189-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu01445-02_1.html)

ARLENE C. ALLEN, BERNIE BUETTNER, RICHARD ESANDRIO, JOHN A. MAIKOS, BARBARA OBERDING, CARMINE N. VITOLO AND SHARON WEISKOPF v. BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY **AND** DOROTHY BARANGER, DENIS BORAI, ALLAN CZAYA, ARLENE DELLACERRA, SUSAN DOUGHERTY, LEONARD FERRARA, THOMAS GALISZEWSKI, HARVEY GOLDBERG, PAMELA HARTKOPF, THOMAS KAPTOR, BETTY MELCHIOR, LORRAINE OLSZEWSKI, JUDY ROTHWELL, EDWARD SAN FILIPO, LOIS SAVAGE, GENE STRYKER, KAREN VINACOUR AND ILENE ZELKIN v. BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY

SYNOPSIS

In consolidated matters, petitioners, tenured teachers formerly employed by the Union County Regional High School District No. 1, alleged respondent Clark School Board, their new employer when the Regional District was dissolved effective June 30, 1997, violated their rights under *N.J.S.A.* 18A:6-31.5 and 13-64 when it improperly calculated their compensation for sick leave upon retirement. Petitioners contended they were entitled to compensation for sick leave accumulated while employed by the Regional School District, at the rate provided in the collective bargaining agreement in effect at the time.

The ALJ concluded that payment for accumulated sick leave, like salary is compensation for services rendered during periods that were covered by the most recent collective negotiations agreement with the Regional District. Once that level of compensation was established, the protections of the tenure law were implicated. Thus, the ALJ concluded that affected staff members must be retained at the accumulated sick leave benefit level established through the last most recent contract with the Regional District, until such time as that level would be reached through subsequent contract negotiations, whereupon the staff members would be placed on the level of the other employees and accorded equal treatment thereafter. The ALJ ordered the Clark Board to recalculate the payment of accumulated sick leave for petitioners.

The Commissioner rejected the Initial Decision. The Commissioner determined that payment for accumulated sick leave was not protected pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or an "other similar benefit" under that provision. Upon full consideration of the language of *N.J.S.A.* 18A:13-64, its legislative intendment, and applicable case law, the Commissioner held that payment for accumulated sick leave is not preserved and protected by this statute but, rather, is a contractual benefit subject to collective bargaining negotiations. Summary decision was granted to the Board; consolidated petitions were dismissed.

April 30, 2004

OAL DKT. NOS. EDU 1445-02 AND EDU 1357-03 (CONSOLIDATED)
AGENCY DKT. NOS. 449-10/01 AND 372-11/02

ARLENE C. ALLEN, BERNIE BUETTNER, RICHARD ESANDRIO, JOHN A. MAIKOS, BARBARA OBERDING, CARMINE N. VITOLO AND SHARON WEISKOPF,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	
RESPONDENT.	:	
		COMMISSIONER OF EDUCATION
AND	:	
		DECISION
DOROTHY BARANGER, DENIS BORAI, ALLAN CZAYA, ARLENE DELLACERRA, SUSAN DOUGHERTY, LEONARD FERRARA, THOMAS GALISZEWSKI, HARVEY GOLDBERG, PAMELA HARTKOPF, THOMAS KAPTOR, BETTY MELCHIOR, LORRAINE OLSZEWSKI, JUDY ROTHWELL, EDWARD SAN FILIPO, LOIS SAVAGE, GENE STRYKER, KAREN VINACOUR AND ILENE ZELKIN,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. Petitioners filed reply and cross-exceptions. Reply to petitioners' cross-exceptions filed by the Board was not considered herein as *N.J.A.C.* 1:1-18.4 makes no provision for replies to cross exceptions.

The Board's exceptions charge that the Initial Decision is undeniably wrong and urge that, because this matter was decided on stipulated facts, without benefit of testimony, the Commissioner conduct a *de novo* review of the purely legal issues involved which, without question, will lead to a rejection of the grossly erroneous Initial Decision. (Board's Exceptions at 5) In this regard the Board advances the following three arguments:

I. THE ADMINISTRATIVE LAW JUDGE (ALJ) ERRED BY REJECTING THE BOARD'S ARGUMENT THAT PREVIOUS LITIGATION ON THIS ISSUE HAS A BINDING EFFECT HEREIN.

The Board argues that the ALJ mistakenly concluded that the instant matter was not *res judicata* as a result of the Commissioner's decision in *Nadasky et al. v. Board of Education of the Township of Clark, Union County,* decided by the Commissioner July 9, 2001, dismissed for failure to prosecute State Board, October 5, 2001, because *Nadasky* was ultimately decided on procedural rather than substantive grounds. Such a suggestion, the Board proffers, wholly "ignores the jurisdictional and historical setting of *Nadasky* and these consolidated matters." (Board's Exceptions at 7) To the contrary, it posits, *Nadasky*, as here, involved petitioners challenging the Clark School District's refusal to pay them for accumulated, unused sick time pursuant to the terms of the Union County Regional School District contract at the time of their subsequent retirement from the Clark School District; was litigated on cross-applications for summary decision, based on stipulated facts identical to the ones in this matter except as to

the identity of the petitioners; and was decided without hearing. Notwithstanding that the ALJ ultimately dismissed the *Nadasky* petition as a consequence of the petitioners' failure to pursue their claim in a timely manner pursuant to the 90-day rule, the Board alleges, her initial decision addressed the substantive issue and she made the following legal holding with regard to petitioners' claim:

