

New Jersey Commissioner of Education
Final Decision

Heather Deitch,

Petitioner,

v.

Board of Education of the Borough of Berlin,
Camden County,

Respondent.

Synopsis

The petitioner – a librarian and certified media specialist previously employed in the respondent Board’s school district – claimed that her tenure rights were violated when the Board abolished her position in April 2017 and announced plans to make the library/media specialist job a shared position, staffed under an arrangement with the Camden County Educational Services Commission (CCESC). Petitioner filed a motion for summary decision. The Board contended that its actions were consistent with law and regulations.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the Board acted lawfully in eliminating petitioner’s position for economic reasons, and its intention to provide library/media services through a shared service agreement was appropriate; there was no violation of petitioner’s tenure rights during the time when the Board was relying upon the CCESC to interview and fill the new shared position, from May/June through early September 2017, or perhaps through January 2018, when the Board’s waiver request to provide required library/media services using a non-certified employee was rejected by the Commissioner; after that point, however, the Board had an obligation to restore a position for a certified media specialist either full or part-time, and petitioner would have been entitled to that position if she chose to exercise her tenure rights; while a teacher whose tenure rights have been violated is generally entitled to receive back pay, here the petitioner obtained full time employment with another school district by the beginning of the 2017-2018 school year; petitioner therefore suffered no financial damage from the Board’s failure to create a part-time library/media services position. The ALJ concluded that despite the Board’s failure to honor petitioner’s tenure rights by restoring her to a part-time library/media specialist job, petitioner suffered no financial loss because she was already employed by another school district, earning more than she would have made had she been rehired by the Board to fill the new part-time library/media services position. Accordingly, the ALJ granted petitioner’s motion for summary decision, but found that she is not entitled to any monetary award given the facts of this matter.

Upon comprehensive review, the Commissioner concurred with the ALJ’s findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter.

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.

July 22, 2019

New Jersey Commissioner of Education
Final Decision

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Petitioner,

v.

Board of Education of the Borough of Berlin, Camden
County,

Respondent.

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 agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly expressed in the Initial Decision – that the petitioner was entitled to a restored, vacant part-time library/media specialist position by virtue of her tenure rights following a reduction in force. Nevertheless, the Commissioner further concurs with the ALJ that the petitioner suffered no financial loss as a result of the Board’s failure to restore a position of part-time library/media specialist since the petitioner had already secured full time employment, with a higher salary, in a different school district.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner’s motion for summary decision is granted but she is not entitled to a monetary award.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision:

Date of Mailing:

¹ 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 11919-17

AGENCY DKT. NO. 165-7/17

HEATHER DEITCH,

Petitioner,

v.

**BERLIN BOROUGH BOARD
OF EDUCATION, CAMDEN
COUNTY,**

Respondent.

Amy L. Gillette, Esq. and Matthew B. Wieliczko, for petitioner (Zeller & Wieliczko, LLP, attorneys)

Daniel H. Long, Esq., for respondent (Wade, Long, Wood & Long, LLC, attorneys)

Record Closed: May 13, 2019

Decided: June 24, 2019

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

Heather Deitch was employed by the Berlin Borough Board of Education (BOE) as a librarian and certified media specialist at Berlin Community School. She is the holder of a Standard Elementary School Teacher certificate and a Standard Educational Media Specialist certificate. In April 2017, she was notified that her position as a librarian and

certified media specialist would be eliminated and that she would no longer be employed with the school district as of June 30, 2017. On April 27, 2017, the Board of Education voted to abolish her position and announced plans to make the library/media specialist position a shared position, to be staffed under an arrangement with the Camden County Educational Services Commission (CCESC). The current matter involves Ms. Deitch's claim that the Board of Education violated her tenure rights in the librarian and certified media specialist position. In previous proceedings under this docket, I granted partial summary decision, dismissing her claim for tenure under her instructional certificate. In addition, a separate proceeding filed by petitioner against the CCESC was dismissed because Ms. Deitch had no tenure rights that she could assert against that agency. She now moves for summary decision, as permitted by N.J.A.C. 1:1-12.5, asserting that the undisputed facts demonstrate that the Board violated her tenure as a librarian and certified media specialist.

