

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-2019-006

PHILLIPSBURG EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the Phillipsburg Education Association's contested transfer petition alleging that the Phillipsburg Board of Education transferred a custodian between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The Commission finds that a single verbal altercation between the custodian and the principal prompted the transfer, which occurred in close in time to the verbal altercation. Further, the Board did not show any staffing or operational need to transfer the custodian from the high school to the elementary school. The Board did not show that a more experienced custodian was needed at the elementary school or that there was any animosity between the custodian and the new lead custodian at the high school. The Commission finds the transfer was a means of discipline and orders the custodian back to the previous position and work site following the 2018-2019 school year.

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.

P.E.R.C. NO. 2019-51

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Appearances:

For the Respondent, Russo Law Offices, LLC, attorneys  
(Jeffrey M. Russo, of counsel)

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

DECISION

On December 4, 2018, the Phillipsburg Education Association (Association) petitioned for a contested transfer determination. The Association alleges that the Phillipsburg Board of Education (Board) transferred a custodian (initials "J.B.") between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The petition was supported by the November 14, 2018 certification of J.B.

On December 21, 2018, the Board filed an Answer admitting and denying different assertions made in J.B.'s certification. The Answer was supported by the December 20, 2018 certifications of Matthew Scanlon, Principal of Phillipsburg High School, and Gregory Troxell, Superintendent of Schools.

On January 4, 2019, 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. The conference occurred on March 11 and the matter was not resolved. On March 27, the Commission Case Administrator set a briefing schedule pursuant to N.J.A.C. 19:18-3.9. On April 9, the Board submitted its brief, along with exhibits comprised of the parties' previously filed petition and certifications. On April 10, the Association submitted its brief, along with the previously filed certification of J.B. The following facts appear.

J.B. has been employed by the Board as a custodian since 2010. He has worked as a second shift custodian at the middle school, a third shift custodian at the high school, a first shift custodian at the alternative secondary school, and from December 23, 2016 to September 24, 2018 as a second shift custodian at Phillipsburg High School. On September 24, 2018, the Board transferred J.B. to a second shift position at Phillipsburg Elementary School. That transfer is the subject of this dispute.

On September 13, 2018, Principal Scanlon called and presided over a meeting of all custodial staff. He advised of a number of matters during the meeting, including the introduction of a new lead custodian. Principal Scanlon and J.B. both certify that one of the topics discussed at the meeting was the state/condition of Phillipsburg High School.

J.B. certifies that during the September 13, 2018 meeting, Principal Scanlon's tone changed as he yelled about the condition of the building and the dingy look of the floors. He certifies that he told the principal that the floors will not look better unless the custodians strip the build up of waxes, and that the principal replied that he needed to be informed of such things. J.B. certifies that he responded that he had previously told him about the wax build up and had requested a wax stripper. He certifies that Principal Scanlon said that he had never said that. J.B. certifies that one of his colleagues at the meeting stated that he had in fact told the principal about the wax build up in a previous meeting. He certifies that the principal told J.B. he had never said anything about the wax stripper and that J.B. should "man up" or there will be a problem. J.B. certifies that he started to leave the meeting because he was upset and embarrassed, but that the principal told him to sit down and to stay after the meeting, which he did. He certifies that as the others left the meeting, the principal again told him to "man up" or there would be trouble, and that he did not respond.

Principal Scanlon certifies that when he introduced the new lead custodian at the September 13, 2018 meeting, J.B. immediately expressed displeasure and concern about the staffing arrangement, stating that he was not happy with it and would have to talk to his union representative about it. He certifies that

J.B. wanted to leave the meeting but that he respectfully requested that J.B. stay and offered to discuss his concerns about the new lead custodian after the conclusion of the meeting. He certifies that at no time during the meeting did he act unprofessionally and that J.B. did stay for the meeting and that they spoke after the meeting. He further certifies that J.B. again expressed displeasure with the new lead custodian and his inability to work with/under the lead custodian and that J.B. indicated that he had conflicting personalities with the new lead custodian, had past problems with him, and will not have a good working relationship with him. Principal Scanlon certifies that he thanked J.B. for staying after the meeting to discuss his concerns with him, and that they proceeded to shake hands. He certifies that following the September 13 custodial meeting, he informed Superintendent Troxell of J.B.'s displeasure about working with the new lead custodian.

