

H.E. NO. 2006-6

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

In the Matter of

BERGEN COUNTY VOCATIONAL
TECHNICAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-2004-005

BERGEN COUNTY VOCATIONAL TECHNICAL
CUSTODIAL MAINTENANCE PERSONNEL ASSOCIATION,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends dismissing the contested transfer petition where she found that the Board demonstrated legitimate operational and staffing needs to transfer Custodian Francis Green. Specifically, the Board had to accommodate another custodian's medical condition by moving him to a first shift position from the third shift on the Hackensack campus. The Board also needed to ensure that the third shift on the Hackensack campus was sufficiently staffed because it had determined through time studies that it was understaffed. In selecting Green for transfer, the Board determined that other custodians under consideration for transfer were operationally better fits where they were assigned; Green had previously worked on the Hackensack campus and was familiar with its operations; and Green had performance related problems on the first shift. The Hearing Examiner further determined that although Green had been reprimanded for non-performance related issues, these reprimands and criticisms did not motivate the transfer. The Hearing Examiner rejected Petitioner's contention that the Board transferred Green because of his union activities. She also determined that poor performance reviews are not by themselves discipline within the meaning of N.J.S.A. 34:13A-25.

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 which 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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Charging Party.

Appearances:

For the Respondent, Nowell, Amoroso, Klein, Bierman,
P.A., (William C. Soukas, of counsel)

For the Petitioner, Springstead & Maurice, attorneys,
(Alfred Maurice, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 7, 2004, the Bergen County Vocational Technical Custodial Maintenance Personnel Association (Association or Petitioner) filed a petition for contested transfer determination. The petition alleges that the Bergen County Vocational Technical Board of Education (Board or Respondent) violated N.J.S.A. 34:13A-25 by transferring Francis Green from the Board's Paramus Campus to the Hackensack Campus for disciplinary reasons. Specifically, the Association alleges that Green was active in the Association as a past president and current building representative and grievance chair and that as a

result, the Board assigned a new supervisor to write Green up and transfer him to a less visible post. In particular, the Association contends that Green's transfer from the first or day shift to the third or overnight shift and to a different campus was motivated by anti-union animus.

On February 12, 2004 the Board filed an Answer, denying that the transfer was for disciplinary reasons. It asserts that Green's transfer was part of a larger overall managerial plan to more efficiently and effectively deploy staff resources and funds to the Hackensack Campus, particularly on the third shift, and, also, to accommodate another employee's medical condition.

On November 29, 2004, a Notice of Hearing issued. On April 5, 2005, after the previously assigned hearing examiner became unavailable, the Commission designated me to conduct the hearing pursuant to N.J.A.C. 19:14-6.4(a). On July 27 and 28, 2005, I conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by October 17, 2005.

Based upon the entire record, I make the following:

Findings of Fact

BACKGROUND

1. The Bergen County Vocational Technical Board of Education is an employer within the meaning of the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-22.

The Bergen County Vocational Technical Custodial Maintenance Personnel Association is a majority representative within the meaning of N.J.S.A. 34:13A-3 and Francis Green is an employee within the meaning of N.J.S.A. 34:13A-22.

2. The Board and the Association stipulate that Francis Green was transferred in November 2003 between work sites within the meaning of N.J.S.A. 34:13A-25, specifically from the Board's Paramus Campus to its Hackensack Campus, and that the only dispute is whether the transfer was for disciplinary reasons (1T9).

3. Green has been employed by the Board since 1975 (1T21, 1T89). He has held various positions including bus driver, groundsman and groundsman/custodian and has worked on various campuses throughout his career. In the early 1990s, Green worked on the Hackensack campus but was transferred to the Teterboro campus in 1994 where he remained for one and one half years before transferring back to Hackensack. In April 2001 Green was transferred to the Paramus campus as a custodian/groundsman on the first shift (7:00 a.m. to 3 p.m.) (1T23-1T25).

4. In 1999, 2000, 2002 and 2003, Green received satisfactory performance evaluations (J-2, J-3, J-4, J-5; 1T31-1T34).^{1/}

In 1999, while Green was working as a maintenance man on the Hackensack campus, his supervisor, Joe Ferri, gave him a

^{1/} Green's 2001 evaluation was not submitted into evidence.

satisfactory evaluation for 1998-1999 (1T133). In the summary commentary, Ferri wrote specifically:

You are a satisfactory performer. You usually complete regular work projects on schedule. You are competent in solving problems and making decisions. You are generally effective working within your own group as well as within the entire organization. (J-2)

On September 13, 2000, while still working on the Hackensack campus as a maintenance man, Green's supervisor, Mike Hunken gave him a satisfactory evaluation and wrote (1T31-1T32, 1T134):

You are flexible and creative about making adjustments to your plans. You take a big picture perspective to anticipate future challenges and relate your daily activities in response to change, organizational needs. (J-3)

On February 27, 2002, while working on the Paramus campus as a custodian/groundsman, Green's supervisor, Dennis Purcell, gave him a satisfactory evaluation and wrote (1T32-1T33, 1T135-1T136):

You stay aware of changing departmental and cooperative objectives and keep your plans and daily activity aligned with them. (J-4)

Finally, on March 31, 2003 Green received another evaluation from Purcell, (1T33-1T34, 1T136). Purcell gave Green an average or rating of "3"^{2/} and wrote:

2/ Robert Csigi was hired in 2002 and began his tenure as Head of the Buildings and Grounds Department (1T113-1T114). He changed the evaluation forms from a two-step rating system of satisfactory/unsatisfactory to a five-step rating system (continued...)

