

11-99

ARLENE MILLER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BURLINGTON COUNTY EDUCATIONAL : DECISION
SERVICES UNIT, BURLINGTON COUNTY,
RESPONDENT. :
_____:

SYNOPSIS

Petitioning school psychologist alleged respondent Educational Services Unit (ESU) violated her tenure rights when it failed to employ her as a school psychologist when the ESU took over the provision of child study team services to the New Hanover District. Petitioner had been rified in 1996 when the District had contracted her duties to an outside contractor. Petitioner contended that pursuant to *N.J.S.A. 18A:28-12*, she had a right to be placed on a preferred eligibility list for reemployment in the District in the event the position of school psychologist became available in the District.

ALJ determined that the record indicated that the New Hanover Board and the ESU agreed that the ESU “would supply child study team evaluations to the New Hanover School District on a case-by-case basis” and that the agreement did not appear to have contemplated that the ESU would take over or in any way replace the operation of any program of special education operated by the District, nor that the programs then in operation in the District to provide such education would be abolished. Therefore, since the protection afforded by the statutes are accorded to employees of a “school” previously operated, and since it can hardly be said that the District or any of its educational programs were “abolished,” the ALJ concluded that neither *N.J.S.A. 18A:28-16* nor *N.J.S.A. 18A:6-31.3* afforded any protection to petitioner. Motion for summary decision on behalf of ESU was granted and petitioner’s motion was denied. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own with clarification.

JANUARY 19, 1999

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The record and initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and respondent’s reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner’s exceptions essentially reiterate the arguments considered by the Administrative Law Judge (ALJ) in the initial decision and set forth in petitioner’s brief in support of summary decision. Petitioner’s exceptions contend that the ALJ clearly misinterpreted the law on the issues presented in this matter. Petitioner avers, *inter alia*, that, while the ALJ acknowledged that the Courts have determined that the definition of “ school” in the context of *N.J.S.A.* 18A:28-16 and 18A:6-31.3 includes programs for the handicapped, he misinterpreted the rulings as limiting tenure and seniority protection mandated by these statutes to teaching staff members who work in a direct teaching setting. (Petitioner’s Exceptions at p. 1) Petitioner further contends that the ALJ erroneously presumed that the child study team performs only evaluative functions, a presumption which petitioner maintains is neither supported by facts

nor the plain language of *N.J.S.A. 18A:46-5* which identifies numerous functions and duties related to the development, supervision and coordination of educational programs for students the child study team evaluates, as well as the provision of psychological and other services to those students. Moreover, petitioner avers that even if one were to conclude her duties were primarily evaluative, the ALJ's determination in this matter is still incorrect because the aforementioned statutes apply to all teaching staff members, not just teachers, and the applicable case law (*Stuermer, supra*, and *Shelko, supra*) provides absolutely no basis in law for the distinction which the ALJ chose to make between petitioner's position of employment and those in the aforementioned decisions. (*Id.* at pp. 2-3)

Respondent's reply exceptions urge that the Commissioner affirm the initial decision rendered by the ALJ, reiterating that petitioner's reliance on *Stuermer* and *Shelko* is misplaced because in both those matters, a special services school district assumed operation of an entire special education program, whereas in the instant matter, the Burlington County Educational Services Unit (BCESU) is supplying child study team evaluation services to the New Hanover School District on a contractual basis. It has, therefore, neither supplanted nor taken over the operation of the special education program in New Hanover. Respondent further argues that

The legislation under which the Petitioner claims entitlement to*** employment and ancillary rights with the BCESU is silent with respect to the assumption by an Educational Services Unit of the CST services previously provided by a Board of Education. Similarly, the provisions of *N.J.A.C. 6A:14-5.1*, which authorize a school district to contract with an Educational Services Unit to provide CST services is silent with respect to the continuation of the employment rights of CST members. (Respondent's Reply Exceptions at p. 2)

Upon careful and independent review of the initial decision and record in this matter, the Commissioner determines to adopt the recommended decision of the OAL, as he agrees with the ALJ's conclusion that “***if the tenure rights guaranteed to employees in the context of *N.J.S.A.* 18A:28-16 and *N.J.S.A.* 18A:6-31.5 are to apply to protect [petitioner] in the present instance, then the term ‘school’ used therein *must be stretched far beyond* the meaning which the Commissioner in *Stuermer* and the Supreme Court majority in *Shelko* have already accepted.***” (emphasis supplied) (Initial Decision at p. 4)

The record establishes that the New Hanover Board of Education entered into a contractual agreement in July 1997 with BCESU to provide child study team evaluation services. This agreement was amended in December 1997 to contract provision of child study team services, not just for child study team evaluations. Such joint contractual agreements for provision of child study team services are permitted by *N.J.S.A.* 18A:46-5.1 and such agreements are distinguishable from the circumstances in *Stuermer* and *Shelko* wherein the educational programs under dispute in each case were taken over in their entirety by the county special services school district. The local boards of education who had operated the educational programs in each of these matters *ceased to operate or have any continuing responsibility for, or governance over*, those particular programs, hence the operation of those programs was taken over/assumed by a county special services district in each case.

In the instant matter, however, the New Hanover Board of Education at all times retains legal responsibility under *N.J.S.A.* 18A:46-5.1 to provide child study team services, albeit that it may provide those services either separately/independently as it did prior to 1996 or through a joint agreement with another public entity, as it has with the BCESU since the 1997-1998 school year. In the Commissioner's judgment, such a joint agreement between the

New Hanover Board of Education and the BCESU does not constitute a “takeover” or assumption of operation of a school or educational program, even when giving deference to the broader applicability of the statute enunciated by the New Jersey Supreme Court in its 1984 *Shelko* decision. At any given point in time, the New Hanover Board of Education could determine to resume the provision of child study team services through its own employees, in which case the employment of the child study team would be subject to the provisions of *N.J.S.A. 18A:28-12*, or it could determine to enter into a joint agreement with another public board of education.

As pointed out by the ALJ, the Supreme Court in the *Shelko* matter was sharply divided as to the tenure rights of teaching staff members where a special education program previously operated by the Ewing school district was taken over by the Mercer County Special Services School District. As determined by the Supreme Court, the provisions for tenure protection of teaching staff members set forth in *N.J.S.A. 18A:46-5.1* did extend to the circumstances present in that matter because it determined, *inter alia*, that

***Our overwhelming sense of the reality of the situation is that this is precisely the kind of takeover the Legislature contemplated. It is conceded that before and after the transition we are essentially looking at the same teachers, the same students, the same curriculum, and the same classroom. When a transition from local to [County Special Services School District] control of such a program looks, sounds, and acts like a takeover, we should treat it as a takeover. (*Shelko, supra* at 420)

Such is not the case in the instant matter, even when fully agreeing with petitioner’s position that tenure protection under the statutes being construed herein extends to all *teaching staff members*, not just to teachers who provide direct instruction to students.

Accordingly, for the reasons expressed therein as clarified and expanded above, the recommendation of the ALJ to dismiss the Petition of Appeal is adopted as the final decision in this matter.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.