Superintendent Troxell certifies that in or around the week of September 17, 2018, Principal Scanlon informed him of J.B.'s unwillingness to work with/under the new second shift lead custodian at the high school. He certifies that around the same time, the elementary school was in need of an experienced custodian. Troxell certifies that he recommended J.B.'s transfer from the high school to the elementary school based on his unwillingness to work with/under the new lead custodian,

consistent with the Board's operational and staffing objectives and to further maintain a harmonious working environment.

Troxell certifies that during the Board's regular meeting on September 24, J.B. was transferred from his second shift custodian position at Phillipsburg High School to a second shift position at Phillipsburg Elementary School.

N.J.S.A. 34:13A-25 prohibits transfers of school employees between work sites for disciplinary reasons. The Commission has jurisdiction to determine whether a transfer is predominately disciplinary and, if so, to take reasonable action to effectuate the purposes of our Act. N.J.S.A. 34:13A-27. Where we find that a school employee was transferred for disciplinary reasons, the remedy is to return the employee to the former work site. 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 Board's involuntary transfer of J.B. from the high school to the elementary school was punishment for speaking up at the September 13, 2018 custodial meeting, and was therefore predominately disciplinary.

It argues that if the Board's version of events were accepted, then the Commission would have to believe that J.B. was accommodated with a transfer because he announced displeasure with the new lead custodian.

The Board asserts that the transfer was not disciplinary, but was effectuated to accomplish staffing and operational objectives due to J.B.'s alleged unwillingness to work with the high school's new lead custodian and because there was a need for an experienced custodian at the elementary school. It argues that Principal Scanlon's certification shows that J.B.'s assertions regarding the September 13, 2018 meeting were misconstrued, denied, or contested.

In Paterson State Op. Sch. Dist., P.E.R.C. No. 2018-19, 44 NJPER 227 (¶65 2017), the Commission dismissed a petition contesting the transfer of a teacher due to the effects, that the teacher's deteriorating relationship with her room's ESL teacher, were having on the other staff and the school environment. Not only did the teachers frequently complain to the principal about each other and ask to have their students in separate classrooms, but the tensions were adversely affecting the climate of the school as teachers who supported one teacher were quarreling with those who supported the other teacher. Paterson, 44 NJPER at 228. The principal, union, and other staff made multiple failed attempts to mediate and diffuse the situation before the District



transferred the teacher to a different school at the end of the school year. Ibid. The Commission found that the facts supported the District's reasons for the transfer, which "were non-disciplinary due to the effects of their dispute on the classroom environment as well as the other teachers in the school." Id. at 229. See also Asbury Park Bd. of Ed., P.E.R.C. No. 2010-87, 36 NJPER 225 (¶79 2010) (contested transfer dismissed based on escalating tensions and complaints between two teachers that created significant tensions among other teachers and was adversely affecting staff and students); and 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) (contested transfer dismissed based on statements of three administrators/supervisors about teacher's difficulty getting along with and communicating with entire physical education staff, causing staff to complain about him).

