

H.E. NO. 2011-6

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

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-2009-003

SAMUEL IACOBONE,

Petitioner.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a petition for contested transfer determination filed by the Edison Township Education Association on behalf of a high school physical education/health teacher who was involuntarily transferred to an elementary school. The Hearing Examiner determined that the transfer was not for disciplinary reasons and therefore not a violation of N.J.S.A. 34:13A-25.

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Appearances:

For the Respondent,
Wolff, Helies, Duggan, Spaeth & Lucas, attorneys
(John Duggan, of counsel)

For the Petitioner
Oxford Cohen, attorneys
(Nancy Iris Oxford, of counsel)

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

On June 15, 2009, the Edison Township Education Association (Association) filed a petition for contested transfer determination (C-2).^{1/} The petitioner alleges that Edison Township Board of Education (Board) violated N.J.S.A. 34:13A-25^{2/}

^{1/} I have marked exhibits into evidence with the following descriptions: "C" denotes Commission exhibits. "J" indicates a document jointly submitted by the parties. "P" denotes an exhibit proffered by the petitioner and "R" designates respondent's documentary evidence.

^{2/} N.J.S.A. 34:13A-25 provides: Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an
(continued...)

by involuntarily transferring a physical education/health teacher, Samuel Iacobone (Iacobone), from Edison High School to Martin Luther King Elementary School for disciplinary reasons. On July 24, 2009, the Board filed an answer with affirmative defenses (C-3). The Board denies that the transfer was for disciplinary reasons.

The Public Employment Relations Commission (Commission) issued a notice of hearing in this matter on November 17, 2009, after determining there existed disputed material facts (C-1). I conducted a hearing on July 13 and October 13, 2010. The parties were given the opportunity to examine witnesses and introduce documentary evidence. I received post-hearing briefs on January 3, 2011.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Association is an employee representative and the Board is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. (1T10).^{3/} Iacobone is a physical education and health teacher

2/ (...continued)
employee for disciplinary reasons.

3/ "T" refers to the transcript of the hearing. The number which precedes the "T" is the day of the hearing and the number which follows the "T" is the page number of the transcript. For example, the notation "1T10" indicates that the fact can be found on page 10 of the transcript for the
(continued...)

employed by the Board and represented by the Association for the purposes of collective negotiations (1T10-1T11). He also coached lacrosse for the school district from 1997 until he resigned in September 2008 (P-8; 1T12, 1T42, 1T61).

2. Iacobone began his employment with the Board in 1995 as a physical education teacher at the Herbert Hoover Middle School. He taught there until 1999 (1T11-1T12). For the 1999-2000 school year he split his teaching time between the middle school and Edison High School. He began teaching full-time at the high school during the 2000-2001 academic year and remained there until he was involuntarily transferred to the Martin Luther King Elementary School in 2009 (P-10; 1T12, 1T56, 1T102; 2T6-2T8).

3. James Muldowney was the athletic director at Edison High School from 2000 until June 2008. As athletic director he was responsible for all athletic programs and physical and health educators at the high school (1T15; 2T25, 2T27). Muldowney was Iacobone's supervisor and prepared performance evaluations for Iacobone as head lacrosse coach and classroom teacher (P-1 through P-7; R-1 through R-5; R-7; 1T14-1T15, 1T18; 1T100; 2T25). He also developed policies and guidelines for the physical education department at the high school. Two such policies were

3/ (...continued)
first day of hearing.

the jewelry and unprepared policies (J-1; 1T44, 1T52, 1T100; 2T40).

4. The physical education jewelry policy states in pertinent part:

For health/safety reasons, the district policy states that no jewelry, including religious jewelry, may be worn during PE class. The only exception is medical identification type bracelets/anklets, which must be covered with soft, elastic cloth or tape. . . . Students who do not remove jewelry are considered unprepared for PE and cannot participate. [J-1].

The unprepared policy sets forth a schedule of consequences which will occur if a student is marked unprepared for class. If a student is marked as unprepared a certain number of times, he will fail the class for the marking period which could result in the student failing the class for the year (J-1; 1T45).

