

P.E.R.C. NO. 2001-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST NEW YORK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-H-99-2

JOSEPH AMARA,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the West New York Board of Education violated N.J.S.A. 34:13A-25 by transferring Joseph Amara between work sites for disciplinary reasons. The Commission concludes that Amara was not transferred because he did his computer technology job poorly or was better suited to supervise special education, but was transferred because of his complaints about the district's computer network and to preempt any effort to contact the media to assist repair efforts. In the absence of exceptions, the Commission orders Amara to be transferred back to the high school as district supervisor of special education.

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, Scarinci & Hollenbeck, attorneys
(Esther Suarez, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Gail Oxfeld-Kanef, of counsel)

DECISION

On February 16, 1999, Joseph Amara filed a petition for a contested transfer determination. The petition alleges that the West New York Board of Education violated N.J.S.A. 34:13A-25 by transferring him for disciplinary reasons from the position of supervisor of technology to the position of supervisor of special education.

On March 24, 1999, the Board filed an answer denying that the transfer was disciplinary. It asserts that under a reorganization, Amara's previous position was abolished and replaced by a network administrator.

On October 7, 1999, a Notice of Hearing issued. On March 7, 2000, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. On May 26,

the Hearing Examiner denied the Board's motion to reopen the hearing to admit new evidence. The parties then filed post-hearing briefs. The Hearing Examiner did not consider documents attached to the Board's brief that were not part of the record.

On August 25, 2000, the Hearing Examiner issued his report and recommended decision. H.E. No. 2001-8, 26 NJPER 421 (31163 2000). He found that the transfer was intended to punish Amara for actions that took place while he oversaw the district's computer technology program. The Hearing Examiner recommended a finding that Amara had been transferred between work sites for disciplinary reasons and an order transferring him back to the high school as district supervisor of special education.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 2-15). We summarize his factual findings.

Amara is certified to teach mathematics and science, is certified as a supervisor, and has a doctorate in computer education. He was the district supervisor of the technology department.

In November 1997, Amara asked to be relieved of the duty of overseeing technician repairs because the department was growing and it was too large a job for him. At about that time, Amara started complaining to Superintendent Pablo Clausell and the Board about computer disrepairs and the Board's failure to

implement a technology plan, including the hiring of a network administrator.

In July 1998, the Board nearly doubled the number of special education teachers and resolved to return about 75 students to the district. It did not then consider creating a special education supervisor position.

By September 1998, Amara had been relieved of his repair oversight duties and the Board had hired a network administrator. Amara learned that \$40,000 of his department's budget had been reallocated to purchase library software. Upset by the diversion, Amara questioned Clausell who told him that it was an administrative decision.

Computer disrepairs increased and the Board hired an outside company to assist in making repairs. Sometime in September 1998, the Board's director of curriculum and instruction ordered Amara to surrender all software site licenses to the network administrator. Amara asked the director why the licenses had to be returned but received no response. Anthony Yankovich, then assistant superintendent of personnel, testified that he wanted the licenses kept in the central office under the control of a confidential employee, as distinguished from a negotiations unit employee like Amara.

In October and November 1998, Amara wrote a series of memoranda complaining that teachers were frustrated by the non-functioning computers and about the fact that repairs were not

getting done by the outside company. On November 6, he suggested to the superintendent that going to the media (Jersey Journal, Bergen Record, Channel 12, I-Team, etc.) might help get the computer labs up and running. He offered to prepare a memorandum to send the media unless the superintendent believed sending it would be an unwise move.

On November 9, 1998, Amara reported that his computer password no longer functioned. Clausell responded that there was some kind of system glitch. Yankovich testified that Amara's password had been taken away because he had access to all areas of the district's computers and the district wanted such access to be limited to confidential employees. The Hearing Examiner rejected that explanation, noting that it was not identified at the time.

On November 10, 1998, Amara wrote another memorandum to Clausell questioning the competency of the repair company, and asking that Clausell not discuss Amara's work "with my subordinates as this is quite unprofessional." That same day, Yankovich sent a confidential memorandum to Clausell recommending, among other things, that Amara's supervisor of computer technology position be abolished and that a position of special education district supervisor be established. Yankovich also recommended that Amara be offered the special education position.

On November 12, 1998, the Board's Director of Special Services sent a letter to Yankovich requesting that he consider

the need for a special education supervisor. On November 19, Yankovich circulated a job posting for the position. One of the qualifications was a valid certification in the subject area. Amara is not certified to teach special education. However, the job description, developed the previous day, specifically excludes the need for subject area certification. Yankovich testified that the posting was an error.

