

P.E.R.C. NO. 2018-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-2017-002

TRENTON EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the Association's contested transfer petition alleging that the Board transferred a teacher between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. Finding that the verbal altercation between the teacher and the principal that prompted the transfer was a disciplinary reason and her transfer was not shown to be due to educational concerns, the Commission orders the teacher back to her previous position and work site.

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, Adams, Gutierrez & Lattiboudere, LLC, attorneys (Ruby Kumar-Thompson, of counsel and on the brief; Kimberly G. Williams, on the brief)

For the Petitioner, Bergman & Barrett, attorneys (Michael T. Barrett, of counsel)

DECISION

On November 7, 2016, the Trenton Education Association (Association) filed a petition for a contested transfer determination. The Association alleges that the Trenton Board of Education (Board) transferred A.L. between work sites for disciplinary reasons in violation of N.J.S.A. 34:13-25. The Association's petition was supported by the certification of A.L.^{1/}

^{1/} The Association also filed an application for interim relief, which it withdrew on May 5, 2017.

On May 30, 2017, the Board filed an Answer asserting that A.L. was transferred to meet its educational, operational and staffing objectives.

On June 30, 2017, the matter was assigned to a staff agent to clarify the issues in dispute and explore the possibility of settlement. The conference took place on August 7, and the matter was not resolved. On August 17, the parties were instructed by the Commission Case Administrator to file briefs by August 31.

On August 31, 2017, the Board filed a brief in opposition to the petition, supported by exhibits and the certifications of Monalisa Kalina, former Principal of Patton J. Hill Elementary School^{2/} (P.J. Hill) and Lissa Johnson, Assistant Superintendent, Talent Acquisition and Development for the Board.^{3/} Also on August 31, the Association filed a supplemental certification of A.L.

The following are the pertinent facts. Since 2010, A.L. has been employed as a teacher at P.J. Hill. She has taught first grade for every year of her employment at P.J. Hill except for the 2014/2015 school year. Kalina became employed as Principal of P.J. Hill for the 2016/2017 school year.

2/ A.L. certifies that Kalina is no longer employed by the Board

3/ The Board also made a request for oral argument, which is denied.

On October 3, 2016, Kalina sent A.L. the following email: "[p]lease drop in my office sometime tomorrow. I want to discuss the morning routine with you. You appear to be absent frequently or you leave in the middle of my announcements." Upon receiving the email, A.L, who had some time available before her next class, went to Kalina's office to discuss the email.

A.L and Kalina have differing accounts of what transpired in Kalina's office. A.L. certifies that upon entering Kalina's office, Kalina asked if she wanted to close the door or sit down, and that she responded "No" to both questions. A.L. further certifies that Kalina restated her concerns about A.L.'s attendance at morning meetings, and A.L. acknowledged that she left a few meetings early that were run by a non-supervisory teacher, but that she had never left a meeting over which Kalina presided. A.L. attests that Kalina then became angry, raised her voice and shouted, "I don't know who you think you are. You are a teacher and I don't care what union you think you have!" and that A.L. responded, "I don't know who you think you are" and included an expletive. Kalina told A.L. to leave her office and that she was calling the police. A.L. responded that she would not be spoken to like a child and that she did not do anything wrong and to call the police. A.L. sat down in Kalina's office and called the Association. Kalina telephoned 911 at the same time.

Kalina's account differs from A.L.'s account of the incident in that Kalina certifies that upon her asking A.L. why she doesn't participate in the morning meetings, A.L. began to yell that another teacher is not the administrator and as a result she does not need to listen to her do the morning announcement. Kalina certifies that A.L. became increasingly hostile, used curse words and displayed threatening acts of physical aggression towards her, and that A.L. yelled, "I don't give a fuck why you are." Kalina further asserts that she repeatedly asked A.L. to calm down and change her behavior but she refused and that she also asked A.L. to leave her office two times but she refused and instead sat down and stated, "No, I am not going anywhere." Kalina further certifies that A.L. then stood back up and began screaming curse words again in such close proximity that Kalina could feel A.L.'s spit on her face while she was violently banging Kalina's desk with closed fists, and that A.L. yelled, "Who the fuck do you think you are?" and "you will not talk to me however the fuck you want to."