> The Appellate Division has pointed out, as recently as 1998, that reimbursement for unused sick time is a matter which is not preempted by statute and may be negotiated as a term and condition of employment. *Alford v. Board of Education of Buena Regional School District*, 310 *N.J. Super.* 147, 155 (App. Div. 1998) Furthermore, as Respondent points out, the Commissioner has held that in *N.J.S.A.* 18A:13-64, providing that the rights of tenure, seniority and pension, for example, are transferable, there is no indication in the statute that its intent was to require the establishment of two levels of compensation and benefits for comparable levels of training and experience. *Board of Education of Central Regional High School District v. Board of Education of Lacey Township, et al*, 1980 *S.L.D.* 553 (Commissioner Decision, June 6, 1980). Clearly, to pay these three tenured employees at a more generous rate than other tenured employees at the time of retirement would result in two levels of compensation for similarly situate[ed] employees. Finally, the very fact that there is a choice between provisions in two contracts is a clear indication that the nature of the issue to be determined is contractual.
> *Nadasky,* Initial Decision at 9.
> (Board's Exceptions at 8-9)

The Board points out that petitioners' exceptions to this decision addressed both the procedural and substantive determinations of the ALJ. Upon review of the decision and exceptions, the Commissioner

> expressly rejected Petitioners' argument that relaxation of the 90-day Rule was appropriate by reason of "substantial constitutional or other issue of fundamental public interest." Commissioner's Decision at 19. So noting, the Commissioner ultimately held, "for the reasons stated in the Initial Decision and herein, the Petition of Appeal is hereby dismissed." (*Id*. at 9)

Pursuant to *N.J.S.A.* 52:14B-10(c), the Board argues, the Commissioner has the authority and obligation to adopt, reject or modify each and every finding of fact, conclusion of law or policy interpretation contained in the Initial Decision. His wholesale adoption of the *Nadasky* decision, without rejection or dismissive comment on any of its content, necessarily signifies his agreement with each factual finding and legal conclusion, including the above-detailed excerpt. (*Ibid.*) Consequently, the Board proffers, as the determination of the very issue involved in this case was previously made in *Nadasky,* the instant litigation is *res judicata* and collateral estoppel prevents the ALJ from reopening this matter.

II. THE ALJ ERRED IN DETERMINING THAT PAYMENT FOR ACCUMULATED, UNUSED SICK LEAVE UPON RETIREMENT IS "COMPENSATION" AS DEFINED FOR PURPOSES OF STATUTORY TENURE PROTECTION.

The gravamen of the ALJ's decision here, the Board argues, is that the negotiated amount of payment for unused sick leave upon retirement is "compensation" within the intendment of the Tenure Laws and, therefore, like salary, can never be reduced from its maximum level. Such a determination, it avers, is unquestionably wrong as it operates to eviscerate the PERC Act and the underlying principles of public employee negotiations, is unsupported by statutory, regulatory or case law and fully fails to recognize the nature of this benefit and the serious pragmatic consequences which would result upon acceptance of this premise. (Board's Exceptions at 13)

Collective Bargaining Under the PERC Act: Consideration of the ALJ's decision vis-à-vis collective negotiations pursuant to the PERC Act evidences an overreaching interpretation which contradicts the very laws it seeks to enforce. The ALJ's reliance on his conclusion that payment for unused sick leave at retirement is "compensation" falling within the protections of *N.J.S.A.* 18A:28-5, and, consequently, rejection of the Board's argument that such

payment is a negotiable issue and that limitations on negotiations are contrary to public policy, endangers the fundamental principles of collective bargaining negotiations. (Board's Exceptions at 14-15) The Board cites *Bd. of Edu. of Neptune v. Twp. Education Assoc.*, 144 *N.J.* 16, 23-24 (1996) (*citing Red Bank Bd. of Educ. v. Warrington*, 138 *N.J. Super.* 564, 569 (App. Div. 1976), for the proposition "that the New Jersey School Laws and the PERC Act must be read *in pari materia,* in a manner mindful of the legislative intent and that they be 'unitary and part of a harmonious whole.'" It avers that neither the courts nor quasi-judicial agencies can ascribe meaning to any statute or regulation "which would render another statute or regulation moot or unenforceable." (Board's Exceptions at 14) Here, the Board posits, utilizing the ALJ's overly broad definition of "compensation" would operate to eviscerate the express provisions of the PERC Act and lead to dramatically more far-reaching consequences than the instant controversy between these parties, notably

> [i]f benefits such as the payment for sick leave at retirement are "locked in" at their maximum level, the necessary result is that the issue can no longer be negotiated between the parties, or, at a minimum, cannot be applied equally to its employees. For example, if a contract provision grants 100% per diem payment for 100% of unused sick time at retirement, the Association's reading of "compensation" would forever bar the parties to such an agreement from negotiating a cap or reduction of that benefit. However, while sick leave itself is statutory, clearly the payment for such leave at retirement is negotiable. To define such payments as tenurable "compensation" would undermine the PERC Act, and the effects upon Collective Bargaining Agreements, particularly those in post-dissolution districts, would range from confusing to truly convoluted. (*Ibid.*)

