

P.E.R.C. NO. 2002-12

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BERGEN TOWNSHIP  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-H-2000-2

NORTH BERGEN FEDERATION OF TEACHERS,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the North Bergen Township Board of Education violated N.J.S.A. 34:13A-25 by transferring a switchboard operator represented by the North Bergen Federation of Teachers from the Board office to an elementary school for disciplinary reasons. The Commission orders the Board to return the switchboard operator to the position in the Board office at her regular work hours.

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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Petitioner.

Appearances:

For the Respondent, Giblin & Giblin, attorneys  
(Michael A. Gannaio, of counsel)

For the Petitioner, Mullica & Mullica, attorneys  
(Victor P. Mullica, of counsel)

DECISION

On June 10, 2000, the North Bergen Federation of Teachers, Local 1060, AFL-CIO, filed a petition for contested transfer determination. The petition alleges that the North Bergen Board of Education violated N.J.S.A. 34:13A-25 by transferring a switchboard operator, Louise Peterkin, from the Board office to an elementary school for disciplinary reasons.

On August 31, 2000, the Board filed an Answer denying that the transfer was for disciplinary reasons. It asserts that Peterkin was transferred for reasons of economy and efficiency.

On November 28, 2000, a Notice of Hearing issued. On May 2, 2001, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On July 9, 2001, the Hearing Examiner issued his recommendations. H.E. No. 2002-1, 27 NJPER 315 (¶32112 2002). He concluded that Peterkin was transferred because, immediately before the transfer, she had filed a grievance over losing an overtime opportunity to a part-time employee. He rejected the Board's defense that Peterkin was transferred from her switchboard position because she did not speak Spanish and because it was efficient.

On July 23, 2001, the Board filed exceptions. The Board argues that this case need not be decided on circumstantial evidence, as the testimony of its superintendent, Peter Fischbach, provided direct evidence of its intentions. The Board maintains that the petitioner did not sustain its burden of proof due to the lack of direct evidence and its inability to disprove Fischbach's testimony. It contends that a reprimand issued to Peterkin was not disciplinary and that Peterkin was transferred to fill a temporary vacancy and was not transferred back for programmatic reasons.

On July 24, 2001, the petitioner filed an answering brief. It contends that the Hearing Examiner, as the trier of fact, made appropriate credibility determinations.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 2-14).

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).

Our case law provides a framework for assessing whether a transfer is disciplinary under N.J.S.A. 34:13A-25. A transfer is predominately disciplinary when it is punitive and/or is not made for educational or staffing reasons. West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001). 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 that prompted the transfer.

The Hearing Examiner concluded that Peterkin was transferred from her switchboard position in the Board office to a secretarial position at the Franklin school for predominately disciplinary reasons. He relied on the fact that the transfer came on the heels of her filing a grievance and receiving a reprimand for leaving work without a replacement. He rejected the Board's proffered non-disciplinary rationale for the transfer, noting that Peterkin had worked at the switchboard for 25 years without incident; the Board had never criticized her inability to speak Spanish; and there was no evidence of a recent increase in the percentage of Spanish-speaking residents. The Hearing

Examiner also drew an adverse inference from the lack of testimony from the Board Secretary, whose signature appeared on the posting for a bilingual clerical employee who replaced Peterkin and who issued the reprimand to Peterkin for leaving work at the end of her shift even though the next operator had not yet arrived.

We need not accept all of the Hearing Examiner's credibility determinations to accept his conclusion that the transfer was predominately disciplinary. Under all the circumstances, we believe that conclusion was correct.

Peterkin has worked for the district for 31 years, the last 25 as the full-time switchboard operator at the Board offices. She filed a grievance contesting the awarding of overtime to a part-time employee rather than her. A few days later, she left work shortly after her normal quitting time. It appears that there was no replacement, but there were at least two other clerical employees available to cover the switchboard.

