

P.E.R.C. NO. 2002-49

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-H-2000-1

EAST ORANGE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a petition for contested transfer determination filed by the East Orange Education Association. The Association alleges that the East Orange Board of Education violated N.J.S.A. 34:13A-25 when it transferred several middle school teachers for disciplinary reasons. The Hearing Examiner found that the transfers were intended to enhance student achievement. The Commission finds that the Association has not proven that the transfers were disciplinary.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Love & Randall, attorneys,  
(Melvin C. Randall, of counsel)

For the Petitioner, Oxfeld Cohen, LLC, attorneys  
(Nancy I. Oxfeld, of counsel)

DECISION

On November 24, 1999, the East Orange Education Association petitioned for a contested transfer determination. The Association alleges that the East Orange Board of Education violated N.J.S.A. 34:13A-25 when, in September 1999, it transferred several middle school teachers for what the Association contends were disciplinary reasons.

On January 11, 2000, the Board filed an Answer asserting that the transfers were made for educational reasons and were not disciplinary or punitive.

On August 10, 2000, the Chair granted the Association's request for an evidentiary hearing. The Chair advised the parties

that, absent objections, Hearing Examiner Susan E. Galante would conduct a hearing and prepare a report containing only findings of fact. The matter would then be transferred to the Commission for final disposition.

On October 19, 2000, and February 14 and June 14, 2001, the Hearing Examiner conducted a hearing. The parties examined witnesses, introduced exhibits, and filed proposed findings of fact.

On September 25, 2001, the Hearing Examiner issued a report containing her recommended findings of fact. H.E. No. 2002-2, 28 NJPER 29 (¶33010 2001). The parties stipulated that the teachers were informed that they were being transferred because of the high failure rates in their classes. The Hearing Examiner found that a Board member's memorandum expressing concern about high student failure rates triggered the decision-making process that resulted in the transfers. The Hearing Examiner also found that the assistant superintendent credibly explained why administrators proposed the transfers after the teachers' failure rates were identified and discussed. He testified that he and the superintendent recommended the transfers because they believed a change in schools, a different environment, and an opportunity to work with different administrators and students might result in improved teaching performance, which would in turn result in increased student achievement and better student preparation for high school.

On October 31, 2001, the Association filed exceptions. It asserts that the facts are essentially undisputed, but that the reason for the transfers is at issue. It argues that the teachers were punished to make it look as though the superintendent was taking action in response to the Board member's memorandum. The Association asserts that the superintendent responded to the Board member with a 17-page memorandum setting forth methods to deal with the problem, but did not suggest transferring teachers. It further asserts that the Board did not review information relevant to failure rates, such as evaluations of the teachers' performance, the comparative achievement of the students in those classes with their prior achievement, or student attendance. The Association notes that nine of the twelve teachers transferred were rated satisfactory in all areas of their yearly evaluation or in all areas except attendance and lateness. None of the teachers had been told that they were required to pass a certain percentage of students, and teachers with higher failure rates were not transferred. According to the Association, the timing of the transfers on the second day of school, after the memorandum from the Board member but before the superintendent's response, shows that the transfers were not made for educational reasons.

On January 2, 2002, the Board filed an answering brief. It argues that the assistant superintendent's testimony was unrefuted and unimpeached and that we should defer to the Hearing Examiner's decision to credit that testimony. The Board further

argues that it did not transfer the teachers because of poor evaluations, but because of high student failure rates.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 2-29). Despite the Association's urging, we have no basis to reject her decision to credit the testimony of the assistant superintendent about the non-disciplinary motivation for the transfers.

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. Non-disciplinary transfers are not mandatorily negotiable. 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).

Our case law does not provide a bright line test for assessing whether a transfer was disciplinary. 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 that prompted the transfer. West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001).

The Hearing Examiner has credited the assistant superintendent's testimony about the Board's educational objective for the transfers: it believed that a change in schools, a

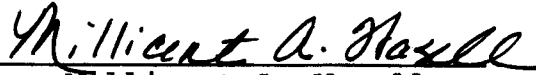
different environment, and an opportunity to work with different administrators and students might result in teachers' improved performance, which would result in increased student achievement. The teachers were not otherwise disciplined for failing too many students.

The Hearing Examiner recognized that the transfers were not a proven district strategy for enhancing teaching performance. They were a cost-free, quick way of responding to the Board member's concerns and taking some action to address low achievement in the first year of high school. The transfers were not based on the teachers' evaluations, but instead on student failure rates. The Board's approach may have been mechanical, given that other factors may have contributed to a particular student's failing, and it may have been imprecise, given that teachers with higher failure rates were not transferred. But the assistant superintendent testified credibly about why administrators proposed the transfers. Their reason was not to punish teachers, but to enhance student achievement. Under these circumstances, the Association has not proven that the transfers were disciplinary and we dismiss the petition.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners McGlynn, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan and Katz opposed. Commissioner Muscato was not present.