Also on November 19, 1998, Amara faxed a letter to the Commissioner of Education alleging "malfeasance, misappropriation of state/federal funds and violations of state regulations." Amara did not provide a copy of the letter to anyone in the district until December 1998.

On November 20, 1998, Clausell informed Amara that he was transferring him immediately to special education for the betterment of the school district. Clausell denied Amara's accusation that the transfer was in retaliation for the letter to the Commissioner. Amara asked if the Board had been informed of the transfer. Clausell said it had not and that the decision was within his authority. Amara demanded that the directive be put in writing since there were no witnesses. Clausell summoned Yankovich and repeated the directive to Amara. Clausell asked Yankovich if he knew of Amara's letter to the Commissioner and Yankovich said no.

Clausell directed Amara to accompany the business administrator to Amara's office at the high school. The lock on his door had been changed. Amara removed his personal effects and

was relocated to an office building that houses the majority of district supervisors.

On December 9, 1998, the Board approved Amara's transfer and abolished his former position. Before the vote, Amara argued that the transfer was in retaliation for the letter he faxed to the Commissioner. Clausell spoke at the meeting and stated that he was unaware of the substance of Amara's letter.

The Board employs ten district supervisors. Although supervisors are not required to be certified to teach the subject areas they supervise, Amara is the only one not certified to teach even one class over which he has subject-area supervision.

The Hearing Examiner concluded that the decision to transfer Amara was motivated by a resolve to remove him from his oversight of the computer technology department so as to end his complaints about disrepairs and to preempt any documentary revelation of the problem outside the district. He characterized the motive as akin to an intent to punish and one that is predominately disciplinary within the meaning of N.J.S.A. 34:13A-27. By way of remedy, the Hearing Examiner recommended that Amara be transferred back to the high school as district supervisor of special education.

On September 8, 2000, the Board filed exceptions. The Board argues that the Hearing Examiner erred: in finding that the Board exhibited disciplinary animus by removing its software site licenses from Amara and turning them over to the network

administrator; in finding that the Board transferred him as discipline for his inquiry regarding the transfer of \$40,000 out of his department's budget; and in not acknowledging that new regulations of the State Department of Education mandated that the district receive 300-400 special education students that had previously been educated outside the district. In addition, the Board presents its view of the facts but does not specify any other questions of fact to which exception is taken as required by N.J.A.C. 19:14-7.3(b) and N.J.A.C. 19:18-3.11. The Board argues that the Hearing Examiner failed to address its needs and constraints at the time of the transfer. It further argues that its decision was based on reasonable education-related factors, and not disciplinary animus.

Amara did not file exceptions or a response to the Board's exceptions.

We first address the Board's exceptions.

One can construct legitimate reasons for asking Amara to turn over software licenses to the new network administrator. Nevertheless, the Hearing Examiner reasonably inferred animus from the fact that Amara was ordered to turn over the licences and received no answer when he asked why.

The Hearing Examiner did not specifically conclude that Amara's inquiring about the transfer of \$40,000 out of his department's budget motivated the transfer. The Hearing Examiner

simply reported the fact that Amara had asked the superintendent to explain the diversion in writing.

The Hearing Examiner did report that the district was experiencing rapid growth in special services as a result of special education students returning to the district. But he questioned the timing of the decision to create a supervisor of special education position, just days after Amara suggested that the district's computer problems be brought to the attention of the media and just days after his computer password was changed, without a truthful explanation. The Hearing Examiner was also suspicious of the fact that Amara became the only district supervisor not certified to teach even one class over which he was given subject area supervision.

We next address the legal framework for this decision.

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).

Before 1990, decisions to transfer and reassign were generally not mandatorily negotiable or legally arbitrable, but disciplinary transfers could be submitted to binding arbitration if the parties had so agreed. Thus, we have often assessed

whether or not a transfer is disciplinary, although not in the context of exercising our jurisdiction under N.J.S.A. 34:13A-27.