Frank is a very good worker when he wants to be. He has tendencies to leave his work assignment without permission from his supervisor (J-5).

5. Throughout his career with the Board, Green has been involved with the Association. He served as Association president from 1981 to 1995 and then again from 2000 to 2002 (1T21-1T22, 1T24, 1T28, 1T95-1T100). He has also served as Association grievance chair and filed grievances as per the parties' collective agreement, including, among others, one in 2001 and one in 2002 (J-1, P-1, P-2; 1T25-1T29, 1T91-1T92, 1T96-1T97). These grievances mostly resulted in the Board granting the requested relief (1T98-1T99). Indeed, between 2000 and 2003, Green received no negative feedback from the administration - e.g. critical performance reviews - despite numerous grievance filings (1T25, 1T29-1T30). It was only after the transfer of Eugene Focarelli to the Paramus campus that Green's performance came under critical review (1T30).

Green regularly attends Board meetings to communicate complaints and/or criticisms. For instance, in November 2004, he attended a Board meeting to complain about the condition of a boiler which he felt was not being safely maintained. The Board

2/ (...continued)
with "1" as unsatisfactory up to "5" as outstanding. He expected all employees to reach at least a "3" or satisfactory rating (1T33, 1T121-1T122, 1T166-1T168).

told him they would look into it and identify the problem (1T88, 1T93-1T94, 1T100).

Robert Csigi

6. In November 2002, Robert Csigi was hired by the Board as Manager Operations, Maintenance and Custodial and, as such, is head of the buildings and grounds department (1T140). Csigi reported directly to Assistant Business Administrator Andrew Nemec when he was first hired but, most recently, as a result of a restructuring, Csigi reports to the assistant to the superintendent (R-1; 1T141).

Csigi directs seven campus supervisors who manage the custodial, maintenance and grounds staff through head custodians or crew chiefs (1T141, 1T145). Csigi's responsibilities include maintaining the physical structures in two districts (Bergen County Technical Schools and Bergen County Special Services) which consist of twenty-nine (29) buildings as well as supervising approximately ninety (90) custodial/maintenance/grounds staff and truckers (1T141).

The Bergen County Technical Schools have approximately thirty-five custodians assigned to work either first shift/ 7 a.m. to 3 p.m.; second shift/ 3 p.m. to 11 p.m.; or third shift/ 11:00 p.m. to 7 a.m. (1T143-1T144). There are also a few custodians who work a split shift between the first and second

shifts (1T157). Csigi is responsible for assigning individuals to particular shifts (1T146).

Hackensack is the only campus to have a third shift because after-school programs extend the school day into the evening hours thus necessitating overnight cleaning (1T143-1T144). The third shift entails straight custodial work with no staff or student contact. As a result, it is generally less demanding than the other shifts. For instance, on the first shift, in addition to cleaning, custodians respond to the demands of teachers, students and principals, including demands involving emergency situations (1T159-1T160).

7. When Csigi was hired, Nemec explained to him that the schools were not as clean as they should be and charged Csigi with evaluating and ameliorating the situation (1T147). As a result within the first six months on the job, Csigi, an expert in time studies, performed one regarding the custodial staff. The time study reviewed how much each employee would be able to clean on a daily basis and addressed whether there was enough manpower to achieve a "B" cleaning - a very clean environment for educational purposes (1T147-1T148).

From the study, Csigi determined that the third shift was understaffed, while the second shift was overstaffed (1T147-1T148). In general, he determined that the Hackensack campus was a problem. It was a large campus with a lot of activity. In

order to properly clean the campus, Csigi decided he needed to increase the third shift custodial staff from five or six to ten. Green was not reassigned at this time, although other custodians were. Csigi's time studies also resulted in the reassignment of supervisors based on what he perceived to be their expertise (1T149-1T151).

In addition to conducting a time study, Csigi observed that there was little documentation relating to job performance (1T164). In order to help mentor employees and better communicate with them, he developed a Building/Custodial Inspection Report to be filled out by supervisors and head custodians (J-7; 1T164-1T166). Specifically, the purpose of the report was to inform employees that improvement was needed in certain areas; once improvement was noted, the reports were discarded. All employees were subject to these reports (1T165-1T166, 1T206-1T207).

