

al sentence on the aggravated assault conviction. Defendant's record of prior delinquency is minimal and, in light of these circumstances, it would be grossly unjust to impose a custodial sentence or require probationary supervision.

So modified, the judgment of convictions is affirmed.



223 N.J.Super. 136

**Linda BASSETT, Petitioner-Respondent,
Cross-Appellant,**

v.

**BOARD OF EDUCATION OF the BOROUGH OF OAKLAND, BERGEN COUNTY, Respondent-Appellant,
Cross-Respondent.**

Superior Court of New Jersey,
Appellate Division.

Argued Feb. 9, 1988.

Decided Feb. 24, 1988.

Local school board appealed from State Board of Education's determination that part-time tenured teacher should be paid proportionately to full-time salary, and teacher cross-appealed from State Board's decision respecting calculation of her proportional salary and from denial of both pre and postjudgment interest. The Superior Court, Appellate Division, Pressler, P.J.A.D., held that: (1) State Board of Education did not err in requiring that teacher be paid proportionately to full-time salary; (2) teacher was entitled to one-sixth of full-time salary designated for her job level for every period she taught; (3) teacher was not entitled to prejudgment interest, and (4) teacher was entitled to postjudgment interest as equitable matter.

Affirmed in part, and calculation of salary and postjudgment interest modified.

1. Schools ⇄144(4)

Statute prohibiting reduction in compensation of tenured teachers required that full-time tenured teacher, who took leave of absence and upon return accepted reassignment to part-time position in same instructional area, be compensated proportionately to full-time salary and not substantially lesser hourly rate provided for in collective bargaining agreement. N.J.S.A. 18A:28-5.

2. Statutes ⇄219(9)

Since State Board of Education is agency ultimately charged by Legislature with implementation and enforcement of school laws, its statutory interpretation of school laws is entitled to considerable weight, particularly where its interpretation is not inconsistent with school laws and promotes school laws' purpose and intent.

3. Schools ⇄144(4)

Full-time tenured teacher, who took leave of absence and upon return accepted reassignment to part-time position in same instructional area, was entitled to one-sixth of full-time salary designated for her job level for every period she taught under statute prohibiting reduction in compensation of tenured teachers. N.J.S.A. 18A:28-5.

4. Schools ⇄145

Part-time tenured teacher, who should have been compensated proportionately to full-time salary and not paid at lesser hourly rate provided for in collective bargaining agreement, was not entitled to prejudgment interest against Board of Education because teacher failed to show that Board either deliberately violated statute prohibiting reduction in compensation of tenured teachers or acted in bad faith or from other improper motive in paying her at hourly rate. N.J.S.A. 18A:28-5.

5. Schools ⇄145

Part-time tenured teacher, who should have been compensated proportionately to full-time salary instead of being paid at lesser hourly rate provided for in collective bargaining agreement, was entitled as eq-

uitable matter to postjudgment interest from Board of Education on money due her of which she had been deprived and of which Board had use. *N.J.S.A. 18A:28-5*.

Stephen R. Fogarty, for respondent-appellant, cross-respondent (Fogarty & Hara, attorneys; Stephen R. Fogarty, Rutherford, of counsel and on the brief).

Gregory T. Syrek, for petitioner-respondent, cross-appellant (Bucceri & Pincus, attorneys; Gregory T. Syrek, Clifton, of counsel and on the brief).

W. Cary Edwards, Atty. Gen. of New Jersey, for respondent State Bd. of Educ. (Marlene Zuberger, Deputy Atty. Gen., Trenton, on the statement in lieu of brief).

Zazzali, Zazzali & Kroll, for amicus curiae New Jersey Educ. Ass'n (Paul L. Kleinbaum, Newark, on the brief).

Before Judges PRESSLER, BILDER and GIBSON.

