

**MABEL B. PERRY,**  
Petitioner,  
v.  
**BOARD OF EDUCATION OF THE BOROUGH OF GLEN  
ROCK, BERGEN COUNTY,**  
Respondent.

Decided May 12, 1980

**Initial Decision**

SYNOPSIS

Perry, a tenured guidance counselor employed since 1971 by the Board of Education of the Borough of Glen Rock, charged she had been denied equal access to supervisory employment by the Board because of her race. She also alleged that the Board improperly reduced her position from full time to half time.

In a preliminary observation, the administrative law judge noted that although Perry had filed similar charges with the Equal Employment Opportunity Commission, state administrative agencies have no jurisdiction to give relief for such claims and the only alleged acts of employment discrimination to be considered were those remediable under *N.J.S.A. 5:10-1 et seq.*

The judge ruled that to meet her burden of establishing a prima facie case of racial discrimination Perry must demonstrate that similarly situated non-blacks were promoted in place or hired out-of-category while she was not, and when the Board offered non-discriminatory reasons for such action, to come forward with evidence that the Board's reasons were sham.

The administrative law judge found that there was no credible evidence in the record to support Perry's allegations of racial discrimination and that any rejection of Perry's applications for supervisory positions were for reasonable standards. Further, Perry's reduction in time had been made for reasons of economy and had been carried out properly according to the standards of *N.J.S.A. 18A:28-9*.

Accordingly, the judge found that Perry had failed to sustain her burden of proof and the matter was dismissed.

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**M. Karen Thompson, Esq.,** for Petitioner (Norris, McLaughlin & Marcus, Attorneys)

**Irving C. Evers, Esq.,** for Respondent (Parisi, Evers & Greenfield,

Attorneys)

**OSPENSON, ALJ:**

Mabel B. Perry, a tenured guidance counsellor employed since 1971 by the Board of Education of the Borough of Glen Rock, charged she had been denied equal access to supervisory employment by the Board by reason of her race. She is black. Her petition of appeal to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, invokes the Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.*, and *N.J.A.C.* 6:4-1.1, 1.6(a), (b); the Equal Employment Opportunity Act of 1972, 42 *U.S.C.A.* § 2000e-4, *et seq.*; and Title VII of the Civil Rights Act of 1964, 42 *U.S.C.A.* § 2000e-2, *et seq.* See, *Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 523 (1978), which states that, "Public schools under supervision of the Commissioner of Education are specifically [a] place of public accomodation under the Law Against Discrimination." *N.J.S.A.* 10:5-5(e). Though least senior guidance counsellor, petitioner also alleged the Board improperly reduced her from full time to half time in a reduction in force for 1979-80, such reduction being discriminatory, there having been a history of racial unrest in the district and petitioner having been first hired in 1971 as a result thereof. The Board denied the allegations.

*Pro se*, petitioner filed her petition in the Division of Controversies and Disputes of the Department of Education on June 1, 1979. An answer by the Board was filed on October 10, 1979. On October 25, 1979, the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was scheduled and conducted in the Office of Administrative Law on January 28, 1980, and an order entered. A hearing was scheduled for March 10 and 11, 1980, but was adjourned, at the Board's request, to April 7, 1980, when it was begun and concluded on April 8, 1980. Closure of the record was 30 days thereafter, at the deadline for filing of briefs.

**PRELIMINARY PROCEDURAL HISTORY**

Cast first in general terms, petitioner's charges of discrimination were more precisely formulated at the prehearing conference. In the prehearing order, entered January 28, 1980, she charged as follows:

A. In September 1976, petitioner applied for the position of director of guidance. The position was eliminated. Her application was denied, allegedly because of her race.

B. In February 1977, petitioner applied for the position of chairperson of guidance. The position was posted then but was eliminated. Petitioner was rejected, allegedly because of her race.

C. In May 1978, petitioner applied for the position of high school principal. She was not a finalist after being heard by a screening committee, rejected allegedly because of her race.

D. In October 1978, petitioner applied for the position of part-time supervisor of guidance at \$10,000 per year. She was then a full-time guidance counsellor at \$25,000 per year. Her application was denied, allegedly because of race, she said, and an uncertificated person hired.

E. In June 1979, petitioner applied for the position of acting vice-principal of the high school for the summer program. Though she was denied the position for the reason that to grant it would have improperly preferred her over another applicant who, with petitioner, had applied for the regular position of vice-principal in 1979-80, she alleged pretextual discrimination.

