



# New Jersey School Boards Association

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## FREQUENTLY ASKED QUESTIONS ABOUT NONRENEWALS AND RIFS (2017)

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**1. Each year, what action must a board take with respect to the contracts of its nontenured teaching staff?**

On or before May 15 in each year, every board of education must give to each nontenured teaching staff member (certificated employee) continuously employed by it since the preceding September 30 either:

- a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education; or
- b. A written notice that such employment will not be offered.<sup>1</sup>

**2. Each year, what action must a board take with respect to the contracts of its nontenured non-teaching staff?**

On or before May 15 in each year, a paraprofessional continuously employed since the preceding September 30 in a school district that receives funding under Title I of the federal Elementary and Secondary Education Act of 1965 shall receive either:

- a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education; or
- b. A written notice that such employment will not be offered.

“Paraprofessional” means an individual who is employed in a school district as a school aide or classroom aide who assists a teaching staff member with the supervision of pupil activities.<sup>2</sup>

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<sup>1</sup> N.J.S.A. 18A:27-10.

Notification to other non-teaching, non-certificated personnel is governed by individual contracts, collective bargaining agreements or board of education policy.

### 3. How does a board renew the contract of its nontenured staff?

A board of education may renew the employment contract of a certificated or noncertificated employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board.<sup>3</sup> The written offer of employment for nontenured teaching staff members and paraprofessionals must be made on or before May 15.<sup>4</sup>

A nontenured officer or employee who is not recommended for renewal by the chief school administrator is deemed nonrenewed. Before notifying the officer or employee of the nonrenewal, the chief school administrator must notify the board of the recommendation not to renew and the reasons for that recommendation.<sup>5</sup>

A tenure-eligible employee who is hired mid-year will often obtain tenure before May 15 in a given year. Boards of education must remain aware of the anniversary dates of nontenured staff, to avoid a situation where a staff member acquires tenure simply by inadvertent failure of the board to take appropriate and timely action. In calculating the date on which a staff member will acquire tenure, recent Commissioner rulings indicate that short term leaves of absence will be counted toward the statutory probationary period, unless the board can demonstrate that the absences have an adverse impact on the Board's ability to evaluate.<sup>6</sup>

Where a tenure-eligible employee would acquire tenure mid-year, and the employee is not provided a notice of nonrenewal in an earlier year, the employee's tenure will automatically accrue once the employee has served the statutorily- required period. If notice of nonrenewal has not been provided in an earlier year, the accrual of tenure may be avoided by invoking the termination clause in the individual's employment contract; however, mid-contract terminations may be subject to the board's grievance procedure if so required by the collective bargaining agreement.<sup>7</sup> It is recommended that the board involve board counsel as to the appropriate way to proceed.

For teaching staff employed after the 2012-2013 academic year, the board's inadvertent failure to provide notice of nonrenewal by the anniversary date of

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<sup>2</sup> N.J.S.A. 18A:27-10.2.

<sup>3</sup> N.J.S.A. 18A:27-4.1(a).

<sup>4</sup> N.J.S.A. 18A:27-10.

<sup>5</sup> N.J.S.A. 18A:27-4.1(b).

<sup>6</sup> Kletzkin v. Spotswood Bd. of Ed., 136 N.J. 275 (1994); Jarmond v. Elizabeth Bd. of Ed., Comm'r. Sept. 8, 2009. Mendez-Azzollini, Commr Aug. 26, 2009, on remand, Mendez-Azzollini v. Irvington Bd of Ed., Commissioner 2010:April 23; Kowalsky v. State Operated School District of Newark, Dkt. No. A-0261-13T3 (App. Div. May 8, 2015) certif. den. (October 5, 2015); Kolodziej v. Bd. of Ed., 436 N.J. Super. 546 (App. Div. 2014), certif. den. 220 N.J. 100 (2014).

<sup>7</sup> Mount Holly Township Board of Ed. v. Mount Holly Twp. Educ. Ass'n., 199 N.J. 310 (2009); Northvale Board of Education v. Northvale Ed. Ass'n., 192 N.J. 501 (2007).

employment will not always result in tenure acquisition. The TEACHNJ Act, L.2012 c. 26, which changes the number of years of service from three to four for teachers hired for the 2012-2013 academic year and after,<sup>8</sup> also requires that in order to acquire tenure, such teachers complete a district mentorship program during the initial year of employment and receive a rating of effective or highly effective in two annual summative evaluations within the first three years of employment after the initial year of employment in which the teacher completes the district mentorship program. There are similar provisions for principals, assistant principals, and vice-principals. Therefore, it would seem that where the district inadvertently fails to give a teaching staff member employed after the 2012-2013 academic year notice of nonrenewal by his or her fifth anniversary date, tenure would not automatically attach unless these other conditions were also met. However, if those conditions involving mentoring and evaluation are met, the board's failure to provide notice of nonrenewal prior to the applicable date will result in the inadvertent acquisition of tenure.