DATED: February 28, 2002  
Trenton, New Jersey

ISSUED: March 1, 2002

H.E. NO. 2002-2

STATE OF NEW JERSEY  
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THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and-

Docket No. TO-H-2000-1

EAST ORANGE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

In accordance with a procedure proposed by the Commission Chair and agreed to by the parties, a Hearing Examiner makes recommended findings of fact, but does not issue a recommended decision, with respect to the Association's allegation that the Board violated N.J.S.A. 34:13A-25 when it transferred twelve middle school teachers between work sites for what the Association contends were disciplinary reasons. The parties stipulated that the teachers were informed that they were being transferred because of the high failure rates in their classes. The Hearing Examiner recommends that the Commission find that a Board member's memorandum expressing concern about high student failure rates triggered the decision-making process that resulted in the transfers. The Hearing Examiner also recommends that the Commission find that the assistant superintendent was credible in explaining why administrators proposed the transfers after the teachers' failure rates were identified and discussed.

The case is transferred to the Commission for final disposition. The parties shall have the opportunity to address the issue of whether the transfers were disciplinary and to file exceptions and cross-exceptions to the Hearing Examiner's recommended findings of fact.



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Appearances:

For the Respondent, Love & Randall, attorneys,  
(Melvin C. Randall, of counsel)

For the Petitioner, Oxfeld Cohen, LLC, attorneys  
(Nancy I. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT

On November 24, 1999, the East Orange Education Association (Association) filed a petition for contested transfer determination. The Association alleges that the East Orange Board of Education (Board) violated N.J.S.A. 34:13A-25 when, in September 1999, the Board transferred several middle school teachers for what the Association contends were disciplinary reasons (C-1).<sup>1/</sup> On January 11, 2000, the Board filed an Answer asserting that the transfers were made for educational reasons and were not disciplinary or punitive (C-2). On August 10, 2000,

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<sup>1/</sup> "C" refers to Commission exhibits; "P" refers to Petitioner exhibits; "R" refers to Respondent exhibits; "J" refers to joint exhibits.

Commission Chair Millicent A. Wasell granted the Association's request for an evidentiary hearing and assigned me as Hearing Examiner. Chair Wasell advised the Association and the Board that, absent objections, I would conduct a hearing and prepare a report containing findings of fact. The matter would then be transferred to the Commission for final disposition (C-3). On August 21, after no objections were received, a Notice of Hearing issued (C-4).

A hearing was held on October 19, 2000, and February 14 and June 14, 2001. The parties examined witnesses; introduced exhibits; and filed proposed findings of fact, which were received by August 13.

Based on the entire record, I make the following:

RECOMMENDED FINDINGS OF FACT

The parties entered into a partial stipulation of facts (J-1), as follows:

PARTIAL STIPULATION OF FACTS

1. Steven Cowan is the principal of Healy Middle School. On one of the first days of school in September 1999, teaching staff members Bobbie E. Andrews, Toni Armstrong and Robert West were called in by Cowan and informed that they were being transferred to Tyson Middle School based on the high failure rates in each of their classes.

2. Andrews and West were both employed at Healy during the 1998-99 school year. Neither had been told during that school year that he was required to pass a certain percentage of students or informed that he could face disciplinary action if a certain percentage of students did not pass. Both Andrews and West had received year end evaluations for the 1998-1999 school year, and a PIP for the 1999-2000 school year.

3. Roxolana Potter is the principal of Costley Middle School. Margaret Arrington, Reginal Cantave and Joseph Marquis were each employed at Costley during the 1998-1999 school year as a teaching staff member.

4. At no time during the 1998-99 school year were Arrington, Cantave or Marquis ever told that he or she was required to pass a certain percentage of students or that he or she could face disciplinary action if a certain percentage of students did not pass. Arrington, Cantave and Marquis each received an end of year evaluation for the 1998-1999 school year and a PIP for the 1999-2000 school year.

5. Arrington, Cantave and Marquis were called in individually by Potter on one of the first days of school in September 1999. Arrington and Cantave were informed they were being transferred to Tyson Middle School. Marquis was informed he was being transferred to Truth Middle School. Arrington and Marquis were told the transfer was based on the high failure rate in their classes Cantave was told the transfer was based on the low scores of his students.

6. Baruti Kafeli is the principal of Sojourner Truth Middle School.

7. Kathleen M. Donnelly and Kenneth H. Williams were both employed as teaching staff members at Truth during the 1998-1999 school year, Donnelly teaching language arts and Williams teaching students awaiting classification.

8. At no time during the 1998-1999 school year was either Donnelly or Williams informed that there was a requirement that teaching staff members pass a certain percentage of their students and neither was informed that he or she would face disciplinary action if a certain percentage of students did not pass or if students received low scores. Both Donnelly and Williams received year end evaluations for the 1998-1999 school year and PIPs for the 1999-2000 school year.

9. On one of the first days of school in September 1999, Donnelly and Williams were called into a meeting together by Kafeli. Kafeli informed them that they were being transferred due to high failure rates in their classes.

10. Laura Trimmings is the Principal of Tyson Middle School.

11. During the 1998-1999 school year Lillie Dickinson, Richard Green, Sarah Ritter and Dana Williamson were each employed as teaching staff members at Tyson.