The Board submits that PERC case law holds that all fringe benefits are mandatorily negotiable. *Montville Board of Education*, P.E.R.C. No. 76-51, 2 *NJPER* ¶230. Fringe benefits, it proffers, include such things as health insurance coverage, timing and amount of bereavement leave, number of personal days, tuition reimbursement and a wide variety of

other issues. Because all fringe benefits undeniably have value to employees, acceptance of the ALJ's expansive definition of "compensation" protected by tenure, would prevent any of them from being negotiable but, rather, would operate to afford employees the maximum value of each of these benefits, effectively freezing negotiations at the maximum level for each of them, an outcome which is diametrically opposite to the express provisions and underlying intent of the PERC Act. The Board further argues, *citing City of Somers* Point, P.E.R.C. No. 77-48, 3 *NJPER* ¶99; *Union City Board of Education*, P.E.R.C. No. 84-79, 10 *NJPER* 46 (¶15026 1983); *Alford v. Buena Board of Education*, 310 *N.J. Super*. 147, 155 (App. Div. 1998); *Township of Edison*, P.E.R.C. No. 84-89, 10 *NJPER* ¶15063 (1984); that it is well-established under PERC case law that payment for sick leave at retirement is a negotiable issue. Moreover, it submits, neither the Appellate Division nor the Supreme Court has ever held that payment for sick leave upon retirement is beyond the scope of collective negotiations, preempted by School Law or cannot be reduced through parties' bargaining negotiations. Although the ALJ correctly recognized that the PERC Act and the School Laws must be read *in pari materia,* he proceeded to conclude that *N.J.S.A.* 18A:28-5 provides protection which precludes bargaining negotiation on benefits which PERC and the Appellate Division and Supreme Court in interpreting the Act have specifically found are mandatory subjects of negotiation. The obvious consequence of the acceptance of the ALJ's decision here, the Board argues, would be to "effectively invalidate the PERC Act, and make negotiations mandatory only to the extent that negotiations *increase* the value of a benefit," an outcome which cannot be tolerated. (emphasis in text) (Board's Exceptions at 15)

Statutes and Regulations: The Board next argues that the major difficulty in this matter arises from the lack of a definition of "compensation" either in the Tenure Laws, *N.J.S.A.* 18A:28 *et seq.* or in the "General Definitions" section of Title 18A. Notwithstanding, it submits,

the pension provisions, also contained in Title 18A, read *in pari materia* with the tenure laws, supply guidance with respect to the legislative intent in this regard. The Definitions provision of this section, *N.J.S.A.* 18A:66-2, defines "compensation" thusly:

> d. "Compensation" means the contracted salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year. (Board's Exceptions at 17)

Recognizing that the Tenure Laws contain no definition of "compensation," the ALJ, without explanation, ignored the definition contained in *N.J.S.A.* 18A:66-2, despite the fact that it is the only such definition contained in the Education Laws which must be read *in pari materia* with other provisions in that Title. Rather, he chose to rely on the Police and Fireman's Retirement System pension regulations, *N.J.A.C.* 17:4-4.1, wholly inapplicable to the instant matter, to support his "determination that payment for sick leave at retirement is 'extra compensation,' subject to the tenure laws but not includable in pension." However, a review of the parallel regulation contained in the Teachers' Pension and Annuity Fund Regulations, *N.J.A.C.* 17:3-4.1(a) belies the ALJ's conclusion in this regard. This provision, the Board advances, "sets a distinction between "compensation" and "extra compensation" – the former is, like salary and rolled-in longevity, creditable for all purposes; the latter, such as lump-sum payments and bonuses, is not. Thus, it argues, payments for longevity, accumulated educational credits and salary would be included in "compensation," but other emoluments of a teacher's employment which are not part of the "regular, periodic installments in accordance with the payroll cycle," such as negotiated lump-sum payments for accumulated sick leave at retirement, would be excluded. (Board's Exceptions at 18)