The police arrived and questioned both A.L. and Kalina. They took no action and left the scene. Both A.L.'s and Kalina's union representatives also arrived on the scene. Assistant Superintendent Wilfredo Ortiz arrived to investigate the incident. Ortiz directed A.L., Kalina and the union representatives into a conference room where he presided over a

meeting taking accounts of what happened. The meeting ended and everyone returned to work.

The record includes a statement from the school security officer who was called to the scene by the school secretary. The security officer's statement is as follows:

Around 12:00 p.m. [I was called] on the walkie talkie [and] I hear all this commotion in the background people screaming while me running to the front. So I get in the main office A.L. is screaming at Kalina. The only thing I heard was you will not talk to me however the fuck you want to. Kalina said she was calling the cops. A.L. got up and called somebody on the phone.

The record also includes a statement from an employee who was in the main office making copies at the time of the incident. The employee states as follows:

I witnessed [A.L.] standing in the principal's office yelling at her. She was saying that "you are not going to talk to me like that." I then heard the principal say "you need to leave my office" (2 times); she then stated that she would call the police. [A.L.] said "I don't care call them, I'm not going anywhere, while saying this there was a banging noise coming from the office.

The record also includes a recording of Kalina's 911 call. A.L. can be heard in the background screaming (inaudibly) while Kalina was relaying information about the incident to the dispatcher.

On October 4, 2016, Kalina filed an internal incident report. On October 5, Kalina filed a domestic violence complaint

and a certification in support of probable cause against A.L. in the Trenton Municipal Court. A Complaint-Summons was issued against A.L. by the court and she was directed to appear on October 18. Also on October 5, A.L. was placed on administrative leave with pay pending the outcome of an investigation of the October 3 incident. She was instructed not to enter Trenton School District Property. On October 17, A.L. received a letter from Johnson advising her, in pertinent part, as follows:

The District is continuing to investigate the incident that occurred at P.J. Hill on October 3, 2016.

In the interim, the District believes it is important to have you return to a classroom. We do not believe that it is in your best interest or the best interest of the District to have you return to P.J. Hill.

Therefore, please be advised that effective October 18, 2016, you are being involuntarily transferred to Washington Elementary School, Grade 2.

On October 18, 2016, A.L. appeared in court and the judge ordered mediation and "no contact whatsoever pending further order." On October 19, Ortiz issued a report and summary of the October 3 incident, concluding that A.L. engaged in conduct unbecoming of professional staff, insubordination, as well as confrontational and threatening behavior, and recommending that her increment be withheld and that she participate in an anger management program. Ortiz afforded A.L. the opportunity to further discuss the incident and provide a written statement as

part of the investigation. However, A.L. declined to participate due to the criminal matter pending in municipal court.

A.L. certifies that in December 2016 she attended a court-ordered mediation session, but Kalina would not participate in accordance with the rules so the mediation never occurred and Kalina has taken no action with regard to the criminal complaint. A.L. further certifies that her increment was withheld for the 2017/2018 school year due to the October 3, 2016 incident.

The Board argues that it transferred A.L. to meet the District's educational, operational and staffing objectives. Specifically, the Board asserts that it transferred A.L. to separate her from Kalina which was necessary to accomplish a safe working environment for Kalina; to prevent disruption at P.J. Hill; and because there was a vacancy at Washington State School for a first-grade teacher. The Association responds that A.L. was transferred due to disciplinary reasons resulting from the October 3, 2016 incident.

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 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 Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001):

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].