By contrast, in Trenton Bd. of Ed., P.E.R.C. No. 2018-46, 44 NJPER 412 (¶115 2018), the Commission granted a contested transfer petition where the teacher had been transferred shortly after she engaged in a verbal altercation with the principal. The verbal altercation escalated to the point where profanity was allegedly used, other staff members could hear yelling and screaming, security and the police were called to the scene, the principal filed an internal incident report and criminal domestic

violence complaint in court against the teacher, an internal investigation was conducted, and the teacher's increment was withheld. Trenton, 44 NJPER at 412-13. The Board argued that it transferred the teacher to meet its operational and staffing objectives, specifically by separating the teacher from the principal to accomplish a safe working environment, to prevent disruption at the school, and because there was a vacancy for a first-grade teacher at another school. Id. at 413. Finding that the record overwhelmingly supported that the teacher's transfer was directly caused by her participation in the verbal altercation with the principal, and that the Board failed to demonstrate how the overall school environment had been disrupted by the incident between the teacher and the principal, the Commission held that the teacher was transferred predominately due to disciplinary reasons. Id. at 414.

The instant case revolves around a single verbal altercation between J.B. and Principal Scanlon during and after a September 13, 2018 custodial staff meeting. J.B. certifies that their dispute concerned stripping wax buildup from the floors and whether J.B. had previously told the principal about the issue and suggested that they needed a wax stripper. Principal Scanlon certifies that the dispute concerned the announcement of a new lead custodian on J.B.'s shift, and whether J.B. would be able to get along with him well enough to work with/under him. Even if

there were indications from that verbal altercation that J.B. would be unwilling to work with the new second shift lead custodian, there is nothing in the record evidencing a realization of that impression. Principal Scanlon's certification contains no personal knowledge of a conflict between J.B. and the lead custodian, and there is no certification from the lead custodian or from other staff as to any conflicts between J.B. and the lead custodian that might inhibit their ability to work together. The Board did not allege or demonstrate that J.B. and the lead custodian actually had a bad working relationship, let alone that any personality conflict between them was irreparable and resulted in such a negative impact on the Board's custodial operations as to necessitate a transfer. Thus, this case is distinguishable from Paterson, Asbury Park, and Woodbridge, because there is no record of pervasive conflicts between J.B. and another staff member or staff members that disrupted the school's operations by adversely impacting either their work or other staff. Paterson and Asbury Park contained evidence of multiple, actual conflicts between staff members that escalated and resulted in multiple complaints and attempts to mediate.

Furthermore, the swift time line from the date of the verbal altercation between J.B. and Principal Scanlon to the date of transfer supports J.B.'s allegation that his transfer was a means of discipline for that incident. Regardless of what prompted the verbal dispute during the September 13 meeting, the record shows that Principal Scanlon informed the Superintendent of it the following week, and the Board transferred J.B. just eleven days after the September 13 meeting. There is no indication in the record that J.B. did anything in those eleven days to cause concern that he would be unable to work with the lead custodian. Nor is eleven days enough time for J.B. to have demonstrated that he could work with the lead custodian.

Moreover, the Board did not substantiate its assertion that a more experienced custodian was needed at the elementary school in September 2018. It did not explain why a custodial position became available at another school after the school year had started, why a more experienced custodian was needed for that position, why J.B. was the best choice to fill that staffing need, or who would replace J.B. at the high school and why that replacement would be better-suited than J.B. for J.B.'s position rather than for the other opening. The Board supplied no corroboration of a true staffing or operational need for J.B. to be transferred from the high school to the elementary school at

that time. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2001-74, 27 NJPER 287 (¶32103 2001).

This case is therefore more analogous to Trenton, in which the transfer was also based primarily on a single verbal altercation between the petitioner and the principal, the transfer was made shortly after that altercation, and there was no evidence of broad-based problems occurring among staff or in the school environment to support the Board's assertion that the transfer was due to operational or staffing concerns. Likewise, based upon the record in this case, the most plausible cause for J.B.'s transfer was his September 13 verbal altercation with Scanlon. Accordingly, we find that the basis for J.B.'s transfer was predominately disciplinary.

#### ORDER

The Phillipsburg Board of Education is ordered to return J.B. to his custodial position at Phillipsburg High School following the 2018-2019 school year.

#### BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 30, 2019

Trenton, New Jersey