

P.E.R.C. NO. 2018-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and-

Docket No. TO-2017-001

PATERSON EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a contested transfer petition filed by the Association against the District that alleges a unit member was transferred between work sites for predominately disciplinary reasons in violation of N.J.S.A. 34:13A-25. The Commission finds that the record supports the District's assertion that the teacher was transferred due to continued tension between herself and another staff member that affected the classroom and staff. The Commission also finds that the Association did not meet its burden of showing that the transfer was disciplinary.

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, Robert E. Murray, LLC, attorneys
(Karen A. Murray, of counsel; Robert E. Murray, on the
brief)

For the Petitioner, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

DECISION

On September 21, 2016, the Paterson Education Association petitioned for a contested transfer determination. The Association alleges that the Paterson State Operated School District transferred a teacher between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The petition was supported by a September 27, 2016 certification of the transferred employee.

On October 26, 2016, the District filed an Answer denying that the petitioner was transferred for disciplinary reasons. The Answer was supported by an October 26, 2016 certification of Principal Jorge Ventura of the District's School 29.

The matter was assigned to a Commission staff agent to clarify the issues in dispute and explore the possibility of settlement. N.J.A.C. 19:18-3.2. On May 26, 2017, after being notified that the matter would not settle, the Commission set a briefing schedule pursuant to N.J.A.C. 19:18-3.9.^{1/} On June 12, the Board filed an amended Answer. On June 28, a new briefing schedule was set with each party's brief due July 19.

On July 12, 2017, the District filed a motion for summary judgment alleging that the Association's petition was untimely. On July 21, the Association filed its response, supported by a July 13 certification of the transferred unit member. The Commission postponed the regular briefing schedule pending the outcome of the summary judgment motion. On September 28, the Commission denied the District's motion for summary judgment, finding that the Association timely filed the petition within 90 days of the date the unit member received notice of the transfer. See Paterson State Operated School District, P.E.R.C. No. 2018-10, 44 NJPER 140 (¶40 2017); N.J.A.C. 19:18-2.3.

^{1/} By letter of May 31, 2017, the Commission Case Administrator notified the District that its November 1, 2016 request for an evidentiary hearing did not comply with the requirements of N.J.A.C. 19:18-3.8(a) for such requests. By letter of June 2, 2017, the Case Administrator permitted either party another opportunity to file a request for an evidentiary hearing in compliance with the regulation. On June 28, the Case Administrator notified the parties that neither party had filed a compliant request for an evidentiary hearing and therefore a new briefing schedule would issue.

On September 28, 2017, the Commission Case Administrator set a new briefing schedule following the Commission's denial of the District's summary judgment motion. The District filed its brief on October 25, along with exhibits and a copy of the October 26, 2016 Ventura certification originally filed with its Answer and Amended Answer. On October 31, 2017, the Association filed an updated certification of the transferred unit member dated October 30, 2017, along with exhibits, but with no supporting brief. Both parties filed reply briefs on November 15. The District's reply brief was supported by an updated certification of Principal Ventura dated November 14, 2017.

Debra Prosinski has been a first grade teacher in the District since 2005 and received tenure in the 2008-09 school year. During the 2015-16 school year, Prosinski was a first grade teacher at School 29. An English as a Second Language (ESL) teacher, who we will refer to as "N.F.," was assigned to teach certain students in Prosinski's class. An October 6, 2015 incident in Prosinski's classroom came to the attention of Principal Jorge Ventura on November 9, 2015 when a student's parents requested a meeting with Ventura and Prosinski. At the meeting, the student accused Prosinski of taking the student's shoe and throwing it across the room, but Prosinski denied it. However, the student said the ESL teacher in the room at the time, N.F., witnessed the event. N.F. was summoned to the

meeting and confirmed that Prosinski had taken the student's shoe off and thrown it across the room. On November 10, 2015, Prosinski sent Principal Ventura an e-mail admitting that she had taken the student's shoe, thrown it across the room, and told him not to retrieve it. After consultation with Assistant Superintendent Santa, Principal Ventura issued a written reprimand to Prosinski for the shoe incident on November 13, 2015.

