#### **New Jersey Commissioner of Education**

### **Final Decision**

Alexander Cardillo,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County,

Respondent.

#### Synopsis

Petitioner, formerly employed as a nontenured library media specialist with the Board, was non-renewed prior to the 2019-2020 school year due to a reduction in force (RIF). Petitioner discovered in 2022 that the Board had hired another person as a librarian and contended that because of the RIF, he should have been subject to recall based on his seniority. Petitioner asserted that the Board should have offered him the librarian position before it hired another individual. The Board filed a motion to dismiss, contending that petitioner failed to state a claim upon which relief can be granted since nontenured employees do not have recall rights under New Jersey law.

The ALJ found, *inter alia*, that: reemployment following a RIF is governed by *N.J.S.A.* 18A:28-12, which by its terms applies only to tenured employees; petitioner's contention that the Paterson Board of Education Policy 3146 includes recall rights for employees terminated as the result a RIF is without merit, as that policy is consistent with state law and affords recall rights and seniority only to tenured staff members; and petitioner does not have a cause of action since neither state law nor board policy provide recall rights to nontenured employees. Accordingly, the ALJ granted the Board's motion to dismiss the petition for failure to state a claim.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the comprehensive Initial Decision of the OAL as the final decision in this matter. Accordingly, the Board's motion to dismiss the petition for failure to state a claim was granted.

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.

192-24

192-24 OAL Dkt. No. EDU 10182-22 Agency Dkt. No. 290-10/22

### **New Jersey Commissioner of Education**

### **Final Decision**

Alexander Cardillo,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner was formerly employed as a nontenured library media specialist with the Board. On May 13, 2019, the Board informed him that his employment would not be renewed due to a reduction in force (RIF). According to petitioner, Board meeting minutes from September 2022 reflect that the Board subsequently hired a librarian. He asserts that because of the RIF in 2019, he should have been subject to recall based upon his seniority and that the Board should have offered him the librarian position before hiring another individual. The Board moved to dismiss the petition on grounds that it failed to state a claim upon which relief can be granted because nontenured employees do not have recall rights under New Jersey law. Upon review, the Administrative Law Judge (ALJ) granted the Board's motion to dismiss the petition for failure to state a claim. The ALJ reasoned that "[e]ven accepting all of petitioner's alleged facts as true, the petitioner does not have a cause of action" because "neither state law nor board policy provide recall rights to nontenured employees." Initial Decision, at 9. The ALJ concluded that *N.J.S.A.* 18A:28-12, which addresses reemployment based on seniority after a RIF, is not applicable to nontenured employees. The ALJ further concluded that Board Policy 3146 "is consistent with state law, affording recall rights and seniority only to tenured staff members." Initial Decision, at 10. Accordingly, the ALJ granted the Board's motion to dismiss the petition for failure to state a claim.

In his exceptions, petitioner argues that the ALJ did not apply the correct standard of review when he dismissed the petition. Petitioner contends that he alleged sufficient facts to support a cause of action which the ALJ should have accepted as true. Petitioner claims that if the action had been permitted to move forward, he would have presented proofs to establish that the Board has previously recalled nontenured faculty after their separation from the district, thereby applying its RIF policy to both tenured and nontenured faculty.<sup>1</sup>

In reply, the Board argues that the Initial Decision should be adopted by the Commissioner. The Board asserts that the ALJ applied the correct standard of review when dismissing the petition for failure to state a claim. It further contends that the ALJ correctly concluded that nontenured staff members whose employment is not renewed do not have recall rights under either state law or Board Policy 3146.

<sup>&</sup>lt;sup>1</sup> Petitioner also contends that the ALJ should have held oral argument on the motion to dismiss the petition because he requested same. However, he was not entitled to oral argument at the OAL. The Uniform Administrative Procedure Rules, at *N.J.A.C.* 1:1-12.2(d), provide that "[a]II motions in writing shall be decided on the papers unless oral argument is directed by the judge." Thus, "it was within the ALJ's discretion to decide the written motion without oral argument." *R.P. v. Bd. of Educ. of Hunterdon Centr. Reg'l High Sch. Dist., Hunterdon Cnty.*, Commissioner Decision No. 188-20 at 4 (Aug. 27, 2020).

