

RENDERED: AUGUST 31, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000540-MR

SHAINA M. GERON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JUDGE
ACTION NO 16-CI-004155

JEFFERSON COUNTY BOARD OF
EDUCATION d/b/a JEFFERSON COUNTY
PUBLIC SCHOOLS; ANGELA HOSCH,
PRINCIPAL; DR. DONNA M. HARGENS,
SUPERINTENDENT; AND STATE
EVALUATION APPEALS PANEL,
KENTUCKY BOARD OF EDUCATION,
KENTUCKY DEPARTMENT OF
EDUCATION, EDUCATION AND
WORKFORCE DEVELOPMENT CABINET

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Shaina M. Geron appeals from the Jefferson Circuit Court's dismissal of her action seeking review of the decision not to renew her limited teaching contract with Jefferson County Public Schools ("JCPS") which decision had been upheld following hearings before the Local Evaluation Appeals Panel ("LEAP") and the State Evaluation Appeals Panel ("SEAP"). Following a careful review, we discern no error and affirm.

Geron was a non-tenured teacher with a limited contract of employment for JCPS. The contract specifically stated it was for the 2013-2014 school year and reserved the right of the Superintendent of JCPS "to transfer, suspend, non-renew, or terminate" the employment. Geron worked at Portland Elementary School during the 2013-14 school year, the first year of her teacher internship. She was directly supervised by Principal Angela Hosch.

On multiple occasions during the year, Geron was informed and counseled regarding perceived deficiencies in her classroom management, teaching performance and student behavior supervision. Additionally, several times Geron failed to turn in completed work for her Kentucky Teacher Internship Program ("KTIP")¹ or was tardy in submitting the work. At her mid-year summative evaluation, Geron's performance on all benchmarks was classified as "inconsistently meets" which means an "employee's performance is less than the performance criteria expected and needs improvement." The deficiencies were

¹ KTIP is a program for new teachers administered by the Educational Professional Standards Board of the Kentucky Department of Education.

described in detail in a summative evaluation report. Unfortunately, Geron's performance did not improve, despite continued counseling and advice from school administrators.

Near the end of the school year, Geron received another summative evaluation which reflected the decline in her performance. The rating on all benchmarks was classified as "does not meet" which means her "performance [was] substantially below expectations and is unacceptable. The employee rarely accomplishes the performance criteria even with frequent assistance and support." Again, detailed information was provided in the summative evaluation report outlining Geron's failure to improve from her mid-year evaluation. Hosch recommended Superintendent Dr. Donna M. Hargens not renew Geron's limited employment contract for the following year. Geron did not file a grievance or otherwise challenge the recommendation.

Superintendent Hargens informed Geron by letter of the nonrenewal of her limited teaching contract for the 2014-15 school year. Because Geron had not successfully completed her KTIP, she lost her teaching certification. Due to this loss of certification, Superintendent Hargens issued another letter informing Geron she would be ineligible to hold a teaching position after June 30, 2014.

Geron subsequently requested a written explanation from Superintendent Hargens for the nonrenewal of her limited teaching contract. A detailed response was issued explaining the nonrenewal with multiple supporting documents attached thereto. Fifteen months after her nonrenewal, Geron—through

counsel—sought to appeal her evaluations and nonrenewal, specifically requesting a LEAP hearing. Because JCPS believed the time for seeking such a hearing was fourteen days after receiving notice, the request was denied as untimely.

Geron filed a “Verified Petition” in Franklin Circuit Court against Hosch, Superintendent Hargens and JCPS (collectively “JCPS appellees”) seeking reinstatement to her teaching position, damages and injunctive relief based on claims of breach of contract, violation of statutory and regulatory procedures precipitating her nonrenewal, age discrimination, and religious discrimination. Approximately one month later, Geron requested and was granted a SEAP hearing. Geron and representatives from JCPS, all represented by counsel, attended the SEAP hearing. The SEAP determined the appeal was not ripe for review because the LEAP had denied an initial hearing. On December 17, 2015, the matter was remanded to the LEAP to convene a hearing.

On December 28, 2015, the JCPS appellees moved to dismiss Geron’s complaint or, alternatively, to transfer the action to Jefferson Circuit Court. Geron responded and challenged what she believed was the improper inclusion of numerous documents to the motion to dismiss.

