board of Education.

The Board's exceptions refer to the following specific items contained within the hearing examiner's report: J214D Reading Teachers, Salaries; J710B Maintenance, Salaries; and the unappropriated free balance in the current expense account.

In the judgment of the Commissioner, an examination of the record in the instant matter discloses that the Board has adequately proven the necessity for one additional speech therapist in order to maintain thorough and efficient services for pupils having speech deficiencies. Therefore, the Commissioner does hereby restore the sum of \$8,000 for the employment of an additional speech therapist for the 1973-74 academic year. In all other respects, the Commissioner concurs with the findings and recommendations of the hearing examiner, as shown in the report, *ante*.

Accordingly, the Commissioner finds and determines that the sum of \$86,070 for the current expense account and \$100,000 for the capital outlay account, in addition to \$8,000 for a speech therapist, must be restored to the 1973-74 school budget of the School District of the Township of Hillside, in order to provide a thorough and efficient system of public schools.

The Commissioner, therefore, directs that the Mayor and Township Committee of the Township of Hillside certify to the Union County Board of Taxation an additional sum of \$194,070 to be raised by local taxation for current expenses and capital outlay purposes for the public schools of Hillside Township in the 1973-74 school year.

COMMISSIONER OF EDUCATION

December 27, 1973

**In the Matter of the Tenure Hearing of Anna Simmons,  
School District of the Borough of Eatontown,  
Monmouth County.**

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel)

For the Respondent, Law Offices of Joseph N. Dempsey (Stafford W. Thompson, Esq., of Counsel)

The Board of Education of the Borough of Eatontown, Monmouth County, hereinafter "Board," has certified a series of eight charges against respondent, a tenured teacher in its employ, for consideration by the Commissioner of Education under the Tenure Employees Hearing Act. *N.J.S.A. 18A:6-10 et seq.* A hearing on these charges was conducted by a hearing examiner appointed by the Commissioner at the office of the Monmouth County Superintendent of Schools, Freehold. The hearing began on January 9, 1973, and was continued on nine days thereafter, until its conclusion on May 17, 1973. An oral summary on this date finalized the matter for submission. The report of the hearing examiner is as follows:

Respondent had been employed by the Board as a teacher for a total period of fourteen years to the date of July 10, 1972. On the evening of that day, however, the Board met in regular session and considered written charges proffered against respondent, by the principal of the school in which she taught. Subsequently, the Board voted to certify the charges to the Commissioner, and the Petition of Certification was received in the Division of Controversies and Disputes on July 13, 1972.

Thereafter, respondent was requested to provide an Answer to the charges which the Petition contained and did respond on or about July 27, 1972. In general, respondent's response to the charges was either to:

1. Deny the factual truth of certain specific charges; or
2. Admit the truth of certain specific charges, but maintain such charges were charges of inefficiency, for which she had not been provided with a ninety-day period of notice as required by statute *N.J.S.A. 18A:6-12*; or
3. Maintain the charges were so frivolous that, even if found true in fact, they would not constitute reason for either "dismissal" or "reduction in salary" — the possible penalties set forth by statute *N.J.S.A. 18A:6-16*.

Additionally, respondent maintained that Charge No. 6, a charge alleging acts of corporal punishment, was deficient in that the Board had not acted as required by statute, *N.J.S.A. 18A:6-13*, within a forty-five day period subsequent to the time of receipt of such written charges.

All of these contentions, as contained in respondent's Answer to the Petition, were duplicated in a subsequent Motion to Dismiss, and the subject of an oral argument conducted on September 8, 1972 by the hearing examiner. Briefs and/or Memoranda were also filed in support of, or opposed to, the Motion.

However, on September 18, 1972, the hearing examiner finished his review of the arguments pertinent to the Motion, and notified the parties by letter that he had decided to hold the Motion in abeyance and to proceed with petitioner's proofs. Subsequently, the hearing did commence and proceeded to the conclusion of the Board's presentation, at which time the Motion to Dismiss was advanced again by respondent, and granted by the hearing examiner, in part, with respect to certain charges. At that juncture, too, Charge No. 7, as contained in the Board's certification was, in effect, abandoned by the Board, and no defense was required with respect to it by the hearing examiner.

The charges will now be considered *seriatim* with respect to the proofs, and *in pari materia* with the arguments advanced in support of, and opposed to, the Motion to Dismiss.

"Charge 1. She has failed, after being advised repeatedly, to report to her assigned school each day at the designated time of 8:15 a.m.

"(a) On or about October 22, 1968, October 28, 1968, November 18, 1968, November 19, 1968, February 5, 1969, April 16, 1969, April 17, 1969, April 21, 1969, June 9, 1969, September 4, 1969, September 10, 1969, November 12, 1969, September 22, 1970, January 5, 1972, February 1, 1972, February 16, 1972, March 27, 1972, April 12, 1972 she failed to report at the designated time and was late.

"(b) On October 22, 1968, she arrived at 8:33 and her class was left unattended and unsupervised.

"(c) On October 28, 1968, she reported late to school at 8:18 but she signed the attendance sheet as being present at 8:14.

"(d) On November 18, 1968, she arrived at 8:40 and her class was left unattended and unsupervised.

"(e) On March 14, 1969, she reported late to school at 8:18 but she signed the attendance sheet as being present at 8:10.

"(f) On March 18, 1969, she reported late to school at 8:20 but she signed the attendance sheet as being present at 8:10.

“(g) On April 16, 1969, she reported late to school at 8:20 but she signed the attendance sheet that she was present at 8:18.

“(h) On September 22, 1970, she reported late to school at 8:19 but she signed the register that she was present at 8:10.”

*Sub-Charge No. 1(a).* The sub-charge that petitioner was tardy as alleged herein is found to be true in fact, and that fact was stipulated by counsel for petitioner (Tr. V-68) in his renewal of the Motion to Dismiss on January 22, 1973. He said on that occasion:

“\*\*\* So, we will acknowledge that Mrs. Simmons was late three days in 1968, eight days in 1969, one day in 1970 and five days in 1972, as set out in the charges.\*\*\*”

(See also P-1 through P-25.) Accordingly, the contest of the parties with respect to this sub-charge is not with respect to the truth or falsity of the charge, but with the implication which the truth may hold.

The hearing examiner finds that respondent had been “advised repeatedly” by the principal to be in school each day at the designated time. The principal’s notes to respondent are confirmation of this fact. (P-2) (P-3) (P-5) (P-12) (P-14) (P-21) (P-24) (P-25) However, there is no documentation that respondent’s tardiness had been referred to the Board of Education, or of the principal’s concern with regard to it, prior to the filing of the instant charges; although, on March 18, 1969, the principal did say in a letter to respondent: (P-24)

“\*\*\* Unless this practice is corrected it is my intention to bring the matter to the Superintendent and the Board of Education.\*\*\*”

(Later, in 1969, respondent was called to a meeting with the Superintendent to discuss her general performance as a teacher.) (P-60) (P-61)

In summary, Sub-Charge No. 1(a) is found to be true in fact. The question for the Commissioner’s determination is whether or not the charge is one of inefficiency or one of insubordination. If it is the former, it must be pointed out that petitioner was not noticed, as the statute, *N.J.S.A. 18A:6-12*, provides.

*Sub-Charges Nos. 1 (b), (c), (d), (e), (f), (g), (h).*

These sub-charges allege either that:

1. The tardiness of petitioner was an extreme case in which classes were “unattended and unsupervised” (Sub-Charges Nos. 1(b) and (d) ) or;
2. Petitioner falsified her true arrival time at school (Sub-Charges Nos. 1(c), (e), (f), (g), (h) ).

With respect to the first allegation, *ante*, petitioner has stipulated she was tardy

as alleged, and so it is assumed the class for which she was responsible was, accordingly, "unattended and unsupervised." However, the gravamen of the remainder of the sub-charges is that respondent falsified the extent of her tardiness on those specific days. Respondent states that she never deliberately misled nor deceived the school office with respect to the time of her arrival (Tr. VI-65) and she avers her

"\*\*\* own watch was not always accurate on each morning.\*\*\*" (Tr. VI-65)

The Board, on the other hand, at the hearing, *ante*, produced documentation consisting of letters from the principal to respondent which detail some of the specific instances considered, *sub judice*. (P-24) (P-25) An office secretary also testified with respect to "numerous" such occasions when respondent incorrectly notated her time of arrival at school, (Tr. IV-125), and the secretary's testimony was supplemented by that of the principal. (Tr. I-39-41)

The hearing examiner has examined all of the evidence with respect to this charge and finds that the alleged falsification of arrival time in Sub-Charges Nos. 1(b) and (g) are very minor (four minutes and two minutes), and that other irregularities involve alleged discrepancies of eight, nine and ten minutes.

The hearing examiner's finding herein, based on the testimony and documentation, *ante*, is that respondent did on a few occasions, in the course of her fourteen years of employment by the Board, incorrectly "sign in" at the time of her arrival at school. However, he finds no confirmed pattern in this regard and no conclusive testimony that even the few charges of misrepresentation were other than inadvertent.

"Charge 2. She has habitually left her classroom unattended during the teaching day without permission and without giving notice to her supervisor as to where she could be reached and without allowing the office to arrange for substitute supervision of her class during her absence.

"(a) On January 3, 1969, she was absent from her room without permission and without providing supervision for her children.

"(b) On February 24, 1969, she left her class unattended and without proper supervision.

"(c) On February 27, 1969, she left her class unattended and without proper supervision.

"(d) On March 5, 1969, she left her class unattended and without proper supervision.

"(e) On November 12, 1969, she left her class unattended during school hours without informing supervisory personnel.

“(f) On November 13, 1971, she left her class unattended during school hours without informing supervisory personnel.

“(g) On March 10, 1970, she left her class unattended during school hours without informing supervisory personnel.

“(h) On October 7, 1970, she left her class unattended during school hours without informing supervisory personnel.

“(i) On October 29, 1970, she left her class unattended during school hours without informing supervisory personnel.

“(j) On February 7, 1972, she left her classroom unsupervised resulting in pupil turmoil during her absence. Upon a request from the principal's office to speak with her following normal school hours her reply was defiant and sarcastic accompanied with the statement, 'I don't want to'. As a result of her leaving the classroom unsupervised, several children were involved in a kicking incident and two youngsters were found crying.

“(k) On February 8, 1972, she left her class unattended during school hours without informing supervisory personnel.

“(l) On February 15, 1972, she requested to leave the classroom and when the teacher arrived to supervise her children, she was absent from the classroom and the children had been left unsupervised.

“(m) On April 13, 1972, she left her class unattended during school hours without informing supervisory personnel.”

(Note: The following amendments to Charge No. 2 were made at the hearing of January 9, 1973. With respect to sub-paragraph (a), change to January 31, 1969; with respect to sub-paragraph (f), change to November 13, 1972.)

The documentation and testimony with respect to Charge No. 2 were also extensive, and the Board's basic contention that respondent left her classroom unattended on some occasions during the course of the regular school day, is not disputed. Accordingly, the hearing examiner so finds. However, counsel for respondent argued in his Motion for Dismissal (Tr. V-71) on January 22, 1973, that:

“\*\*\* when Mrs. Simmons left the class without supervision, on any occasion when that happened, that happened only because she had received approval of the administrative staff; and that on occasions when she was out of the classroom without another teacher there or \*\*\* when she asked other teachers to watch her class \*\*\* it was for a very short time; and because of the shortness of this time, the charges are insubstantial and trivial\*\*\*.”



It is noted here that the first four specific dates set forth in the charge occurred early in the year 1969. Testimony of witnesses for the Board with respect to these dates was limited to that of the Superintendent of Schools, (Tr. I-78-80) who specifically recalled the alleged events of January 31, 1969. (Amended Sub-Charge No. 2(a) )

With respect to that date, he said respondent

“\*\*\* was visiting room 14, which is around the corner from the central hall in the west wing. I met Mrs. Simmons by the clinic, and told her that her class was noisy, and that she should not leave her class unsupervised. She had apologized, said I was right, and that she was sorry.\*\*\*” (Tr. I-78)

However, again according to the principal:

“\*\*\* the practice of leaving the classroom unsupervised continued. \*\*\*” (Tr. I-78)

Other dates contained in Sub-Charges Nos. 2(a), (b), (c) were also recited by the principal in his narrative of this charge (Tr. I-80-81), and evidently led him to conclude that a conference with the Superintendent of Schools and respondent was required. One such conference was held on November 10, 1969, and according to the principal, respondent was told that if she needed to absent herself from her class, she was required to “inform” the school office prior to leaving. (P-60) (P-61)

Despite this instruction, however, it is alleged that the absences continued. The testimony of the principal is not specific with regard to the allegations of Sub-Charge No. 2 (e). (However, see P-58.) Other allegations are made by the principal with respect to Sub-Charges Nos. 2(f)-(m), and buttressed by memoranda he sent to her at the time. (P-26) (P-27) (P-28) (P-29) (P-58)

In general, these memoranda recited the details of the alleged leave without permission, and one of the memoranda (P-29), with respect to February 15, 1972, (Sub-Charge No. 2(e) ) receives corroboration from a note (P-59) sent to the principal by the substitute for respondent on that date. The substitute’s note (P-59) states:

“Mr. Iacopino [the principal] requested me to relieve Mrs. Simmons. When I arrived at her room at 1:04 no teacher was present. I left at 1:06 when Mrs. Simmons returned.\*\*\*”

(The hearing examiner notices, however, that this absence of respondent must have been one of very short duration, since Exhibit P-29 states that respondent requested such leave at 1:00 p.m.)

There was a considerable amount of testimony concerned with the charge contained in sub-paragraph (j), *ante*. The Board avers (P-28) that respondent left her

“\*\*\* class unsupervised and pupil turmoil ensued.\*\*\*”

The principal then requested a “written account” from respondent concerned with “\*\*\* what took place in the classroom,\*\*\*” and respondent replied with a two-page note. (P-62)

This reply of respondent stated that she:

“\*\*\* left my room to find a child who reportedly ‘took off,’ (I didn’t know where) because she was insulted in the office by refusal of the use of the telephone to call home for dry clothes.\*\*\*”

(See also Tr. III-39 and Tr. VI-75.)

Finally, the hearing examiner leaves to the determination of the Commissioner, a judgment as to whether or not all of Charge No. 2 constitutes a series of allegations within the parameter of a definition of inefficiency. If the Commissioner’s judgment is to this effect, the hearing examiner recommends that even the limited finding of censure contained herein should be considered a nullity, in the absence of the mandated notice required by law. *N.J.S.A. 18A:6-12*

“Charge 3. She has failed to follow Board of Education rules and procedure in reporting her absences and requesting a substitute teacher.

“(a) On November 19, 1968, she called to report her absence at 8:20 in the morning knowing that the school day begins at 8:30, and she was due to report to school at 8:15. A report of an absence at such a late time caused difficulty in securing supervision for her classroom and for arranging a substitute teacher.

“(b) On December 10, 1971 at approximately 9:30 a.m. she placed a call from the school clinic directly to Mrs. Laisant, the person in charge of substitute teacher arrangements, requesting a substitute for that day. Because of the time element it was difficult to contact a substitute and when one was finally reached the substitute could not make arrangements to report until 12:00 noon. Upon this information being conveyed to her, she replied that if she could not have a substitute right away, then it was not her desire to have any. This necessitated the contacting of the arranged substitute to cancel the emergency coverage and to cast doubt as to her need for a substitute as originally requested.

“(c) On or about December 22, 1971, she called the answering service to report that she would be absent from school the next day and that a substitute teacher should be arranged to cover her class. On December 23, 1971, a substitute reported to the school as per her instructions only to find that she was present despite her representations the day before. In addition, she denied requesting a substitute when in fact it was a matter of record that she had done so.”

The “Board of Education Rules and Procedure” to which Charge No. 3 relates are found in Exhibit P-35 at page 12. They specify that “\*\*\*\* Teachers who find it necessary to be absent \*\*\*\*” are to call a designated person “\*\*\*\* Mary Laisant \*\*\* before 7:30 a.m. \*\*\*\*” (*Emphasis in text.*)

The Board’s main proof with respect to the truth of the allegations herein are found in the testimony of the Vetter School’s principal (Tr. I-100 *et seq.*), and the testimony of Mary Laisant, the person charged with the responsibility for securing the services of substitute teachers. (Tr. V-48 *et seq.*) Respondent’s defense with respect to the incidents in question is found at Tr. VI-79 *et seq.* Additionally, there are three documents of pertinence; namely, P-30, P-31 and P-34.

On the basis of this testimony and evidence, the hearing examiner finds as follows with respect to the sub-sections of this charge:

*Sub-Charge No. 3(a).* There is no question with respect to the basic truth of this charge, since respondent admits that she did call in late on November 19, 1968. (Tr. VI-81) However, her excuse for the delinquency is that:

“I thought I would be able to go to work and I wasn’t.”

(See also P-31). She states, also, that after this one occasion she did “\*\*\*\* call at the proper time.” (Tr. VI-81)

*Sub-Charge No. 3(b).* The hearing examiner finds that this charge is also true in fact, although respondent testified that her response to information that a substitute could not be secured until 12:00 noon was:

“I told her if I had to wait two hours I would probably be feeling better and there would only be a possible two more hours before school would be over and I wouldn’t need one.” (Tr. VI-84)

*Sub-Charge No. 3(c)* is a charge embedded in contradictions and confusion and in the judgment of the hearing examiner, is not proven to be true in fact.

This finding is grounded in the imprecise testimony of the person charged with securing substitutes. (Tr. V-55) This testimony was that the substitute in question was called, and reported for duty, on December 22, 1971, rather than December 23, 1971, as charged. Respondent denies she requested a substitute for the day of December 23, 1971, as alleged (Tr. VI-85), and the memo of the principal does not suffice to clear up the contradiction, in the judgment of the hearing examiner. (The principal does not claim he personally received such a call and, thus, his documentation cannot be held to be primary proof that respondent was the caller of record.)

In summary, the hearing examiner finds that:

1. On one occasion in 1971, respondent called for a substitute at a time later than the designated time.

2. On one occasion in 1971, respondent placed a request for a substitute for half a day, but rescinded the request.

*“Charge 4.* She has constantly requested extraordinary leave for personal reasons and has continuously requested permission to leave before the end of the school day contrary to her obligations to fulfill duty assignments and attend faculty meetings.

“(a) On or about the following dates Mrs. Simmons has constantly requested extraordinary leave from her teaching duties for personal reasons causing great inconvenience and hardship upon the administrative staff and the faculty of Vetter School in order to make arrangements to have her class supervised:

“February 1, 1969	January 5, 1970	February 4, 1972
November 12, 1969	January 15, 1970	February 9, 1972
November 13, 1969	January 19, 1970	February 11, 1972
November 17, 1969	February 3, 1970	February 18, 1972
November 20, 1969	February 17, 1970	March 17, 1972
November 26, 1969	February 27, 1970	
December 3, 1969	March 6, 1970	
December 15, 1969	March 9, 1970	
	March 10, 1970	
	March 18, 1970	
	May 6, 1970	

“(b) On Tuesday, February 25, 1972, Mrs. Simmons requested a substitute teacher and permission to leave the school at lunch time in order to repair a broken glass section of the door of her home. As a result of this leave, considerable difficulty was encountered by the administrative staff in obtaining a substitute and covering duties for Mrs. Simmons. On said occasion she had informed the Principal that she had no duty assignments while in fact she had.

“(c) On February 15, 1972 and on February 17, 1972 Mrs. Simmons had an unannounced visitor or guest in her room despite school regulations which require all visitors to report to the administrative office when entering the building. Such conduct was in violation of the Board of Education rules and regulations.”

At the conclusion of the presentation of the Board’s case, and subsequent to the Motion to Dismiss, the hearing examiner determined that no defense was required with respect to that portion of Sub-Charge No. 4(b) which alleges:

“\*\*\* On said occasion she had informed the Principal that she had no duty assignments while in fact she had.”

(See Tr. V-101.) The determination was founded on the fact that no evidence had been advanced by the Board in support of the allegation.

However, a defense was required with respect to other aspects of the total charge, that respondent had requested "extraordinary" leave for personal reasons and had "continuously" requested permission to leave before the end of the school day, despite respondent's argument, contained in her counsel's Motion to Dismiss, that

"\*\*\* A request for leave is not a punishable offense\*\*\*." (Tr. V-75)

At this juncture, the hearing examiner finds that the total Charge No. 4, with exceptions noted, *ante*, is essentially true in fact. This finding is grounded in a Stipulation of Counsel for respondent on January 9, 1973 (Tr. I-117), that

"\*\*\* Mrs. Simmons made requests for leave on those particular days \*\*\*,"  
(Tr. I-117) (the days specified in Sub-Charge No. 4(a) )

and on testimony and written documents admitted as evidential (P-32) (P-33) (P-37) with respect to Sub-Charges Nos. 4(b) and (c).

However, with respect to that portion of the charge which states that respondent "continuously" requested leave before the end of the school day, the finding is that she did so on three occasions, in the year 1968. (P-37) Such leaves occurred while faculty meetings were in progress and the principal of the school stated:

"\*\*\* the only request I received from Mrs. Simmons to leave the faculty meetings early was in lieu of the class that she had \*\*\*." (Tr. III-62)

(See also Tr. II-32.) There is no evidence that on other occasions she left school before the conclusion of the official school day.

Respondent also testified with respect to the three occasions in 1968 when she left school early. She stated she had requested permission to leave early to attend graduate classes at Newark State College and said she could not recall ever leaving school early with making a prior request. (Tr. VI-90-91)

Respondent testified further that she had made a request to leave at noon on February 25, 1972, and the request was granted. (Tr. VI-94) The principal testified he had "considerable trouble" in securing a substitute on that occasion. (Tr. III-65)

The incident which is the subject of Sub-Charge No. 4(c) resulted in a memorandum from the principal to respondent (P-32), which detailed school regulations with regard to visitors and stated that:

"\*\*\* on many different occasions a gentleman has been observed looking for you or with you on school time.\*\*\*"

Respondent's reply (P-33) stated she had told her guest to "\*\*\* come directly to my room \*\*\*" and she testified at the hearing, *ante*, that the visits had occurred during "lunch hour." (Tr. VI-95)

In summary, the hearing examiner finds the allegations of this total charge to be essentially true in fact; respondent did in the years 1969-72 submit requests for leave on the specified days and they were granted. It is assumed to be true that all such requests caused a degree of "inconvenience and hardship" as charged.