Upon review, the Commissioner adopts the comprehensive Initial Decision as the final decision in this matter. Petitions are subject to dismissal by the Commissioner "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true." N.J.A.C. 6A:3-1.10. This standard also appears in New Jersey Court Rule 4:6-2(e), which permits a motion for judgment on the pleadings for failure to state a claim upon which relief can be granted. See Jonathan Wadley v. N.J. Dep't of Educ., Office of Student Prot., OAL Dkt. No. EDU 09223-22, Initial Decision at 4-5 (Mar. 10, 2023), adopted, Commissioner Decision No. 110-23 (Apr. 11, 2023) (assessing respondent's motion to dismiss pursuant to N.J.A.C. 6A:3-1.10 under the standards used by courts when analyzing Rule 4:6-2 motions). Such motions "must be evaluated in light of the legal sufficiency of the facts alleged" in the petition. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (quoting Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005)). While petitioner is not expected to prove his case at the pleadings stage, the petition must contain factual "allegations, which, if proven, would constitute a valid cause of action." Ibid. (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). Ultimately, a petition must be dismissed for failure to state a claim "if it has failed to articulate a legal basis entitling [petitioner] to relief." Ibid.

The Commissioner concurs with the ALJ that *N.J.S.A.* 18A:28-12, "Reemployment in order of seniority," is not applicable to nontenured employees. "The Legislature's intent is the paramount goal when interpreting a statute, and, generally, the best indicator of that intent is the statutory language." *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005). Statutory language should be read "in context with related provisions so as to give sense to the legislation as a whole." *Ibid.* Accordingly, it is important to recognize that *N.J.S.A.* 18A:28-12 is codified in Title 18A, Chapter 28 ("Tenure"), Article 3, which is titled "Effect of Reduction of Force Upon Persons Under Tenure." Nontenured

employees are not referenced within Chapter 28. Provisions related to employment of nontenured employees are codified within Chapter 27. *See, e.g., N.J.S.A.* 18A:27-10 (mandating requirements for notice of continued employment to nontenured teaching staff members).

Moreover, New Jersey's courts have consistently held that Title 18A, Chapter 28 "does not purport to create employment rights for nontenured employees." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 585 (1993) (quoting Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987)). "[N]ontenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28." Bednar, 221 N.J. Super. at 242. See Union Cnty. Reg'l High Sch. Bd. of Educ. v. Union Cnty. Reg'l High Sch. Tchrs. Ass'n, 145 N.J. Super. 435, 437 (App. Div. 1976) ("[N]ontenured teachers whose contracts of employment are not renewed by reason of a reduction in force plainly are denied any reemployment rights whatever ...."); Bd. of Educ. of Englewood v. Englewood Tchrs' Ass'n, 150 N.J. Super. 265, 270 (App. Div. 1977) ("The determination not to renew the contract of a nontenured teacher is a discretionary matter for the local board, and where it results from a reduction in force there exists no right of reemployment."). Additionally, "[s]eniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits." Carpenito v. Bd. of Educ. of Borough of Rumson, 322 N.J. Super. 522, 531 (App. Div. 1999). Therefore, employees who have not acquired tenure "have no right to seniority nor to a place on the preferred eligibility list" for purposes of reemployment following a RIF. Kaprow, 131 N.J. at 586.

Notably, petitioner's exceptions neither address the significance of the plain language within Title 18A, Chapter 28, nor related controlling case law. Instead, petitioner relies primarily upon Board Policy 3146 in support of his contentions. With respect to Board Policy 3146, which cites Title 18A, Chapter 28, the Commissioner concurs with the ALJ that it affords recall rights and seniority only to tenured staff members. Boards of education are not empowered to adopt policies or otherwise act in a manner inconsistent with the laws codified in Title 18. *N.J.S.A.* 18A:11-1(c). *See Atl. City Educ. Ass'n v. Bd. of Educ. of Atl. City*, 299 *N.J. Super.* 649, 654 (App. Div. 1997) ("A local Board is a creature of the State and may exercise only those powers granted to it by the Legislature either expressly or by necessity or fair implication."). As a matter of law, Board Policy 3146 cannot extend reemployment rights to nontenured faculty as petitioner alleges. *See Bednar*, 221 *N.J. Super.* at 242 ("[N]ontenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28."). Neither the Board nor the Commissioner may "erode[] tenure rights which appear plain on the face of the statute, [and] which . . . can be removed only by the Legislature." *Id.* at 243. Even assuming the facts alleged by petitioner are true—i.e., that the Board has extended reemployment rights to nontenured staff in the past based upon Board Policy 3146 that fact cannot provide a legal basis for petitioner's claims. Therefore, petitioner has failed to state a claim upon which relief can be granted.

