H.E. NO. 2007-9

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

In the Matter of

MONTCLAIR BOARD OF EDUCATION,

Public Employer,

-and- Docket NO. TO-2006-001

MONTCLAIR EDUCATION ASSOCIATION,

Petitioner.

**SYNOPSIS**

A Hearing Examiner recommends dismissal of a contested transfer petition where the Board demonstrated that it acted pursuant to its Harassment Policy and anti-discrimination laws in transferring an employee/harasser. After an investigation the Board found a violation of its policy and took certain affirmative actions including issuing a formal reprimand, transferring the harasser and ordering sensitivity training. The Hearing Examiner determined that the prohibition against transferring an education employee for disciplinary reasons is not fundamentally inconsistent with requiring an employer to remediate a hostile work environment by transferring a harasser. She further found that even if the transfer was partially disciplinary, the testimony of the Board's witness combined with the investigative findings that female complainants were uncomfortable around the harasser and took measures to avoid contact with him supported that the transfer was not predominately disciplinary.

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Appearances:

For the Public Employer,
Genova, Burns & Vernoia
(Yaacov M. Brisman, Esq.)

For the Petitioner,
Oxfeld Cohen
(Nancy Iris Oxfeld, Esq.)

**HEARING EXAMINER'S REPORT**
**AND RECOMMENDED DECISION**

On September 29, 2005, the Montclair Education Association (Association or Petitioner) filed a petition for contested transfer determination. The petition alleges that the Montclair Board of Education (Board or Respondent) violated N.J.S.A. 34:13A-25 by transferring Kevin Shearin from Montclair High School to the Renaissance School for disciplinary reasons. Specifically, the Association alleges that as a result of a sexual harassment investigation, Shearin was found to have violated the Board's sexual harassment policy and was

subsequently disciplined by being transferred and formally reprimanded.

On October 21, 2005, the Board filed an Answer, denying that the transfer was for disciplinary reasons. It asserts that Shearing's transfer was an appropriate remedial measure in response to the complaints of female co-workers and the sexual harassment investigation.

On November 1, 2005, a Notice of Hearing issued. On February 23, 2007, I conducted a hearing at which the parties examined witnesses and introduced exhibits.[1/] After several requests by Petitioner and one by Respondent for extensions of time to file, post-hearing briefs were filed by May 16, 2007.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Montclair Board of Education is an employer and Kevin Shearin is an employee within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically N.J.S.A. 34:13A-22 (1T7). The Montclair Education Association is a majority representative within the meaning of N.J.S.A. 34:13A-3 (1T7).

2. The Board and Association stipulate that Kevin Shearin was permanently transferred in the 2005/2006 school year between

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1/ Transcript references to the hearing are "1T". Exhibits are "R-" for Respondent and "J-" for joint exhibit. Petitioner offered no exhibits into evidence.

work sites within the meaning of N.J.S.A. 34:13A-25, specifically from Montclair High School to the Renaissance School, and that the only dispute is whether the transfer was for disciplinary reasons (1T7-1T8).

3. Shearin has been employed by the Board as an operational aide, providing security for students, staff and Board property since the 2003/2004 school year. When first hired and until transferred, he was assigned to Montclair High School in both the main building and the freshman building (1T14-1T15).

4. In June 2003, Shearin received and signed a copy of the Board's Harassment Policy (R-1; 1T27-1T28). The Policy states in pertinent part:

> Our district is committed to a workplace free of discrimination and harassment based on race, color, religion, sex, national origin, disability or any other bases protected by federal, state or local laws. In an effort to prevent illegal harassment or discrimination from occurring, we will communicate and enforce this policy consistently. [No] [sic] employee of this district is exempt from this policy. Employees violating this policy may be individually liable [for] [sic] the effects of harassment.
>
> * * *
>
> Discrimination or harassment. . . .is considered a form of employee misconduct. Examples of such misconduct may include, but are [sic] [not] necessarily limited to:
>
> * A request or demand for sexual favors accompanied by a threat concerning an individual's employment status or a promise of preferential treatment;