Ventura certifies that immediately after the November 9, 2015 conference, "the professional relationship between Ms. Prosinski and [N.F.] disintegrated." Ventura certifies that both teachers began coming to his office and e-mailing him with complaints about the other. In December 2015, Ventura asked the School 29 Liaison Committee, designed to deal with issues between teachers and the principal, to meet with Prosinski and N.F. to help restore professional cooperation. Ventura certifies that to his understanding the teachers would not meet together, but met with the Committee separately. In February 2016, the Committee reported that they could not do anything more to resolve the disagreements between Prosinski and N.F.. Around the same time, Ventura contacted Ms. Karcher, a Committee member and also the Association's building representative, to ask if she could help with the problem.

Ventura certifies that Prosinski and N.F. continued to complain about each other in 2016, and that he personally observed the tension continue in the classroom during his daily walks through the building. He certifies that N.F. asked Ventura if she could remove her ESL students from the classroom she shared with Prosinski, but no other classroom was available. On March 16, 2016, Prosinski reported to Principal Ventura that intervention documentation was missing from her data binder, and that she believed it had been stolen by N.F.. Ventura certifies that the situation was intolerable, the tension was adversely affecting the school, and teachers who were friends with Prosinski were quarreling with teachers who were taking sides with N.F..

On April 1, 2016, Ventura met with Prosinski and N.F.. Prosinski certifies that Ventura questioned the professionalism of Prosinski and N.F., stating that their "constant chatter and gossip was having a negative effect on the climate and culture of the building." Ventura certifies that he explained that his efforts of resolving the situation through the Liaison Committee or Association building representative were unsuccessful. Principal Ventura gave Prosinski and N.F. the option of requesting a transfer to a different school by April 15, 2016, or he would involuntarily transfer one of them at the end of the year. Ventura certifies that Prosinski expressed her desire to

remain at School 29, but expressed an interest in a Resource Teacher position in lower grades if she was transferred. He certifies that the special education resource teacher positions are very highly sought after.

On April 15 and May 17, 2016, the Association filed grievances on behalf of Prosinski against the District. The April grievance alleged that Principal Ventura sent an e-mail to Prosinski and two colleagues that subjected her to "public criticism, humiliation, and embarrassment" and that "shortly afterwards, in retaliation, Mr. Ventura threatened to transfer me for disciplinary reasons." The May grievance alleged multiple contractual violations "when Jorge Ventura called me into his office" without prior notice for a meeting with Ventura, N.F., and the Association representative.

On June 24, 2016, Prosinski was hand-delivered a copy of a notice of transfer dated June 21 to School 4 (Dr. Frank Napier School) for the 2016-17 school year. She was transferred to a special education Resource Teacher position in School 4. Prosinski's certification alleges that "the transfer was for disciplinary reasons and in retaliation for the filing of the grievance asserting my rights under the collective bargaining agreement." Principal Ventura certifies that Prosinski's transfer was in no way disciplinary or in retaliation for any grievance or Association activity.

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. N.J.S.A. 34:13A-27 confers jurisdiction on the Commission to determine whether the transfer is predominately disciplinary, and, if so, to take reasonable action to effectuate the purposes of our Act. 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).

In West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001), the Commission set standards for assessing whether a transfer is disciplinary under our statute. The Commission stated:

Our case law does not establish a bright line test for assessing whether a transfer is disciplinary. . . . [O]ur 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 Association asserts that the transfer was disciplinary in retaliation for Prosinski's grievance complaining of Principal Ventura's behavior. It argues that even if the transfer was made in order to diffuse the tensions between her and a co-worker, that such a reason is disciplinary and not performance-related.