The question we must answer in this case is what motivated the transfer of A.L.? The record overwhelmingly supports that A.L.'s transfer was directly caused by her participation in the October 3, 2016 incident. Our role in contested transfer cases is not to make findings about whether the transfer was for cause or otherwise justified. Camden Bd. of Ed., P.E.R.C. No. 2001-9, 26 NJPER 366 (¶31148 2000). N.J.S.A. 34:13A-25 asks only whether a transfer was for disciplinary reasons, and, for the following reasons, we conclude affirmatively that A.L.'s transfer was for disciplinary reasons.

On October 5, 2016, almost immediately following the October 3 incident, A.L. was placed on administrative leave with pay. On October 7, A.L. was transferred to Washington Elementary School. There were other consequences to A.L. which flowed from the October 3 incident in that after Ortiz completed his investigation (which A.L. did not participate in due to the pending criminal matter), he recommended that her increment be withheld and that she participate in an anger management program. A.L.'s increment was withheld for the 2017/2018 school year.

Johnson's certification states that A.L. was transferred because "her behavior had a disruptive impact on the

instructional environment at P.J. Hill.” The October 17, 2016 letter to A.L. states that “the District believes it is important to have you return to a classroom. We do not believe that it is in your best interest or the best interest of the District to have you return to P.J. Hill.” An October 20 letter to A.L.’s attorney states that A.L.’s transfer was “necessitated solely by the disruptive impact the incident has had in the instructional environment at P.J. Hill and is now legally necessary given . . . that [the municipal court judge] issued a no contact order that requires Principal Kalina and [A.L.] to work in separate locations.” However, the Board has failed to explain, either in the above documents or elsewhere in the record, how or why the environment was disrupted by the October 3 incident which occurred between two employees only. With regard to the related municipal court matter, while the judge did issue a no contact order between A.L and Kalina, it did not necessarily require that A.L be transferred from P.J. Hill. During the time that the order was in place, another administrator could have handled any issues relating to A.L. There is no evidence in the record that Kalina took any further action after making the initial municipal court filing, and she is no longer employed at P.J. Hill.

The Board relies on cases that are factually distinguishable wherein teachers were transferred to another school due to more broad-based problems occurring among staff or in the school

environment, unlike the instant matter where a problem existed between two employees only. In Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005), aff'd 32 NJPER 201 (¶87 App. Div. 2006), we found that while a physical education teacher's transfer may have been motivated by a punitive reason, the transfer was predominately about operational and staffing concerns because three administrators certified that he did not get along with other staff members and was transferred to a position where he would not have to work with others. In Asbury Park Bd. of Ed., P.E.R.C. No. 2010-87, 36 NJPER 225 (¶79 2010) a teacher was transferred to another school after she allegedly called another teacher a "cracker." We found that the transfer was not predominately disciplinary because the transfer was made to defuse tension that had arisen not only between the two teachers but among staff which appeared to be along racial lines - African Americans vs. Caucasians. In Montclair Bd. of Ed., H.E. No. 2007-9, 33 NJPER 171 (¶59 2007), a teacher was transferred in accordance with the board's sexual harassment policy after its witnesses testified and investigative findings revealed that female complainants were uncomfortable around him and took measures to avoid him.

Under all of the circumstances described above, we find that A.L. was transferred due to disciplinary reasons directly related to her participation in the October 3, 2016 incident and

that the Board has failed to provide evidence supporting its assertion that her transfer was due to operational or staffing concerns. Camden Bd. of Ed. (finding that a physical education teacher was transferred to punish him for his actions as a coach and to satisfy a New Jersey Interscholastic Athletic Association condition that administrative action be taken against him); see also Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001) (finding that the transfer of a teacher was disciplinary where the board failed to provide evidence to support its assertion that the transfer was for operational or staffing concerns).

ORDER

The Trenton Board of Education is ordered to promptly return A.L. to her first grade teaching position at Patton J. Hill Elementary School.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: April 26, 2018

Trenton, New Jersey