Our case law does not establish a bright line test for assessing whether a transfer is disciplinary and, therefore, legally arbitrable. But read together, our decisions indicate that we have found transfers to be 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 these cases, we noted that the employer did not explain how the transfer furthered its educational or operational needs. See, e.g., Ocean Tp., P.E.R.C. No. 93-13, 18 NJPER 442 (¶23198 1992) (reassignment was disciplinary where it was made shortly after officer mishandled an investigation and received a reprimand for the incident on same day supervisor recommended reassignment); Mt. Arlington Bd. of Ed., P.E.R.C. No. 98-4, 23 NJPER 450 (¶28211 1997) (teacher's reassignment was disciplinary where it related to incident involving misuse of testing materials for which teacher had been reprimanded and had her increment withheld); see also West New York Bd. of Ed., P.E.R.C. No. 91-94, 17 NJPER 248 (¶22113 1991) (teacher transfer was disciplinary where it was effected shortly after he posted signs protesting layoffs); Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) (temporary transfers of supervisors to different shifts were disciplinary where they were made shortly after employees were reprimanded).

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. See, e.g., Sea Girt Bd. of Ed., P.E.R.C. No. 91-75, 17 NJPER 158 (¶22065 1991) (teacher transfer intended to accomplish the board's goal of maintaining kindergarten enrollment; board had investigated complaints, concluded that no disciplinary action was warranted, and did not place complaints in personnel file); see also Long Branch Bd. of Ed., P.E.R.C. No. 92-90, 18 NJPER 132 (¶23062 1992) (transfer not disciplinary where facts did not establish that transfer was a response to teacher's critical comments at Board meeting).

Other of our cases have found that transfers effected because of concern about an employee's poor performance of core job duties -- as opposed to concerns about absenteeism or violation of administrative procedures -- were not disciplinary but instead implicated the employer's right to assign and transfer employees based on their qualifications and abilities. See, e.g., Ridgefield Park Bd. of Ed., P.E.R.C. No. 92-67, 18 NJPER 55 (¶23023 1991) (reassignment based on belief teacher would be more effective in another grade; performance review included negative comments on absences, tardiness, use of grades, and poor student performance); see also Cape May Bridge Comm'n, P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984), aff'd NJPER Supp.2d 152 (¶135

App. Div. 1985) (transfer motivated by desire to replace employee with a better qualified employee who would not be involved in as many accidents).

This case law provides a framework for assessing whether a transfer is disciplinary under N.J.S.A. 34:13A-25, and is consistent with what appears to have been the Legislature's understanding that 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.

Against this backdrop, we adopt the Hearing Examiner's conclusion that Amara was not transferred because he did his computer technology job poorly or was better suited to supervise special education. Amara was transferred to end his complaints about the district's computer network and to preempt any effort he was considering to contact the media to assist repair efforts.

Amara persistently complained about the state of the district's computer network. When he suggested going to the media, he got no response, but three days later his computer password was changed. Clausell falsely told Amara that a glitch was to blame when in fact he had directed that Amara's password by

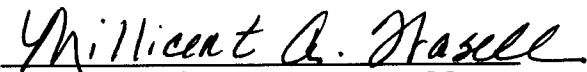
deleted. Unable to access the computer system, Amara could not perform his duties. The Board soon after abolished his position and transferred him to a new position based, in part, on a confidential memorandum. The timing of that memorandum, however, was suspicious; the Board did not explain why the need to abolish the technology position and create a special education position arose in November and the Director of Special Services had not yet recommended creating the new position. Finally, we agree with the Hearing Examiner that the immediacy of the transfer and the abrupt way Amara was escorted from his office are more analogous to a termination than a lateral transfer.

Under all these circumstances, we conclude that the Board violated N.J.S.A. 34:13A-27(b) when it transferred Amara to another worksite for disciplinary reasons. In the absence of exceptions, we also adopt the Hearing Examiner's proposed remedy.

ORDER

The West New York Board of Education is ordered to transfer Joseph Amara back to the high school as district supervisor of special education.

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: January 25, 2001
Trenton, New Jersey
ISSUED: January 26, 2001

H.E. NO. 2001-8

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

In the Matter of

WEST NEW YORK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-H-99-2

JOSEPH AMARA,

Petitioner.

SYNOPSIS

A Hearing Examiner recommends that the West New York Board of Education promptly return Joseph Amara to the high school in his position, district supervisor of special education. Amara alleged that the Board violated N.J.S.A. 34:13A-25 by transferring him from the high school (in the position of district supervisor of computer technology) to another building, Hudson Hall (in the position, district supervisor of special education). The Hearing Examiner concludes that the transfer was intended to essentially punish Amara for actions that took place while he oversaw the computer technology department.

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.

