

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14OSP00389

JOSEPH VINCOLI PETITIONER, V. N C DEPARTMENT OF PUBLIC SAFETY RESPONDENT.	FINAL DECISION ORDER OF DISMISSAL
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THIS CAUSE came on to be heard on March 14, 2014 in the Office of Administrative Hearings (“OAH”) in Raleigh, North Carolina before the undersigned on Respondent’s Motion to Dismiss for lack of subject matter jurisdiction. After reviewing the pleadings and the entire file and hearing the arguments of Counsel, the undersigned hereby enters the following:

STATEMENT OF FACTS

1. Petitioner Joseph Vincoli [hereinafter “Petitioner” or “Vincoli”] alleges that he was improperly designated as managerial exempt as a “sham” or pretext for a disciplinary dismissal.

2. Prior to the substantial revision of Chapter 126 in August 2013, a state employee could appeal the designation of his or her position as exempt to the OAH under G.S. 126-34, which was repealed. G.S. 126-34.02(b) removed the ability to make such as appeal.

3. Session Law 3012-382 changed the types of cases which can be heard as contested cases in the OAH. G.S. 126-34.02(b), effective on August 21, 2013, provides that only a limited number of specific issues may be heard as contested cases after being considered by the agency. The specific issues are listed in the statute:

- (1) Discrimination or harassment
- (1) Retaliation
- (3) Just cause for dismissal, demotion, suspension . . .
- (4) Veteran’s preference . . .
- (5) Failure to post or give priority consideration.
- (6) Whistleblower.

4. Petitioner received a letter from Department of Public Safety Secretary Frank L. Perry, dated October 1, 2013, informing him of his designation as a managerial exempt employee.

5. By letter dated December 9, 2013, Secretary Frank L. Perry determined that a change in agency staff was appropriate and informed Petitioner that he was dismissed on that day.

6. Because Petitioner was a career state employee with more than two but less than ten cumulative years of service, and was being removed for reasons other than just cause, he was entitled to a one-time priority placement for rehire for twelve months to any available non-exempt position for which he applied and was qualified at or below his current salary grade.

7. Petitioner filed his Petition for a Contested Case Hearing in the OAH on January 16, 2014.

CONCLUSIONS OF LAW

1. Effective August 21, 2013, the law changed controlling the matters over which the OAH has original jurisdiction, and the General Assembly repealed the right to appeal an exempt designation. This statutory change removes the rights of a state employee to challenge an exempt designation; therefore, the merits of this contested case will not be addressed.

2. As a managerial exempt employee, Petitioner is not subject to the provisions of Chapter 126. Therefore, G.S. 126-5(h) does not grant Petitioner the right to appeal his exempt designation or ultimate dismissal under G.S. 126-5(h) and Chapter 150B.

3. Only those grievances listed in G.S. 126-34.02 may be heard as contested cases in the OAH and only after review by the Office of State Human Resources. Petitioner's exempt designation is no longer among the grievances listed; therefore, the OAH has no subject matter jurisdiction, which is the predicate authority for a contested case to proceed. The lack of subject matter jurisdiction requires that Petitioner's contested case be dismissed.

FINAL DECISION

IT IS HEREBY ORDERED, for the foregoing reasons that the Office of Administrative Hearings lacks subject matter jurisdiction over the Petition because it fails to allege an enumerated ground for a contested case under G.S. § 126-34.02, that this matter is DISMISSED.

NOTICE

This **Final Decision** is issued under the authority of N.C.G.S. § 150B-34.

Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed

with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 21st day of April, 2014.

J. Randall May
Administrative Law Judge