283-20

New Jersey Commissioner of Education

Final Decision

Trenton Education Association, Karin Davis, Michele Fekete, Ben Kenion, Inger Morin, Debjit Mitra, Wendy Lockhart, Bernadette Piscopo, Tiffani Finley, Wanda Perry, Janice Phillips, Stephanie Shaffer, Cheryl Caruso, Heather Baron, Elizabeth Manzi, and Alexa Sherman,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

Synopsis

The Trenton Education Association (TEA) and several of its members challenged a 2016 reduction in force (RIF), implemented by the Trenton Board of Education (Board) as the result of a budget shortfall. Specifically, the Board abolished the individual petitioners' occupational, physical, and speech-language therapy positions, and subsequently contracted with the Monmouth-Ocean Educational Services Commission (MOESC) to provide these mandated special education services to its students. The MOESC, in turn, provided these services through private agencies that entered into contracts with MOESC rather than services provided directly by MOESC employees. Petitioners appealed, arguing that this arrangement was improper, and sought reinstatement and other remedies. The TEA and the Board filed cross-motions for summary decision.

The ALJ found, *inter alia,* that: *N.J.A.C.* 6A:14-5.1(c)1.v prohibits public school districts from contracting with private providers for speech-language therapy services unless the district is financially unable to hire sufficient staff to provide the services; one of the speech-language therapists, petitioner Caruso, was not tenured at the time of the RIF and the Board is largely unrestricted in its ability to non-renew non-tenured employees; the Trenton Education Association's claim regarding the remaining speech-language therapists can be severed and continued; however, there is no restriction on a district's ability to contract with private providers for occupational and physical therapy services; therefore, the Board's utilization of MOESC to arrange for private occupational and physical therapy providers was lawful. Accordingly, the ALJ: dismissed the petitions of Caruso, occupational therapists Kenion, Fekete, and Mitra, and physical therapist Lockhart; denied the parties' cross-motions for summary decision pertaining to the tenured speech-language therapists: and granted the Board's motion regarding the provision of occupational and physical therapy services through MOESC.

Upon review, the Commissioner granted the Board's motion for summary decision, finding. *inter alia,* that: the Board's decision to implement a RIF was not arbitrary, capricious, unreasonable or undertaken in bad faith; the Commissioner lacks jurisdiction to determine if and how the limitation on a board of education's ability to contract with private providers for speech-language therapy services is applicable to the Board's contract with MOESC and whether that contract is valid; such jurisdiction lies with the Office of Special Education, not the Commissioner. Accordingly, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 14, 2020

OAL Dkt. No. EDU 13998-16
Agency Dkt. No. 183-7/16

New Jersey Commissioner of Education

Final Decision

Trenton Education Association, Karin Davis, Michele Fekete, Ben Kenion, Inger Morin, Debjit Mitra, Wendy Lockhart, Bernadette Piscopo, Tiffani Finley, Wanda Perry, Janice Phillips, Stephanie Shaffer, Cheryl Caruso, Heather Baron, Elizabeth Manzi, and Alexa Sherman,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto by both parties, have been reviewed.

This matter involves a reduction in force (RIF) implemented by the Board in 2016, when it was facing a budget shortfall of $5.9 million. The Board abolished the individual petitioners' occupational, physical, and speech-language therapy positions.[1] However, recognizing that it was still legally obligated to provide these special education services to its students, the Board contracted with the Monmouth-Ocean Educational Services Commission (MOESC) to provide the services, through private agencies that entered into contracts with

[1] The remaining individual petitioners are Ben Kenion, Michele Fekete, Debjit Mitra, Wendy Lockhart, and Cheryl Caruso.

MOESC rather than services provided directly by MOESC employees. Petitioners appealed, arguing that this arrangement was improper, and sought reinstatement among other remedies.

Following discovery at the OAL, the parties filed cross-motions for summary decision. The ALJ found that *N.J.A.C.* 6A:14-5.1(c)1.v prohibits public school districts from contracting with private providers for speech-language therapy services unless the district is unable to hire sufficient staff to provide the services. The ALJ concluded that the Board's contract with MOESC, which in turn provided for MOESC to contract with private agencies, was invalid unless the Board can meet the regulatory exception by showing that it was unable to hire sufficient staff to provide speech-language therapy services due to its financial circumstances. The ALJ dismissed the petition of speech-language therapist Caruso, because she was not tenured at the time of the RIF, and the Board is largely unrestricted in its ability to non-renew non-tenured employees. The ALJ found that the Trenton Education Association's (TEA) claim regarding the provision of speech-language therapy services could be severed and continued, and denied the TEA's and the Board's cross-motions for summary decision.

As to the provision of occupational and physical therapy services, the ALJ found that there is no restriction on a district's ability to contract with private providers for these services, and therefore the Board's utilization of MOESC to arrange for private occupational and physical therapy providers was lawful. Accordingly, the ALJ dismissed the petitions of occupational therapists Kenion, Fekete, and Mitra, and physical therapist Lockhart.

In their exceptions, petitioners argue that the ALJ improperly accepted the Board's allegedly unsubstantiated assertion that the RIF was necessitated by the district's overall budgetary shortfall. According to petitioners, *N.J.S.A.* 18A:28-9 and associated case law permit a RIF "for reasons of economy," and because the Board did not provide any evidence that the

therapist positions at issue were abolished for reasons of economy or that the RIF would actually save money, summary decision in favor of petitioners should have been granted. Petitioners assert that the ALJ incorrectly permitted the Board to enter into a "sham transaction" with MOESC for occupational and physical therapists, because the county superintendent did not approve the contracts between MOESC and the private providers, which is required by *N.J.S.A.* 18A:6-63. Finally, petitioners argue that the Board violated the tenure rights of the tenured occupational and physical therapists by using non-tenured therapists – the private providers contracted by MOESC – to provide the same occupational and physical therapy services previously provided by the tenured therapists.

In reply, the Board argues that it provided extensive evidence of a budget shortfall of nearly $6 million for the 2016-17 school year and that its fiscal decisions related to the shortfall were made in collaboration with the State Monitor appointed by the Commissioner. According to the Board, petitioners were required to prove that the RIF was arbitrary, capricious, or unreasonable, or undertaken in bad faith, and they failed to meet that burden. Moreover, the Board asserts that *N.J.S.A.* 18A:6-63 does not apply to the contract between the Board and MOESC, but only applies to contracts between MOESC and private providers, and that the Board should not be responsible for verifying to what extent MOESC may or may not have complied with statutes or regulations regarding contracts to which the Board was not a party. Finally, the Board argues that the petitioners were properly RIF'ed and their positions were outsourced through MOESC, and, as such, there are no vacancies to which the tenured petitioners would have a right of reemployment. The Board also notes that petitioners' exceptions do not dispute the ALJ's conclusion that the claims of the non-tenured petitioners should be dismissed.