> * Unnecessary and unwelcome touching of an individual . . .
> * Offensive jokes, comments, slurs, e-mail, memos, faxes, posters, cartoons, or gestures.
>
> Disciplinary action, up to and including termination, may be taken against any employee engaging in this type of behavior.
>
> * * *
>
> Any employee who believes he or she is being discriminated against or harassed based on any of the grounds stated above should report it immediately to his or her direct supervisor, to the affirmative action officer or to the human resources department. The district will investigate the complaint, make a written determination of its conclusion and when appropriate, prepare a plan of action to correct the problem and prevent its reoccurrence. The district shall inform the complaining employee of its determination. (R-1)

5. In the spring of 2005, Shearin was called into a meeting in the main office of Montclair High School (MHS). Several individuals were in attendance, including Head of Security/Assistant Vice-Principal Dr. Watts, Assistant to the Superintendent/Affirmative Action Officer Bruce Dabney, MHS Principal Dr. Katz and Ms. Thomas[2/] (1T15-1T16, 1T32). Dr. Katz informed Shearin, that he had received complaints from Shearin's female co-workers regarding allegedly improper sexual comments made by Shearin (J-1; 1T17-1T18).

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2/ The record does not more specifically identify Ms. Thomas.

Shearin asked for specifics, but was only told that the complaints involved sexual harassment. He was very upset and caught off guard, because he had never previously had any sexual harassment complaints leveled against him (1T18).

Shearin was not told at this meeting that he would be transferred. About a week later, however, he was told to report to the Renaissance School pending an investigation into the complaints (1T18-1T19, 1T21). He did not immediately report to his new assignment, because he was upset and called out sick. Eventually, Shearin reported to the Renaissance School (1T20).

6. Meanwhile, in response to the complaints, Dabney was instructed to conduct an investigation. He interviewed the five female complainants. Dabney determined that the "unwavering" testimony of three complainants was credible. He, therefore, sustained the allegations against Shearin (J-1; 1T34).

7. On August 29, 2005, after consultation with the District's Personnel Director, Dabney wrote Shearin about the Board's findings and recommendations (J-1; 1T35). The letter stated in pertinent part:

> 3. Even though you didn't intend to harm anyone by making inadvertent or innocuous comments, that would offend any female staff member, merely making comments which caused them to feel uncomfortable in your presence, and/or resulted in them altering their route to classrooms and around the high school campus to avoid having contact with you, is considered a violation

> of the Montclair Public School's Harassment Policy.
>
> 4. Even though you have denied "intentionally" making any inappropriate remarks to any female staff member at the high school, and were very remorseful and offended by the allegations lodged against you, it is the conclusion of these findings, that in the best interest of all parties that this be considered a formal reprimand and that you be transferred to another assignment within the district, and receive some sensitivity training related to the Montclair Public School's Harassment Policy.
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> 5. It is also recommended that you may continue to work at after school activities i.e. basketball, football, sporting events, plays, proms, etc., to receive overtime compensation. (The appropriate people will be notified)
>
> 6. Finally, a last chance agreement will be implemented following your review that unequivocally states the appropriate, courteous, and respectful manner in which you must treat all staff members in or out of the workplace. Any violation of the "last chance agreement" may result in immediate termination of employment. (J-1)

Dabney felt that his main responsibility under the Board's Harassment Policy was to remediate the harassment. Although he intended the formal reprimand to be disciplinary, the transfer and sensitivity training were, in his mind, corrective actions to address the hostile work environment (1T36).

All Board employees are given sensitivity training during the course of their employment, and sensitivity training is standard after an investigation and finding of sexual harassment

(1T36). Also, the transfer, Dabney concluded, was appropriate in order to separate the complainants from Shearin. Dabney reasoned that it was easier to transfer one employee (Shearin) than five employees (the female complainants) (1T37-1T38).

