

**NEWARK ATTENDANCE
COUNSELORS ASSOCIATION,**
Petitioner,
v.
**BOARD OF EDUCATION OF
THE CITY OF NEWARK,**
Respondent.

Decided December 31, 1979

Initial Decision

SYNOPSIS

Although laid-off attendance counselors had been employed by Newark Board of Education, they were classified Civil Service employees and their employment rights were governed by the Civil Service laws. Thus the Commissioner of Education cannot affect their rights of lay-off or re-employment. Board of Education's motion to dismiss for lack of subject matter jurisdiction on the part of the Commissioner of Education was granted.

Anthony M. Tamasco, Esq., for Petitioners

Louis C. Rosen, Esq., for Respondent

GLICKMAN, ALJ:

This matter comes before the court by way of petition filed pursuant to *N.J.S.A.* 18A:6-9, vesting the Commissioner of Education with jurisdiction to hear or to determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Prior to a prehearing in this matter, the attorney for respondent filed a notice of motion to, among other things, dismiss the petitioner for lack of subject matter jurisdiction. The respondent filed a brief and affidavit in support of its motion. Counsel for petitioner filed a brief with certain exhibits annexed thereto in opposition to respondent's motion. Oral argument was held on December 21, 1979.

This tribunal has carefully examined and considered the pleadings filed herein, the briefs filed herein, the affidavits attached to the briefs and any

other documents attached thereto, and has carefully listened to the arguments of counsel. Additionally, this tribunal has carefully considered the prehearing order dated December 11, 1979, which identifies two issues related to respondent's motion to dismiss:

1. Does the Commissioner of Education have jurisdiction or does the Civil Service Commission have jurisdiction over the rights of the employees in question, pursuant to *N.J.S.A.* 18A:6-31?

2. Would not the Civil Service Commission be the proper forum to determine any remedy with regard to reinstatement, pursuant to *N.J.S.A.* 11:5-1?

Stating the issue, insofar as this motion is concerned, in another way, should this petition be dismissed because of lack of subject matter jurisdiction, since the proper forum for this action is before the Civil Service Commission?

In order to put this action in its proper context, a brief examination shall be made of its history, which is not in dispute:

1. On or about January 20, 1979, the respondent, Board of Education of Newark, passed a resolution to reduce its force of attendance counselors from 54 to 19 active attendance counselors.

2. The effective date of this reduction of force was March 7, 1979.

3. On or about March 8, 1978, before the Board resolution laying off attendance counselors, the Newark Board of Education filed an appeal to the Commissioner of Education, appealing the reduction by the Board of approximately \$8,214,310.00 from its 1978-79 current expense budget.

4. The Commissioner of Education signed an order on January 29, 1979, resolving the "budget appeal" and incorporating in that order the terms and conditions of the settlement.

5. On February 23, 1979, an Action in Lieu of Prerogative Writ was filed with the Honorable Paul B. Thompson in the Superior Court of New Jersey, Law Division, Essex County. The caption of the suit was *Newark Attendance Counselors Association, et al v. Board of Education of the City of Newark, et al.*

6. Subsequent to the filing of the Action in Lieu of Prerogative Writ, an answer was filed with the Superior Court by the Newark Board of Education.

7. Subsequent to the filing of an Answer to said action, by the Newark Board of Education, the Newark Board of Education moved for an entry of judgment in defendant's favor on the grounds, among others, that plaintiffs failed to exhaust their administrative remedies. Judge Peter W. Thomas signed an order entering judgment in favor of defendants sometime in March 1979.

8. Subsequent thereto, on March 29, 1979, the Newark Attendance Counselors Association, as plaintiff, filed a notice of appeal with the Commissioner of Education against the Board of Education of the City of Newark.

9. On April 27, 1979, the respondent, Board of Education of the City of Newark, filed an answer to the matter filed on March 29, 1979, by the Newark Attendance Counselors. It is this matter the suit that was filed on March 29, 1979, that has been transferred to the Office of Administrative Law and which is the subject matter of the instant motion.

According to the affidavit submitted by Edith Gallimore, who is the Executive Director of Personnel Services for the Board of Education of the City of Newark, the attendance counselors (who are the petitioners herein, and who are in the employ of respondent) are classified Civil Service employees, subject to competitive appointment. Additionally, the personnel actions, which were taken in the instant matter, were taken in compliance with Title 11 of the Revised Statutes, which mandates a 45-day notice of personnel action. All subsequent personnel actions have been in compliance with Title 11 and Civil Service rules and regulations.

Petitioners argue, among other things, that this action, which deals with questions of thorough and efficient education, and whether or not the respondent Board of Education, has a "suitable number of qualified persons," employed as attendance officers pursuant to *N.J.S.A.* 18A:38-32, is properly before the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws.

Respondent argues, on the other hand, that the rights of each petitioner are governed by the Civil Service law under Title 11, since all of the petitioners are classified Civil Service employees. Additionally, respondent argues that the Commissioner of Education cannot affect their rights of lay-off or re-employment, since those rights are governed by Civil Service law.

The law is abundantly clear that the protections, which petitioners are entitled to, are clearly governed by Title 11 of the Revised Statutes. *See: Laurence Plessis, Lillian Williams and Serafina Piscitelli v. Bd of Ed. of the City of Newark, Essex Cty.*, 1976 *S.L.D.* 1006. In fact, those rights are recognized under *N.J.S.A.* 18A:6-31 which provides that:

Nothing contained in this title shall be construed to affect the *tenure* or *Civil Service rights* of any person presently existing, or hereafter obtained under this or any other law. [Emphasis added].

Further, *N.J.S.A.* 18A:11-1 reads, in part, as follows:

The Board shall . . . c. make, amend and repeal rules, not inconsistent

with this title or with the rules of the State Board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, *subject, where applicable, to the provisions of Title 11, Civil Service, of the revised statutes.* [Emphasis added].

It seems clear, therefore, that Title 18, dealing with education laws, has taken into account a situation where a person may be employed by a local Board of Education, such as the attendance counselors in the instant case, but shall, nevertheless, be governed by Civil Service laws under Title 11. Also, it would be illogical, in the instant case, for the Commissioner of Education to retain jurisdiction when he cannot give the petitioners a remedy.

Petitioners are entitled to a hearing and to obtain a remedy, pursuant to the Civil Service Statute. As *N.J.S.A.* 11:5-1 states:

The commission, in addition to the other duties imposed upon it by law, shall, as a body: . . . d. hear appeals, either as a body or through one or more members designated by a majority thereof to hear such appeals, of persons in the classified service sought to be removed, demoted in pay or position, suspended, fined or otherwise discriminated against contrary to the provisions of this sub-title, jurisdiction in the instant matter.

It is, therefore, **CONCLUDED** that respondent's motion to dismiss for lack of subject matter jurisdiction be and is hereby **GRANTED** and the petition filed by petitioners is hereby **DISMISSED**.

After review this Initial Decision,
the Commissioner of Education on February
19, 1980 issued the following Final Decision:

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.