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

This appeal involves a question arising under the school laws. *N.J.S.A. 18A:28-5* prohibits the reduction in compensation of tenured teachers except for inefficiency, incapacity or unbecoming conduct. Petitioner Linda Bassett was a full-time tenured teacher whose position was eliminated by reason of a reduction in force but who was offered and accepted reassignment to a part-time position in the same instructional area. The issue before us is whether *N.J.S.A. 18A:28-5* requires that she be compensated proportionally to the full-time salary to which she would have been entitled but for the reduction in force or whether she may be paid at the substantially lesser hourly rate provided for in the collective negotiation agreement for hourly-rate teachers.

Petitioner was first employed as a full-time reading teacher by the Oakland Board of Education (Oakland) in September 1974.

1. The record does not include a copy of the offer or reassignment notice by the Board. The denomination of the position is specified by the

She taught continuously until March 1980 when she commenced an approximately three-and-a-half year approved maternity leave of absence. By the time she started her leave, she had achieved tenure and obtained State Board certification as an art teacher, a reading teacher, a reading specialist, and a supervisor. Her salary for the 1979-1980 school year was commensurate with step 8½ of the teachers salary guide negotiated as part of the collective negotiation agreement. Prior to petitioner's anticipated return to her employment in September 1983, her full-time reading-teacher position was eliminated because of a reduction in force. She was accordingly offered and accepted reassignment as a "part-time Supplemental and Compensatory Education Teacher,"¹ to teach reading for specifically designated school periods each day. Although her initial assignment required her to teach only two fifty-minute periods daily, she was, almost immediately after the start of the 1983 school year, assigned to teach three such periods each day. That assignment continued with little change until February 17, 1984, when she was assigned to teach four periods daily. The regular school day has six periods.

The parties agree that had petitioner returned to full-time employment in September 1983 she would have been paid at step 9½ of the salary guide, receiving an annual compensation of \$24,699. The salary which she was actually paid was the hourly rate of \$10.80 in accordance with the collective negotiation agreement then in force which prescribed an hourly rate for "hourly rate teachers." Petitioner objected, claiming that unless her part-time position were compensated proportionally to the full-time position, she would suffer a salary reduction in violation of *N.J.S.A. 18A:28-5*. Oakland disagreed, and petitioner accordingly filed a verified petition seeking relief with the Commissioner of Education.

The matter proceeded as a contested case heard by an administrative law judge. Both he, the Commissioner, and ultimately

parties in the joint stipulation of fact submitted by them to the administrative law judge.

the State Board of Education concluded that payment of the hourly rate contravened petitioner's statutory protection as a tenured teacher against salary reduction. Oakland appeals from that determination. Petitioner cross-appeals from the State Board's directive respecting the manner of calculating her proportional salary and from the denial of both pre- and post-judgment interest. We affirm the State Board on the ruling appealed from by Oakland. With respect to the cross-appeal, we affirm the State Board's denial of prejudgment interest but reverse the denial of post-judgment interest and its directive respecting the calculation of petitioner's proportional entitlement.

We address first Oakland's contention that the State Board erred in requiring petitioner to be paid for her part-time teaching at the rate prescribed for full-time teachers at step 9½. We note first that the collective negotiation contract provides for three categories of teachers. Paragraph 4 of Article III prescribes an hourly rate for teachers who are therein designated as "hourly rate teachers" and sets a slightly higher rate for those teaching for four or more years than for those in their first three years. Paragraph 5 of Article III prescribes the rate for "part-time teachers," providing that

Part-time teachers who are compensated based on the attached salary guides * * * shall be compensated at the rate of ½ per teaching period per day and shall be paid on a pro-rata basis for all additional required time.

The salary guides referred to are those applicable to full-time teachers, the third category. We further note that the contract does not define either the category of hourly-rate teachers or the category of part-time teachers or the distinction between them. The only difference on the

2. In this respect the State Board disagreed with the Commissioner who had concluded that the disparate salaries for these two categories in the circumstances contravened the principle expressed by *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 63, 447 A.2d 140 (1982), that remedial teachers be accorded full rights and recognition as teaching staff members. He also concluded

face of the contract appears to be the salary to which each is entitled.