On April 15, 2016, the Franklin Circuit Court dismissed Geron’s breach of contract claim upon concluding the statute of limitations period had run before the action was filed. The remainder of the claims were transferred to Jefferson Circuit Court for disposition. After Geron moved to alter, amend or vacate the April 16 order, the Franklin Circuit Court ordered the record returned

from Jefferson Circuit Court. Although technically granting Geron's motion, by order entered on August 21, 2016, the Franklin Circuit Court reaffirmed its prior dismissal of her breach of contract claim and transfer of the action to Jefferson Circuit Court.

While the Franklin Circuit Court action was progressing, a LEAP hearing was convened at which all parties were represented by counsel and were permitted the opportunity to present evidence supportive of their respective positions. The LEAP upheld the evaluations and nonrenewal of Geron's limited teaching contract. Geron timely appealed the decision to the SEAP which conducted a hearing on October 4, 2016. Again, all parties were present and represented by counsel; the entire LEAP record was presented to the SEAP and all parties filed prehearing written briefs. In its final order dated October 25, 2016, the SEAP noted its jurisdiction was limited to review of procedural matters already addressed by local panels and it did not have authority to review or amend a superintendent's decision not to renew a limited teaching contract. After considering the arguments and exhibits presented, the SEAP concluded Geron had failed to show a material procedural violation sufficient to overturn the decision of the LEAP.

On November 23, 2016, Geron filed a "Verified Petition" in Jefferson Circuit Court challenging the decision of the SEAP.² The new petition raised

² The effect of initiating the new suit was to bring the Kentucky Department of Education (KDE) and Kentucky Board of Education (KBE) into the fray.

similar claims and allegations to those brought in the earlier action. Geron's subsequent motion to consolidate the two actions was granted. On January 1, 2017, the JCPS appellees moved to dismiss the junior action. The Jefferson Circuit Court granted the motion and Geron timely moved to reconsider. In denying reconsideration, the Jefferson Circuit Court clarified the dismissal was applicable to both of the consolidated actions. This appeal followed.

Geron raises multiple allegations of error in seeking reversal. First, she contends attaching multiple documents to the first motion to dismiss filed by the JCPS appellees in Franklin Circuit Court was improper, those documents should be disregarded, and consideration of the exhibits by the court constituted reversible error. Second, Geron alleges the SEAP decision to uphold nonrenewal of her limited teaching contract was arbitrary and capricious and, therefore, subject to judicial review. She believes the dismissal of her petitions deprived her of such review. Next, she contends JCPS materially breached its contractual promises, thereby rendering the Franklin Circuit Court's dismissal of her breach of contract claim erroneous. Finally, Geron contends she presented a *prima facie* showing of religious discrimination sufficient to withstand a motion to dismiss.

In response, the JCPS appellees, KDE and KBE (collectively "school appellees") contend SEAP decisions are not subject to judicial review, thereby rendering the circuit court's dismissal appropriate. Alternatively, the JCPS appellees argue the documents attached to the motion to dismiss were referred to and relied on by Geron in her Verified Petition and thus were properly tendered to

and considered by the court; Geron was not denied due process and no arbitrary action occurred at the administrative level;³ no breach of contract occurred when Geron's limited teaching contract was not renewed following its expiration; and Geron did not establish a *prima facie* case for religious discrimination. Discerning no error in the proceedings below, we affirm.

First, Geron presents what she believes is a "threshold matter," arguing the inclusion of "twenty-six (26) exhibits, spanning one hundred and twenty-seven (127) pages" by the JCPS appellees in their first motion to dismiss was improper. She contends these documents should be disregarded and the trial court's failure to do so constituted reversible error. Geron alleges consideration of the exhibits converted the motion to dismiss into one for summary judgment, a motion which would be clearly premature as no discovery had been completed, thereby mandating reversal. Geron's assertions fall wide of the mark.