Two days later, a "positions available" notice was posted for "clerks (bilingual helpful)." The Board Secretary's signature was stamped on the posting. Peterkin is not bilingual, but has always been able to arrange for a Spanish-speaking co-worker to take any calls from a Spanish speaker. The school population is about 75 percent Hispanic.

Three days later, the Board Secretary wrote a memorandum to Peterkin criticizing her for leaving the switchboard unattended at the end of her shift. Peterkin had never received such a

memorandum in her 31 years as a Board employee. Nor had she ever been disciplined.

That same day, a Franklin School clerical employee advised the Board that she would be going on a maternity leave. Even before the job was posted, the superintendent told Peterkin that she would be transferred to temporarily fill that position.

The Board then appointed a bilingual clerical employee to the "Board Office Switchboard." When the employee returned from maternity leave to her secretary/clerk position, the Board did not return Peterkin to her position at the Board offices.

The Board offered no other evidence other than its superintendent's testimony to support its explanations for the transfer. The Board has provided no basis for rejecting the Hearing Examiner's overall conclusion that discipline, not the need to fill a temporary vacancy, triggered this transfer and his specific credibility determination rejecting the superintendent's testimony that the transfer was not motivated by a punitive intent.<sup>1/</sup> The disciplinary nature of the memorandum that

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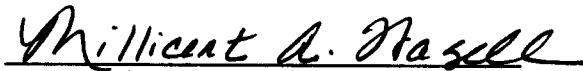
<sup>1/</sup> We need not accept all parts of the Hearing Examiner's analysis to find that the transfer was predominately disciplinary. We are not sure, for example, that the grievance alone would have motivated the transfer or that the Board Secretary's memorandum referenced that grievance. Nor do we discount the interest in having bi-lingual employees in light of possibly changing demographics. Nevertheless, we are persuaded that the transfer would not have happened when it did but for the grievance and the disciplinary incident.

immediately preceded the transfer is plain on its face and the Board Secretary was not called as a witness to explain why it was not. We also note that the transfer occurred mid-year, without a convincing explanation of why it had to be done at that time or any evidence of a precipitating problem caused by Peterkin's inability to speak Spanish. Accordingly, we adopt the Hearing Examiner's recommendations and proposed remedy.

ORDER

The North Bergen Township Board of Education is ordered to return Louise Peterkin to the switchboard operator position in the Board office at her regular work hours.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: September 26, 2001  
Trenton, New Jersey  
ISSUED: September 27, 2001

H.E. NO. 2002-1

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

In the Matter of

NORTH BERGEN TOWNSHIP  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-H-2000-2

NORTH BERGEN FEDERATION OF TEACHERS,

Petitioner.

**SYNOPSIS**

A Hearing Examiner recommends that the North Bergen Township Board of Education violated N.J.S.A. 34:13A-25 by transferring Louise Peterkin between work sites for disciplinary reasons. The Hearing Examiner recommends that Peterkin was not transferred from the switchboard position because she did not speak Spanish (in a predominantly Spanish-speaking community) and because it was "efficient," but because she had filed a grievance over an award of overtime employment to a part-time employee. The Hearing Examiner recommends that Peterkin be returned to her former position, building and work hours.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and 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. 2002-1

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

In the Matter of

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Appearances:

For the Respondent, Giblin & Giblin, attorneys  
(Michael A. Gannaio, of counsel)

For the Petitioner, Mullica & Mullica, attorneys  
(Victor P. Mullica, of counsel)

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

On June 30, 2000, the North Bergen Federation of Teachers, Local 1060, AFL-CIO, filed a petition for contested transfer determination. The petition alleges that the North Bergen Board of Education violated N.J.S.A. 34:13A-25 by transferring Louise Peterkin from the Board office to an elementary school for disciplinary reasons.

On August 31, 2000, the Board filed an Answer, denying that the transfer was for disciplinary reasons. It asserts that Peterkin was transferred for reasons of economy and efficiency.

