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## 2007 FREQUENTLY ASKED QUESTIONS ABOUT NON-RENEWALS AND RIFS

**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” 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. 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. The written offer of employment must be made on or before May 15.

Nothing contained in this document should be construed as legal advice. This document is for informational purposes only. Please consult your board attorney for legal advice.

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

**3. May the board renew the contract without the CSA’s recommendation to renew?**

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 *Donaldson* hearing, after which the board may override the CSA’s recommendation.)

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>2</sup>

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.

**4. Does the May 15 deadline apply to renewals of the contracts of nontenured administrators?**

Yes, since administrators such as principals, business administrators, and assistant superintendents, fall within the statutory definition of “teaching staff members,” they must be given appropriate notice of nonrenewal by May 15. However, the May 15 deadline does not apply to the superintendent. There is a specific statutory renewal procedure for superintendents, who must be provided notice of nonrenewal at least one year prior to the expiration of their existing 3 to 5 year contracts, which contracts must expire July 1. *N.J.S.A. 18A:17-15*.

Also, under newly enacted legislation, there may be additional obligations to provide public notice and a hearing when acting on the contracts of certain of these employees, as described in the question below.

**5. Does the renewal of the contracts of nontenured administrators require 30-days’ notice and a public hearing under the provisions of A5?**

At this time, it is not clear how the new law affects the renewal of contracts. A5 amends *N.J.S.A. 18A:11-11* to provide:

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.

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<sup>2</sup> *N.J.S.A. 18A:27-4.1*.

While it may be argued that the renewal of a contract would *not* seem to require notice and a hearing since it involves a new contract rather than a change to an existing contract, some in the legal community have maintained that renewal can be viewed as the extension of an existing contract. In light of the disagreement in the legal and educational community over whether and under which circumstances A5 would apply, and in the absence of specific guidance from the Department of Education, administrators should seek an opinion from the board attorney on whether notice should be given for renewals for the superintendent, assistant superintendents, and business administrators. Where there is any doubt about whether the notice provision should be followed in these situations, it is best to err on the side of providing the notice.

Also, please take note that under another new law (A4), any contracts of superintendents, assistant superintendents, and school business administrators, executed after July 1, 2007 (the date by which new Executive County Superintendents under A4 will be in place), must be reviewed and approved by the Executive County Superintendents prior to execution of those contracts.

**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 a notice that employment will not be offered (or fails to 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>3</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>4</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.

**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. 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 appears to be unsettled with regard to whether the 30 or 60-day notice period starts to run immediately from

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<sup>3</sup> N.J.S.A. 18A:27-11.

<sup>4</sup> N.J.S.A. 18A:27-12.

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).<sup>5</sup> The 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.

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

No. An employee whose contract is terminated before he begins working in the fourth 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 fourth 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>6</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>7</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, boards of education should consult with their board attorneys with respect to a board's obligation in such a situation.

**11. What's to prevent an employee from purposely avoiding receipt of the notice of non-renewal, and then "accepting" employment by June 1?**

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<sup>5</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*, 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.*, 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>6</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).

<sup>7</sup> See, *Lydon v. Hillsborough Bd. of Ed.*, 1985 S.L.D. 1426 (Sept. 19), aff'd St. Bd. 1986 S.L.D. 3085.

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>8</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 agreement 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.

**13. What rights does a teacher have after being nonrenewed?**

In a nutshell, the teacher 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 called a "*Donaldson* hearing" (named after a school law decision from the North Wildwood Board of Education.)

Note that it is the teacher who must act first, in order to activate these rights. Within 15 days of notification that he/she will not be offered a new contract, the teacher 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>9</sup>

Within 10 calendar days of receiving the board's statement of reasons, the teacher may request in writing an informal appearance before the board of education.<sup>10</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>11</sup>

**14. What happens at the *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>12</sup>

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<sup>8</sup> 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.

<sup>9</sup> N.J.S.A. 18A:27-3.2.

<sup>10</sup> N.J.S.A. 18A:27-4.1; N.J.A.C. 6A:32-4.6; *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>11</sup> *Id.*

<sup>12</sup> N.J.S.A. 18A:27-4.1; *Velasquez v. Brielle Bd. of Ed.*, St. Bd. 1997 S.L.D. (Aug. 6).

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 teacher to convince the board members that they have made an incorrect determination by not offering reemployment. The teacher 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 teacher may be represented by counsel or one individual of his or her own choosing. The teacher 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 teacher's witnesses. Witnesses must 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. 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 teacher requests that it be conducted in public, and that the employment be discussed in public, the board must do so.<sup>13</sup>

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

Yes. After the *Donaldson* hearing, the board can override the CSA's recommendation not to renew, and can vote to offer the teacher 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. 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. After such a vote, 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.

**16. Must the board take a vote after the *Donaldson* hearing?**

No, the board is not obligated to take a vote after the *Donaldson* hearing. If it does not vote, then the CSA's recommendation not to renew will stand.<sup>14</sup>

**17. What happens after the *Donaldson* hearing?**

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<sup>13</sup> *Payne v. Willingboro*, 96 N.J.A.R.2d (EDU) 1024.