However, the total findings with respect to the allegations of this charge are left for consideration by the Commissioner *in pari materia* with respect to the separate findings of the other charges.

"Charge 5. On many occasions, contrary to the rules of the Board of Education she has requested and/or brought her daughter to school or on a school activity, often without the permission of the Principal or the school administration.

"(a) On February 12, 1969, February 10, 1971, March 26, 1971, January 19, 1972 and March 15, 1972, she requested the administration to grant permission to allow her daughter to accompany her to school, or to a school activity.

"(b) During May, 1970, she brought her daughter on a field trip to Allaire State Park without obtaining the permission of the administration to have her daughter accompany her with her fourth grade class."

The principal of respondent's school testified with respect to this charge, and stated there was no written school policy concerned with school field trip privileges for members of a teacher's immediate family. (Tr. II-47) However, he also said he thought there was a

"\*\*\* general acceptance, or knowledge, or awareness concerning situations such as bringing their own children or adults to school\*\*\*." (Tr. II-48)

In addition to this and other testimony of the principal, with respect to this charge (See Tr. II-40 *et seq.*), there was also testimony of a school secretary (Tr. X-7 *et seq.*) and by respondent. (Tr. VI-96 *et seq.*) Documents of pertinence herein are P-38, P-39 and P-64.

There is direct conflict in the testimony noted, *ante*, with respect to whether or not, on all occasions, respondent secured permission for her daughter to attend school with her, or participate in school activities, prior to the time when such attendance or participation actually occurred. However, respondent does admit she made the requests itemized in Sub-Charge No. 5(a). (Tr. VI-96)

With respect to Sub-Charge No. 5(b), respondent's testimony was as follows:

"Q. Now, prior to taking her on that trip, [to Allaire State Park] did you make a request of anyone for permission to do that?

“A. Yes.

“Q. Who did you ask?

“A. Mrs. Moag [school secretary].” (Tr. VI-98)

Mrs. Moag, however, denied she was ever asked for such permission (Tr. X-8) and stated she “\*\*\* did not give permission. \*\*\*” (Tr. X-7)

The principal testified he “thought” respondent had taken her daughter (Tr. II-50) to Allaire State Park in May 1970 without permission, and on May 7, 1970, he penned this note (P-39) with respect to respondent’s actions on that occasion:

“\*\*\* without permission included her own daughter to go on field trip with all 4th graders\*\*\*.”

The hearing examiner finds that there is no evidence, as the charge herein implies, that there were “rules of the Board of Education” with respect to requests by or for pupils not enrolled in respondent’s school, to participate with classes of that school in regularly scheduled school activities. He does find it to be true in fact that:

1. Respondent did request, on five occasions in the years 1969-72, that she be allowed to include her daughter in regular school activities.
2. Respondent did, on one occasion in 1970, include her daughter in a field trip activity without prior approval of anyone on the school staff.

“Charge 6. Contrary to all school and Board of Education regulations she has on occasion used physical and corporal punishment in order to discipline school children under her charge.

“(a) On the 18th day of February, 1972, she disciplined a female student in her charge by pulling her by the arms and shaking her vigorously and then slapping her on the backside. Said incident upset the child and resulted in a very strong letter of protest from the child’s mother.

“(b) On the 3rd day of March, 1972, she disciplined two male students in her class by pulling their hair. This incident led to the extreme upset of the children in question and to complaints lodged against the school by the children’s parents.”

Extensive written documentation with respect to this charge was submitted at the hearing, *ante*. (P-40 through P-48) However, the direct oral testimony on the charge was very limited because of the fact that the potential witnesses against respondent had, for the most part, left the community area prior to the time the hearing was held.

The documentary evidence consists of certain letters from parents of children in respondent's classes, and memoranda of the principal and respondent concerning the alleged incidents. Each of the letters and documents is concerned with events of February and March 1972, and the letters from parents could be held to constitute "written charges" against respondent requiring certification by the Board to the Commissioner within forty-five days of receipt by the Board. *N.J.S.A. 18A:6-13 et seq.* However, there was no evidence that the Board ever received such charges, and in fact, members of the Board testified they had not. (Tr. VII, VIII)

The proofs with respect to this charge, in oral testimony and in written form, will be considered separately with respect to the two parts:

*Sub-Charge No. 6(a).* The proofs with respect to this sub-charge consist of the documents P-40, P-41, P-42 and P-43, and the testimony of one pupil who was a classmate of the pupil allegedly "pulled by the arms" and shaken. Additionally, there was testimony from the principal and respondent. The child allegedly harmed was not available to testify, since she and her family had moved from the Eatontown area.

The testimony of the pupil, who was a classmate of the pupil allegedly abused, was that he and another boy were in the back of the room one day working at an easel when they were "bothered" by another child. He said he "\*\*\*\* told the teacher, and the teacher got mad and hit her. \*\*\*\*" (Tr. IV-14) (Subsequently, this pupil testified, respondent had hit her "\*\*\*\* on her backside \*\*\*\* with her open hand.\*\*\*\*" (Tr. IV-16) He also indicated that the girl allegedly "hit," had then cried (Tr. IV-30), but he "didn't know" whether it was a "hard hit" or a "little slap." (Tr. IV-29)

In any event, the child allegedly "hit," had reported this incident to the principal and the child's mother. The principal's report of what he was told by the child that day (P-42), and the note from the mother (P-40), paralleled the testimony of the child witness, *ante*, with respect to a "hit" on the "backside" (or "side"), but differed in other details and contained other allegations. (The child was "pulled \*\*\*\* by the arms," "shook," shoved (P-40), and had a desk "pushed" against her chest.) (P-42)

Respondent's reply to the accusation, in written form (P-41), was that she could not recall

"\*\*\*\* ever touching her [the] child \*\*\*\* except to get her off my feet and out of my stomach as she fled from behind the chalkboard after having been told several times to sit. \*\*\*\*"

She also stated in a second memo on the subject: (P-43)

"\*\*\*\* [The child] scrambled into me. \*\*\*\*"



Her oral testimony in this regard at the hearing, *ante*, was that on the day in question, she had found it necessary to “hold” the child and “restrain her.” (Tr. VI-99) Later, she said in testimony:

“\*\*\* [The child] was out of her seat behind a portable chalkboard \*\*\* and after having been asked twice to sit down I went back to see what was keeping her \*\*\* and she was startled at my standing there and she \*\*\* darted into me and there she was, so I restrained her by holding her shoulder, I got behind her and I assisted her to her seat.\*\*\*” (Tr. VI-100)

Respondent denied striking the child, shaking her, or using physical force. (Tr. VI-100)

In summary of this sub-charge, there is the testimony of the only one primary eyewitness, a child, against that of respondent with respect to this specific allegation of corporal punishment. In respondent’s view, expressed in summation, (Tr. X-53) such evidence is “simply insufficient” and the charge should be dismissed. The Board indicates the charge cannot be specifically proved, perhaps, because of circumstances (Tr. X-68), but that the incident fits in as part of a “mosaic” pattern which proves respondent should be dismissed. (Tr. X-69-70)

The hearing examiner has considered all the evidence with respect to this sub-charge and finds that on February 18, 1972, there was some physical contact between respondent and a child in her class, but that the evidence is not conclusive that such contact constitutes corporal punishment.

*Sub-Charge No. 6(b).* The primary proofs with respect to this sub-charge were not advanced as the paragraph indicates they would be, with respect to “\*\*\* two male students \*\*\*,” but with respect to one. The Board states that the second pupil has moved from the community and is not available to testify.

The testimony of the one pupil, a ten-year-old boy, hereinafter “P.H.,” was heard with respect to one incident during the 1971-72 school year. He testified that he had been at his seat one day, when he noticed some Chinese checkers on the floor nearby, and “\*\*\* went to pick them up.” (Tr. IV-6) Whereupon, P.H. said, respondent instructed him and another boy to go to their seats and:

“\*\*\* When she told us, she pulled my hair and told me to sit back down.\*\*\*” (Tr. IV-8)

He averred that he did go to his seat and described the alleged effect of the incident in the following words:

“It just hurt.” (Tr. IV-9)

(Later, on cross-examination, the testimony was that it hurt “\*\*\* a little bit.”) (Tr. IV-28)

This testimony of P.H. received a corroboration of sorts from the testimony of a witness called by the Board in rebuttal. (Tr. X-15 *et seq.*)

The testimony of the mother of P.H. was that her own appraisal of the incident was that a remark of respondent to P.H., subsequent to the incident, “\*\*\* upset him more than having his hair pulled.” (Tr. IV-46)

Respondent also testified with respect to this incident. She stated she had requested P.H. to pick up the checkers and at the conclusion of the task:

“\*\*\* I reached down, I either accepted them [the checkers] or helped him pick them up from the floor, and I put my hand on his shoulder and said ‘Thank you.’ \*\*\*” (Tr. VIII-77)

She indicated it was “possible” she touched his hair as she reached for his shoulder to say “Thank you.” (Tr. VIII-78-79)

The hearing examiner observes that the one principal witness with respect to both sub-charges of Charge No. 6 is P.H., and the finding of the hearing examiner with respect to Sub-Charge No. 6(b) is the same as with respect to Sub-Charge No. 6(a). This finding is that there was some physical contact between respondent and a child in her class as alleged herein, but the evidence is not conclusive that such contact constituted corporal punishment.

“Charge 7. She has been incompetent in the performance of her professional duties in regard to her clerical requirements of attendance and record keeping.

“(a) During the month of March, 1969 it was brought to Mrs. Simmons’ attention that she was failing to keep daily attendance records. In addition, many mistakes were discovered in her register causing the Superintendent not to accept her register.

“(b) On March 10, 1969, Mrs. Simmons did not take daily attendance and thus a child who was truant in the afternoon was not noted as being absent from her class. Subsequently, the parents of the child called and were told that the child was present when in fact, unknown to the administration, the child was truant.

“(c) On or about November 3, 1969, Mrs. Simmons was advised that she did not turn in her register cards at the end of the month as is required by administrative procedure. Upon turning in the said register cards, totals for the month were not entered and the cards were incomplete.”

Respondent moved for dismissal of this charge at the hearing, *ante*, on the grounds that it was clearly a charge of inefficiency, and respondent had not been afforded the notice which the law requires. (*N.J.S.A.* 18A:6-13) (Tr. V-81-82) The hearing examiner, having heard petitioner’s proofs, noted that the events related in the charge allegedly occurred in 1969, and there was no evidence that they ever occurred again. (Tr. V-101)

Thereupon, the hearing examiner stated that he would not require a defense to the charge, and that he would recommend its dismissal. The Board concurred with this statement.

“Charge 8. She has been incompetent in the performance of her professional duties in regard to lesson preparation and has failed to file her lesson plans each week with the Principal of her school.

“(a) Despite being advised by the administration that lesson plans for a coming week must be submitted to the Principal’s office on Thursday of the prior week, Mrs. Simmons failed to submit lesson plans on October 28, 1971, November 3, 1971, November 11, 1971, November 18, 1971, November 24, 1971, December 2, 1971, December 9, 1971, December 16, 1971, January 7, 1972, January 13, 1972, January 20, 1972, January 27, 1972 and February 3, 1972. Thus, Mrs. Simmons’ class was taught during this period with a lesson schedule that had failed to be approved by the Principal as required by Board of Education rules and procedure.

“(b) During the week of February 14, 1972, Mrs. Simmons used audio visual aids and educational films before they were approved by the Principal as required by administrative procedure.

“(c) During the week of February 22, 1972, Mrs. Simmons used audio visual aids and educational films before they were approved by the Principal as required by administrative procedure.

“(d) During the week of February 28, 1972, Mrs. Simmons used audio visual aids and educational films before they were approved by the Principal as required by administrative procedure.

“(e) On March 9, 1972, she was advised in writing that her lesson plans were not submitted as required by administrative regulation. On the following day, March 10, 1972 she made no effort to submit her lesson plan. As a result of this action, for the week of March 13th Mrs. Simmons again carried out an educational program for her class which had not been approved by the Principal in accordance with school regulations and procedures.”

The hearing examiner did require a defense with respect to Charge No. 8 at the hearing, *ante*, since the allegations, and the Board’s proofs in support thereof, were addressed, in some aspects at least, to a charge with the gravamen of insubordination. (Tr. V-103) The major proofs in support of this charge were offered by the principal in oral testimony (Tr. II-88 *et seq.*) and in certain written documentation. (P-35) (P-36) (P-52) (P-53) (P-54) (P-56) (P-57) Respondent’s testimony with regard to this charge is directly contrary to the testimony of the principal. (Tr. VI-106) (See also the testimony of a school secretary. Tr. IV-120, Tr. V-9)

On the one hand, the principal testified that respondent did not, as charged, submit lesson plans on the dates specified in Sub-Charge No. 8(a) (Tr. II-91-92), and that she failed to notate films to be used in her classroom prior to such use. (Tr. II-103) His memos to her in these respects are dated February 28, 1972 (P-52), March 9, 1972 (P-53), and March 15, 1972 (P-54). In general, these memos advised respondent that she had not submitted lesson plans as required by school rules (P-56) or that her recording of projected film use was inadequate or entirely absent.

Respondent testified, on the other hand, that she had completed lesson plans each week (Tr. VI-106), and could not recall failing to submit such plans on the dates specified by the principal. (Tr. VI-107) She also said she was aware of the requirement for submission of lesson plans, and she had always attempted to comply, particularly after receipt of the principal's memos on the subject. (Tr. VI-109) Respondent testified additionally, that films she ordered from the county film library did not always arrive on time, but were used by her at the time they became available. (Tr. VI-113)

The hearing examiner finds the charges contained herein in Sub-Charges Nos. 8(a), (b), (c), (d) to be true in fact based on the documentary evidence, *ante*. The question of the gravamen of such charges is left for determination by the Commissioner.

The hearing examiner also finds that Sub-Charge No. 8(e) is true in fact based on the evidence admitted at the hearing, *ante*, in oral and written form. (P-53) (P-5) A characterization of such conduct as "insubordination" or inefficiency is left to the decision of the Commissioner.

This completes a recital of the charges against respondent and the evidence adduced in support of such charges at the hearing, *ante*. However, the hearing examiner believes it is necessary to document some other testimony in summary form at this juncture and to make certain observations as follows:

1. At the hearing of February 26, 1973, respondent called as her witness a school administrator who had served as her immediate supervisor or principal for a period of "nine or ten" years. (Tr. VII-19) Such service occurred prior to 1967. He testified that his principal-teacher relationship with respondent had been good (Tr. VII-21), and that he could recall no specific instances wherein respondent had failed to perform her teaching duties or failed to follow his directions. (Tr. VII-20 *et seq.*)

2. Respondent has one child for whom she alone is responsible. (Tr. VI-57) This fact standing alone is of no compelling importance herein. However, in the context of charges by the Board, the fact is of some importance, and it is clear to the hearing examiner, from the evidence, that in recent years, respondent has permitted her responsibility as a parent to intrude in certain ways on her responsibility as a teacher (i.e., respondent's desire to have her daughter attend school with her when the daughter's school was closed; respondent's need to leave school early on certain occasions to check on her daughter's welfare prior

to attendance by respondent in graduate classes; etc.). It is clear, too, that certain of the charges made against respondent herein were the direct result of this intrusion.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions to such report as filed by counsel. He will proceed first to make his determination with respect to the individual charges *seriatim*, preparatory to consideration of the totality of such charges as are found to be true in fact.

#### CHARGE NO. 1

With regard to Sub-Charge No. 1(a), found by the hearing examiner to be true in fact, the Commissioner determines that such occasional lateness, over a period of four school years, constitutes inefficiency rather than incompetence. Regarding Sub-Charges Nos. 1(b), (c), (d), (e), and (f), absent a clear finding by the hearing examiner of gross intentional misrepresentation, the Commissioner finds and determines that such acts of respondent, insupportable as they are, must likewise be characterized as acts of inefficiency. He further notes that such alleged falsification has not occurred since September 22, 1970.

#### CHARGE NO. 2

Herein are allegations, certain of which are admitted or otherwise found to be true in fact, that on thirteen separate occasions from 1969 to 1972, respondent left her classroom unattended for short periods of time. The Commissioner determines that such careless acts, which have properly drawn upon respondent the severe censure of agents of the Board, though brief in duration, do not constitute a flagrant show of insubordination as charged by the Board, but are indeed acts of carelessness and inefficiency.

#### CHARGE NO. 3

The Commissioner determines that the failure of respondent to twice make timely arrangements for a substitute may properly be characterized as inefficiency.

#### CHARGE NO. 4

The Commissioner determines that respondent's frequent requests to leave early were granted by administrative agents of the Board (although they were under no obligation to do so) and that they are not properly the subject of charges. Accordingly, Charge No. 4 is dismissed.

#### CHARGE NO. 5

The Commissioner determines that respondent's requests for permission to take her daughter to school and her inclusion of her daughter on a field trip without permission of the Board's administrative agents, represents a

questionable intermingling of the family life and professional life of respondent which generally should not be intertwined in such manner. However, absent a clear showing by the Board of policy or written regulation that would cast such requests and acts in a mold of impropriety, the Commissioner dismisses Charge No. 5.

#### CHARGE NO. 6

The hearing examiner's total finding of fact, *ante*, with regard to alleged acts of corporal punishment by respondent upon pupils in her class is that on two instances,

“\*\*\* there was some physical contact between respondent and a child in her class, but that the evidence is not conclusive that such contact constitutes corporal punishment.\*\*\*”

Absent such conclusive evidence, the Commissioner determines that there is no clear showing that respondent inflicted corporal punishment as defined previously by the Commissioner:

“\*\*\* any punishment causing or intended to cause bodily pain or suffering \*\*\*.” *Craze v. Allendale Board of Education*, 1938 S.L.D. 585, 586

It is therefore determined that the evidence is insufficient to warrant the dismissal of respondent, although it may properly be considered within the scope of the mosaic of findings in the matter *sub judice*.

#### CHARGE NO. 7

This charge was so clearly one of inefficiency regarding respondent's failure to submit timely and complete records during 1969 that the hearing examiner required no proof and recommends dismissal of the charge. The Board concurs. The Commissioner likewise concurs and dismisses Charge No. 7.

#### CHARGE NO. 8

It is alleged, herein, that respondent performed in an incompetent and insubordinate manner on sixteen separate occasions from 1971 to 1972, in that she failed to make timely submission of daily lesson plans and that she further failed to secure the required administrative approval for use of audiovisual materials on three separate occasions. It is determined that such omissions may best be characterized as inefficient, absent a showing that she was incompetent or otherwise incapable of performing such duties.

The Commissioner opines that the total gravamen of the findings with respect to the remaining Charges Nos. 1, 2, 3, 6 and 8, *ante*, is that respondent did on numerous occasions clearly act in a careless and inefficient manner, but with no clear showing of insubordination or incompetence. With respect to such inefficiency, the Commissioner has spoken on numerous occasions as in *Georgia B. Wallace v. Board of Education of the Township of Greenwich*, 1938 S.L.D. 491, 493:

“\*\*\* The Tenure of Office Law was enacted to protect efficient teachers. It should not protect the inefficient. The welfare of the pupils is the first consideration in cases of this kind. If inefficiency \*\*\* is shown, the dismissal of a teacher \*\*\* should be affirmed.\*\*\*”

An historical review shows that prior to the enactment of *N.J.S.A. 18A:3-23 (L. 1960, c. 36-1)*, now *N.J.S.A. 18A:6-10*, a local board of education was empowered to dismiss for inefficiency or other good cause a tenured teacher, and that the Commissioner served in an appellate capacity in such matters. However, *N.J.S.A. 18A:6-10* now provides that no tenured person shall be reduced in compensation or dismissed “\*\*\* except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner \*\*\* after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person\*\*\*.” Accordingly, the Commissioner now provides a forum of primary review in litigation such as the instant matter.

In such matters it is incumbent upon the Commissioner to interpret and uphold the laws of the State. Herein, he finds that *N.J.S.A. 18A:6-12* has particular pertinence wherein it states:

“The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same.”

In the instant matter, there is no showing that such written notice as required by *N.J.S.A. 18A:6-12* was provided to respondent with regard to such inefficiencies, *ante*. Therefore, the Commissioner determines that those charges in the matter, *sub judice*, as found true in fact, and constituting inefficiency, were improperly presented herein. Accordingly, it is ordered that respondent be restored forthwith to her position as a teacher with such salary and other benefits due her consistent with Board policy, retroactive to the date of her suspension but mitigated by any earnings of respondent during the period of her suspension. The Commissioner further states, that in its endeavor to present a thorough and efficient program of education, the Board is in no way impeded by this decision from serving upon respondent, pursuant to *N.J.S.A. 18A:6-12*, written notice with regard to such inefficiencies admitted to and otherwise found true herein.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 28, 1973

**Frank W. Zimmermann et al.,**

*Petitioners,*

*v.*

**Board of Education of the Southern Regional High School District,  
Ocean County,**

*Respondent.*

**COMMISSIONER OF EDUCATION  
DECISION**

For the Petitioner, Frank W. Zimmermann, *Pro Se*

For the Respondent, Berry, Summerill, Rinck & Berry (Jane Rinck, Esq.,  
of Counsel)

Petitioner is supported by certain other taxpayers, resident in the Southern Regional High School District, in alleging that the Board of Education of such district, hereinafter "Board," imposed illegal requirements in a discriminatory manner against his son, hereinafter "E.Z.," which requirements were prerequisite to participation in the school's band music program, and that E.Z. was unlawfully excluded therefrom. He prays for a judgment to this effect. The Board denies the allegation or any illegality and avers that its requirements are necessary to the maintenance of an orderly educational environment.

A hearing in this matter was conducted on June 21, 1973 at the office of the Ocean County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Briefs were filed by the parties subsequent to the hearing. The report of the hearing examiner is as follows:

A Motion to Strike respondent's Answer to the Petition of Appeal was referred by the hearing examiner to the Commissioner for consideration in his decision. (Tr. 5)

Petitioner alleges first:

"That \*\*\* [E.Z.] was refused instrumental music instruction in the seventh period Band class. That the reason for the refusal advanced by the respondent was that no student who was unable to participate in afterschool (sic) and Saturday marching was qualified for this particular course." (Petition of Appeal, at p. 1)

Pertinent thereto, the hearing examiner believes it is necessary to give a recital of facts regarding the musical background and aspiration of E.Z., as well as certain events that occurred in September 1972.