On November 28, 2000, a Notice of Hearing issued. On May 2, 2001, I conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by July 5, 2001.

Based upon the entire record, I make the following:

**FINDINGS OF FACT**

1. Louise Peterkin has been employed by the North Bergen Board of Education for thirty-one years, the last twenty-five as the full-time switchboard operator at Board offices at 7317 Kennedy Boulevard. Peterkin's hours were 7 a.m. - 2 p.m., the final hour being her lunch period (T21; T23)<sup>1/</sup> Peterkin typically arrived at work between 6:15 and 6:45 a.m. and left for the day at 1 p.m. (T23).

2. Peterkin's clerical title is included in a consolidated unit of teachers and support staff represented by Local 1060 of the American Federation of Teachers. The applicable agreement between the Board and Local 1060 extends from September 1, 1997 to August 31, 2000 (C-3).<sup>2/</sup>

The agreement has a grievance procedure (Article 6) ending in binding arbitration. Grievances must be filed within ten (10) days of the "occurrence of the condition giving rise

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<sup>1/</sup> "T" refers to the transcript of the hearing, followed by the page number.

<sup>2/</sup> "C" refers to Commission exhibits; "P" refers to Petitioner exhibits; "R" refers to Respondent exhibits.

thereto...." A "grievance" is defined as:

Any difference or dispute between the Board and the Unit relating to the terms of the agreement, or its interpretation, or application or enforcement.... [C-3]

The procedure for support staff also has a "non-reprisal" provision (Article 6(g)(6)).

The agreement has a "files" provision, stating in a pertinent part: "No material derogatory to an employee's conduct, service, character or personality shall be placed in the employee's file unless the employee has had the opportunity to read the material" (p. 55). This provision states in another pertinent part: "Materials shall be removed from the files when a unit member's claim that they are inaccurate or unfair is sustained at any step of the grievance procedure."

The agreement has an hours and overtime provision defining part-time employees as those working 19.5 hours or less per week (pp. 55-57). An overtime rotation list based upon seniority is required for each "employment category" and overtime "shall be offered to unit members on a rotating basis according to said list provided the employee is able to do the work" (C-3).

The agreement has a "job vacancies, new jobs created or promotions" provision, stating in a pertinent part:

5(b). The Board agrees that it shall post a notice of such new job, vacancy or promotion on the bulletin board for a period of three (3) working days. Such notice shall contain where available, a description of the job, the rate and when the job will be available.... [C-3]

The agreement also specifies "three levels of clerk" (A, B, C) in descending levels of compensation and annual months of employment (pp. 66-67 of C-3).

3. In 1996, Peterkin was classified as a level "A" clerk, pursuant to an arbitration award (T155).

4. On March 15, 2000, Peterkin filed a grievance protesting the Board's award of overtime employment to a part-time clerical employee (T72; T26; T44). Peterkin and Local 1060 President Monica Coyle, on Peterkin's behalf, were concerned that the overtime should have been awarded to her instead, pursuant to the agreement (T24; T70-T72).

5. On March 21, 2000, Peterkin prepared to leave work shortly after 1 p.m., her normal quitting time. She needed to attend an unspecified appointment. At least two other clerical employees were in the office at that time and one, Wanda Ryglicki, was the subject of Peterkin's grievance (T51). The record does not show what specific duties these two employees were performing. Peterkin wanted to confirm her departure with Board Secretary John Duffy but did not because she saw him speaking with someone in his office with the office door closed. Upon leaving, Peterkin informed the other employee -- Carol Lattiano -- that she had to leave (T52). Board Superintendent Peter Fischbach was in the Board office at the time of Peterkin's departure but did not testify that he observed her (T127).