12. At no time during the 1998-1999 school year were Dickinson, Green, Ritter or Williamson ever told that they were required to pass a certain percentage of students or that they could face disciplinary action if a certain percentage of students did not pass. Dickinson, Green, Ritter and Williamson each received a 1998-1999 final evaluation as well as a PIP for the 1999-2000 school year.

13. On one of the first days of school in September 1999, Dickinson, Green, Ritter and Williamson were each called in separately by Trimmings. Dickinson and Williamson were informed they were being transferred to Costley Middle School based on high failure rates. Green was informed he was being transferred to Truth Middle School based on high failure rates and Ritter was informed she was being transferred to Healy Middle School based on high failure rates. [J-1]

ADDITIONAL CIRCUMSTANCES SURROUNDING THE TRANSFERS

14. None of the teachers had their salaries or benefits reduced and none received a warning letter concerning the failure rates in their classes (T26-T27).<sup>2/</sup> They were directed to be at their new middle school assignments on September 7, the first day of school for students (R-1). Middle schools include grades six, seven and eight (T50). Including Tyson, there are four district middle schools; Tyson also includes grades nine through twelve (T49).

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<sup>2/</sup> The transcripts will be referred to as "T" (October 19, 2000); "2T" (February 14, 2001); and "3T" (June 14, 2001).

15. "High failure rates" refers to the course grades assigned by teachers to their students (R-1; T50-T51). As discussed in findings 23 and 26, administrators were concerned that students who were receiving failing grades were not learning the material required by the Core Curriculum Content Standards. Core Curriculum Content Standards "define what all students should know and be able to do by the end of their public school education." N.J.A.C. 6A:8-1.1(a). They include cumulative progress indicators at the benchmark grades of four, eight and 11-12, attainment of which is measured by State assessment tests. N.J.A.C. 6A:8-1.1(b).

1998-1999 ASSIGNMENTS AND EVALUATIONS  
OF TRANSFERRED TEACHERS

16. Of the twelve teachers transferred, seven taught mathematics during the 1998-1999 school year; three taught English or Language Arts; and two taught a "Phoenix Grade 7" class at one of the middle schools (R-4).<sup>3/</sup> A Phoenix class is a small class for students with academic problems; teachers instruct in all subject areas (3T8). The teachers' 1998-1999 assignments were as follows:

|                                     |                 |
|-------------------------------------|-----------------|
| Bobbie Andrews (Healy)              | Mathematics 7/8 |
| Robert West (Healy)                 | Mathematics 6   |
| Toni Armstrong (Healy)              | Language Arts   |
| Joseph Marquis (Costley)            | Phoenix Grade 7 |
| Reginal Cantave (Costley)           | Mathematics 6/7 |
| Margaret Arrington (Costley)        | Phoenix Grade 7 |
| Kathleen Donnelly (Sojourner Truth) | Language Arts   |

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<sup>3/</sup> Three other teachers were transferred but are not involved in this matter (R-3).

|                                    |             |
|------------------------------------|-------------|
| Kenneth Williams (Sojourner Truth) | Mathematics |
| Lillie Dickerson (Cicely Tyson)    | Mathematics |
| Richard Green (Cicely Tyson)       | Mathematics |
| Dana Williamson (Cicely Tyson)     | English     |
| Sarah Ritter (Cicely Tyson)        | Mathematics |
| [R-4; 2T21] <sup>4/</sup>          |             |

17. The 1998-1999 evaluations rate a teacher in eight areas -- teaching strategies or techniques; knowledge of content; planning and preparation; classroom management; development of student attitude; professional/personal qualities; school/community relations; and attendance/punctuality. Each area has two to eight rating factors, for a total of 43. Teachers may be rated satisfactory; needs improvement or unsatisfactory. The evaluator may also indicate that a rating element is not applicable or was not observed (R-4). The form includes space for commendations; summary comments; and the teacher's Professional Improvement Plan (PIP).

18. Five of the teachers (Andrews, West, Arrington, Cantave, and Ritter) received satisfactory ratings in all eight categories and all 43 rating elements. Four teachers received satisfactory ratings in all areas and all rating elements except absenteeism and tardiness (Donnelly, Green, Dickerson, and

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<sup>4/</sup> The parties' stipulation states that Williams taught students "awaiting classification." Reading the stipulation together with his evaluation, I find that he taught math to such students. I note as well that the stipulation lists Dickerson as "Dickinson" (J-1, paragraph 12). I use the name on the evaluation.

Williams). Seven of these nine teachers' evaluations included commendations.