STATE OF NEW JERSEY
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Appearances:

For the Respondent, Scarinci & Hollenbeck, attorneys
(Esther Suarez, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Gail Oxfeld-Kanef, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 16, 1999, Joseph Amara filed a petition for contested transfer determination. The petition alleges that the West New York Board of Education violated N.J.S.A. 34:13A-25 by transferring him from the position, supervisor of technology to the position, supervisor of special education for disciplinary reasons. Amara alleges that on the day before his transfer, he faxed a letter to the commissioner of education "detailing allegations of [the Board's] improper spending."

On March 24, 1999, the Board filed a letter denying that the transfer was "retaliatory." It asserts that a reorganization was implemented in which Amara was appointed special education district supervisor and his previous position, district technology

supervisor, was abolished and replaced by a network administrator, a non-certified position.

On October 7, 1999, a Notice of Hearing issued. On March 7, 2000, I conducted a hearing at which the parties examined witnesses and introduced exhibits. On April 28, 2000, the Board filed a motion to re-open the hearing to add "new evidence" and rebut other evidence in the record. On May 12, 2000, petitioner filed a letter opposing the motion. On May 26, I issued a letter denying the Board's motion. Briefs were filed by June 20, 2000.^{1/}

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. In 1971, Joseph Amara was hired as a mathematics teacher by the West New York Board of Education. He is certified to teach mathematics and science and is certified as a supervisor. In 1992, Amara received a doctorate degree in computer education. In 1993, he was appointed to a newly-created position, district supervisor of the technology department

^{1/} On June 19, the Board filed a post-hearing brief which included (contrary to my May 26 letter ruling) eight exhibits which were not proffered at the hearing in this matter, seven of which are dated earlier than March 7, 2000. The eighth exhibit is an affidavit of the Board business administrator, who did not testify at the proceeding and about whom no claim of unavailability was proffered. The brief refers to the attached exhibits in addition to those properly marked into evidence. On June 20, I wrote a letter to counsel, advising that I shall not consider any such proffers as part of the record in this case.

(T15-T16).^{2/} In 1995, the position was changed from 10 months to 12 months and re-titled district supervisor of computer technology. Amara's duties were to supervise teachers in the department; establish the curriculum; write the technology departmental plan; prepare grant applications; and oversee repairs and maintenance of the computer terminals (T16-T17).

2. In or around November 1997, Amara asked Board Superintendent Pablo Clausell to relieve him of the duty to oversee technician repairs of the computers because it had become "too large a job for [him]" (T20-T21). The department was admittedly "growing and expanding" (T64). By that month, Amara had complained verbally and in writing to the Superintendent and to the Board at its regular meetings about computer disrepairs and about the Board's failure to implement the "technology plan." Specifically, the plan called for the hiring of a "network administrator", the duties of which Amara was performing in the absence of such an employee. He also requested that more technicians be hired (T20; T32). By September 1998, Amara had been relieved of his repair oversight duties and the Board business administrator had assumed the supervision of the computer technicians (T18-T19). On some undisclosed date before September 1998, the Board hired a network administrator.

^{2/} "T" refers to the transcript of hearing followed by the page number; "C" refers to Commission exhibits; "P" refers to Petitioner exhibits; and "R" refers to Respondent exhibits.

3. In September 1998, Amara learned that about \$40,000 of the technology department budget was reallocated, some or all of which was used to purchase library computer software (T23; T24). Upset by the diversion, Amara asked the Superintendent about it; he was told that "it was an administrative decision" (T21). Amara asked Clausell to "put it in writing", but he refused (T21).

4. In or around July 1998, the Board formally resolved to educate all of its "special education" students, about half of the 150 total of whom were "being serviced out of district" (T88). The Board hired more staff, nearly doubling the number of special education teachers, child study team members, and speech therapists. At that time, and for no proffered reason, the Board did not "look" at creating the position, district supervisor of special education (T144). Throughout the summer and fall of 1998, the Board sought to "create space" for the anticipated increased number of special education students, a process not completed by the date of hearing (T89; T90).

Throughout most of 1998, computer disrepairs increased as the Board acquired more terminals for the district (T96). The Board's technicians could not keep pace with repair work. The Board had hired NUART, Inc., a computer repair company, to assist making repairs; the company removed the terminals from the school buildings and returned them when repairs were completed (T69; T96).

5. Sometime shortly before September 29, 1998, the Board director of curriculum and instruction ordered Amara to surrender all "site licenses" to the network administrator, who worked under supervision of the business administrator (T30; T115). A "site license" is an agreement between the Board and a software vendor which enabled students to use software on multiple terminals in a particular location (T32; T66). The only such licenses in Amara's possession were those for terminals used by students and faculty (T66). Amara believed he should have retained the licenses; as district supervisor of technology, he "would have the documentation, should anyone question what software is appropriate or what software resides on any particular computer" (T31). Amara asked the director of curriculum and instruction why the licenses had to be returned but received no response (T68).

