

H.E. No. 2006-7

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

In the Matter of

EDISON TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. TO-2005-003

EDISON TOWNSHIP EDUCATION
ASSOCIATION,

Petitioner.

SYNOPSIS

A Hearing Examiner recommends that the petition for contested transfer be dismissed. The petition alleged that the Board transferred a reading specialist because, in the past, she made critical comments about a newly hired principal. The hearing examiner determined that the Board established that the transfer met its educational and staffing objective of filling a position in a Title 1 school with an experienced reading specialist who could provide consistent instruction to younger students in greater need of basic skills assistance. She further determined that under Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005), even if the past contentious working relationship factored into the transfer decision, the transfer was not disciplinary. The Board could have decided that because the two individuals did not work well together in the past, they would not be a good match for the needs of the students.

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.

H.E. No. 2006-7

In the Matter of

Edison Township Board of Education
-and-
Edison Township Education Association
Docket No. TO-2005-003

Service on the following:

Sandra Varano, Esq.
Nirenberg & Varano, LLP
145 Main St
Hackensack, NJ 07601

Arnold Mellk, Esq.
Wills, O'Neill & Mellk
10 Nassau St
Princeton, NJ 08542

Issued: April 21, 2006
R/R Due: May 4, 2006

H.E. No. 2006-7

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

In the Matter of

EDISON TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. TO-2005-003

EDISON TOWNSHIP EDUCATION
ASSOCIATION,

Petitioner.

Appearances:

For the Respondent, Nirenberg & Varano, LLP
(Sandra Varano, of Counsel)

For the Petitioner, Willis, O'Neill & Mellk
(Arnold Mellk, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 27, 2004, the Edison Township Education Association (Association or Petitioner) filed a petition for contested transfer determination. The petition alleges that the Edison Township Board of Education (Board or Respondent) violated N.J.S.A. 34:13A-25 by transferring Carol Ziznewski from James Madison Intermediate School to John Marshall Elementary School. Specifically, the Association alleges that Ziznewski was transferred because in the past she made critical comments about Regina Foxx, the newly hired principal at James Madison.

On October 1, 2004, the Board filed an Answer, denying that the transfer was for disciplinary reasons. It asserts that Ziznewski was transferred to John Marshall to replace a reading specialist who, after the birth of her child, was on family leave intermittently, requiring the frequent use of substitute teachers. The Board explains that John Marshall is a Title 1 school with a younger population of students (grades K through 5) than James Madison (grades 3 through 5) who require more reading instruction than older students. It also explained that it is important also to have stability in the instructional staff. Thus, it argued that Ziznewski, an experienced reading specialist, was a logical replacement choice.

On May 12, 2005, a Notice of Hearing issued. On November 22, 2005 and February 22, 2006, I conducted a hearing at which the parties examined witnesses and introduced exhibits.^{1/} Post-hearing briefs were filed by April 17, 2006.

Based upon the entire record, I make the following:

Findings of Fact

BACKGROUND

1. The Edison Township Board of Education is an employer within the meaning of the New Jersey Employer-Employee Relations

^{1/} "P" and "R" refer to Petitioner and Respondent exhibits, respectively, received into evidence at the hearing in the instant matter. The transcript of the respective days of hearing are referred to as "1T" and "2T".

Act, specifically N.J.S.A. 34:13A-22. The Edison Township Education Association is a majority representative within the meaning of N.J.S.A. 34:13A-3, and Carol Ziznewski is an employee within the meaning of N.J.S.A. 34:13A-22.

2. The Board and the Association stipulate that Carol Ziznewski was transferred in September 2004 between work sites within the meaning of N.J.S.A. 34:13A-25, specifically from the James Madison Intermediate School to the John Marshall Elementary School, and that the only dispute is whether the transfer was for disciplinary reasons (1T7).^{2/}

3. Edison is a district with a student population of approximately twelve thousand (12,000) and a staff of approximately nine hundred fifty (950) teachers, seventeen principals, eight vice-principals and approximately four hundred support staff (2T29).

4. Ziznewski has been employed by the Board since 1973 (1T19). She holds a bachelors degree in elementary education (grades K through 8) and masters degrees as a reading specialist and public administrator. Ziznewski is also certified as a supervisor and principal (1T19).