Prior to September 1972, E.Z., age sixteen, had studied classical piano for six and one-half years, bass violin and bass guitar for lesser periods, and flute for



three months. At the hearing, *ante*, he stated that he aspires to a musical career as a serious classical instrumentalist. He further stated:

“\*\*\* I would like to go as far as I can up to doctorate \*\*\* For a time concertize myself, and from there go to teaching \*\*\* in a college.\*\*\*” (Tr. 25)

Pursuant to a furtherance of this goal, he was enrolled in September 1972 in the school’s seventh period band class with an enrollment of twenty-five pupils. On the first day the band class met in September 1972, the band was directed by the teacher to go outside with her to practice marching formations. Thereupon, E.Z. refused to march or to play the drum as was requested by the teacher. Regarding this refusal, E.Z. testified:

“\*\*\* I felt that if I would march, I would not receive musical instruction \*\*\* and I said to \*\*\* [the band teacher] I am not a soldier. I’m a musician. And I don’t think in order to be a musician you have to march.\*\*\*” (Tr. 20-21)

E.Z. further testified that he stated to the band teacher that his four year plan sheet contained a notation which he felt was understood; namely, “\*\*\* Nonmarching, instrumental music instruction, oboe preferred, flute second choice.\*\*\*” (P-1) (Tr. 18) Following this conversation, the teacher told him to walk along with her and “\*\*\* try to march [with her] in the rear of the band\*\*\*” (Tr. 67) Once outside the school where this discussion had taken place, E.Z. choose to talk to an adult acquaintance, rather than follow the direction of the teacher.

At the second class meeting, E.Z. was issued band music and played the flute with the band in the classroom. The band teacher testified at the hearing with respect to her request that E.Z. play the drums on the preceding day:

“\*\*\* his development on the flute was not such that he could march and play at the same time. He could sit and play \*\*\* in the classroom.\*\*\*” (Tr. 70)

Testimony at the hearing, *ante*, established that marching was indeed required for *full participation* in the instructional program of the band class during the fall quarter, and that no alternate instrumental instruction was provided while the band was marching. However, when questioned whether anyone told him he would have to march to remain in the program, E.Z. stated:

“\*\*\* No; that they would kick me out if I wouldn’t march, no, but I would not get instruction while everyone was out marching. I would be just sitting there.\*\*\*” (Tr. 29)

After a third band class, E.Z. sought and was granted permission to drop the band class. Henceforth, he enrolled in the school strings (orchestra) course for three periods per week. When questioned at the hearing as to whether he ever sought to return to the band after the marching season, he stated:

“\*\*\* I have not, because I felt that the year had been partially gone\*\*\*.”  
(Tr. 30)

With regard to the possibility of E.Z.’s re-enrolling in the band subsequent to the fall marching season, a letter from the President of the Board to petitioner, dated October 31, 1972, stated:

“\*\*\* It is hoped that most, if not all students interested in band, will participate in both marching and concert band instruction and activities. Those who do not desire to take part in both may participate in one or the other without prejudice. If [E.Z.] chooses to join the band in December he is entitled and welcome to do so.\*\*\*” (R-1)

Further testimony by E.Z., his guidance counselor, the Superintendent of Schools, and band teacher, clearly showed that E.Z. or any other pupil could have enrolled or re-enrolled in the band class at the end of the marching season in November. (Tr. 53, 69, 119)

In summary, the hearing examiner finds that E.Z. enrolled in the band class, refused to march in the marching band, received instrumental instruction when the band played in the classroom, dropped the class at his own request after the third day, and enrolled in another instrumental class. He did not, thereafter, seek to re-enroll in the band class. The hearing examiner does not, however, find evidence that E.Z. was forced by respondent to drop the seventh period band class which offered him limited instruction on the instrument of his choice during the fall, which class would have provided full-time instrumental instruction on such instrument for the remainder of the school year, had he chosen to remain. Nor does the hearing examiner find that E.Z. was in any way prevented from re-enrolling in the seventh period band class at the end of the marching band season in November.

Petitioner sets forth his second allegation as follows:

“\*\*\* respondent maintains that the said course of music instruction requires all members of this music class to be willing, physically able, and available to participate in the afterschool (sic) and Saturday marching activities which are an essential part of the football sports program.

“That \*\*\* [E.Z.] was excluded by the respondent from participating in the said course of instruction because he was required to work, take private music lessons, study, and practice.

“The petitioners contend that under the provisions of N.J.S. 18A:38-26 that the respondent is unlawfully excluding \*\*\* [E.Z.] and other students who are not available for after school and Saturday marching activities from a regular course of instruction, and that this policy is offensive to the public and unconscionably discriminates against the poor and physically handicapped children.\*\*\*” (Petition of Appeal, at pp. 1-2)

Pertinent testimony thereto, by the band teacher, established that provision was made for football players, working pupils, and pupils with physical disabilities to receive instruction in the band class regardless of their availability for after-school or Saturday marching. In this regard she testified:

“\*\*\* We have had to make arrangements in the past. For instance, we have some students that play football, and they schedule the band classes, and they play during the class period, but for obvious reasons they are not with us on Saturdays. We have had people with physical disabilities who have played with us, and we have also had people who have worked, and tried to make their work arrangements such as they could play with us on as many occasions as possible.\*\*\*” (Tr. 69)

Further testimony by the Superintendent of Schools in the instant matter was as follows:

“\*\*\* we would sincerely follow the policy of being flexible enough so that youngsters that have other commitments, (sic) in order to gain the experience in demand, may not be deprived of this opportunity, because of the work obligation, home obligation or what have you within reasonable limits. \*\*\*” (Tr. 114)

With respect to this second allegation, the music department chairman testified that he had personally encouraged E.Z. to remain in the band (Tr. 82) and that he did not know of any pupil who has ever been required to leave the band because of refusal to march. (Tr. 81-82) He further stated:

“\*\*\* No one has even been coerced to march in any band that we have \*\*\*. We, as music teachers, have attempted to present the largest possible opportunity to all students, whatever their interest and in whatever fields of music they wish to participate.\*\*\*” (Tr. 81)

In regard to this allegation, E.Z.’s guidance counselor testified that he knew of no pupil in Southern Regional High School who had ever been forced to drop band because of non-marching. (Tr. 53)

Petitioner further contends that the notation calling for “Non-marching, instrumental music instruction,” which notation was on E.Z.’s four-year plan sheet (P-1), *ante*, was binding upon the respondent.

Agreement to such a notation was denied by E.Z.’s band teacher (Tr. 68), the chairman of the music department (Tr. 81), and the Superintendent of Schools. (Tr. 116) In this regard, E.Z.’s counselor stated:

“\*\*\* being as flexible as our music program is, \*\*\* I didn’t see any reason why some arrangement couldn’t be made whereas he wouldn’t have to march, and would be able to participate in the other portions of the band program. \*\*\*” (Tr. 45)

However, the counselor denied having established prior understanding with the music department concerning whether or not E.Z. was expected to march (Tr. 56) and stated:

“\*\*\* This could be done on the instructor’s and the department chairman’s okay. It is not formal procedure to do this type of thing.\*\*\*” (Tr. 52) (*Emphasis supplied.*)

Regarding such plan sheet, the Superintendent of Schools said that it is:

“\*\*\* subject to change on the part of the student at any time, at his request, and they are subject to changes as far as the administration goes, again depending on the enrollment and direction of the overall curriculum.\*\*\*” (Tr. 122)

Further, the notation on E.Z.’s four-year plan sheet (P-1), specifying non-marching, was shown to be written by E.Z., himself, as herein he stated: “\*\*\* I had signed it on my plan sheet here, and I thought it was understood.\*\*\*” (Tr. 19)

Pertinent to the second allegation of petitioner, the hearing examiner finds in the record no conclusive proof that E.Z. or other pupils were denied instruction in the seventh period band class because of physical disabilities, work or home commitments. Nor does he find that the Southern Regional High School maintains an inflexible or exclusive posture with regard to individuals with physical disabilities, work requirements, or other responsibilities. In addition to the above finding, the hearing examiner notes the lack of evidence to support petitioner’s contention that there existed between E.Z. and respondent, a binding agreement to the effect that E.Z. was not expected to march in the marching band during the fall quarter of 1972.

Herewith, the hearing examiner presents for consideration by the Commissioner the issues posed in the Petition as agreed upon by counsel, followed by the prayers of petitioner:

The issues:

1. Was E.Z. denied an opportunity to participate in the band program of the school during the regular school day?
2. Was there a prior agreement that participation in said class did not require a corollary responsibility to march?
3. If such a corollary responsibility to march existed, was it *ultra vires*?

The prayers of petitioner are:

“\*\*\* the petitioners demand that the respondent be:

“A. ordered to immediately correct and rectify the educational deficiencies herein complained of, and to correct those educational deficiencies previously complained of in the documents submitted to both the respondent and to the Commissioner of Education.

“B. ordered to institute a program of band music instruction open and available to all students for the entire school year regardless of their physical handicaps, or for their availability for after school and Saturday marching activities,

“C. ordered and restrained from requiring students to involuntarily participate in marching as a condition to receiving musical instruction.

“D. Finally, that the Commissioner of Education abolish the present system which conscripts football-band musicians from the high school’s music program.” (Petition of Appeal, at p. 2)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner and the exceptions taken thereto, as filed by petitioner.

In regard to petitioner’s Motion to Strike the Answer of respondent on the grounds of illogical reasoning, the Commissioner does not agree. The denial by respondent of allegations contained in the Petition with respect to important issues shows on its face the necessity of a preliminary hearing to determine the facts germane to such issues. Therefore, the Commissioner denies the Motion to Strike and considers the entire record for adjudication in the instant matter.

With regard to the first issue, *ante*, the Commissioner finds that E.Z. was not denied opportunity to participate in the band program of the Southern Regional High School during the regular school day. Rather, he finds that E.Z. did receive instruction in instrumental music on the instrument of his choice on the second day of class and that such instruction would have been available to him throughout the school year had he not voluntarily left the band class in favor of alternate instrumental instruction in the school’s strings program.

With regard to the second issue, *ante*, the Commissioner finds no evidence of a prior, binding agreement between E.Z. and administrative or guidance personnel at Southern Regional High School to the effect that E.Z. was not required to participate in marching instruction during the fall quarter.

The remaining issue to be considered is whether the inclusion of required marching instruction and activities for band pupils as part of the curricular and cocurricular course offerings of the school for a portion of the school year is *ultra vires*.

In this regard, the Commissioner finds that *N.J.S.A. 18A:33-1* speaks plainly wherein it says:

“Each school district shall provide \*\*\* courses of study suited to the ages and attainment of all pupils \*\*\* but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district.”

Thus, it is seen that the right of a board of education to establish and approve course offerings and requirements, as herein controverted, stems from legislative fiat and is indispensable to the orderly and efficient educative process.

The instant matter concerns a determination by the Board to offer marching instruction, as well as other instruction, within the band course of study during the months of September through November. Such inclusion, the Commissioner finds, was well-known and properly described. (P-2) Petitioner knew, or had opportunity to know, that marching was an integral part of the fall instructional and activity program of the band class.

Additionally, the Courts have spoken plainly regarding the rights of boards of education to make such decisions, as affirmed by the N.J. Superior Court, Appellate Division, in *Thomas v. Board of Education of the Township of Morris*, 89 N.J. Super. 327, 332 (1965) wherein it was said:

“\*\*\* 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 \*\*\*.”

The Commissioner does not find the inclusion of instruction and practice in band marching within the band course of study to be improper or illegal. There is much evidence that for many pupils such instruction has been a helpful adjunct to growth, enabling them to participate in a satisfying activity both in the public schools and thereafter. Further, the Commissioner does not find the requirement, that pupils enrolled in said course participate in such instruction, to be capricious, arbitrary, or unreasonable. There is ample proof to support respondent’s contention that no pupil was denied instrumental instruction in such class. It is clear that E.Z. received instrumental instruction despite his unwillingness to participate in the marching phase of the program of study and that, without coercion, he dropped from the course and enrolled in an alternate instrumental course.

It is clearly shown that some pupils may be unable or unwilling to participate fully in both curricular and extracurricular activities of the band for the entire year. However, petitioner’s plea for the establishment of a separate concert band without marching instruction, although hardly supportable in view of the limited band enrollment, *ante*, is solely within the discretion of the

Southern Regional Board of Education. It has been held for a period extending over twenty-seven years that:

“\*\*\* it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. \*\*\*” *Boult and Harris v. Board of Education of the City 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 (E. & A. 1947)

The Commissioner is of the opinion that musical offerings set forth by the Board could be more advanced, extensive, and individualized, but such offerings frequently have not been possible in public schools, and their establishment is subject to the discretionary judgment of local boards of education. Evidence does show, however, that the Southern Regional Board of Education has made some recent improvements in musical course offerings.

The Commissioner notes, in addition to the agreed-upon issues, *ante*, that petitioner has advanced allegations of discrimination against poor and handicapped children, as well as numerous other allegations of discrimination and coercion against music pupils. However, the Commissioner finds that the record is barren of proofs of such allegations.

From a careful consideration of the findings and the total record, the Commissioner finds petitioner's allegations without merit.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 28, 1973

## SUBJECT INDEX TO COMMISSIONER'S DECISIONS

<b>ABOLISHMENT OF POSITIONS</b>	
Page v. Trenton . . . . .	704
<b>ABSENT WITHOUT LEAVE</b>	
Megnin Tenure, Wayne Township . . . . .	641
<b>Absentee Ballots</b>	
see BOARDS OF EDUCATION-ELECTIONS	
<b>ACCOUNTABILITY</b>	
Chappell v. Commissioner of Education . . . . .	539
<b>AFFIDAVITS</b>	
Haledon v. Haledon . . . . .	146
Sherman v. Spotswood . . . . .	51
<b>AGREEMENTS</b>	
Yanowitz v. Jersey City . . . . .	57
<b>ALTERNATIVE SCHOOL PROGRAMS</b>	
"T.A." v. Edgewater Park/Burlington . . . . .	501
<b>Apportionment-School Debt</b>	
see SCHOOL DEBT-APPORTIONMENT	
<b>ARBITRATION</b>	
Weller v. Verona . . . . .	513
Lakewood v. Lakewood . . . . .	684
see also GRIEVANCE PROCEDURES	
<b>Annexation-School Districts</b>	
see SCHOOL DISTRICTS-ANNEXATION	
<b>ASSAULTS BY TEACHERS</b>	
Beam Tenure, Sayreville Borough . . . . .	157
Megnin Tenure, Wayne Township . . . . .	641
<b>ASSAULTS ON PUPILS</b>	
"T.A." v. Edgewater Park/Burlington . . . . .	501
<b>ASSESSMENT, EDUCATIONAL</b>	
Chappell v. Commissioner of Education . . . . .	539
<b>Assignment-Teachers</b>	
see TEACHERS-ASSIGNMENT	
<b>Attacks by Teachers</b>	
see ASSAULTS BY TEACHERS	
<b>Attacks on Pupils</b>	
see ASSAULTS ON PUPILS	
<b>Ballots</b>	
see BOARDS OF EDUCATION-ELECTIONS	
<b>BIDDERS-DISQUALIFICATION</b>	
Matter of Charles H. Knecht & Sons, Inc. . . . .	576
<b>BIDS AND BIDDING-CONSTRUCTION</b>	
Application of Almeida's Construction Co., Inc. . . . .	430
<b>BLACK LIBERATION FLAG</b>	
Cervase v. Newark . . . . .	701
<b>BOARDS OF EDUCATION-ELECTIONS</b>	
BALLOTS, ABSENTEE	
Deal . . . . .	108
Monroe . . . . .	212
BALLOTS, IRREGULAR	
Clementon . . . . .	164
Lower Cape May . . . . .	1
West Morris Regional . . . . .	600
CAMPAIGN ACTIVITIES	
Licato v. Crilley . . . . .	361
Point Pleasant Beach . . . . .	697



<b>CHALLENGERS</b>	
Helmetta	279
Lambertville and South Hunterdon Regional	371
Lower Cape May	1
Watchung Borough and Watchung Hills Regional	376
<b>COUNTY SUPERINTENDENT APPOINTMENT</b>	
East Greenwich	145
Haledon	154
Hopatcong	115
Lakeland	112
Lower Cape May	1
<b>INCORRECT INSTRUCTIONS</b>	
Frankford	680
Lakeland	112
<b>LOITERING</b>	
Helmetta	279
<b>MACHINE FAILURES</b>	
Galloway	677
Haledon	154
<b>MAILING NOTICES</b>	
Frankford	680
<b>NOMINATING PETITIONS</b>	
Hopatcong	115
<b>POSITION DRAWING</b>	
Helmetta	279
South Brunswick	36
<b>BOARDS OF EDUCATION-ELECTIONS</b>	
<b>RECOUNTS</b>	
Cherry Hill	124
Clark	129
East Greenwich	145
Fairlawn	144
Galloway	677
Green Brook	127
Haledon	154
Milltown	126
Mount Laurel	96
North Caldwell	122
Northfield	128
Oradell	123
Somers Point	140
Teaneck	142
Upper Saddle River	196
Waterford	125
West Deptford	228
West Morris Regional	600
Woodcliff Lake	143
<b>REGISTERS</b>	
Galloway	677
<b>VOTER LISTS</b>	
Lambertville and South Hunterdon Regional	371
Watchung Borough and Watchung Hills Regional	376
<b>BOARDS OF EDUCATION-MAJORITIES</b>	
Beckhusen v. Rahway	167
<b>BOARDS OF EDUCATION-MEETINGS</b>	
Karamessinis v. Wildwood	351
Moore v. Roselle	526
see also <b>BOARDS OF EDUCATION-ROLL CALL VOTES</b>	
<b>BOARDS OF EDUCATION-POLICIES</b>	
Mosselle Tenure, Newark	176

<b>BOARDS OF EDUCATION-POWERS AND DUTIES</b>	
Cervase v. Newark . . . . .	701
Karamessinis v. Wildwood . . . . .	351
Moore v. Roselle . . . . .	526
Page v. Trenton . . . . .	704
Weller v. Verona . . . . .	513
Zimmerman v. Southern Regional . . . . .	741
<b>BOARDS OF EDUCATION-QUORUMS</b>	
Beckhusen v. Rahway . . . . .	167
Gana v. Quinton . . . . .	657
Robinson v. Quinton . . . . .	257
see also BOARDS OF EDUCATION-MAJORITIES	
<b>BOARDS OF EDUCATION-ROLL CALL VOTES</b>	
Scherman v. Rahway . . . . .	85
Mosselle Tenure, Newark . . . . .	176
<b>Boards of Examiners-Local</b>	
see DISTRICT BOARDS OF EXAMINERS	
<b>Bonded Indebtedness</b>	
see SCHOOL DISTRICTS-BONDED INDEBTEDNESS	
<b>Briefs-Late Filing</b>	
see FAILURE TO PERFECT APPEAL	
<b>BUDGETS</b>	
<b>CERTIFICATION CHANGES</b>	
Colts Neck Township . . . . .	623
East Orange . . . . .	179
Haledon Borough . . . . .	146
Hillside Township . . . . .	710
Matawan Regional . . . . .	689
South Harrison Township . . . . .	438
Stratford Borough . . . . .	589
Union Beach Borough . . . . .	231
<b>DEBT SERVICE ACCOUNT</b>	
South Harrison Township . . . . .	438
<b>SURPLUS</b>	
Middlesex Borough . . . . .	648
<b>TAX APPROPRIATION</b>	
Paterson . . . . .	12
<b>TESTIMONY-WRITTEN</b>	
Haledon Borough . . . . .	146
<b>BUILDINGS AND GROUNDS-USE</b>	
Cervase v. Newark . . . . .	701
<b>Calendar</b>	
see SCHOOL CALENDAR	
<b>CAMPAIGN CONTRIBUTIONS AND EXPENDITURES</b>	
Matter of Charles H. Knecht & Sons, Inc. . . . .	576
<b>CERTIFICATES-EMERGENCY</b>	
K'Burg v. Lower Alloways Creek Township . . . . .	636
<b>CERTIFICATES-REVOCATION</b>	
Royer Tenure, Brick Township . . . . .	460
<b>CHARGES AND RESPONSES</b>	
Brennan Tenure, Elizabeth . . . . .	235
Ferrell Tenure, Clayton Borough . . . . .	293
Orr Tenure, Wyckoff Township . . . . .	40
<b>City Boards of Examiners</b>	
see DISTRICT BOARDS OF EXAMINERS	
<b>CLASS SIZE</b>	
South Harrison v. South Harrison . . . . .	438
Weller v. Verona . . . . .	513
<b>CLEAN HANDS DOCTRINE</b>	
Beckhusen v. Rahway . . . . .	167