In her petition, Geron referenced and relied on the contents of the exact documents the JCPS appellees attached to their motion to dismiss. They were clearly essential to her case as she made multiple allegations regarding the content and meaning of these documents. To cry foul when these matters are presented to the court for its consideration is disingenuous at best. Generally, when a court considers matters outside the pleadings, a motion to dismiss is converted to a motion for summary judgment. CR⁴ 12.02. However, when the

³ KDE and KBE likewise assert Geron was provided sufficient due process and the SEAP's decision was not arbitrary.

⁴ Kentucky Rules of Civil Procedure.

documents or exhibits are central to the issues raised in a plaintiff's complaint and referenced therein, even if not incorporated by reference or attached to the complaint, "the records are subject to consideration without having to convert the motion under review to a summary judgment motion." *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 564 (Ky. App. 2017). *See also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (document not fully incorporated by reference or attached to complaint may be considered part of pleadings when referred to in complaint and central to plaintiff's claim). The attached documents were not "matters outside the pleadings" as Geron suggests and were properly placed before the trial court. No error occurred.

Second, Geron contends the SEAP's upholding of Superintendent Hargens' nonrenewal of her limited teaching contract constituted an arbitrary and capricious action. She argues judicial review is required under KRS⁵ Chapter 13B and the dismissal of her petitions deprived her of such review. The school appellees counter that the SEAP does not conduct administrative hearings pursuant to KRS Chapter 13B and thus, its decisions are not subject to judicial review.

The administrative hearing procedures set out in KRS Chapter 13B apply to all administrative hearings conducted by an agency except those which are specifically exempted. KRS 13B.020(1). Pursuant to KRS 13B.010(2), "[a]dministrative hearing' or 'hearing' means any type of formal adjudicatory

⁵ Kentucky Revised Statutes.

proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person.” However, KRS Chapter 13B “creates only procedural rights and shall not be construed to confer upon any person a right to hearing not expressly provided by law.” KRS 13B.020(1). Importantly, no express provision for judicial review appears in the statutory framework or administrative regulations related to the SEAP. “There is no appeal to the courts from an action of an administrative agency as a matter of right.” *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Thus, unless the SEAP conducts “administrative hearings” the provisions of KRS Chapter 13B do not apply.

Our review reveals SEAP proceedings simply do not constitute “administrative hearings” as envisioned by KRS Chapter 13B. The SEAP is organized pursuant to KRS 156.557(7) which states:

[t]he Kentucky Board of Education shall establish an appeals procedure for certified school personnel who believe that the local school district failed to properly implement the evaluation system. The appeals procedure shall not involve requests from individual certified school personnel members for review of the judgmental conclusions of their personnel evaluations.

The operating procedures for the SEAP are set forth at 704 KAR⁶ 3:370 §12(2)(a) as follows:

[t]he Kentucky Board of Education shall appoint a committee of three (3) state board members to serve on the state evaluation appeals panel (SEAP). The SEAP’s

⁶ Kentucky Administrative Regulations.

jurisdiction shall be limited to procedural matters already addressed by the local appeals panel related to the district's alleged failure to implement an evaluation plan as approved by the department. The SEAP shall not have jurisdiction of a complaint involving the professional judgment conclusion of an evaluation, and the SEAP's review shall be limited to the record of proceedings and documents therein, or lack thereof, at the local district level.

A finding by the SEAP of noncompliance with a district's evaluation plan renders the subject evaluation void. 704 KAR 3:370 § 12(2)(e).

Clearly, the SEAP is a review panel possessing very limited statutorily defined functions, and no provision exists for a hearing officer, the presentation or cross-examination of witnesses or any of the traditional hallmarks of an administrative hearing. The SEAP merely reviews the actions of the LEAP to determine compliance with an approved evaluation plan and thereby provide accountability and encouragement for local districts to implement appropriate evaluation plans. The SEAP is not empowered to reinstate a teacher to a prior position or provide any other remedy apart from setting aside a defective evaluation. Therefore, we conclude the SEAP does not conduct "administrative hearings" and actions of the SEAP do not come within the purview of KRS Chapter 13B.

Nevertheless, courts may assume jurisdiction in the absence of a specific statutory authorization to prevent arbitrary action. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness occurs in

administrative actions when the agency acts in excess of statutory powers, denies due process, or makes a decision unsupported by substantial evidence. *Id.* In this case the SEAP acted within the powers permitted it by statute and administrative regulation. Geron was permitted due process hearings. Lastly, substantial evidence supported the final decision. Under such circumstances this Court may not substitute its judgment for that of the administrative body. Thus, the decision must stand. We find no reversible error in the trial court's dismissal of Geron's petition.