The Board also filed its own exceptions, arguing that the petition of appeal does not seek any relief other than damages personal to the individually named petitioners, and the only possible relief that could be awarded to the TEA as the sole remaining petitioner would be a finding that the Board violated regulations regarding the provision of special education services – relief which was not sought in the petition. Therefore, according to the Board, the Commissioner does not have jurisdiction to hear this matter, both because jurisdiction over the alleged violation of *N.J.A.C.* 6A:14-5.1 lies with the Office of Special Education rather than the Commissioner, and because the petition is now moot since all relief requested therein pertains to petitioners whose claims have subsequently been dismissed. Alternatively, the Board argues that the TEA does not have standing to pursue the action because damages are not available to it, such that the petition should be dismissed in its entirety. The Board further asserts that the ALJ improperly determined that the Board was prohibited from outsourcing its speech-language therapy services unless it established that it was unable to hire sufficient staff. According to the Board, the Initial Decision improperly conflated two independent provisions of the relevant regulation, and the restriction of *N.J.A.C.* 6A:14-5.1(c) – related to the district's inability to hire sufficient staff – only applies to outsourcing services directly to private providers, and not to outsourcing to an educational services commission, as the Board did here. Finally, the Board argues that it presented ample evidence of the district's budget shortfall, proving that its RIF was undertaken in good faith for reasons of economy, and that by ruling that there were unresolved issues of facts on this issue, the ALJ improperly shifted the burden of proof from petitioners to the Board.

In reply, petitioners argue that the Commissioner has jurisdiction because the underlying claim in this matter relates to whether the individual petitioners' tenure rights had

been violated, an issue properly raised by the TEA as the majority representative of a negotiations unit consisting of hundreds of district employees. Petitioners also maintain that the case is not moot, and that the TEA has standing to pursue it, based on the conclusions made by the ALJ related to the Board's obligations in implementing the RIF and entering into the contract with MOESC for speech-language therapy services. Petitioners assert that the Board knew at the time it entered into the contract with MOESC that MOESC would need to contract with private providers for services, such that the Board's action was unlawful. Finally, petitioners argue that while the Board presented evidence of an overall budgetary shortfall, it presented no specific evidence that its abolition of speech language, physical, and occupational therapy positions saved any money.

Upon a comprehensive review, the Commissioner concludes that the Board's motion for summary decision must be granted. A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b); *see also Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995). Here, the material facts are not in dispute, as both parties acknowledge that the Board implemented a RIF that affected petitioners, that the Board subsequently outsourced special education services which had previously been performed by petitioners to MOESC, and that MOESC used private providers to deliver special education services to the Board's students.

First, the Commissioner concludes that the Board's decision to RIF 236 employees, including the individual petitioners here, was not arbitrary, capricious, or unreasonable, or undertaken in bad faith. The ALJ concluded that in the face of an undisputed

economic crisis, facing a serious budget gap and with an economic motivation, the Board legally abolished the positions of the occupational and physical therapists. The Commissioner concurs and finds petitioners' arguments to the contrary to be unpersuasive. Pursuant to *N.J.S.A.* 18A:28-9, the Board may abolish positions for reasons of economy. Petitioners bear the burden of proof to demonstrate that the Board's decision to implement a RIF was arbitrary, capricious, or unreasonable, or undertaken in bad faith. *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960); *see also Wollman v. Bd. of Educ. of the City of Trenton, Mercer County*, 1995 *N.J. Agen. LEXIS 506* (May 3, 1995). Given the evidence of the district's financial circumstances, petitioners have not met that burden.

Petitioners argued, and the ALJ agreed, that even a lawful RIF may violate employees' tenure rights if the board of education enters into an illegal arrangement to provide mandatory services that were previously provided by tenured employees. Therefore, the Commissioner must address the Board's contract with MOESC. With regard to the claims of the occupational and physical therapists, the Commissioner concurs with the ALJ's conclusion that these claims must be dismissed. The New Jersey Supreme Court has held that the threshold question in determining whether a board of education has violated an employee's tenure rights by outsourcing services performed by a tenured employee to an educational services commission (ESC) is whether the board has the authority to contract with an ESC to provide those services. *Impey v. Bd. of Educ.*, 142 *N.J.* 388, 392 (1995) (holding that the board of education did not violate the tenure rights of a speech correctionist when it abolished her position and entered into a contract with an ESC to provide those services). *See also Anders v. Bd. of Educ. of the Twp. of Lakewood, Ocean County*, Commissioner Decision No. 2-01 (Jan. 2, 2001) (holding that the board of education was permitted to abolish its in-district child study teams and enter into a

contract with MOESC for those services, and that the board did not violate the tenure rights of the petitioners); *Trigani v. Bd. of Educ. of the Borough of Monmouth Beach*, Commissioner Decision No. 415-02 (Dec. 2, 2002) (holding that a school psychologist, social worker, and speech therapist were not unlawfully terminated and that the board of education had the authority to contract with MOESC for those services); *Becton Ed. Ass'n v. Bd. of Educ. of Carlstadt-East Rutherford Regional Sch. Dist.*, Commissioner Decision No. 513-04 (Dec. 20, 2004), *aff'd* State Board of Education, Decision No. 3-05 (May 4, 2005) (holding that the board did not unlawfully terminate a school psychologist and learning disabilities teacher-consultant and that the board's contract with an ESC for those services was compliant with statutory and regulatory requirements).

