

P.E.R.C. NO. 2010-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASBURY PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-2009-002

CORDELIA GOLDEN,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a contested transfer petition filed by Cordelia Golden against the Asbury Park Board of Education that alleges Golden was transferred between work sites for predominately disciplinary reasons. The Board asserts that Golden was transferred after a teacher filed a complaint against Golden which resulted in significant tensions between employees who supported the teacher and employees who supported Golden; the relationship between Golden and the teacher could not be repaired after multiple mediation sessions; the teacher alleged Golden was harassing her; and the principal recommended that at least one of the employees had to be transferred. The Commission holds that the transfer was not predominately disciplinary where the Board asserted non-disciplinary reasons to defuse what its administrators believed was a tense situation that was adversely affecting both students and staff.

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, Kenney, Gross, Kovats & Parton,
attorneys (Daniel R. Roberts, of counsel)

For the Petitioner, Detzky & Hunter, LLC, attorneys
(Stephen B. Hunter, of counsel and on the brief)

DECISION

On May 4, 2009, Cordelia Golden filed a petition for contested transfer determination. Golden alleges that the Asbury Park Board of Education transferred her between work sites for disciplinary reasons in violation of N.J.S.A. 34:13-25. On June 10, the Board filed its Answer asserting that Golden was transferred solely for educational reasons. We conclude that the transfer was not for predominately disciplinary reasons and dismiss the petition.

Both parties filed certifications.^{1/} No material facts are in dispute and neither party requested an evidentiary hearing. We deny the Board's request for oral argument as the matter has been fully briefed.

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). The following facts are undisputed.

Cordelia Golden has been employed as an elementary school teacher within the Asbury Park School District for over 16 years. During her many years of employment, she has received consistently positive instructional observations and evaluations. Before the transfer, Golden was assigned to the Thurgood Marshall Elementary School for approximately 2 1/2 years as a fourth grade special education inclusion teacher.

On or about November 25, 2008, Golden was served with a copy of a Discrimination/Harassment Notification and Respondent Form advising that a complaint against her had been filed by a fellow teacher at the Thurgood Marshall School. That teacher alleged

^{1/} N.J.A.C. 19:18-2.2(b) (7) requires that a petition be accompanied by all documents and affidavits supporting the petition's factual allegations. N.J.A.C. 19:18-3.4(d) requires that the Answer be accompanied by all supporting documents and affidavits. The Board has attached documents and certifications to its briefs. We will accept them in this case because they do not create any material factual disputes.

that Golden had referred to her as a "cracker" during a conversation with a co-worker. Golden denies making the statement.

The teacher subsequently wrote to the Acting Superintendent stating that the situation had escalated and that since the racial comment, she was concerned about her safety at work. She accused Golden of taking a number of actions to intimidate and bully her.

Golden advised the Board's Affirmative Action Officer in a memorandum dated November 26, 2008 that the teacher's complaint was "strewn with inaccuracies."

In a letter dated December 4, 2008 from the Acting Superintendent of Schools, Golden was again advised about the Affirmative Action Complaint and told of her refusal to meet with the Affirmative Action Officer.

On December 9, 2008, Golden wrote to the Affirmative Action Officer regarding the scheduling of a meeting to address the allegations.

On or about December 15, 2008, Golden received a memorandum from the Affirmative Action Officer informing her of a December 22 meeting in reference to the complaint filed against her and attaching a copy of a December 2 Investigative Report. The report states that the Officer interviewed two witnesses to the alleged comment. One said that she did not hear what was going

on and the other said that he arrived after the comment, but heard the other witness repeat what Golden had allegedly said, "Why did you let that cracker tell you what to do with your braids?" The Officer reported that she thinks the first witness does not want to get involved, and given that Golden did not respond to the union president or the Officer, "I think that there is some truth to what [the teacher] is saying." However, she was also informed that there was a history of tension between the two teachers.

On December 22, 2008, the Affirmative Action Officer issued a revised report. She reported that the teacher had called her to complain about Golden's constant harassment/bullying and that the Officer had reported it to the administration. She also reported on a December 22 meeting at which the teacher repeated her allegations and at which Golden denied those allegations. The Officer reported that she could not find common ground and that she told the staff members that she would be recommending that both staff members be transferred out of the building. The Officer certified that at the end of her investigation, she could not be sure that Golden had made the alleged statement. However, she also certified that: the dispute resulted in tension among district employees; some employees were siding with Golden and other employees were siding with the complaining teacher; and many of these tensions were along racial lines -- African-

American employees tending to support Golden and Caucasian employees tending to support the complaining teacher.

On or about January 6, 2009, Golden wrote a letter of apology to the teacher which states:

As per your request, I am putting into writing our conversation that took place on today. I want to apologize to you if I have made you feel uncomfortable here at Thurgood Marshall. It was never my intent to create a hostile working environment for you or anyone else. I want you to feel secure every day when you come to this building. I do not want to be the cause of any discord amongst any of my fellow co-workers. I truly saw how upset and anxious you were at our last meeting on December 22, 2008 and I do not want to continue the rest of the school year with that anxiety.