5. Iacobone's evaluations as head lacrosse coach from 2004 through 2008 rate his performance. They compliment his strengths, point out his deficiencies and offer suggestions for improvement (P-5 through P-7; R-7). A few comments stand out and bear upon this case. From his 2004 coaching evaluation:

- (a) Coach Iacobone is a tough, demanding coach who must continue to work at building relationships within his program.
- (b) A greater effort must be made to foster better relationships with our student/athletes. [R-7]

Comments from Iacobone's 2006 coaching evaluation include:

- (a) Sideline conduct of players/coaches must improve.
- (b) Not only are we not winning, but now our character and professionalism are coming under question. [P-5].

His 2008 evaluation contains this remark: "Coach Iacobone must follow administrative guidelines and policies in dealing with athletes and parents" (P-7). Significantly, despite evaluations describing areas of his coaching that need improvement, Iacobone was recommended for re-employment as head lacrosse coach each and every year until he resigned in September 2008 (P-5 through P-8; R-7; 1T62-1T63).

6. During the 2008 lacrosse season, Iacobone dismissed a player from the team for attempting to steal an opponent's helmet at an away game. The Edison player had caused other issues effecting the team but the attempted theft was ". . . the straw that broke the camel's back," according to Iacobone's testimony (1T30, 1T36, 1T40, 1T82-1T84). Both Muldowney and high school principal Salvatore Mistretta supported Iacobone's decision to remove the player from the team for the remainder of the season (P-11; 1T32-1T33, 1T35-1T36, 1T83).

The player's parents complained to the school. A meeting was arranged with the parents, Iacobone, Muldowney and Mistretta. After the meeting, Mistretta asked Iacobone to reconsider his decision prohibiting the student from playing lacrosse that season (1T36-1T40, 1T85).

Iacobone stuck with his decision and the student remained off the team (1T40-1T41, 1T84). At the conclusion of the 2008 lacrosse season, Iacobone was recommended and rehired as the head lacrosse coach for the following season (P-7; 1T63, 1T85).

7. All of Iacobone's teacher evaluations were prepared by Muldowney during his tenure at the high school (P-1 through P-4; R-1 through R-5; 1T14-1T15, 1T18; 2T25). Dating back to Iacobone's first high school teacher evaluation in 2001, the evaluations of him consistently reveal several areas needing improvement including building better relationships with his classes/teams; a flexible approach to discipline; communication and interpersonal skills with students, colleagues and administrative staff; and administering school/department rules and regulations (P1 through P4; R-1 through R-5). Read together, Iacobone's evaluations indicate that he should be more flexible and use better judgment in dealing with his student/athletes, colleagues and administrative staff as well as his handling of administrative/department procedures (P-1; R-2; R-3; R-5; 1T93; 2T29, 2T34-2T35, 2T37, 2T41-2T42).

8. In the first marking period of the 2008-2009 school year (the fall), Iacobone had a special needs student in his sophomore physical education class. The student was a senior who needed credits to graduate high school (1T45-1T46, 1T59; 2T14-2T15). During the same marking period, the student also took

senior level physical education (1T88). Though the student was classified as special needs, Iacobone was not advised to provide any accommodations to the student in gym class (1T46-1T47; 2T14-2T15).

The student attended Iacobone's physical education class wearing a braided string bracelet. Iacobone asked the student to remove the bracelet (1T48). Iacobone believed that the bracelet qualified as jewelry under the physical education department's jewelry policy (1T87; 2T18). That policy prohibits the wearing of jewelry during gym class (J-1; 2T44).

The student refused to remove the bracelet and left the class to go to the principal's office without permission (1T48). Later that day, Iacobone received a note from Vice Principal Dan Kelly advising him that a covered string bracelet is not a violation of the physical education dress code policy and that the student should be permitted to wear it during class (P-12; 1T49-1T50, 1T88; 2T47).

Iacobone disagreed with Vice Principal Kelly's interpretation of the jewelry policy (1T49-1T50, 1T52). He discussed the issue with Muldowney and Mistretta and continued to mark the student as unprepared for class (1T53, 1T55, 1T88).

The jewelry policy was not uniformly applied at the high school. Some gym teachers allowed students to wear jewelry and others did not (1T88-1T89, 1T106, 1T108; 2T18). For example, the

teacher of the senior level physical education class that the special needs student was also enrolled permitted him to wear the string bracelet during class (1T88-1T89; 2T18). Muldowney believed that string bracelets were jewelry and disallowed under the policy (2T40, 2T44, 2T46).