Andrews

The teacher does an exemplary job of helping students' transfer learning from one situation to another. He is exceptionally skillful at helping students retain the relevant aspects of a lesson by making it especially meaningful to them. [R-4, Andrews evaluation]

West

The teacher has demonstrated an ability to advance students who are somewhat reluctant to participate in the classroom. He aids them in the development of social awareness and awareness of self. [R-4, West evaluation]

Ritter

It is evident that you are committed to the success of students and moving in a positive direction toward providing for all their learning needs. [R-4, Ritter evaluation]

Dickerson

Ms. Dickerson is a seasoned professional who has years of proven instructional strategies under her belt. Her classroom is organized and students can be found working cooperatively with one another or attentively paying attention to board work being explained by Ms. Dickerson. Her love of teaching is evident in the execution of her job responsibilities. [R-4, Dickerson evaluation]

Green

Mr. Green is a no nonsense teacher who has a way of making his classroom a warm environment that makes students feel relaxed, comfortable and unafraid to learn. He is very organized and methodical in his instructional approach. He takes his teaching responsibilities very seriously, yet he makes learning fun to his students. Mr. Green provides his students with

the opportunity to employ different mediums of self expression which builds their confidence in presenting materials to the entire class. He capitalizes on their strengths and helps them build on their weaknesses. [R-4, Green evaluation]

Donnelly

You are to be particularly commended for your strong class mgt. skills which enable you to maximize time on task. [R-4, Donnelly evaluation]

Williams

Mr. Williams is to be commended for his efforts in the Math program at Truth school. [R-4, Williams evaluation]

Green's and Williams's PIPs suggested that they should work to improve performance in certain areas. Green's PIP encouraged him to be more aggressive in classroom management and to broaden his "content knowledge base" and instructional strategies (R-4, Green evaluation). Williams was encouraged to "use ways to involve more of his students in the class activities" (R-4, Williams evaluation).

19. Marquis received all satisfactory ratings except for one "needs improvement" rating under "teaching strategies" and an "unsatisfactory" in number of absences. Under the "teacher strategies or techniques" portion of the form, the evaluator, Potter, stated:

Students' achievement is essential. Weekly review of student progress. Excessive absences affects student learning. [R-4, Marquis evaluation]



Williamson and Armstrong received several "needs improvement" ratings in such areas as teaching strategies; planning and preparation; classroom management and professional/personal qualities. Armstrong also received a "needs improvement" rating in "developing student attitude." Williamson's evaluation included the following commendation:

Mr. Williamson is a talented individual who shares his talents freely and gladly for the betterment of students and enrichment of the school. His commitment to working with students in getting them involved in student government and other activities to develop their social, civic, and political awareness is commendable.

His PIP directed him to, among other things, "become better organized as it would permit for better delivery of the course's content" (R-4, Williamson evaluation).

Armstrong's summary comments stated:

Ms. Armstrong is encouraged to implement suggestions for improving the academic performance for her students by providing lessons which are well-planned and engage the interest and attention of her students. She is encouraged to structure lessons to maximize opportunities for student mastery. [R-4, Armstrong evaluation]

A notation under the "professional/personal qualities of Armstrong's evaluation encouraged her to "organize and label her grade book as suggested or use some means of clearly identifying the components of her grades" (R-4, Armstrong evaluation).

None of the teachers' evaluations referred to "high failure rates" -- that is, the percentage of students to whom the

teachers gave failing grades. None directed the teacher to work toward increasing the number of students who passed his or her course. Cantave's evaluation did not mention that his students received low scores and did not identify this as an area for improvement.

20. Some evaluations referred to the Core Curriculum Content Standards and State assessment tests. For example, Andrews's PIP required him to:

[G]ain a comprehensive understanding of testing (GEPA) specifications. Upon gaining that understanding he is to work within his team to create ideas that set the stage for learning.  
[R-4, Andrews evaluation]

GEPA refers to the Grade Eight Proficiency Assessment "which is used to determine cumulative achievement of the Core Curriculum Standards through eighth grade." N.J.A.C. 6A:8-1.3.

Summary comments on Marquis' and Cantave's satisfactory evaluations noted that "core curriculum standards must be addressed," as did notations under "planning and preparation." Their summary comments added that "student progress is contingent [upon] teacher's satisfactory performance" [R-4, Marquis and Cantave evaluations]. Donnelly's satisfactory evaluation also stated that she was to continue to plan effectively using district curriculum guides and the Core Curriculum Content Standards. Summary comments in Arrington's evaluation advised her to "[c]ontinue working with the Core Curriculum Standards as well as integrating it with Cross Curriculum Content Standards." Her PIP stated:

Your teaching success is determined by student achievement in both the District's and Statewide Tests. Continue to implement the Core Curriculum Standards in your content area. [R-4, Arrington evaluation]

BOARD MEMBER AND ADMINISTRATOR ACTIONS PRIOR TO TRANSFERS

21. On August 17, 1999, Board member Mary Ann Cool wrote a memorandum to Superintendent Dr. John Howard, Jr., entitled "Failure of Ninth Graders in Math and Algebra" (P-1). On September 8, Howard responded with a 17-page "Response to Concerns" memorandum which discussed strategies for improving student achievement and test scores in math and English. Howard also stated that he shared Cool's "concerns about the failure rate in English I and Algebra I" (P-1). Accordingly, I find that Cool had expressed concerns about both subjects, despite the title of her memorandum.<sup>5/</sup>

22. On September 3, 1999, Howard and Assistant Superintendent Dr. Kenneth King met with Cowan, Kafeli, Potter, and Trimmings, the principals of the district's middle schools (R-1; T50). King testified that he and Howard met with middle school principals because they were concerned with the performance of high school students, especially ninth graders, and therefore believed they needed to examine student performance in English, language arts and math in the sixth, seventh and eighth grades (T50). I infer from this testimony that King and Howard thought that an analysis of student performance in middle school would provide

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<sup>5/</sup> The memorandum is not included in the record.

insight into why students were not succeeding in the first year of high school. As discussed in finding no. 31, I conclude that they concentrated on math and English teachers because Cool had inquired about low student grades in those subjects. However, that circumstance is not inconsistent with King's testimony, which I credit, that the district considered math and English to be the foundation for success in other subjects, particularly since the Core Curriculum Content Standards concentrate on those areas (T31; T34).