Anthony Yankovich is acting superintendent of the West New York Board of Education. From July to December 1998, Yankovich was assistant superintendent of personnel (T87). He testified that the Board wanted all site licenses kept in the central office under the auspices of a "confidential" employee, as distinguished from a negotiations unit employee, like Amara (T115). On September 29, Amara gave the network administrator all site licenses which he held (P-1).

6. On October 13, 1998, Amara wrote a memorandum to Superintendent Clausell, advising that his teaching staff is "frustrated" by the non-functioning computers and the apparent

failure of the "NUART solution." Amara recommended some specific steps to remedy the problem and asked Clausell to respond "a.s.a.p." (P-1; T36). The repair company's fees were exorbitant and its repairs "were not getting done" (T37; T117). Amara received no reply (T34).

On October 20, Amara wrote a memorandum to Clausell, advising that several computers were not repaired, including those which were to have been repaired by NUART (P-1).

On October 30, Amara wrote another memorandum to Clausell, again advising on computer disrepairs and noting that some problems haven't been fixed in months. Amara concluded the memorandum: "I suggest you at least try the recommendations of the Board-appointed supervisor of computer technology who holds a doctorate in the area" (P-1).

On the same date, Clausell wrote a reply to Amara on the memorandum:

Thank you for your reminder. The present technology area organization was your recommendation; and I believe each of us needs to pitch-in to ensure it works, and we correct existing conditions.
[P-1]

The "recommendation" to which Clausell referred was Amara's suggestion that the Board directly employ technicians (rather than contract the "overflow" to NUART) (T71).

On November 6, 1998, Amara wrote another memorandum to Clausell, advising that "another week has gone by" without necessary repairs. Noting that he has been unable to contact the network

administrator, Amara recommended help from "the media": "They may be able to assist us in getting these labs up and running. I will prepare a memo that I will send to them (Jersey Journal, Bergen Record, Channel 12, I-Team, etc.) Monday, unless you believe this would be an unwise move" (P-1; T29). Amara received no response (T40).

On an unspecified date, either on or sometime soon after November 6, 1998 (i.e., November 9; the 7th and 8th are weekend dates) Clausell directed Amara to personally repair some computers at a school (T41; T42). Amara completed the repairs within 90 minutes and reported that fact to Clausell, who said, "thank you" (T43).

7. Also on November 9, Amara wrote another memorandum to Clausell, advising that his computer "password" no longer functioned and accordingly, he was "not responsible for anything done under that password and login since [he] last logged-in (11/5/98)." Amara wrote that the password change was a "serious breach of security" (P-1). He was concerned that someone could have altered records, damaged the system or even downloaded pornography under his "name" (T75). Amara also spoke with Clausell that day about his non-functional password. Clausell responded, "there was some kind of system glitch" (T47).

Yankovich testified that Amara's "password" was "taken away" because he "had access or he could have access to all areas of the computer in the district" and because;

he being in the union, and being that we wanted to centrally locate, and have confidential employees deal with this, I felt - I assume I can't say assume - we felt that the password should be taken away [T121].

Yankovich testified that Amara had "access to information in my office because I know he helped set up the personnel files" (T119). He also testified that Amara was "actively involved" in "putting the budget into the State department. He was called in the meantime to help out with that" (T120).

Amara denied that he had access to confidential budget information (T67). I find that "confidential" in Yankovich's parlance means "personnel files" and not labor relations information. I also infer that Amara had access to unspecified budgetary information for a finite period of time, which lapsed.

Yankovich conceded on cross-examination that Superintendent Clausell decided to "change" Amara's password, after they discussed the matter at a "cabinet meeting" (T146).

I do not credit Yankovich's testimony concerning the reasons for "taking away" Amara's password. Amara's inclusion in a supervisory negotiations unit was not identified in any conversation or writing between Amara and Clausell. If that purported reason was (as Yankovich testified) a concern of the Board in September 1998, when Amara was ordered to surrender the site licenses, no one told him or memorialized it in any form. Nor did Yankovich explain why such a concern in September did not also result in deleting Amara's password, along with his surrendering of site licenses. Similarly,

Yankovich did not explain how Amara's continued access to the computers between September and November 1998 assisted in any way the Board's desire to "centrally locate" the computer function.