Unbeknownst to Iacobone, the string bracelet had sentimental meaning to the student (1T59, 1T98). Under the circumstances, Mistretta asked Iacobone to accommodate the student (1T53). Iacobone refused to accommodate the student and failed him for the marking period (1T54). If Iacobone had known that the bracelet had sentimental meaning and had the student not walked out of his class without permission, he would have accommodated the wearing of the bracelet. The bracelet could have been covered with cloth, like a medical identification bracelet, as contemplated and excepted by the jewelry policy (J-1; 1T99).

The next marking period, the student was transferred to a different sophomore level gym class where the teacher permitted him to wear the string bracelet (1T54, 1T59, 1T89).

9. Iacobone continued teaching physical education and health at the high school during the 2008-2009 academic year. On March 16, 2009, Iacobone received a memorandum from high school principal Mistretta directing him to attend a meeting with Mistretta and Muldowney (P-9; 1T55). At this meeting, Iacobone was advised that he would be transferred out of the high school

at the end of the school year. Iacobone was not informed of which school he would be transferred to nor given a reason for the transfer at the meeting (1T56).

Iacobone requested that the Board of Education provide him with the reasons for his transfer out of the high school. By letter dated April 16, 2009, the Acting Superintendent of Schools, John DiMuzio, advised Iacobone that he was being transferred because of his difficulty working with special education students and overall lack of flexibility with students (P-10; 1T57-1T58; 2T7, 2T12-2T13).

DiMuzio's decision was based on Mistretta's recommendation that Iacobone be transferred out of the high school and his own review of Iacobone's evaluations (2T6-2T7, 2T9, 2T12-2T13). After reviewing Iacobone's evaluations and learning of the way in which Iacobone managed the string bracelet incident, DiMuzio concluded that it would be in the best interests of the school district for Iacobone to teach grades lower than the high school level. DiMuzio was hopeful that Iacobone would be more flexible with younger age students and that it would be a better fit for all those concerned (2T7-2T8, 2T13, 2T20).

10. DiMuzio initially looked into transferring Iacobone to a middle school where he had taught previously. However, no openings were available. Ultimately, Iacobone was involuntarily

transferred to the Martin Luther King Elementary School (2T7-2T8, 2T13).

11. During his teaching career in the Edison School District, Iacobone had taught special education students. Until receiving DiMuzio's April 16, 2009 letter regarding his transfer, Iacobone had never been advised that he had difficulty in working with special education students. There is no mention of this issue in any of his evaluations. After his transfer to the elementary school, Iacobone was assigned and taught a gym class comprised exclusively of autistic students. Those children are classified as special education students (P-1 through P-7; R-1 through R-5; R-7; 1T57; 2T14).

ANALYSIS

N.J.S.A. 34:13A-25 provides:

Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons.

N.J.S.A. 34:13A-37 provides in pertinent part:

- a. If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominantly disciplinary.
- b. If the commission determines that the basis for a transfer is predominantly disciplinary, the commission shall have

the authority to take reasonable action to effectuate the purposes of this act.

The Association contends that Iacobone was transferred from Edison High School to Martin Luther King Elementary School for disciplinary reasons. It argues that the Board wanted the special education student to graduate and punished Iacobone for not bending the jewelry policy and failing the student for the marking period.

The Board maintains that the transfer was made for non-disciplinary reasons and in the best interests of the school district. It contends that Iacobone was transferred to teach younger students in lower grades based on his lack of flexibility in dealing with high school students. The Board had hoped that it would be a better work place fit for Iacobone and the district.

It is my responsibility to determine the Board's motive in making the transfer. After reviewing the entire record, I find that the transfer was made for non-disciplinary reasons and recommend that the petition be dismissed.