In assessing the Board's authority to contract with MOESC for occupational and physical therapy services, the Commissioner looks to *N.J.S.A.* 18A:6-63, which allows ESCs to enter into contracts to provide special education services to public school districts. Furthermore, *N.J.A.C.* 6A:14-5.1(c) allows boards of education to contract with private providers for occupational and physical therapy services, and the only restriction is that the providers must be certified and licensed according to State statutes and rules.[2] There is no allegation that the private providers with whom MOESC contracted did not meet these requirements. Petitioners have argued that the Board entered into a "sham transaction" with MOESC to avoid regulatory requirements prohibiting boards of education from contracting with private providers. However, because the Board could have contracted directly with private occupational and physical therapy

[2] Petitioners have argued that *N.J.A.C.* 6A:14-5.1(c)1.v, restricting a district's ability to enter into contracts with private providers, applies to contracts for occupational and physical therapy services. That provision clearly states that it applies to contracts for speech language therapy services, and the Commissioner declines to expand its meaning beyond its plain language.

providers under *N.J.A.C.* 6A:14-5.1(c), the Commissioner concludes that there is no impropriety in the Board's decision to contract with MOESC, who in turn contracted with private providers.[3]

Next, the Commissioner concludes that the claim of petitioner Caruso, the sole remaining speech-language therapist in the matter, must be dismissed. A board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). As such, where non-tenured staff members challenge a board's decision to terminate their employment on the grounds that the reasons provided by the board are not supported by the facts, they are entitled to litigate that question only if the facts they allege, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Truncellito v. Bd. of Educ. of the Twp. of Lyndhurst*, Commissioner Decision No. 271-19+, decided December 3, 2019, citing *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986). Petitioner Caruso has not alleged any violations of her constitutional or legislatively-conferred rights. Therefore, the Commissioner finds that the Board's non-renewal of Caruso was proper.[4]

The final issue for the Commissioner to decide is whether the TEA may continue to pursue its claim regarding the validity of the Board's contract with MOESC for speech-language therapy services. In *Long Beach Island Education Association and John Puljer v. Bd.*

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[3] Petitioners' argument that the county superintendent did not approve of the Board's use of MOESC to contract with private occupational and physical therapy providers is unpersuasive. *N.J.S.A.* 18A:6-63, on which petitioners rely for this assertion, requires the county superintendent's approval of contracts between ESCs and private agencies. The Commission cannot conclude that the Board violated petitioners' tenure rights based on the actions of MOESC, which is not a party to this matter and over which the Board has no authority.

[4] This principle also applies as a secondary reason for the dismissal of the claim of petitioner Mitra, who was not tenured at the time of the RIF.

of Educ. of the Long Beach Island Consolidated School District and Dawn Watson, Commissioner Decision No. 330-09 (Oct. 13, 2009), the Commissioner held that in the absence of underlying claims of infringement of tenure and seniority rights or other rights and responsibilities under the school laws, the Commissioner has no jurisdiction to adjudicate a claim that a board of education's contract for the provision of special education services violated New Jersey's special education regulations because such review falls exclusively within the purview of the Department's Office of Special Education Programs.[5] *N.J.A.C.* 6A:9-14.2.

While the question of the validity of the Board's contract in light of the special education regulations and the tenure and seniority rights of the Board's employees were intertwined at the time the petition was filed, jurisdiction is an ongoing question and the Commissioner concludes that it is appropriate to assess her jurisdiction based on the current posture of the case. Here, with the dismissal of petitioner Caruso's claim, there is no active claim that the Board has violated the tenure or seniority rights afforded to any speech-language therapist. If the Commissioner allowed the TEA's claim regarding speech-language therapy services to proceed and that claim was ultimately successful, there is no relief that the Commissioner can order. The record demonstrates that ten speech-language therapists were subject to a RIF. One of the therapists never joined in this matter, and of the remaining nine, eight have withdrawn their claims during the pendency of this proceeding. Petitioner Caruso's claim has been dismissed for the reasons stated herein. Therefore, there are no speech-language therapists affected by the RIF whose tenure interests the TEA can represent.[6]

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[5] The name of the relevant office has subsequently been changed to the Office of Special Education Policy and Dispute Resolution (SEPDR).

[6] To the extent that the validity of the Board's contract with MOESC may affect the rights of other members of the TEA, those claims are purely speculative.

Furthermore, the only possible outcome of permitting the TEA's claim to proceed would be a ruling on the validity of the Board's contract with MOESC – a ruling that could only be rendered with regard to the regulations governing the provision of special education and related services. Accordingly, the Commissioner lacks jurisdiction to determine whether and how the limitation on a board of education's ability to contract with private providers for speech-language therapy services is applicable to the Board's contract with MOESC, and whether that contract is valid.

Accordingly, the Board's motion for summary decision is granted and the petition is hereby dismissed.

IT IS SO ORDERED.[7]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2020
Date of Mailing: December 15, 2020

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[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c*. 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED ORDER GRANTING

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 13998-16

AGENCY DKT. NO. 183-7/16

TRENTON EDUCATION ASSOCIATION; KARIN DAVIS, MICHELE FEKETE, BEN KENION, INGER MORIN, DEBJIT MITRA, WENDY LOCKHART, BERNADETTE PISCOPO, IFFANI FINLEY, WANDA PERRY, JANICE PHILLIPS, STEPHANIE SHAFFER, CHERYL CARUSO, HEATHER BARON, ELIZABETH MANZI AND ALEXA SHERMAN,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioners (Detzky, Hunter & DeFillippo, LLC, attorneys)

Sandra Varano and Howard M. Nirenberg, Esq., for respondent (Nirenberg & Varano, attorneys)

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BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

This contested case involves a limited challenge by the Trenton Education Association and several of its members to a reduction in force (RIF) instituted by the Trenton Board of Education in the spring of 2016, which, according to the Board, resulted in the reduction of 236 employees. The instant matter addresses not that large group, but instead several petitioners who lost their positions as speech/language, physical or occupational therapists who provided mandatory therapeutic services to special education students in the District. The Board contends that it lawfully abolished these positions in good faith for economic reasons. The petitioners, who argue that the Board had other choices for saving money rather than riffing their positions, also argue that when the Board eliminated their positions it knew that its intended plan for continuing to provide these legally-mandated speech/language, physical and occupational therapy involved the Board's plan to enter into a contract with the Monmouth-Ocean Educational Services Commission (MOESC). Further, the Board acknowledged in that contract that in order to fill the needed positions and provide adequate services MOESC would be not be utilizing employees of the MOESC, but instead independent contractors, thus using contracts with private agencies to provide the services. The petitioners contend that under applicable law the local Board of Education was itself barred by N.J.A.C. 6A:14-5.1(c) from engaging private contractors to provide these services, unless, as the regulation provides, the District was unable to provide such services through in-district employees, and that the contractual arrangement to obtain such private contractors to work in the District's schools through the MOESC contract was illegal. In response, the Board contends that its arrangement with the MOESC conformed with clear legal authority, codified in N.J.S.A 18A:6-63, which allows local districts to contract with Educational Services Commissions (ESC) for the provision of services and additionally permits such ESCs to contract with private agencies to provide such services. It contends that authorization permitted the use of such private agencies within the local district. In addition, it points to N.J.A.C. 6A:14-5.11, which requires that districts either "employ or contract" for speech-language specialists and other school personnel and authorizes this to be accomplished via "joint

agreements" with ESCs. Each party moves for summary decision, as authorized by N.J.A.C. 1:1-12.5.