In addition, in a recent decision, the Commissioner of Education determined that it would "behoove" board of education provide written notice of tenure status to nontenured staff serving in a replacement capacity, so as to clarify any tenure expectations. In Bridgewater-Raritan Educ. Assn. v. Bridgewater-Raritan Bd. of Educ., a nontenured teacher ultimately obtained tenure where the board could not demonstrate that they informed the teacher that she was serving in the capacity of a replacement teacher, and was thus ineligible to accrue eligibility toward tenure. The Commissioner held that teachers serving in a replacement capacity had a right to be notified of that replacement status so as to clarify the lack any tenure expectation in such a position.

**4. May the board renew the contract without the CSA's recommendation to renew?**

Generally, no. A board of education may renew the employment contract of a certificated or noncertificated employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. (However, see subsequent discussion regarding the informal appearance before the board known as the "Donaldson hearing," after which the board may override the chief school administrator's (CSA's) nonrenewal recommendation and reemploy without the CSA's recommendation.)

Renewal requires both the CSA recommendation as well as the board's vote. Therefore, even where the CSA does recommend renewal, the board may vote against renewal, whereupon the teacher's contract will be nonrenewed. However, the board may not withhold its approval for arbitrary and capricious reasons.<sup>9</sup>

**5. Does the renewal of the contract of a nontenured school administrator require 30 days' notice and a public hearing under N.J.S.A. 18A:11-11?**

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<sup>8</sup> These teachers can satisfy the four year requirement in three ways:

- A. Service for "four consecutive calendar years;" or
- B. Service for "four consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- C. Service for "the equivalent of more than four academic years within a period of any five consecutive academic years."

<sup>9</sup> N.J.S.A. 18A:27-4.1(a).

Yes, as to certain non-tenured school administrators.

The School District Accountability Act, P.L. 2007, c.53, established N.J.S.A. 18A:11-11 which provides:

*A board of education shall not renegotiate, extend, amend, or otherwise alter the terms of a contract with a superintendent of schools, assistant superintendent of schools, or school business administrator, unless notice is provided to the public at least 30 days prior to the scheduled action by the board. The board shall also hold a public hearing and shall not take any action on the matter until the hearing has been held. The board shall provide the public with at least 10 days' notice of the public hearing.*

The public notice and public hearing required pursuant to N.J.S.A. 18A:11-11 is applicable to a board of education that renegotiates, extends, amends, or otherwise alters the terms of an existing contract with a superintendent of schools, deputy superintendent, assistant superintendent, or school business administrator. It does not apply to new contracts, which includes contracts that replace expired contracts for existing employees in one of these positions, whether tenured or not tenured. Nothing precludes a board of education from issuing a public notice and/or holding a public hearing on new contracts, including new contracts that replace expired contracts for existing tenured and nontenured employees.<sup>10</sup>

Also, please take note that other legislation enacted in 2007 (P.L. 2007, c.63) amended N.J.S.A. 18A:7-8 to provide in (j) that any contracts of superintendents, assistant superintendents, and school business administrators, executed after July 1, 2007 (the date by which new Executive County Superintendents were expected to be in place), must be reviewed and approved by the Executive County Superintendents prior to execution of those contracts. The Executive County Superintendent must review contracts for interim and acting administrators serving in these positions, as well. The Executive County Superintendent must review new contracts, as well as renegotiations, extensions, amendments, or other alterations of contracts that were already approved, and contract extensions where the terms were not included in the original employment contract.<sup>11</sup>

The contract review and approval shall take place prior to any required public notice and hearing pursuant to N.J.S.A. 18A:11-11 and prior to the board approval and execution of those contracts to ensure compliance with all applicable laws, including, but not limited to, N.J.S.A. 18A:30-3.5, 18A:30-9, 18A:17-15.1, 18A:11-12, and payment of the "maximum salary amount" according to salary cap provisions contained in N.J.A.C. 6A:23A-1.2.<sup>12</sup>

**6. What happens if the board does not provide notice of nonrenewal by May 15?**

If a board of education fails to give to any nontenured teaching staff member (any certificated staff member) a notice that employment will not be offered (or fails to