FOCARELLI AND GREEN

8. As a result of Csigi's time studies and reassignments, on July 1, 2003 Eugene Focarelli was transferred from Teterboro to Paramus to replace Dennis Purcell who had been Green's supervisor for the previous year and a half (1T41-1T42). Focarelli was assigned to the first shift and was responsible for supervising three custodians, including Green (1T188-1T189).

Green testified that Purcell told him that he (Purcell) was transferred because he was not writing Green up (1T85-1T86). Therefore, Green believed that Focarelli was assigned to Paramus to "come down" on him and write him up (1T112, 1T128, 1T132). Purcell did not testify. Focarelli testified that Csigi gave him no explanation for his transfer from Teterboro to Paramus, although he would have preferred staying on the Teterboro campus (1T190). Csigi denied telling Purcell that he wanted a supervisor who would write Green up or that he instructed Focarelli to retaliate against Green or focus on Green more than other employees (1T160, 1T171-1T172). Csigi explained that he transferred Focarelli to Paramus as part of his effort to match skills and strengths of supervisors to particular campuses (1T151-1T152). He instructed all supervisors, including Focarelli, to make sure that all employees worked within Board guidelines. Csigi also explained that as a result of this general directive, Focarelli began citing Green for inefficiency (1T181-1T182). In light of Csigi and Focarelli's testimony, I do not credit Green's uncorroborated hearsay testimony concerning the reason for Purcell's transfer.

9. Focarelli was first employed by the District in 1985 and became a supervisor in 2000 (1T187, 1T189). From 1985 until 2000 he was a member of the Association. Focarelli knew Green because both he and Green worked on the Hackensack campus in the late

1980's - Green as a bus driver and Focarelli as a maintenance man. Focarelli was also Association vice-president, while Green was Association president. Focarelli had not worked with Green in recent years and had never supervised him (1T190-1T191).

10. On his first work day in Paramus (July 1, 2003), Focarelli arrived early to tour the campus. He began his tour with the EMS training building because he knew the director, Jerry Schwartz, and knew that Schwartz wanted his building done first (1T193-1T194). Green's custodial responsibilities included both the EMS facility and the barn (1T191-1T193)^{3/}.

During his inspection, Focarelli noticed rust stains in the bathroom toilets. The stains were unacceptable, because classes were conducted there in the summer months. Focarelli saw Green outside the building and asked him to come in to view the toilets. Green complained to Focarelli that the stains were not his fault. Focarelli told Green he did not care whose fault it was but wanted Green to take care of the problem. According to Focarelli, Green called him an asshole. When asked by Focarelli to repeat what he said, Green called him an asshole and told Focarelli his attitude sucked (R-1; 1T194-1T195).

Nemec told Focarelli to record the incident, which he did (R-1; 1T195). Focarelli thereafter issued Green a written

^{3/} The Paramus campus also has numerous other buildings (1T193).

reprimand for insubordination which was placed in his personnel file (R-1). According to Green, this was his first reprimand (1T89).

Green described the July 1 incident slightly differently. He testified that Focarelli did not greet him nor did he identify himself as Green's supervisor (1T41-1T42). Green, however, otherwise corroborated Focarelli's description of the incident. For instance, Green admitted that he told Focarelli that he was not responsible for the condition of the toilets. He also acknowledged that the toilets were, indeed, "really dirty" as Focarelli had observed (1T42-1T43).^{4/} I credit Focarelli's testimony which was buttressed by his contemporaneous writing describing the incident.

11. On July 16, 2003, Green received a letter from Focarelli accusing him of not carefully painting a bathroom in the 285 building: leaving paint on door jambs, the floor, switch plate covers and the paper towel dispenser. Green was the only one assigned to paint that bathroom on that day (J-7; 1T43-1T45, 1T198-1T200).

^{4/} There is conflicting testimony as to whether Green contested this reprimand. Green testified on cross-examination the he did not contest the reprimand (1T109-1T111). There is reference in R-7 that Green responded in writing on July 2. Whether Green responded or not is immaterial. Green and Focarelli agree that an incident occurred on July 1 which led to a written reprimand.

Green felt this criticism was undeserved claiming the paint had been there since 1975 (1T44-1T45). He also believed Focarelli's letter was motivated by animus to his union activity because he believed other custodians did not paint neatly but were not criticized (1T45-1T46).

Unlike the July 1 reprimand for insubordination, the July 16th letter was not put in Green's personnel file. It was kept in a separate file in Focarelli's office with Green's name. Focarelli kept a similar file on all of his employees for purposes of annual performance evaluations (2T91-2T99). A copy of the letter was also given to Nemeč and Csigi (1T199-1T200,).

12. Green received several other critical performance reviews from Focarelli in July. For instance, also on July 16, Focarelli sent Green a letter regarding a July 15 assignment to paint street curbing. Focarelli criticized the amount of time (four and a half hours) it took Green to paint one hundred eighty feet of curbing. According to Focarelli, another employee took much less time to paint an equivalent area (J-7; 1T47, 1T201-1T204).