***Case Law**:* The Board proposes that a review of applicable case law fully "belies the ALJ's determination that Petitioners are entitled to a permanent 'lock-in' of their 1995 level of payment for sick leave at retirement under the Tenure Laws." (Board's Exceptions at 19) Unquestionably, it proposes, a tenured teaching staff member's contractual salary is the primary component of his or her "compensation," which, absent a RIF or tenure charges, cannot be reduced under any circumstances. However, in addition to salary, the Board recognizes that other payments have been found to constitute compensation, *i.e.*, longevity increments – an increase in a teacher's salary in consideration of long-term service to the Board (*Middletown Board of Education*, P.E.R.C. No. 99-72, 25 *NJPER* 122 (¶30053 1999) and payments for additional education (*Green Township Board of Education*, P.E.R.C. No. 99-73, 25 *NJPER* 124 (¶30054 1999). This remuneration, like salary, is made as a part of payroll and, once awarded, becomes a component of the teacher's tenure-protected salary. (Board's Exceptions at 19-20) In contrast, it advances, remaining "customary and incidental," negotiable benefits paid to teachers are excluded from the scope of "compensation" for purposes of tenure protection, *i.e.*, early retirement inducement payments (*Fair Lawn Education Association v. Fair Lawn Board of Education*, 161 *N.J. Super*. 67 (App. Div. 1978, *aff'd* 79 *N.J.* 574 (1979)); "customary" overtime (*McLean v. Glen Ridge Board of Education*, 1977 *S.L.D.* 311); lump sum payment to department chair at the end of the school year, notwithstanding that it was contractually defined as "extra compensation." (*Bishop v. Bd. of Trustees, TPAF*, 4 *N.J.A.R.* 179 (1980). The Board argues that these and other benefits such as health insurance, personal days, and payment for sick leave at retirement are rightfully excluded as "compensation" because "these benefits are not part of the employee's regular compensation, but are, rather, lump-sum or sporadic payments incident to employment [which] are not protected by the tenure laws." (Board's Exceptions at 20)

Furthermore, the Board claims that in *Hyman v. Teaneck Board of Education, 1983 S.L.D.* 699, *rev'd on other grounds* State Board at 1985 *S.L.D.* 1940, *aff'd* App. Div. A-3508-84T7 (App. Div. 1986), *certif. den.* 104 *N.J.* 469 (1986), the Commissioner examined the intended scope of tenure protection in the context of a tenure challenge by three auxiliary teachers, and held:

> [t]here are only a few statutorily mandated benefits: sick leave, accumulation of sick days, disability, and military service credit. All other benefits are a matter of contract. I FIND that all petitioners herein receive not only statutory sick leave benefits, but in addition receive…child rearing leave, bereavement leave, family illness leave, personal days, health and dental insurance, tuition payments and pension…any benefits other than those mandated by statute are within the discretion of the Board to grant in a negotiated contract and *cannot be required as a matter of law.*
> 1983 *S.L.D.* at 719-720 (emphasis added).
> (Board's Exceptions at 21)

Also particularly instructive in this regard, the Board submits, is the Appellate Division's decision in *Alford, supra,* a case which, it avers, stands for the proposition that "sick leave accumulated by a teacher in a defunct or former district is to be treated as if it had been accumulated in the new district." (Board's Exceptions at 21) This holding, standing alone, it claims, evidences the necessity of rejection of the ALJ's decision in this matter. Additionally, it professes, the *Alford* court's decision connotes an "understanding that the 'bundle of rights' involved in sick leave reimbursement are distinct from the 'bundle' making up salary. *Id.* At 157." (*Id.* at 22) Of significant import in this regard, it proffers, is the language utilized by the court in its decision with respect to its discussion of payment for accumulated sick time:

> [t]he court began with the premise, arising out of *N.J.S.A.* 18A:28-6.1, that all transferred teachers were to "receive *compensation and benefits* based on the *Receiving* District's contractual agreements." *Id.* at 150 (*emphasis added*). Clearly, the Appellate Division intended for the receiving district, here Clark, to dictate, via its existing Collective Bargaining Agreement, the benefits to which transferring teachers are entitled.***

> Ultimately, the *Alford* court concluded that the transferred teachers have a right to share in the negotiated *benefit* of sick leave reimbursement, *Id.* at 150, in the identical manner as all other employees of the Receiving District. (emphasis in text)
> (Board's Exceptions at 22)

The Board tenders that this language clearly evidences the Appellate Division's understanding that sick leave payments at retirement are a) a negotiable issue; and b) governed by the receiving district's bargaining agreements, in direct opposition to the conclusion of the ALJ in this matter that benefits of a sending district "travel" with transferring teachers. (*Ibid*.)

The Board charges that, in reaching his conclusion that sick leave payment upon retirement is "compensation" protected by tenure, the ALJ wholly ignores these "developed tenets of New Jersey law" and, instead, purports to ground his conclusion in the Commissioner's decision *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217 and *Matter of School Board of Morris*, 310 *N.J. Super.* 332 (App. Div. 1998). (*Id*. at 23) His reliance on *Stagaard* in this regard is curious as he clearly recognized that "[w]hile the *Stagaard* decision clearly established the guidelines for treatment of the salary, among the other rights of the staff members of the dissolved Regional District, it left unresolved the very issues addressed herein." Initial Decision at 16 (*Ibid.*) Moreover, on appeal to the State Board the *Stagaard* petitioners sought guidance on the definition of "similar benefits" referenced in *N.J.S.A*. 18A:13-64. The State Board expressly refused to define such benefits, holding:

> Constituent districts are required to maintain the salary of tenured teaching staff members when establishing their levels of compensation under the salary guides of those districts. In so doing, however, we decline in this context to delineate what, if any, additional benefits former employees of the regional district may be entitled to under the education laws beyond those expressly enumerated in *N.J.S.A*. 18A:13-64.
> *Stagaard*, State Board Docket No. SB #88-96, October 1, 1997, at 15. (Board's Exceptions at 24)