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<sup>10</sup> N.J.A.C. 6A:23A-3.1(c)(1)

<sup>11</sup> N.J.A.C. 6A:23A-3.1(a)

<sup>12</sup> N.J.A.C. 6A:23A-3.1(c).

give a written offer of contract for employment for the next succeeding year), the board of education will be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.<sup>13</sup> If the teaching staff member desires to accept such employment, he must notify the board of education of such acceptance in writing on or before June 1.<sup>14</sup>

**7. If an employee accepts employment by June 1, must the board provide the teacher with a contract for the subsequent year?**

Yes, once the employee submits a timely written acceptance, the employee must be provided a contract, even if the board unwittingly created an offer by missing the May 15 deadline. The law states that if the teaching staff member desires to accept such employment and notifies the board of such acceptance in writing on or before June 1, “such employment shall continue as provided for herein.”<sup>15</sup>

**8. Once an employee accepts an offer of employment by June 1, can the board end the contract?**

Just like with any nontenured employee under contract, the board may terminate the contract, subject to the terms and conditions of the contract. A board may be responsible to pay contractual damages to the employee for terminating a new contract—usually 30 or 60 days’ advance notice of termination is required by contract. The case law is inconsistent with regard to whether the 30 or 60-day notice period starts to run immediately from the day of the notice of termination and continues to run over the summer (in which case a board’s obligation to pay damages may be reduced or eliminated) or whether it only starts to run from the beginning of the new contract in September (so that damages for the full 30 or 60-day period will be owed). Some more recent cases indicate that so long as notice of nonrenewal is provided by July 1 for contracts containing 60-days’ notice there is no entitlement to 60 days’ pay.<sup>16</sup> The Commissioner has more recently determined that when 60 days notice was given on July 24 and ended September 22, the petitioner was not entitled to salary for 38 of the 60 days because she was on a ten month contract.<sup>17</sup>

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<sup>13</sup> N.J.S.A. 18A:27-11.

<sup>14</sup> N.J.S.A. 18A:27-12.

<sup>15</sup> N.J.S.A. 18A:27-12

<sup>16</sup> See, Armstrong v. East Brunswick, 1975 S.L.D. 117, aff’d 1976 S.L.D. 1104 (App. Div.) which found that the summer recess does not count towards the 60 days’ notice. For example, a board would still owe 60 days’ pay even if a board provides notice on July 1 – 60 days prior the start of the school year. See, also, Klein v. Leonia Bd. of Ed., 1981 S.L.D. 1156. But see, Delgado v. Union City Bd. of Ed., 93 N.J.A.R.2d (EDU) 744, aff’d St. Bd. 94 N.J.A.R.2d (EDU) 277 and Romanoski v. Springfield Bd. of Ed., 1991 S.L.D. 1369, relying on NJEA v. Essex Cty Ed Services Comm’n v. Board of Trustees TPAF, 1984 S.L.D. 420, aff’d St. Bd. 1985 S.L.D. 1976; aff’d App. Div. 4/30/1986, for the proposition that so long as notice of nonrenewal is provided by July 1 for contracts containing 60-days’ notice there is no entitlement to 60 days’ pay.

<sup>17</sup> Simons v. Hamilton Twp. Bd. of Ed., Mercer County, Commissioner, April 24, 2006.

**9. If the board terminates a new contract prior to the start of the fifth year of employment, and pays damages, will the employee earn tenure?**

No. An employee whose contract is terminated before he begins working in the fifth year of employment will not acquire tenure merely as a result of a damage payment that coincides with the new contract. Tenure only accrues if the employee is actually working on the first day of the fifth year. The discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure.<sup>18</sup>

**10. What happens if the board misses the May 15 deadline, but the employee fails to accept employment by June 1?**

Where an employee fails to accept an offer of employment by June 1 the employee is deemed to have rejected the board's offer of employment. This applies both where an employee has received an explicit offer of employment by May 15, as well where an employee hears nothing from the board by May 15.<sup>19</sup> If the employee does not accept by June 1, the offer lapses. It is advisable for the board to let the employee know his status in writing as soon as possible. Based on the statutory language, the board should have no obligation to pay any contractual damages in such a case; however, a board of education should consult with its board attorney with respect to a board's obligation in such a situation.