<b>Commissioner of Education-Jurisdiction</b>	
see JURISDICTION-COMMISSIONER OF EDUCATION	
<b>Commissioner of Education-Motions</b>	
see MOTIONS-COMMISSIONER OF EDUCATION	
<b>COMMISSIONER OF EDUCATION-RELUCTANCE TO DECIDE</b>	
Royer Tenure, Brick Township . . . . .	460
<b>COMPULSORY EDUCATION</b>	
“T. A.” v. Edgewater Park/Burlington . . . . .	501
<b>CONDUCT UNBECOMING A TEACHER</b>	
Miller Tenure, Manville Borough . . . . .	409
Royer Tenure, Brick Township . . . . .	460
Williams Tenure, Union Township . . . . .	464
<b>CONFLICT OF INTEREST</b>	
Licato v. Crilley . . . . .	361
<b>Contract Agreements</b>	
see AGREEMENTS	
<b>Contract Cancellations-Principals</b>	
see PRINCIPALS-CONTRACT CANCELLATIONS	
<b>Contracts of Employees</b>	
see JANITORS-CONTRACTS	
PRINCIPALS-CONTRACT CANCELLATIONS	
PRINCIPALS-CONTRACT RENEWALS	
SUPERINTENDENTS-CONTRACT CANCELLATIONS	
SUPERINTENDENTS-CONTRACT RENEWALS	
TEACHERS-CONTRACT CANCELLATIONS	
TEACHERS-CONTRACT RENEWALS	
<b>CORPORAL PUNISHMENT</b>	
Miller Tenure, Manville . . . . .	409
Williams Tenure, Union . . . . .	464
see also ASSAULTS BY TEACHERS	
<b>COURSES OF STUDY-CONTENT</b>	
Zimmerman v. Southern Regional . . . . .	741
see also CURRICULUM	
<b>CURRICULUM</b>	
Zimmerman v. Southern Regional . . . . .	741
see also COURSES OF STUDY-CONTENT	
<b>De-Annexation-School Districts</b>	
see SCHOOL DISTRICTS-ANNEXATION	
<b>Debt Apportionment to School Districts</b>	
see SCHOOL DEBT-APPORTIONMENT	
<b>Directive Language</b>	
see MANDATORY AND DIRECTIVE LANGUAGE	
<b>DISCIPLINE-POLICIES</b>	
Mosselle Tenure, Newark . . . . .	176
<b>Discipline-Students</b>	
see STUDENTS-DISCIPLINE	
<b>DISCRIMINATION-RELIGIOUS</b>	
Sherman v. Spotswood . . . . .	51
<b>Dismissal of Complaints</b>	
see MOTIONS-DISMISSAL	
<b>Dismissal of Employees</b>	
see JANITORS	
PRINCIPALS	
SUPERINTENDENTS	
TEACHERS	
<b>Distribution of Materials</b>	
see TEACHERS-DISTRIBUTION OF MATERIALS	
<b>DISTRICT BOARDS OF EXAMINERS</b>	
Yanowitz v. Jersey City . . . . .	57

<b>DOMICILE AND RESIDENCE</b>	
see STUDENTS-DOMICILE AND RESIDENCE	
TEACHERS' REPRESENTATIVE-DOMICILE AND RESIDENCE	
<b>Dress Code</b>	
see STUDENTS-DRESS AND APPEARANCE	
<b>DUE PROCESS</b>	
Sherman v. Spotswood . . . . .	51
<b>Duties</b>	
see TEACHERS-DUTIES	
<b>Elections</b>	
see BOARDS OF EDUCATION-ELECTIONS	
CAMPAIGN CONTRIBUTIONS AND EXPENDITURES	
<b>Emergency Certificates</b>	
see CERTIFICATES-EMERGENCY	
<b>Employer-Employee Relations Act</b>	
see N.J. EMPLOYER-EMPLOYEE RELATIONS ACT	
<b>Employment Terms</b>	
see TEACHERS-EMPLOYMENT TERMS	
<b>EVIDENCE</b>	
Williams Tenure, Union Township . . . . .	464
<b>Examiners-Local Boards of</b>	
see DISTRICT BOARDS OF EXAMINERS	
<b>Extracurricular Activities</b>	
see STUDENTS-EXTRACURRICULAR ACTIVITIES	
TEACHERS-EXTRACURRICULAR DUTIES	
<b>Failure to Comply with Boards of Education Directives</b>	
see INSUBORDINATION	
<b>Fear</b>	
see INTIMIDATION OF PUPILS	
<b>FEES-REGISTRATION</b>	
Appeals of Black Horse Pike Regional and Sterling Regional . . . . .	130
<b>FEES-TUITION</b>	
"K.K." v. Westfield . . . . .	30
Little Egg Harbor v. Galloway . . . . .	324
North Bergen v. Guttenberg . . . . .	18
<b>FIRST AMENDMENT</b>	
Sherman v. Spotswood . . . . .	51
<b>FITNESS</b>	
Williams Tenure, Union Township . . . . .	464
<b>FOURTEENTH AMENDMENT</b>	
Sherman v. Spotswood . . . . .	51
Moroz v. Essex County Vocational School District . . . . .	385
<b>GRADING SYSTEMS</b>	
"K.C." v. Collingswood . . . . .	347
<b>GRIEVANCE PROCEDURES</b>	
Monaco v. Hanover Park Regional . . . . .	272
see also ARBITRATION	
<b>GUIDANCE COUNSELORS-SALARIES-INCREMENTS</b>	
Aikins v. East Paterson . . . . .	80
<b>HARASSMENT OF TEACHERS</b>	
Williams Tenure, Union Township . . . . .	464
<b>Hearsay-Testimony</b>	
see TESTIMONY-HEARSAY	
<b>Hearsay Evidence</b>	
see EVIDENCE	
<b>Injuries-Students</b>	
see STUDENTS-INJURIES	
<b>IN LOCO PARENTIS</b>	
Rovere v. Ridgefield Park . . . . .	97

<b>Increments</b>	
see GUIDANCE COUNSELORS-SALARIES-INCREMENTS	
PRINCIPALS-SALARIES-INCREMENTS	
TEACHERS-SALARIES-INCREMENTS	
<b>INEFFICIENCY</b>	
Simmons Tenure, Eatontown Borough . . . . .	721
<b>INSUBORDINATION</b>	
Gana v. Quinton . . . . .	657
Williams Tenure, Union Township . . . . .	464
<b>Intention of Parties to an Agreement</b>	
see AGREEMENTS	
<b>INTEREST ON WAGES WITHHELD</b>	
Banick v. Riverside . . . . .	401
<b>Interested Parties</b>	
see PARTY IN INTEREST	
<b>INTIMIDATION OF STUDENTS</b>	
"T.A." v. Edgewater Park/Burlington . . . . .	501
Williams Tenure, Union Township . . . . .	464
<b>JANITORS-CONTRACTS</b>	
McLean v. Glen Ridge . . . . .	217
<b>JURISDICTION-COMMISSIONER OF EDUCATION</b>	
Beam Tenure, Sayreville Borough . . . . .	157
Lakewood v. Lakewood . . . . .	684
Megnin Tenure, Wayne Township . . . . .	641
Point Pleasant Beach . . . . .	697
<b>LACHES</b>	
Begier v. Rahway . . . . .	91
<b>Lateness Penalties</b>	
see TEACHERS-SALARIES-PENALTIES	
<b>Language of Agreements</b>	
see AGREEMENTS	
<b>Language-Mandatory and Directive</b>	
see MANDATORY AND DIRECTIVE LANGUAGE	
<b>LEGAL EXPENSES-BOARDS OF EDUCATION</b>	
Young v. Downe . . . . .	671
<b>LEGAL EXPENSES-TEACHERS</b>	
Banick v. Riverside . . . . .	401
<b>Liberty Rights</b>	
see FOURTEENTH AMENDMENT	
<b>Local Boards of Examiners</b>	
see DISTRICT BOARDS OF EXAMINERS	
<b>Majorities-Boards of Education</b>	
see BOARDS OF EDUCATION-MAJORITIES	
<b>MANDATORY AND DIRECTIVE LANGUAGE</b>	
Orr Tenure, Wyckoff Township . . . . .	40
<b>May (meaning of)</b>	
see MANDATORY AND DIRECTIVE LANGUAGE	
<b>Meetings of Boards of Education</b>	
see BOARDS OF EDUCATION-MEETINGS	
<b>Mental Examinations</b>	
see PRINCIPALS-MENTAL EXAMINATIONS	
STUDENTS-MENTAL EXAMINATIONS	
TEACHERS-MENTAL EXAMINATIONS	
<b>MENTALLY RETARDED-TRAINABLE</b>	
Williams Tenure, Union Township . . . . .	464
<b>Military Service-Teachers</b>	
see TEACHERS-MILITARY SERVICE	
<b>MOOTNESS</b>	
Beckhusen v. Rahway . . . . .	167
Cervase v. Newark . . . . .	701
Hoffman v. Cherry Hill . . . . .	406

<b>MOTIONS-COMMISSIONER</b>	
Mosselle v. Newark . . . . .	176
<b>MOTIONS-CONSOLIDATION</b>	
Sipos v. Manville . . . . .	434
<b>MOTIONS-DISMISS</b>	
Cervase v. Newark . . . . .	701
Sherman v. Spotswood . . . . .	51
<b>MOTIONS-PENDENTE LITE</b>	
“M.C.” v. Trenton . . . . .	254
Mosselle v. Newark . . . . .	176
<b>MOTIONS-SALARY PAYMENTS</b>	
Pietrunti Tenure, Brick Township . . . . .	9
<b>MOTIONS-STRIKE</b>	
Haledon v. Haledon . . . . .	146
Williams Tenure, Union Township . . . . .	464
<b>Negotiated Agreements</b>	
see AGREEMENTS	
<b>NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT</b>	
Weller v. Verona . . . . .	513
<b>NOTICE OF RESIGNATION</b>	
Royer Tenure, Brick Township . . . . .	460
<b>NURSES-SALARIES</b>	
Sipos v. Manville . . . . .	434
<b>PARENTS-RIGHTS</b>	
Rovere v. Ridgfield Park . . . . .	97
<b>PARTY IN INTEREST</b>	
Monaco v. Hanover Park Regional . . . . .	272
<b>Penalties for Lateness</b>	
see TEACHERS-SALARIES-PENALTIES	
<b>PENDENTE LITE</b>	
Rovere v. Ridgfield Park . . . . .	97
<b>Pendente Lite-Motions</b>	
see MOTIONS-PENDENTE LITE	
<b>PETITIONS-DEFECTIVE</b>	
Cervase v. Newark . . . . .	701
<b>Policies-Boards of Education</b>	
see BOARDS OF EDUCATION-POLICIES	
<b>Political Campaign Expenditures</b>	
see CAMPAIGN CONTRIBUTIONS AND EXPENDITURES	
<b>Positions-Abolishment</b>	
see ABOLISHMENT OF POSITIONS	
<b>Powers and Duties-Boards of Education</b>	
see BOARDS OF EDUCATION-POWERS AND DUTIES	
<b>PRIMA FACIE</b>	
Sherman v. Spotswood . . . . .	51
<b>PRINCIPALS-CONTRACT CANCELLATIONS</b>	
Martin v. South Amboy . . . . .	496
<b>PRINCIPALS-MENTAL EXAMINATIONS</b>	
Gana v. Quinton . . . . .	657
<b>PRINCIPALS-SALARIES-GRADUATE CREDITS</b>	
Romeo v. Madison Township . . . . .	102
<b>PRINCIPALS-SALARIES-INCREMENTS</b>	
Scherman v. Rahway . . . . .	85
<b>PRINCIPALS-TENURE EMPLOYEE HEARINGS</b>	
Gana Tenure, Quinton Township . . . . .	661
Megnin Tenure, Wayne Township . . . . .	641
Orr Tenure, Wyckoff Township . . . . .	40

<b>PRINCIPALS-TRANSFER</b>	
Moore v. Roselle . . . . .	526
<b>Profanity-Dismissal of Teachers</b>	
see TEACHERS-DISMISSAL-VULGARITY	
<b>PROMISSORY ESTOPPEL</b>	
White v. Collingswood Borough . . . . .	261
<b>Public Records</b>	
see RIGHT TO KNOW LAW	
<b>Public Use of Schools</b>	
see BUILDINGS AND GROUNDS-USE	
<b>Quorums</b>	
see BOARDS OF EDUCATION-QUORUMS	
<b>Records-Public</b>	
see RIGHT TO KNOW LAW	
<b>Records-Teachers</b>	
see TEACHERS-RECORDS	
<b>Registration Fees</b>	
see FEES-REGISTRATION	
<b>Religious Discrimination</b>	
see DISCRIMINATION-RELIGIOUS	
<b>REMOTE (meaning of)</b>	
Minelli v. Trenton . . . . .	321
see also TRANSPORTATION OF STUDENTS	
<b>Representative of Teachers</b>	
see TEACHERS' REPRESENTATIVE	
<b>RES JUDICATA</b>	
"K.K." v. Westfield . . . . .	30
<b>Resignation-Notice of</b>	
see NOTICE OF RESIGNATION	
<b>RETIREMENT</b>	
Begier v. Rahway . . . . .	91
<b>Revocation of Certificate</b>	
see CERTIFICATE-REVOCATION	
<b>RIGHT TO KNOW LAW</b>	
Chappell v. Commissioner of Education . . . . .	539
Deal Election Inquiry . . . . .	108
<b>Rights-Parents</b>	
see PARENTS-RIGHTS	
<b>Roll Call Vote at Board Meeting</b>	
see BOARDS OF EDUCATION-ROLL CALL VOTES	
<b>SAFETY OF STUDENTS</b>	
"T.A." v. Edgewater Park/Burlington . . . . .	501
<b>Salaries</b>	
see GUIDANCE COUNSELORS-SALARIES	
NURSES-SALARIES	
PRINCIPALS-SALARIES	
TEACHERS-SALARIES	
<b>Salary Payments-Motions</b>	
see MOTIONS-SALARY PAYMENTS	
<b>SARCASM OF TEACHERS</b>	
Williams Tenure, Union Township . . . . .	464
<b>SCHOOL CALENDAR</b>	
Goldman v. Bergenfield Borough . . . . .	441
<b>SCHOOL DEBT-APPORTIONMENT</b>	
Toms River Regional v. Lavallette Borough . . . . .	609
<b>SCHOOL DISTRICTS-ANNEXATION</b>	
Toms River Regional v. Lavallette Borough . . . . .	609
<b>SCHOOL DISTRICTS-BONDED INDEBTEDNESS</b>	
Toms River Regional v. Lavallette Borough . . . . .	609

<b>SENDING-RECEIVING RELATIONSHIPS</b>	
New Brunswick v. North Brunswick	578
"T.A." v. Edgewater Park/Burlington	501
<b>Sixty Days' Notice</b>	
see NOTICE OF RESIGNATION	
<b>SPECIAL EDUCATIONAL SERVICES</b>	
"K.K." v. Westfield	30
Little Egg Harbor Township v. Galloway	324
<b>STATUTE OF LIMITATIONS-CONTRACT ACTIONS</b>	
Begier v. Rahway	91
<b>STRIKES AND SANCTIONS</b>	
Goldman v. Bergenfield Borough	441
<b>Students-Attendance</b>	
see COMPULSORY EDUCATION	
<b>STUDENTS-CLASSIFICATION</b>	
Chappell v. Commissioner of Education	539
<b>STUDENTS-DISCIPLINE</b>	
"M.C." v. Trenton	254
<b>STUDENTS-DOMICILE AND RESIDENCE</b>	
Little Egg Harbor Township v. Galloway	324
<b>STUDENTS-DRESS AND APPEARANCE</b>	
Farrell v. North Arlington Borough	301
<b>STUDENTS-EXTRACURRICULAR ACTIVITIES</b>	
Rovere v. Ridgefield Park	97
<b>STUDENTS-INJURIES</b>	
"T.A." v. Edgewater Park/Burlington	501
<b>STUDENTS-MENTAL EXAMINATIONS</b>	
"R.K." v. Lakewood Township	343
<b>STUDENTS-RECORDS</b>	
Rovere v. Ridgefield Park	97
<b>Students-Safety</b>	
see SAFETY OF STUDENTS	
<b>STUDENTS-SUSPENSIONS AND EXPULSIONS</b>	
"M.C." v. Trenton	254
"R.K." v. Lakewood Township	343
Rovere v. Ridgefield Park	97
"W.S." v. East Windsor Regional	341
"W.S." v. East Windsor Regional	652
<b>SUBSTITUTE TEACHERS</b>	
Yanowitz v. Jersey City	57
<b>SUMMER SCHOOL PROGRAM</b>	
Appeals of Black Horse Pike and Sterling Regional	130
<b>SUPERINTENDENTS-CONTRACT RENEWALS</b>	
Karamessinis v. Wildwood	351
<b>SUPERINTENDENTS-TENURE CLAIMS</b>	
Van Wagner v. Roselle Borough	488
<b>Suspensions-Students</b>	
see STUDENTS-SUSPENSIONS AND EXPULSIONS	
<b>Suspensions-Teachers</b>	
see TEACHERS-SUSPENSIONS	
<b>TEACHERS-ASSIGNMENTS</b>	
Weller v. Verona	513
<b>TEACHERS-CONTRACT CANCELLATIONS</b>	
Moore v. Roselle	526
<b>TEACHERS-CONTRACT RENEWALS</b>	
Moroz v. Essex	385
Page v. Trenton	704
Rawicz v. Piscataway	305
White v. Collingswood	261



<b>TEACHERS-DISMISSAL-VULGARITY</b>	
Williams Tenure, Union Township . . . . .	464
<b>TEACHERS-DISTRIBUTION OF MATERIALS</b>	
Ferrell Tenure, Clayton Borough . . . . .	293
<b>TEACHERS-DUTIES</b>	
Begier v. Rahway . . . . .	91
MacDonald v. Middle Township . . . . .	287
<b>TEACHERS-EMPLOYMENT TERMS</b>	
Weller v. Verona . . . . .	513
<b>TEACHERS-EXTRACURRICULAR DUTIES</b>	
Monaco v. Hanover Park . . . . .	272
<b>TEACHERS-MENTAL EXAMINATIONS</b>	
Gana v. Quinton . . . . .	657
Williams Tenure, Union Township . . . . .	464
<b>TEACHERS-MILITARY SERVICE</b>	
Boublis v. Hawthorne Borough . . . . .	437
<b>TEACHERS-RECORDS</b>	
Chappell v. Commissioner of Education . . . . .	539
<b>TEACHERS-SALARIES-INCREMENTS</b>	
Banick v. Riverside Township . . . . .	401
Begier v. Rahway . . . . .	91
Coniglio v. Teaneck . . . . .	449
Sroka v. Jackson Township . . . . .	301
<b>TEACHERS-SALARIES-INEQUITIES</b>	
Yanowitz v. Jersey City . . . . .	57
<b>TEACHERS-SALARIES-PENALTIES</b>	
Central Regional Education Association v. Central Regional . . . . .	247
Pietruni Tenure, Brick Township . . . . .	9
<b>TEACHERS-SALARIES-REDUCTIONS</b>	
MacDonald Tenure, Middle Township . . . . .	287
Page v. Trenton . . . . .	704
<b>TEACHERS-SALARIES-RESOLUTIONS</b>	
DeRenzo v. Passaic . . . . .	236
<b>Teachers-Sarcasm</b>	
see SARCASM OF TEACHERS	
<b>TEACHERS-SUSPENSIONS</b>	
Beam Tenure, Sayreville Borough . . . . .	157
Ferrell Tenure, Clayton Borough . . . . .	293
Gana v. Quinton . . . . .	657
MacDonald Tenure, Middle Township . . . . .	287
Miller Tenure, Manville Borough . . . . .	409
Pietruni Tenure, Brick Township . . . . .	9
Royer Tenure, Brick Township . . . . .	460
<b>TEACHERS-TENURE CLAIMS</b>	
K'Burg v. Lower Alloways Creek Borough . . . . .	636
<b>TEACHERS-TENURE EMPLOYEE HEARINGS</b>	
Beam Tenure, Sayreville Borough . . . . .	157
Miller Tenure, Manville Borough . . . . .	409
Pietruni Tenure, Brick Township . . . . .	9
Royer Tenure, Brick Township . . . . .	460
Simmons Tenure, Eatontown Borough . . . . .	721
Williams Tenure, Union Township . . . . .	464
see also CHARGES AND RESPONSES	
<b>TEACHERS-TRANSFER</b>	
Mosselle v. Newark . . . . .	176
Page v. Trenton . . . . .	704
<b>TEACHERS' REPRESENTATIVE-DOMICILE AND RESIDENCE</b>	
Moore v. Roselle . . . . .	526

<b>Tenure Claims</b>	
see SUPERINTENDENTS-TENURE CLAIMS	
TEACHERS-TENURE CLAIMS	
<b>Tenure Employee Hearings</b>	
see PRINCIPALS-TENURE EMPLOYEE HEARINGS	
TEACHERS-TENURE EMPLOYEE HEARINGS	
<b>Terms and Conditions of Employment</b>	
see TEACHERS-EMPLOYMENT TERMS	
<b>TESTIMONY-HEARSAY</b>	
Williams Tenure, Union Township . . . . .	464
<b>TESTING</b>	
Chappell v. Commissioner of Education . . . . .	539
<b>THOROUGH AND EFFICIENT</b>	
Chappell v. Commissioner of Education . . . . .	539
<b>Trainable Children</b>	
see MENTALLY RETARDED-TRAINABLE	
<b>Transfer-Principals</b>	
see PRINCIPALS-TRANSFER	
<b>Transfer-Teachers</b>	
see TEACHERS-TRANSFER	
<b>TRANSPORTATION OF STUDENTS-DISCRIMINATION</b>	
Hoffman v. Cherry Hill . . . . .	406
Minelli v. Trenton . . . . .	321
<b>TRANSPORTATION OF STUDENTS-ELIGIBILITY</b>	
Smith v. Gloucester Township . . . . .	381
<b>Tuition Fees</b>	
see FEES-TUITION	
<b>Unfitness-Teachers</b>	
see FITNESS OF TEACHERS	
<b>Vote, Roll Call by Boards of Education</b>	
see BOARDS OF EDUCATION-ROLL CALL VOTES	
<b>Vulgarity-Dismissal of Teachers</b>	
see TEACHERS-DISMISSAL-VULGARITY	

**Blanche Beisswenger, Ruth Hayford, and Elizabeth Dale,  
individually and in behalf of others similarly situated as a class  
(Englewood Teachers Association),**

*Petitioners-Appellants,*

*v.*

**Board of Education of the City of Englewood,  
Bergen County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**OPINION**

Decided by the Commissioner of Education, November 20, 1972

For the Petitioners-Appellants, Theodore M. Simon, Esq.

For the Respondent-Appellee, Sidney Dincin, Esq.

The decision of the Commissioner of Education is reversed. We conclude that the language in disagreement, “\*\*\* all on the present top step \*\*\*” must apply to both school years 1969-70 and 1970-71, since the language appears at the end of the two-year salary guide. Because the 1970-71 salary guide was intended to be read and applied in the future, the particular language in disagreement cannot now be separated to be read and applied to the 1969-70 salary guide only.

June 6, 1973

Pending before Superior Court of New Jersey

**Citizens for Better Education, Marilyn Whitham,  
Jerrothia Riggs, Barbara Brown, Dr. John W. Robinson, Joyce Carter,  
Sandra Armstrong, Vera Benjamin, Jacqueline Harper, Edith Curly,  
Alma G. Peterson, and Deloris Moye,**

*Petitioners-Appellants,*

*v.*

**Board of Education of the City of Camden and Dr. Charles Smerlin,  
Superintendent of Schools, Camden County,**

*Respondents-Appellees.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 20, 1971

Decided by the State Board of Education, June 1, 1972

Argued June 4, 1973 – Decided July 12, 1973

Before Judges Carton, Mintz and Seidman.