The parties entered into a Joint Stipulation of Facts and Exhibits, A through Q. The Stipulation is incorporated herein as if recited in full. From the Stipulation, certain facts regarding the chronology of events need be recited here. As already noted, the Board voted to abolish the petitioner's position as a librarian and certified media specialist on April 27, 2017. The Board resolution regarding the abolishment of this position as the result of a reduction-in-force, or RIF, noted that the position was abolished for reasons of economy, reorganization, reassignment of staff and other good cause, effective June 30, 2017. In doing so, the Board also announced its plan to provide library/media services for its students through a shared service arrangement with the CCESC. Thus, the person providing the services in the Berlin Borough District would do so on a part-time basis. On June 22, 2017, the Board approved the shared services agreement. The CCESC quoted the projected salary for the part-time, shared media specialist position for the school year 2017-2018 at \$34,272.

Ms. Deitch filed an application with the CCESC for the shared services library/media specialist position on May 24, 2017. On July 27, 2017, the position of library/media specialist was advertised on the Berlin Community School website, with the posting noting

that applications were to be filed online with the CCECSC. Ms. Deitch did not interview for nor did she obtain this advertised position. The job posting specified that the media specialist would be shared by one to three public school districts.

On September 14, 2017, the Board, aware that the attempt to provide library/media services through the arrangement with the CCECSC for shared services had not produced a provider, passed a motion to approve a submission to the New Jersey Department of Education, seeking a waiver under N.J.A.C. 6A:5. The submission described the necessity for the waiver in the following terms

The waiver is necessary for the district to implement media services and meet the requirements of N.J.A.C. 6A:13-2.1(h). The district is requesting that media services be provided by a certified Elementary School Teacher in Grades K-6 with Middle School Subject matter specialization: Language Arts/Literacy Specialization in Grades K-5-8 or a certificate Teacher of Supplemental Instruction in Reading and Mathematics, Grades K-8.

The need to eliminate our full-time Media Specialists, due to RIF, was first brought to the attention of the public and the BOE at the April 27, 2017 BOE meeting. The district sought the assistance of the Camden County Educational Services Commission (CCECSC) to provide a PT Media Specialist. Since June 2017, the district and the CCECSC has posted the availability of the position. The district has reached out to several establishments seeking support and information on individuals who possess the Media Specialists Certificate, as well as seek opportunities for a shared service. To date, we have not been able to locate such a certificated individual or engage in a shared service. The community, parents, BOE, administration and staff have all had access to the BOE agendas and information pertaining to the media specialists since April 2017

The Stipulation of Facts notes that on January 2, 2018, the CCECSC website again contained a posting for a shared service school librarian/media specialist. On January 11, 2018, Commissioner of Education Kimberly Harrington denied the BOE's request for a waiver. In her letter, the Commissioner found that the waiver application failed to meet the "spirit and intent" of Title 6A because

N.J.A.C. 6A:5-1.3 specifically states the certification requirements of N.J.S.A.18A:26-2 shall not be violated. Approval of the equivalency application would be a de facto waiver of school library media specialist certification requirements at N.J.S.A.C. 6A:9B-14.14, which would be in violation of N.J.S.A. 18A:26-2.

Please know that finding a candidate who is eligible for an emergency school library media specialist endorsement, which is renewable at least once, would be an appropriate remedy for this situation.

Ms. Deitch again applied for the posted shared services library/media specialist position on January 16, 2018. The CCESC library/media specialist position remained posted on the Berlin Borough School District website as of February 13, 2018. The petitioner, a qualified applicant, was not contacted or interviewed by the CCESC for the posted position. On May 10, 2018, the BOE approved a professional services proposal, dated March 27, 2018, with the CCESC for a media specialist for the 2018-2019 school year. This provided for a media specialist working in the District three days per week and a basic skills teacher working two days a week. The BOE has certified that it did not offer the petitioner an interview because the employment decision for the position was within the purview of the CCESC. According to answers to supplemental interrogatories, Superintendent Martello certified that “to the best of respondent’s information Petitioner never applied to CCESC for the posted position.”

