

H.E. NO. 2008-6

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOLMDEL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-2007-005

ELENA PONTORIERO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a contested transfer petition filed against the Holmdel Board of Education by a secretary transferred from the confidential position of executive secretary to the assistant superintendent in the board office to a non-confidential secretary position in the Transportation Department. Petitioner alleged her transfer was for disciplinary reasons. The Board filed a motion to dismiss arguing that the Commission lacked jurisdiction over confidential employees. The Hearing Examiner finds that the Act excludes confidential employees including those seeking relief under the transfer amendment to the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys (Rita F. Barone, of counsel and on the brief)

For the Charging Party, Ansell, Zaro, Grimm & Aaron, attorneys (Phyllis Barker, of counsel and on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 28, 2006, Elena Pontoriero petitioned for a contested transfer determination. She alleges that the Holmdel Board of Education violated N.J.S.A. 34:13A-25^{1/} by transferring her from the position of executive secretary to the assistant superintendent in the Board office to a secretary position in the Transportation Department building for disciplinary reasons.

^{1/} This subsection provides: "Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons."

On January 17, 2007, the Board filed an Answer denying that the transfer was for disciplinary reasons. It asserts that Pontoriero was transferred for reasons of poor job performance and the need to change her duties.

On November 8, 2007, a Notice of Hearing issued. On December 5, the Board filed a notice of substitution of attorney. On January 21, the Board filed a motion to dismiss, contending that at the time of transfer, Pontoriero was a confidential employee not protected by the Act. On February 4, Pontoriero filed a brief opposing the motion.^{2/} I adjourned the hearing date and heard oral argument on the motion to dismiss on February 7. The following facts are undisputed.

Elena Pontoriero was appointed to the position of confidential executive secretary to the assistant superintendent of Holmdel Township Public Schools in September 2000. The executive secretary position is by agreement a confidential title within the meaning of the Act and excluded from the secretary negotiations unit. Pontoriero became tenured in 2003 and consistently received high performance ratings on her evaluations. In 2006, Barbara Duncan was appointed superintendent of schools. Duncan recommended that Pontoriero be transferred from her confidential secretary position in the

^{2/} On February 5, 2007, Respondent filed a reply brief without a request for leave to file. The reply brief was not considered. N.J.A.C. 19:14-4.4(b).

central office to a non-confidential secretary position in the Transportation Department building.

On October 19, 2006, the Board transferred Petitioner from her position of confidential executive secretary to the assistant superintendent to the position of secretary assigned to the Transportation Department building.

Petitioner alleges that her transfer between sites was for predominately disciplinary reasons. The Board asserts that Superintendent Duncan was dissatisfied with Pontoriero's work performance and that the transfer was based upon the negative evaluation.

ANALYSIS

The motion to dismiss is based upon the undisputed facts set forth in the petition. In essence, it is a motion for summary judgment on the facts set forth in the petition granting every favorable inference to the non-moving party. Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

It is undisputed that petitioner was a confidential employee excluded from the negotiations unit. The Board argues that since Pontoriero was a confidential employee before her transfer, she

was not an employee under the Act and therefore is ineligible for the protections of N.J.S.A. 34:13A-25.

Petitioner contends that Respondent's motion is untimely because it had previously responded to the petition without raising an objection to jurisdiction and participated in the processing of the petition through conferences with Commission staff. Petitioner further argues that although she was a confidential secretary, she ceased performing the duties of a confidential secretary after Superintendent Duncan was appointed in July 2006. Also, Petitioner contends that the definition of "employee" in the contested transfer amendment should be interpreted to include any employee of a school district, notwithstanding the exclusion of confidential employees set forth in N.J.S.A. 34:13A-3.

Respondent's motion presents a legal question of first impression: whether confidential employees are included within the Commission's contested transfer jurisdiction. N.J.S.A. 34:13A-25 provides: "Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons." N.J.A.C. 19:18-2.1 provides that any employee as defined by N.J.S.A. 34:13A-22 or their majority representative may file a contested transfer proceeding. N.J.S.A. 34:13A-22 defines employee as "employees of an employer as defined by this act."

Contested transfer determinations are limited to employees of school employers under the authority of the commissioner or State Board of Education. Ibid.

The Act defines "employee" in the first definition section at N.J.S.A. 34:13A-3(d). It provides in a pertinent part: "This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees." Subsection (g) defines confidential employee as "employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties."

I do not find that the Board's initial willingness to contest the merits of the disputed transfer waived its right to later contest the Commission's jurisdiction over "confidential employees." Subject matter jurisdiction cannot be waived. Peper v. Princeton Univ. Bd. Of Trustees, 77 N.J. 55, 65-66 (1978).

No material facts are disputed. Petitioner held a confidential title. Whether she was properly excluded from the negotiations unit when she ceased performing the duties of a confidential secretary is a representation issue not relevant to

this matter. Nothing in the record indicates that Petitioner is a "public employee" falling within the protection of the Act. Granting every inference in favor of the petitioner and without any evidence of a legislative intent to expand the definition of employee in the contested transfer amendment to the Act, I find that the Act excludes confidential employees including those seeking relief under the transfer amendment.

I recommend that the petition be dismissed because Pontoriero was a confidential employee at the time of her transfer from executive secretary to the assistant superintendent to secretary in the Transportation Department.

Mary E. Hennessy-Shotter
Hearing Examiner

DATED: March 13, 2008
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 26, 2008.