In Galloway Tp. Bd. of Ed., P.E.R.C. No. 2011-15, 36 NJPER 319 (¶124 2010) and West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001), the Commission reviewed its case law both before the 1990 amendments prohibiting disciplinary transfers between work sites and after the amendments were

enacted. In Galloway Tp. Bd. of Ed., the Commission summarized its case law as follows:

. . . our case law did not establish a bright line test for assessing whether a transfer is disciplinary. However, when read together, our decisions indicate that we have found transfers to be disciplinary where they were triggered by an incident for which the employee was also reprimanded or otherwise disciplined or were closely related in time to an alleged incident of misconduct. In all of those cases, we noted that the employer did not explain how the transfer furthered its educational or operational needs. By contrast, we have found transfers not to be disciplinary where they were effected predominantly to further an employer's educational, operational, or staffing objectives. In addition, transfers effected because of concern about an employee's poor performance or core job duties -- as opposed to concerns about absenteeism or violation of administrative procedures -- were not disciplinary but instead implicated the employer's right to assign and transfer employees based on their qualifications and abilities. We summed up our finding by stating that 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.

Iacobone's transfer to the elementary school is missing the hallmarks of a disciplinary transfer -- there are no other disciplinary actions such as a written warning or reprimand associated with the transfer nor any diminution in the emoluments of employment. The Association relies on the lacrosse helmet and

string bracelet incidents to demonstrate that the transfer was for punitive reasons.

With regard to the lacrosse helmet incident, the school administration supported Iacobone's decision to dismiss the player from the team. Athletic Director Muldowney recommended that Iacobone be reappointed as varsity lacrosse coach after the incident, and Iacobone in fact was reappointed as head coach. Iacobone remained the varsity lacrosse coach until he resigned in September 2008. The Board did not exhibit a disciplinary motive in this instance.

The Board's asserted reasons for transferring Iacobone are his difficulty working with special education students and overall lack of flexibility with students. The evidence does not support and I do not find that difficulty working with special education students was a motivating factor in Iacobone's transfer. None of Iacobone's evaluations mentioned that he had difficulty working with special education students nor was he ever otherwise so advised. After he was transferred, Iacobone was assigned a class comprised exclusively of autistic students. If working with special education students was a genuine Board concern, he never would have been assigned to teach such a class.

The record does support, however, and I so find that Iacobone's overall lack of flexibility in dealing with high school students was the reason for his transfer. Long before the

jewelry incident, Iacobone's coaching and teaching performance evaluations consistently identify his need to work on building better relationships with his students and athletes as well as developing a more flexible approach to teaching. I credit Acting Superintendent DiMuzio's testimony that he thought Iacobone would perform better in grades lower than the high school level, after he had reviewed all of Iacobone's evaluations. I also credit DiMuzio's testimony that he initially looked into transferring Iacobone to a middle school -- a grade level in which Iacobone had taught successfully in the district -- before transferring him to an elementary school. I find that the Board's motive was to find a better employment fit for the district and Iacobone, not to punish him for failing the senior special education student who refused to remove the string bracelet in class.

In Ridgefield Park Bd. of Ed., P.E.R.C. No. 92-67, 18 NJPER 55 (¶23023 1991), the Commission found that a reassignment of a teacher was not disciplinary based on the Superintendent's belief that the teacher would be more effective in another grade. In that case, the Commission restrained arbitration of a grievance challenging the discipline even though the teacher in question would lose a stipend because of the reassignment. Here, DiMuzio transferred Iacobone out of the high school because he thought Iacobone would be more flexible with students in lower grades and Iacobone did not suffer any financial loss due to the transfer.

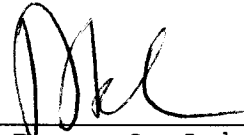
I am not persuaded on this record that Iacobone's transfer was for disciplinary reasons.

The Association in part relies on Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001). There, the Commission found that the Board transferred a physical education teacher between work sites for disciplinary reasons. Hamilton Tp. Bd. of Ed. is distinguishable in that the physical education teacher there had favorable reviews and the Board did not supply any evidence to support its reason for the transfer. Here, the parties have provided 9 years of performance reviews which consistently express concerns that formed the basis of the Board's decision to ultimately transfer Iacobone.

Accordingly, I do not find that the Edison Township Board of Education violated N.J.S.A. 34:13A-25 when it involuntarily transferred Samuel Iacobone from Edison High School to Martin Luther King Elementary School.

RECOMMENDATION

I recommend that the Commission dismiss the petition for contested transfer determination filed by the Edison Township Education Association.



Perry O. Lehrer
Hearing Examiner

DATED: January 26, 2011
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 7, 2011.