In moving for summary decision, the petitioner acknowledges that a Board of Education has the right to eliminate positions as part of a reduction in force for the purpose of effecting monetary savings. Ms. Deitch does not argue that the Board’s original determination in April 2017 to abolish the position violated her rights. She does not dispute that the determination was made for reasons of economy. However, she notes that at the time that the Board abolished the position that provided services it was legally required to provide under the direction of a certified school library/media specialist it had not yet established a shared services arrangement with the CCESC for the required position and therefore was taking a chance as to whether such an arrangement would

result in the shared services position being filled in time for the 2017-2018 school year. Additionally, she argues that when the position remained unfilled at the start of the next school term in September 2017, the Board violated her rights under the pretense of a shared service arrangement which was not actually put in place for the 2017-2018 school year. The tenure right she asserts arises from N.J.S.A. 18A:28-12.

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

She notes that N.J.A.C. 6A:2.1(h) requires that all school districts shall provide library/media services under the direction of a certified school library media specialist.

(h) All school districts shall provide library-media services that are connected to classroom studies in each school building, including access to computers, district-approved instructional software, appropriate books including novels, anthologies and other reference materials, and supplemental materials that motivate students to read in and out of school and to conduct research. Each school district shall provide these library-media services under the direction of a certified school library media specialist.

Ms. Deitch argues that when the District was unable to fill the abolished position through the part-time arrangement it sought to initiate under its agreement with the CCESC, the Board, having an ongoing obligation to provide the required service, was, in view of her tenure rights to the position, obligated to place her in that position.

The Board replies that the Uniform Shared Services and Consolidation Act, N.J.S.A. 40A:65-1 to 35 authorized “agreements between local units for services or circumstance to reduce property taxes through the reduction of local expenses.” N.J.S.A. 40A:65-2. N.J.S.A. 40A:65-3 specifically includes local school districts in this

authorization. Where a RIF occurs, and a shared services agreement is reached for a service that the local board is required to provide for its students, the agreement does not violate the tenure rights of the rified individual(s). Prezioso v. Board of Education of the Polytech Career Academy, Hunterdon County. Prezioso involved school nursing services. By statute, each school district was required to “employ a certified school nurse” to provide nursing services while school was in session. N.J.A.C. 6A:16-2.3(b). Yet, despite the “employment” requirement, the shared services arrangement was held to be an acceptable means of assuring that school nursing services were available. In the present case, in contrast to the requirement to “employ” nurses, the law does not require that a school district “employ” a “library/media specialist.” Instead, the applicable regulation does requires that the district “provide” library-media services “under the direction of a certified school library media specialist.” The shared services agreement with the CCESC was intended to do just that, to “provide” the library/media services, but do so through someone not an employee of the District. As the CCESC was the agency charged with hiring the shared service provider, and as the recall rights afforded to tenured, rified employees only relate to openings occurring within the employ of the “body causing dismissal,” Ms. Deitch cannot assert a right to recall against the Berlin Borough School District, which was not the employer of the person who would provide the part-time, shared service to the District’s students. Indeed, as the full-time position she held with the District had been lawfully abolished, there was no position with Berlin Borough for her to be returned to.

In response, the petitioner asserts that while the Board was intending to perform a legally authorized RIF for economic reasons and enter into a shared services agreement for the part-time provision of the required services, it did not proceed “correctly” in pursuing that goal. It had no actual “provider” in place when she was rified. Then, once the provider position remained open in September, despite the CCESC’s presumed attempt to fill it, she was “ready, willing and able to work in that same legally obligated Certified Media Specialist position.” And the waiver application, which sought to provide library/media services through improperly certificated personnel, was denied. Thus, as she puts it, there are “two elephants in the room,” the lack of any shared services

agreement in 2017-2018 and the denial of the waiver. As counsel sees it, the District's timing on the RIF was "off." As for the alleged lack of any vacancy or opening within the employ of the Board for the certified media specialist position since the RIF, that "contention . . . is incorrect," due to the Board's failure to staff a required position within its schools when its alternative plan failed.