Green disagreed with Focarelli's criticism because he had to first clean the curbs before he could paint, thus, adding time to the job (1T47-1T48). Focarelli acknowledged that if the job involved cleaning the curbs, as Green claimed, it would take longer than straight painting (1T76).

On July 21, 2003, Focarelli directed Green to change ceiling tiles. According to Focarelli, it was a simple job - it did not involve cutting or painting. Focarelli felt that Green took too long to complete the task and issued another letter noting specifically that "replacing 70 tiles in 7 ½ [hours] is unacceptable." He requested to meet with Green and Csigi to find out why Green takes so long to finish jobs and to correct the situation. In the letter, Focarelli also noted that Green took an additional seven minutes break time on July 21, 2003 (J-7; 1T46-1T47, 1T200-1T202). This letter was not put into Green's personnel files, but was kept by Focarelli in his own files and copied to Csigi and Nemec (1T201).

Green thought Focarelli's comments were unwarranted because, in his opinion, he had done a good job despite encountering unforeseen difficulties (cutting tiles) (1T47). Focarelli acknowledged that if cutting were involved, it would take longer (2T75-2T76).

13. As a result of the July incidents, Focarelli, Csigi, Uniserve Representative Ray Skorka and Green met. Skorka confirmed the meeting in a July 24, 2003 letter to Csigi (R-7). The parties agreed Focarelli would issue Green work orders for any major (not minor) work assignments and specify approximate times for completion of projects (R-7).

In the letter, Skorka also described various "administrative reprimands" issued between July 1 and 21 from Focarelli and/or Csigi to Green, including the July 1 insubordination reprimand; a July 3 memo concerning a broken sink and urinal; July 11 memos concerning Green's not punching out for lunch, returning late from lunch and extending his break time; July 16 memos about paint on ceiling grids, paper towel dispensers, doorjamb and floor as well as one concerning painting yellow street curbing; and a July 21 memo about replacing ceiling tiles (R-7). Skorka confirmed that the Association would not file grievances regarding these "reprimands" and the Board would waive timeliness considerations until September 1, provided Focarelli would consider removing the memo's from Green's file, if Green's performance improved (R-7).

14. After this meeting and over the next several months, Focarelli continued to criticize Green's work performance, namely his inability to finish daily tasks and/or the amount of time Green took to complete assigned tasks (J-7). Specifically, Focarelli considered Green's work performance unsatisfactory and criticized him for, among other things, inadequately cleaning floors and glass, not dusting lockers or emptying wastebaskets, failing to clean the cafeteria, leaving dirty water in his mop bucket, not supplying the ladies room with toilet paper and not cleaning the cardio room (on several occasions) (J-7; 1T200,

1T203, 1T206-1T208, 2T8-2T9, 2T11-2T13, 2T15-2T16, 2T29, 2T31, 2T34-2T36, 2T41, 2T44, 2T47-2T48).

Focarelli memorialized Green's perceived performance deficiencies in approximately thirty critical performance write-ups and/or Building Inspection Reports which Focarelli kept in a separate file in his office for reference and evaluation purposes (J-7; 1T89, 1T129, 1T200). These performance related memoranda were not put into Green's personnel file. Csigi, Nemec and Green, however, were given copies (1T199, 2T45, 2T48).

Csigi conceded that it is unusual for an employee to receive so many write-ups in this period of time, but he has seen it happen before. Csigi felt that although Green was the only employee receiving this many write-ups in Paramus, if he had stayed in Paramus and his performance had not improved, Green would have received more write-ups (1T179-1T181).

15. Green disagreed with Focarelli's evaluation of his work performance and responded in writing copying Csigi (J-7). Generally, Green felt that he was treated unfairly because he was given too much work to do in the allotted time (J-7; 1T45-1T46, 1T127).

In response to Green's complaints about not being able to complete his tasks, such as the cardio room, Focarelli assigned Head Custodian Stacy Prihoda on September 9, 2003 to accompany Green on his rounds. Prihoda was to mentor Green by observing his

performance and identifying ways to correct performance deficiencies. Prihoda observed that Green spent too much time talking to students and teachers, returned late from lunch break and set too slow a work pace, all of which prevented him from completing assigned tasks (J-7; 1T124, 1T217-1T218, 2T105). She communicated her observations to Focarelli, but Green was not told about her observations. Green felt uncomfortable with Prihoda's following him around him (J-7; 2T124-2T125).