On appeal from State Board of Education.

Mr. Robert D. Pitt argued the cause for petitioners-appellants (Mr. Carl S. Bisgaier, Director Camden Regional Legal Services, Inc., attorney).

Mr. Raymond Kassekert argued the cause for respondents-appellees (Mr. Leonard A. Spector, attorney).

Mr. George F. Kugler, Jr., Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the New Jersey State Board of Education (Mr. Lewis M. Popper, Deputy Attorney General, of counsel).

The opinion of the Court was delivered by SEIDMAN, J.A.D.

This is an appeal by petitioners pursuant to *R.2:2-3(a)* (2) from an affirmance by the New Jersey State Board of Education of an adverse decision of the Commissioner of Education.

The principal question is whether petitioners have a statutory or common law right to require the respondent school board to disclose the results of standardized achievement tests on a school-by-school and grade-by-grade basis. They do not seek access to the records of individual pupils.

Citizens for Better Education is an unincorporated association which describes itself as “an informal group of citizens, parents, and professional

people who take an active interest in education in general and in the schools of the City of Camden, in particular". The individual petitioners are residents of Camden most of whom are parents of children enrolled in the school system. They had requested the local Board of Education to make public the results of standardized achievement tests administered in the public schools of the city.

Specifically, they sought the median reading level scores by school and grade for the year 1968 to 1970; and also, on an annual basis, the test results in a form which gave the mean or median for each grade in each school and the national norm for each grade. It is not disputed that reports of the test results in the form sought are in respondents' possession. The Board furnished test results by grade but regionally by groups of schools. It has refused to give the data by grade and by school as requested.

Petitioners then sought an order from the Commissioner of Education requiring the local board and its superintendent to disclose the information in the form sought by petitioners. Testimony and documentary evidence were presented at a hearing conducted June 1, 1971, by a hearing officer appointed by the Commissioner. On December 20, 1971, the Commissioner issued a decision adverse to petitioners. On appeal to the State Board of Education, the decision was affirmed. This appeal followed.

The Commissioner characterized the testimony presented as "consist[ing] almost entirely of expressions of differing points of view of educational philosophy and both personal and professional judgment, regarding the role of the public schools with respect to community interest generally, and certain specific concerns of a diverse group of citizens". He saw the issue as turning on the discretionary exercise of power by the school board. He reasoned that "[s]ince local boards of education are not required by law to administer comprehensive achievement tests of basic skills, the test-results data sought by petitioners do not constitute a public record"; consequently, petitioners' right to the test results was not protected by the so-called Right-to-Know Law, *N.J.S.A. 47:1A-1 et seq.* He said further that the Board's decision to publish the data by region was an exercise of its discretionary authority which the Commissioner would not disturb in the absence of a showing that it was arbitrary or unreasonable.

We disagree with the conclusions of the Commissioners.

If the test results are available in the form desired by petitioners, as they seem to be, the question to be resolved is whether they are public records. If they are, petitioners would have a statutory right to inspect them. The Right-to-Know Law, *N.J.S.A. 47:1A-2*, declares that every citizen of this State, during regular business hours, shall have the right to inspect and copy or purchase copies of public records. No showing of any personal or particular interest in the material is required. *Irvial Realty v. Bd. of Pub. Util. Commissioners*, 61 *N.J.* 366, 372-373 (1972). There is also a common law right to inspect such records. In the *Irvial Realty* case, *supra* at 372, the court said:

At common law a citizen had an enforceable right to require custodians of public records to make them available for reasonable inspection and examination. It was, however, necessary that the citizen be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though this individual interest may have been slight. *Ferry v. Williams*, 41 N.J.L. 332 (Sup. Ct. 1879); *Taxpayers Association v. City of Cape May*, 2 N.J. Super. 27 (App. Div. 1949); *Moore v. Board of Chosen Freeholders of Mercer County*, 76 N.J. Super. 396 (App. Div. 1962), mod. 39 N.J. 26 (1962). Yet some showing of interest was required.

The Commissioner's conclusion that since local boards are not required to administer comprehensive achievement tests the results thereof are not public records is unsound. The fact that something need not be done does not mean that if it is done the report thereof is not a public record.

To ascertain what is a public record we look first to the Right-to-Know Law, N.J.S.A. 47:1A-2, which provides, with exceptions not applicable here, that

... [A]ll records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof ... shall, for the purpose of this act, be deemed to be public records ...

In the Destruction of Public Records Law (1953), N.J.S.A. 47:3-16, the term is defined, in pertinent part, as

... [A]ny paper, written or printed book, document or drawing, map or plan, photograph, microfilm, sound-recording or similar device, or any copy thereof ... that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or *because of the information contained therein*. [Emphasis supplied.]

Considering these statutes *in pari materia*, the test results clearly qualify as public records. It is noted, moreover, that the rules of the State Board of Education relating to the inspection of school records provide, among other things, that "pupil records may be open to inspection by persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic education research, guidance and social service". N.J.A.C. 6:3-4(b). See also N.J.S.A. 18 A:36-19.

Additionally, it is undisputed that the rules and regulations contained in the Administrative Manual of the Camden Board of Education direct the Supervisor of Guidance Services to coordinate system-wide testing programs and to report the results of tests administered. Since the reporting of test results is required by administrative rule, such reports are public records within the statutory definition. *Irvial Realty v. Bd. of Pub. Util. Commissioners*, *supra*, 61 *N.J.* at 375.

There is no merit to the contention that since a summary of the report was publicly released, the refusal to furnish the data requested by petitioners was a proper exercise of discretionary authority. The report contained information which a citizen may have a legitimate interest in knowing, in which case there is no valid reason for withholding the information from public view. *DeLia v. Kiernan*, 119 *N.J. Super.* 591, 584 (App. Div. 1972), *certif. den.* 62 *N.J.* 74 (1972). Respondents' further argument that the information in question is highly technical and intended for use by professional, qualified educators, and that the "results in the hands of non-qualified evaluators would only lead to erroneous inferences" is specious. These conjectured fears are not sufficient to justify keeping from petitioners a public record which, by statute or by common law, they can rightfully inspect. *Cf. Accident Index Bureau, Inc. v. Hughes*, 46 *N.J.* 160 (1965). See also *Bzozowski v. Penn-Reading Seashore Lines*, 107 *N.J. Super.* 467 (Law Div. 1969). Petitioners are endeavoring to ascertain what deficiencies, if any, exist in any grade or school. This is a matter of legitimate public concern and clearly outweighs any conceivable interest there may be in maintaining the confidentiality of the information in the form sought.

Reversed. Respondents are ordered to permit petitioners to inspect and copy reports or such portions thereof as reveal the results of city-wide standardized achievement tests by grade and school, as sought in their petition, or to purchase copies thereof. No costs.

Mabel Clark,

*Petitioner-Appellant,*

*v.*

Board of Education of the Borough of East Paterson,  
Bergen County,

*Respondent-Appellee.*

#### STATE BOARD OF EDUCATION

#### Decision

Decided by the Commissioner of Education on Motion for Summary Judgment, May 17, 1972

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Law Offices of Charles A. Bartlett (Stanley Turitz, Esq., of Counsel)

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

January 3, 1973

**Robert J. Cornell,**

*Appellant,*

*v.*

**New Jersey State Board of Education,  
Carl L. Marburger, Commissioner of Education,**

*Respondents.*

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

Decided by the Commissioner of Education, May 11, 1972

Decided by the State Board of Education, November 1, 1972

Submitted June 19, 1973 — Decided July 5, 1973

Before Judges Kolovsky, Matthews and Crahay.

On appeal from the State Board of Education.

Mr. Robert J. Cornell, appellant, *pro se*.

Mr. Robert J. T. Mooney, attorney for respondent Board of Education of the Borough of Watchung.

Mr. George F. Kugler, Jr., Attorney General, filed a statement in lieu of brief on behalf of State Board of Education (Mr. Lewis M. Popper, Deputy Attorney General, of counsel)

**PER CURIAM**

Plaintiff appeals the affirmance by the State Board of Education of the dismissal by the Commissioner of Education of that part of his complaint which alleged it to have been improper for an incumbent member of the Board of Education of Watchung to act as a challenger for a candidate in a school board election. The other charges set forth in the complaint are not involved in this appeal. We affirm.



N.J.S.A. 18A:14-15 expressly provides that each candidate himself may act as a challenger and in addition “may appoint also a legal voter of the school district to act as a challenger for \*\*\* each polling district in which he is to be voted for.” Absent an express statutory prohibition against an incumbent member of a Board of Education being so designated, it is apparent that such a Board member, as a legal voter of the school district, is eligible to act as a challenger under the statute.

We find no merit to plaintiff’s argument that holding the office of member of a Board of Education and acting as a challenger are incompatible.

Affirmed.

**Mary Dawson,**

*Petitioner-Appellant,*

*v.*

**Boards of Education of the Townships of Ocean and Berkeley,**

*Respondent-Appellees.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, November 17, 1971

Decided by the State Board of Education, November 3, 1972

Submitted: February 5, 1973. Decided: February 9, 1973.

Before: Judges Goldmann, Fritz and Lynch.

On appeal from judgment of the New Jersey State Board of Education.

Mr. Richard E. Beck, attorney for appellant.

Mr. Peter Shebell, Jr., attorney for respondent Ocean Township Board of Education.

Mr. Wilbert J. Martin, Jr., attorney for respondent Berkeley Township Board of Education.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney for New Jersey State Board of Education, filed a statement in lieu of brief (Mr. Lewis M. Popper, Deputy Attorney General, of counsel).

**PER CURIAM**

We affirm substantially for the reasons stated in the decision of the Acting Commissioner of Education, affirmed by the State Board of Education, dismissing petitioner-appellant's claim for salary and for contributions to the Teachers' Pension and Annuity Fund allegedly due her for a period of time during which she was absent from work.

**Robert G. Enslin,**

*Petitioner-Appellant,*

*v.*

**Board of Education of Egg Harbor Township School District,  
Atlantic County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, September 15, 1972

For the Petitioner-Appellant, Henry Bender, Esq.

For the Respondent-Appellee, A. Ralph Perone, Esq.

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

May 2, 1973

**Rose Franco,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the City of Plainfield,  
Union County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, June 20, 1972

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent-Appellee, King & King (Victor R. King, Esq., of Counsel and Victor E. D. King, Esq., on the Brief)

For the New Jersey School Boards Association, *Amicus Curiae*, Robert P. Martinez, Esq.

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

May 2, 1973

**Alfred W. Freeland,**

*Petitioner-Appellee,*

*v.*

**Board of Education of the District of Scotch Plains-Fanwood,  
Union County, New Jersey,**

*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 17, 1972

Decided by the State Board of Education, September 13, 1972

Argued April 10, 1973 – Decided April 25, 1973

Before Judges Kolovsky, Matthews and Crahay

On appeal from the New Jersey State Board of Education.

Mr. Jeremiah D. O'Dwyer argued the cause for appellant (Messrs. Johnstone & O'Dwyer, attorneys).

Mr. Cassel R. Ruhlman, Jr. argued the cause for appellee.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of State Board of Education (Mr. Lewis M. Popper, Deputy Attorney General, of counsel).

**PER CURIAM**

The Board of Education of the District of Scotch Plains-Fanwood appeals from a decision of the State Board of Education which affirmed, for the reasons expressed therein, the decision of the Commissioner of Education that petitioner had tenure as assistant superintendent of schools in charge of business affairs of

the school district. The Commissioner's decision concluded with a direction that petitioner be restored by the local Board of Education to his position forthwith and "that he be given all the salary and furnished all of those benefits to which he is entitled retroactively to July 1, 1971, subject only to mitigation resulting from his earnings during that period."

We affirm, essentially for the reasons given by the Commissioner of Education.

**In the Matter of the Tenure Hearing of Paula M. Grossman  
a/k/a Paul M. Grossman, School District of the Township of Bernards,  
Somerset County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, April 10, 1972

For the Respondent-Appellant, Halpern, Schachter & Wohl (Richard J. Schachter, Esq., of Counsel)

For the Complainant-Cross Appellant, Young, Rose & Millspaugh (Gordon A. Millspaugh, Jr., Esq., of Counsel)

**PART I**

We affirm that portion of the Commissioner of Education's decision which ordered and directed Respondent Grossman be dismissed as a teacher in the Bernards Township School System, pursuant to *N.J.S.A. 18A:6-10 et seq.*, and directed that the Assistant Commissioner for Controversies and Disputes make the entire record of that proceeding available to the trustees of the Teachers' Pension and Annuity Fund, should they deem such a record useful in their deliberations.

**PART II**

We reverse that portion of the Commissioner's decision which directed the Bernards Township Board of Education to make payment of Respondent Grossman's salary pursuant to *L. 1971, c. 435*, on the theory that the effect of that law was not retroactive.

Mrs. Hugh Auchincloss, Mrs. Marion G. Epstein, Calvin J. Hurd, Esq., and Mrs. Ruth Mancuso dissent from Part II above.

February 7, 1973  
Pending before Superior Court of New Jersey

**In the Matter of the Tenure Hearing of Wardlaw Hall,  
School District of the Township of Cinnaminson, Burlington County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, September 1, 1972

For the Petitioner-Appellee, Brown, Connery, Kulp, Wille, Purnell &  
Greene (George Purnell, Esq., of Counsel)

For the Respondent-Appellant, Plone, Tomar, Parks & Seliger (Howard S.  
Simonoff, Esq., of Counsel)

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

June 6, 1973

**Robert Kolbeck,**

*Petitioner-Appellant,*

*v.*

**New Jersey State Board of Education, Board of Education  
of the Township of Lumberton and Cornelius T. McGlynn,**

*Defendants-Respondents.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 3, 1972

Decided by the State Board of Education, September 13, 1972

Submitted April 10, 1973 – Decided May 7, 1973

Before Judges Kolovsky, Matthews and Crahay.

On Appeal from the New Jersey State Board of Education.

Messrs. Hyland, Davis & Reberkenny, attorneys for appellant (Mr. John S.  
Fields of counsel and on the brief).

Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney for  
respondent State Board of Education (Mr. Lewis M. Popper, Deputy  
Attorney General, of counsel and on the brief).

Messrs. Miller, Myers, Matteo & Rabil, attorneys for respondent McGlynn (Mr. Albert R. Rago on the brief).

**PER CURIAM**

Petitioner appeals from a final determination by the New Jersey State Board of Education denying him the right to intervene in and prosecute an appeal from the decision of the Commissioner of Education in *McGlynn v. The Board of Education of Lumberton* wherein Cornelius McGlynn successfully challenged his dismissal as Superintendent of the school system in Lumberton.

In February 1971, petitioner was elected president of the Board of Education in Lumberton. On April 23, 1971 he convened and conducted a meeting at which a motion was adopted, by a 5-4 vote, authorizing the municipal attorney to give McGlynn a sixty-day notice to the effect that his contract as Superintendent for the year 1971-72 would not be renewed. McGlynn, who had been engaged as Superintendent on July 1, 1969, actually remained in his position as Superintendent until July 13, 1971 at which time another resolution was passed providing that he was no longer in the Board's employ. McGlynn thereupon appealed his ouster to the Commissioner claiming tenure under *N.J.S.A. 18A:28-6* and prevailed. His reinstatement was ordered on February 3, 1972. On February 8, 1972 petitioner and another were defeated in a re-election bid thereby changing the complexion of the board. On February 23, 1972 the board voted to restore McGlynn to his position as Superintendent of Schools, and further rejected a motion to appeal the Commissioner's decision to the State Board of Education. On February 24, 1972 petitioner sought to intervene in the then moot *McGlynn* case. The State Board of Education denied his intervention petition without a hearing on September 13, 1972.

Petitioner appeals from the denial on the grounds 1) that since it was done without a hearing it was procedurally defective and in contravention of provisions of the New Jersey Administrative Procedure Act (*N.J.S.A. 52:14B-1 et seq.*); and, 2) that it was an arbitrary and unreasonable exercise of administrative discretion.

Petitioner, as a citizen and taxpayer, was not entitled to a hearing under the *New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-9 (a) & (c)* provide that "all parties" shall be afforded the opportunities for hearings. Similar references to "parties" may be found in *N.J.S.A. 52:15B-10*.

Petitioner's reliance on *N.J.S.A. 18A:6-27* and the *New Jersey Administrative Code, N.J.A.C. 6:24 et seq.* is misplaced.

*N.J.S.A. 18A:6-27* provides in pertinent part;

"... Any party aggrieved by any determination of the commissioner may appeal from his determination to the state board..." (emphasis added).

Petitioner was not a party in *McGlynn*. A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. He is a person who is actually and substantially interested in the subject matter, as distinguished from one who has only a nominal, formal, or technical interest in it or connection with it. *In re Carey*, 65 *N.J. Super.* 585 (Cty. Ct. 1961); *Black's Law Dictionary*, rev. 4th ed., p. 1278.

*N.J.A.C.* 6:24-1.6 provides:

*Permission to intervene.*

"The Commissioner may allow any person upon a showing that he may be substantially and specifically affected by the proceeding, to intervene as a party in the whole or any portion of the proceeding, and may allow any other interested person to participate by presentation of argument, orally or in writing, or for any other limited purpose, as the Commissioner may order."

Petitioner did not demonstrate in anywise how he had been "substantially and specifically affected" by the decision of the Commissioner in the *McGlynn* case. Petitioner, as a citizen and taxpayer, with no direct pecuniary interest in the litigation between McGlynn and the Board of Education, was without standing to appeal from the adverse judgment against the Board of Education. *cf. Botkin v. Westwood*, 28 *N.J.* 218 (1958).

Rather than being arbitrary and unreasonable the Board's denial of the petition to intervene here was its only course.

The Lumberton Board of Education's decision not to appeal McGlynn's reinstatement was sound in that the Commissioner properly found him to have tenure under *N.J.S.A.* 18A:28-6. *Canfield v. Board of Education of Pine Hill*, 97 *N.J. Super.* 483 (App. Div. 1967), rev'd 51 *N.J.* 400 (1968).

The action of the State Board of Education is affirmed.

**In the Matter of the Tenure Hearing of Emma Matecki,  
School District of New Brunswick, Middlesex County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, November 18, 1971

For the Complainant-Appellee, Terrill M. Brenner, Esq.

For the Respondent-Appellant, Joseph N. Dempsey, Esq.

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

February 7, 1973

**Emma Matecki,**

*Petitioner-Appellant,*

*v.*

**The Board of Education of the City of New Brunswick,  
in the County of Middlesex,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, November 18, 1971

Decided by the State Board of Education, February 7, 1973

Submitted November 5, 1973 — Decided November 28, 1973

Before Judges Leonard, Allcorn and Crahay.

On appeal from the State Board of Education.

Mr. Joseph N. Dempsey, attorney for appellant.

Mr. Terrill M. Brenner, attorney for respondent. (Mr. Alan G. Cosner, on the brief).



**PER CURIAM**

In this appeal, involving the dismissal of appellant from her position as a school teacher in the school district of the City of New Brunswick, New Jersey, the State Board of Education affirmed the decision of the Commissioner of Education. We affirm essentially for the reasons stated by the Commissioner in his written decision dated November 18, 1971. The factual findings contained therein are reasonably supported by substantial credible evidence present in the record and appellant has not affirmatively demonstrated that the Commissioner's decision was arbitrary, capricious or unreasonable. See *Thomas v. Bd. of Ed. of Morris Tp.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd* 46 N.J. 581 (1966).

Likewise, under the totality of the existing circumstances, we conclude that the penalty of dismissal was reasonable and proper.

Affirmed.

**Patricia Meyer,**

*Petitioner-Appellee,*

*v.*

**Board of Education of the Borough of Sayreville,  
Middlesex County,**

*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, April 7, 1971

Decided by the State Board of Education, April 12, 1972

Submitted March 19, 1973 – Decided March 29, 1973

Before Judges Collester, Leonard and Halpern.

On appeal from the State Board of Education.

Mr. Casper P. Boehm, Jr., attorney for appellant.

Mr. George F. Kugler, Jr., Attorney General, attorney for the State Board of Education (Ms. Virginia L. Annich, Deputy Assistant Attorney General, of counsel; Mr. Lewis M. Popper, Deputy Attorney General, on the brief).

Messrs. Sauer, Boyle, Dwyer & Canellis, attorneys for appellee (Mr. George W. Canellis, on the brief).

**PER CURIAM**

In this appeal from a determination of the State Board of Education which ordered petitioner reinstated to her teaching job, we affirm essentially for the reasons stated by the State Board in its two written decisions, dated December 2, 1970 and April 12, 1972, respectively. The factual findings therein are reasonably supported by the substantial credible evidence in the record.

Affirmed.

**Morris School District**

*v.*

**Board of Education of the Township of Harding and  
Board of Education of the Borough of Madison,  
Morris County.**

**DECISION OF THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

Decided by the Commissioner of Education, May 19, 1972

Decided by the State Board of Education, September 13, 1972

Argued May 15, 1973 — Decided May 15, 1973

This matter, having been duly presented to the Court, is remanded to the Commissioner of Education.

**Mt. Olive Fair Election Practices Committee,**

*Plaintiff-Appellant,*

*v.*

**Carl L. Marburger, Commissioner of Education, State of New Jersey;  
State Board of Education, Department of Education, State of New Jersey;  
Bernice Kern; Charles Digney; and Arthur Magalio,**

*Defendants-Respondents.*

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

Decided by the Commissioner of Education, May 19, 1972

Decided by the State Board of Education, January 3, 1973

Submitted March 27, 1973 – Decided April 11, 1973

Before Judges Kolovsky, Matthews and Crahay.

On appeal from State Board of Education.

Mr. Arthur K. Sirkis, attorney for appellant.

Messrs. Nusbaum, Stein and Goldstein, attorneys for respondents Bernice Kern, Charles Digney and Arthur Magalio.

Mr. George F. Kugler, Jr., Attorney General, filed a Statement in Lieu of Brief on behalf of respondent State Board of Education (Mr. Lewis M. Popper, Deputy Attorney General, of counsel).