In its reply to this argument, the Board contends that the failure of the CCESC to fill the shared services position neither invalidates the RIF and abolishment of Deitch's position nor violates her tenure rights. CCEC was designated in the shared service agreement as the primary employer, as authorized by N.J.S.A. 40A-65.6(a).

a. In the case of an agreement for the provision of services by an officer or employee of a local unit who is required to comply with a State license or certification requirement as a condition of employment, the agreement shall provide for the payment of a salary to the officer or employee and shall designate one of the local units as the primary employer of the officer or employee for the purpose of that person's tenure rights. If the agreement fails to designate one of the local units as the primary employer, then the local unit having the largest population, shall be deemed the primary employer for the purposes of that person's tenure rights.

As the employer of the shared service position was designated as the CCESC, it alone had the authority to hire for the position. The Berlin Borough School District had no "opportunity or say at any point to . . . afford Petitioner the opportunity to interview or be considered for the proposed shared services position." It could only advertise that the shared service position with the CCESC existed, "in order to direct potential candidates to the CCESC position." As for the contention that the Board had to "employ" a person to provide the required media specialist services, the wording of N.J.A.C. 6A:2.1(h) only requires that the service be provided by the Board ("shall provide"), but does not require that the person(s) providing the service be employed by the Board. If the Board failed to provide the required service, that failure might implicate the District's obligation under the "Standards-Based Instructional Priorities" of the Department of Education's regulations, but such a failure would not involve any violation of Ms. Deitch's tenure or bumping rights.

Discussion

As petitioner has conceded, the law authorized the Board of Education to RIF her position for economic reasons. She does not challenge the announced reason for that action. The stipulated facts show that the Board then entered into an agreement with the CCESC for that agency to provide part-time library/media specialist services. The Board was, as petitioner notes, required to have such services in the District, but, as respondent argues, the regulation that requires the service does not require that the Board “employ” the provider, only that the service be “provide[d].” As such, I **FIND** that, on its face, the Board’s intention to “provide” the service through the shared service agreement was not a violation of its obligations to its students. The record shows that the shared service position was advertised after the District abolished its own in-house position, and, indeed, it is stipulated that Ms. Deitch applied for it on May 24, 2017, even before the Board approved the agreement on June 22. As the Board correctly states, the process of interviewing and hiring for the shared position lay in the hands of the CCESC, not its own. There does not appear to be anything improper in the Board having first abolished the in-house position and then seeking to arrange for the required services through the initiation of an intended shared service position through the auspices of the CCESC. I **CONCLUDE** that based on these facts, there was no violation of Ms. Deitch’s tenure rights during this period from May/June through the early days of September 2017. However, on September 14, no doubt shortly after the start of the 2017-2018 school year, the Board was obviously aware that the CCESC had not managed to fill the shared services position, and it was aware that it did not have on staff or otherwise have available the legally required certified library/media specialist to “provide” the services required by law. The existence of this situation raises the question of what the Board’s rights and obligations were after it became aware that the proposed shared service position was unfilled, and that school was starting without a certificated media specialist on staff or otherwise “available.”

The Board having legally abolished the position of library/media specialist through the reduction in force, Ms. Deitch's claim of a violation of her tenure rights to be reemployed by Berlin Borough Board of Education can only have merit if, at some point in time, the Board was legally required to recreate a position of certified library/media specialist on its own employment rolls. That is so because the wording of the tenure provision that she relies on to establish the Board's obligation to reemploy her after the lawful RIF provides that the Board's obligation to her only exists "whenever a vacancy occurs in a position for which such person shall be qualified and [she] shall be reemployed by the body causing dismissal, if and when such vacancy occurs" The employment "position" that Ms. Deitch occupied prior to the conclusion of the 2016-2017 school year did not exist after the lawful RIF. Thus, there was no vacancy in that non-existent position for her to be reemployed in. As such, her right to reemployment with the Board was dependent upon action by the Board to restore the position, or, in the absence of such action, there being a legal obligation for the Board to re-establish the position of certified media specialist on its employment rolls, a position that once re-established would be "vacant" and for which she could then be hired in recognition of her tenure rights. But the facts here show that as of September 14, 2017, the Board, aware of the lack of a person to "provide" the required service, did not choose to restore the in-house, full-time position that it had earlier abolished for economic reasons, nor did it decide to create its own part-time position to be staffed by a properly certificated person. Instead, it sought a different means to "provide" required library/media services. It determined to apply to the Commissioner of Education for a waiver that, if granted, would allow it to have a certificated elementary school teacher in grades K-6 with middle school subject matter specialization: Language Arts/Literacy Specialization in grades K-5-8 or a certificate Teacher of Supplemental Instruction in Reading and Mathematics, grades K-8, "provide" the services normally provided, as required by N.J.A.C. 6A:13-2.1(h), by a certified school library/media specialist. As the Board noted in Section 4 of the Waiver Application, the "description of the process," it had rified the full-time media specialist position and had sought the "assistance" of the CCESC to provide a part-time media specialist. Clearly, by seeking this waiver, the Board was announcing that in the face of the absence of a certified part-time library/media specialist produced through the shared services