F. In June 1979, petitioner applied for the vice-principalship for 1979-80. Her application was denied, allegedly because of her race, which the Board denied. Petitioner survived the selection committee and was one of four recommended to the Board, which chose a white woman candidate after its first choice, a black man, refused the position.

G. On April 18, 1979, the Board reduced petitioner's position of guidance counsellor full-time to half-time, beginning September for 1979-80. Petitioner was least senior guidance counsellor for grades 6-12 in the district. She alleged she was hired in 1971 as the only black guidance counsellor because of racial unrest. She contended the reduction in force was unlawful, therefore, even though she was least senior. The Board denied discrimination, denied the 1971 situation prompted petitioner's hiring, and denied any special status that exempted or excepted petitioner from operation of seniority laws.

When it developed, at prehearing, that petitioner had filed charges of employment discrimination on some of the same or similar grounds before the New Jersey Division on Civil Rights on April 23, 1979 and before the Equal Employment Opportunity Commission on June 29, 1979 it was ordered that copies of the prehearing order be served on the Attorney General of New Jersey, the Director of the Division on Civil Rights, and on the Commissioner of the Department of Education. Principles of comity and deference to sibling agencies are a fundamental responsibility of administrative tribunals. It became incumbent upon this tribunal, therefore, to give notice of pendency of proceedings before the Commissioner of Education that were presumptively of then present jurisdictional concern to the Attorney General and the Director of the Division on Civil Rights, at least to offer reasonable opportunity for intervention and consolidation of duplicitious claims for trial. See *Hinfey v. Matawan*, *supra*, 77 *N.J.* 530,

533; and *cf. City of Hackensack v. Winner*, 162 *N.J. Super.* 1 (App. Div. 1978), modified, 82 *N.J.* 1 (1980), and *see, generally, Uniform Administrative Practice Rules, N.J.A.C.* 1:1-12.1 (Intervention) and *N.J.A.C.* 1:1-14.1 (Consolidation). These procedural measures seek to avoid multiplicity of actions, forum shopping, inconsistent determinations and struggles for jurisdiction and seek to foster dispute resolution by the forum best positioned by statutory status, administrative competence and regulatory expertise to adjudicate the matter. *See, Hinfey, supra*, at 531-532.

A fair reading of charges lodged before those other agencies shows charges A, B, and D above were before the EEOC and charges A, B, D, E and F were before the New Jersey Division on Civil Rights. After prehearing, the Office of Administrative Law was informed that the Director of the Division on Civil Rights, after investigation of allegations (i.e., the equivalent of charges A, B, D, E and F herein), had determined on April 1, 1980, pursuant to *N.J.S.A.* 10:5-14 and *N.J.A.C.* 13:4-6.1(d), there was no probable cause to credit them and the Division file was closed. (The finding was marked into evidence but admission was qualified by a ruling that the finding, not being an adjudication on the merits, was of no substantive evidential value, was not *res judicata* and did not collaterally estop petitioner from prosecuting them further here). Thus, the charges before the Division never became contested, never became ripe for transmission to the Office of Administrative Law and never, therefore, reached a stage appropriate for other agency intervention or consolidation. *See N.J.S.A.* 52:14B-10 and *N.J.S.A.* 52:14F-5 but *cf. Hackensack v. Winner, supra*, at 24-32, *N.J.A.C.* 82 *N.J.* 1 (1980) and *see, Sprague v. Glassboro State College*, 161 *N.J. Super.* 218, 225 (App. Div. 1978).

#### *LIMITATIONS ON CHARGES A, B, C, D*

Addressed at the outset of hearing was the question whether the charges in A, B, C and D at times, respectively, from September 1976, February 1977, May 1978 to October 1978, were timely under the 180 day limiting periods of *N.J.S.A.* 10:5-18 and 42 *U.S.C.A.* 2000e-5(e). Facially, these charges detailed single, discrete and episodic instances of alleged discriminatory failure to hire petitioner in supervisory posts. Unlike the complaint in *Decker v. Bd. of Education of Elizabeth*, 153 *N.J. Super.* 470 (App. Div. 1977), which charged that a female employee was being paid a lower salary than a male employee performing the same function, the several instances do not purport to be continuing into, and thus capable of suspending the running of, the limiting period of 180 days before petitioner filed her petition on June 1, 1979, before the Commissioner of Education.

*See, United Airlines, Inc. v. Evans*, 431 *U.S.* 553 (1977). Petitioner makes no attack upon the neutrality of a separate salary guide or a seniority system with payments thereunder continuing to within the limiting period. Her case is a disparate treatment case.