23. In connection with the September 3, 1999 meeting, King reviewed the failure rates of each middle school teacher who had primary responsibility for teaching math, English and language arts (T34-T35; T51; T52-T53; R-1). The benchmark for analyzing whether a teacher had an unacceptable failure rate was the distribution that would occur under a bell-shaped grading curve, where a 12.5% failure rate would be the norm (T54; R-1). King identified the teachers who had failure rates above 12.5% (T34-T35) and he, Howard and the principals discussed those failure rates (R-1). King testified that the purpose of the meeting was to decide which teachers would be transferred (T52). I infer from this testimony that King and Howard had decided before the meeting that some teachers would be transferred. All of the transferred teachers had failure rates significantly above 12.5% (T54).

In making the transfer decisions, administrators did not compare how students had performed in the teachers' classes with

how those students had performed in prior years (T52). King did not know whether the grades assigned reflected only academic performance, or whether some of the teachers might have reduced a student grade because of poor attendance (T55). However, he observed that a student with poor attendance will often have poor grades (T55).

The administrators did not review the teachers' 1998-1999 evaluations at the meeting, although King maintained that principals are always aware of how their teachers are performing (T56-T57). King and the other administrators looked "primarily" at failure rates but "discussed many topics" because many factors affect teacher performance and student achievement (T52). While King did not identify any other criterion that entered into the transfer decisions, he and Howard discussed with the middle school principals "how students were achieving in relationship to the grades assigned" (T50). That testimony suggests that administrators may have looked at whether, despite failing grades, there were other indicators -- such as test scores -- that a teacher's students were achieving. I also infer from this testimony that the administrator's concern was not the teachers' grading practices per se but student achievement. That inference is supported by R-2 and R-3, described in finding no. 26, which direct principals to be attentive to whether the students in the transferred teachers' classes are acquiring the knowledge required by the Core Curriculum Content Standards.

Some math and English teachers who were not transferred may have had higher failure rates than the transferred teachers (T54). King estimated that there were approximately 10-12 math and English teachers at the Healy School; three of them were transferred; and all three -- Armstrong, Andrews and West -- had failure rates above 12.5% (T53-T54; J-1). However, on cross-examination, King responded that it was "probably correct" that they did not necessarily have the highest failure rates of the 10-12 math and English teachers at Healy (T54). King added that the three transferred teachers were the teachers who had failure rates that were significantly above those that "were acceptable under the circumstances" (T54).

24. King directed the principals to inform the teachers of their transfers immediately after the September 3 meeting (R-1). A memorandum from King on the same date stated that teachers were to be informed that the transfers were based on "a review of student achievement data and failure rates assigned by the affected teachers for the 1998-1999 school year in the subjects of English and/or Mathematics" (R-1). The transfers were submitted to the Board for approval on Tuesday, September 7, the day on which students reported to class and the teachers reported to their new schools (R-1).

King testified that the transfers were made in order to improve student achievement by improving teaching performance (T31; T36). King explained that:

[W]e felt that a change of school, a change of environment, an opportunity to work with different students, an opportunity to work with different staff, an opportunity to work with different administrators might improve teaching performance which would automatically lead to improved student achievement. [T36]

The Association's assertion that this statement is not credible is addressed in finding no. 31.

There were no involuntary transfers at the high school level at the beginning of the 1999-2000 school year and King did not recall any at the elementary school level (T47-T48). Prior to 1999-2000, there had been cases where teachers had been transferred in order to improve teaching performance (T46-T47).

As stipulated, the Board has no policy that teachers are expected to pass a given percentage of students (J-1). Teachers are expected to grade appropriately and are not to pass a student whose performance does not merit it (T57-T58). Teachers are also expected to provide a consistently satisfactory program of instruction so that students can master all subject areas (T57). As far as King was aware, none of the transferred teachers were informed that they would face disciplinary action if they did not increase student achievement (T43).