6. On March 23, 2000, a "positions available" notice was posted in the schools for the title, "clerks (bilingual helpful)." "Qualifications" for the job were "excellent typing, proficient computer skills, filing and office machines." "Responsibilities" were "as per job description on file in the Superintendent's office." Applications were to be filed by April 1, 2000, at the superintendent's office. Board Secretary John Duffy's stamped signature appears on the posting and a copy was sent to the Superintendent (P-4; T122).

7. Board Superintendent Fischbach testified that the posting was for the purpose of "obtaining bilingual clerks within the North Bergen school system for various positions, one possibly being the switchboard operator" (T123). He added:

During the past several years, the Board has voted to obtain bilingual clerks in all our schools, bilingual aides [ ] due to population being more than 75% Hispanic.... [T123]

He also testified that the "number of calls in Spanish were increasing and the number of calls were a little bit more than a few" (T162).

Peterkin is not bilingual (T65). She testified that people speaking only Spanish phoned "occasionally" and that she invariably located a nearby Spanish-speaking co-worker to take such calls (T67). Peterkin denied that the procedure had caused problems. Nothing in the record suggests that the Board had previously expressed concern that Peterkin did not speak Spanish or that other clerical (and presumably, bilingual) employees answered the

"occasional" or the "little bit more than a few" Spanish-speaking callers (T83). I credit Peterkin's testimony.

The record does not show if the Spanish-speaking population of North Bergen varied from 75% over the past several years, assuming that Fischbach's current estimate is correct. Although the Board did not introduce any hiring notice dated before March 15, 2000, I credit Fischbach's testimony that the Board sought to hire bilingual clerks and clerical aides "in the past several years.". But I do not credit his testimony that the March 23rd posting was targeted at hiring a bilingual switchboard operator. Nothing in the posting identifies duties at the switchboard; all but one of the "qualifications" specified are purely secretarial and the one possible exception, "office machines," was never referenced in testimony or in any document as synonymous with or inclusive of the switchboard. Nor did anyone rebut Peterkin's testimony that all of her duties were at the switchboard. Nor is the "bilingual helpful" description sufficiently unambiguous to disqualify Peterkin for the position she held for 25 years.

8. On March 24, 2000, Lilliana Duque, a part-time clerical aide at the Board's Franklin school, sent a letter to Fischbach, advising of her application for a clerk position. She wrote that she was bilingual and was taking a computer class at the high school (R-1). Fischbach received the letter the same day (T124-T125). No other responses to the posting were received by April 1 (T125).

9. On Monday, March 27, 2000, Board Secretary Duffy wrote a memorandum to Peterkin, which she found lying open on her desk "for anyone to read" (P-2; T55). Peterkin is identified as the "switchboard operator" and the memorandum concerns her "leaving switchboard unattended." It states:

Please be advised, you are not to leave the switchboard unattended.

On Tuesday, 21st of March, at 1 p.m., you left work for the day leaving the switchboard unattended. This is not acceptable! In the future, you are to remain at your position until relieved.

Since you do not seem to care for working in excess of your normal hours, we will make every effort to have someone relieve you at/or close to your normal quitting time as possible. [P-2]

Copies were sent to Superintendent Fischbach, Local 1060 President Coyle and two assistant superintendents (P-2). Another copy was placed in Peterkin's personnel file (T47; T147).

10. Peterkin testified that she had never before received such a memorandum (T47). Nothing in the record contradicts her testimony. I infer that Peterkin meant that she had never been disciplined and had never received a derogatory or critical memorandum. Corroborative of that inference is Fischbach's testimony that "Peterkin was and is an excellent employee" (T145).

Fischbach has final authority to impose discipline. He testified that he did not "intend" to impose discipline on Peterkin for the March 21 incident (T127). He denied that Duffy's letter was "disciplinary action" (T147). He conceded that Local 1060 has the

right to challenge an "unfair document" through the grievance procedure (T147-T148). Asked on cross-examination about the intent or purpose of the final paragraph of Duffy's memorandum, Fischbach replied, "I believe you would have to ask Mr. Duffy" (T151).