8. On November 10, Amara wrote another memorandum to Clausell to "clear up [his apparent] misconception[s]...." Referring to his recent repairs, Amara wrote in one of five enumerated "facts", "the time I spent in the lab and the things I did in the lab could have been done in each of the labs in August, September, October or November." He also questioned NUART's competency, noting that he had recommended against hiring the company. Writing that his subordinate was given "misleading information" about his work, Amara admonished:

And for your information, each of the other labs (those done by the technicians and NUART) will have to undergo similar reconfiguration when the network comes on-line. In the future, I would appreciate you (or anyone else) not discussing my work with my subordinates as this is quite unprofessional. I am disappointed that our personal discussions yesterday did not resolve this matter; I sincerely had hoped it would.

[P-1]

Amara's reference to a "misled subordinate" was a teacher who had been told that Amara had not "really" fixed the computer laboratories at school no. 1 (T49).

9. Also on November 10, Yankovich sent a "confidential memo" to Clausell concerning "needed resources" (R-2). The memorandum states:

The implementation of Technology within our schools continues to evolve in unprecedented ways. In a way it parallels other growing areas

such as educational programs for disabled students, and early childhood education. As a result there is a need to continuously assess our ability to improve the delivery and supervision of educational services while considering our resources.

The hiring of a Network Administrator to handle the board's management information systems, who needs not be a certified instructional person, leads me to the conclusion that the position of district technology supervisor is duplicative.

Following the on-going reviews of our technology program, coupled with the additional requirements contained in the Abbott regulations, and the revised special education code, I wish to make the following recommendations:

1. Establish the position of Early Childhood District Supervisor.
2. Establish the position of Special Education District Supervisor (K-12).

Due to the duplicative nature of the position of District Supervisor of Computer Technology, I recommend it be abolished.

Please see me at your earliest convenience if you wish to further discuss this matter.

[R-2]

The memorandum was the first occasion that Yankovich recommended the creation of the two new positions (T135). The five teachers under the district supervisor of computer technology's supervision would report instead to the principals and assistant principals of their respective buildings (T102).

Yankovich spoke with Clausell soon after writing the memorandum. Clausell agreed with Yankovich's recommendations in the November 10 memorandum (T103). Yankovich also recommended that the special education district supervisor position be "offered" to Amara (T101).

The record does not show if Clausell received Amara's November 10 memorandum before he received Yankovich's.

10. On November 12, 1998, August Busso, Board Director of Special Services, sent a letter to Yankovich, requesting his "consideration regarding the need for a district supervisor for the special education department" (R-1). Busso wrote that:

With the rapid growth of my department as a result of students returning to district, as well as the opening of many new classes, and the adoption of...N.J.A.C. 6A:14, it is imperative that the special education teachers, school CORE teams, the speech department, classroom aides, and all other providers be adequately and regularly supervised [R-1].

Yankovich was aware of the "impact that was going on" before he received Busso's memorandum, which "supported" his November 10 memorandum to Clausell (T94).

11. On November 19, 1998, Yankovich wrote and distributed to the schools a "position vacant" memorandum (i.e., a job posting) to all personnel, advising of the position, district supervisor of special education (R-3; T105). The memorandum enumerates four qualifications for the position, including "valid NJ certification in subject area." Amara is not certified to teach special education (T19).

The previous day, November 18, Yankovich produced the district supervisor of special education job description (R-3; T139). It enumerates three qualifications for the position, excluding "valid NJ certification in subject area." No facts suggest that the job description was posted in the schools. When

asked on cross-examination why there is a discrepancy between the posting and the job description, Yankovich responded, "That's a good question. I don't know" (T140). He then testified that the posting was an "error" and that he believed it was "corrected" (T140; T141). I credit the Board's own exhibit over Yankovich's equivocations.

The Board employs about 10 district supervisors who are not required to be certified to teach the subject areas they supervise (T136). Yankovich was asked how many of them are not certified to teach those subjects the "area" of which they supervise (T136-T137). After considering for a moment, Yankovich responded, "Right now I have to say off the top of my head one or two", excluding Amara (T137). He then named a Mr. Bendian, the supervisor of art and music, but quickly conceded that he was certified to teach art. He then testified that the supervisor of technology was certified in industrial arts, "but he has home ec[onomics] under him, so there's two, that brings this up to two" (T138).

I do not credit Yankovich's testimony that "one or two" district supervisors are not certified to teach the subject areas they supervise, despite his strenuous effort to the contrary. The first supervisor named is certified to teach a subject area over which he was supervisor as does the second, except it seems by some fortuity one class outside his teaching certification was placed under his auspices. I find that Amara is the only district supervisor not certified to teach even one class over which he has subject-area supervision (in special education).