Although we have determined the trial court did not err in dismissing Geron's claims, for clarity and completeness, we shall address her remaining arguments on appeal. Neither of her contentions warrant relief.

Geron contends JCPS materially breached its contractual obligations to her, thereby giving rise to a viable breach of contract claim. The sole contract at issue in this matter is Geron's one-year limited teaching contract. Pursuant to KRS 161.750, Superintendent Hargens had express authority and nearly unfettered discretion on whether to renew Geron's employment. Geron's contract clearly recognized this power and specifically stated Superintendent Hargens' authority would be "in no manner impaired or affected by this contract." It is axiomatic that superintendents may decline to renew a limited teaching contract without cause. *See Board of Education of Louisville v. Louisville Education Association*, 574 S.W.2d 310 (Ky. App. 1977); *Johnson v. Dixon*, 501 S.W.2d 256 (Ky. 1973).

"Non-tenured teachers have very few rights under our statutory scheme. A school

board neither has to rehire a teacher on a limited contract nor provide him with a hearing if he is not rehired.” *Gibson v. Board of Education of Jackson County*, 805 S.W.2d 673, 675 (Ky. App. 1991). Reemployment of a non-tenured teacher “is dependent on the grace of the board of education.” *Belcher v. Gish*, 555 S.W.2d 264, 266 (Ky. 1977). Superintendent Hargens exercised her statutory right to not reemploy Geron based on the results of numerous unfavorable evaluations and Geron’s continued decline in performance over the course of the school year. We are not at liberty to substitute our judgment for hers and decline to do so.

Further, Geron’s attempt to couch her claim on the alleged failure of JCPS to follow its own procedures related to evaluations and teacher performance deficiency improvement is unavailing as these matters cannot serve as the basis for Geron’s claim for breach of her limited teaching contract. These are exactly the types of issues for which the General Assembly required creation of the LEAP and SEAP. Geron took advantage of those systems but was unsuccessful in obtaining relief. Her dissatisfaction with the result of the administrative process is insufficient to support a breach of contract claim. We discern no error in the Franklin Circuit Court’s dismissal of Geron’s breach of contract claim.

Finally, Geron’s religious discrimination claim is wholly without merit and fails as a matter of law.

KRS 344.040 prohibits religious discrimination by employers. The elements of a *prima facie* case of religious discrimination were set forth by this court in *Kentucky Comm’n on Human Rights v. Lesco*, Ky. App., 736 S.W.2d 361 (1987). Therein, the court held that

“one must prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement.”
Id. at 363.

Irvin v. Aubrey, 92 S.W.3d 87, 89 (Ky. App. 2001). In her petition, Geron claimed she is a practitioner of Judaism, her limited teaching contract was not renewed, she was qualified for the position she held, and she was replaced by someone who was not Jewish. Thus, she asserted JCPS must have discriminated against her because of her religion. Nowhere in the record is there any indication Geron believed any portion of her employment conflicted with her religious beliefs. Nor is there any suggestion she informed JCPS of the existence of any such conflict. Further, Geron does not allege adherence to her religious beliefs and refusal to act contrary thereto was the basis for the nonrenewal of her contract. Geron plainly did not establish a *prima facie* showing of religious discrimination. The trial court properly dismissed this claim.

Therefore, for the foregoing reasons the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Peter J. Jannace
Teddy B. Gordon
Louisville, Kentucky

BRIEF FOR APPELLEES,
JEFFERSON COUNTY BOARD OF
EDUCATION d/b/a JEFFERSON
COUNTY PUBLIC SCHOOLS,
ANGELA HOSCH, AND DR.
DONNA M. HARGENS:

C. Tyson Gorman
R. Joseph Stennis, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES,
KENTUCKY BOARD OF
EDUCATION AND KENTUCKY
DEPARTMENT OF EDUCATION:

Ashley Lant
Assistant General Counsel
Kentucky Department of Education
Frankfort, Kentucky