In the absence of any testimony about the meaning of the final paragraph of Duffy's memorandum by the Board's only witness, I rely on the exhibit exclusively. I find that the final paragraph of the March 27 memorandum is a sarcastic and essentially unfounded retort to Peterkin's grievance.

I do not credit Fischbach's testimony that the memorandum was not "discipline," nor "intended" to be discipline. Nothing in the agreement defines discipline and the memorandum is indistinguishable from a reprimand. Fischbach did not testify that he did not know that the memorandum was placed in Peterkin's file. I infer that he read and knew about the memorandum when it was issued and took no action to change its wording or placement; his inaction amounts to authorization. I infer from this finding that Fischbach's response to the question about the purpose of Duffy's last paragraph is not credible, and that Fischbach knew that it was intended to upbraid Peterkin for her March 15 grievance.

Peterkin had worked overtime frequently (T52). The record does not show that the Board had any difficulty in any aspect of Peterkin's overtime employment (T74).

11. On the same date, March 27, Franklin school clerical employee Eileen Wende-Hurtuk sent a letter to the Board, advising of



her "...leaving on April 14, 2000, for maternity leave." She also wrote that she would return on July 3, 2000 (R-2; T56).

12. On April 4 or 5, 2000, Fischbach told Peterkin that she would be transferred, pursuant to an imminent job posting (T136). On April 6, Fischbach posted a solicitation to "all non-professional staff members" to apply "...for the position of temporary clerk in Franklin school." No reply deadline is specified (R-3; T130). The advertisement was in response to Wende-Hurtuk's March 27 letter, though Fischbach could not account for the 10-day interval (T131).

13. Also on April 6, Fischbach wrote a letter to Peterkin, advising that in response to Wende-Hurtuk's maternity leave, "you will be temporarily transferred to clerk at Franklin school effective April 17, 2000." Fischbach also wrote that the hours for a clerk in the elementary schools are 8:30 a.m. - 3:30 p.m., with one hour for lunch (P-3).

Fischbach was asked on direct examination why Peterkin's transfer was "temporary," pursuant to his letter. He testified:

Because two things occurred, one was that the advertisement had gone up for a temporary clerk position and if there was a respondent then we could refill the position by a respondent to the advertisement.... Secondly, - previously we had advertised for bilingual personnel, the temporary replacement there at the time was bilingual and it led to a more efficient operation of the school system. [T135]

The only specific "previous advertisement" for bilingual personnel on this record was posted on March 23, 2000. I infer that Fischbach

was referring to his "temporary" transfer of Duque from the Franklin school to the switchboard at the Board office on April 17 (T161; T168).

Fischbach's "second" reason is non-responsive because the question asked for his motive in labelling Peterkin's transfer as "temporary" on April 6 and not for his explanation for transferring Duque on April 17. I have not credited Fischbach's testimony that the March 23rd posting was aimed at hiring a bilingual switchboard operator (see finding no. 7). Accordingly, I do not credit Fischbach's "second" reason for writing "temporary" in his April 6 letter to Peterkin.

The first reason is only partially responsive - it vaguely acknowledges that the vacancy created by Wende-Hurtuk's leave was "temporary." That an unspecified support staff employee might have later applied for the "temporary" vacancy is non-responsive. The hypothetical portion of the first reason is also undercut by the absence of evidence showing how many day(s) the April 6 "advertisement" was posted.

14. On April 17, 2000, Peterkin reported to work at Franklin school (T64; P-3). On the same date, Duque was transferred from Franklin school, where she was a part-time clerical aide, to the Board office, where she operated the switchboard (T64; T80; T158).

Fischbach was asked on direct examination why he

transferred Peterkin. He testified:

There was a need for a clerical position at Franklin school to keep the school operating efficiently.