**PER CURIAM**

Plaintiff appeals from a decision of the State Board of Education, which affirmed the decision of the State Commissioner of Education, refusing plaintiff's request that the election, on February 8, 1972, of defendants Kern, Digney and Magalio as members of the Mt. Olive Board of Education be set aside.

Plaintiff contends first that the election was invalid because the evidence disclosed that campaign material was distributed, favoring the successful candidates, which, in violation of *N.J.S.A. 18A:14-97*, did not bear upon its face a statement of the name and address of the person causing it to be printed or who defrayed the cost of printing. However, we agree with the Commissioner, for the reasons given by him, that on the proofs in this case and the findings made by him, which are supported by sufficient credible evidence present in the record, neither the violation of the cited statute nor any other evidence adduced at the hearing warranted a setting aside of the election.

Plaintiff also contends that the elected candidates are not entitled to serve because of an alleged conflict of interest, both statutory and common law, stemming from the fact that the Superintendent of Schools and various teachers allegedly "assisted in their campaign." The contention is frivolous.

The decision of the State Board of Education is affirmed.

**John Mountain,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Township of Fairview,  
Bergen County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, September 27, 1972

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Weintraub, Urato and Schulman (Robert S. Schulman, Esq., of Counsel)

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

June 6, 1973

**Jack Noorigian,**

*Petitioner-Appellant,*

*v.*

**Board of Education of Jersey City, Hudson County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, May 22, 1972

Supplementary decision by letter of the Commissioner of Education, June 21, 1972.

For the Petitioner-Appellant, Law Offices of Thomas F. Shebell (Robert A. Conforti, Esq., of Counsel)

For the Respondent-Appellee, Brown, Vogelmann, Morris and Ashley (Irving I. Vogelmann, Esq., of Counsel)

This is an appeal from the decision of the Commissioner of Education necessitating adjudication of two points: (1) whether or not petitioner-appellant has a tenure status and, (2) whether or not petitioner-appellant was entitled to vacation pay. The first point was decided by the Commissioner on May 22, 1972. The second point was rendered by letter decision of the Commissioner on June 21, 1972, which reads as follows:

"June 21, 1972

"Dear Mr. Conforti:

"JACK NOORIGIAN V. BOARD OF EDUCATION OF JERSEY CITY,  
HUDSON COUNTY

"This will acknowledge receipt of your letter of May 25, 1972 in the above-entitled matter.

"The Commissioner's decision in the above matter rendered on May 22, 1972, provided for back pay for accumulated sick leave for persons 'who are steadily employed by the board of education.' *N.J.S.A.* 18A:30-2

"No such statutory prescription exists for vacation pay for employees. In the instant matter, petitioner was paid by the hour; therefore, he has not earned nor has he any statutory entitlement to further compensation pursuant to his working agreement with the Board.

"Sincerely,

"Carl L. Marburger  
"Commissioner of Education

"Robert A. Conforti, Esq.  
\*\*\* "

The decision of the Commissioner of Education on the first point is affirmed for the reasons expressed therein. However, the letter decision of June 21, 1972, on the second point, is reversed. We hold that petitioner-appellant is entitled to and should be paid for those holidays occurring during the course of time he was employed by respondent-appellee, September 6, 1966, through January 19, 1970, and April 1970 until August 1970. The State Board of Education directs, therefore, that the Jersey City Board of Education compensate Jack Noorigian according to the terms set forth above.

January 3, 1973

**Nancy Oxfeld, by her parent and natural guardian,  
Emil Oxfeld,**

*Petitioner-Appellant,*

**and**

**Jeffrey Goodman, etc., et al.,**

*Petitioners,*

*v.*

**Board of Education of South Orange-Maplewood,**

*Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, June 18, 1969 and March 12, 1971

Decided by the State Board of Education, March 1, 1972

Argued January 22, 1973 — Decided February 5, 1973

Before Judges Collester, Leonard and Halpern.

On appeal from State Board of Education.

Mr. Lewis M. Holland argued the cause for appellant (Messrs. Chasan, Leyner, Holland and Tarleton, attorneys).

Mrs. Joyce Usiskin, Deputy Attorney General, argued the cause for respondent State Board of Education (Mr. George F. Kugler, Jr., Attorney General, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel).

Mr. David Samson argued the cause for respondent Board of Education of South Orange-Maplewood (Messrs. Lieb, Wolff & Samson, attorneys).

**PER CURIAM**

We are of the opinion that the present appeal may be moot, since it is questionable whether presently it asserts a justiciable claim for relief. *Cf. Laird v. Tatum*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 92 S.Ct. 2318, 2325 (1972); *North Carolina v. Rice*, 404 U.S. 244, \_\_\_\_, 92 S.Ct. 402, 404 (1971); *Donadio v. Cunningham*, 58 N.J. 309, 325 (1971). However, in view of the importance of the issues involved, we shall dispose of it upon its merits.

Considering the facts that were present when this matter was originally before the Commissioner of Education, we affirm the decision of the State

Board of Education (dated March 1, 1972) which affirmed the decision on remand of the Commissioner (dated March 12, 1971) essentially for the reasons stated in each of these decisions, and by the Commissioner in his original decision (dated June 18, 1969).

Affirmed.

**The Board of Education of Passaic in the County  
of Passaic, David Hammer and Robert Hopkins, individually  
and as Taxpayers, and Board of Education of the City of  
Paterson, in the County of Passaic, Intervener,**

*Plaintiffs-Respondents,*

*v.*

**Board of Education of Township of Wayne, Board of Chosen  
Freeholders of Passaic County, and Board of Trustees of  
Passaic County Children's Shelter,**

*Defendants-Appellants.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued November 13, 1973 — Decided November 26, 1973

Before Judges Carton, Seidman and Goldmann.

On appeal from Superior Court, Law Division, Passaic County.

Mr. Sylvan G. Rotherberg, attorney for appellant, Board of Education of the Township of Wayne.

Mr. John G. Thevos, Special Assistant County Counsel, argued the cause for appellants, Board of Chosen Freeholders of Passaic County and Board of Trustees of Passaic County Children's Shelter (Mr. Herman W. Steinberg, County Counsel, attorney).

Mr. Robert P. Swartz, Attorney for respondent, Board of Education of the City of Paterson, argued the cause for respondents Board of Education of Passaic, David Hammer and Robert Hopkins, and Board of Education of Paterson (Mr. Louis Marton, Jr., attorney for respondents, The Board of Education of Passaic, David Hammer and Robert Hopkins).

**PER CURIAM**

Plaintiff Boards of Education of Passaic and Paterson and the individual plaintiffs Hammer and Hopkins, brought this prerogative writ action against the

Board of Education of Wayne Township, the Board of Chosen Freeholders of Passaic County (County Board), and the Board of Trustees of Passaic County Children's Shelter to recover monies allegedly unlawfully exacted from plaintiffs to finance the costs of an educational program established at the Passaic County Children's Shelter. The Wayne Township Board of Education managed and operated the school facilities at the Children's Shelter, which were located in Wayne Township. However, such facilities were owned by defendant County of Passaic.

Defendants County Board and the Board of Trustees denied that the monies were unlawfully obtained from plaintiffs. They also asserted a cross-claim against the Wayne Township Board of Education seeking indemnification in the event that judgment was rendered against them. The theory of this cross-claim was that all children located in the Children's Shelter technically became residents of Wayne Township and were entitled to the benefits of educational programs conducted there. The Wayne Township Board of Education also interposed a cross-claim against the County Board to meet the contingency that judgment might be rendered against it. This cross-claim proceeded on the theory that the children in the Children's Shelter were residents of other school districts than Wayne Township.

On motion by all parties for summary judgment, the court ruled in favor of plaintiffs, and defendants appeal.

A brief summary of the factual background is helpful in understanding the issues. The Passaic County Board established the Passaic County Children's Shelter in December 1954 pursuant to *N.J.S.A. 9:12A-1*. This facility houses abandoned or neglected children, and delinquent children or children placed there by appropriate authorities while awaiting disposition of judicial actions involving them. The statute under which the facility was established authorizes the establishment of the facility "for the temporary detention of children \*\*\*." *N.J.S.A. 9:12A-1*. Regulations of the Department of Institutions and Agencies limit the stay of such children to 21 days. However, it appears that in numerous cases children have been confined there in excess of that period.

From 1954 until 1968 inmates at the Children's Shelter did not receive the benefit of any formal or substantial educational program. In April 1968, with the recommendation of the Board of Trustees of the Children's Shelter, defendant County Board, in cooperation with defendant Wayne Township Board of Education, instituted an educational program to be conducted for the benefit of such children. Until 1968 the County Board supplied all funds for the operation of the shelter. However, in its resolution instituting the program adopted in April 1968, the Board departed from this practice and provided that the costs of the educational program would be apportioned among the various school districts in the proportion that they had children in attendance there.

Plaintiff school boards protested the charges as being assessed without statutory authority. They resisted payment until defendant Wayne Township Board, which operated the facility, threatened the exclusion of children from



plaintiffs' school districts. Plaintiffs then paid the charges and initiated this action.

In a written opinion Judge Rosenberg decided that plaintiff boards were entitled to recover the payments made under mistake of law. He ordered an accounting to this end. He also held not only that tuition assessments previously paid by plaintiffs should be returned, but that "the Passaic County Board of Chosen Freeholders is to provide free education to the children housed at the County Shelter." In a supplemental opinion Judge Rosenberg ruled that the issue was not one which arose under the School Law (*N.J.S.A. 18A:1-1 et seq.*), but under the provisions of *N.J.S.A. 9:12A-1*, and consequently that no hearing before the Commissioner of Education was required.

We agree with the trial court's basic conclusion that responsibility for funding any educational program conducted at the Children's Shelter was that of defendant Passaic County Board of Freeholders by reason of *N.J.S.A. 9:12A-1* and that there existed no statutory authority authorizing the County Board to seek monies from the plaintiff district boards of education for that purpose. Consequently, the trial court rightly held that monies paid by plaintiffs under protest to defendants for the purpose of funding educational programs at the shelter were recoverable as paid under mistake.

The judgment appealed from is affirmed essentially for the reasons set forth in Judge Rosenberg's written opinions.

**In the Matter of the Tenure Hearing of  
Kathleen M. Pietrunti, School District of the Township  
of Brick, Ocean County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, July 19, 1972

Decision on Motion by the Commissioner of Education, June 14, 1972.

For the Respondent-Appellant (Decision of July 19, 1972), Rothbard,  
Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Petitioner-Appellant (Decision of June 14, 1972), Anton and Ward  
(Martin B. Anton, Esq., Donald H. Ward, Esq., of Counsel)

For the New Jersey School Boards Association and the New Jersey  
Association of School Administrators, *Amicus Curiae*, Cook & Knipe  
(Thomas P. Cook, Esq., of Counsel)

*Part I*

The decision of the Commissioner of Education of July 19, 1972, dealing with the dismissal of Kathleen M. Pietrunti from her employment with the Brick Township School System, is affirmed.

We are aware that an arbitration award in a proceeding between the Brick Township Education Association and the Brick Township Board of Education handed down February 22, 1973, held, among other things, that the Brick Township Board of Education did violate the collective bargaining agreement with the Association by including Charge No. 15 in its specifications against Kathleen M. Pietrunti. The Brick Township Board of Education was ordered, by the award, to file a copy of same with the State Board of Education, which has been done. We are also advised that the arbitrator's award has been appealed to the New Jersey Superior Court.

Without concurring in the arbitrator's award or in any way agreeing to its propriety or validity, we make this decision without consideration of Charge No. 15, and have taken such action as has eliminated the effect of the filing of Charge No. 15. Having eliminated the effect of Charge No. 15, we are of the opinion that the mutiplicity and severity of the remaining charges are more than sufficient to sustain affirmation of the Commissioner's decision.

*Part II*

We reverse the June 14, 1972, decision of the Commissioner of Education, on the motion to grant Kathleen M. Pietrunti compensation at her regular salary pursuant to the provisions of and imposed by *N.J.S.A. 18A:6-14*, as amended pursuant to *L. 1971, c. 435 § 2*, eff. February 10, 1972. Kathleen M. Pietrunti was suspended without pay from her teaching duties by the Brick Township Board of Education on September 8, 1971, some five months prior to the effective date of *N.J.S.A. 18A:6-14*, as amended. We subscribe to the rule of statutory construction, that statutes will not ordinarily be given retroactive effect, unless it is the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. Under the circumstances, we do not give retroactive effect to *N.J.S.A. 18A:6-14*, as amended, and determine that no compensation should be awarded Kathleen M. Pietrunti.

Mrs. Hugh Auchincloss, Mrs. Marion G. Epstein, Calvin J. Hurd, Esq., and Mrs. Ruth Mancuso dissent from Part II above.

April 4, 1973

Pending before Superior Court of New Jersey

**In the Matter of Duncan Raymond and the  
Board of Education of the Township of Montgomery,  
Somerset County.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, April 22, 1971

Decided by the State Board of Education, April 12, 1972

Submitted March 19, 1973 – Decided March 29, 1973

Before Judges Collester, Leonard and Halpern.

On appeal from the State Board of Education.

Messrs. Skillman and Koerner, attorneys for appellant (Mr. Richard A. Koerner, on the brief).

Mr. George F. Kugler, Jr., Attorney General, attorney for the State Board of Education (Mr. Lewis M. Popper, Deputy Attorney General, on statement in lieu of brief).

Mr. Wesley L. Lance, attorney for respondent Flemington/Raritan School District.

Messrs. Smith and Lambert, attorneys for respondents Raymonds.

**PER CURIAM**

The sole issue involved herein is whether the Board of Education of Montgomery Township, Somerset County (petitioner) or the Board of Education of Flemington/Raritan, Hunterdon County (respondent), should bear the total costs of educating and busing Duncan Raymond, a severely handicapped mongoloid child, born October 6, 1960.

The petitioner appeals from a determination of the State Board of Education, which affirmed an order dated April 22, 1971 of the Commissioner of Education, holding petitioner responsible to provide Duncan with a suitable program of instruction in its own schools, or in the alternative to pay for his tuition in and transportation to an appropriate class in another school of its choosing.

Duncan's parents presently reside in Montgomery Township and have resided therein since his birth in 1960. He has never lived with his parents. He has been in several private nursing homes and in the Woodbridge State School from 1966 to March 30, 1969. On that date he moved to the home of a Mrs. Richard Sands in Flemington, New Jersey where he has remained until the present time. Duncan's parents have always paid Mrs. Sands the costs of his care.

Thereafter, it was determined that he was trainable and capable of attending public school. Accordingly, he has been bused from Mrs. Sand's home to the Clinton School in respondent's school district.

We affirm essentially for the reasons stated in the order of the Commissioner of Education dated April 22, 1971. Additionally, we determine that *N.J.S.A. 18A:38-1(a)* is applicable to the present situation and that Section (c) of that statute is inapplicable.

Affirmed.

Appealed to Supreme Court of New Jersey

**In the Matter of the Application of the Board of Education  
of Ridgewood for the Termination of the Sending-Receiving  
Relationship with the School District of Ho-Ho-Kus,  
Bergen County.**

State Board of Education Resolution, January 3, 1973  
State Board of Education Decision, March 7, 1973  
State Board of Education Resolution, March 7, 1973  
State Board of Education Resolution, June 27, 1973  
Statement of the State Board of Education, June 27, 1973  
Superior Court of New Jersey, Appellate Division, August 22, 1973  
State Board of Education Resolution, April 3, 1974

**State Board of Education Resolution**

WHEREAS, the pupils of HoHoKus are entitled to a free, public education by statutory prescription, and

WHEREAS, the Commissioner has found good and sufficient reason for the dissolution of the sending-receiving relationship between the school districts of HoHoKus and Ridgewood, which latter district has heretofore provided for the education of HoHoKus pupils enrolled in grades 9 through 12, and

WHEREAS, the HoHoKus Board of Education has not effectuated an arrangement to insure an alternative placement for such students, and

WHEREAS, entitlement to a free public education must be assured for HoHoKus students at this juncture by the State Board of Education, and

WHEREAS, it appears from a study of the report of the Bergen County Superintendent of Schools that the school district of Midland Park is best able to offer accommodations for students enrolled in grades 9-12 from HoHoKus in future years; now therefore be it

RESOLVED, that the school district of Midland Park is hereby designated as the receiving district for such HoHoKus students as may be entitled to enter the 9th grade in the school year 1973-74 and in succeeding years thereafter, and that the Bergen County Superintendent of Schools is hereby directed to take all necessary steps forthwith to expedite the establishment of a relationship between HoHoKus and Midland Park, and be it

FURTHER RESOLVED, that the Commissioner of Education is to retain jurisdiction over the implementation of this resolution.

January 3, 1973

**In the Matter of the Application of the Board of Education  
of Ridgewood for the Termination of the Sending-Receiving  
Relationship with the School District of Ho-Ho-Kus,  
Bergen County.**

**STATE BOARD OF EDUCATION**

**DECISION**

This matter comes before the State Board of Education, hereinafter "State Board," on review. It is the sequel to: (1) the decision of the Commissioner of Education that the sending-receiving relationship heretofore existent between the school districts of Ho-Ho-Kus and Ridgewood, Bergen County, should be severed and (2) the decision of the State Board that a new sending-receiving relationship should be established between the school districts of Ho-Ho-Kus and Midland Park in 1973. This latter decision of the State Board was embraced in a resolution adopted by the State Board on January 3, 1973.

Subsequent to such adoption, the President of the Ho-Ho-Kus Board of Education appealed for restudy of certain building capacity figures, which had formed the basis for the State Board's ultimate determination, and the Commissioner of Education agreed that such a restudy was pertinent. Thereafter, he directed that officials of the State Department of Education review all data with pertinence to the establishment of a new sending-receiving relationship for the school district of Ho-Ho-Kus.

Subsequent to the Commissioner's action, the State Board, on February 7, 1973, granted a stay until March 7, 1973, from the implementation of its resolution of January 3, 1973, and designated a hearing examiner to conduct a hearing, after notice to all interested parties, on the 21st day of February 1973. Such a hearing was conducted on that date by the hearing examiner at the State Department of Education, Trenton. Briefs and/or Memoranda were subsequently submitted by the parties. The report of the hearing examiner is as follows:

On June 16, 1969, the Ridgewood Board of Education adopted a resolution, which requested the Commissioner to terminate the sending-receiving relationship existing between it and the school district of Ho-Ho-Kus pursuant to the statutory prescription contained in *N.J.S.A. 18A:38-13*. Ho-Ho-Kus never formally opposed the resolution, and, following an informal inquiry, the Commissioner made an "equitable determination" on May 12, 1971, as required by *statute (N.J.S.A. 18A:38-13)*, which directed the Ho-Ho-Kus Board to:

" \*\*\* Present to the Commissioner no later than May 10, 1972, a specific plan calling for the ultimate dissolution of the HoHoKus sending-receiving relationship with Ridgewood. \*\*\*" (See E-4)

In the months that followed the Commissioner's directive, *ante*, the Ho-Ho-Kus Board was not able or was not willing to establish an alternative sending-receiving relationship with one of its neighbors. Thereafter, Ho-Ho-Kus was given an extension of time until January 1, 1973, to effect such a relationship. (See E-1, at p. 2)

Subsequent efforts of Ho-Ho-Kus to establish a new sending-receiving relationship during the period May 1972 to December 30, 1972, also met with failure, except that the Midland Park Board said in a letter to the Ho-Ho-Kus Board dated October 13, 1972 (E-1, Appendix):

"\*\*\* it appears to be possible for this district to accept your high school pupils beginning with the ninth grade in September, 1973 and adding one grade per year thereafter. \*\*\*"

Despite this apparent offer, however, a new relationship was not effectuated between the Midland Park and Ho-Ho-Kus School Districts.

Consequently, in the waning months of 1972, the Bergen County Superintendent of Schools was directed by the Commissioner's representative assigned to monitor this matter, to prepare a review and recommendation concerned with the placement of Grades 9-12 pupils from Ho-Ho-Kus in the years beginning in September 1973. The response of the County Superintendent, which is contained in the document E-1, consists of a detailed analysis and review of the problem. It was on the basis of this document that the State Board founded its decision of January 1973 to assign pupils from Ho-Ho-Kus henceforth to Midland Park. It was also this report which was challenged by the President of the Ho-Ho-Kus Board, as reported, *ante*, and this challenge has, in turn, occasioned the instant review.

Specifically, the Ho-Ho-Kus Board has challenged the rated functional school capacity figures used by the Bergen County Superintendent in arriving at his conclusion that Midland Park High School offered the best long-term security for the pupils of Ho-Ho-Kus in a sending-receiving relationship. As a result of the challenge, the hearing examiner was directed to coordinate a study by the State Department of Education of such capacity figures. The study (E-2, 3) was made and sent to all of the parties herein on February 13, 1973.

Thereafter, on February 21, 1973, a hearing was conducted by the hearing examiner, as noted, *ante*, which was concerned with this study (E-2, 3) and the relationship it has to the earlier study conducted by the Bergen County Superintendent of Schools. (E-1)

The essence of the study (E-2, 3) conducted by the State Department of Education is that it estimates a lower functional capacity for Midland Park High School and contains other variances in the capacities of the high schools in the Northern Highlands Regional and Ridgewood School Districts. Specifically, these variances were charted by the hearing examiner as follows at page 4 of the document E-2:

	Functional Capacity State Dept. of Education	Originally Rated Functional Capacity
Midland Park	583	788
Northern Highlands	1,830	1,800
Ridgewood	1,562	1,622

These variances were the principal subject of proof, interpretation and discussion at the hearing of February 21, 1973.

At this hearing all four of the districts which are involved in this matter were represented, and offered testimony by school officials. The Midland Park and Ho-Ho-Kus Boards of Education were also represented by counsel. While the hearing was conducted informally, there was cross-examination of witnesses, and an oral summation of the respective positions was made by all four of the districts at the close of the hearing.

The hearing examiner believes that it is necessary to summarize some of the testimony and opinions offered at the hearing, *ante*. However, in this respect, the hearing examiner states that a full copy of the transcript is being made available to each member of the State Board. Therefore, this summary is not intended to be complete or definitive in this regard. The hearing examiner does wish to point to two evident errors, which the transcript contains, since they are of some consequence in the review which the State Board will want to make.

These errors are found at page 117 of the morning session and at page 55 of the afternoon session. At page 117, the last answer the page contains should read "We have an 1,830 capacity now." At page 55 of the afternoon session, please correct line eight beginning with the last word "We" so that the words from that point to the very end are attributed to the hearing examiner, Lawrence C. Anderson, and not to Victor J. Podesta.