ADMINISTRATIVE MEMORANDA FOLLOWING THE TRANSFERS

25. Howard's 17-page September 8 memorandum to Cool outlines the district's strategies for improving student achievement but does not discuss teacher transfers (P-1). However, at several points, the memorandum reflects Howard's view

that an examination of teacher failure rates and teacher performance was required to improve student achievement. For example, at the outset of the memorandum Howard stated that he had told one principal that he was very concerned about one teacher's "grossly disproportional" failure rates and had advised her principal to "monitor this personnel matter very carefully and to take steps to insure that this behavior is not repeated." The memorandum continued that he had directed Trimmings and two other principals, a Ms. Nichols and a Dr. Morgan, to investigate the failure rates in their schools and plan strategies to:

1. alleviate unfair failure practices;
2. institute routines for teachers to be in contact with parents on a regular basis regarding progress of their children;
3. commence biweekly meetings between teachers with a failure rate greater than 25% and their evaluators of record to review student progress and insure that parent contacts are being made;
4. implement a school-wide effort to improve student attendance, particularly at grade 9;
5. monitor the Mid-quarter Notice Reports for indications of failure by course and by teacher;
6. work with Central Office administrators to improve student performance; and
7. keep the Superintendent apprised of progress in these areas regularly.

[P-1, pp. 1-2]

Thus, items 3 and 5 focus on the failure rates of teachers, albeit Howard uses a different benchmark (25%) from than used in the



transfer decisions (12.5%). Nichols is a principal of Clifford Scott High School (T25-T26); Trimmings is principal of Tyson, which includes grades nine through 12; and I infer that Dr. Morgan is a high school principal given the reference to grade 9 in item 9.

The closing of Howard's memorandum refers to teaching performance.

Our most severe problem at this time is the unwillingness and/or inability of teachers to deliver instruction effectively. This problem persists in spite of the comprehensive staff development opportunities which we make available every year ... and significant advances which we have made in technology.

I found it very curious that problems with teacher performance were not addressed in your memorandum dated August 17. Members of my central office staff and building administrators will be instructed to continue to monitor instruction carefully and intensify efforts to deal with teachers who are unable and/or unwilling to deliver instruction effectively to our students. We will continue to expect the cooperation of the Personnel Committee and the full Board of Education in these critically important efforts. [P-1, p. 17]

The remainder of the memorandum lists district programs to improve math and reading skills at both the elementary and secondary levels (P-1, pp. 2 through 16). There are references to middle school students under "Secondary Initiatives." For example, Howard describes how middle school students are given quarterly examinations "in order to assess their progress and modify instruction to meet their needs" (P-1, p. 8). Throughout

the memorandum there are numerous references to the Core Curriculum Content Standards; the various statewide assessment tests; and the importance of preparing district students for those tests (P-1, pp. 2 through 16).

26. On October 26, 1999, Howard sent King the following memorandum:

In September of 1999 we transferred fifteen middle school teachers due to prior year's classroom failure rates. Please provide an update to my office as to the performance of those teachers, i.e., the present performance levels in their newly assigned schools. Please review their classroom failure rates with particular emphasis on whether students are acquiring the needed New Jersey Core Curriculum Content Standards information. [R-3]

On November 23, 1999, King wrote a memorandum to middle school principals Cowan, Kafeli, Potter and Trimmings, titled "Status Report: Teacher Transfers" (R-2). The memorandum stated that the purpose of the September transfers had been "to provide teachers with a different educational environment and an opportunity to demonstrate their ability to provide a satisfactory instructional program for the students assigned to them" (R-2). King noted that the first marking period ended November 10; directed the principals to attend a November 30 meeting; and asked them to bring information concerning the assigned grades of the transferred teachers (R-2). In addition, they were to present "objective, verifiable data about whether the students assigned to the teachers were acquiring the information needed as determined by the New Jersey Core Curriculum Content Standards" (R-2).

King also advised that, while the principals should focus on the transferred teachers, they should also maintain a heightened awareness of all staff, and pay particular attention to the manner and the extent to which teachers are "causing/permitting students to acquire the skills and knowledge they need to demonstrate mastery of the various subject areas" (R-2).

DUTIES OF CANTAVE, ARRINGTON, AND RITTER

27. On October 19, 2000, the parties read into the record the partial stipulation of facts and presented evidence directed to whether the transfers were disciplinary. The Association had also proposed stipulations with respect to the nature of Arrington's, Cantave's, Marquis's and Ritter's assignments (T14). The parties agreed that the Board would decide whether it could agree to those stipulations and, if it could not, additional evidence would be presented concerning the four teachers' assignments (T14). That took place on February 14 and June 14, 2001.<sup>6/</sup> While neither party's proposed Findings of Fact addresses these teachers' assignments, I make the following findings should they be pertinent to the parties' legal arguments before the Commission.

Arrington

28. Arrington taught a Phoenix Grade 7 class in 1998-1999 (R-4, Arrington evaluation). She and Board witness Potter were in basic agreement concerning the nature of Phoenix classes.

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<sup>6/</sup> The Association elected not to present evidence as to Marquis's 1998-1999 assignment.

Phoenix classes are comprised of "disaffected" students with academic problems (2T7-2T8; 2T11; 3T7-3T8). They are small -- 13 to 21 students -- and are designed to help "move students along" in terms of grade and skill levels (2T7; 3T8). During 1998-1999, Arrington's students did not have behavioral problems, although some had poor attendance records (2T8-2T9). Arrington taught her students all subject areas except for "unique themes" (3T8).

#### Cantave

29. During 1998-1999, Cantave taught Mathematics Grades 6 and 7 (2T21). In November 2000, he ceased employment with the Board and is now teaching at a charter school (2T28-2T29).