The Petition of Appeal was filed on July 6, 2016. Originally it listed fifteen individual petitioners, in addition to the Education Association. According to information supplied recently by the Board, sixteen therapists were noticed that their positions would be abolished as of July 1, 2016. One speech/ language therapist resigned on May 11, 2016, and was not included among the petitioners. From the remaining fifteen noticed, one speech/language therapist, Bernadette Piscopo, and one occupational therapist, Inger Morin, each retired as of July 1, 2016. It is apparent that these two were included amongst those who received notices that their positions would be riffed as of July 1. Thus, eight speech/language therapists, three occupational therapists and one physical therapist, were noticed and then became petitioners. However, as of the date of this opinion, besides the Association, there are only five remaining individual petitioners. These are occupational therapists Ben Kenion and Michele Fekete, each tenured, and Debjit Mitra, non-tenured; Wendy Lockhart, a tenured physical therapist, and Cheryl Caruso, a non-tenured speech language therapist.

The several therapists received notice on April 25, 2016, that they were to be riffed, effective at the end of the 2015-2016 school year, June 30, 2016. Their petition sought a finding that their tenure rights had been violated by their RIF; that they were entitled to employment in their full-time therapist capacities, that they be reinstated retroactive to July 1, 2016, that the Board make them whole for their losses attributable to the unlawful RIF, and that the Board make them aware of their seniority and reemployment rights, where applicable, pursuant to N.J.S.A. 18A:28-12, "if the Board of Education subsequently determines to end its outsourcing of Therapists to provide state-mandated 'related services' and decides to either use 'in-district' Therapists again, and for such other relief as the Commissioner deems just and appropriate."

After the Board filed an answer to the petition, the contested case was transferred to the Office of Administrative Law. Discovery disputes were managed by

the then assigned administrative law judge. On April 15, 2019, the Board moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. The petitioners responded on June 21, 2019, cross-moving for summary decision. The Board replied on August 14, 2019. The contested case was transferred to this judge, retired and serving on recall, on June 25, 2019. Oral argument was held on October 30, 2019, at which time the record concerning the cross-motions closed. However, due to the need for further information with which to assess the cross-motions, the record was reopened. Information sought by the judge was supplied by letters received from the Board and petitioners, respectively, on February 20 and March 2, 2020. The record concerning the motion then re-closed. Subsequent discussions concerning a possible settlement resulted in a request to delay issuance of this Order. However, on May 15, 2020, the judge was informed that the Order should proceed.

In order to fully understand the arguments concerning the cross-motions, it is necessary to review certain undisputed facts. Initially, the Board contends that in the spring of 2016, it faced a clear economic crisis. It notes the minutes of its March 21, 2016 meeting, where the proposed budget for the 2016-2017 school year was discussed and a 5.9 million-dollar shortfall identified. Seeking to deal with this situation, the Board riffed hundreds of employees. The Board agrees that even after abolishing the positions of the riffed petitioners, it was not relieved of its legal duty to provide the legally-mandated therapeutic services of speech/language, occupational and physical therapy that the petitioners had previously provided. In order to continue to do so, the Board entered into a contract with the Monmouth-Ocean Educational Services Commission under which the ESC was to provide the services. The language of the contract affirms the petitioners' argument that the Board knew at the time that it entered into this agreement that the ESC did not have therapists in its own employ and thus would of necessity have to contract with outside, private vendors to provide the therapy services that were to be delivered in the Trenton schools.[8] According to the Board's recent letter, as of July 1, 2016, the first day that the riffed employees were no longer on the Board's payroll, the MOESC contract was providing five occupational therapists, two

[8] As opposed to providing such services in schools operated by the ESC.

physical therapists and seven speech/language therapists. As the parties agree, after the date the petitioners filed their petition, it became clear that the arrangement that the Board made with the ESC had not produced sufficient personnel needed to provide the level of services necessary to meet the demands of the Trenton school population. As acknowledged by the Board and as noted in the Certification provided by Lester Richens, the appointee of the Commissioner of Education as the State Monitor for the Trenton Board of Education during the 2015-2016 school year and thereafter, at the Board's October 24, 2016, meeting it was announced that the ESC "would not be able to provide a sufficient number of speech therapists." As Richens then noted, and as counsel confirmed at oral argument, the Board then recalled three of the riffed speech/language therapists to supplement the services being provided by the ESC's private contractors, thus bringing to ten the number of speech/language therapists working in the District.[9] However, at that same Board meeting, Richens noted that in addition to the recall of these three therapists, the Board was "also contracting out for another group to come and provide a service so we can get the compensatory time in."[10] Thus, as the Board does not dispute, as of at least October 24, 2016, the District, while utilizing both recalled, in-district personnel and MOESC-provided contractors, was seeking to provide at least a portion of the mandated therapy services by entering into its own direct contract with outside vendors, rather than through additional recalls of its own employees. In its recent letter, the Board appears to seek to clarify the situation existing after the recall of the three speech/language therapists, explaining that after the recall it had "resolved the deficiency," however, Richens' statement at the time of the recall of these three does not exactly tally with this statement. Nevertheless, as explained by the Board in response to my request for additional information,

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[9] One of the three recalled speech/language therapists was Janice Phillips. She retired in June 2018. According to counsel for the petitioners, her position was not filled by a "District employed" Therapist.

[10] Richens also notes that he was "aware" that the Board had entered into the contract with the MOESC dated June 28, 2016, and that pursuant to that agreement, the MOESC was "going to utilize independent contractors for these services." Richens' Certification is silent as to any "approval" that he may have granted for such an arrangement. As will be discussed below, the Board acknowledges it did not obtain any approval for either the June contractual arrangement of the later October arrangements from the county superintendent, but it notes Richens' role as the Commissioner's appointed monitor for the Trenton District.

> sometime thereafter in the 2016-2017 school year, a MOESC speech language pathologist resigned. As such, Kaleidoscope was asked to provide two part-time speech language pathologists. One started in mid-April and worked for approximately 7 weeks in the spring of 2017. The other worked approximately 4 weeks from the end of May through the remainder of the school year.

Kaleidoscope is a private contractor, not associated with the MOESC's efforts to fulfill the agreement that the Commission had with the Board.

The record does not contain any similar information about any action by the Board to recall physical or occupational therapists after July 1, 2016.

Based upon this, it appears that the Board claims that the need for speech/language therapy in the District after July 1, 2016, was fully met by the utilization of ten speech/language therapists, that number made up of the seven MOESC-procured therapists, the recalled three in-house therapists, and eventually, the substitution of two part-time Kaleidoscope personnel for the resigned MOESC therapist.