agreement, it was not intending to recreate the full-time position that it had eliminated to save money, or, alternatively, to create a part-time position of its own. It still wanted to proceed without the economic burden it had shed with the abolition of the full-time slot(s).

As previously noted, N.J.A.C. 6A:5 does provide for the possibility of a waiver. N.J.A.C. 6A:5-1.1 announces

(a) This chapter's purpose is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in the New Jersey Administrative Code Title 6A. Regulatory flexibility may be granted as a waiver or equivalency to a specific rule so school districts can provide effective and efficient educational programs. The Commissioner, with authority delegated by the New Jersey State Board of Education, may approve on a case-by-case basis a waiver or equivalency to a specific rule.

Despite this authorization for some regulatory flexibility, here the Commissioner decided to deny the waiver. In doing so, she noted that its fundamental premise, the provision of library/media services by personnel not properly certificated, violated the “spirit and intent” of Title 6A because

N.J.A.C. 6A:5-1.3 specifically states the certification requirements of N.J.S.A.18A:26-2 shall not be violated. Approval of the equivalency application would be a de facto waiver of school library media specialist certification requirements at N.J.A.C. 6A:9B-14.14, which would be in violation of N.J.S.A. 18A:26-2.

Thus, the Commissioner in effect advised the Board that, given the specific commands of N.J.A.C. 6A:5-1.3 and N.J.S.A. 18A:26-2, its proposal was fundamentally flawed. Despite this seemingly obvious flaw in its plan, given the Board’s intent to economize, perhaps the Board thought it worth the chance that the Commissioner might nevertheless allow the waiver. However, it must be noted that in its description of the facts underlying its application, the Board stated that after posting of the shared service position by the CCESC and by the Board itself (with that posting directing the applicants to file with the CCESC), it “reached out to several establishments seeking support and information on

individuals who possess the Media Specialists Certificate, as well as seek opportunities for a shared service. To date, we have not been able to locate such a certificated individual or engage in a shared service.” It is not at all clear why the Board did not attempt to contact Ms. Deitch, its very own recent and fully certificated employee, about the position, who it certainly could have located. Even if the position was to be a shared service job through CCESC, rather than a position on the Board’s own payroll, the Board could have asked her if she had applied to the CCESC, or if it contemplated the need to staff the position itself, to see if she was interested in it as either a part- or full-time position. The lack of any suggestion that the Board tried to see if Deitch was interested raises concerns about the Board’s representation to the Commissioner in the waiver application. Yet, that said, I **FIND** that there is no direct evidence that in filing for the waiver, the Board was purposely seeking to deny Ms. Deitch a job or directly seeking to avoid her tenure rights.

The Board was legally obligated to provide services and, as the Commissioner explained, to do so with properly certificated personnel. If the waiver attempt, fundamentally flawed as it was, did somehow postpone the Board’s obligation in the face of the failure to obtain shared services until the waiver was denied, surely by January the Board could no longer avoid an obligation to lawfully staff the services. In either case, whether that obligation attached in September or in January, Ms. Deitch would have been entitled to be offered the restored position, even though she was then employed in the Trenton School District. That said, if the Board did have an obligation to restore a position so as to “provide” services through a properly certificated individual in conformity with N.J.A.C. 6A:2.1(h), what exactly did that obligation entail? Must the Board have created a full-time position, as existed prior to the RIF, or was it only required to create a part-time slot, in accordance with the intent of the shared service agreement, which clearly contemplated that the services to be provided by a shared, properly certificated, individual working part-time in the District under the auspices of the CCESC would be sufficient to meet the requirements of the law? In either case, if the obligation existed, Ms. Deitch was entitled under her tenure rights to the position, but the question of what damages

and remedy is appropriate for any violation of her rights may turn on the nature and timing of the Board's obligation.²