Therefore, the Board argues, contrary to the apparent belief of the ALJ, *Stagaard* is extremely limited in its precedential impact on the instant matter. (*Id.* at 25) With regard to the ALJ's reliance on *Morris, supra*, the Board urges that this is similarly misguided as it wholly ignores the fact that the *Morris* court refers to payment for sick leave at retirement as "additional" payment upon retirement, as do the pension statutes previously cited. Moreover, the ALJ's equating such payments, like salary, to tenurable compensation fails to consider the end of the very sentence he cited, *i.e.*, "these payments are 'additional compensation upon retirement subject to mandatory negotiation' Initial Decision at 17, citing *Morris, supra*." (*Ibid.*) Acknowledgement of the negotiability of this issue, the Board professes, cannot logically be reconciled with the ALJ's conclusion that these monies are protected by *N.J.S.A.* 18A:28-5. (*Ibid*) Finally, in this regard, the Board points out that the ALJ noted the *Morris* court's reliance on *Lawrence v. Board of Education of School District 198*, an Illinois decision. Inasmuch as this case, along with the others outside New Jersey jurisdiction cited by the *Morris* court, were admittedly "not directly on point," (*Morris, supra,* at 347), they provide minimal assistive value in this matter. (*Ibid.)*

III. THE ALJ ERRED IN REJECTING THE ARGUMENT THAT ARTICLE 17.0 OF THE 1995-1997 COLLECTIVE BARGAINING AGREEMENT BETWEEN PETITIONERS AND UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 IS INAPPLICABLE TO THIS MATTER AND/OR UNENFORCEABLE.

The Board charges that petitioners cannot reasonably claim a right to payment for sick leave at retirement pursuant to Article 17.0 of the 1995-1997 Collective Bargaining agreement between petitioners and the Union County Regional District because they never did and never will satisfy the triggering mechanism giving rise to a payment obligation pursuant to

that provision. (Board's Exceptions at 29) The clear language of Article 17.0, it argues, evidences that operation of this provision is triggered "when, and only when, a member of the Union County Federation left that District during the 1995-1996 or 1996-1997 school year." (*Id.* at 30) The Board maintains that all parties agree that, pursuant to education law, none of the within petitioners ever legally "left" the Regional District. Additionally, it is now impossible for them to leave that District which no longer exists. (*Ibid.)* Consequently, the Board argues, it is obvious that petitioners' right to compensation pursuant to Article 17.0 was dependent upon his or her chosen time of retirement. In this regard, it advances, a petitioner choosing to retire during the period of the 1995-1997 Agreement would have been entitled to payment pursuant to this Article, as would a petitioner retiring upon the dissolution of the Regional District. After dissolution, however, the 1995-1997 Bargaining Agreement no longer governed the terms of petitioners' employment, "and it became legally and pragmatically impossible for any Petitioner to leave that District." (*Ibid.*) Irrespective of this "logical conundrum" with regard to the Regional District Bargaining Agreement, it avers that petitioners' claim is also barred by the controlling Clark Collective Bargaining Agreement. Sick time accumulated by petitioners, it professes, must be treated as if it were accumulated in Clark. The Clark Bargaining Agreement provides that retiring employees are entitled to payments, pursuant to Clark Article XI, when they retire pursuant to the TPAF or PERS systems. (*Id.* at 31) The Board proffers, petitioners can claim no entitlement to payment under the defunct Regional's 1995-1997 contract for their 2001-2002 retirement from the employ of the Clark Board of Education. (*Ibid.)*

In their reply and cross-exceptions, petitioners propound three points:

I. <u>JUDGE GIORDANO PROPERLY CONCLUDED THAT PAY FOR UNUSED SICK LEAVE IS "COMPENSATION" THAT CANNOT BE REDUCED.</u>

Petitioners first urge that the ALJ correctly concluded that payment for unused sick time is properly categorized as "compensation," pointing out that this categorization is one which has been recognized by New Jersey courts. In support of this assertion, they cite to *Maywood Education Association v. Maywood Board of Education*, 131 *N.J. Super.* 551 (1974) and *Matter of School Board of Morris,* 310 *N.J. Super.* 332 (App. Div. 1998), *cert. den.* 156 *N.J.* 407 (1998), wherein they allege these courts repeatedly and explicitly refer to pay for accumulated sick days as "compensation." (Petitioners' Reply and Cross-Exceptions at 2-4) Furthermore, in a matter *specifically* involving education law, *Caponegro v. State Oper. Sch. Dist.*, 330 *N.J.Super.* 148 (App. Div. 2000), where, among other things, at issue was the question of whether former employees of the takeover district could be denied payment for accumulated sick leave, the court, citing *Morris, supra,* stated:

> …a contractual right to *compensable* accumulated leave is typically characterized as deferred *compensation* since it constitutes remuneration for services already rendered, and, to the extent already earned, is not subject to unilateral divestment by the employer. (at 156) (emphasis supplied) (Petitioners' Reply and Cross-Exceptions at 5)

Petitioners emphasize that the *Caponegro* court went even further, recognizing that Federal and State constitutions prohibit impairment of the obligation of contract, this court opined:

> we have no doubt that the vested-rights portion of the package – the accumulated vacation days and sick leave – could not, in any case, have been constitutionally withheld. (at 154) (*Ibid.*)