Although their petition was filed immediately after the effective date of the RIF, the petitioners contend in their briefs that the Board has continued to fail to provide adequate services ever since the spring 2016 reduction.

The Legal Framework

Several relevant statutes and regulations must be considered in assessing these motions. Initially, the Tenure Act, N.J.S.A. 18A:28-9, addresses the right of a board of education to reduce teaching staff, including tenured employees.

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the <u>number</u> of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction

> in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

However, N.J.A.C. 6A:14-5.1(c) mandates that boards provide certain therapeutic services for students. The regulation provides specific directions and limitations as to the manner in which the services of these therapists may be procured.

> (a) Each district board of education, independently or through joint agreements, shall employ or contract with child study teams as set forth in N.J.A.C. 6A:14-3.1(b), speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.
>
> 1. Joint agreements for child study team services may be entered into with local education agencies including other local school districts, educational services commissions, jointure commissions and county special services school districts
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> . . . .
>
> (c) For the services listed below, district boards of education may contract with private clinics and agencies approved by the Department of Education, private professional practitioners who are certified and licensed according to State statutes and rules, and agencies or programs that are certified, approved or licensed by the Department of Human Services or by the Department of Health to provide counseling or mental health services. For the related services listed in (c)1iii and v below, approved private schools for students with disabilities may contract with private clinics and agencies approved by the Department of Education, private professional practitioners who are certified and licensed according to State statutes and rules, and agencies or programs that are certified, approved or licensed by the Department of Human Services or by the Department of Health to provide counseling or mental health services. All instructional, child study team and related services personnel provided by approved clinics and agencies and private professional practitioners shall be fully certified . . .
>
> 1. For public school students: . . .

iii. Related services

(1) Certified occupational therapy assistants . . . shall work under the supervision of an appropriately licensed, and where applicable, certified provider of such services.

(2) Physical therapy assistants shall work in the presence of and under the supervision of a certified physical therapist.

. . .

v. Speech-language services provided by a speech-language specialist when a district or private school for students with disabilities is unable to hire sufficient staff to provide the service.

N.J.S.A. 18A:6-63 addresses the authority of ESCs. It provides that such

> b. Commissions may enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools. These contractual arrangements shall conform to rules and regulations of the State Board of Education and be approved by the county superintendent or superintendents, as the case may be.

As noted the remaining individual petitioners include both tenured and non-tenured personnel. And of these, only one is a speech/language therapist, and she was non-tenured. As a general rule, a school board may dismiss a non-tenured employee for practically any reason. Unlike a tenured employee, the Board need not have good cause for such a dismissal, or failure to renew a nontenured employees‘ contract for another school year.

Parties' Contentions

In moving for summary decision, the Board argues that in the face of a substantial deficit clearly identified at its March meeting, it had to take significant steps

to economize. Thus, for reasons directly involving this economic necessity, it exercised its authority to reduce force, as allowed under N.J.S.A. 18A:28-9, in order to abolish over 200 positions. As it faced a legitimate economic crisis, and as the existence of that economic motivation is not in dispute, the petitioners have no basis for asserting the impropriety of the reduction in force affecting their positions. Further, as the Board exercised its legal right to enter into a contract with the MOESC, which had the legal authority to contract with private contractors to provide the services needed by Trenton, its means of providing those services after the RIF was lawful. As the petitioners' petition only asserts the impropriety of the reduction, the Board's motion must be granted and the petition must be dismissed.

The petitioners do not appear to directly dispute that the Board had an economic problem at the time that it considered and decided to reduce the force. The Education Association does not here object to the reduction of positions held by other than these therapists, that is, those originally included in the petition. However, in their brief and arguments, the petitioners advert to the idea that the Board could have made up its shortfall, or at least that part that purportedly required the abolition of their particular positions, by other reductions, such as in the administrative ranks of the District. But it appears that the main thrust of the petitioners' arguments do not challenge that the Board faced an economic crunch. Instead, they contend that since the arrangement that the Board sought to utilize to provide the required services involved an illegal attempt to use private contractors as therapists within the District's schools, the abolition of the petitioners' positions could not be carried out through such a scheme. In effect, if the services rendered by those whose positions were abolished were not legally provided subsequent to the RIF, then, as the services could not themselves be abolished, the initial attempt to abolish the positions must be deemed to have failed and the positions must be deemed to have remained open. In such case, the Board was then legally required to offer the positions to the tenured employees who had been riffed, in accordance with their seniority for such positions. If the Board's attempt to fill these positions through its contract with the ESC violated the law, then summary decision is warranted for the petitioners.

One of the petitioners' contentions is that when the Board noticed them that their positions were to be abolished, it did not provide any specific economic justification for the action. It did not provide any analysis of the costs, direct or indirect, of the continued employment of the petitioners as against the costs associated with the plan to provide the services through the ESC, or any other such plan. Thus, it baldly claimed an economic motivation, without any details to demonstrate that the reduction in force of these positions would actually save money. At oral argument, counsel for the petitioners conceded that he was not aware of any statute, rule or caselaw that specifically required such information to be provided at the time when employees are noticed of a reduction in force. However, he points to caselaw which he asserts at least suggests such a necessary and also supports the propriety of considering the legality of a Board's plan to replace the services provided by riffed employees who provided mandated services and the right of such employees to a remedy if that plan is found to be illegitimate.

McKenna v. Board of Education of the Andover Regional High School District, Sussex County, an unpublished and therefore not binding decision of the Appellate Division, 2013 N.J. Super. Unpub. Lexis 435, involved two tenured members of the District's Child Study Team (CST) who challenged the abolition of their positions in a reduction in force justified as a cost-saving measure. In lieu of the employment of these two, the Board intended to arrange for CST services provided by the Sussex County Educational Services Commission. One of the employees resigned when she learned of the plan. The other employee did not resign. A month after the Board authorized the RIF, it authorized the District's superintendent to enter into a contract with the ESC to provide CST services. The Board later replied to a request from the appellant's labor union for details of the Board's staffing plan, and the response was that the Board intended to provide the CST services through "both employees of the SCESC" and also by "third party consultants." The petitioners then filed a verified petition with the Commissioner of Education, claiming that the Board's decision to eliminate their positions violated their tenure rights. They contended that the Board's plan to enter into

an agreement with the ESC was “arbitrary, capricious and/or unreasonable” and violated N.J.S.A. 18A:46-5.1 and N.J.A.C. 6A:14-3.1.