**11. What is to prevent an employee from purposely avoiding receipt of the notice of nonrenewal, and then "accepting" employment by June 1?**

In Moses, (10/13/81) the Commissioner found that an employee's deliberate scheming served to frustrate the board's intention to serve the employee with timely notice. The employee failed to claim the mail 3 times, left no forwarding address, and then "accepted" employment in writing by June 1. The Commissioner held that his June 1 acceptance was not binding and the board's notice of nonrenewal was deemed complete when deposited in the post office.<sup>20</sup>

**12. May a board modify the May 15 date for notice of nonrenewal, through collective negotiations?**

The parties to the collective bargaining agreement may agree to advance the date to an earlier one (e.g., April 30) but not to a later date. If the collective bargaining

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<sup>18</sup> Canfield v. Pine Hill Bd. of Ed., 51 N.J. (1968) (judgment below reversed for the reasons expressed in the dissenting opinion of Judge Gaulkin in the Appellate Division, 97 N.J. Super. 483) ("tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure.") See also, Picogna v. Bd. of Ed., 143 N.J. 391 (1996); Winston v. Jersey City School District, 94 N.J.A.R.2d (EDU) 41, appeal dismissed 94 N.J.A.R.2d (EDU) 320.

<sup>19</sup> See, Lydon v. Hillsborough Bd. of Ed., 1985 S.L.D. 1426 (Sept. 19), aff'd St. Bd. 1986 S.L.D. 3085.

<sup>20</sup> Moses v. Newark Bd. of Ed., 1981 S.L.D. Oct. 13. See also White-Stevens v. Rumson-Fair Haven Bd. of Ed., 1987 S.L.D. Jan 16, where the board's failure to provide timely notice was a mere technical violation as the teacher had personal knowledge of the nonrenewal, and the board had substantially complied.

agreement or individual employment contract indicates an earlier date, the board should make sure that notice is provided by that date; if the board misses the contractual date for nonrenewal and the employee deems this to be an offer, and responds with a letter of acceptance, it is likely that a contract will have been formed. A board's subsequent attempt to nonrenew could be deemed to constitute the termination of a new contract and the employee will be entitled to damages. The notice of termination clause in the contract would control the level of damages.

**13. What rights does an employee have after being nonrenewed?**

In a nutshell, the employee has 1) upon request, a right to a written statement of reasons for nonrenewal, and 2) upon request, a right to an informal appearance before the board, often called a “*Donaldson* hearing” (named after a school law decision from the North Wildwood Board of Education).

Note that it is the employee who must act first, in order to activate these rights. Within 15 days of notification that employee will not be offered a new contract, the employee may request in writing a statement of the reasons for that nonrenewal decision. The board must provide the statement of reasons for nonrenewal within 30 days of receiving the request.<sup>21</sup>

Within 10 calendar days of receiving the board's statement of reasons, the employee may request in writing an informal appearance before the board of education.<sup>22</sup> The board must schedule the informal appearance within 30 calendar days from the time the employee received the board of education's statement of reasons.<sup>23</sup>

**14. Do these provisions for nonrenewal apply to the renewal of noncertificated staff?**

As with teaching staff members, a noncertificated employee who is not recommended for renewal by the chief school administrator is deemed nonrenewed.

The May 15 deadline for notification does not apply by statute to noncertificated staff except for paraprofessionals as previously stated; however, boards may establish through collective negotiations a deadline for support staff, custodians and other noncertificated staff.

As with certificated staff, prior to notifying the employee of the nonrenewal, the chief school administrator must notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. When a noncertificated staff member is not renewed, the employee has the right to request a written statement of reasons for nonrenewal

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<sup>21</sup> N.J.S.A. 18A:27-3.2.

<sup>22</sup> N.J.S.A. 18A:27-4.1; N.J.A.C. 6A:10-9.1; *Donaldson v. North Wildwood Bd. of Ed.*, 65 N.J. 236 (1974). See also, *Hicks v. Pemberton Bd. of Ed.*, 1975 S.L.D. 332.

<sup>23</sup> Id.



pursuant to N.J.S.A. 18A:27-3.2 and to a *Donaldson* hearing (an informal appearance before the board.)<sup>24</sup>

These provisions do not apply to the appointment, transfer, removal, renewal or nonrenewal of a person who is a treasurer of school moneys, election officer, board auditor, board attorney or board secretary who does not perform business administration functions.<sup>25</sup>

**15. What happens at the informal appearance (*Donaldson* hearing)?**

The hearing is not an adversarial proceeding. The purpose of such an appearance is to permit the staff member to convince the members of the board to offer reemployment.<sup>26</sup> In a situation where employee was deemed nonrenewed because the superintendent had not recommended renewal, the board has the ability to overrule the superintendent's recommendation after the *Donaldson* hearing.<sup>27</sup> This is the only situation in which an employee can be appointed without the recommendation of the chief school administrator.