Green also felt that Focarelli ignored his requests for assistance to complete his tasks (1T45-1T46, 1T127). Focarelli acknowledged that Green asked for help from the bus drivers to clean the cardio room, but he (Focarelli) did not feel Green needed assistance. No other custodians asked him for help in performing their duties unless they needed assistance to lift a heavy object (1T209-1T210, 2T42). Moreover, on October 27, 2003, Prihoda filled in for Green, performing his assigned tasks for the day, including dusting, mopping and cleaning the cardio room. She performed all of Green's daily duties between 12:30 p.m. and 3:05 p.m. (R-5; 2T113). Focarelli noted on the custodial duties check list for that day that:

Stacy picked up the garbage at 12:40 p.m. and finished the entire bld [sic] classrooms, bathrooms, shops, office and dust moped the floors and finished at 2:00 p.m. /completed the cardio rm at 3:05 p.m. She went into the cardio rm at 2:55 p.m. (R-5).

Finally, Green concluded that Focarelli was treating him unfairly believing other custodians were given lighter workloads (1T45-1T46, 1T126-1T128). No other custodian testified (1T45-1T46). Green's testimony lacked specificity and was not otherwise independently corroborated. Focarelli, however, developed a checklist of job responsibilities for all custodians in October 2003, and Green's job responsibilities were the same as for other custodians (J-7; R-4, R-5, R-6). I do not, therefore, accept Green's conclusion that other custodians had lighter workloads.

16. During this period of time (summer/fall 2003), Green also received criticisms which were not performance related. For instance, on August 16, 2003, Green received a letter from Focarelli chastising him for using the phone in a teacher's office when he was supposed to be moving furniture. Focarelli had advised custodians not to use the phone except on breaks or in an emergency. In this instance, when Focarelli spotted Green using the phone, he asked him what he was doing. Green replied that since it was pay day, he was calling the bank to see if his pay check had been deposited into his account. Focarelli did not feel that this was an emergency call. This letter was not placed in Green's personnel file (J-7; 1T48-1T49, 1T204-1T206). According to Green, however, this letter was unwarranted because

all custodians use the phone, but only he was reprimanded. He also claimed he was making an emergency call (J-7; 1T48-1T49).

On September 16, 2003, Focarelli reprimanded Green for insubordination. The reprimand arose when Green disobeyed Focarelli's directive not to speak to a teacher, Mr. Hammerschlag, about his garbage which Hammerschlag had complained was not being picked up. Focarelli instructed Green several times not to speak to Hammerschlag, because the teacher complained about Green speaking to him. The reprimand was placed in Green's personnel file (J-7; 2T49-2T50). Green disagreed with Focarelli's reprimand believing he (Green) was simply speaking to a staff member about a garbage situation (J-7; 1T82-1T83).

On October 17, 2003, Focarelli noted in a memo that Green's radio/walkie talkie was either turned off or set to the wrong channel so that he could not be reached (J-7; 2T29-2T31). Green acknowledged that he has an obligation to keep the radio on but believed Focarelli was being unfair because sometimes the radio accidentally turns off, the battery runs out or he cannot hear it when he is in a crowd (1T132-1T133).

17. On October 9, 2003, Deb Daviou, who was employed as a counselor, approached Focarelli to discuss a situation involving Green. She related that Green approached her to sign a petition verifying that he was doing a good job. Green explained to her

that Focarelli was writing him up and generally giving him a hard time.

Daviou told Focarelli that she felt intimidated into signing the petition, but afterwards told Green to remove her name. Daviou wrote a memo describing the incident and gave a copy to Focarelli (J-7; 2T48). Focarelli never spoke to Green about this incident (1T81, 2T48-2T49). The record does not reflect that Focarelli took any action in response to the petition circulated by Green nor what, if anything, Green did with the petition.

18. On October 10, 2003, Csigi, Focarelli, Green, Skorka and Personnel Director Thomas Klemm met again to discuss Green's performance. They established a plan for Green to log his job responsibilities (R-8). As a result of the meeting and at the request of Green and Skorka, a Custodial Duties for Special Needs checklist was developed by Focarelli to document Green's responsibilities and create a better working relationship between the two (1T169-1T170, 1T214-1T216, 2T6, 2T61). The checklist was not intended as a punishment for Green, but was meant to provide information regarding what daily duties Green was performing in addition to those listed and to identify problems in order to improve his performance. The checklist, however, was also filled out by the other custodians in Paramus, including Len Sgherza, Stacy Prihoda and, subsequently, Mike Cotter who replaced Green on the first shift. These checklists indicate that all three had

the same daily duties to complete (J-7; R-4, R-5, R-6; 1T169-1T172, 1T214-1T215, 2T57-2T59, 2T78, 2T80).^{5/} Focarelli had used a similar checklist when he was a supervisor on the Teterboro campus (2T68).

Csigi's November 2003 Decision to Transfer Green to Hackensack

19. In May 2003, as a result of Csigi's time studies and the need for more custodians on the third shift, Michael Cotter, a sixteen year employee, was reassigned from the first shift to the third shift on the Hackensack campus. However, Cotter had some medical problems which his doctor believed would be adversely affected by his third shift assignment. Therefore, on May 23, 2003, the Board received a request from Cotter's physician for a medical accommodation. Cotter needed to be moved from the third shift in Hackensack to a custodial position in a shift between 6:00 a.m. and 6:00 p.m., essentially the first shift (R-2; 1T85, 1T152-1T154).