<sup>14</sup> *Velasquez v. Brielle Bd. of Ed.*, St. Bd. 1997 S.L.D. (Aug. 6).

Within three days following the informal appearance, 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.

**18. Do these provisions for nonrenewal apply also to the renewal of non-certificated 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 non-certificated staff; however, boards may establish through collective negotiations a deadline for support staff, custodians and other non-certificated 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 non-certificated staff member is not renewed, the employee has the right to request a written statement of reasons for nonrenewal pursuant to *N.J.S.A. 18A:27-3.2* and to a *Donaldson* hearing (an informal appearance before the board.)

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>15</sup>

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

Yes. However, as long as the reason for non-renewal is not arbitrary or capricious or improper, the non-renewal 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 non-renewal is before the Commissioner of Education. Where discrimination is the issue, the DOE has concurrent jurisdiction with the Division of Civil Rights.

**20. Is the board's decision to non-renew staff reviewable through arbitration?**

Teachers: PERC has held that decisions to not renew a nontenured teacher cannot be submitted to binding arbitration.<sup>16</sup>

Noncertificated staff: The question of whether a non-certificated staff member may arbitrate a board's decision to nonrenew was addressed by the New Jersey

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<sup>15</sup> *N.J.S.A. 18A:27-4.1.*

<sup>16</sup> *Englewood Board of Education*, PERC No. 9 -78, 8 NJPER 3040;  
*Long Branch Board of Education*, PERC No. 9 -79, 8 NJPER 304.

Supreme Court in a matter concerning custodians.<sup>17</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. Non-renewals will only be arbitrable discipline if the board explicitly waives its statutory right to renew with clear and unmistakable language under the terms of the collective negotiations agreement. If the contract does not clearly permit arbitral review of the decision, the employee's remedy will be through other grievance procedures that may be set forth in the contract and/or appeal to the Commissioner of Education if not foreclosed by the negotiated contractual provisions.

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<sup>17</sup> *Camden Board of Education v. Alexander*, 181 N.J. 187 (2004).



- 20. What is a RIF?**  
A RIF is a Reduction-in-Force; a way to reduce the number of employee positions in a district.
- 21. 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 needed to RIF a custodian might be different than that of a teaching staff member.
- 22. What standards govern the RIF of teaching staff members?**  
Boards may reduce teaching staff members for reasons of economy, reduction in pupils, change in administrative or supervisory organization or other good cause. *N.J.S.A. 18A:28-9*
- 23. Does a district have any responsibility to those eliminated staff once the RIF is completed?**  
Yes. RIF'd staff are placed on a preferred eligibility list for recall, in order of seniority, should a position become available in the future. *N.J.S.A. 18A:28-12*
- 24. Which staff members have seniority rights?**  
Teaching staff members and custodians have seniority rights by statute. Seniority rights can also be given to secretaries and others through the collective bargaining agreement, individual contract or policy.
- 25. 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. *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).
- 26. 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 negotiable. Boards should consult their collective bargaining agreements and policies to determine the amount of notice needed. If the agreement is silent, 60 days notice may apply. *Old Bridge Teachers Assn. v. Old Bridge Bd. of Ed.*, 98 *N.J.* 523 (1985).
- 27. Can a district make RIFs in its janitorial staff?**  
Yes. There is a specific statute governing RIFs of 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. *N.J.S.A.* 18A:17-4.

**28. 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 matter of public concern and deserves to be discussed and decided in public. *Mann v. Cherry Hill Bd. of Ed.*, 1987 *S.L.D.* 1506, aff'd St. Bd. 1987 *S.L.D.* 1522. Other cases have held that the issue 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. *Spizziri v. West Paterson Bd. of Ed.*, No. 58472 (Passaic Cty. Ct. June 10, 1976) Boards are urged to consult with their board attorneys concerning this issue.

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

Seniority is determined by number of academic or calendar years of employment, or fraction thereof, in district in specific categories of employment. 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. *N.J.A.C.* 6A:32-5.1(h).

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

Yes. 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. *N.J.A.C.* 6A:32-5.1(b).

**31. Does military service count toward seniority?**

Yes. Certain military service does count toward seniority. *N.J.S.A.* 18A:28-11.1, 12. Under state law, employees can only get credit for up to four years of military service. However, federal law places no cap on the number of years of military service that may be credited for seniority. 38 *U.S.C.* 4316(a). Boards should consult with their board attorneys concerning the inconsistency in these laws.

**32. 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, he/she will be credited with 5 months of seniority for that year. 1982: July 1, *South Brunswick*, St. Bd., 1983: May 4.

**33. If a tenured staff member is RIF'd, how long does his/her name remain on the preferred eligibility list for recall?**

The employee remains on the preferred eligibility list for recall for an indefinite time period. *Bodine v. Burlington Bd. of Ed.*, 1989 *S.L.D.* 1053, aff'd St. Bd. 1989 *S.L.D.* 1064.

- 34. What happens if there are two people on the recall list with equal seniority?**  
The board can employ some sort of method to break the tie such as a lottery or other such method. *Mann*, 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.