Accordingly, the Board's motion to dismiss the petition for failure to state a claim is granted. IT IS SO ORDERED.<sup>2</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 15, 2024 Date of Mailing: May 16, 2024

<sup>&</sup>lt;sup>2</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey OFFICE OF ADMINISTRATIVE LAW

# INITIAL DECISION MOTION TO DISMISS OAL DKT. NO. EDU 10182-22 AGENCY DKT. 290-10/22

# ALEXANDER CARDILLO,

Petitioner,

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# CITY OF PATERSON BOARD OF EDUCATION,

PASSAIC COUNTY,

Respondent.

Juan C. Fernandez, Esq., for Petitioner (Fernandez Garcia, LLC, attorneys)

**Kyle J. Trent, Esq.**, for Respondents (Apruzzese, McDermott, Mastro & Murphy, PC, attorneys)

Record Closed: February 5, 2024

Decided: April 10, 2024

BEFORE THOMAS R. BETANCOURT, ALJ:

### STATEMENT OF THE CASE

Petitioner, a former nontenured staff member at Paterson Public Schools was let go during a reduction in force and alleges that when the respondent later hired another employee to a similar position, he should have been recalled or offered the job. The matter at issue is whether nontenured staff members at Paterson Public Schools have a recall right following a reduction in force.

### **STATEMENT OF THE FACTS**

Alexander Cardillo, the petitioner, was a nontenured library media specialist at Paterson Public Schools. The petitioner was months away from receiving tenure when on May 13, 2019, he was informed that his employment would end on June 30, 2019, due to a reduction in force (RIF). Cardillo asserts that he was the most senior nontenured library media specialist in the District. The petitioner asserts that because of the RIF that occurred in 2019, the District had a callback list based on seniority. He asserts that by January 2023, the District had hired more than 149 teachers from 2022-2023. He asserts that September 2022 Board minutes show the District hired a librarian and did not offer the position to him first. The petitioner asserts that because of the RIF in 2019, he should have been subject to recall and been offered the position before others could have received it. The petitioner asserts that respondent violated law and policy when it did not recall him or offer him the position prior to hiring another individual.

#### PROCEDURAL HISTORY

On or around October 18, 2022, the petitioner filed a petition with the Department of Education alleging that the Paterson Board of Education violated policy and practice when it did not call him back to work following a reduction in force. On or about November 8, 2022, respondent, the Paterson Board of Education, filed a motion to dismiss the petition in lieu of an answer. On or about November 14, 2022, the Department of Education transmitted the petition as well as the motion to the Office of Administrative Law. A hearing was held on the matter on November 15, 2023, where the filing of an

amended petition was discussed. The petitioner filed an amended petition on December 29, 2023. On January 18, 2024, the respondent filed a motion to dismiss the amended petition in lieu of answer. On February 1, 2024, the petitioner filed an opposition to the motion to dismiss the amended petition. And on February 5, the respondent filed a reply.

On or about March 13, 2024, the matter was transferred from the Hon. Elissa Testa to the Honorable Thomas R. Betancourt.

### **MOTION TO DISMISS**

### I. <u>Respondent's Arguments for Dismissal</u>

Respondent argues in its motion to dismiss the amended petition that the petitioner has failed to state a claim where relief may be granted. Respondent states that "as a non-tenured former employee whose employment ended contemporaneous to a RIF, Cardillo was and is not entitled to any seniority, recall, or reemployment rights under the law or District Policy." Resp't Mot. to Dismiss 6. Respondent points to N.J.S.A. 18A:28-12 and N.J.A.C. 6A:32-5.1 and says that under the law seniority and reemployment rights only apply to those with tenure. Respondent cites to Lichtman v. Board of Education, 93 N.J. 362, 368 n. 4 (1983) where the New Jersey Supreme Court stated, "Seniority, on the other hand, provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies" (signaling to N.J.S.A. 18A:28-10 to -12). Respondent points out that the reduction in force laws under New Jersey Statute are titled, "Article 3. Effect of Reduction of Force Upon Persons Under Tenure (§§ 18A:28-9 - 18A:28-14)." Respondent guotes from the Superior Court, Appellate Division, stating, "The determination not to renew the contract of a nontenured teacher is a discretionary matter for the local board, and where it results from a reduction in force there exists no right of reemployment." Board of Education v. Englewood Teachers' Ass'n, 150 N.J. Super. 265, 270 (App. Div. 1977) (signaling to Union County Regional High School Board of Education v. Union County Regional High School Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977)).