Based on the medical accommodation request, the Board's physician evaluated Cotter (1T152-1T153). Eventually, Csigi was instructed by Director of Human Resources Thomas Klemm to find a first shift position for Cotter. Csigi did not have the ability to just reassign Cotter to first shift without moving another

^{5/} Since Michael Cotter has taken over Green's tasks as his replacement, according to his Custodial Duties for Special Needs check list, Cotter has finished all tasks assigned, the same tasks as Green was expected to finish, including cleaning the cardio room (R-6).

custodian because the third shift would be understaffed and the first shift would be over staffed (1T153-1T154).

Csigi reviewed the custodians assigned to the Bergen Tech campuses (1T154, 1T156). Csigi confined his search to custodians working on the first shift because he wanted a direct replacement (one for one) for Cotter who could only work first shift hours (1T143, 1T154-1T155, 1T178). Csigi put together a chart of the employees he reviewed for possible reassignment and to explain his rationale to Nemec for selecting Green to be reassigned (R-3; 1T155).

Csigi considered all ten first shift custodians as possible replacements for Cotter. He eliminated all custodians except Green for various reasons: Lenny Sgherza had given up a head custodian position to remain on first shift because of a medical condition; Joe Porter was a crew chief and a long time employee on the Paramus campus; Charlie Joseph had previously requested to be demoted from crew chief with a loss in pay in order to move to the first shift; Barry Mansfield was a long time first shift employee on the Hackensack campus who was a good fit there; Joe Giallombardo, Abdul Mirza and Tom Collins worked split shifts encompassing hours past 6:00 p.m. which Cotter could not work; Dave Bonardi was a crew chief and key employee on the Teterboro campus, running both first and second shifts; Mike Addice was a

long time employee on his campus and because of his age was not felt to be a good candidate for reassignment (1T156-1T158).

Frank Green was chosen for reassignment because Csigi felt it would be the least disruptive to operations. Green had transferred before and was familiar with the Hackensack campus (1T157-1T158). Csigi had not known Green before 2002 when Csigi was hired. Although he had no direct interaction with Green, Csigi knew from Green's supervisor (Focarelli) that he was a "middle of the road" employee with some performance problems (1T160-1T161). In other words, Csigi knew that Green was not performing satisfactorily on the first shift and felt that he was, for whatever reason, not willing to perform satisfactorily (1T185).

Csigi did not discuss his review with Focarelli who does not have the authority to reassign or transfer. Csigi, however, did review his plan with Nemec before finalizing the decision to transfer Green to Hackensack (1T155-1T156, 1T175, 1T192).

20. Green was notified of the transfer to Hackensack in November 2003, but because he was not working due to an injury, he did not report to Hackensack until January 26, 2004 (1T84). Before his transfer, Focarelli gave Green a partial evaluation for the five months under his supervision. Green was given an overall unsatisfactory grade (2T100-2T101).

Since Green's transfer to third shift on the Hackensack campus, Csigi has observed his performance and spoken to the head custodian (1T172). Green is working well with the head custodian and is performing better than he was on the Paramus campus (1T172, 1T184). For instance, in Green's most recent evaluation dated March 10, 2005, Hackensack Supervisor James Rosa wrote (1T35, 1T136-1T137:

Despite needing occasional reminders to details [sic] of areas (i.e. dusting secluded spots, lamps and things like that), Frank will willingly and cheerfully accept and volunteer for additional work when needed. He will not walk past a bag of trash without picking it up and taking it to the dumpster if he's heading there (J-6).

Green has lost no salary or benefits as a result of the transfer. He is, however, given a stipend of one-thousand dollars for working the third shift which is required by the parties' collective negotiations agreement (1T130).

ANALYSIS

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. The petitioner has the burden of proving its allegations by a preponderance of the evidence. Irvington Bd. of Ed., P.E.R.C. No. 98-94, 24 NJPER 113 (¶29056 1998).

In West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96, 98 (¶32037 2001) the Commission stated in pertinent part:

Our case law does not establish a bright line test for assessing whether a transfer is disciplinary and, therefore, legally arbitrable. But read together, our decisions indicate that we have found transfers to be disciplinary where they were triggered by an incident for which the employee was also reprimanded or otherwise disciplined or were closely related in time to an alleged incident of misconduct. In all of these cases, we noted that the employer did not explain how the transfer furthered its educational or operational needs.

* * *

Other of our cases have found that transfers effected because of concern about an employee's poor performance of core job duties - as opposed to concerns about absenteeism or violation of administrative procedures - were not disciplinary but instead implicated the employer's right to assign and transfer employees based on their qualifications and abilities.

* * *

Accordingly, in exercising our jurisdiction under N.J.S.A. 34:13A-27, we will consider such factors as whether the transfer was intended to accomplish educational, staffing or operational objectives; whether the Board has explained how the transfer was so linked; and whether the employee was reprimanded for any conduct or incident which prompted the transfer.