The discussion which follows will be a recital by school districts of the testimony and opinions offered by the parties at the hearing of February 21, 1973. Specifically, the recital will relate in sequence to the positions of the Midland Park, Northern Highlands Regional, Ridgewood and Ho-Ho-Kus Boards of Education.

### Midland Park

The position of the Midland Park Board with relation to the matter discussed herein was outlined at the hearing, *ante*, by three school officials; namely, the Superintendent of Schools, High School Principal and Board Secretary. Their testimony viewed as a whole is that the Midland Park School District needs and wants a sending school district, specifically Ho-Ho-Kus, and has proceeded with plans to accommodate Grade 9 pupils from Ho-Ho-Kus in 1973.

The Superintendent of the Midland Park Schools testified that there is now a declining population of school-age children in the district (Tr. 30) and that the number of live births in the community has decreased from an average of 176 per year in the years prior to 1968 to a figure of approximately 105 per year since that time. (Tr. 31) The decline in the enrollment of school-age children is said, by the Superintendent, to approximate 144 pupils (Tr. 32, 37) at this juncture, but he expects an even sharper decline in future years. (Tr. 32) Therefore, he avers, the district will have room to handle the pupils from Ho-Ho-Kus. (Tr. 33, 46) His testimony in this regard was in response to a question concerned with rated functional capacity of the Midland Park High School; specifically, the question was (Tr. 46):

“Q. In spite of the findings and — of the calculation made by the State as to the functional capacity do you, notwithstanding, feel that Midland Park could accommodate the HoHoKus students, the total enrollment required, and furnish quality education for those youngsters?”

His answer was, “I do.” (Tr. 46)

This testimony was reinforced by the testimony of the Midland Park High School Principal — the person most responsible for the detail of scheduling work — whose testimony, based on his analysis of all projections of building capacity and pupil population projections, was as follows: (Tr. 94, 95)

“Q. Mr. Fugelsoe, you have heard the testimony of Dr. Fehr [Superintendent] and Mr. David [Board Secretary], and yourself have testified, and you have heard the state present the calculations based upon the state formula. Appreciating everything that has come before you at this time, do you feel that the Midland Park High School could handle the HoHoKus students, and give them quality education for this period of time?

“A. Yes, I do, and I’d like to go beyond, if I could, and say this: I think it is going to improve the education in both communities, because it is going to give us a larger high school base to work with. That, incidentally, was another thrust of the Middle States Report; namely, that we actively seek this kind of arrangement to give us more high school students.”

The Principal’s estimate herein is founded on his projection, that in future years through 1977-78, he will be required to operate the high school building at a



figure that varies between 81% to 97% of full capacity. (Tr. 84) The Principal said that the building has been operated by him at such percentages in the past. (Tr. 93) The Principal does acknowledge that the Middle States report to which he alluded, *ante*, was critical of certain of the existing building facilities of Midland Park High School, and he stated his view that the library was not adequate. (Tr. 78) However, he also avers:

“\*\*\* we will be less crowded, now, in the next few years with HoHoKus than we have in the past with just Midland Park students.\*\*\*” (Tr. 63)

The Midland Park Board Secretary testified that the Midland Park Board budgeted \$55,000 to provide money for staff and building alterations to accommodate pupils from Ho-Ho-Kus in 1973 (Tr. 50) and anticipated \$105,000 in tuition revenue. Both the planned expenditure and tuition revenue must be viewed in the context of the fact that the Midland Park Board has unappropriated balances of approximately \$90,000. (Tr. 54) The Board Secretary detailed the principal building alterations planned for 1973 as:

1. The relocation of a special education class; (Tr. 52)
2. The relocation of guidance offices; (Tr. 52)
3. Partitioning of certain classrooms; (Tr. 52)
4. Certain adjustments of storage space. (Tr. 52)

He also indicated that larger improvements, which are needed and which are possible only through referendum, have been deferred to a future decision date. (Tr. 53)

#### **Northern Highlands**

The President of the Northern Highlands Board expresses the view that certain enrollment projection figures developed for the Board by a private consultant will prove accurate over a long term, although at the present time, such figures may be “overoptimistic.” (Tr. 115, 116, 122) In his view, therefore, he avers it is valid to say that a relationship with Ho-Ho-Kus at this juncture would provide only short-term security. (Tr. 119) The Board President also maintains that the residents of the Northern Highlands District are on record as opposed to a relationship (regional or sending-receiving) — with Ho-Ho-Kus (Tr. 113 and 49, Afternoon Session), and he argues that the State Board should take a long-term view of the matter controverted herein. Specifically, he urges that, when the State Board addresses this problem: (Tr. 49, Afternoon Session)

“\*\*\* they do it in a way that doesn’t solve the immediate problem, but possibly create two other problems in relatively near future. By that I

mean a situation three, four, five, seven years down the road, where it would be necessary for Northern Highlands either to get a referendum through to put on additional facilities, or request Ho-Ho-Kus to leave, and of course the second aspect might be if the projections with respect to Midland Park go through, and Midland Park, some day might have a secondary school enrollment that would be questionable from the standpoint of a viable operation of a high school.\*\*\*"

The Board President does admit that there is a possibility the termination of an arrangement with Ho-Ho-Kus might prove unnecessary. (Tr. 120)

#### **Ridgewood**

The Superintendent of Ridgewood Schools testified that, as contrasted with a rated functional capacity of 1,562 pupils, the Ridgewood High School anticipates an enrollment of 2,025 pupils in 1973-74 (Tr. 130) and, as one projection of note, an enrollment of 1,964 in the school year 1977-78. Consequently, he states that:

“\*\*\* the Board has met, within the past two days prior to my coming, to reiterate strongly, as they have previously, the desire to discontinue the sending-receiving relationship. [With Ho-Ho-Kus] \*\*\*\*” (Tr. 127)

#### **Ho-Ho-Kus**

The Ho-Ho-Kus Board produced testimony by a member of the Board and its Superintendent of Schools. From this testimony it develops an argument that the rated functional capacity figures of the three high schools involved in this review show that Ho-Ho-Kus pupils can best be accommodated both now and in the future in the Northern Highlands Regional High School. The Ho-Ho-Kus Board rates Ridgewood High School as representing the second best placement and the Midland Park High School in third position.

In effect, the Ho-Ho-Kus Board rests its case in this regard on a comparison of enrollment figures projected for the future, and the respective capacity figures developed for each of the high schools herein by the State Department of Education. (E-2, 3) Specifically, it cites charts contained in the report of the Bergen County Superintendent of Schools (E-1) to show that, beginning in the year 1973, Midland Park High School, if required to accept Ho-Ho-Kus pupils, will be forced to operate over such capacity (583 pupils) with 600 pupils, and that such a situation will continue each of the years thereafter through 1977-78. (E-9) (With 662 pupils in 1974-75, 743 in 1975-76, 807 in 1976-77, and 758 in 1977-78)

Contrasted with this, the Ho-Ho-Kus Board argues that the Northern Highlands projections clearly show a more favorable trend; i.e., rated functional capacity of 1,630 pupils and projected enrollments with Ho-Ho-Kus pupils of 1,595 pupils in 1973-74, 1,697 pupils in 1974-75, 1,815 pupils in 1975-76, 1,915 pupils in 1976-77, and 1,960 pupils in 1977-78. (E-8) Further, the Ho-Ho-Kus Board maintains that the validity of the enrollment figures, which

Northern Highlands projects for the future, are questionable since the enrollment figures anticipated are less (by 89 pupils) than those formerly projected. (Tr. 122)

The Ho-Ho-Kus Board also offers its own capacity evaluation studies, which employ both the standards of the State Department of Education and the standards of Midland Park, to show statistical comparisons of "Enrollment/Capacity" and the "Square Feet Per Student." It avers that this latter measurement is a gauge worthy of consideration. These charts (E-10, 11) are reproduced as follows:

STATE STANDARDS				
Capacity Evaluation				
	(a)	(b)	(c)	(d)
	1972-73	1977-78	1977-78	1981-82
	Actual	Straight-Line	School Estimates	Straight-Line
<b>Enrollment/Capacity</b>				
% over (+) or under (-)				
Northern Highlands	- 8	- 4	+ 7	- 25
Ridgewood	+28	+21	+26	0
Midland Park	+39	+32	+30	+21
<b>Square Feet Per Student</b>				
State & Fed. Guide	125-155	125-155	125-155	125-155
Northern Highlands	136	131	117	167
Ridgewood	101	107	103	130
Midland Park	82	86	87	94

MIDLAND PARK STANDARDS				
Capacity Evaluation				
	(a)	(b)	(c)	(d)
	1972-73	1977-78	1977-78	1981-82
	Actual	Straight-Line	School Estimates	Straight-Line
<b>Enrollment/Capacity</b>				
% over (+) or under (-)				
Northern Highlands	- 32	- 29	- 21	- 45
Ridgewood	- 5	- 10	- 7	-26
Midland Park	+ 3	- 2	- 4	- 11
<b>Square Feet Per Student</b>				
State & Fed. Guide	125-155	125-155	125-155	125-155
Northern Highlands	136	131	117	167
Ridgewood	101	107	103	130
Midland Park	82	86	87	94

In summary, the Ho-Ho-Kus Board argues: (Tr. 46, Afternoon Session)

“\*\*\* in the ultimate \*\*\* the question is whether the Ho-Ho-Kus students should be subjected to a situation in Midland Park where there would be overcrowding now, on the mere speculation that at some point in the future the situation may improve, when there is at hand a school which can adequately accommodate them, and which can accommodate them for a number of years into the future, and maybe for as many years as the Ho-Ho-Kus Board has enjoyed in Ridgewood. Speculation as to what may happen in ten years simply is not a valid basis for making a decision when you have in front of you the hard facts concerning the existing situation.\*\*\*”

This concludes a summary review of the testimony and argument of the parties in the controversy herein at the hearing of February 21, 1973. A further exposition of the relative positions is found in the respective Briefs and/or Memoranda which accompany this report. The hearing examiner recommends that the members of the State Board incorporate a review of these documents as part of the total consideration, which is a requisite part of the ultimate decision.

Finally, the hearing examiner adds these facts:

1. The Bergen County Superintendent of Schools has also been asked to reevaluate his recommendation in this regard which is contained in E-1. His report is attached.
2. The voters of Midland Park have rejected bond issue proposals on two occasions in the past, in 1970 and 1971, for the improvement of their high school facilities. (Tr. 35, 79) Despite this fact, and the evident and admitted need for such improvement, the Visiting Committee of the “Middle States Association of Colleges and Secondary Schools” was able to report in March 1971 (E-7):

“\*\*\* The curriculum offerings of the school are greater than many schools of much larger size.\*\*\*” (at p. 1)

The report (E-7) also stated:

“More adequate financial resources and a student body nearer the optimum size for a high school can be achieved, if some type of cooperative arrangement can be developed for Midland Park to provide secondary education for an adjoining community. Midland Park is encouraged to pursue their efforts along these lines.\*\*\*” (at p. 2)

\* \* \* \*

The State Board has reviewed the report of the hearing examiner, and the transcripts of the hearing conducted by him on February 21, 1973. It has also studied the Briefs and/or Memoranda submitted by the parties to the disputes *sub judice*.

As a result of this review and study, it is noted that one of the basic statistical estimates, which served as a part of the reasoning for the State Board's decision of January 1973, to assign the school district of Midland Park as the receiving district for high school pupils of Ho-Ho-Kus beginning in September 1973, has been altered. Nevertheless, it is observed that the relative argumentative positions of the four districts which are involved in the relationship of districts considered herein, remain essentially the same.

The principal altered estimate of reference is concerned with the rated functional capacity of Midland Park High School. Such estimate has been reduced by an application of new criteria to the physical facilities which comprise the high schools in Ridgewood, Northern Highlands Regional and Midland Park. This criteria, as used by the State Department of Education in its assessment of the functional capacity of the Midland Park High School, has reduced the applicable capacity of that building from 788 pupils to a capacity of 583.

The reduction is a significant one and does certainly provide the basis for a review of the January 1973 decision of the State Board. The changes in the rated functional capacities of the Ridgewood and Northern Highlands schools, on the other hand, are of minor consequence by comparison. How may the importance of the principal alteration to the rated functional capacity of Midland Park be measured? How may the alteration be weighed on balance in the context of other factors? What other factors are present and need to be considered as a part of the judgment equation, which the State Board must employ in its review?

Initially, in considering these questions, it would appear that a recital of some of these other factors is a necessity to establish perspective. Succinctly stated, they are itemized as follows:

1. The Midland Park Board wants the Ho-Ho-Kus Board to join with it in a new sending-receiving relationship.
2. The Midland Park Board flatly, and without equivocation, avows that it can and will provide a suitable educational program for the pupils of Ho-Ho-Kus in future years. In the face of such avowal, there is no concrete evidence to the contrary except that which is based on conjecture; namely, that provision for a suitable educational program may be rendered impossible by a rated building capacity which appears to be inadequate to the need.
3. The Midland Park Board has shown its good faith in this regard by proceeding with plans to implement certain changes in its physical plant, which have been recommended by the Bergen County Superintendent in his study. (E-1)
4. The reply of the Ho-Ho-Kus Board to the offer of the Midland Park Board is a reply of rejection. The Ho-Ho-Kus Board maintains, in effect, that the respective school capacity figures of the high schools in Midland

Park and Northern Highlands Regional clearly show that only the latter facility may be expected to be able to provide an acceptable educational program in future years. Therefore, in the view of the Ho-Ho-Kus Board, the pupils of its district should be assigned to Northern Highlands.

5. The Northern Highlands Board rejects this reasoning and avers that its projections indicate a population growth of significance in future years and the likelihood that if Ho-Ho-Kus is established as its sending district at this juncture, such relationship will be transitory in nature. Therefore, Northern Highlands argues the relationship should not be established at all.

6. The Ridgewood Board reiterates its position, which seems clearly buttressed by present enrollment figures, that the present overcrowding of its high school has served, and still serves, as a sound basis for the dissolution of its sending-receiving relationship with Ho-Ho-Kus.

Thus, the matter stands as a series of firm, apparently irreconcilable, positions to be weighed *in pari materia* with certain other factors involving pupil enrollment and the rated functional capacities of the high schools in the three school districts.

In the assessment of all of these facets, there is a truth, however, which seems of paramount importance to the State Board; namely, that there is an unequivocal avowal by the Midland Park Board that it can provide a suitable educational program for the pupils of Ho-Ho-Kus, and there is no concrete and definitive evidence that it cannot — to date it has not been given an opportunity to try.

In the face of such an avowal, Ho-Ho-Kus offers the argument that the facilities of Midland Park High School, when measured against the projected enrollment figures of the two communities of Midland Park and Ho-Ho-Kus, render the avowal as one that should be given something less than full credence. This argument is founded on the supposition that the Midland Park Board cannot add to or significantly enhance its present high school facilities, since the voters of the district have, on two occasions in the past, rejected such propositions.

The State Board rejects such an argument. It postulates the view, instead, that it is just as likely that the opposite is true; specifically, that Midland Park (with enhanced resources and a larger enrollment) will be able to move toward facility expansion commensurate to the demonstrated need.

Assuming, therefore, that this is so, it follows that a decision of the State Board at this juncture to deny Midland Park the opportunity to try to provide the educational program it avers it can provide would be both premature and unwise. This is so because such a denial would carry with it the distinct possibility that the fact of declining enrollment would force Midland Park to abandon its high school program.

Such a consequence would mean that pupils from Midland Park would then be joined with pupils of Ho-Ho-Kus in a need to be provided with an appropriate education in schools which, at that juncture, might well be filled to overflowing. An eventuality of that sort would be the tragic consequence of an action by the State Board, at this juncture, to weigh school capacity figures so heavily as to preclude any possibility that they may be enhanced.

The State Board further opines that it is clear that, in the circumstances herein, the districts of Midland Park and Ho-Ho-Kus need each other. As separate school districts without a high school, they would each be liable in the future to the same kind of uncertainty which, in recent years, has been of concern to the Ho-Ho-Kus Board. As school districts joined together in a new relationship, there is the distinct possibility of a positive cooperative advance to a new level of educational compatibility.

Accordingly, the State Board conditionally reaffirms its decision contained in the resolution adopted by it on January 3, 1973, to assign pupils of Ho-Ho-Kus in Grade 9 to Midland Park High School beginning in September 1973.

Finally, having reached this determination, the State Board feels constrained to say that its decision has not been, and cannot be, determined by a comparison of the variety or depth of program offerings in each of two or three schools in Bergen County. The standard of measurement is only that which the New Jersey Constitution establishes as a basic entitlement to all pupils between the ages of 5 and 18 who are residents of the State; namely, the entitlement of all pupils to a free public education which is "thorough and efficient." In the event that the education, which the Midland Park Board is able to provide, fails to meet such standards, the Ho-Ho-Kus Board has a statutorily-prescribed remedy for the severance of such relationships, as is herein established.

This decision is to read *in pari materia* with the resolution of the State Board adopted March 7, 1973.

#### State Board of Education

#### RESOLUTION

WHEREAS, the State Board of Education has reviewed the report of its hearing examiner of the hearing conducted by him on February 21, 1973, *In the Matter of the Application of the Board of Education of Ridgewood for the Termination of the Sending-Receiving Relationship with the School District of Ho-Ho-Kus, Bergen County*, and

WHEREAS, the State Board has reviewed the transcript of the hearings and the Briefs and reply Briefs of the parties concerned in the Matter; and

WHEREAS, the State Board has determined that the most essential element of decision herein must be concerned with the quality of education in the two school districts of Ho-Ho-Kus and Midland Park;

THEREFORE, the State Board of Education does hereby find and determine on this 7th day of March, 1973, that:

1. It will conditionally affirm its resolution of January 3, 1973, in this matter subject to the following limitations and directions:
  - (a) The State Board of Education will maintain jurisdiction,
  - (b) The State Board recommends that the two districts of Midland Park and Ho-Ho-Kus engage in a regionalization study forthwith,
  - (c) The State Board directs that the Midland Park Board afford an opportunity for representation in all of its deliberations by a representative or representatives selected by the Ho-Ho-Kus Board,
  - (d) The State Board directs that a hearing be conducted during the first week of December 1973 to ascertain what positive action, if any, has been taken in the planning of the Midland Park Board to upgrade the total physical plant and program of the Midland Park High School.

A full report and written decision in this matter will be published in the immediate future.

President, State Board of Education  
Secretary, State Board of Education

March 7, 1973

**State Board of Education**

**RESOLUTION**

WHEREAS, the Ridgewood Board of Education did petition the Commissioner to sever the sending-receiving relationship between the school districts of Ridgewood and HoHoKus, Bergen County, and

WHEREAS, the Commissioner, pursuant to N.J.S.A. 18A:38-13, did find "good and sufficient reason" for such severance, and

WHEREAS, HoHoKus presented no proofs or offered no resolution in opposition to such petition, and

WHEREAS, the Commissioner determined that the relationship between the districts should be severed, and

WHEREAS, the HoHoKus Board of Education was unable to effectuate an alternative sending-receiving relationship, and



WHEREAS, the State Board of Education deemed it advisable to establish a new sending-receiving relationship between HoHoKus and Midland Park beginning in the 1973-74 school year for pupils enrolled in grade nine from HoHoKus, and

WHEREAS, the two Boards of Education have been actively engaged in the attempt to effectuate such new relationship, and

WHEREAS, the State Department of Education is proposing to assist the transition in order to accomplish an enduring relationship between the HoHoKus and Midland Park Boards, and

WHEREAS, the HoHoKus and Midland Park Boards have jointly resolved that an additional year is necessary to effect a proper transition, and

WHEREAS, it appears that the Ridgewood Board has facilities necessary to accommodate ninth grade pupils from HoHoKus in the 1973-74 school year without impairing its own program, now therefore be it

RESOLVED, that the decision of the State Board of Education establishing a new relationship between the districts of Midland Park and HoHoKus is stayed for a period of one school year, and the Ridgewood Board is directed to accommodate the ninth grade pupils from HoHoKus for the 1973-74 school year only.

June 27, 1973

#### **Statement of the State Board of Education**

The Commissioner's recommendation in this matter provides the basis for the State Board's decision. The Commissioner and the State Board have analyzed Ridgewood, HoHoKus and Midland Park's enrollment projections through the process of an adversary hearing and accept Ridgewood's representation that the Benjamin Franklin Junior High School is overcrowded with the resultant negative effect on its educational program. The Commissioner has noted, however, that the accumulative enrollment in the 7th, 8th and 9th grades at Ridgewood positing receipt of 66 additional students will be approximately 1,855 pupils. This should be contrasted to the enrollment figure of 1,901 for the school year 1973. The Commissioner concludes that an additional year in the sending-receiving situation will not markedly alter the situation in Benjamin Franklin or in the Ridgewood Junior High School program in comparison to previous years. The State Board supports and applauds the interests of the Ridgewood Board and accepts its analysis regarding community pressures to relieve the overcrowding conditions in Ridgewood.

However, in an effort to make a long-term contribution to the high school program of youngsters from HoHoKus and Midland Park, the State Board is moving to assist in every way the boards of HoHoKus and Midland Park to implement on a positive note the action of the State Board ordering HoHoKus

to attend Midland Park Schools. In fairness to HoHoKus it should be noted that the Midland Park facilities require a general upgrading, and in fairness to Midland Park it should be noted that the initial step in this regard will be difficult if not impossible to accomplish without sufficient planning there and some state support. The State Board is confident that Midland Park and HoHoKus can develop a long-term high school program, which will enable Midland Park High School to be certain of a long-term future. Without the HoHoKus students, it is doubtful that Midland Park will be able to maintain a high school program in the future.

In essence, the Commissioner is recommending and the State Board has approved the recommendation to maintain the status quo for one year only to enable Midland Park and HoHoKus sufficient planning time to accomplish a mutually satisfactory high school program. In the judgment of the Commissioner, it is ill-advised to request Northern Highlands Regional High School to accept HoHoKus students for the next school year. This would be introducing another district into the situation and while Northern Highlands has the best facilities to handle the problem, the students from HoHoKus would be required to become familiar with an entirely new system for a period of one year.

