

P.E.R.C. NO. 2020-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TO-2019-007

EAST ORANGE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the East Orange Education Association's petition for a contested transfer determination, finding that the East Orange Board of Education transferred a teacher between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The Commission finds the Board's contemporaneous announcement on February 1, 2019 of both the transfer and a disciplinary suspension for the teacher's conduct during a December 5, 2018 incident in which she allegedly threatened a student indicates the Board's reasons for the transfer and the discipline were intertwined. The Commission further finds that the Board's delay in transferring the teacher undermines its assertion that it was motivated by a need to protect the student's safety and maintain a productive educational environment at the school. The Commission further finds that the record does not support that the transfer was effected predominately to fill a staffing need at another school.

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, DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys (Jennifer L. Personette, of counsel)

For the Petitioner, Oxfeld Cohen, PC, attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On March 7, 2019, the East Orange Education Association (Association) petitioned for a contested transfer determination. The Association alleges that on February 19 the East Orange Board of Education (Board) transferred a teacher ("S.A.") between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25.

On April 4, 2019, the matter was assigned to a Commission staff agent for a conference to clarify the issues in dispute and explore the possibility of settlement. N.J.A.C. 19:18-3.2. On April 9, the Board filed a letter rebutting the petition in lieu of a more formal Answer, and on April 29, it filed a position

statement, supported by exhibits, which asserted that the transfer of S.A. was not for disciplinary reasons, but was a permissible Board action pursuant to educational, operational and staffing objectives. A May 9 conference did not resolve the matter.

On May 21, 2019, the Association requested that the contested-transfer petition be held in abeyance pending the outcome of tenure charges against S.A. The Board did not consent and a briefing schedule was issued pursuant to N.J.A.C. 19:18-3.9. On June 17, the Association submitted its brief and exhibits. On July 3, the Board submitted its brief and exhibits. The following facts appear.

S.A. has been employed by the Board as a teacher since 2003. She has been assigned to East Orange Campus High School (EOCHS) as a social studies teacher since the 2011-12 school year. According to an incident report, on December 5, 2018, S.A. used "abusive and threatening language" against a 9th grade student while directing students to be quiet during an assembly in the high school's auditorium. The school hired a private investigator to investigate the incident. His undated report indicates that several witnesses were interviewed on December 14, 2018. The report concludes as follows:

All witnesses made the same claim that [S.A.] did use abusive and threatening language against the student [name redacted]. All students are very concerned about their

safety at EOCHS and only one student did in fact take the statements [S.A.] made as a joke. All parties interviewed stated that [S.A.] did say "Shut The Fuck Up" "You Don't Know Me" "I Will Get One Of These Big Niggas To Jump You" "I Will Get You Jumped" "He Don't Know Me." There was a third teacher who was not involved in the incident but overheard the threats. She tried to calm [S.A.] down and stated she was very confrontational and was not trying to deescalate the situation but was escalating the situation. [S.A.] does have a very good relationship with some students at the school but for the most part the history and [S.A.]'s reputation is known to go from zero to one hundred very quickly and very confrontational.

After interviewing [S.A.] it is my conclusion that she did have two versions of her story. [S.A.] omitted information from her original statement that she did want to add to her statement during the interview. [S.A.] was asked why she omitted the information from the original statement she claimed "she forgot." Both [S.A.]'s statements had inconsistencies.

It is my recommendation that East Orange Campus High School officials take this matter serious and it be dealt with expeditiously.

On February 1, 2019, the Superintendent met with S.A. along with the Assistant Superintendent, Dr. Deborah Harvest, and Ms. Greadington. At the meeting, the Superintendent provided S.A. with a letter which he then read aloud. The letter, dated February 1 and entitled "Notice of Suspension," is addressed to S.A., signed by the Superintendent, and copied to the president and members of the Board. It states (underlined emphasis in original, bolded emphasis added):

Please be advised that this letter serves to inform you that you are hereby suspended with pay for two (2) weeks beginning February 4, 2019. This action is being taken pursuant to Board Policy 3150 - Discipline and Board Policy 3281 - Inappropriate Staff Conduct. Furthermore, effective February 20, 2019 you will be transferred to a new assignment.

An investigation was conducted in response to reports that you made inappropriate comments including profanity and threats toward an East Orange Campus High School student. The investigation resulted in findings which corroborated the reports and a determination that you did indeed violate Board Policies 3150 and 3281 and acted in a manner which is contrary to the East Orange School District's Vision, Mission, Core Beliefs, and/or Non-Negotiables.

During your suspension, you are not to report to any District facility. **In addition, you will be transferred to a different school location as of February 20, 2019. You will report to the Director of Labor Relations & Employment Services at 8:30 am on Wednesday, February 20, 2019 to receive your new assignment.**

Please be advised that under no circumstances do I condone inappropriate behavior or physical threats of any type. As a veteran teacher here in the East Orange School District, you are aware of my expectations and appropriate manner when dealing with students. Your behavior demonstrated a total disregard and disrespect for the position as a teacher, the student that you made the inappropriate comments to, and the school district.

It is my hope that from this day forward, you will conduct yourself in a professional manner exemplifying the high ideals set forth by the Superintendent and East Orange Board of Education. Any future infraction(s) will

result in progressive discipline, up to and including a recommendation for the Board to certify tenure charges against you.