Cantave's classes were "heterogenously composed" meaning that none of the students had been identified as needing a special education classification and none were "disaffected" students (3T6-3T7). Disaffected students are assigned to Phoenix classes (3T6-3T7). Cantave believed that some of his students -- perhaps one-quarter -- should have been classified (2T23). Cantave spoke with co-workers, including special education teachers, about his views, but did not otherwise alert school district personnel (2T20-2T26).

Cantave also believed that some of his students had special needs because they seemed to understand course material but did not test well (2T19). Some of his students needed extra help beyond normal classroom instruction whereas others did not (2T27-2T28).

Based on the foregoing, I find that the record does not show that Cantave's classes had an unusual number of students with academic or other difficulties.

Ritter

30. During 1998-1999, Ritter was part of a "mathlink" program, an extended class format designed to enhance student performance on GEPA (2T43-2T44; P-1, page 15). Ritter and Robin Lewis were assigned to one class and the 1998-1999 administrative schedule listed Lewis as the developmental math teacher and Ritter as the math link teacher (2T43). In addition, Marianne Haynes was assigned as a basic skills teacher or "pull-out" person (2T43). All three teachers had responsibility for the same students, although they had different instructional roles (2T44).

Despite the master schedule, the math link program was flexible; instructional arrangements were internal; and teachers could determine how best to meet student needs because the goal was to raise student achievement (2T43; 2T50). In this vein, Ritter spent much of her time during 1998-1999 working with small groups of students outside the classroom (2T32-2T34). She did not always work with the same students (2T32).

While the math link program had been in existence for several years, the 1998-1999 class was a pilot program in the sense

that class periods were arranged differently than in prior years (2T42).<sup>7/</sup>

Lewis, Ritter and Haynes met together, developed lesson plans; and decided which students needed special help (2T35). Ritter believed that as the "developmental" teacher, Lewis was in charge (2T34-2T35).

Ritter recalled that Lewis was responsible for assigning grades, which were based on homework and classroom tests (2T34; 2T37). She stated she did not assign grades for her breakout classes (2T34-2T35). However, Lewis would ask Ritter how students were doing in Ritter's class -- "were they passing or failing" (2T37-2T38). When grades were to be assigned, she and Lewis would talk about Ritter's students and which should pass and which should fail (2T40). Ritter also had input when a student was in between grades (2T37).

Ritter had a role book which noted the results of tests taken in Lewis's classroom and which students had done their homework (2T39). Ritter keep abreast of whether students understood their homework by classroom review (2T39).

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<sup>7/</sup> Ritter was not certain whether she had been designated a math link teacher for 1998-1999 -- as she had been in prior years -- given the pilot nature of the program (2T38). I credit Trimmings's recollection that Ritter was a math link teacher given Trimmings's familiarity with how the 1998-1999 program compared with the math link class in other years.

Student report cards are compiled from grade scans completed by different teachers (2T45-2T46). Ritter did not "believe" that she completed a grade scan during 1998-1999 (2T40). When she had completed grade scans in prior years, her grades were always the same as Lewis's (2T40).

Trimmings's recollection of grading procedures differed from Ritter's. She stated that during 1998-1999, as in previous years, students received a math grade and a math link grade and that "there are grades and grade distribution sheets in Mrs. Ritter's name that could only have been generated by Mrs. Ritter's grade scans" (2T45). Haynes did not have grading responsibilities (2T45).

Trimmings reviewed the grades assigned by Lewis, Ritter and other math and English teachers at Tyson (2T58). Ritter's and Lewis's grades differed somewhat in terms of the number of students failed and which students they failed (2T58). Based on her review of grade reports; percentage of failures; and the relationship between student failures and scores on standardized tests, Trimmings recommended that Ritter be transferred (2T54-2T55). Neither Lewis nor Haynes were transferred (2T56).

I find that Trimmings and Ritter both described the math link grading procedures as they recalled and understood them but that it is not necessary or possible to resolve all of the discrepancies in their testimony. Because the relevant inquiry in this contested transfer matter is the reason for the transfers, I

focus on whether administrators believed that Ritter had grading responsibilities when they recommended her transfer. I conclude that they did.

As principal of the school, Trimmings was in a position to view the grade scans submitted for all classes and she was firm and credible in her recollection that there were grade distribution sheets issued in Ritter's name. While I recognize that her testimony would have been buttressed had the Board produced the sheets, its failure to do so does not undermine my assessment of Trimmings's credibility.

Moreover, Trimmings was familiar with the design and purpose of the math link program, and I credit her testimony that students in 1998-1999 received both a math and a math link grade, as they had in prior years, and that the administration understood that the assigned math teacher would issue the math grade and the math link teacher would assign the grade in that course component. Nothing in Ritter's testimony explains why there would be a deviation from the two grade procedure in 1998-1999. Finally, the Association's own theory of the case is that the teachers were transferred because the high percentage of failing grades they assigned embarrassed the superintendent and made him "look bad" in front of a Board member. It does not suggest any other basis for Ritter's transfer.