Petitioners, therefore, conclude that "the withholding of the deferred compensation earned by Petitioners raises constitutional issues." In this regard, petitioners advance that the constitutional infirmity of the retraction of a vested contractual benefit was addressed in *State Troopers Fraternal Ass'n v. New Jersey*, 149 *N.J.* 38 (1997), wherein the Court examined a contractual commitment to pay retroactive salary increases to troopers who resigned and the effect of a

regulation enacted subsequent to their resignations which purported to deny them retroactivity. Because these individuals justifiably relied on the commitment which had existed at the time of their retirement, the Court found that depriving them of this vested contractual benefit would work a "manifest injustice," which this Court defined as a "nonconstitutional equitable doctrine designed to prevent unfair results that do not necessarily violate a constitutional provision." *State Troopers, supra,* at 54 (Petitioners Reply and Cross-Exceptions at 6) Petitioners urge that the "manifest injustice doctrine" is appropriately applicable in the instant matter in that

> [t]he deferred compensation Petitioners earned is a present fixed interest that was vested pursuant to a valid contract. The Board promised to compensate petitioners if they performed as requested. Petitioner's [sic] performed the conditions bargained for by their employer. When they performed the conditions precedent to entitlement their right became vested. That vested right is constitutionally protected from impairment. To paraphrase the rationale of *Caponegro*, the financial obligation of the Board and Petitioner's [sic] concomitant right to compensation for unused sick days were fixed prior to dissolution.
> (*Id.* at 7)

II. *N.J.S.A.* 18A:13-64 MANDATES THAT "ALL …RIGHTS OF TENURE…LEAVE OF ABSENCE AND OTHER SIMILAR RIGHTS SHALL BE RECOGNIZED AND PRESERVED" IN A WITHDRAWING DISTRICT. PAY FOR UNUSED SICK DAYS IS ONE OF THE RIGHTS RECOGNIZED AND PRESERVED BY *N.J.S.A.* 18A:13-64.

Petitioners argue that the intent of *N.J.S.A.* 18A:13-64 is to ensure that all employees are "held harmless" upon dissolution of a school district "and *all* tenure, seniority, pension and similar rights and benefits are recognized and *preserved*." (emphasis supplied) (Petitioners' Reply and Cross-Exceptions at 8) They maintain that because tenure rights, such as protection from reduction of compensation, are expressly preserved by this statutory provision, and given that payment for unused sick days is "compensation," "pay for unused sick leave is among the enumerated rights listed in the statute." (*Id.* at 10) In the alternative, petitioners

advance that in addition to the enumerated rights protected by *N.J.S.A.* 18A:13-64, it also preserves "other similar rights." "It cannot," they posit, "be seriously denied that pay for unused sick days [is] 'similar' salary." (*Ibid.*)

In response to respondent's contention that because payment for unused sick days is a contractually negotiable issue it is, therefore, not preserved by *N.J.S.A.* 18A:13-64, petitioners submit:

> Pay for unused sick days is negotiable, but that does not remove the protection afforded by *N.J.S.A.* 18A:13-64. It is a form of deferred compensation for which concessions are traded in the collective negotiating process. But negotiability has no bearing on whether sick leave pay is protected by *N.J.S.A.* 18A:13-64.*** Salaries too are negotiable, yet salaries are protected by *N.J.S.A.* 18A:13-64. So, too, "leaves of absence" and "seniority" are negotiable, and they are protected. Moreover, negotiability is constrained when deferred compensation is involved.***
>
> The fact that pay for unused sick days is negotiable does not remove that benefit from the protection of *N.J.S.A.* 18A:13-64. Neither does the fact that the benefit derives from contract rather than a specific statute.
>
> > Stating the problem in terms of incorporation in the labor contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment. *Lavin v. Hackensack Board of Ed.*, 90 *N.J.* 145 (1984, at p. 150.
> > (*Id.* at 12)

III. <u>THE CLARK CONTRACT DOES NOT ENTITLE CLARK TO IGNORE THE BENEFITS ACCRUED BY PETITIONERS UNDER THE REGIONAL CONTRACT.</u>

Petitioners cite to *Board of Education v. Buena Regional*, 300 *N.J. Super.* 415 (App. Div. 1997), *certif. den.* 151 *N.J.* 406 (1997) where the court considered the rights of

transferred teachers to longevity pay and the impact of a negotiated collective bargaining agreement and determined that the agreement was of no effect, finding:

> [t]he Buena Educational Association had no authority to enter into a collective negotiating agreement which relinquished the transferred–teachers' right guaranteed by *N.J.S.A.* 18A:28-6.1 to receive full credit for their prior service in the Newfield district. at 424.
> (Petitioners' Reply and Cross-Exceptions at 13)

Consequently, petitioners argue, subsequent collective bargaining agreements in Clark cannot operate to divest petitioners of benefits accrued by them at the regional district preserved by *N.J.S.A.* 18A:13-64. Moreover, petitioners contend,

> Clark has assumed the role previously performed by Regional to educate high school pupils in the Clark district. Clark has assumed valuable assets formerly owned by the Regional District. Clark has, for all practical purposes, become a successor, *pro tanto* of the Regional District. As such, it is responsible for the obligation to Petitioners incurred by the Regional District.
> (*Id.* at 15)

Upon his independent and comprehensive review of the record and after full consideration of the parties' exceptions, the Commissioner determines, for the reasons detailed below, to reject the ALJ's determination that the within petitioners have a right, protected by *N.J.S.A.* 18A:13-64, to be paid for unused sick leave at the contractual rate established by the collective bargaining agreement in effect at the time they were employed by the Regional District.