By letter dated February 5, 2019, Marissa McKenzie, Director of the District's Division of Labor Relations & Employment Services, informed S.A. that effective February 20 she would be "reassigned from Social Studies/History Teacher at East Orange Campus HS to Social Studies Teacher (Grds 6-8) at Patrick F. Healy Middle School."

Greadington certifies that the Board approved the transfer at its February 19, 2019 meeting. Greadington further certifies that S.A. told her "that when she arrived at Healy Middle School on the morning of February 20, 2019, the building principal, though professional and courteous, was more than surprised to see her. Not only was he not informed by the Administration of [S.A.]'s transfer, but he had no need for another Social Studies teacher at Healy . . . , as he had a full complement of said teachers." Greadington further certifies that S.A. told her that, with her transfer away from the high school, "there are now three vacant positions at that school."

The Superintendent certifies that the findings of the investigator's report warranted "discipline in the form of a two-week paid suspension." The Superintendent further certifies that, due to S.A.'s threats against the student, her transfer to another school at the conclusion of her suspension was the best

way to preserve a productive educational environment. The Superintendent further certifies he informed the principal at Healy that [S.A.] would be joining his school to fill "a need for an experienced teacher to co-teach with a less-experienced teacher" there.^{1/}

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 predominately 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

^{1/} The Board also relies on a second investigative report detailing a follow-up investigation to determine whether S.A., after the transfer announcement, used "social media to bully the student," and to ascertain the truth of "a rumor that the parent . . . and the student . . . had recanted their previous statement" about S.A.'s behavior during the December 5 incident. The report reveals the student "was transferred by his parent to Cicely Tyson high school for safety reasons due to the internet bullying and school threats," that both the parent and student denied recanting their initial statement, and that the student "is happy at Cicely Tyson HS and . . . feels safe" there.

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.]

Here, the announcement of S.A.'s transfer was made contemporaneously with the announcement of a disciplinary suspension for her conduct during the December 5 incident. We find this indicative that the Board's reasons for the transfer and the discipline were intertwined. West New York, supra. The Board did not promptly transfer S.A. after the December incident. Thus, there is not a "closely related in time"-based inference that the transfer was predominately discipline for that incident. Cf., Trenton Bd. of Ed., P.E.R.C. No. 2018-46, 44 NJPER 412 (¶115 2018) (finding transfer disciplinary where teacher was transferred shortly after a verbal altercation with principal). However, the Board's delay in transferring S.A. also does not bolster its argument that operational and educational concerns motivated the transfer. The Board does not explain how the student's safety and the Board's ability to maintain a productive educational environment at the school were not jeopardized by S.A.'s continued presence at EOCHS from December 5 through February 4.^{2/} Moreover, the Board has not pointed to evidence of

2/ The Board also alleges that after the transfer announcement, S.A. urged students and parents through social media to protest her transfer, and identified the student she had threatened on December 5, which again jeopardized the student's safety. We find the Board's allegations about
(continued...)

ongoing tension or conflict during this time between S.A. and the student, or affecting the classroom or staff, that would establish a legitimate operational objective for the transfer. Cf., Paterson State Operated School District, P.E.R.C. No. 2018-19, 44 NJPER 227 (¶65 2017).

Hence, the Board's actions are distinguishable from those addressed in a decision upon which the Board relies as being similar to this one, Trenton Ed. Ass'n, P.E.R.C. No. 2018-52, 44 NJPER 468 (¶130 2018). There a teacher was temporarily transferred to an administrative building in order to protect the safety and welfare of its students while the district investigated allegations that the teacher directed a highly offensive derogatory term at a student. Under those circumstances, we found that the board's reasons for the transfer centered on its educational/policy concerns, and was thus not a disciplinary transfer that violated N.J.S.A. 34:13A-25. Here, the transfer is not temporary and occurred well after the Board completed its investigation into the December 5 incident, but was announced the same day the Superintendent met with S.A. to address that incident. The temporary reassignment in Trenton also was not accompanied by a disciplinary suspension or reprimand, unlike here.

2/ (...continued)
S.A.'s post-transfer conduct to be irrelevant to our determination about whether the transfer was disciplinary.

Turning to the alleged staffing needs as a non-disciplinary reason for the transfer, this assertion is disputed and the evidence is mixed. The Superintendent's February 1 letter does not cite staffing needs at any other school as a reason for it. Both the Association and the Board rely on conflicting hearsay statements of the principal at Healy Middle School as to his awareness of S.A. being transferred there and his need for another Social Studies teacher on his staff. While staffing needs may be a legitimate, non-disciplinary reason for a transfer, on this record we cannot say that S.A.'s transfer was effected predominately to further that objective. Yet even if the evidence supported a staffing rationale, that is only one of three reasons for the transfer proffered by the Board, the other two being protecting student safety and preserving a productive educational environment at EOCHS. As discussed, supra, however, the Board has not adequately "explained how the transfer was so linked" to those objectives. West New York, supra.

Based on the foregoing, and given that this transfer was accompanied by other clear hallmarks of disciplinary action, namely a written reprimand and a suspension, id., we find that on balance a preponderance of the evidence supports the Association's claim that the reason for the transfer was predominately disciplinary.

ORDER

The East Orange Board of Education is ordered to return S.A. to her teaching position at East Orange Campus High School.

BY ORDER OF THE COMMISSION

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

ISSUED: September 26, 2019

Trenton, New Jersey