There was also previously an arbitration and Ms. Peterkin had - should have the opportunity for an "A" position. As - look at the rest of the staff at the school system it would be a more efficient transfer at that particular time. [T133]

Wende-Hurtuk was also a classification "A" clerk (T137). On cross-examination, Fischbach conceded that Peterkin had been classified as an "A" clerk since 1996 and had remained assigned to the switchboard until April 2000 (T155).

Fischbach's testimony is partially responsive. Although the "need" at the Franklin school was prompted by Wende-Hurtuk's maternity leave, Peterkin's transfer is not persuasively explained by her "A" classification. The Board presented no evidence of the number or distribution of "A" clerks in the district nor specific evidence of how Peterkin's transfer was "more efficient at that particular time." Nor do I credit the notion that Peterkin benefited from a transfer to the Franklin school, if that is the intended meaning of "opportunity" in Fischbach's testimony. If the transfer was an opportunity, it inured to the Board's benefit only.

15. On May 24, 2000, the Board resolved to appoint Lilliana Duque to the position, "Board Office Switchboard," effective August 1, 2000, at a salary of \$20,100 - "5th step - category A," about one-half of Peterkin's salary (P-5; T24).

Fischbach was asked on cross-examination why Duque's

starting date was "so late after May 2[4]th." This exchange ensued:

A: In interviewing each candidate the criteria and availability for the position and also the finances of the Board of Education would dictate the starting date.

Q: Was she going on a trip to South America?

A: The only thing I could indicate is that Ms. Duque did not have an availability to start, commence a full-time clerical position...

Q: In other words...

A: ...Until a later date. And also the finances of the Board of Education would take effect - I believe that was the start of the contractual year for that I'm not sure, but because it was...simply a matter of the decision between the employee and the Board. [T166-T167]

I infer that "the start of the contractual year" refers to the first month of the collective agreement, the "start" of which was each September (C-3). Duque commenced her full-time employment on August 1, indicating that the "contractual year" was not a controlling or contributing "financial" factor in "dictating" her full-time employment start date at the switchboard. I credit Fischbach's other reason for Duque's August 1 start date, specifically, "she did not have an availability...until a later date."

I infer from this evidence that the Board would have hired Duque as the full-time switchboard operator commencing May 24, if she had been so available.

16. On July 5, 2000, Wende-Hurtuk returned to her secretary/clerk position in the principal's office at Franklin school (T76). Peterkin remained at Franklin school (T58; T77; T136).

Fischbach was asked on cross-examination why Peterkin was not "returned to her original position" (T136). He testified:

There are two things that occurred. One is that at Franklin school where she is, has had an annex which was the addition of approximately 80-90 more students to it, plus a good, say, half, 50% of another program, which was transferred. And simply that there was a need for clerical assistance at that building because it is a split building now.

Secondly, is simply the bilingual switchboard operator that was operating during the temporary period prior to vacation time allowed incoming calls in a Spanish individual to speak to them in Spanish, not interfere with the operation and/or interrupt the payroll clerk and/or any other clerk/secretary within the office. So that it became less interruptive of other functions in the central office. [T136-T137]

Fischbach's testimony indicates that the first of "the two things that occurred" was after July 5, 2000. If Franklin school is a "split building, now," as Fischbach testified, when did it change? The record is not clear. If it became a split building before May 24, 2000, and absorbed more students, why would Duque be transferred from the Franklin school, where she provided clerical assistance, at a time when Wende-Hurtuk was on maternity leave? If Franklin school split after the 1999-2000 term ended, I am no less skeptical of Fischbach's testimony.

The Board rendered its employment decision on May 24, when it resolved to appoint Duque to the full-time switchboard operator position, in place of Peterkin. I have found that Duque would have been hired and started on May 24, if she had been available. The Board resolved the next closest decision under the circumstances; it

appointed Duque on May 24 to begin her full-time duties on August 1 at a fixed contractual salary. In either case, the Board's intent on May 24 was to permanently replace Peterkin at the switchboard. Events after that date, including changes at the Franklin school, are irrelevant to that decision. Accordingly, I find that Fischbach's testimony is surplusage.