8. Upon receipt of J-1, Shearin immediately contacted Dabney. He had no idea why his behavior was considered inappropriate and wanted to face his accusers (1T23, 1T28). Shearin considered that all actions taken against him - his reprimand, permanent transfer and sensitivity training - were disciplinary because J-1 was a last-chance agreement (1T25, 1T29).

ANALYSIS

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. N.J.S.A. 34:13A-27 confers jurisdiction on the Commission to determine whether the transfer is predominately disciplinary, and, if it is, to take reasonable action to effectuate the purposes of our Act. 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 (¶32037 2001), the Commission set standards for assessing whether a transfer is disciplinary under our statute. The Commission stated in pertinent part:

> Our case law does not establish a bright line test for assessing whether a transfer is disciplinary . . . . . . [O]ur 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 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. Id. at 98.

Here, the parties agree that the finding of a violation of the Board's Harassment Policy precipitated, among other actions, the transfer of Shearin who was also formally reprimanded and ordered to attend sensitivity training. The Board admits that the formal reprimand was discipline. The question is whether the transfer, following an incident for which Shearin was disciplined, is predominately disciplinary and, thus, prohibited under our Act.

The Board contends that the transfer and sensitivity training were corrective actions required by its Harassment Policy. It argues also that Shearin's transfer complied with anti-discrimination statutes, particularly Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. §2000e et seq. and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq., as well as case law interpreting those statutes. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993); Blakey v. Continental Airlines, 164 N.J. 38 (2000). These statutes and

case law, the Board asserts, require an employer to act to prevent and stop harassment in the workplace, including, where sexual harassment is established, to separate the harasser from complainants.

The Board is correct in its analysis of anti-discrimination laws as interpreted by federal and state courts. In Knabe v. The Boury Corp., 114 F. 3d 407 (3rd Cir. 1997), the Court determined that once an employer has actual or constructive knowledge of the existence of a sexually hostile work environment and fails to take prompt and adequate remedial action, it can be held liable for the discriminatory conduct of its employee. The Court further explained that to avoid liability, an employer does not necessarily have to terminate or otherwise discipline the offender as long as it takes corrective action designed to prevent the offending conduct from recurring. Thus, the Court distinguished between punishment and corrective action as two distinct ways to deal with hostile work environment claims. See also, Trude S. Bouton v. BMW of North America, Inc., 29 F. 3d 103 (3rd Cir. 1994) (where employer divested harasser of apparent authority through effective grievance procedure, it was divested of liability for harasser's actions).

In considering a claim of sexual harassment under the LAD, the New Jersey Supreme Court reached a similar conclusion. Payton v. New Jersey Turnpike Authority et al., 148 N.J. 524,

536-537 (1997). In Payton, the Court determined that an employer who knows or should know of the harassment and who fails to take action sends a message that management supports the inappropriate behavior. In essence, an employer's failure to take corrective action creates direct liability for its own conduct. Effective measures, as defined by the Court, are those "reasonably calculated to end the harassment".

The question raised by the Board's argument and the above-cited case law is whether our contested transfer statute prohibiting the transfer of education employees for disciplinary reasons can be harmonized with anti-discrimination laws which require remediation of hostile work environments and may require transferring the harasser/employee. I find that the prohibition against transferring education employees for disciplinary reasons is not fundamentally inconsistent with requiring an employer to take corrective action where it determines that the employee has violated its harassment policy. It could not have been the intent of the New Jersey Legislature to weaken anti-discrimination laws by the mechanical application of N.J.S.A. 34:13A-25 - e.g. prohibiting the transfer of any education employee who is found to be a harasser. Where appropriate, a Board employer can lessen tensions by separating the harasser from his/her accusers without incurring liability under our Act for transferring an employee as a punishment for

the harassment. The employer's actions under these circumstances are not punitive or disciplinary but remedial.

That is not to suggest that in every instance where there is a finding that an employee has violated a harassment policy, transfer is a required corrective action or automatic result. In Konstantopoulos v. Westvaco Corp., 112 F. 3d 710 (3rd Cir. 1997), cert. den. 522 U.S. 1128 (1998), the Court found no liability where the plaintiff employee was assigned to work around former harassers for a brief period during her second period of employment. The Court noted that in some, but not all, cases the mere presence of the harasser can be enough to create a hostile work environment. The determination is fact specific.