The State Board recognizes the burden that this decision places on Ridgewood, but believes as a matter of equity that it has exercised its statutory right and obligation in the best interests of the students of all the districts in question.

June 27, 1973

**In the Matter of the Application of the Board of Education  
of Ridgewood to Terminate the Sending-Receiving Relationship  
with the School District of HoHoKus, Bergen County**

Argued August 7, 1973 – Decided August 22, 1973

Before Judges Conford, Leonard and Crahay.

On Appeal from the State Board of Education.

Mr. Robert H. Greenwood argued the cause for appellant The Board of Education of Ridgewood (Messrs. Greenwood, Weiss & Shain, attorneys; Mr. Stephen G. Weiss, on the brief).

Mr. Lewis M. Popper, Deputy Attorney General, argued the cause for respondent State Board of Education (Mr. George F. Kugler, Jr., Attorney General, attorney; Ms. Virginia Long Annich, Deputy Assistant Attorney General, of counsel; Mr. Gordon J. Golum, Deputy Attorney General, on the brief).

Mr. John E. Patton argued the cause for respondent The Board of Education of HoHoKus (Messrs. Carpenter, Bennett & Morrissey, attorneys; Mr. Arthur M. Lizza, of counsel; Mr. William S. Jeremiah, on the brief).

Mr. John H. Crammond argued the cause for respondent The Board of Education of Midland Park (Messrs. Podesta, Myers & Crammond, attorneys).

#### PER CURIAM

Petitioner, the Board of Education of Ridgewood (Ridgewood), appeals from a decision of the State Board of Education (State Board) dated June 27, 1973, which stayed for one year its previous two determinations to sever the sending-receiving relationship between the Board of Education of Ho-Ho-Kus (Ho-Ho-Kus) and Ridgewood and create a new such relationship between Ho-Ho-Kus and the Board of Education of Midland Park (Midland Park) commencing with the school year 1973-1974, and mandated Ridgewood to accommodate approximately 60 ninth grade pupils from Ho-Ho-Kus "for the 1973-74 school year only."

Ridgewood first contends that the above described decision constituted a "precipitous and wholly unprecedented reversal" of the State Board's two earlier decisions, is not substantiated by any proper factual record and is therefore arbitrary, capricious, unreasonable and contrary to law.

Preliminarily, we note, that the June 27, 1973 decision does not constitute a "reversal" of the previous orders of the State Board. It merely stays for one year the new sending-receiving relationship between Ho-Ho-Kus and Midland Park which was theretofore ordered. The State Board's legal power to stay, reopen or rehear orders previously entered by it is settled. See *Ruvoldt v. Nolan*, 63 N.J. 171, 183 (1973).

Here, in granting the stay, the State Board recognized the burden that its decision placed upon Ridgewood, but nevertheless found that such action, "as a matter of equity," was "in the best interests of the students of all the districts in question." The Board acted to implement, in a positive way, its prior orders by giving to Midland Park and Ho-Ho-Kus sufficient planning time to accomplish a satisfactory program and to make certain that Midland Park's facilities were generally upgraded.

Upon the record we find that this policy decision is amply supported by the substantial credible evidence in the record. Thus, Ridgewood's contention that the decision is arbitrary, capricious, unreasonable and contrary to law is without merit. We affirm essentially for the reasons stated by the State Board in its resolution dated June 27, 1973.

Further, we find no substance to Ridgewood's claim that it was not given reasonable notice of the June 27, 1973 hearing and a fair opportunity to meet and refute the evidence or material the State Board was relying upon to

support its contemplated action. Dr. William Shine, a representative of the State Department of Education, personally discussed the contemplated stay with the Ridgewood Board of Education on May 17, 1973 and with its Superintendent of Schools one week later by telephone. Formal notice of the hearing was given on June 20, 1973. Ridgewood appeared at the hearing and was given full opportunity to present witnesses and evidence in support of its position. Under the existing circumstances we find no prejudice.

Finally, Ridgewood's request that we, at this time, "mandate a finality" to the instant matter is inappropriate and we refuse so to do.

Affirmed.

### RESOLUTION

WHEREAS, the New Jersey State Board of Education stayed the establishment of a sending-receiving relationship between Ho-Ho-Kus and Midland Park for a period of one school year, and

WHEREAS, the New Jersey State Board of Education, by resolution, assigned the Ho-Ho-Kus ninth grade pupils to the Ridgewood school district for the 1973-74 school year only, and

WHEREAS, the Midland Park voters passed a referendum for increased secondary school facilities, and

WHEREAS, the construction of these secondary school facilities will take place, in part, during the 1974-75 school year, and

WHEREAS, the addition of 57 tenth grade pupils from Ho-Ho-Kus would negatively affect the operation of the Midland Park schools, thereby weakening the establishment of long-term sending-receiving relationship, and

WHEREAS, the continuation of these tenth grade students through to graduation in the Ridgewood schools would be educationally sound and would not significantly affect the budgetary and facility planning of Ridgewood, now therefore be it

RESOLVED, that the decision of the New Jersey State Board of Education establishing a sending-receiving relationship between the districts of Midland Park and Ho-Ho-Kus be activated for the 1974-75 school year with the exception of the class of 1977, who will remain at Ridgewood for the completion of their high school program.

April 3, 1974

**In the Matter of the Application of the Board of  
Education of the Borough of South River for the Termination  
of the Sending-Receiving Relationship with the School District  
of Spotswood, Middlesex County.**

**STATE BOARD OF EDUCATION**

**Decision**

Decided by the Commissioner of Education, December 14, 1970

Remanded by the State Board of Education, September 8, 1971

Decision on Remand by the Commissioner of Education, June 1, 1972

Decided by the State Board of Education, November 1, 1972

We do not take jurisdiction of the request from the Board of Education of Spotswood Borough to extend the termination of the sending-receiving relationship with the Board of Education of the Borough of South River; we remand the request to the Commissioner of Education.

January 3, 1973

Pending before Superior Court of New Jersey

**Marilyn Winston and South Plainfield Education Association,  
a nonprofit corporation of the State of New Jersey,**

*Appellants,*

*v.*

**Board of Education of the Borough of South Plainfield  
in the County of Middlesex,**

*Respondent,*

**State Board of Education,**

*Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, June 15, 1972

Decided by the State Board of Education, November 11, 1972

Argued May 14, 1973 – Decided August 9, 1973

Before Judges Lora, Allcorn and Handler.

On appeal from the New Jersey State Board of Education.

Mr. Abraham L. Friedman argued the cause for appellants (Rothbard, Harris & Oxfeld, attorneys).

Mr. Robert J. Cirafesi argued the cause for respondent, Board of Education of South Plainfield.

Mr. Lewis M. Popper, Deputy Attorney General argued the cause for respondent State Board of Education (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

#### PER CURIAM

Appellant Marilyn Winston was an elementary school teacher employed by respondent, Board of Education of South Plainfield. She had been employed in a nontenured capacity under annual contracts for each of the school years 1968-1969, 1969-1970 and 1970-1971. Her employment contract was not renewed for the year 1971-1972, and as a result she did not acquire tenure.

An evaluation report was submitted by Winston's principal on or about February 23, 1971. The Board thereafter determined not to renew Winston's employment contract. Among other matters, the report contained "administrator's remarks" to the effect that Winston had been overly critical of administrative policy and action, had not sufficiently focused her attention on her duties and had not supported administrative policy and the like. On March 11, 1971 Winston invoked the grievance procedures provided in the current "collective bargaining agreement" between the Board and appellant, South Plainfield Education Association, the recognized exclusive representative of teachers and certain other employees of the Board under the "New Jersey Public Employer-Employee Relations Act," L. 1968, c. 303, *N.J.S.A. 34:13A-1 et seq.*

The gist of her grievance was the unfavorable evaluation report and in particular as set forth in Part I, a claim that the report was "unconstitutional by penalizing the aggrieved [i.e. Winston] for her proper exercise of the First Amendment Guarantees of freedom of expression, etc." In the processing of her grievance, Winston was represented by the Association. The grievance was taken through four administrative levels including an appeal to the local Board on April 30, 1971. The Board concurred in the conclusion of the Superintendent that the matters complained of were "non-grievable" and it rejected the grievance noting in part that "[a]lthough the grievance is couched in language suggesting violations of a constitutional dimension, it appears that the primary distress of the teacher is the possibility of her non-reemployment in the school system." It indicated further that the Board was under "no compulsion to announce reasons for not re-hiring a probationary employee" and that Winston had not given any detailed support for her request for a hearing. The Board also stated that it was "unable to conclude that the evaluation report submitted by Mr. Reilly [the principal] was composed with the intention of, or that it has a substantial tendency to, abridge Mrs. Winston's right to free speech \* \* \*."

On May 18, 1971, about the same time that the Board's decision was rendered, a list of teachers to be re-hired was approved and Winston was not among them. Thereafter on or about June 16, 1971, the Association on behalf of Winston endeavored to invoke the fifth level for processing grievances by demanding arbitration. It was alleged that there had been a denial of constitutional rights as well as a recommendation that Winston not be reemployed. At an arbitration hearing conducted on October 14, 1971, the issue of arbitrability was argued and the Board was given the opportunity to seek judicial relief on this issue. It then filed an action on November 16, 1971 in the Superior Court, Chancery Division, which issued an injunction on February 8, 1972 restraining the arbitration proceedings until administrative remedies had been exhausted.

There followed a petition of appeal to the Commissioner of Education. The Board filed a motion to dismiss which was argued before a Deputy Commissioner who presented a report to the Commissioner. The Commissioner ruled that the Association had no standing as a party to the proceedings and determined that Winston's appeal be dismissed. Both Winston and the Association appealed this determination to the State Board of Education which, after a referral of the matter to its Law Committee, affirmed the decision of the Commissioner.

## I

Appellants contend that the Commissioner of Education erred in failing to afford them the opportunity to object to the report of the hearing examiner before issuing his decision. They also contend that the State Board of Education committed comparable error by not affording them the opportunity to object to the report of its Law Committee prior to the rendering of its decision.

The decision of the Commissioner makes it quite clear that he was furnished with and relied upon a report of the Deputy Commissioner designated as the hearing examiner who heard the appellants' petition in the first instance.\* Respondents argue that there was no requirement that the report of the hearing examiner be furnished the parties prior to its utilization by the Commissioner in deciding the controversy. Among the reasons advanced were that the Commissioner of Education is not the "head of the agency" within the meaning of *N.J.S.A. 52:14B-10 (c)* and consequently the report of a hearing examiner designated by the Commissioner is not subject to the mandate of that statute; also that since the Commissioner's decisions are reviewed by the State Board of Education the parties there have the opportunity "to except and object to the findings of fact and conclusions of law of both the Departmental hearing examiner and the Commissioner of Education \* \* \*."

---

\* A request for clarification on this point elicited from the office of the Attorney General the representation that "the hearing officer also assisted the Commissioner of Education in the preparation of the Commissioner's decision itself \* \* \*. In this case, the decision proposed by the hearing examiner is the same as that rendered by the Commissioner."

These arguments carry no weight. The law is firmly settled where a final decision is made by one who did not hear the evidence but who relies in part upon a report of a hearing officer, there is a risk that the ultimate decision may be based upon findings not supported by the evidence. To secure essential fair play and to minimize the risk of fundamental error, it is necessary that "prior to its submission to the deciding officer the hearer's report be made available to the parties and \* \* \* they be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the agency, does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof." *Mazza v. Cavicchia*, 15 N.J. 498, 523-524 (1954). There can be not the slightest doubt that this axiom of administrative due process is applicable to hearings before the Commissioner of Education. See *In re Masiello*, 25 N.J. 590, 604 (1958); cf. N.J.A.C. 6:24-1.13.

The decisional law in this respect has been underscored and codified by the Administrative Procedure Act, L. 1968, c. 410 particularly N.J.S.A. 52:14B-10(c), viz:

(c) When a person not empowered to render an administrative adjudication is designated by the head of the agency as the presiding officer, his recommended report and decision containing recommended findings of fact and conclusions of law shall be filed with the agency and delivered or mailed to the parties of record; and an opportunity shall be afforded each party of record to file exceptions, objections and replies thereto, and to present argument to the head of the agency or a majority thereof, either orally or in writing, as the agency may order. The head of the agency shall adopt, reject or modify the recommended report and decision. The recommended report and decision shall be a part of the record in the case.

The requirement that the hearing examiner's report be furnished the parties prior to its submission to the Commissioner for his decision is in no way lessened by the availability of a further administrative review before the State Board of Education. In a given case, the Commissioner's decision may well be final. Moreover, even if there is a further appeal, his decision, while not binding, may have a crucial impact upon the State Board of Education. See *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 N.J. Super. 40, 50 (App. Div. 1962). We conclude, therefore, that appellants were entitled to be furnished with the report of the hearing examiner prior to its submission to the Commissioner for decision.

At the next level the State Board of Education in accordance with its rules submitted the appeal for preliminary review by the Law Committee. N.J.A.C. 6:1-4.4. The Law Committee as required submitted its report and recommended conclusions to the Board. N.J.S.A. 18A:6-29; N.J.A.C. 6:2-1.4. The Board thereupon rendered its decision for the reasons advanced by the Commissioner of Education.



The procedure followed was defective in not providing the parties the opportunity to address the report of the committee before it was transmitted to the State Board for final action. *In re Masiello*, *supra* at 605; *Quinlan v. Bd. of Ed. of North Bergen Tp.*, *supra* at 53; *cf. Redcay v. State Board of Education*, 128 N.J.L. 281 (Sup. Ct. 1942).

This serious procedural dereliction cannot be ignored. Respondent suggests that "[t]he State Board never engages in independent fact-finding of its own" and also that the Law Committee is "concerned primarily with an evaluation of the Commissioner's conclusions of law, with an eye only to the reasonableness of the findings of fact." To the contrary, the State Board "is not precluded from making its own independent findings of fact." *Quinlan v. Bd. of Ed. of North Bergen Tp.*, *supra*, at 51; *cf. In re Masiello*, *supra*. And the Law Committee is not restricted in its review to issues of law. There is no basis for the assumption that such a committee through its recommendation may not have a decisive effect upon the eventual decision. N.J.A.C. 6:2-1.4. "Due process requires that the litigant be allowed to make an impressionable contact with the powers of decision." *Fifth St. Pier Corp. v. City of Hoboken*, 22 N.J. 326, 337 (1956). Consequently, there was error in the proceedings before the State Board of Education in not making available to the parties the report of the Law Committee with adequate opportunity to object thereto prior to its submission to the State Board for final action.

## II

It is argued that it was error to dismiss the South Plainfield Education Association as a party to the proceedings before the Commissioner of Education. Respondents in defense of this ruling take the position that the Association is a "bargaining agent of employees" under L. 1968, c. 303, N.J.S.A. 34:13A-1 *et seq.* and that the Commissioner does not have the "jurisdiction \* \* \* to hear the complaint of [such] a bargaining agent under the guise of a 'controversy and dispute under School law'." It is also stated that the Association as an organization would not have standing to represent an individual on a "personal grievance simply by virtue of the organization's function in representing that person for certain collective purposes."

In general, disputes involving teachers are cognizable as controversies under the school laws, N.J.S.A. 18A:6-9; *e.g. Woodbridge Tp. Ed. Ass'n. v. Bd. of Ed., Woodbridge Tp.*, 91 N.J. Super. 54 (Ch. Div. 1966); *Bd. of Education of Garfield v. State Bd. of Education*, 130 N.J.L. 388 (Sup. Ct. 1943). In a particular case, however, such disputes might also be the proper subject of grievance procedures adopted pursuant to N.J.S.A. 34:13A-5.3. If a dispute is grievable in accordance with the terms of a collective bargaining agreement between a board of education and the exclusive employee representative, the latter not only has the right but indeed may be under a duty to process such a grievance and to do so fairly and impartially, where the contract so provides. *Cf. Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970); *N.J. Turnpike Emp. Union, Local 194 v. New Jersey Turnpike Authority*, 123 N.J. Super. 461 (App. Div. 1973).

Appellants' unilateral initiation of the grievance procedures under the contract does not imply that the dispute should now be regarded as one not amenable to the jurisdiction of the Commissioner as a controversy arising under the school laws. In this case, not all grievable complaints under the collective bargaining agreement are entitled to be resolved ultimately by arbitration. This agreement specifically provides that "[n]o claim by a teacher shall constitute a grievable matter beyond level four or be processed beyond level four [review of Superintendent's decision by Board of Education] if it pertains to \* \* \* [a]ny complaint of a non-tenure teacher which arises by reason of his not being reemployed." If such a complaint cannot by the terms of the operative contract be resolved by means of arbitration, then its ultimate disposition should follow the course applicable to any other controversy or dispute, namely by successive appeals to the Commissioner of Education and the State Board of Education.

Here Winston's initial complaint focused upon the adverse evaluation report as such. But quite obviously this had a tangible bearing upon her employment status since the report itself recommended that Winston not be reemployed. In fact her employment was discontinued by the nonrenewal of her contract before her complaint could be taken beyond the level four grievance procedure to arbitration. Her claim was then expanded to include the specific charge that she had not been reemployed and the nonrenewal of her employment contract was wrongful because of the evaluation report. Thus by the very terms of the collective bargaining agreement, her claim no longer constituted a "grievable matter" after the decision of the Superintendent. It could, therefore, appropriately be considered a controversy or dispute thereafter cognizable by the Commissioner and State Board of Education.

The Association, having been duly selected the exclusive employee representative pursuant to *N.J.S.A. 34:13A-1 et seq.*, had the authority under the contract to initiate a grievance and process a claim on behalf of an aggrieved teacher such as Winston through the applicable administrative levels. In this posture, it would be anomalous to deny the Association the standing to pursue the matter to conclusion. The final disposition of such claims might have an impact which transcends the personal interest of the individual claimant and have repercussions affecting other employees. No sound reason has been advanced why, at the critical and final stages of the administrative machinery before the Commissioner of Education and ultimately the State Board, the very real interest of the Association should be negated and the Association shorn of its status to participate as a party and to represent the interests of the aggrieved employee.

The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable such an entity to participate as a party in proceedings before the Commissioner and State Board of Education. *N.J.A.C. 6:24-1.6*; cf. *Crescent Park Tenants Assoc. v. Realty Equities Corp. of N.Y.*, 58 *N.J.* 98 (1971). In consequence, it was error for the Commissioner of Education, and on appeal the State Board of Education, to have ruled that South Plainfield Education Association be dismissed as a party to the proceedings.

### III

Before the Commissioner, the local Board of Education moved to dismiss the petition for failure to state a cause of action and to plead essential facts. The Commissioner ruled that the allegations of the petition “stand alone” and there was no “offer of proof that the Board failed to renew petitioner’s contract because she exercised her right of free speech.” Appellants contend that the Commissioner of Education erred in dismissing Winston’s appeal without a hearing. Respondents argue that the petition was based upon “bare allegations” and was properly dismissed where “no additional proofs were offered.”

A nontenured teacher does not have the right to have an employment contract renewed; nor is such a teacher ordinarily entitled to a statement of reasons for such nonrenewal or to a hearing prior to such action. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963); *Donaldson v. Bd. of Ed. of North Wildwood*, 115 N.J. Super. 228 (App. Div. 1971), certif. granted 59 N.J. 272 (1971). The discretion vested in a board over these matters is extremely broad. Nevertheless, this wide latitude enjoyed by a board of education with respect to such matters as the appointment, transfer, dismissal or nonrenewal of teachers is conditioned upon Fourteenth Amendment limitations. *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed. 2d 570 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); cf. *Burlington County Evergreen Park Mental Hospital v. Cooper*, 56 N.J. 579 (1970). “[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). School teachers, it has been noted, do not “shed their constitutional rights to freedom of speech at the school house gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969); cf. *Katz v. Board of Trustees of Gloucester County College*, 118 N.J. Super. 398, 401 (Ch. Div. 1972). Specifically it has been recognized that “[n]onrenewal of a nontenured public school teacher’s one-year contract may not be predicated on an exercise of First and Fourteenth Amendment rights.” *Perry v. Sindermann*, *supra*, 408 U.S. at 597-598, 33 L. Ed. 2d at 578.

It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl*, 63 N.J. 1 (1973). In this case, however, petitioner’s claim of a deprivation of her constitutional rights was adequately detailed and corroborated, sufficient to require consideration of her complaint. Specifically the petition of appeal to the Commissioner set forth several instances in some detail indicating that Winston had questioned policy decisions, made suggestions and recommendations, sought information or reasons for certain administrative decisions, expressed criticisms among teachers concerning certain administrative directives and the like. These allegations were verified by the petitioner. Additionally, while the evaluation report contains other reasons which might justify the recommendation that appellant not be reemployed, the “Administrator’s remarks” raise an inference that Winston’s speech and expressions were considered too captious and contentious and that

this may have been a material factor in the discontinuance of her employment. Compare *Hetrick v. Martin*, 42 U.S.L.W. 2036 (6 Cir. June 15, 1973).

In *Perry v. Sindermann, supra*, the United States Supreme Court decided that a teacher's lack of tenure or the absence of a contractual right to reemployment as such would not defeat a genuine claim that the nonrenewal of his employment contract was triggered by his public criticism of school administration policies and constituted an infringement upon his constitutional right to freedom of speech. The Court's thesis is here apposite, viz:

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights." 430 F.2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a *bona fide* constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering v. Board of Education, supra*. (408 U.S. at 598, 33 L. Ed. 2d at 578).

Here, Winston has made a sufficient showing that the decision by the respondent local Board may have been prompted by her exercise of the right of speech protected under the First and Fourteenth Amendments. In this sense, she presented a *bona fide* claim of constitutional stature and was, therefore, entitled to a full evidentiary hearing on this contention before the Commissioner of Education.

For the foregoing reasons the matter is reversed and remanded to the Commissioner of Education for further proceedings in accordance with this opinion. We do not pass upon the additional contention urged on this appeal that appellant should receive her normal salary under N.J.S.A. 18A:6-14. This claim was not raised at any time before the administrative agencies and we decline to consider it on this appeal. Cf. *In re E. J. McGovern Dairy Products, Inc.*, 60 N.J. Super. 163, 168 (App. Div. 1959), aff'd o.b. 31 N.J. 601 (1960).

Jurisdiction is not retained.

Pending before Supreme Court of New Jersey.

State of New Jersey  
Department of Education  
225 West State Street  
Trenton, N.J. 08625