For the same reason, I do not credit a portion of Fischbach's purported "second thing that occurred," which defines Duque's "temporary period" at the switchboard as extending to "vacation time" (I infer that "vacation" means summer vacation). Duque worked (part-time, presumably) at the switchboard from April 17 to May 24, when she was hired permanently. In those five weeks (of not more than 19.5 hours per week), Duque's bilingualism ostensibly eliminated "interference" with and "interruption" of other clerical employees in the Board office. No instances or examples were proffered. Nor were any "efficiencies" introduced. In this truncated test period, the proportionate number of Spanish-only speaking callers was a "little bit more than a few." I credit Fischbach's testimony to the extent that this unspecified number of Spanish-only speaking callers were initially assisted by only one clerical employee.

#### ANALYSIS

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. The statute defines discipline to include "all forms of discipline except tenure

charges...or the withholding of increments pursuant to N.J.S.A. 18:29-14" N.J.S.A. 34:13A-22. 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 (¶9056 1998).

In West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001), the Commission reviewed our case law assessing whether disciplinary transfers could be submitted to binding arbitration, if the parties had so agreed. That review provided a framework for deciding whether a transfer is disciplinary under N.J.S.A. 34:13A-25. The Commission wrote:

[A] transfer is predominately disciplinary when it is punitive and/or is not made for educational or staffing reasons. 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.

[27 NJPER 98]

I find that the circumstantial evidence shows that Peterkin was transferred from her switchboard position in the Board office to a secretarial position at Franklin school for predominately disciplinary reasons. The evidence of an intention to punish Peterkin corresponds to the type of evidence necessary to prove that a public employer has retaliated against a public employee for

engaging in protected conduct.<sup>3/</sup> N.J.S.A. 34:13A-5.3; 5.4a(3); In re Bridgewater Tp., 95 N.J. 235 (1984). In such unfair practice cases, no violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse employment action. A charging party must show, by direct or circumstantial evidence, a that the employee engaged in protected activity, the employer knew of this activity and the employer has hostile to the exercise of protected rights. Id. at 246.

Peterkin worked at the office switchboard for twenty-five years without incident, reprimand or other discipline. On March 15, 2000, she filed a grievance protesting the Board's award of overtime employment to a part-time clerical employee assigned to the Board office. Four business days later, on March 21, Peterkin departed work at her usual quitting time, leaving the switchboard "unattended." This incident was the subject of Board Secretary John Duffy's critical memorandum or reprimand issued four business days later, on March 27. The memorandum was placed in Peterkin's personnel file with the tacit approval of Board Superintendent Peter Fischbach. The third and final paragraph is a sarcastic, gratuitous and essentially unfounded rejoinder to Peterkin's grievance. One

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<sup>3/</sup> I take administrative notice that on May 4, 2000, Local 1060 filed an unfair practice charge on behalf of Peterkin, alleging such a motive in the transfer (CO-2000-339). N.J.A.C. 1:1-15.2. The charge was withdrawn on July 16, 2000.



week or eight days later, Fischbach advised Peterkin that she would be transferred "temporarily" to Franklin school on April 17. On that date, Peterkin was transferred. She was not returned to the Board office. The close timing of these events, together with the Board's writings and conduct, demonstrate anti-union animus or an intention to punish. See, e.g., Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

The Board contends that Peterkin's transfer was for reasons of economy and efficiency, with an emphasis on North Bergen's "changed demographics" and on Peterkin's inability to speak Spanish. These reasons, if proved, would show that "the transfer was intended to accomplish staffing or operational objectives," pursuant to West New York Bd. of Ed. Sometimes in unfair practice cases, the record shows that such legitimate motives and unlawful motives under our Act contribute to a personnel action. Under Bridgewater, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 95 N.J. 242. The Board did not carry its burden of proof.