The respondent disputes that Paterson Board of Education policy provides the petitioner with any callback rights, explaining that Board Policy 3146 which addresses reduction in force "expressly implements the law and does not extend additional rights . . . " Resp't Mot. to Dismiss 8. Furthermore, respondent states that the policy itself never mentions providing nontenured employees with any type of seniority or recall rights. And furthermore, respondent states that petitioner's deposition testimony exhibits (which come from a superior court case between the same parties) omit the testimony which contradicts the petitioner's assertions, and that the full deposition testimony of respondent's officials shows that nontenured employees do not have seniority or callback rights.

# II. <u>Petitioner's Arguments Against Dismissal</u>

Petitioner argues that the undersigned should deny the respondent's motion to dismiss because the Commissioner did not grant the dismissal prior to transmittal. Petitioner cites to N.J.A.C. 6A:3-1.10 to support this argument.<sup>1</sup> Petitioner responds to respondent's arguments for dismissal by stating:

Despite BOE policy and testimony that non-tenured teachers have rights to be recalled as a result of a Reduction of Force ("RIF"), the BOE argues that such rights do not exist for nontenured teachers. In support of this assertion, the BOE utilizes extraneous and disputed testimony to attack the veracity of the allegations made by Mr. Cardillo. This is simply impermissible and contrary to the standard of review articulated in Rule 6A:3-1.10 and case law.

[Pet'r Opp'n Mot. 2-3]

Dismissal or transfer of petition

<sup>&</sup>lt;sup>1</sup> N.J.A.C. 6A:3-1.10 states:

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

Petitioner says "that the BOE is compelled by law to determine and create guidelines for the hiring of all staff (the Amended Petition, **¶** 3), and that law and BOE Policy determine staff hiring and recall rights. (See Amended Petition, **¶¶** 4 and 6)." Pet'r Opp'n Mot. 3. Petitioner says that "testimony from the very top School Administrators – including the school district's own Superintendent – confirm that Policy 3146, the conduct of the RIF, and recall of faculty apply to both tenured and non-tenured staff. (See Shafer T80:1-10, T80:11-18; T81:7-14; Rojas T42:1-19; Moody-Stephens T49:3-15)." Pet'r Opp'n Mot. 6-7. Petitioner claims "that there are sufficient facts at issue regarding non-tenured staff rights and their recall rights when they are subject to a RIF" and that therefore this case should not be dismissed. Pet'r Opp'n Mot. 4-5. The petitioner says that there needs to be a hearing to determine the factual issue of whether nontenured teachers have recall rights. Furthermore, petitioner requests oral argument if the respondent's motion is entertained.

### III. Respondent's Reply to Petitioner's Opposition

In response, Respondent points to N.J.A.C. 6A:3-1.5(g) which states in part regarding motions to dismiss in lieu of answer, "Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL." Respondent says that that this shows the ALJ can rule on a motion to dismiss. Furthermore, respondent points out that the motion to dismiss was filed after transmittal given the filing of the amended petition. Respondent also states that it was within its rights to provide the remaining parts of the deposition testimony petitioner had originally provided, since the remaining parts show petitioner's arguments to be incorrect. To that end, respondent relies on <u>R</u>. 4:16-1(d) which states, "If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which ought in fairness be considered with the part introduced, and any party may offer any other parts." Furthermore, respondent states that any claim from when the reduction in force occurred in 2019 would be time barred pursuant to N.J.A.C. 6A:3-1.3(i).