The District asserts that the involuntary transfer of Prosinski was not disciplinary, but was made to resolve an escalating conflict between her and N.F. that negatively affected students and staff and could only be addressed by separating them. It argues that Prosinski had already been advised of the pending transfer during the April 1, 2016 meeting that preceded the April 15 and May 17 grievances; therefore, the decision to

transfer could not have been in retaliation for filing grievances. The District notes that Prosinski was transferred to a special education Resource Teacher position as she requested, and that N.F. was also transferred. The District also contends that Prosinski's failure to address or deny any of the facts asserted in Principal Ventura's certification concerning the 2015 shoe throwing incident and the subsequent disputes between Prosinski and N.F. should be taken as a tacit admission of those facts.

We find that this transfer was not predominately disciplinary within the meaning of N.J.S.A. 34:13A-25. The unchallenged facts of Principal Ventura's October 26, 2016 certification indicate ongoing tension between Prosinski and her co-worker N.F. (who had to share a classroom/students with her) stemming from the November 9, 2015 meeting in which N.F. implicated Prosinski in the shoe throwing incident for which Prosinski received a written reprimand. The facts demonstrate continued tension between Prosinski and N.F. that resulted in frequent oral and written complaints to Principal Ventura, tension in the classroom, and quarreling between other teachers in the building who had taken different sides in their dispute. Principal Ventura attempted to diffuse the situation with the help of the Liaison Committee and the Association representative, but by March 2016 those attempts had failed and N.F. was asking

to take her students out of the classroom. Principal Ventura therefore met with Prosinski and N.F. on April 1, 2016 to notify them that they would have to be transferred due to the negative effect their feud was having on the school. Even Prosinski, in her October 30, 2017 certification, acknowledges that her issues with N.F. and their effect on the school were the topic of the April 1 meeting at which Ventura notified them they would be transferred.

In Asbury Park Bd. of Ed., P.E.R.C. No. 2010-87, 36 NJPER 225 (¶79 2010), the Commission dismissed a contested transfer petition concerning an elementary school teacher's transfer following escalating tensions and complaints between her and another teacher. The Board contended that it transferred the teacher for educational and operational concerns because "significant tensions arose between employees who supported the teacher and the employees who supported Golden"; "the relationship between the teachers could not be repaired even after multiple mediations"; and "it merely separated the two teachers to restore effectiveness and efficiency to the school."

Id. at 227. The Commission held:

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.

[Asbury Park, 36 NJPER at 227.]

Similarly, 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), the public employer contended it transferred a teacher because he had problems getting along with and working with other people, including the entire physical education staff. In dismissing the petition, the Commission held:

The transfer appears to have been more about operational and staffing concerns than punishment. . . . Given the statements of three administrators about the teacher's difficulty in getting along with others, we conclude that those "other things" were the dominant reason for the transfer and we conclude that they are not disciplinary. The respondent appears to be looking for a position in which to place the teacher where he can continue to perform well as a teacher without having conflicts with his fellow employees. Under these circumstances, the petitioner has not proven that the transfers were disciplinary.

[Old Bridge, 31 NJPER at 118.]

The Appellate Division affirmed. 32 NJPER 201.

Here, as in Asbury Park and Old Bridge, the particular facts support the District's proffered reasons for transferring Prosinski due to the unresolved tension between her and N.F.. Under these circumstances, the District's reasons were non-disciplinary due to the effects of their dispute on the classroom environment as well as the other teachers in the school. The District provided evidence of its non-disciplinary reasons for

the transfer, while the Association did not meet its burden of showing that the transfer was disciplinary.^{2/}

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: November 30, 2017

Trenton, New Jersey

^{2/} Given the timing, vis-a-vis the grievances later filed by the Association on behalf of Prosinski, of the meeting at which Prosinski and N.F. were notified that one or both of them would need to be transferred due to the negative effects of their ongoing tensions, we find no merit in the Association's assertion that Prosinski was transferred in retaliation for filing grievances.