During her career Ziznewski has received mostly good performance reviews (1T55). However, in either the 1995/1996 or

^{2/} Ziznewski was notified of her transfer in late May or early June 2004 (1T58-1T59, 2T10, 2T37-2T38).

1996/1997 school years when she was assigned to the Washington Elementary School , Ziznewski received a poor performance review from Building Principal Donnelly (1T19-1T20, 1T55-1T56, 2T16).^{3/} Also, in the 1997/1998 school year while assigned to the Lindeneau School as a reading specialist, Ziznewski received a poor performance review from Building Principal Samolewicz (1T55-1T56).

Ziznewski and Foxx

5. In the 1995-1996 school year, when Ziznewski was assigned to Washington Elementary School as a reading specialist, she oversaw the Title 1 basic skills program and worked with the bilingual (ESL) classes. She also administered standardized testing under the supervision of Principal Donnelly. Ziznewski worked with teachers as well as students and parents (1T19-1T20).

Regina Foxx was also assigned to the Washington Elementary School. Foxx filled a newly created position as staff development specialist (1T20-1T21).

During the course of that year, Ziznewski developed concerns about Foxx's job performance - e.g. not enough textbooks were ordered for a first grade class - and expressed those concerns to Foxx who, according to Ziznewski, responded negatively to her

^{3/} Ziznewski was assigned to Washington Elementary School for two years. Donnelly was her supervisor. It is unclear from Ziznewski's testimony whether she received a bad performance review in one or both of those years.

criticisms. She also communicated her concerns to Principal Donnelly (1T21-1T25).

Ziznewski tried to clarify with Donnelly how her role as reading specialist interfaced with the new title held by Foxx because there appeared to be an overlap of responsibilities - e.g. textbook orders, creating workshops and developing resources for teachers (1T27). Ziznewski did not know whether Donnelly ever discussed the concerns she raised with Foxx (1T29). According to Ziznewski, however, the tension between she and Foxx was widely known in the District at this time (1T33-1T34).

Foxx and Ziznewski worked together for a total of two years at the Washington Elementary School (1T28). In the 1996/1997 school year, Foxx became an elementary supervisor, no longer assigned to Washington Elementary (1T29).

6. The next contact Ziznewski had with Foxx was during the 1997/1998 school year at the Lindeneau Elementary School where they were both working. As a reading specialist, Ziznewski was involved in a new program for the first grades which required the reading specialist to work with students in their classrooms rather than taking them out of the classroom (1T30).

Ziznewski approached Foxx on behalf of herself and first grade teachers with concerns about the program. They wanted Foxx as an elementary supervisor to bring these concerns to Principal Samolewicz. According to Ziznewski, Foxx spoke to Samolewicz,

but nothing changed. In fact, Samolewicz then put more pressure on Ziznewski by giving her less time to do her work (1T30-1T31).

7. In 2000 when Michael Quinn was appointed principal at James Madison Intermediate School, Foxx left the District. At this time Ziznewski was also assigned to James Madison (1T31-1T32, 1T35-1T36, 2T33). During the time that Quinn and Ziznewski worked together, he gave her very positive evaluations (2T34).

Ziznewski's 2004 Transfer to John Marshall

8. Ziznewski had no further contact with Foxx until 2004 when the Board hired Foxx as principal at James Madison to replace Quinn who was appointed director of staff development. The personnel actions announcing these appointments were reflected in the Board's May 24, 2004 meeting agenda (P-1, 1T35-1T39, 1T48, 2T31-2T32). Although it had been rumored a couple of days before, Ziznewski officially learned about Foxx's appointment from the agenda of that meeting (1T39).