After argument at hearing, nevertheless, petitioner stipulated charges A, B, C and D were not timely filed and that no relief thereunder was sought: i.e., that the 180 day limiting periods of *N.J.S.A.* 5:10-18 and 42 *U.S.C.A.*, § 2000-5(e) barred her from relief. Petitioner was permitted to adduce general background testimony, however, covering those instances. Correspondingly, petitioner's claims for relief were limited to charges E, F and G.

*LIMITATIONS ON RELIEF IN STATE COURTS UNDER TITLE VII FOR CHARGES E, F AND G FOR FAILURE TO FILE EQUIVALENT CHARGES BEFORE EEOC*

Petitioner's charges before the EEOC on June 29, 1979, are the same or similar to charges A, B and D herein. No charges similar to E, F and G were filed there. As to the latter in State courts or State administrative agencies, therefore, no jurisdiction lies in such courts or agencies to give relief under Title VII, 42 *U.S.C.A.*, section 2000e-5(e). *Cf., Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55, 74-76 (1978).

Thus, petitioner herein raises before the Commissioner of Education only those alleged acts of employment discrimination remediable under *N.J.S.A.* 5:10-1, *et seq.*, as are specified in charges E, F and G of the prehearing order.

*EVIDENCE AT HEARING*

*CHARGE E*

*SUMMER SCHOOL VICE PRINCIPALSHIP, JUNE 1979*

Petitioner testified she applied for the position of vice principal in the secondary summer school in June 1979. She holds a principal's certificate. At the time, she was also a candidate for the job in 1979-80. She was told by the superintendent the Board chose another person for the summer position who had five years experience as vice principal (petitioner had none) and was not a candidate for the *full* position for 1979-1980. The superintendent said the Board felt that to choose petitioner for the summer position would have preferred her over other candidates for the *full* position. Petitioner said the summer vacancy was posted but no notice was given that candidates for the full position would not be considered. The superintendent said the Board wished to avoid preferences in order not to create questions of tenure acquisition.

*CHARGE F,**VICE PRINCIPALSHIP FOR 1979-1980, JUNE–AUGUST, 1979*

Petitioner said she applied for the position of vice principal for 1979-1980 in June 1979. She became one of six semi-finalists and was one of four recommended by the screening committee. The superintendent submitted her name and three other names to the Board in August 1979. She was interviewed by the Board on August 30, 1979, at 10:00 p.m. Petitioner found the conduct of some of the Board members offensive: some were eating and drinking coffee, talking and passing notes. They seemed not to pay attention to her, she said. In addition, petitioner's husband who went with her to the interview, said he overheard unidentified persons outside the building chanting "nigger-lover, nigger-lover" just as they arrived. Petitioner's supervising principal testified there were 29 candidates for the job. The screening committee interviewed 26, reducing the list to six including petitioner. These names went to the superintendent. There was no racial discrimination in the procedures, he said, because there were devices employed to prevent any unfair measures. The committee met beforehand to decide questions to ask. All interviewees were treated alike.

The superintendent testified she received six names from the screening committee. She sent 4 of these to the Board, including petitioner's name. She indicated no preference. The Board met August 31, 1979, to interview the selectees. Because the meeting started early and ran long, coffee and sandwiches were supplied and the Board worked through. Petitioner was last, interviewed at 10:00 p.m. She was treated no differently from the rest. The superintendent said she heard no racist chanting outside the building.

The superintendent said, and a Board member confirmed, the Board's first choice was a black man, whose experience included assistant superintendent for personnel in another district. He was offered the maximum salary permitted by the administrator's salary guide in effect in Glen Rock. Since this was less than he was earning and since he would have to relocate, he declined the position and it was offered to a white woman candidate, who accepted it. The Board agreed the black male candidate was best qualified. The woman candidate who was hired had no principal's certificate, but was eligible for it at the time and has since obtained it. This procedure is in accordance with existing Board policy, said the superintendent, because certification even for qualified candidates takes six to eight months. Though petitioner said the Board's offer to the black man for less salary than he was then making elsewhere was a ruse for the Board to be able to say it did not racially discriminate, she did not know what he was making nor whether the Board's offer was in keeping with the administrator's salary guide. As above, the superintendent's testimony

*CHARGE G*

*REDUCTION IN FORCE TO HALF-TIME GUIDANCE COUNSELLOR  
APRIL 1979*

Petitioner and the superintendent agreed in testimony that the procedure for employed staff members to apply for other available positions in the district was by letter or memo. Petitioner knew the position of social studies teacher had been posted by the Board early in 1979, but said she didn't apply for it because she was confident she was going to get the vice principal's position, a matter she had discussed with the particular school principal concerned. The post was filled in August 1979 by a woman who, though qualified, had never taught in the district. Though certificated, petitioner herself had neither experience nor tenure in the category in Glen Rock.