The proceeding is not intended to be protracted, and the board is required to use its discretion in determining a reasonable length of time of the proceeding, depending upon the specific circumstances in each instance. The purpose of the appearance is not for the board to prove its reasons, but rather to allow the employee to convince the board members that they have made an incorrect determination by not offering reemployment. The employee will probably try to refute the board's reasons and possibly present an assessment of his/her value to the school system.

The board must provide adequate written notice to the employee regarding the date and time of the informal appearance. The employee may be represented by counsel or one individual of his or her own choosing. The informal appearance before the board should be conducted in closed session as a personnel matter, in accordance with N.J.S.A. 10:4-12(b)(8). If the employee requests that the hearing be conducted in public, and that the employment be discussed in public, the board must do so.<sup>28</sup>

The employee may present witnesses on his or her behalf, but they do not have to give their testimony under oath. The code states that the board is not permitted to cross-examine the employee's witnesses. Should the hearing be held in closed session, witnesses shall be called into the meeting to address the board one at a time and excused from the meeting after making their statements. The procedure is not intended to place into question the credibility of the witnesses, but to avoid confrontations and insure an orderly proceeding.

**16. May the board offer a contract even if the CSA did not recommend renewal?**

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<sup>24</sup> N.J.S.A. 18A:27-3.2, N.J.A.C. 6A:10-9.1; See, [Ruby v. Piscataway Bd. of Ed.](#), Commr, 2007: Jan 22.

<sup>25</sup> N.J.S.A. 18A:27-4.1(c).

<sup>26</sup> N.J.S.A. 18A:27-4.1; N.J.A.C. 6A:10-9.1(c).

<sup>27</sup> Velasquez v. Brielle Bd. of Ed., St. Bd. 1997 S.L.D. (Aug. 6).

<sup>28</sup> N.J.A.C. 6A:10-9.1(c)-(h), Payne v. Willingboro, 96 N.J.A.R.2d (EDU)1024.

Yes, in one circumstance. After the *Donaldson* hearing, the informal appearance before the board, the board can override the CSA's recommendation not to renew, and can vote to offer the employee a contract. The motion to offer a contract must pass by a recorded roll call majority vote of the full membership of the board. For example, on a nine member board, five votes are required regardless of the number of board members in attendance. If the motion does not pass, the CSA's recommendation not to renew still holds and the employee is deemed nonrenewed.

The board should be careful not to couch its motion as one to affirm the CSA's recommendation not to renew. A vote on such a motion can be problematic. If a motion to nonrenew is defeated, the employee is not necessarily renewed, as renewal requires an affirmative recorded roll call majority vote of the full membership of the board. Even though the board's intent would appear to be in favor of renewal where an affirmative vote to renew does not pass, from a legal perspective the CSA's recommendation not to renew must stand.

**17. Must the board take a vote after the informal appearance (*Donaldson* hearing)?**

No, the board is not obligated to take a vote after the informal appearance (*Donaldson* hearing). If the board does not vote, and the CSA has made a recommendation not to renew, the CSA's recommendation not to renew will stand. Similarly, if the employee was not renewed because of the board's failure to approve renewal despite the CSA's recommendation to renew, and the board does not vote after the *Donaldson* Hearing, the decision not to renew will stand.<sup>29</sup>

**18. What happens after the informal appearance (*Donaldson* hearing)?**

Within three days following the informal appearance (*Donaldson* hearing), the board must notify the teacher in writing of its final determination. The board may delegate such notification to its chief school administrator or board secretary.<sup>30</sup>

**19. May a staff member challenge a board's decision to nonrenew the contract?**

Yes. However, as long as the reason for nonrenewal is not arbitrary or capricious or unreasonable, or discriminatory the nonrenewal is both valid and unassailable. Permitted reasons include performance, absenteeism and conduct. Improper reasons for nonrenewal could include retaliation for a workers compensation claim, or discrimination based on age, sex race, religion, disability, national origin, ethnic background. The avenue for a teaching staff member to challenge a nonrenewal is before the Commissioner of Education. Where discrimination is the issue, the DOE has concurrent jurisdiction with the Division of Civil Rights.

A board of education is not required to offer a contract to a teacher whose evaluations have been "good" or "excellent"; there are equally good reasons other than classroom performance for which a board may conclude not to grant

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<sup>29</sup> Velasquez v. Brielle Bd. of Ed., St. Bd. 1997 S.L.D. (Aug. 6).