On March 23, 2000, Duffy posted the "clerks (bilingual helpful)" advertisement and the next day, March 24, Lilliana Duque, a bilingual part-time clerical employee at Franklin school, favorably replied to Superintendent Fischbach. I have found that the Board had sought to hire bilingual support staff in previous

years but was never critical of Peterkin's inability to speak Spanish. But I also found that the posting was not worded so as to expressly solicit a new switchboard operator, contrary to Fischbach's testimony.

Duffy's anger at Peterkin for her grievance, dating from March 21 or earlier, and reflected in his March 27 memorandum, was contemporaneous with his March 23 posting. Despite the plural calling in the posting, the Board introduced no evidence showing that anyone but Duque ever applied for a clerk position or was interviewed or hired, pursuant to any advertisement. Nor did the Board introduce evidence of Duque's secretarial skills (other than her written claim that she was taking a computer class) qualifying her for a clerk position, pursuant to the March 23 posting. Nothing in the record shows that the Spanish-speaking population of North Bergen varied from the estimated 75% since 1996, when Peterkin's position was re-classified to an "A" clerk over the Board's opposition, pursuant to a grievance arbitration award. Finally, Duffy did not testify at the hearing. (When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.

McCormick, Evidence §272 (3rd ed. 1984); International Automated Machines, Inc., 285 NLRB 1122, 129 LRRM 1265 (1987)). From all these facts, I infer that the March 23 posting was targeted at securing a replacement for Peterkin and its wording was contrived to

deflect immediate attention from the switchboard operator position while addressing a long-known and uncensored fact -- Peterkin did not speak Spanish.

No evidence suggests that the timing of Wende-Hurtuk's March 27 notice of maternity leave was other than fortuitous. Fischbach nevertheless decided to transfer Peterkin to Franklin school before the "temporary" vacancy notice was posted on April 6. Other than her status as an "A" clerk (the record does not show the number or distribution of "A" clerks), no specific evidence shows why Peterkin was selected. I find that Duffy's animus or intention to punish, together with Fischbach's complicity, motivated the decision.

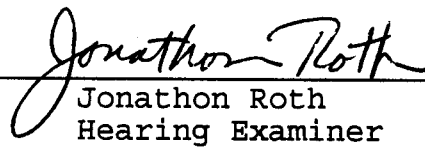
Following a five-week trial period at the switchboard, the Board completed the transfer transaction on May 24 by resolving to hire bilingual Lilliana Duque as the full-time "Board Office Switchboard [Operator]" at one-half of Peterkin's salary, beginning August 1. Duque would have started at the position on May 24, had she been available. I have not credited much of Fischbach's testimony regarding the motives for the Board's actions and virtually nothing of his explanation for not returning Peterkin from the Franklin school to the Board office switchboard in July 2000 (see finding no. 16). I find that Peterkin's transfer was not intended to be "temporary."

Perhaps the Board was consoled by a sharp reduction in salary to a new bilingual switchboard operator while placing a

long-tenured "A" clerk in a secretarial position more commensurate with her salary (in the Board's view, anyway). In other circumstances, such a transfer could be lawful because it advances staffing and operational objectives. In this case however, the Board was motivated by anger at Peterkin's grievance, thereby demonstrating that her transfer was predominately disciplinary.

RECOMMENDED REMEDY

Peterkin seeks a return to her former work hours at the switchboard position in the Board office. I agree that restoration of the status quo ante is the most appropriate remedy and comports with the Commission's remedial authority. N.J.S.A. 34:13A-27b. Accordingly, I recommend that Peterkin be returned to the switchboard operator position in the Board office at her regular work hours, 7 a.m. - 2 p.m., with the final hour designated as her lunch period.

  
Jonathon Roth  
Hearing Examiner

DATED: July 9, 2001  
Trenton, New Jersey