

HEATHER DEITCH, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 CAMDEN COUNTY EDUCATIONAL : DECISION
 SERVICES COMMISSION, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner had been employed under her Education Media Specialist certification as a library media specialist by the Berlin Borough Board of Education (Berlin) when her position was eliminated in a Reduction in Force (RIF). Subsequently, Berlin sought to enter into a shared services arrangement under the auspices of the respondent Camden County Educational Services Commission (Commission). Petitioner alleged that she had applied for shared services positions which were posted on the Commission’s website; however, she was never contacted or interviewed for any position with the Commission. Petitioner contends that her tenure rights through her previous employment with Berlin were violated when she was not considered for advertised positions with the Commission that fell under her Education Media Specialist certification. The Commission filed a motion to dismiss, arguing that petitioner does not present any claim that she has any tenure or seniority rights attained as an employee of the Commission, and – absent the essential allegations of a violation of tenure and seniority rights by the Commission – the petition must be dismissed for failure to state a claim upon which relief can be granted.

The ALJ found, *inter alia*, that: petitioner in this matter has two cases pending before this ALJ, one against Berlin and the within case against the Commission; petitioner was undoubtedly an employee of Berlin, and her essential claim is that she had tenure and seniority rights as an employee of Berlin and within that school district; the fundamental question is whether Berlin may have improperly eliminated her position, and if it did so, the cause of action and the possibility of improper action lie with Berlin; petitioner cannot – and does not – contend herein that she has any claim to status as a tenured employee of the Commission, as she has never been employed by the Commission; and there is no claim that petitioner makes that involves any relief that can be provided against the Commission. The ALJ concluded that the Commission’s motion to dismiss must be granted, and a motion to consolidate this case with petitioner’s original filing against Berlin must be dismissed as moot. Accordingly, the within petition against the Commission was dismissed.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

<p>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.</p>

OAL DKT. NO. EDU 11837-18
AGENCY DKT. NO. 168-7/18

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that petitioner fails to state a claim upon which relief can be granted. Petitioner was never employed by respondent, so respondent could not have violated her tenure or seniority rights.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: November 8, 2018

Date of Mailing: November 9, 2018

* 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

INITIAL DECISION

OAL DKT. NO. EDU 11837-18

AGENCY DKT. NO. 168-7/18

HEATHER DEITCH,

Petitioner,

v.

**CAMDEN COUNTY EDUCATIONAL
SERVICES COMMISSION,**

Respondent.

Matthew Wieliczko, Esq., for petitioner (Zeller & Wieliczko, attorneys)

Robert A. Muccilli, Esq., for respondent (Capehart Scatchard, attorneys)

Record Closed: August 31, 2018

Decided: October 3, 2018

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

Heather Deitch contends that the Berlin Borough Board of Education (“Board”) violated tenure and seniority rights she holds under her Education Media Specialist certification. She previously filed a petition with the Commissioner of Education (OAL Dkt. No. EDU 11919-17) against the Board, in which she claimed that the Board had violated her tenure and seniority rights, not only in regard to that certification, but also in regard to her Instructional certification. The Board filed a motion for summary decision.

I granted partial summary decision, dismissing the petitioner's claim for tenure under the Instructional certification. However, in regard to the educational media specialist position, the Board claimed that the position of library media specialist within the District had been eliminated and that the Board had sought to enter into a shared services arrangement under the auspices of the Camden County Educational Services Commission ("CCESC" or "Commission"). The Board noted that in September 2017, when the position of library media specialist had not been filled despite the assistance of the Commission, it sought a waiver from the New Jersey Department of Education in which it sought an exemption from providing State-law required library media services under the direction of a certified school library media specialist. The application for a waiver noted that the Board had not been able to locate a certificated individual or engage in a shared service.

Ms. Deitch alleged that she had applied for the shared services position in the District schools which was posted on the CCESC website, on January 16, 2018. She also claimed that she was never called for an interview by either the Commission or the Board. The Board took the position that any hiring for the position was under the auspices of the Commission and not of the Board.

Following the grant of partial summary decision, Deitch filed a new petition with the Commissioner, this time naming as the respondent the CCESC. That petition was transferred to the Office of Administrative Law under Docket No. EDU 11837-18. On August 6, 2018, the Commission moved to dismiss the new petition, contending that it failed to state a claim upon which relief could be granted by the Commissioner and that it failed to name an indispensable party, Danielle Fillippone, who had been hired by the Commission to serve in the position of the Commission's media specialist/teacher. On August 13, 2018, Deitch moved to consolidate the new case with her already pending petition against the Board. On August 27, 2018, the Commission filed a motion in opposition to consolidation, arguing in part that the motion to consolidate was premature in light of the pending motion to dismiss the petition. Responses and replies have been received regarding both motions.