Counsel for the Board argues that while the District did not "provide" the library/media services during 2017-2018 through a properly certificated library/media specialist, any violation of its legal obligations under N.J.A.C. 6A:2.1(h) might subject the District to criticism or possibly some sanction for not complying with that regulation, but that failure would not provide any basis for Deitch to claim a violation of her tenure rights. And, even if the Board did, either in September or January, have an obligation to create a position of library/media specialist, at most it was required to create a part-time position. Given her full-time employment in Trenton during the entire 2017-2018 school year, even if her rights were violated, Ms. Deitch's potential earnings from such a part-time position in Berlin, whether for the full school year or certainly from January through June, were such that she has no claim for any financial damages. In response, counsel for Ms. Deitch notes that there never was a shared service in the 2017-2018 school year, and as such, the full-time position that existed before the RIF is the position the Board was required to restore and to which Ms. Deitch had rights.

The Board of Education is legally responsible to manage its school district in conformity with the established statutes and regulations that mandate the curriculum and the providers authorized to deliver it to students. So long as the Board assures that these mandates are met, it is within the Board's discretion as to how to allocate staff and funding to achieve these mandates. As such, if a school board determines that library/media services can be properly "provided" by properly certificated, part-time staff, subject to any other statutory or possibly contractual obligations, the Board may so arrange. If the Board decides that full-time certificated staff are not necessary to fulfill the obligation, it may reduce the position(s) to part-time, so long as it does so, in the case of tenured staff, for legally acceptable reasons of economy or efficiency. And, as said before, it may RIF certificated staff completely, so long as it provides the required media services in some

² It is noted that when the Board did manage to obtain shared service for the 2018-2019 school year, the arrangement was for three days a week for the certified media specialist.

other lawful manner, such as a shared service arrangement. As such, in the spring of 2017, the Berlin Borough Board of Education could have chosen to reduce Ms. Deitch's position to part-time rather than eliminate it, and so long as the services were properly filled in this part-time fashion, the Board's action would be acceptable. Importantly, no claim is made here that the services could not have been properly provided by the shared service personnel intended by the arrangement with the CCESC. As such, I cannot readily see why in September 2017, the Board could not have both sought to economize and still provide the mandated services through a part-time staff member on its own payroll. Merely because the CCESC did not deliver a provider does not mean the Board had to abandon any possibility of lessened expense, so long as the mandated services to its students were met. Given this, I **FIND** that the Board had an obligation, at least as early as September 2017, to restore a position for a certified media specialist on its rolls, but in the absence of any evidence to the contrary, that obligation could have been met by a part-time position. I **CONCLUDE** that Ms. Deitch would have been entitled to that restored, vacant part-time position, if she chose to exercise her tenure rights. Indeed, she had applied for that very part-time position through the CCESC.

Damages

While a teacher whose tenure rights have been violated and who has thereby been denied employment is generally entitled to receive back pay for such losses as she may have suffered, measuring whether Ms. Deitch is entitled to any monetary damages for the Board's failure to honor her tenure rights presents some difficulties. After her position with Berlin Borough was abolished, Ms. Deitch obtained full-time employment with the Trenton Board of Education, thereby fulfilling her responsibility to seek to mitigate her damages. The parties have stipulated that her base salary for 2017-2018 in Trenton was \$69,440. As noted, her anticipated salary for 2017-2018 as a full-time employee of Berlin Borough was \$88,398, a difference of \$18,958. In seeking relief for the violation of her tenure rights, Ms. Deitch also notes commuting costs of \$8,677.27 associated with her employment in Trenton, that she contends were required by her loss of employment with the respondent, as well as medical expenses of \$1,724.20, following the termination of

her health care benefits received from her employment with respondent, until she obtained new coverage through the Trenton Board. She received \$4,268 in unemployment benefits.