Initially, however, the Commissioner concurs with the ALJ that this matter is not *res judicata* as a consequence of the *Nadasky, supra*, decision. The Board's exception argument in this regard is found to be without merit. Because *Nadasky* was decided and dismissed by the Commissioner *solely* on procedural grounds, it was unnecessary for him to reach to or discuss the ALJ's dicta on the merits of that case.

Turning to the adjudication of this matter, *N.J.S.A.* 18A:13-64, which establishes the rights of employees of a regional district in the event of a withdrawal from or a dissolution of a regional district, in pertinent part, specifies:

> [a]ll employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***

The underlying purpose of this provision was considered and addressed in *Board of Education of the Central Regional High School District v. Board of Education of Lacey Township and the Central Regional Education Association and Ronald Villano, individually, Ocean County*, 1980 *S.L.D.* 553, 565, wherein it was recognized "that the Legislative intent [of this provision] was to protect the employment rights of those employees [of the regional district affected by the withdrawal] who have provided good and faithful service to the school district." Full consideration of this statute and its legislative intendment demonstrate that it was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. *Balwierczak et al v. Board of Education of Berkeley Heights, Union County,* decided by the Commissioner December 8, 1999, *aff'd* State Board May 3, 2000. However, it is, likewise, clear that *N.J.S.A.* 18A:13-64 "must be applied in a manner which preserves the continued employment and accrued rights of such staff, but does not result in the wholesale disruption of existing districts ***[or] confer extraordinary rights upon regional staff and effectively usurp the

managerial prerogative of the constituent boards of education." *Stagaard v. Contini*, 97 *N.J.A.R.*2d (EDU) 217, 219.

With this background in mind, the Commissioner finds and concludes that the ALJ has apparently misperceived the issue in this case. At issue here is not whether payment for unused sick leave is nomenclaturally identified as some kind of "compensation" by courts, cited by the ALJ and petitioners, which were reviewing other wholly distinguishable questions, situations or statutes, by courts outside our jurisdiction, or by Police and Fireman Retirement System regulations but, rather, whether such payment is "protected" by the tenure laws and *N.J.S.A.* 18A:13-64. The Commissioner fully concurs with the Board's comprehensive exception arguments in this regard, finding these entirely consistent with prior *education* case law which addressed and resolved, either explicitly or implicitly, this very issue.

First, in *Central Regional,*[1] *supra,* the petitioners argued that *N.J.S.A.* 18A:13-64 protected all of their regional fringe benefits not specifically enumerated in that statute. They supported this argument, as do the instant petitioners, by contending that a reduction of salary or fringe benefits would be in contravention of *N.J.S.A.* 18A:6-10 which specifically prohibits any reduction of a tenured employee's compensation. Upon consideration of such a contention, the Commissioner held:

> The Commissioner agrees that those rights of tenure, seniority, pension, leave of absence, and other such benefits addressed in 18A:13-64 are in fact transferrable, however, the Commissioner does not conclude that the intent of 18A:13-64 was to require the withdrawing district to establish, in effect, two levels of compensation and benefits for comparable levels of training and experience, one for its long time employees and one for its newly acquired employees.

[1] Notwithstanding that this case involved withdrawal from a regional district rather than a dissolution, as here, the statute at issue, *N.J.S.A.* 18A:13-64 and its legislative intent, *i.e.*, to ensure that all employees are held harmless upon a withdrawal or dissolution, are the same in either situation.

> The Commissioner therefore directs the Lacey Township Board of Education to place those employees transferred from the Central Regional School District at the step and level of the Lacey Township salary schedule appropriate for their years of service in the regional district and to fully recognize and preserve "all of their rights of tenure, seniority, pension, leave of absence and other similar benefits" *and to provide them with all other benefits which are accorded employees of the Lacey Township School District.* (emphasis supplied) *Central Regional* 1980 *S.L.D*. at 571.

Thus, more than 24 years ago, the Commissioner found that payment for accumulated sick leave, along with other contractual benefits enjoyed by petitioners in their regional district employment, was not entitled to protection under the governing statute but, rather, these employees were to be accorded all benefits provided to employees in their new constituent district.[2]

More recently, the State Board was confronted with this issue in *Stagaard v. Contini*, decided by State Board October 1, 1997. In its application of *N.J.S.A.* 18A:13-64 as required in *Stagaard*, the State Board, initially, observed:

> Our duty in construing the statute involved here is to determine and effectuate the intent of the Legislature. The principal source of such intent is the legislation itself. However, the policy behind the statute, concepts of reasonableness and the legislative history are also among the sources to be used to determine legislative intent.
>
> We have therefore reviewed the statute at issue with close and careful consideration of its language, structure, purpose and history, as well as prior decisional law. (citations omitted) *Staagard* slip opinion at 11.