Here, the parties agree that the medical condition of custodian Michael Cotter necessitated the transfer of another custodian to the third shift on the Hackensack campus. Thus, they do not dispute the operational need. The Association, however, contends that the Board could have transferred any

number of employees, but chose to transfer Green because it was hostile to his union activity. The transfer to the third shift, it asserts, effectively ensured that Green would have less visibility to other union members. In support of its contentions, the Association also explains that the Board transferred a new supervisor (Focarelli) to Paramus specifically to write Green up and generally harass him.

The Board disputes that it was hostile to Green's union activity. It asserts that Green's transfer was a managerial prerogative, not disciplinary, and was effectuated to accommodate the medical condition of another employee and to accommodate the operational need to increase staff on the third shift in Hackensack. Green, it contends, was not indispensable to his first shift assignment on the Paramus campus based on an assessment of his qualifications and performance. The Board further asserts that poor performance reviews from his new supervisor, Focarelli, were unrelated to Green's activities on behalf of the Association.

Employer discrimination for the exercise of protected activity is a violation under N.J.S.A. 34:13A-5.4a(3). In re Bridgewater Tp., 95 N.J. 235 (1984). Petitioner, however, has brought its claim under a different statutory scheme. Under N.J.S.A. 34:13A-25, the issue is whether the transfer was for discipline, not for protected activity. The evidence of an

intention to punish, however, is similar to the type of evidence necessary to prove a 5.4a(3) violation. North Bergen Tp. Bd. of Ed., P.E.R.C. No. 2002-12, 27 NJPER 370 (¶32135 2001). Nevertheless, the facts do not support a finding of animus. Additionally, the Board has demonstrated legitimate operational needs and staffing objectives.

In 2003 Green was no longer Association President. Even though he was filing grievances and appearing at Board meetings, there is no evidence in the record before me that the Board was hostile to those activities. Green admitted that most grievances resulted in the Board granting the requested relief. There is no evidence that grievance activity had significantly increased in 2003. Green also described his appearance at a Board meeting to complain about boiler safety conditions. The Board heard his complaint and told him that they would look into his concerns to identify the problem, if any. This response does not support an inference that the Board was hostile to Green's protected activity.^{6/}

The evidence also does not demonstrate that the decision-maker, Csigi, was aware of or hostile to Green's union activities. Csigi was hired by the Board in November 2002 as

^{6/} In any event, Green's attendance at this meeting on November 2004 was after his transfer to Hackensack and, thus, the timing does not support an inference of hostility. Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999).

head of the buildings and grounds department. He did not know Green before being employed by the Board. Csigi was given a mandate to improve operations, particularly in regard to cleanliness. As a result, he conducted a time study and determined that the third shift on the Hackensack campus was understaffed. Csigi reassigned numerous custodians and supervisors as a result of his time study, but Green was not initially reassigned. His transfer was ordered in November 2003 only when Cotter's medical condition necessitated a shift in personnel.

After reviewing all custodians on the first shift, Csigi determined for various reasons unrelated to Green's union activities and his prior performance problems that his reassignment would be least disruptive to operations. He determined that the other custodians under consideration for transfer were operationally better fits where they were already assigned because, among other reasons, they had long tenures on their campuses, needed a medical accommodation themselves or had at one point accepted demotions and loss in salary to remain on the first shift. Green, on the other hand, had transferred in the past. Since the early 1990s, Green had worked on the Hackensack campus twice during different periods of time and on the Teterboro and Paramus campuses. Since he had worked on the

Hackensack campus, Csigi reasoned that Green was familiar with its operations.

Csigi also knew that Green's work performance was unsatisfactory to his supervisor, Focarelli, who complained that Green did not finish assigned tasks and took too long to complete others. After receiving copies of memos and attending meetings in July and October with Green, Uniserv Representative Skorka and Focarelli, Csigi was aware of Green's complaints that the workload assigned to him was too great and that Focarelli did not give him help completing his assignments. Additionally, Csigi knew that the first shift is more demanding because custodians must also respond to staff and student needs as well as their cleaning assignments. The third shift, on the other hand, is straight cleaning, thus, Green's complaints about not having sufficient time to complete his assignments could be addressed more easily on this shift.

Green's complaints together with Focarelli's dissatisfaction with his performance buttressed Csigi's decision to transfer Green. It was less disruptive operationally to transfer an employee who was not a good fit than to transfer one who was. Apparently, Green is a better fit on the third shift in Hackensack based on his most recent evaluation and observations by Csigi and the Hackensack head custodian.