Ms. Deitch's new petition contends that when the Board sought to make the library media specialist position a part-time shared position with another school district, she applied for the position and when the position was posted on the Commission's website in May 2017, she applied for the position, but was never interviewed for it, despite "numerous" communications by her counsel regarding her reduction-in-force by the Board.¹ The petition notes that the Board responded to supplemental interrogatories in the case pending against the Board that the "employment decision [for this position] is in the purview of the CCESC." It notes that Ms. Fillippone was hired, full-time with benefits, effective September 1, 2018-June 30, 2019, as Library Mass Media Specialist/Teacher in the Public Schools. Finally, the petition charges that the Commission's "action to not recall Petitioner to a full-time teaching position Petitioner's tenure and seniority entitled her to, or even consider interviewing Petitioner," violated her tenure and seniority rights. In its prayer for relief, the petition asks that the Commissioner find and declare that the Commission "deprived Petitioner of a part-time and/or full time position in violation of" her experience and tenure under the Education Media Specialist Certification and that she is entitled to claim the part-time and/or full-time shared services Library Media Specialist in the Berlin Borough School District, as well as such other relief as a may be deemed appropriate."

The Commission's motion to dismiss notes that in her new petition, Ms. Deitch does not present any claim that she has any tenure or seniority rights attained as an employee of the Commission. Indeed, she does not contend that she was ever employed in, nor does she claim that she was dismissed as a result of, a reduction in force from any position with the Commission. Therefore, she has made no cognizable assertion of any violation of her tenure and seniority rights by the Commission. In the absence of these "essential allegations to a claim of violation of tenure and seniority rights by the Commission," the petition must be dismissed because it fails to state a claim upon which relief can be granted. More specifically, the Commission notes, with

¹ The position was also advertised on the Board's website in July 2017, but the position was advertised as for "Shared service between 1-3 public school districts" and the applicants were directed to submit their applications to the Commission.

reference to N.J.S.A. 18A:28-12 and N.J.A.C. 6A:32-5.1, these provide that when a teaching staff member is dismissed because of a reduction in force she must be placed on a preferred eligibility list in order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and she shall then be reemployed “by the body causing dismissal” if and when such a vacancy occurs. N.J.S.A. 18A:6-10 mandates that a tenured employee may not be dismissed during good behavior and efficiency. N.J.S.A. 18A:28-10 provides that dismissals of teaching staff members under tenure due to a reduction in force must be made on the basis of seniority. In Deitch’s case, the “body” that employed her and the “body causing dismissal” was the Berlin Borough Board, not the Commission. Her tenure and seniority rights, such as they were, had accrued in respect to her employment by the Board, not the Commission, which never employed her. She held no tenure or seniority with the Commission, thus it could not have violated any such rights. As for the motion to consolidate, it is first appropriate to determine if the petition can survive the motion to dismiss before considering whether the new case should be consolidated with the previous case.

In response, Ms. Deitch agrees that she does not claim to have been employed by the Commission, or that she acquired tenure with the Commission, or that she was dismissed from any position with the Commission as a result of a reduction in force. Instead, the petition filed against the Commission is the result of the Board “identifying,” and “pointing the finger” at, CCEC as the reason that Berlin failed and refused to reemploy and recall the petitioner Ms. Deitch, off of a Reduction in Force (‘RIF’) preferred eligible list. She argues that it is premature to consider the motion to dismiss, as the facts and legal issues relevant to the claims against the Commission can only be understood properly in the “full context,” with CCEC as a “indispensable party” to the dispute she has with the Board. The interest of CCEC may be impacted by a determination of the outstanding claims against the Board. The matters should thus be consolidated, as permitted by N.J.A.C. 1:1-17.3(a). As for the contention that dismissal is necessary due to the alleged failure to include Ms. Filippone as an “indispensable party” respondent, Deitch claims this “failure” is inconsequential, as the determination

that Deitch has enforceable tenure and seniority rights against the Board does not mandate the termination of Filippone's position as an employee of the Commission. Alternatively, the petition of appeal could be amended by consent to name Filippone, or another, separate petition could be filed with the Commissioner naming her and it could then be transferred to the OAL and, presumably, be consolidated with the now pending case.

Applicable Rules

The Uniform Rules of Administrative Procedure, N.J.A.C. 1:1-1 et seq. do not specifically provide for a motion to dismiss. However, when no specific UAPR rule exists concerning matters that are covered in the New Jersey Court Rules, those rules may be considered so as to provide for "just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." N.J.A.C. 1:1-1.3(a). In addition, the New Jersey Administrative Code provides that in matters related to disputes before the Department of Education, a motion to dismiss may be filed in lieu of an answer to a petition of appeal. N.J.A.C. 6A:3-1.5(g). The New Jersey Court Rule, R. 4:6-2(e) provides that a motion to dismiss may be filed if the party so moving contends that

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1.