9. Transfer decisions are made by the Board upon the recommendation of the superintendent (2T24). There are frequent annual involuntary and voluntary transfers (1T54). Specialists, including reading specialists, are transferred more often than classroom teachers (2T14-2T15, 2T40-2T41). Indeed, since 1990 when Ziznewski became a reading specialist, the Board has

involuntarily transferred her approximately ten times (1T51-1T53, 2T5-2T6).^{4/}

In 2004, at the time of Ziznewski's transfer to John Marshall, Dr. Vincent Capraro was superintendent (2T4).^{5/} His decision to transfer Ziznewski was precipitated by the need to replace a reading specialist at John Marshall who, for the previous two years, had taken intermittent family leave after the birth of her child, thus necessitating many substitute teachers to fill her position. Capraro wanted to provide more consistent instruction at John Marshall because it was a Title 1 school servicing students in grades K through 3 (James Madison serviced students in grades 3 through 5) in greater need of basic skills teaching than older students. He needed a full-time experienced reading specialist to fill that role (2T8-2T9, 2T15, 2T41-2T42). Capraro was not aware of any past conflict between Ziznewski and Foxx when he made the transfer decision (2T11-2T12, 2T27-2T28, 2T30-2T31).^{6/}

4/ According to Ziznewski, reading specialists are considered the right hand of the principal and are not transferred as often as teachers (1T52-1T53). Her testimony conflicted with the testimony of former Superintendent Dr. Vincent Capraro and Quinn on that point. Ziznewski's own employment history, however, supports Quinn's and Capraro's observation.

5/ Capraro is now retired, but was superintendent for nine years in Edison Tp. (2T4).

6/ Although Capraro did meet with Ziznewski at that time,
(continued...)

Capraro never spoke to Ziznewski personally about her transfer to John Marshall but asked Quinn to do it (1T46, 2T10). Capraro told Quinn that he was transferring Ziznewski because it was in the best interests of the District and students (2T10, 2T35). This explanation was the same reason that Capraro had given Quinn in the past when other teachers were transferred (2T25, 2T35). Capraro also did not tell Quinn where Ziznewski was being transferred, just that she was being transferred out of his building (2T34-2T36).

According to Quinn, he did not ask Capraro about the educational rationale for the Ziznewski transfer because in the past when he asked for a fuller explanation on other teacher transfers "it wasn't necessarily received very well" He, therefore, learned not to question Capraro (2T43-2T44).

10. A few days after the Board's May 24, 2004 official notification of its decision to hire Foxx, Quinn came to

6/ (...continued)

Capraro does not recall the specifics of the conversation (2T23). Capraro explained that in 1996/1997 he was responsible for a student population of approximately 12,000 students, 950 teachers, 17 principals, 8 vice-principals and 400 support staff (2T29). He conducted daily meetings with various principals and met and still meets often with various staff about their issues (2T30). Based on this testimony, I find that even if Capraro was aware of the tension between Ziznewski and Foxx in 1996/1997 as the result of a conversation, the intervening years and his many responsibilities to a large staff and student population support that he did not recall it when he made the 2004 transfer decision.

Ziznewski's classroom to tell her she was being transferred to John Marshall (1T58-1T59, 2T37-2T38). Quinn told Ziznewski that she was being transferred at the discretion of the superintendent for the good of the District which was the explanation given to him by Capraro. Quinn never mentioned Foxx (2T38-2T40, 2T43).^{7/} According to Quinn, he was unaware of any previous conflict between Ziznewski and Foxx (2T32-2T33, 2T36).^{8/}

Upon learning of the transfer, Ziznewski's response to Quinn was "thank God", because she was wondering how she would function as a reading specialist under Foxx's supervision. A lot of

^{7/} There is conflicting testimony regarding the Quinn/Ziznewski conversation. According to Ziznewski, Quinn told her that the decision to transfer her was not his, but was made by Capraro, who told Quinn that the decision was not professional or personal but was for the best, because Foxx was going to be principal (1T40, 1T61-1T62). I credit Quinn's testimony that when he told Ziznewski about her transfer he only told her that it was for the good of the District - e.g. he did not mention Foxx. This is what Capraro told him and was no different than the explanation he received from Capraro on other occasions when his teachers were transferred. Capraro corroborated Quinn's testimony. Additionally, Quinn's relationship with Ziznewski was good - e.g. he had given her very positive evaluations. He bore no particular animosity toward her which might have colored his testimony. Also, Ziznewski's testimony as to who mentioned Foxx in the conversation was equivocal (1T61-1T62).

