



LINDABURY

McCORMICK, ESTABROOK & COOPER, P.C.

Attorneys at Law

EdLawAlert

By the EdLaw Group at Lindabury

March 24, 2011

ANNUAL UPDATE

The EDUCATION LAW GROUP at Lindabury has extensive experience in the area of school law. We serve as general counsel, special education counsel, and labor counsel for boards of education throughout the State.

ANTHONY P. SCIARRILLO
ATHINA LEKAS CORNELL
JEFFREY R. MERLINO
DENNIS MCKEEVER
JENNIFER A. OSBORNE
PAUL E. GRIGGS
JOSHUA S. SKLARIN
SCOTT D. ZUCKER

edlawgroup@lindabury.com

Westfield Office
P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
(TEL) 908-233-6800
(FAX) 908-518-2967

Summit Office
480 Morris Avenue
Summit, NJ 07901
(TEL) 908-273-1212
(FAX) 908-273-8922

Red Bank Office
331 Newman Springs Road
Suite 133
Red Bank, NJ 07701-6766
(TEL) 732-741-7777
(FAX) 732-758-1879

www.lindabury.com

Non-Renewals of Non-Tenured Employees, Including Title I Paraprofessionals

By Jeffrey R. Merlino

The following sets forth the Board of Education's obligations and the procedures for the non-renewal of non-tenured employees.

Written Notice by May 15

On or before May 15 in each year, every non-tenured certificated staff member continuously employed by the Board since the preceding school year must receive a written offer for employment for the following year or a written notice from the Superintendent that there will not be a recommendation to the Board for re-employment. (*N.J.S.A.* 18A:27-10) The May 15 deadline also applies to non-tenured administrators (excluding superintendents) and paraprofessionals in a school district that received funding under Title I. A paraprofessional is defined as an individual employed as a school or classroom aide and who assists a teacher with the supervision of student activities. Notice of non-renewal for non-tenured secretaries and custodians is not subject to the statutory date of May 15, but rather is governed by Board policy and/or applicable collective bargaining agreement.

Failure to Provide Written Notice

Failure to notify a non-tenured certificated employee and Title I paraprofessional of non-renewal by May 15 (or sooner if required by Board policy or an applicable collective bargaining agreement) creates an automatic offer of employment that the employee can accept in writing by June 1. (*N.J.S.A.* 18A:27-10-12)

Automatic New Contract

If the non-tenured staff employee accepts an automatic offer of employment by June 1, then a new contract is created for the subsequent school year. This means that the employee acquires vested rights in a new contract. The Board will be deemed to offer continued employment under the same terms and conditions for the next school year but with such increases in salary as may be required by law, Board policy, or collective bargaining agreement. (*Payne* 76:543, *aff'd*, 76:554, *aff'd* 77:1301; *Chianese*, 76:804, *aff'd* St. Bd. 77:1279)

A Board may still terminate the new contract pursuant to the termination notice provisions set forth in Board policy or collective bargaining agreement. (*Bitzer*, 76:376, *aff'd* St. Bd. 76:381) If proper notice is given to the non-tenured employee pursuant to the termination (cont'd ►)

clause of the contract, i.e. thirty (30) days notice or sixty (60) days notice, then the Board is only liable for the salary for that thirty (30) or sixty (60) day period. (*Bates*, 77:241) Therefore, if the Superintendent does not provide notice of non-renewal by May 15 (or sooner), then the Board may be required to terminate the new contract and be obligated to pay the non-tenured staff member beyond June 30.

Superintendent's Recommendation

Under *N.J.S.A.* 18A:27-4.1, the Superintendent makes the recommendations for renewal or non-renewal. A non-tenured employee who is not recommended for renewal by the Superintendent shall be deemed non-renewed. Prior to notifying the employee of the non-renewal, the Superintendent shall notify the Board of the list of non-renewals and the reasons for the Superintendent's positions.

Basis for Nonrenewal

In *Donaldson v. Board of Education of North Wildwood*, (65 N.J. 236, 320 A.2d 857 (1974)), the Court held that a board of education was required to provide a non-tenured staff member with a statement of reasons for non-renewal. The Board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, for there are many unrelated but nonetheless equally valid reasons why the Board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted.

Statement of Reasons

N.J.S.A. 18A:27-3.2 states the following: Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such non-employment, which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

The Donaldson Hearing

The employee may also request, within ten (10) calendar days of the employee's receipt of the statement of reasons, an informal appearance before the Board (commonly known as a "Donaldson" hearing). (*N.J.A.C.* 6A:32-4.6)

Following this *Donaldson* hearing request, an informal appearance before the Board must be scheduled within thirty (30) calendar days from delivery of the Board's statement of reasons. (*N.J.A.C.* 6A:32-4.6(b)) This hearing is not intended to be "adversarial" but an opportunity to permit the staff member to convince the Board to offer reemployment. (*N.J.A.C.* 6A:32-4.6(c)) The Board is required to provide the employee with written notice of the date, time and location of the informal hearing and the employee may be represented by his or her legal counsel or another individual of his or her choosing. (*N.J.A.C.* 6A:32-4.6(e) & (f)) Within three (3) days of the informal hearing, the Board shall notify the affected employee in writing of the Board's determination. (*N.J.A.C.* 6A:32-4.6(i))

The Board is not required to formally vote after the informal hearing. If it does not vote, the Superintendent's recommendation stands. However, after the informal hearing, the Board can override the Superintendent's recommendation not to renew, and can vote to offer the employee a new contract. The motion must pass by a recorded roll call majority vote of the full membership of the Board. (*Velasquez v. Brielle Board of Education*, (97 N.J.A.R. 2d (EDU) (August 6), *aff'g on different grounds* Comm'r 96 N.J.A.R. 2d (EDU) (April 4))

An employee may challenge the Board's decision not to renew the contract only if the reason for the non-renewal is arbitrary and capricious. Improper reasons include retaliation for a workers compensation claim, or illegal discrimination based on age, gender, race, religion disability, national origin, ethnic background, or sexual orientation. The venue for challenges is generally the Commissioner of Education, although discrimination claims may be brought under the NJ Law Against Discrimination with the Division of Civil Rights, or through the Courts. The Board's decision not to renew is generally not reviewable as a grievance, unless the Board expressly permitted such grievances through collective bargaining.

☞☞☞

The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Jeffrey R. Merlino or Anthony P. Sciarriello of the EdLaw Group at edlawgroup@lindabury.com.



www.lindabury.com

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

You may, if this letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625.