Petitioner's reduction in force to half-time guidance counsellor was an economy measure taken by the Board at its April 18, 1979 meeting. Petitioner was indeed least senior guidance counsellor. The superintendent said to her at the time, according to petitioner, that every effort would be made to rehire those who were rified. The superintendent testified that in addition every effort would be made to reassign such personnel within their categories. *See, N.J.S.A. 18A:28-9; N.J.A.C. 6:3-1.10(b)(h)*. It was stipulated at hearing that though certificated as social studies teacher, petitioner made no claim to tenure or seniority in that category. Social studies teacher and guidance counsellor are different categories. *See, N.J.A.C. 6:3-1.10(k)*.

Petitioner said she was first hired in 1971 as the only black guidance counsellor because of racial unrest. This circumstance alone, she said, made her reduction to half-time unlawful even though she was least senior.

*PETITIONER'S MOTION AT HEARING TO AMEND PETITION TO  
CHARGE FAILURE TO EMPLOY HER AS SOCIAL STUDIES TEACHER  
AFTER REDUCTION TO HALF TIME GUIDANCE COUNSELLOR,  
EVEN THOUGH NON-DISCRIMINATORY, WAS VIOLATIVE OF  
N.J.S.A. 18A:28-9*

Petitioner's eleventh-hour motion to amend her petition to allege non-discriminatory violation of her seniority rights proposed to add, in effect, a new cause of action to her petition. Resolution of the motion before the administrative law judge, as is the practice in the Superior Court, raises questions of prejudice to respondent that lie within the reasoned discretion of the judge. *Cf., R. 4:9-2*. The Board resisted the motion but it sought no adjournment of the hearing to prepare to defend the assertion. Decision on the motion was reserved. I am satisfied now, however, that no prejudice will accrue to the Board's interests if it is granted, and it is hereby so

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**ORDERED.** Charge E was broadly controverted by the Board at prehearing and the Board's evidence furnishes reasonable basis for specific resolution of the issue. See, *Jersey City v. Hague*, 18 N.J. 584, 602 (1955).

*DISCUSSION*

It is unlawful discrimination for an employer to refuse to hire or promote because of race. N.J.S.A. 10:5-12(a). Employment discrimination because of race or any other invidious classification is peculiarly repugnant to this free society. Cf., *Peper v. Princeton University Board of Trustees*, supra, at 80 (1978). Acts of such discrimination are subtle and difficult to prove, more so, it is said, than any other forms. The higher the job level the more difficult the proof, as matters of personality and the subjective judgment of immediate supervisors become determinative. Nevertheless, nothing in the Law against Discrimination may be construed to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard or conditions. N.J.S.A. 10:5-2.1. And in disparate treatment cases, it is a proper judicial inquiry to see whether the failure to promote in place (or hire out of category) was the product of a legitimate business consideration rather than proscribed invidious discrimination. *Peper*, supra, at 80-84.

The order and allocation of proof in a private, non-class action challenging employment discrimination in New Jersey, as under Title VII cases, requires that complainant must carry the initial burden of establishing a *prima facie* case of racial discrimination. See, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), quoted in *Peper*, supra, at 82:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Assuming complainant meets these requirements, the burden shifts to respondent to come forward with a legitimate non-discriminatory reason for rejection. If respondent does satisfy the burden, complainant is permitted to come forward with evidence indicating the non-discriminatory reason was no more than a pretext to hide discriminatory activities or was discriminatorily applied. [Citations omitted].

In this case, petitioner's burden, as in *Peper*, was to demonstrate, firstly, that similarly situated non-blacks were promoted in place or hired out-of-category while she was not, and secondly, when the Board offered non-

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discriminatory reasons therefor, to come forward with evidence the Board's actions were sham and pretextual.