### Legal Discussion

### I. Standards for a Motion to Dismiss

Upon the filing of a petition before the Commissioner of Education, a respondent can file a motion to dismiss in lieu of an answer. N.J.A.C. 6A:3-1.5(g). The Commissioner can grant a motion to dismiss in lieu of answer "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.10. "[T]he test for determining the adequacy of a pleading: whether a cause of action is 'suggested' by the facts." Printing-Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (citing to Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). And the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Ibid. (citing Rieder v. Department of Transportation, 221 N.J.Super. 547, 552 (App.Div.1987)). Furthermore, "On a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, all facts alleged in the complaint and the legitimate inferences drawn therefrom are deemed admitted." Smith v. Newark, 136 N.J. Super. 107, 112 (1975). (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); J.H. Becker, Inc. v. Marlboro Tp., 82 N.J. Super. 519, 524 (App. Div. 1964)). When "reviewing a motion under Rule 4:6-2(e), a court may consider documents referred to in the complaint, matters of public record, or documents explicitly relied on in the complaint, without converting the motion to dismiss into one for summary judgment." New Jersey Department of Environmental Protection v. Occidental Chemical Corp., 2012 N.J. Super. Unpub. LEXIS 899, \*41 (App. Div. 2012) (signaling N.J. Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div.), certif. denied, 192 N.J. 597, (2007); New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, L.L.C., 405 N.J. Super. 173, 178, (Ch. Div. 2007); Acevedo v. Monsignor Donovan High School, 420 F. Supp. 2d 337, 340 (D.N.J. 2006)).

### II. Relevant Law

Reemployment following a RIF is governed by N.J.S.A. 18A:28-12, which by its terms applies only to tenured employees: "Effect of Reduction of Force Upon Persons Under Tenure (§§ 18A:28-9 — 18A:28-14)." N.J.S.A. § 18A:28-12 states in part:

Reemployment in order of seniority

If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State . . .

[N.J.S.A. § 18A:28-12]

N.J.A.C. 6A:32-5.1 provides the "[s]tandards for determining seniority." And under the New Jersey Administrative Code, "Each district board of education or private agency that provides educational services by means of public funds shall determine guidelines for the hiring of all staff." N.J.A.C. § 6A:32-4.1.

Paterson Board of Education Policy 3146 states:

# CONDUCT OF REDUCTION IN FORCE

When teaching staff member positions have been abolished, in accordance with Board Policy No. 3112, the Board of Education will transfer and/or dismiss affected teaching staff members as required by law.

No tenured teaching staff member will be transferred or dismissed in a reduction in force affecting a category of employment in which a nontenured teaching staff member is employed. When two or more nontenured teaching staff members are employed within the category affected by a reduction in force, the nontenured teaching staff member(s) shall be retained in that category who has demonstrated greater competence. Tenure and seniority entitlements will govern the transfer and dismissal of tenured teaching staff members affected by a reduction in force, except that, when two or more tenured teaching staff members within the same employment category affected by a reduction in force possess an identical seniority entitlement to that category, the teaching staff member(s) shall be retained in that category who possesses the greater scope of certification.

The Superintendent shall collect and maintain the information requisite to the calculation of each tenured teaching staff member's seniority status. The Superintendent shall develop and maintain district seniority lists and shall recommend dismissals and transfers in a reduction in force in accordance with those lists. No seniority list shall be a public document or published in the absence of a reduction in force or reemployment from a preferred eligible list.

Teaching staff members affected by a reduction in force will be informed of their seniority status and of the effect of the reduction in force on their employment, as promptly as possible after the Board's action to abolish positions. Wherever possible, the Board will give sixty days notice of a pending dismissal. If notice cannot be given a full sixty days before the end of the employee's service, salary in lieu of notice will be given for the remaining notice period beyond the end of service.

N.J.S.A. 18A:28-1; 18A:28-9 et seq.

N.J.A.C. 6A:32-5.1

Cross reference: Policy Guide Nos. 0166, 3122

Adopted: 31 October 2002

Revised: 19 March 2008

[Paterson Board of Education Policy 3146]

Additionally, Paterson Board of Education Policy Regulation 3146 implements Policy 3146 (see Appendix).

### III. Analysis

### A. Petitioner's sole claim that he should have been recalled is dismissed

I am not persuaded by respondent's argument that petitioner's claims are time barred. The argument might be meritorious if petitioner was seeking a remedy for the events that occurred in 2019 with the reduction in force. But here, petitioner is asserting that he should have been recalled in 2022 and is not bringing any claim specific to what occurred in 2019. Furthermore, it has not been shown to the undersigned that petitioner filed beyond the permitted 90-day time period of when he knew or should have known regarding another individual being hired instead of him being recalled. Rather, based on the facts as alleged by the petitioner, Board minutes from September 2022 show the hiring of a librarian and the petitioner then filed the following the month. Therefore, the undersigned must examine the relevant law related to recall rights following reduction in force.