Oakland argues, in substance, that since petitioner's full-time position was eliminated, there was no impediment to its rehiring her as an hourly-rate teacher. It argues further that the parties to the collective negotiation agreement had the legal right to agree to different pay schedules for the hourly-rate and part-time categories. Hence, it contends, petitioner was accorded the full extent of her statutory right by being paid consistently with a valid contract. It asserts that any other result would violate the contract and impair the integrity of the negotiation process.

The State Board agreed that the separate categorization of hourly-rate and part-time teachers and the disparate salary schedules applicable to each does not, as a general proposition, contravene either the express provision or the intent of the school laws.² It held, however, that as applied to this petitioner, the hourly-rate payment constituted a reduction in compensation proscribed by *N.J.S.A. 18A:28-5*. It concluded, therefore, that since the statutory mandate prevails over inconsistent contractual provision, the hourly-rate prescription of the contract was unenforceable in this case. It reasoned as follows:

It is not disputed that Petitioner achieved tenure prior to commencing her leave of absence in 1980. We emphasize that upon her return to active employment, she was not "transferred" within the meaning of *N.J.S.A. 18A:28-6* from one tenurable position to another. Rather, she was reassigned within the same tenurable position. Prior to commencing her leave, she was employed under her instructional certificate, achieved tenure as a teacher and, upon her return, was reassigned within the same position. Therefore, by virtue of her status as a tenured teaching staff member, she had

that the disparate contractual salary scale for hourly-rate teachers contravened the recognition clause of the contract itself. We do not address this disagreement between the State Board and the Commissioner since the issue it involves is not material to the decision of this appeal.

statutory protection against reduction in her compensation. Since *N.J.S.A.* 18A:28-5 specifically mandates that the Petitioner's salary level be maintained, the Board was required to conform to the statutory requirement even if it was contractually bound by the provision in the collective negotiations agreement establishing a lesser rate of compensation for "hourly rate" teachers which was applicable to Petitioner's assignment for that year.

[1, 2] We are satisfied that the State Board's application of *N.J.S.A.* 18A:28-5 to the circumstances of this case accorded with statutory intent and was consistent with *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 447 *A.2d* 140 (1982), which not only extended tenure rights to remedial and supplemental teachers but also reaffirmed the principle that the Tenure Act, because of its remedial purpose and beneficent ends, must be liberally construed. Beyond that, we are satisfied that since the State Board is the agency ultimately charged by the Legislature with the implementation and enforcement of the school laws, its statutory interpretation is entitled to considerable weight, particularly since that interpretation was not inconsistent with the statute and promoted its purpose and intent. See, e.g., *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 478 *A.2d* 742 (1984); *Board of Educ. of Borough v. Board of Educ. of Tp.*, 204 *N.J. Super.* 508, 512, 499 *A.2d* 523 (App.Div.1985).

With respect to the cross-appeal, the basic dispute is the manner in which petitioner's part-time salary should be calculated in order that it be proportionally commensurate with the full-time salary to which she would have been entitled.³ The State Board directed that she be paid as an hourly-rate teacher but at a full-time teacher's rate. It therefore divided the full-time teacher's annual salary by the required number of annual teaching hours to reach an hourly rate of \$20.22, which it then multiplied by actual number of hours petitioner taught. It is petitioner's position,

3. As we understand the record, petitioner, during the course of subsequent administrative proceedings, did not challenge the conclusion of

concurrent in by the *amicus curiae*, that since the Tenure Act precludes her categorization for salary purposes as an hourly-rate teacher and since salary setting is the apparently sole purpose of the categorization, that categorization should not be utilized for any calculation purposes at all. She therefore argues that for compensation purposes she must be deemed a "part-time teacher" entitled under the contract to $\frac{1}{6}$ the comparable annual salary for each daily teaching period worked.