The Board defended the legality of its action as cost-saving, and the legality of the shared-service arrangement with the ESC. Additionally, it challenged the petitioners’ standing to complain about its action. The administrative law judge who heard the contested case dismissed the petitioner’s challenge solely on the basis of standing. The Commissioner adopted that decision. On appeal, the Appellate Division agreed that the petitioner who had resigned lacked standing and dismissed that challenge. However, it reversed as to the remaining petitioner, McKenna, finding that she had standing and remanded the case for consideration on the merits.

In its analysis of the standing question, the court noted that the petitioners acknowledged that the Board’s abolition of the CST “in a vacuum would not be actionable.” However, given what they argued was an illegal arrangement to replace the CST, their “vested rights as tenured educators” were sufficient to give them legal standing to challenge the arrangement. The ALJ and Commissioner had assumed that any “proven defects in the Agreement between the Board and the SCESC could be cured in a manner that would not involve the possible reinstitution of the CST unit in the school district.” But the court found “[T]hat conclusive assumption . . . unwarranted.”

> Assuming, for the sake of argument, that it was shown that . . . the Agreement with the SCESC does not, in fact, save the district money, or that the Board otherwise lacked “good cause” to displace the in-house program, the continued legal viability of the arrangement might be suspect . . .
>
> Moreover, if it were shown that the Agreement’s reliance upon the services of private contractors does not fully comply with applicable statutes or regulations, there is no guarantee that the SCESC would be able to achieve such compliance, or could do so without raising the contractual charges to the Board. There is also no assurance that the SCESC would be willing to renegotiate the terms of the Agreement.

> Depending upon how these or other scenarios of a nullified Agreement would unfold, it is entirely conceivable that the Board might consider reinstating its in-house CST.
>
> . . .
>
> We are mindful of the "managerial prerogative[s]" of a school districts to reduce its teacher personnel . . . Even so, that does no it mean that the district can fire its tenured staff and replace the CST with what is proven to be an illegal arrangement.

The Board argues that since McKenna only decided the standing issue and did not rule on the merits of Ms. McKenna's claims, and as the decision is unpublished and therefore not precedential, it has no bearing here. But the case does offer the persuasive argument that if a board, having reduced staff who provided mandated services for purported economic reasons, resorts to arguably unlawful means in order to continue to provide such mandated services, then the legality of the Board's arrangements can be considered to determine if the replaced employees may have claims to the positions necessary to provide those services in a lawful manner. In other words, if a board's plan to economize involves unlawful action, such action cannot be sustained even in the face of the economics involved.

Here, the undisputed facts are that the Board riffed these petitioners and proposed to replace their part in providing mandatory services by means of a contract with the MOESC. As events developed, even if that initial contractual arrangement may have been legal, at least in regard to one of the forms of therapeutic services these petitioners provided, the MOESC was unable to provide adequate replacements, providing the Board with only seven speech/language therapists, thereby necessitating the Board's recall of three tenured, riffed speech/language therapists. And then, when the Board was faced with the resignation of one of the MOESC-provided speech/language therapists, the Board resorted to contracting directly with Kaleidoscope, an outside, private contractor, in order to supplement the services of remaining MOESC-contracted private providers and the newly-recalled tenured employees, a plan much akin to the one the Board utilized in McKenna. It can be

argued that both the first plan, the MOESC contract, and the second plan, the direct contracting with outside speech/language contractors, involved the Board in unlawful actions. If that is the case, it can then be argued that the Board, having the legal obligation to adequately provide the therapeutic services, had to reinstate the abolished positions, or at least some of them, in order to lawfully service its students. (It may be that the Board could find another, legally secure plan that did not necessitate reinstitution of abolished positions, but that is purely speculative). And, as the tenured petitioners had the legal right under N.J.S.A. 18A:28-12 to be placed on a preferential rehiring list, the Board would then have been obligated to offer some, or all, of the petitioners those reinstated positions.

The Board contends that it is entitled to summary decision simply due to the essentially undisputed existence of a large economic problem which underlay the decision to RIF these employees, a reduction thus supported by N.J.S.A. 18A:28-9. Indeed, if the arrangement with the MOESC arrangement is deemed lawful, then, in absence of any meaningful challenge to the existence of a legitimate economic motivation, summary decision would result in favor of the Board, at least regarding the initial decision to RIF. The decision to resort to its own contracting with the private contractor, Kaleidoscope, to fill the position vacated by the resigning MOESC contract therapist may, however, present a separate problem.

The authority of a school board to manage its staff and to reduce staff in the face of economic necessity is well-understood. Impey v. Board of Education, 142 N.J. 388 (1995); In re Maywood Board of Education, 168 N.J. Super. 45, 55 (App. Div. 1979). Here, of course, unlike with other discretionary services that the Board offers to its students, even if the economics of a reduction of these therapist positions could play a positive part in meeting the District's economic problems, the services they provided had to continue. As such, while the overall existence of an economic motivation for the significant reductions-in-staff the Board instituted is undisputed, the legality of the means employed by the Board to continue to provide these mandatory services is clearly in dispute.

Thus, if the petitioners establish that the Board's arrangements for continued therapeutic services after the RIF were and continue to be unlawful, in whole or in part, summary decision establishing that the Board improperly riffed these employees would lie. That would lead to a determination that the Board had to reestablish on its rolls the riffed positions, and at least some, if not all, of the tenured employees would be entitled to restoration. Alternatively, if the Board's initial arrangement with the ESC was lawful, given its failure to adequately cover the District's needs through that arrangement, once the Board was aware of this shortfall and itself resorted to direct private contracting, in the absence of another lawful means of covering the deficit in services, the Board would have been required to reestablish sufficient positions to cover the deficit, and to offer the positions to these tenured petitioners in the respective specialties and in the order of their seniority.

Discussion

A motion for summary decision can only be granted where the affidavits, certifications, and other evidential materials produced by the parties presenting and opposing the motions demonstrate that there are no genuine disputes of material facts needed to allow the resolution of the legal issues pertinent to the case. The proofs must be considered in light of the applicable legal standards and burdens of proof and with the opponent of the motion given the benefit of all reasonable inferences arising from the evidence. Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 540 (1995). Here, each party believes that it is entitled to summary decision.

The petition filed in July 2016 challenged the legality of the Board's RIF of fifteen therapists. It sought a determination that the Board's actions to provide mandatory services previously performed by these therapists involved an illegal use of private contractors in the District's schools, illegal despite the Board's use of the MOESC arrangement as the means to secure these private providers. No amended petition has been filed since July 2016.