12. Also on November 19, Amara faxed a letter to Commissioner of Education Klagholtz detailing asserted "malfeasance, misappropriation of state/federal funds and violations of state regulations" (P-2; T51; T52). The letter recites Amara's vain efforts to have the Board's computers for students repaired; the incompetency of NUART and its exorbitant rates; and the "removal, change and alteration" of "funds and items" in the technology budget.

Amara wrote the letter for several reasons, including his feeling that students were being disadvantaged and because "[he] feared that the loss of [his] password meant that the district was engaged in something to my personal detriment" (T51). Amara did not provide a copy of the letter to anyone else until December 1998 (T52; T78).

13. Sometime in the morning of November 20, Amara received a phone call from Clausell's secretary, advising him to report to the Superintendent's office at 2 p.m. (T53). At their 2 p.m. meeting, Clausell informed Amara that he was "transferring" him to special education immediately for "the betterment of the school district" (T53-T54). Amara questioned Clausell's motive, suggesting he was retaliating against him for writing to the Commissioner of Education. Clausell replied, "No it isn't. This is for the betterment of the school district." Clausell denied that he knew the content of Amara's letter to the Commissioner.

Amara next asked Clausell if the Board had been informed of the transfer. Clausell said it was not and that the decision was within his authority. Amara said "I will not obey unless you put it in writing." Clausell replied that he (Amara) "would be insubordinate." Amara replied, "There are no witnesses present. I will not follow a directive that [is] not witnessed" (T54-T55).

Clausell called Yankovich into his office and then repeated the directive to Amara in Yankovich's presence (T55, T108). Clausell asked Yankovich if he knew anything about Amara's letter to the Commissioner. Yankovich said that he had not received anything and was unaware of such a letter (T108).

Clausell directed Amara to accompany the Board Business Administrator to his (Amara's) office at the high school (T55). Arriving at his office at about 2:30 p.m., Amara observed that the lock on the office door had been changed and that "the head of buildings and grounds had to open the door with his key" (T55, T57). The Business Administrator and the head of buildings and grounds observed Amara remove his personal effects (T55).

Amara was relocated to an office in another building, Hudson Hall, which houses the majority of district supervisors (T125).

14. Yankovich has no responsibility for the Board's computer repairs and has no knowledge of NUART's competency and is admittedly "not that computer literate" (T99; T128). Clausell shared and/or discussed all of Amara's memoranda to him with

Yankovich throughout the fall of 1998 (T129-T132; T147). Yankovich was also aware of the Board's computer repair problems and that Amara had recommended an alternate way to get them repaired, which the Board rejected (T131).

15. On December 9, 1998, the Board formally approved Amara's "transfer" at an open meeting. Before the vote, Amara voiced his objection to the transfer, remarking that the action was in retaliation for the letter he faxed to the Commissioner of Education (T109; T110). Clausell also spoke at the meeting and denied that he received the letter or was aware of its substance (T110).

The Board also abolished the position, district supervisor of computer technology.

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. 18A: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 (¶29056 1998).

I find that the circumstantial evidence demonstrates that Amara was "transferred" from the high school to another building, Hudson Hall, in order to remove him from oversight of and

responsibility for the district's computer technology department. The circumstantial evidence also shows that the timing of the Board's "reorganization" (i.e., the elimination of the position, district supervisor of technology and the creation of district supervisor of special education) was pretextual.

For sometime beginning in 1997 or earlier, through the fall of 1998, Amara advocated the improvement of an expanding but faltering computer technology department. His insistent, sometimes obnoxious prodding in memoranda to Superintendent Clausell was at least commensurate with his responsibilities as district supervisor of computer technology. In another sense, his duties were too burdensome - he asked to be and was (eventually) relieved of his oversight of computer technician repairs. His expertise in his chosen field is reflected in his doctoral degree and in his November 1998 "trouble-shooting" repair of a school computer laboratory, pursuant to Clausell's challenge.

Amara's complaints to Clausell usually received no direct or indirect response, yet each of them were discussed with the assistant superintendent of personnel, who is admittedly "not computer literate." Clausell's one written reply on October 30, apart from its sarcasm, was a polite indirection meaning, "fix it yourself." Clausell repeated this directly a week later when, upon hearing another complaint, he told Amara to fix a broken computer lab himself.