<sup>30</sup> N.J.A.C. 6A:10-9.1(i).

tenure.<sup>31</sup> A board's policy of giving tenure only to excellent teachers as opposed to satisfactory teachers has been upheld.<sup>32</sup>

**20. Is the board's decision to nonrenew staff reviewable through arbitration?**

Teachers: PERC has held that decisions to not renew a nontenured teacher cannot be submitted to binding arbitration.<sup>33</sup> Contrast that to a board's decision to terminate a nontenured teacher mid-contract, which could be arbitrable depending on the language of the collective bargaining agreement. (See question 3 above.)

Noncertificated staff: The question of whether a noncertificated staff member may arbitrate a board's decision to nonrenew was addressed by the New Jersey Supreme Court in a matter concerning custodians.<sup>34</sup> The Court made it clear that a board of education has the statutory right to renew, or not, a fixed-term employee for non-arbitrary and non-capricious reasons without being subject to review of that decision by an arbitrator. However, if the board explicitly waives its statutory right to renew with clear and unmistakable language under the terms of the collective negotiations agreement, then the matter may be subject to arbitration under the grievance procedure.<sup>35</sup> (Note that N.J.S.A. 34:13A-5.3 provides for a presumption in favor of arbitration if it is subject to grievance.)

**21. What is a RIF?**

A RIF is a Reduction-in-Force made to reduce the number of employee positions in a district.

**22. Can any position in a district be subject to a RIF?**

Yes, although there may be slightly different procedures depending on the type of position being eliminated. For instance, the amount of notice that must be provided to RIF a custodian might be different than that required to RIF a teaching staff member, depending on procedures that may have been contractually established. See question 27 as to necessary notice for employees. However, certain conditions attach to the RIF of the child study team.<sup>36</sup> A board of education may RIF an entire child study team, but may outsource only to other public sector providers such as other school districts, county special services school districts or county educational services commissions. Private providers may be used for the overflow but cannot replace the school district child study team (CST).

**23. What standards govern the RIF of teaching staff members?**

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<sup>31</sup> Daly v. Winslow Twp. Bd. of Ed., 97 N.J.A.R.2d (EDU) 18.

<sup>32</sup> Hansen v. Red Bank Borough Bd. of Ed., (85:513), aff'd St. Bd. (85:523); Carney v. Montclair Town Bd. of Ed., (89:2560), aff'd St. Bd. (90:1722).

<sup>33</sup> Englewood Bd. of Ed., PERC No. 9-78, 8 NJPER 3040; Long Branch Board of Education, PERC No. 9-79, 8 NJPER 304.

<sup>34</sup> Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004).

<sup>35</sup> Mount Holly Township Bd. of Ed. v. Mount Holly Twp. Ed. Assn., 199 N.J. 310 (2009).

<sup>36</sup> Bloomfield Ed. Assn. v. Bloomfield Bd. of Ed., Dkt. No. EDU-18705-13, Final Decision (Dec. 18, 2015)

Boards may reduce teaching staff members for reasons of economy, reduction in pupils, change in administrative or supervisory organization or other good cause.<sup>37</sup> While the statute refers to teaching staff members, it has been applied to noncertificated staff.<sup>38</sup>

When it is determined that a RIF will take place, the board must determine the seniority of any tenured teaching staff members and notify them of their seniority status. N.J.S.A. 18A:28-11.

When a board reduces teaching staff members in a RIF, it must first eliminate nontenured staff in the position prior to eliminating tenured staff. When a board eliminates tenured teaching staff, the decision of which staff members are to be RIF'd is accomplished on the basis of seniority. Teaching staff members who have less seniority are reduced before those with greater seniority.

Often, the job of determining the seniority and tenure rights of teaching staff members is a complicated task. A tenured employee who is subject to a RIF, and who has no immediate seniority claim, may have an immediate tenure entitlement ("bumping" right) to a position currently held by a nontenured person, if the tenured teaching staff member has tenure in that other position and the appropriate endorsements to serve.<sup>39</sup>

If the tenured employee has past service in other seniority categories, he/she may have a seniority entitlement against another tenured staff member in the other category of employment. Personnel Administrators should acquire as much information as possible about each staff member's employment history to make these determinations of tenure and seniority rights. Consultation with board counsel is advisable.

**24. Does a district have any responsibility to those eliminated staff once the RIF is completed?**

Yes. RIF'd teaching staff (certificated) members and tenured custodian staff are placed on a preferred eligible list for recall, in order of seniority, should a position become available in the future.<sup>40</sup> The list is sometimes also referred to as a recall list, or seniority list.