In support of its contention that Green's transfer was disciplinary, Petitioner asserts that Green's immediate supervisor, Focarelli was assigned to Paramus specifically to get rid of Green because of his union activities. However, there is no support for this proposition. Focarelli was one of many supervisors transferred as a result of Csigi's time study. There is no direct or circumstantial evidence that Focarelli was hostile to Green's union activity. Focarelli himself had been an officer in the Association from 1988 to 1990 when Green was president. Focarelli was also an Association member from 1985 until 2000 when he was promoted to a supervisory title. This history suggests that Focarelli would be sympathetic, not hostile, to any union activity. Finally, Focarelli has no authority to transfer employees, and there is no evidence that he was either consulted or made any recommendation to Csigi regarding Green's transfer. There is, however, evidence that from his first day (July 1) as Green's supervisor, Focarelli and Green were not a good fit. The performance events discussed above likely set the stage for subsequent hard feelings, if any, between the two.

Not all criticisms during the months Focarelli and Green worked together, however, were performance related. For instance, Green received at least two written reprimands for insubordination - the July 1 incident and the Hammerschlag

incident - which were placed in his personnel file and were clearly punitive. He was also criticized for improperly using a teacher's phone, taking too much break time and not having his radio turned on to receive calls. These criticisms did not result in formal reprimands nor were they placed in Green's personnel file, but were also not performance related.

I find, however, that these reprimands and criticisms, did not motivate Green's transfer. Both parties agree that due to a medical accommodation request, the Board had to transfer Mike Cotter, a third shift custodian on the Hackensack campus, to a first shift position. Csigi had determined from his initial time studies that the third shift was understaffed and that, therefore, he did not have the luxury of simply transferring Cotter without replacing him with another custodian. He determined for many reasons, including Focarelli's dissatisfaction with Green's performance in Paramus, that Green would be the best candidate to replace Cotter. These operational and staffing reasons were dominant not the reprimands for insubordination or any union activity in which Green engaged. See Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005) (Commission dismissed petition where punitive reason for transfer was just part of overall picture of a teaching staff member who was transferred to a position where he would not have to work with others. Because he did not get along with other

staff members, the transfer was more about operational and staffing needs than disciplinary.) Contrast Ocean Tp., P.E.R.C. No. 93-13, 18 NJPER 442 (¶23198 1992) (reassignment was disciplinary where it was made shortly after officer mishandled an investigation and received a reprimand for the incident on same day supervisor recommended reassignment); West New York Bd. of Ed. P.E.R.C. No. 91-94, 17 NJPER 248 (¶22113 1991) (teacher transfer was disciplinary where it was effected shortly after he posted signs protesting layoffs); Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) (temporary transfers of supervisors to different shifts were disciplinary where they were made shortly after employees were reprimanded).

The Association also asserts that even if the motive for transfer was not retaliation for Green's union activities or for the insubordination reprimands, the poor performance reviews are themselves disciplinary. Thus, it contends, if Green was transferred because of poor performance, his transfer violates N.J.S.A. 34:13A-25. If I accepted the Association's rationale, employers would be prevented from ever transferring less than perfect employees. In other words, employees with bad performance records could insulate themselves from transfer under N.J.S.A. 34:13A-25 at the expense of employees with good performance records. See East Orange Bd. of Ed., P.E.R.C. No. 2002-49, 28 NJPER 153 (¶33053 2002) (union failed to prove

transfers were disciplinary where teachers transferred as a result of high failure rates in their classes). Contrast Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001) (transfer was disciplinary where triggered by PTA president's complaint regarding teacher's classroom management techniques); Camden Bd. of Ed., P.E.R.C. No. 2001-9, 26 NJPER 366 (¶31148 2000) (transfer disciplinary where recommendation to transfer teacher made to placate New Jersey State Interscholastic Athletic Ass'n).

Finally, I do not consider the Board's refusal to consider other custodians on the second shift as possible candidates for transfer as proof that Green's transfer was disciplinary. Csigi's unwillingness to consider reassigning another custodian from the second shift to the third shift while moving Green to the second shift more likely reflected his belief that a 3-way switch was more disruptive than a one-for-one transfer.^{7/} See Somerset Hills Reg. Bd. of Ed., P.E.R.C. No. 2003-78, 29 NJPER 226 (¶69 2003) (Commission rejected Association's 5.4a(3) claim and refused to infer Board acted for illegal reason in

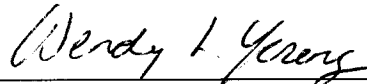
^{7/} Petitioner asserts that transferring Green to the third shift effectively buried him and prevented him from continuing with his union activities. Csigi, however, did not have to go out of his way to accommodate Green's personal or union needs. Local 195, IFPTE v. State, 88 N.J. 393, 418-419 (1982) (unions can negotiate restrictions on an employer's right to transfer union representatives, subject to an employer's right to meet operational requirements.).

transferring custodian to evening shift from its unwillingness to ask another custodian to volunteer to change shifts.)

Based on the foregoing, the Association has not proven that Green's transfer was disciplinary.

RECOMMENDED ORDER

The Petition is dismissed.



Wendy L. Young
Hearing Examiner

DATED: December 6, 2005
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 December 19, 2005.