On January 26, 2009, the Acting Superintendent wrote to Golden that he appreciated the apology to the teacher, but that it was not done in a timely fashion. He continued that the building administration feels as though there is an air of hostility still brewing which is affecting both students and staff. He then informed Golden that he was recommending her transfer to the Asbury Park Middle School effective February 1.

The Acting Superintendent certified that the school principal advised him that it would be difficult to replace the complaining classroom teacher, but not Golden, because Golden was an Inclusion Aide Teacher for students with special needs in classes the students take with the school's general population.

The classroom teacher was a 5th grade teacher and the sole and primary teacher in the classroom.

Before the transfer was implemented, Golden presented a detailed letter to the Board that referred to her side of the story. In her letter, Golden stated that she did not want everything she had accomplished with her students, parents and colleagues to be tainted by fabrication of individuals who have underlying motives against her. She also stated that teachers have been talking about this matter and seeking support from their colleagues; and staff members have felt extremely uncomfortable about this matter and have expressed such feelings.^{2/} She asked not to be involuntarily transferred. However, the Board approved the transfer effective February 9, 2009.

According to Golden, the teacher who was reassigned to Golden's position had never taught in an elementary school. Golden continues to work as a Special Education Inclusion Aide Teacher at the middle school and to perform the same duties. Her new school is 1/2 mile away from the old one.

N.J.S.A. 34:13A-25 provides that transfers of employees between work sites are not mandatorily negotiable or legally arbitrable. However, transfers of school employees between work

^{2/} We note that the Affirmative Action Officer certified that the teacher told her that she was fearful of Golden and was afraid to be anywhere near her.

sites for disciplinary reasons are prohibited. Where we find that a school employee was transferred for disciplinary reasons, the remedy is to return the employee to the former work site.

As we stated in West New York:

Our case law does not establish a bright line test for assessing whether a transfer is disciplinary. . . . 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.

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.

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.

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.

[27 NJPER at 98; citations omitted]

Golden argues that there is no evidence that there was anything other than a dispute between two teaching staff members regarding an alleged remark that was not overheard by either of the two witnesses listed by the teacher in her complaint. She further argues that any problem that may have existed between the teachers was resolved as a result of the January 6, 2009 meeting and the subsequent apology. Golden contends that the Acting Superintendent was angry at Golden for purportedly not being immediately cooperative with the Board's investigation and was determined to punish Golden through implementation of the mid-year involuntary transfer. Golden notes that the Affirmative Action Officer recommended that both teachers be transferred, but only Golden was.

The Board argues that it transferred Golden for educational and operational concerns. The Board contends that the Acting Superintendent recommended the transfer because after the teacher filed the complaint, significant tensions arose between employees who supported the teacher and employees who supported Golden and those tensions fell along racial lines; the relationship between the teachers could not be repaired even after multiple

mediations; the teacher alleged that Golden was harassing her, in part for filing a complaint; and the principal advised him that at least one of the employees must be transferred. The Board notes that even Golden, in her letter to the Board, stated that teachers have been talking about this matter and seeking support from their colleagues; and that staff members felt extremely uncomfortable about this matter and have expressed such feelings. The Board also contends that it never made any finding that Golden committed misconduct and never disciplined her; it merely separated the two teachers to restore effectiveness and efficiency to the school.

We find that this transfer was not predominately disciplinary within the meaning of N.J.S.A. 34:13A-25. Golden was not found to have made the offending statement. She was not disciplined for making the statement. However, tension appears to have arisen in the school because of the tension between the two teachers. The Affirmative Action Officer recommended that both teachers be transferred to defuse the tension. The Principal advised the Acting Superintendent that it would be difficult to replace the classroom teacher, but not Golden, because Golden was an Inclusion Aide for students with special needs in classes the students take with the school's general population. The principal advised that another certified special education teacher could fill Golden's role, whereas replacing the

other teacher in the middle of the school year would be significantly more difficult and would have a negative impact on the students.

Golden's reliance on Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001), and Camden Bd. of Ed., P.E.R.C. No. 2001-9, 26 NJPER 366 (¶31148 2000), is misplaced. In those cases, the school board did not provide evidence of a non-disciplinary reason for the transfer. The Board did so here.

It does not matter whether Golden made the disputed remark. And our decision should not be read to suggest that she did. We are simply finding that, under the particular facts of this case, the Board had a non-disciplinary reason to defuse what its administrators believed was a tense situation that was adversely affecting both students and staff.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton and Watkins voted in favor of this decision. Commissioners Fuller and Kregel voted against this decision. Commissioner Voos abstained.

ISSUED: June 24, 2010

Trenton, New Jersey