A RIF'd teaching staff member who served in another seniority category (or categories) in the past, may have a seniority right to a position in a former

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<sup>37</sup> N.J.S.A. 18A:28-9.

<sup>38</sup> Ferronto v. Weymouth Bd. of Ed., Commissioner August 11, 2005.

<sup>39</sup> Capodilupo v. West Orange Bd. of Ed., 1985 S.L.D. 554, rev'd St. Bd. 1986 S.L.D. 3010, aff'd 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987). RIF'd tenured secondary physical education teacher entitled to reinstatement to elementary physical education position held by nontenured teachers; Bednar v. Westwood Bd. of Ed., 1985 S.L.D. 627, aff'd St. Bd. 1986 S.L.D. 2993, rev'd and remanded 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). RIF'd tenured elementary art teacher entitled to secondary art position held by experienced nontenured teacher; Ellicott v. Frankford Bd. of Ed., 1989 S.L.D. 2244, rev'd St. Bd. 1990 S.L.D. 1714, aff'd 251 N.J. Super. 842 (App. Div. 1991). Tenure acquired in "Educational Services". Tenure rights extend to all endorsements held under the certificate. Tenured Speech Correctionist entitled to LDTC position.

<sup>40</sup> N.J.S.A. 18A:28-12, N.J.S.A. 18A:17-4.

category; if not, the member will also be placed upon the preferred eligible lists for the category (or categories) of former employment.<sup>41</sup>

Responsibility to recall non-certificated staff members is determined through the collective bargaining agreement, individual contract or board of education policy.

**25. Which staff members have seniority rights?**

Teaching staff members and custodians have seniority rights by statute and administrative code.<sup>42</sup> Seniority rights can also be given to secretaries, clerks and others through the collective bargaining agreement, individual contract or board policy.

**26. Must the board of education have the recommendation of its CSA in order to effectuate a RIF?**

There is no statute that specifically requires the recommendation of the CSA in order to carry out a RIF, unlike other employment decisions. See N.J.S.A. 18A:27-4.1. However, the Commissioner has overturned RIFs as arbitrary and capricious where the CSA was not consulted.<sup>43</sup>

**27. How much notice must be given to employees prior to their RIF?**

There is no statute or regulation mandating the amount of notice to which an employee is entitled. However, the amount of notice for a RIF is a negotiable term and condition of employment. Boards should consult their collective bargaining agreements and policies to determine the amount of notice needed. If the agreement is silent, the notice applicable to termination of nontenured staff may apply.<sup>44</sup>

**28. Can a district RIFs its janitorial staff?**

Yes. There is a specific statute governing RIFs of tenured janitors which requires that those who are eliminated be placed on a preferred eligibility list and offered reemployment based on their seniority in the district. The law also makes it clear that janitors shall not be RIF'd because of their residence, age, sex, race, religion or political affiliation.<sup>45</sup>

**29. If a board is considering a RIF, must it do so in closed or open session under the Sunshine Law?**

There is no specific statutory or regulatory guidance on this particular issue. Case law has held that a reorganization plan that affects the employment of staff, is a

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<sup>41</sup> N.J.A.C. 6A:32-5.1(i), (j) and (k).

<sup>42</sup> N.J.S.A. 18A:28-12; N.J.S.A. 18A:17-4. N.J.A.C. 6A:32-5.1.

<sup>43</sup> Primka v. Jamesburg Bd. of Ed., 93 N.J.A.R.2d (EDU) 91, aff'd State Board; 93 N.J.A.R.2d (EDU) 94, aff'd App. Div., unpublished opinion Dkt. #A-2427-92T3 (Jan. 18, 1994).

<sup>44</sup> Old Bridge Teachers Assn. v. Old Bridge Bd. of Ed., 98 N.J. 523 (1985).

<sup>45</sup> N.J.S.A. 18A:17-4.

matter of public concern and deserves to be discussed and decided in public.<sup>46</sup> Other cases have held that a discussion of whether or not to RIF is properly held in public session, while the discussion of the individuals specifically affected by the RIF was properly held in closed session.<sup>47</sup> Boards are urged to consult with their board attorneys concerning this issue.

**30. How is seniority calculated for teaching staff members?**

Seniority is determined by the number of academic or calendar years of employment, or fraction thereof, in a district in specific categories of employment. For purposes of calculating seniority entitlement, there is no distinction between academic years and calendar years. N.J.A.C. 6A:32-5.1(f).