^{8/} In 1996/1997 Quinn, a newly hired Board employee, held the position supervisor of staff development. He was not assigned to the Lindeneau School where Foxx and Ziznewski were assigned (1T32-1T33). I find that as a newly hired employee, even if some staff were aware of the tension between the two women, it is plausible that Quinn was not aware of it.

communication occurs between the reading specialist and principal, particularly regarding placement of children. In Ziznewski's opinion, from her past experience with Foxx, she (Foxx) would be difficult to work with because she did not communicate well with others (1T41-1T42, 2T38-2T39).

11. Ziznewski was not the most senior reading specialist in the District at the time of her transfer to John Marshall. Cathy Sorace is more senior than Ziznewski. Although Ziznewski prefers working in a Title 1 school servicing grades K through five, in the past when she requested a transfer to such a school, her transfer request was denied (1T43-1T45, 1T59-1T60).^{9/}

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

^{9/} In 2000, Ziznewski requested a transfer to Martin Luther King School, a Title 1 School. Her request was denied (1T59).

disciplinary where they were triggered by an incident for which the employee was also reprimanded or other wise 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 by 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 Association has failed to establish that the transfer was triggered by an incident for which Ziznewski was reprimanded or was closely related in time to an alleged incident of misconduct. Ziznewski's criticism of Foxx's job performance four years before the transfer at issue elicited no contemporaneous discipline nor has the Association demonstrated any recent misconduct on the part of Ziznewski for which she would have been disciplined and possibly transferred.

The Board, however, established that Ziznewski's transfer to John Marshall met its educational and staffing objective of filling a position in a Title 1 school with an experienced reading specialist who could provide consistent instruction to younger students in greater need of basic skills instruction. The need to fill this position was created by a reading specialist who was unable to provide consistent full-time instruction due to intermittent family leave.

Petitioner disputes the Board's proffered rationale for its transfer decision stating that Ziznewski was not the most experienced reading specialist in the District. Also, in 2000 the Board turned down Ziznewski's request to transfer to a Title 1 school, the same type of school where it now asserts her experience is needed. Petitioner contends, therefore, that the real reason for the transfer was to separate the new principal, Regina Foxx, from Ziznewski who had criticized Foxx four years earlier when Foxx last worked in the District. This reason, it asserts, is disciplinary.

First, it is immaterial that Ziznewski was not the most experienced reading specialist or that another more experienced reading specialist could have been transferred. Ziznewski is indisputably an experienced reading specialist. Her transfer was not suspect in this regard. Also, the denial of her request to transfer to a Title 1 school in 2000 does not support that the

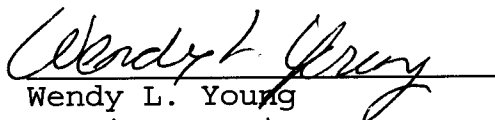
Board's rationale for transferring Ziznewski in 2004 to a Title 1 school was pretextual. The Board's operational need to fill the reading specialist position at John Marshall in 2004 is factually established. The circumstances surrounding its refusal to transfer Ziznewski in 2000 are unknown.

Next, even if the Board's actions were wholly or partially motivated by its desire to separate two individuals - Foxx and Ziznewski - who, in all likelihood based on past experience, were not a good fit, the Board's decision to transfer Ziznewski was not punitive. In Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005), the Commission dismissed a contested transfer petition finding that the teacher was not transferred because he refused to perform bus duty. It determined that given the statement of three administrators concerning the teacher's inability to get along with others, the dominant reason for the transfer was not disciplinary. The Commission concluded that the Board sought to place the teacher in a position where he could continue to perform well without having conflicts with fellow employees.

Here, Ziznewski admits that she did not think working with Foxx would be productive because in Ziznewski's opinion, Foxx does not communicate well with others. When Ziznewski was notified of Foxx's hiring and her own transfer out of James Madison School, her reaction was "thank God", because Ziznewski

recognized that she could not work with Foxx. Like Old Bridge, the Board could have decided that because of past tensions, Foxx and Ziznewski were not a good match for James Madison students. Its transfer decision would not have been disciplinary under those circumstances. Regardless, given the Board's need to fill the position at John Marshall, the transfer decision was about operational and staffing concerns not discipline.

Based on the foregoing, I recommend the Petition be dismissed.


Wendy L. Young
Hearing Examiner

DATED: April 21, 2006
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1 and 19:18-3.10(d), 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 and 19:18-3.11. 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), 19:18-3.13.

Any exceptions are due by May 4, 2006.