From careful analysis of the record and from especially careful consideration of the demeanor of all witnesses in testimony, I am well satisfied petitioner has not borne her burden of proof and persuasion in either respect on charges E, F and G. The Board's not choosing petitioner for either vice principalship and its reduction of petitioner to half-time guidance counsellor were for valid non-invidious reasons and were, therefore, non-discriminatory within the meaning of *N.J.S.A.* 5:10-2.1. It seems clear, moreover, despite petitioner's conclusory assertions to the contrary, that the Board's treatment of petitioner since her hire in 1971 has been even-handed both departmentally within the guidance department as well as in 1979 when she sought the vice principalship. As to that position, it is of more than little significance that the Board first selected a black man. On this record, one can draw no reasonable inference that such a choice was a pretext to deny the position to petitioner. I am satisfied lastly that the hiring and promotional practices in the district generally since petitioner's hire were in no way characterized by casual, systematic, patterned or institutionalized animus towards or visited upon petitioner because of race. (It should be noted again that despite stipulations petitioner sought no relief on charges A, B, C and D, she was nevertheless permitted to and did adduce testimony concerning those allegations as background to charges E, F and G.) The record shows the Board regularly recruited personnel from colleges and universities from which blacks might be expected to apply. *See, N.J.A.C.* 6:4-1.1, *et seq.* Its 1979 reductions in force that affected petitioner were because of declining enrollment and for reasons of economy. Petitioner's case did not overcome those proofs. *See, Sprague v. Glassboro State College*, 161 *N.J. Super.* 218, 225 (App. Div. 1978) which states, in a similar fact situation, that ". . . the record amply demonstrates an even-handed evaluation process that obliterates appellant's allegation." In *Peper, supra*, at 87 the Court said:

In evaluating the treatment of an employee in a particular case, we must be mindful that judicial intervention in the private employment context has a limited purpose. Antidiscrimination laws do not permit courts to make personnel decisions for employers. [See *N.J.S.A.* 18A:11-1; 27-4] They simply require that an employer's personnel decisions be based on criteria other than those proscribed by law. Our courts will be vigilant in enforcing rights against employment discrimination guaranteed by state and federal laws where an employer's conduct is shown to be violative thereof.

*And see, Kiss v. Community Affairs Dep't.*, 171 *N.J. Super.* 193, 201

(App. Div. 1979), where the court said broad discretion must be accorded an employer in exercising the right of fair selection under the Civil Service Rule of Three, a non-discriminatory selection mechanism not unlike that of the Board's selection committee here.

### CONCLUSIONS

Having in mind the testimony, briefs and exhibits herein and having heard arguments of counsel, I **FIND** and **DECLARE** as follows:

1. The foregoing discussion, to the extent of any mediate conclusions of fact, is adopted herein.

2. Mabel B. Perry, a black, is a certified, tenured guidance counsellor employed by the Board of Education of the Borough of Glen Rock since 1971.

3. In April 1979, the Board reduced her position of guidance counsellor to half-time for reasons of declining enrollment and budgetary economy.

4. Petitioner was least senior guidance counsellor at the time.

5. There is no credible evidence in the record to support the proposition the reduction in force was prompted or effected because of racial discrimination against petitioner, as in charge G.

6. Nor is there any evidence to suggest the reduction was violative of *N.J.S.A.* 18A:28-9; on the contrary, it was in accord therewith.

7. In June 1979 petitioner applied and was rejected for summer vice principalship and vice principalship for 1979-1980.

8. Neither such rejections, contrary to petitioner's allegations in charges E and F, were for reasons of race. 9. Consistently with *N.J.S.A.* 10:5-2.1, both such rejections for the vice principalship were for reasonable, non-invidious employment and/or promotional standards.

10. There is no evidence that any of the Board's actions in not hiring or promoting petitioner departmentally or out-of-category were sham or pretextual.

11. There is no evidence of any episodic or systematic animus towards petitioner in such instance by reason of her race.

12. Under *N.J.S.A.* 18A:28-10 and *N.J.A.C.* 6:31.10, upon her being reduced to half-time guidance counsellor, petitioner had no absolute legal right to be transferred out-of-category to a social studies teaching position, either half-time or full-time, in which she had no tenure. *Cf.*, *Newark Teachers Union, Local 481, et al v. Board of Education of Newark*, 1978 *S.L.D.* 229, and *N.J.S.A.* 6:3-1.10(b) and (h).

13. Even had she applied for such positions (she did not), her eligibility therefor would have been co-equal with all other qualified, untenured applicants.

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14. The Board's selection of another under the circumstances herein was a reasonable management measure and, as against petitioner, *damnum absque injuria*.

15. Petitioner has failed to sustain her burdens of proof and persuasion herein.

*CONCLUSION*

Accordingly, based on the foregoing, I **CONCLUDE** the petition of appeal herein, as amended and supplemented, should be and it is hereby **DISMISSED**.

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After reviewing this Initial Decision, the Commissioner of  
Education on May 12, 1981 issued the following Final  
Decision:

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.