Fundamentally, the petitioners argue that the Board's arrangement with the MOESC was, as a matter of law, illegal, as it violated state statute and regulation. On the other hand, the Board contends it acted legally, employing a strategy that was well within the authority it and the MOESC each had under the law. With regard to the RIF itself and the Board's arrangement with the MOESC, I **FIND** that the facts concerning the existence of a serious budget gap for the Board, of the RIF, and of the arrangement with the MOESC, are not in dispute. While the petition filed in July did not of course address anything that occurred subsequent to its filing, I also **FIND** that to the extent relevant to the determination of the legal issues cognizable here, the subsequent determination by the Board that additional resources were necessary to meet the need for speech/language services, the actions taken in October 2016 to recall three riffed employees and later, to replace one speech/language therapist through a contract with Kaleidoscope are not in issue.

Faced as it was with a significant financial dilemma, the Board might have first thought that it could abolish positions held by tenured and non-tenured personnel and directly contract for less costly private contractors as replacements. However, as it at least initially concedes,[11] it could not directly contract for outside personnel to perform speech/language therapy services, as N.J.A.C. 6A:14-5.1(c) 1.v. clearly prohibits public school districts from such contracting with private contractors for such services, with a caveat that such is prohibited "unless the public school district is unable to hire sufficient staff to provide the service." Presumably aware of this clear regulatory prohibition against its own ability to enter into such contracts, and apparently not of a mind in the spring of 2016 to contend that if push came to shove it could not find a means to hire sufficient numbers of speech therapists and thus could as of that time directly contracted with outside vendors, the Board instead attempted to achieve replacement of the riffed speech/ language therapists' mandatory services through the vehicle of an

[11]As will be noted, while this concession seems to relate at least to the Board's understanding of its choices in the spring of 2016 when it needed to furnish services provided by the newly-riffed therapists, at least at oral argument, it seems to be claiming that it could contract directly for such private services once its attempt to fully furnish necessary services through the vehicle of the MOESC proved inadequate.

entity that did have the general legal authority to contract with private vendors. It cannot be disputed that on its face, N.J.S.A. 18A:6-63 b. provides such authority to the MOESC, since "Commissions may enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools." While, as noted in Attorney General's Formal Opinion No. 1-1981, initially this statute did not authorize such contracting with "private agencies", since the issuance of that opinion the statute has been amended and now provides ESCs with such authority. Thus, the Board argues its initial attempt to provide these services involved no breach of the limits of its own authority and a wholly legitimate process that vitiates any concern arising under the McKenna rationale. The statute's clear language authorizes the ESC to contract with both school districts and with private agencies, and the direct language of the statute must govern. As such, it is entitled to summary decision and the petitioners' motion should therefore be denied and their petition dismissed. However, the question arises as to whether the local Board could legally use the ESCs' acknowledged statutory contracting authority to obtain private contractors' services in its district schools for a specific set of mandated therapy services that it could not, in most instances, itself contract for under equally clear and unambiguous language in N.J.A.C. 6A:14-5.1(c) 1.v.

Notably, the second sentence of N.J.S.A. 18A:63 b. provides a limitation on the ESC's authority and a caution that, despite the clear general authorizing language, that authority must be understood and implemented in conformity with other provisions of law, including non-statutory provisions in the form of State Board rules and regulations. It cautions that "These contractual arrangements [that is, those authorized by the subpart's first sentence] shall conform to rules and regulations of the State Board of Education and be approved by the county superintendent or superintendents, as the case may be." And N.J.A.C. 6A:14-5.1(c) 1.v. is a "rule and regulation of the State Board of Education." The question then is why would it be that, with only a limited exception, a local district that cannot obtain speech/language specialist services through private agencies to provide these services in the district's schools by its own contracting authority should be able to do so through the more general authority granted

to the ESC. And, in addition to this basic question of statutory authority, the Board concedes, with a caveat explained below, that, even if the law would allow its action, it did not obtain approval from the county superintendent for the arrangement proposed by the contract.[12]

It must be assumed that the State Board had reasons for generally prohibiting such private contractor arrangements for speech/language services for public school students, and in the absence of any indication in the amendment to the ESC's authority that specifically addresses such a defined area, the State Board's rule must be given precedence over the more general authority, as the means to achieve conformity between these legal standards. As such, I **CONCLUDE** that unless the Board could demonstrate its inability to hire "sufficient staff," that the arrangement with the MOESC was an invalid means for the Trenton Board to provide the services of the speech/language therapists for its students. However, as for the provision of occupational and physical therapy, it must be noted that the only limitation stated in N.J.A.C. 6A:14-5.1(c)iii with regard to the ability of a board to contract for these services relates to certain supervisory requirements and, therefore, I **CONCLUDE** that the Board's utilization of the MOESC to arrange for the provision of these therapies after July 1, 2016, did not violate that rule and was a lawful action by the Board in conformity with its authority, as well as that of the MOESC.

As noted, the petition does not address actions subsequent to July 2016. However, those events do provide useful information concerning the context of the RIF and the MOESC arrangement. When that arrangement failed to provide adequate

[12] The Board notes that State Monitor Richens was clearly aware of both the ESC arrangement and the subsequent direct Board private contract arrangement to supplement the inadequate resources produced by the ESC contract. Richens acknowledges this in his Certification. He never specifically says that he approved these, and the Board may be understood to see his lack of any stated objection as approval. The regulation refers to the need for approval of ESC contracting arrangements as requiring approval from the county superintendent and does not mention a state monitor. It also does not provide that the county superintendent could approve an arrangement that otherwise violated existing statutes. No power to waive otherwise applicable statutes or regulations is mentioned regarding such an approval. Neither is it suggested that the state monitor had such power. If such authority did exist, it would seem that an approval involving any such waiver would be in writing, or at the very least given in a verbal statement at a Board meeting, and would not simply be implied by a lack of any expressed disapproval.

speech/language specialist services to meet the District's needs, even eventually after the recall of three of the riffed speech therapists, the Board implemented another scheme, involving its own direct contracting with a private provider, to supplement the services obtained through the ESC under that unlawful arrangement. Again, unless the exception was established, that arrangement was also invalid. Thus, the picture presented is of a Board first utilizing a potentially unlawful "end run" arrangement with the ESC, in practical violation of the specific prohibition against the provision of the District contracting speech/language specialist services with private contractors, and then resorting to a direct contracting arrangement that again was potentially prohibited. The Board, by its own admission, found that in order to provide what it deemed sufficient speech/language services for its students, it needed ten therapists. During the 2016-2017 school year, this number was achieved first through the use of seven MOESC contractors and three later-recalled in-district staff, and then by six MOESC contractors, three in-district recalled staff and two part-time Kaleidoscope-provided private contractors. As of July 1, 2016, there were nine riffed speech/language therapists. Three were recalled, apparently in October 2016. Clearly, given the illegal nature of the MOESC arrangement, all nine should been recalled as of July 1. Indeed, since the arrangement for their replacement was illegal, their RIF was not a valid act on the Board's part and, in the absence of a lawful means of providing the mandatory services, they could not have their positions abolished.