With respect to Ritter's testimony, it may be that she simply did not recall that she had filled out grade scans: she



testified that she did not "believe" she had done so in 1998-1999 (2T40). It is also possible that, as the teacher in charge, Lewis recorded the math link grades after conversations with Ritter: Ritter at several points referred to discussions with Lewis about whether Ritter's students were "passing" or "failing" (2T37-2T39).

In sum, I do not resolve how grade scans in Ritter's name came into existence, but I conclude that they did exist and that Ritter was transferred after a review of them. I make no findings as to how Ritter's duties corresponded to those which are ordinarily performed by the math link teacher. The record includes no information concerning the role of the math teacher vis a vis the math link teacher.

#### BOARD'S REASONS FOR TRANSFERRING TEACHERS

31. Whether some or all of the transfers were disciplinary under N.J.S.A. 34:13A-25 is a legal issue that will be determined by the Commission. However, these factual findings address the impetus and reasons for the Board's actions.

Based on the timing of the transfers, as well as the teachers' evaluations, I find that Cool's memorandum triggered the decision-making process that resulted in the transfers. All of the teachers were evaluated at the end of 1998-1999; none of the evaluations evidenced a concern with high failure rates or, in Cantave's case, low scores, and none directed the teachers to improve in these areas. Eight of the evaluations included

laudatory comments about the teachers' performance. When assignments for the 1999-2000 were initially made, all of the transferred teachers were assigned to their 1998-1999 schools (R-1; R-4).

It was only after Cool's August 17 memorandum that administrators examined the failure rates of middle school math and English teachers. The subjects highlighted -- math and English -- were the ones that Cool had identified (P-1). And the focus on teacher failure rates coincided with a similar focus in Howard's September 8 memorandum to Cool (P-1, pp. 1-2). Finally, the transfers were quickly arranged on September 3 to take effect September 7, before they were officially approved by the Board. For all of these reasons, I find that the decision-making process that resulted in the transfers was triggered by Cool's memorandum. They did not occur in the ordinary course of making staffing assignments for the 1999-2000 school year; nor were they an outgrowth of the teachers' 1998-1999 evaluations.

However, I also find that the transfers were one part of the district administrators' effort to address a problem that Cool had highlighted: high student failure rates in ninth grade math and English.

Viewing the record as a whole, I find that administrators responded to a Board member's concerns by, among other things, explaining the district's educational programs and strategies; reviewing the failure rates of high school and middle school

teachers; and implementing a program to improve high school attendance (P-1). At the high school level, teachers with high failure rates were required to meet biweekly with their evaluators to review their students' progress and make sure that parent contacts were being made (P-1, p. 1).

With respect to the middle school transfers, King recounted that he and Howard recommended the transfers because they believed a change in schools, a different environment, an opportunity to work with different administrators and students, "might" result in teachers' improved performance, which would in turn "automatically" result in increased student achievement and better student preparation for high school (T36). Consistent with this rationale, King's November 1999 post-transfer memorandum directs principals to monitor all teachers, but especially the transferred teachers, to ensure that their students were acquiring the "information needed as determined by the New Jersey Core Curriculum Content Standards" (R-2). I credit King's testimony and find that he was knowledgeable and straightforward in explaining his and other administrators' rationale and decision-making process. At the same time, I find that transfers were not a proven district strategy for enhancing teaching performance, as evidenced by King's statement that administrators believed the transfers "might" improve performance. The record also does not indicate why high school teachers with high failure rates were not transferred among the district's three high schools.

While the Association asserts that the teachers were transferred because the grades they assigned made the superintendent "look bad" in front of a board member, there is no direct evidence of that and the record does not support such an inference. Howard's memorandum does show that he was dismayed that Cool had not mentioned teaching performance as one reason for low student achievement (P-1, p. 17). However, that in and of itself does not mean that administrators recommended the transfers without believing that they could result in improved teaching performance and student achievement. King was sincere and credible in explaining how he and other administrators believed in the strong link between teaching performance and student achievement (T36; T46).

Moreover, if administrators had wanted to transfer teachers because they were embarrassed when Cool highlighted the failure rates of ninth graders, it is more likely they would have recommended the transfers of ninth grade teachers who had failed a large percentage of students, as opposed to sixth, seventh, and eighth grade teachers. The focus on middle school teachers tends to reinforce King's testimony that the district wanted to examine student and teacher performance at the middle school level in order to assess the causes of low achievement in the first year of high school.

In making these findings, I recognize that there is a lack of congruence between, on the one hand, the teachers' generally

satisfactory evaluations for 1998-1999 and, on the other, administrators' conclusions that their performance needed to be improved because of their high failure rates. This apparent inconsistency derives from the fact that the teachers' evaluation form is directed to teaching methods and other skills, but does not focus on student achievement per se. Cool's memorandum prompted administrators to focus on which teachers had failed a significant percentage of students. However, in my view, that circumstance does not undermine King's testimony as to why administrators recommended that these teachers be transferred after their failure rates were identified and discussed by Howard, King and middle school principals.



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Susan E. Galante  
Hearing Examiner

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Trenton, New Jersey  
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