N.J.A.C. 1:1-17.3(a) addresses the standards to be applied when considering the possible consolidation of contested cases.

(a) In ruling upon a motion to consolidate, the judge shall consider:

1. The identity of parties in each of the matters;
2. The nature of all the questions of fact and law respectively involved;
3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;
4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;
5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and
6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

Initially, in regard to the fact that there exist two contested cases that each factually address Ms. Deitch, the Berlin Borough Board of Education and the provision of services for library and media within the District, as both matters are assigned to this judge, I am fully aware of the relationship of the two matters. There is no danger that these cases, and the allegedly entwined facts relating to each, might proceed before different judges, each somehow unaware of the other matter. Thus, at this point, the question of consolidation seems less pressing than the question of whether the newer case survives the contention raised in the motion to dismiss. If it does, then the continued existence of two such matters revolving around Deitch's tenure and seniority claims would very likely result in consolidation of the cases. But if the new case cannot survive the contention that it fails to state a claim upon which relief can be granted, then there is no new case to consolidate with the old. As I am aware of the facts asserted regarding each petition, I will consider the motion to dismiss first.

The crux of Ms. Deitch's concern is that she believes that she had tenure and seniority rights to a position as an employee of the Board that were ignored by the Board when it decided to eliminate her position within the District and then sought to obtain services for similar work through a shared services arrangement that meant that the person providing the service in Berlin would also do so in some other school district or districts. In order to effectuate this goal, the Board turned to the CCESC. When that effort was at least initially unsuccessful, the Board sought a waiver to provide the services through someone not holding a certificate as a certified school library media specialist, a waiver which it failed to obtain. Eventually, the CCESC did find someone to serve, Ms. Filippone. As Deitch was undoubtedly an employee of Berlin and her claim is that she had tenure and seniority rights as an employee of the Board and within that District, the fundamental question is whether the Board may have improperly eliminated her position. If it did so in violation of her rights, relief lies against the Board and in favor of Deitch. If the elimination was lawful, then was the attempt to provide services through a shared arrangement a lawful alternative for the Board to continue to have within its own District its own employee, certified or otherwise, providing the service? If it was, is there any basis for Deitch to complain? Then, when the attempt at a waiver failed, did the Board do anything unlawful when it apparently continued to seek to have the CCESC assist it in obtaining shared services? If Berlin somehow violated any tenure or seniority rights of Deitch then relief would lie against the Board, which presumably would have to place Deitch in a job commensurate with her certification and possibly provide back pay and benefits. In all of this, the cause of action and the possibility of improper action lie with the Board. This is the crux of the pending case against that body. As for the new case, clearly Ms. Deitch cannot contend that she has any claim to status as a tenured employee of the Commission; indeed, she herself makes no such claim. She has no tenure or seniority rights vis-a-vis the CCESC that it can be found to have violated. No duty toward her on the part of the Commission has been identified in the petition. And the petition does not identify how the CCESC, as the body identified by the Board as responsible for the filling of a shared services position, owes any legal obligation to Ms. Deitch in its conduct of that task. If Berlin violated her rights, and it were ordered in the pending action against it to place her in a position and

make her whole, it would be up to the Board to do so. If the Board has services being provided to it by the Commission, it would no doubt have to work out with the Commission how to terminate the services, but since the person providing the services is a Commission employee and not a Board employee, it would be up to the Commission to adjust that employee's work. As the position is shared with other districts, it can be presumed that she would not become unemployed. Nevertheless, the employer she must deal with regarding all this is the Commission, not the Board. If the petitioner is successful in her claim against the Board, it would not be necessary to issue any order to the Commission or, for that matter, to Ms. Filippone. As such, there does not appear to be any claim that Deitch makes that involves any relief that can be provided against the Commission. While a full understanding of the circumstances of Deitch's claim for relief from the Board may require that evidence be provided concerning the Commission's role in the shared service arrangements, that fact does not justify a legal proceeding in which the Commission is a respondent. There is no viable basis asserted for a claim that it wronged Deitch, and thus no relief could lie against it. For that reason, the **motion to dismiss** is **GRANTED**. The petition against the Camden County Educational Services Commission is **DISMISSED**. The motion for consolidation is **DISMISSED AS MOOT**.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 3, 2018

DATE

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

Date Received at Agency:

Date Mailed to Parties:

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