Even accepting all of petitioner's alleged facts as true, the petitioner does not have a cause of action. To have a cause of action in regard to not being recalled, law and/or policy would need to provide recall rights for that specific individual. Upon review of the relevant law and policy, it is evident that petitioner did not have any type of recall right following the reduction in force in 2019. Petitioner was a nontenured library media specialist and neither state law nor board policy provide recall rights to nontenured employees.

### 1. State Law

N.J.S.A. 18A:28-12, which describes reemployment based on seniority after a reduction in force, is not applicable to nontenured employees. It is specifically found in chapter 28 which addresses tenure and within Article 3 which is named, "Effect of Reduction of Force Upon Persons Under Tenure (§§ 18A:28-9 — 18A:28-14)." Nor does N.J.A.C. § 6A:32-5.1, which provides the "[s]tandards for determining seniority," afford recall rights to nontenured staff members. Furthermore, respondent correctly cites to Lichtman v. Board of Education, 93 N.J. 362, 368 n. 4 (1983) where the New Jersey Supreme Court states, "Seniority, on the other hand, provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies" (signaling to N.J.S.A. 18A:28-10 to -12). Seniority only applies to tenured staff members. As the Superior Court, Appellate Division, states, "The determination not to renew the contract of a nontenured teacher is a discretionary matter for the local board, and where it results

from a reduction in force there exists no right of reemployment." <u>Board of Education v.</u> <u>Englewood Teachers' Ass'n</u>, 150 N.J. Super. 265, 270 (App. Div. 1977) (signaling to <u>Union County Regional High School Board of Education v. Union County Regional High</u> <u>School Teachers Ass'n</u>, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977)).

### 2. Board Policy

A review of the language of Paterson Board of Education Policy 3146 shows that it is consistent with state law, affording recall rights and seniority only to tenured staff members. The first sentence of the policy states, "When teaching staff member positions have been abolished... the Board of Education will transfer and/or dismiss affected teaching staff members as required by law." Thus, at the outset, the reduction in force policy establishes state law as its guiding post. And furthermore, at the bottom of the policy, it references 18A:28-9 et seq. (Effect of Reduction of Force Upon Persons Under Tenure). Also, the policy only references nontenured staff members twice. In the first instance, the policy addresses the situation in which a decision needs to be made between two nontenured staff members. Instead of using seniority - which is connected to recall rights - the policy dictates that "the nontenured teaching staff member(s) shall be retained in that category who has demonstrated greater competence." The only other time the policy references nontenured staff is to show that a tenured employee has priority over a nontenured employee. Regulation 3146 also does not show seniority or recall rights for nontenured employees (see appendix).

Nothing in the deposition testimony of respondent's senior staff members undermines respondent's position that recall rights only apply to tenured staff members. For example, when asked "Do you have an understanding that once an individual is RIF'd from Paterson, there is a policy callback that individual if the position becomes available?" Assistant Superintendent Luis M. Rojas who works in human resources responded, "If they're tenured, yes. If they are nontenured, no." (Trent Cert., Ex. 1, Rojas Dep Transcript 33-14 to -19). When questioned about the language of Policy 3146, he also notes that the policy references the relevant statutes and code. He also stated, "I can only tell you, in practice, what I have done since 2006 has been what I've already testified to." (Trent

Cert., Ex. 1, Rojas Dep Transcript 37-22 to -24). And former Superintendent Eileen Shafer said, "Non-tenured don't have seniority." (Trent Cert., Ex. 2 79-17 to -20.). Other questions posed during deposition about specific language in the policy, seem to parse the language out of context and, in any event, do not support a finding that Board policy affords recall rights to nontenured staff.

The undersigned finds that neither state law nor board policy provide for the recall/callback rights of nontenured staff members in Paterson Public Schools.

### IV. Conclusion

For the reasons set forth above, the petitioner as a former nontenured staff member does not have recall/callback rights, and therefore does not have a cause of action. The respondent's motion is **GRANTED** and the case is **DISMISSED**.

#### <u>ORDER</u>

The respondent's motion to dismiss the petition is hereby **GRANTED**.

I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION. Exceptions may be filed by email to** 

OAL DKT. NO. EDU 10182-22

<u>ControversiesDisputesFilings@doe.nj.gov</u> or by mail to Office of Controversies and Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500. A copy of any exceptions must be sent to the judge and to the other parties.

Thous 1. Blanny

April 10, 2024\_

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

bs/db