This said, it is recognized that there is an exception to the prohibition against a Board directly contracting for speech/language specialist services with private providers. It may not do so "unless the public-school district is unable to hire sufficient staff to provide the service." This language does not identify the possible causes of the District's inability to hire sufficient staff. It could be that after a diligent search, the District could not achieve the hiring of sufficient qualified therapists. Or, perhaps, the inability spoken of could be due to serious financial reasons. Here, the Board has not suggested that it could not identify and hire sufficient staff, as it had such personnel on board prior to the RIF. Thus, the Board's defense to why its actions did not violate the

law must rest on a claim that it could not hire sufficient staff due because it did not have the money to do so.

The Board points to the general principal that its acts are presumed to be lawful, and thus its RIF, based upon economic difficulties recognized in statute as permitting reductions in staff, including of tenured employees, must be presumed lawful. However, given that the State Board regulation provides only this limited exception for direct local Board private contracting for speech/language services where the Board is “unable to hire sufficient staff to provide the service,” it seems that more than a mere identification of a general budget shortfall is needed before it can be concluded that the Board is so limited in its options that it cannot hire, or, in this scenario presumably retain, sufficient speech/language therapy staff, and can therefore rely on the exception. At oral argument, Board counsel, attempting to justify why the Board could directly contract after the failure of the ESC contract to deliver adequate speech/language staffing, raised the claim that it was “impossible” for the District to otherwise meet its needs. This presumably means that it was economically impossible “to hire sufficient staff.” And certainly, the Board’s undisputed evidence does establish the existence of a budget shortfall that at least at this stage can be the implied basis for a claim of such inability to ”hire.“ But the record does not contain any evidence that seeks to demonstrate that, faced with the budget gap and the mandatory duty to deliver speech/language therapy services, the Board could not have found a means to retain these therapists. Indeed, when it saw that the staffing provided through the MOESC arrangement was insufficient, it apparently found a way to recall three of the riffed therapists. And, as noted, the union has argued that the Board could have made other choices in how to meet the budget problem without having to RIF those providing mandated related services. Thus, while the details of the dispute over the budget possibilities and choices have not been spelled out in detail, the existence of a material dispute over the necessity of the RIF of these personnel is established.

The petitioners bear the ultimate burden of establishing the illegality of the reduction in force as it affected them. While the Board’s freedom to manage it staffing

needs is certainly well-understood, nevertheless, since the Board's fundamental defense to the petition has been based upon the legality of its arrangement with the MOESC, without specifically acknowledging that it must or that it could meet the "inability" exception, it is fair to allow the Board to seek to demonstrate that status, if it chooses to do so. Since the Board effectively relies upon an exception to the general prohibition of its contracting for private providers, it is the Board's burden to demonstrate that inability. If it does so, the petitioners will fail to meet their ultimate burden of proof; if the Board fails to establish that its actions qualify under the exception, the petitioners will meet their burden. As such, while the petitioners' motion for summary decision establishes that without qualifying under the exception, the Board's action was illegal, if the Board can successfully show that it was "unable to hire sufficient staff" due to its economic situation, it may yet prevail.

Finally, it must be noted that to the extent this order has determined certain applicable legal principles, the status of the several remaining petitioners going forward varies. The Education Association remains a viable petitioner, but the physical and occupational therapists' claims are extinguished by the determination that in the face of an undisputed financial crisis, the Board acted legally when it abolished their positions. As for the remaining non-tenured speech/language therapist, as the Board is largely unrestricted in its decision not to renew its association with the therapist, the only conceivable way in which Ms. Caruso might have any recourse against the Board would be if the Board were to fail to establish that it could not obtain speech/language therapy services and therefore failed to prove that it was entitled to use the exception permitting it to obtain private therapist through the MOESC arrangement. Nevertheless, if it failed to prove this, in such a scenario the right to fill the necessary positions would have been available for those with tenure, and not for an untenured employee with no tenure protections. As such, Ms. Caruso has no real claim for relief.

Given these considerations, as the case moves forward, the sole remaining viable petitioner is the Education Association itself. As such, the Board is entitled to summary decision regarding the claims of the remaining individual petitioners. The

contested cases of petitioners Caruso, Lockhart, Kenyon, Mitra and Fekete are **DISMISSED**. The Association's continued claim will be severed from the other remaining petitioners' claim. In respect to its claim pertaining to the Board's conduct, vis-a-vis the tenured speech/language therapists, the cross-motions for summary decision must be **DENIED.**

The parties and judge have agreed that given the legal conclusions reached, the age of the matter and the expense and time needed for further proceedings, it would be in the best interests of the parties and the most efficient means of expeditiously resolving the entire case and the legal ramifications for similar parties going forward, for this order to be reviewed at this time by the Commissioner. Therefore, this order granting partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF EDUCATION** ,marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 2020
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: ____________________

Date Mailed to Parties: ____________________

mph

EXHIBITS:

On behalf of Petitioners—Attached To Brief:

Exhibit A Formal opinion No. 1-1981, January 14, 1981

Exhibit B Portion of Board minutes for June 14, 2017, with attachment

Exhibit C Monmouth-Ocean Educational Services Commission Invitation to Bid and Contract Documents

On behalf of Respondent—Attached to Brief in Support of Motion for Summary Decision:

Exhibit A Petition of Appeal

Exhibit B Board meeting minutes, April 25, 2016

Exhibit C Agreement for Provision of Educational Services, dated June 28, 2016

On behalf of Respondent—Attached to Brief in Opposition to Petitioners' Motion for Summary Decision and Reply to Petitioners' Opposition to Respondent's Motion for Summary Decision:

Exhibit A Board meeting minutes for March 21, 2016

Exhibit B Board meeting minutes for April 25, 2016

Exhibit C Employee Salary Report for Human Resource Year 2015-2016

For Respondent:

Exhibit 1 Certification of Lester Richens, with attachments

Exhibit 2 Letter dated February 20, 2020, from Howard M. Nirenberg, Esq., with attached list (Exhibit A)