[3] We are persuaded that petitioner is correct in this assertion. The State Board held that she must be paid proportionately to a full-time teacher at step 9 $\frac{1}{2}$ in order not to suffer a salary reduction. The contract, as we have pointed out, defines a part-time teacher solely in terms of compensation, that is, a part-time teacher is one who by definition is paid on the basis of the full-time teacher's salary guide. The State Board itself used the salary guide as the starting point and analytical predicate of its own calculation, and we regard it as obvious that preservation of petitioner's salary level can be achieved only by reference to the salary guide. But since reference to the salary guide as the compensation determinant is the definitional essence of a part-time teacher, it necessarily follows, as a tautological matter, that petitioner must be paid as if she were a part-time teacher rather than an hourly-rate teacher. We therefore conclude that for the years in question, petitioner is entitled to $\frac{1}{6}$ of the full-time salary designated for her step for every period taught.

[4, 5] Finally, we address the question of interest. We concur in the Board's denial of prejudgment interest. Petitioner had not made a showing that Oakland either deliberately violated the statute or acted in bad faith or from other improper motive in paying her at the hourly rate. See *Bd. of Educ., City of Newark, Essex Cty. v. Levitt*, 197 *N.J. Super.* 239, 244, 484 *A.2d* 723 (App.Div.1984). See also *N.J.A.C.* 6:24-1-

the administrative law judge that in any event she would not be entitled to insurance "fringes." We accordingly do not address that issue.

18. We see no reason, however, to deprive petitioner of post-judgment interest. The conditions prescribed by that administrative rule were met, and although petitioner failed to make specific request therefor in her verified petition, she is entitled, as an equitable matter, to interest on the money due her to which she has been deprived and of which Oakland has had the use.

We affirm the State Board's determination that petitioner must be paid in proportion to a full-time teacher's salary at her appropriate step. We also affirm its denial of prejudgment interest. We modify the State Board's determination respecting calculation of petitioner's salary and post-judgment interest. If the parties are unable to agree within 30 days from the date hereof as to the amount of back pay to which petitioner is entitled under this opinion and as to the amount of post-judgment interest due, they shall submit their dispute to the Commissioner of Education. Jurisdiction is not retained.



223 N.J.Super. 145

STATE of New Jersey,
Plaintiff-Respondent,

v.

Julius C. LEWIS, Defendant-Appellant.

Superior Court of New Jersey,
Appellate Division.

Submitted Jan. 19, 1988.

Decided Feb. 24, 1988.

Defendant was convicted by the Superior Court, Law Division, Mercer County, of first-degree aggravated manslaughter, second-degree aggravated arson, six counts of second-degree aggravated assault, and one count of second-degree burglary, and defendant appealed. The Superior Court, Appellate Division, Ashbey, J.A.D., held that: (1) jury instructions did not unfairly

focus deliberations on greater offense of murder; (2) issuance of jury instruction regarding passion/provocation manslaughter was harmless error; (3) arson, assault and burglary counts did not merge with aggravated manslaughter; and (4) sentence imposed was not improper.

Affirmed.

1. Criminal Law \S 798

Jury instructions which required jury not to return verdict on lesser offense if it found that defendant was guilty of greater one did not unfairly focus jury's deliberations on greater offense of murder; judge instructed jury as to applicable law, and further, defendant was not found guilty of murder by jury.

2. Homicide \S 340(4)

Though jury instruction on issue of passion and provocation was improperly given in prosecution of defendant for fire-bombing apartment building which resulted in death of child, error was harmless; given fact that defendant was found guilty of aggravated manslaughter, jury was not confused by error in charge concerning passion and provocation.

3. Criminal Law \S 30

Crime of aggravated manslaughter did not merge with crime of aggravated arson or aggravated assaults; death of child was caused by defendant's reckless indifference to child's life when he set fire which cut off all avenues of escape, but defendant fire-bombed entire property purposely to injure different individual.

4. Criminal Law \S 1208.1(2)

Aggregate sentence imposed upon defendant of 50 years imprisonment with 25 years of parole ineligibility was not improper, though total sentence was greater than some of longest terms allowable for two most serious offenses; defendant received concurrent sentences on five out of nine convictions, and further, manslaughter victim's death occurred in especially heinous, cruel and depraved manner through fire-bombing. N.J.S.A. 2C:44-1, subd. a(1-3, 5, 6, 9).