Amara's November 6 memorandum is remarkable for its suggestion that "the media" be called to assist the (not-happening quickly enough) repair efforts. His promise to send a press release on Monday (November 9) unless Clausell thought it "unwise", received no direct response. But on November 9, Amara discovered that his computer password did not work and in fact had been changed, unbeknownst to him. Crediting Yankovich's testimony attributing responsibility, I find that Clausell falsely told Amara that a "glitch" was to blame when in truth he directed that Amara's password be deleted. In disagreement with petitioner's asserted theory that the November 19 fax to Commissioner Klagholtz resulted in Amara's transfer, I find that the perceived threat of media exposure was the fulcrum event which led inevitably to the transfer. The close timing of Clausell's deletion of Amara's password, without any truthful explanation to the employee, fits a paradigm of workplace retaliation. See e.g., Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

Unable to gain meaningful access to the computer system, Amara could not do his job. The Board then moved with deliberate speed to remove him. Yankovich's elaborate and "confidential" November 10 memorandum addresses for the first time the Board's need for a supervisor of special education. Apart from the suspect timing of the memorandum, Yankovich did not explain why the need did not first exist in September, when the special education teaching staff nearly doubled in size to accommodate the same proportional increase in special education students.

The timing of the Board director of special services November 12 memorandum is also suspect for two reasons. First, Yankovich had two days earlier recommended creating the supervisor of special education position - Busso's memorandum was written after-the-fact. To the extent that Yankovich testified that Busso's memorandum merely confirmed what he already knew, it cannot be credited. (I have not credited Yankovich's testimony explaining why Amara's password was deleted). Second, the memorandum states that the special education department had grown "rapidly" as "a result of students returning to district." I infer that this phrase means that the department grew rapidly in September, underscoring a concomitant need for a supervisor at that time. Just why an "imperative" need for the supervisor was first revealed on November 12 was not explained. I find it suspicious.

The relative haste in the Board's November 19 posting of the supervisor of special education position led to a mistake - the posting included a requirement that the successful applicant would have "valid New Jersey certification in subject area." The requirement was a mistake because supervisors are not required to have subject-area certification, though Yankovich had great difficulty citing even one of the ten district supervisors without it. Under these circumstances, I find that Amara's lack of subject-area certification (in special education) is suspicious.

The next day, November 20, Clausell told Amara for the first time that he was now the supervisor of special education and

that he was being escorted to his office in the high school so that he could collect his personal effects. The lock on his office had been changed and the business administrator and building and grounds supervisor observed him box-up his belongings. This sequence of events is more analogous to a termination than to a lateral transfer. Yankovich offered no explanation for Clausell's security action. I can only infer that the Board would not tolerate the possibility that Amara could access the computer system. This concern (and conduct) is consistent with the Board's deletion of Amara's password about ten days earlier.

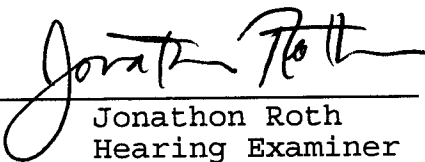
In Camden Bd. of Ed., P.E.R.C. No. 2001-9, 26 NJPER ____ (¶ ____ 2000), the Commission found that a "transfer was intended to punish [the employee] as a teacher for actions that took place while he was a coach and was an attempt to satisfy [the interscholastic athletic association] condition that administrative action be taken against the former coach." Id. at slip op., p. 6. The Commission ordered the Board to promptly return the employee to his teaching position at the school from which he was transferred. The Commission did not order that the employee be reinstated as a coach because "...our jurisdiction in a contested transfer case is limited only to the transfer between work sites, not to a removal from an extracurricular position." Id.

The Board's decision to transfer Amara was motivated by a resolve to remove him from his oversight of the computer technology department. The Board quickly determined to create the supervisor

of special education position as a lateral repository for Amara, notwithstanding any pre-existing need for it. Amara was not transferred because he did his job poorly or acted in any unprofessional manner. He was transferred to end his complaints about disrepairs and to preempt any documentary revelation of the problem outside the district. This motive is akin to an intent to punish and is "predominately disciplinary" within the meaning of N.J.S.A. 34:13A-27.

REMEDY

Amara has been transferred between work sites for disciplinary reasons and his prompt transfer back to the high school as district supervisor of special education is the appropriate and recommended remedy, pursuant to N.J.S.A. 34:13A-27(b) and Camden Bd. of Ed.



Jonathon Roth
Hearing Examiner

DATED: August 25, 2000
Trenton, New Jersey