It is clear that if Ms. Deitch could have expected full-time employment in 2017-2018 with the respondent her anticipated earnings would have exceeded those from the position she obtained in Trenton. However, given that the Board only had to create a part-time position to which she would have had entitlement, it is also clear that if she had been placed in the part-time position with the respondent that she applied for with the CCESC, or if she had been offered and had accepted the part-time position that this decision concludes the respondent was obligated to create in September 2017, the salary for that part-time position would obviously not have been the \$88,398 that she anticipated she would have earned in a full-time position with the respondent in 2017-2018. According to the Stipulation, the CCESC pegged the salary for the part-time position advertised that summer as \$34,272. According to a quote for services from the CCESC to the Board, this was to be for two days a week at \$476 a day. Clearly, if all that Ms. Deitch could have expected to receive from respondent for a part-time position restored to the Board's rolls would have been this figure, her earnings in Trenton far exceeded this figure, and that is so even if the commuting and medical expenses are included as money to which she would be entitled in view of the violation of her tenure rights. Even if the two-day a week salary were measured against her anticipated full salary of \$88,398, 40 percent of that salary, representing two of five work days, would total \$35,359.20. Again, the earnings from Trenton far exceed this figure. Thus, I **FIND** that she suffered no financial damage from the Board's failure to create a part-time position for school year 2017-2018 to allow it to properly provide media specialist services in the absence of provision through the shared services arrangement. Of course, had the Board created the part-time position for that school year, it could have then chosen to abolish that part-time position and seek to fill it through a shared service arrangement with the CCESC for 2018-2019. In fact, while it did not create a position of its own for 2017-2018, it did succeed in obtaining shared service from CCESC for 2018-2019. But if it had an obligation to create this part-time position on its rolls for 2017-2018, it would have had to

formally abolish, or RIF, the position before it entered into a new shared service arrangement. Since it never created the part-time position that this decision concludes it was obligated to create, it of course never acted to abolish it. Thus, if Ms. Deitch, exercising her tenure rights, had taken the part-time position Berlin Borough should have created, in the absence of proper action to abolish the position, she would have been entitled to the part-time position for 2018-2019. Her anticipated salary for that year in Berlin Borough, at two days a week as per the work anticipated by part-time arrangement sought for 2017-2018, and based on 40 percent of the anticipated full-time salary of \$89,198 would have been \$35,679.20. Instead if three days a week were required, as was the case under the actual part-time arrangement filled by the CCESC for 2018-2019, the salary would have been approximately \$53,518.80; 60 percent of the full salary. In reality, Ms. Deitch was rified by Trenton at the end of 2017-2018, hired by the Millville School District, worked there from September 2018 through October 31, 2018, resigned and was rehired by Trenton, starting on November 2, 2018, through June 30, 2019. She received unemployment during the summer of 2018, totaling \$3,977. She earned \$8215.84 from Millville. Her salary with Trenton was \$72,390, plus a \$1,500 stipend for her dual certifications, totaling \$73,890, a figure that was prorated for the time employed by Trenton starting November 2, 2018. While she again notes additional commuting costs related to travel to Millville and Trenton, it is obvious that once again her actual earnings exceeded any earnings she would have received from a part-time position with the Berlin Borough School District. As such, I **CONCLUDE** that despite Berlin Borough's failure to honor Ms. Deitch's tenure rights when it failed to restore a position of library/media specialist, as that obligation only involved the creation of a part-time position, she suffered no financial loss and thus no damages are warranted.

ORDER

There being no material facts in dispute and the evidence supporting Ms. Deitch's claim that under the tenure law she was entitled to a position with the Berlin Borough Board of Education, and that the Board failed to honor her tenure rights, **IT IS HEREBY**

ORDERED her motion for summary decision is **GRANTED**. However, she is not entitled to any monetary award.

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.

June 24, 2019
DATE

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

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

LIST OF EXHIBITS:

Joint Exhibits:

J-1 Stipulated Facts and Exhibits A through Q **NOTE:** The Stipulation states that Exhibit D contains the Board meeting minutes from April 27, 2017 and June 22, 2017, as well as the Board Resolution for the Reduction In Force. However, the judge's copy only has the April minutes attached. The June minutes are separate and are therefore labeled as Exhibit D-1

For petitioner:

None

For respondent:

R-1 Quote for Service Delivery, dated May 11, 2017