In the State Board's decision, the Commissioner concludes, contrary to the position espoused by the parties, it was implicitly determined that payment for accumulated sick leave was not entitled to protection or preservation pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or under the "other benefits" provision of that statute. First, the decision in *Stagaard* evidences that the State Board accepted that the tenure entitlement of the petitioners in that matter was satisfied by the

[2] The Commissioner does not find the *Central Regional* result at all altered by the fact that the instant petitioners are, at this time, seeking the preservation of only one of their Regional District benefits.

preservation of their salary. Had the State Board found any other claimed right of petitioners in that matter to be one which was protected by tenure, they would have identified and included it. Therefore, the Commissioner concludes that "compensation" for purposes of the protections provided by *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:13-64 has implicitly been defined as "salary."

Next, *citing Hyman v. Board of Education of the Township of Teaneck*, decided by the State Board, March 6, 1985, *aff'd* Docket No. A-3508-84T7 (App. Div. 1986), *cert. denied*, 104 *N.J.* 469 (1986), the State Board declined "to delineate what, *if any*, additional benefits former employees of the regional district may be entitled to under the education laws beyond those expressly enumerated in *N.J.S.A.* 18A:13-64." (emphasis supplied) Stagaard slip opinion at 15. It must be noted that in *Hyman*, when faced with the question of benefits which may be owed to the supplemental teachers in that case, the State Board, after reviewing language from the Supreme Court's decision in *Spiewak v. Rutherford Bd. of Ed.,* 90 *N.J.* 63 (1982), found:

> the decision in *Spiewak* is based on an analysis of the tenure statutes. Although the court acknowledged that supplemental teachers may be entitled to additional benefits, it clearly stated that such benefits, unlike tenure rights, are primarily a matter of contract. Thus, we conclude that the decision in *Spiewak* does not grant to supplemental teachers any *statutory* entitlement to benefits beyond that which may be conferred on them by existing statutes. (emphasis in text) (*Hyman,* 1985 *S.L.D.* at 1942-1943)

Again, because the *Stagaard* petitioners were specifically seeking payment for unused sick leave as an entitlement pursuant to *N.J.S.A.* 18A:13-64, if the State Board had accepted this as an "other similar benefit," necessitating preservation within the intendment of that statute, they would not have declined to so find. The Commissioner, therefore, concludes that the instant petitioners are protected with respect to the preservation of all of their statutorily mandated benefits. However, there is no reasonable interpretation of *N.J.S.A.* 18A:13-64 or *Central*

Regional and *Stagaard* which could establish that the Legislature additionally intended to preserve and protect their contractual benefits. Therefore, the Commissioner determines that payment for accumulated sick leave is not protected pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or as an "other similar benefit" under that provision.

As persuasively argued by the Board, to find otherwise would lead to preposterous consequences:

> [i]f benefits such as the payment for sick leave at retirement are "locked in" at their maximum level, the necessary result is that the issue can no longer be negotiated between the parties, or, at a minimum, cannot be applied equally to its employees. For example, if a contract provision grants 100% per diem payment for 100% of unused sick time at retirement, the Associations reading of "compensation" would forever bar the parties to such an agreement from negotiating a cap or reduction of that benefit. However, while sick leave itself is statutory, clearly the payment for such leave at retirement is negotiable. To define such payments as tenurable "compensation" would undermine the PERC Act, and the effects upon Collective Bargaining Agreements, particularly those in post dissolution districts, would range from confusing to truly convoluted.
> (Board's Exceptions at 14)

Moreover, acceptance of the ALJ's premise would operate to eviscerate the underlying legislative intent of the governing statute. As found by the Appellate Division in *Alford v. Board of Education of Buena,* 310 *N.J. Super.* 147 (App. Div. 1998),[3] it must be remembered

> that the polestar is equality of treatment of transferred teachers from the sending district to the receiving district. Fundamental fairness and common sense demand that two teachers of equal seniority and service teaching side-by-side in a school district should be treated equally unless there is a clear and unequivocal demonstration of intent to treat such teachers differently. (at 157)

[3] This case dealt with the question of whether, pursuant to *N.J.S.A.* 18A:28-6.1, another "save harmless" provision which governs the protected rights of teaching staff members upon the discontinuance of a school, teachers "received" by a new school district as a result of the discontinuance of school activities by a "sending" district are entitled to reimbursement for unused sick time consistent with the same benefit received by the teachers in the "receiving" district.

The Commissioner, upon full consideration of the language of *N.J.S.A.* 18A:13-64, its legislative intendment, and applicable case law, holds that payment for accumulated sick leave is not preserved and protected by this statute but, rather, is a contractual benefit subject to collective bargaining negotiations.[4]

Accordingly, the Initial Decision of the OAL is rejected. Summary decision is hereby granted to the Board and the within consolidated Petitions of Appeal are dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: April 30, 2004
Date of Mailing: April 30, 2004

[4] As the Commissioner has determined that petitioners' right to the benefit they seek is not conferred by the School Laws, discussion with respect to the validity of the Regional District contract or whether and how petitioners' rights under this contract could be "waived," is unnecessary.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*