Whenever a teacher moves from one category to another, all periods of employment are credited to, or tacked on to, the amount of seniority in all categories in which the teacher was previously employed.<sup>48</sup> The specific categories are listed in the administrative code.<sup>49</sup>

When a teacher holds employment simultaneously under two or more subject area endorsements or in two or more categories, seniority is counted in all subject area endorsements and categories.<sup>50</sup>

**31. Do leaves of absence count toward seniority?**

Yes, to an extent. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward seniority. All other unpaid absences or leaves of absence (see military exception below) shall not receive seniority credit.<sup>51</sup>

**32. Does service in the uniformed services count toward seniority?**

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<sup>46</sup> Mann v. Cherry Hill Bd. of Ed., 1987 S.L.D. 1506, aff'd St. Bd. 1987 S.L.D. 1522.

<sup>47</sup> Spizziri v. West Paterson Bd. of Ed., No. 58472 (Passaic Cty. Ct. June 10, 1976).

<sup>48</sup> N.J.A.C. 6A:32-5.1(b); N.J.A.C. 6A:32-5.1(h).

<sup>49</sup> The seniority categories listed in N.J.A.C. 6A:32-5.1(1) are: 1. Superintendent of schools; 2. Assistant superintendent (each title a separate category); 3. Director (each title is a separate category); 4. High school principal; 5. Adult high school principal; 6. Alternative school principal; 7. Vocational school principal; 8. Junior high school principal; 9. Elementary principal; 10. Supervisor (each title is a separate category); 11. High school vice principal or assistant principal; 12. Adult high school vice principal or assistant principal; 13. Alternate school vice principal or assistant principal; 14. Junior high school vice principal or assistant principal; 15. Elementary school vice principal or assistant principal; 16. Vocational school vice principal or assistant principal; 17. Secondary (within subject area endorsements in which person has served); 18. Elementary; 19. Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification pursuant to N.J.A.C. 6A:9.

<sup>50</sup> N.J.A.C. 6A:32-5.1(f).

<sup>51</sup> N.J.A.C. 6A:32-5.1(b). Note that the [Family and Medical Leave Act](#) does not entitle an employee to the accrual of seniority during periods of leave. See 29 U.S.C. 2614(3).

Yes. Certain military service does count toward seniority.<sup>52</sup> Under state law, employees can only get credit for up to four years of military service. Federal law also requires that eligible employees who return to civilian employment must be reinstated with the seniority rights and benefits they would have obtained had they remained continuously employed by their civilian employer. Unlike State law, federal law places no cap on the number of years of military service that may be credited for seniority.<sup>53</sup> Boards should consult with their board attorneys concerning the inconsistency in these laws.

**33. How is part-time service counted for purposes of seniority?**

Part-time service is pro-rated. In other words, if you have a tenured 10-month employee who works ½ time for a year, the employee will be credited with 5 months of seniority for that year.<sup>54</sup>

**34. If a tenured staff member is RIF'd, how long does the staff member's name remain on the preferred eligible list for recall?**

The employee remains on the preferred eligible list for recall for an indefinite time period.<sup>55</sup> If the employee is offered a position in which the employee is entitled on the basis of seniority and declines the position the employee is removed from the preferred eligible list. While it would appear that similar removal would occur if an employee were offered a position on the basis of a tenure entitlement and refused the position, there is no definitive case law on that topic.

**35. What happens if there are two people on the recall list with equal seniority?**

The board has the discretion to employ through policy, a method to break the tie, such as a lottery or use of certain policy-based criteria.<sup>56</sup>

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<sup>52</sup> N.J.S.A. 18A:28-11.1, 18A:28-12.

<sup>53</sup> Uniformed Services Employment and Reemployment Rights Act (**USERRA**), [38 USCS § 4301 et seq.](#) See particularly, [38 U.S.C. 4316\(a\)](#).

<sup>54</sup> South Brunswick Bd. of Ed. v. Craig, 1982 S.L.D. (July 1), aff'd St. Bd., 1983 S.L.D. (May 4).

<sup>55</sup> Bodine v. Burlington Bd. of Ed., 1989 S.L.D. 1053, aff'd St. Bd. 1989 S.L.D. 1064.

<sup>56</sup> Mann v. Cherry Hill Bd. of Ed., 1987 S.L.D. 1506, aff'd St. Bd. 1987 S.L.D. 1522, aff'd App. Div. Dkt. #A-2695-87T1, June 7, 1990.