The facts in the matter before me establish that Shearin's transfer was a necessary corrective action. Unlike the formal reprimand that the Board admits was disciplinary, the transfer and sensitivity training were consistent with its investigative findings, namely that Shearin made offensive and inappropriate sexual comments and that female co-workers felt uncomfortable in his presence and altered their routines to avoid contact with him. The transfer and training were designed to stop the current harassment and prevent future inappropriate behavior.

Shearin's opinion that the transfer was discipline under the last-chance agreement is conclusory and unsupported by the record. Nor does the evidence suggest an alternative, possibly

illegal motive under our Act - e.g discrimination for the exercise of protected activity. Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984). I cannot find that the Board's actions in transferring Shearin were other than those articulated by J-1 and the Board's witness - corrective measures necessitated by their investigation and findings. The proceeding before me does not challenge the appropriateness of the Board's investigation and findings. Whether those findings were accurate or mistaken, the Board acted pursuant to its investigation in determining that the transfer was a necessary corrective action to reduce hostility or tensions at the high school.

Additionally, the matter before me is distinguishable from other instances where the Commission has found transfers to be disciplinary. See, Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001) (where transfer was triggered by PTA President's criticism of teacher's classroom management techniques); West New York Bd. of Ed., supra, (where transfer was intended to punish employee for his complaints about the district's technology program and intentions to contact media about his concerns); North Bergen Tp. Bd. of Ed., P.E.R.C. No. 2002-12, 27 NJPER 370 (¶32135 2001), aff'd 28 NJPER 406 (¶33146 2002) (where school switch board operator was transferred shortly after filing grievance and receiving reprimand).

Petitioner contends that Shearin's transfer is like the Board's actions in Camden Bd. of Ed., P.E.R.C. No. 2001-9, 26 NJPER 366 (¶31148 2000). In Camden, the Commission determined that a physical education teacher was transferred as a sanction to placate the New Jersey Interscholastic Athletics Association (NJSIAA) after a two-year suspension of its team from post-season play and concluded that the transfer was, thus, predominantly disciplinary. Petitioner suggests that, like Camden, the Montclair Board acted to placate the female complainants without regard to the validity of their claims. Camden is distinguishable from the matter before me.

Here, the Montclair Board transferred Shearin after conducting an investigation - interviewing and considering the "unwavering" testimony of female complainants - and finding a violation of its own harassment policy. The Board transferred him in response to the hostile work environment to end the harassment. Even if the transfer was, in part, disciplinary because the language of J-1 appears to link the reprimand and the transfer, Dabney's testimony that the transfer was meant to separate Shearin from the complainants when viewed in tandem with his investigative findings (the complainants avoided contact with him) establishes that the transfer was not predominantly disciplinary and, therefore, not violative of our Act.

Shearin's transfer is more akin to the facts in Old Bridge Tp. Bd. of Ed. and Old Bridge Tp. Ed. Ass'n., P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005), aff'd 32 NJPER 201 (¶87 2004) [App. Div. Dkt No. A-5245-04T5 June 30, 2006]. There the Commission determined a teacher's transfer was not predominately disciplinary where the teacher was transferred because he could not get along with other staff members, not because he complained about bus duty. Similarly, Shearin's inappropriate statements made his female co-workers uncomfortable and, in some instances, caused them to seek alternate routes in the high school to avoid contact with him. Moving him to another work location resolved that issue, just as moving the Old Bridge teacher away from staff members he could not get along with ameliorated that situation. The transfer under these circumstances was not punitive.

**CONCLUSIONS OF LAW**

The Montclair Board of Education did not transfer Kevin Shearin for disciplinary reasons in violation of N.J.S.A. 34:13A-25.

**RECOMMENDATION**

I recommend the Commission ORDER that the Petition be dismissed.

Wendy L. Young
Hearing Examiner

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 May 31, 2007.