

P.E.R.C. NO. 2022-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKEWOOD TOWNSHIP BOARD OF EDUCATION,

RESPONDENT,

-and-

Docket No. TO-2021-003

LAKEWOOD EDUCATION ASSOCIATION,

PETITIONER.

Appearances:

For the Respondent, Methfessel & Werbel, Esqs. (Ashley E. Malandre, on the brief)

For the Petitioner, Melk Cridge, LLC. (Edward A. Cridge, Esq., on the brief)

DECISION

On June 7, 2021, the Lakewood Education Association (Association) petitioned for a contested transfer determination. The Association alleges that the Lakewood Township Board of Education (Board) transferred an administrative secretary ("R.C.") between work sites for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The petition was supported by the June 7 certification of Kimberlee Shaw, the Association's President. On June 14, the Board filed an Answer admitting and denying different assertions made in the Association's petition. The Answer was supported by the June 14 certification of Laura Winters, the Board's Superintendent of Schools.

On June 30, 2021, the matter was assigned to a Commission staff agent to clarify the issues in dispute and explore the possibility of settlement pursuant to N.J.A.C. 19:18-3.2. The conference occurred on September 2 and the matter was not resolved. On November 17, the Commission's General Counsel requested that the parties submit position statements regarding whether an evidentiary hearing was necessary, with any asserted disputed facts supported by certification. On December 16, the Board filed its position statement asserting that an evidentiary hearing was not necessary, supported by a supplemental certification of Winters. On December 17, the Association filed its position statement asserting that an evidentiary hearing was necessary. The Association did not file a certification. On December 22, the Commission's Case Administrator informed the parties that the Association's request for an evidentiary hearing was denied and the matter would be decided on the briefs. N.J.A.C. 19:18-3.9. On January 5, 2022, the parties filed their initial briefs, and on January 12, the Board filed a reply brief. The following facts appear.

R.C. is an administrative assistant who has been employed by the Board for 36 years. On, or about March 17, 2021, the Board transferred R.C. from Ella G. Clarke School (Clarke) to Spruce Street School (Spruce), which is the subject of this contested transfer petition. On March 11, 2021, R.C. was directed by her

supervisor, Clarke's vice principal, to contact the Board's Central Administration and inquire how the vice principal could access Clarke's daily COVID-19 surveys. The Board asserts that both Clarke's principal and vice principal had access during the entire 2020-2021 school year. Further, when the COVID-19 surveys were instituted in September 2020, the Board's Director of Technology showed office staff how to access the report because it had to be reviewed daily.

Following the vice principal's directive, R.C. contacted the Board's Technology department to make the inquiry, but they did not answer her inquiry. On March 15, 2021, R.C. received a "Rice notice"^{1/} for the Board's March 17 public meeting, and on the evening of March 17, R.C. was informed by a colleague that the Board had transferred her.

A March 14, 2021 email from the Board's general counsel states in pertinent part:

Good early Sunday morning.

I received a disturbing call late Friday afternoon.

^{1/} Employees are entitled to reasonable notice of the Board's intention to consider personnel matters related to them; under an exception to the Open Public Meetings Act, N.J.S.A. 10:4-15, such employees can waive their right to have the school board discuss their employment in private session. Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 74 (App. Div. 1977). The details of that notice have become commonly known as a "Rice notice."

Specifically, if I understood correctly, the administrative secretary at Clarke [R.C.] at the request of [her vice principal] contacted central administration to access contact tracing information that, again, demonstrates lack of knowledge as to the process and should have been available at the building level.

In Winters' June 2021 certification, she certifies that on or about March 25, 2021, she met with R.C. to discuss her transfer. She informed R.C. that it was not disciplinary and not based on work performance. Winters certifies that the transfer was partly due to previous personnel issues that had arisen with a former Clarke vice principal, who was reassigned from Spruce to Clarke at the same March 17 Board meeting. Winters further certifies that in the meeting R.C. expressed that she did not want to be at Clarke with the newly reassigned vice principal. Winters certifies that R.C.'s compensation was not reduced and there was no change to any other term or condition of employment. Winters also certifies that while R.C. did not agree with the transfer, she did not characterize it as disciplinary at the meeting, and that R.C. received her request to take her keyboard, chair, and refrigerator with her to Spruce.

In Winters' December 2021 certification, she certifies that along with the reassignment of Spruce's vice principal to Clarke, Spruce's administrative secretary was also transferred to Clarke. Winters further certifies that Clarke's vice principal was going to be transferred to Spruce, along with R.C., but that did not

happen because Clarke's vice principal was placed on administrative leave for reasons unrelated to this matter. Winters certifies that R.C. and Spruce's vice principal did not have "a collegial relationship" from a previous period working together at Clarke. Winters certifies that the above transfers occurred to meet the Board's operational needs and staffing objectives by (1) increasing the effectiveness of contact tracing at Clarke and ensuring health and safety at the school; (2) improving relationships between staff members, and staff members and the contact tracer in order to get reliable and valid contract tracing information; (3) maintaining healthy relationships and creating a harmonious school environment. Winters further certifies that R.C. was not accused of misconduct nor did she receive disciplinary action for following her supervisor's directive.

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 argues that R.C. was transferred as discipline for complying with her supervisor's directive to inquire how the vice principal could access contact tracing information. It argues that the Board's general counsel's email, characterizing the incident as "disturbing," is proof of the Board's displeasure with R.C.'s actions, which shortly thereafter resulted in her transfer. The Association argues that the Board does not explain how the transfer furthered its educational, operational, and staffing objectives. It asserts that the Board provided no details of the personnel and inter-personal issues which were allegedly being addressed by R.C.'s transfer. The Association further asserts that the Board does not establish how R.C.'s transfer would improve the effectiveness of contact tracing or create a harmonious working environment at Clarke. The Association argues that the Board did not traditionally discipline R.C. because it had no legitimate basis to do so due to her compliance with her supervisor's direct, but nonetheless,

the Board expressed its displeasure with R.C.'s actions by transferring her.

The Board responds that R.C.'s transfer was not disciplinary, but rather, she was transferred to meet the operational needs and staffing objectives at both Clarke and Spruce, which was within the Board's managerial prerogative to assign and transfer employees for non-disciplinary reasons. The Board asserts that R.C. was not reprimanded or otherwise disciplined or even accused of misconduct for following her supervisor's directive. The Board argues that the Association has not met its burden to prove by a preponderance of evidence that R.C.'s transfer was predominately disciplinary, and thus, the Association's contested transfer petition must be dismissed.

Here, we find the Association has not sufficiently established, by a preponderance of evidence, that R.C.'s transfer was predominately disciplinary. Other than the temporal proximity of the transfer to the incident, the Association does not establish any of the common indicia of disciplinary action present in Commission cases finding a predominately disciplinary transfer, such as allegations of misconduct or a volatile incident occurring, among others. See, e.g., Wayne Twp. Bd. of Ed. P.E.R.C. No. 2021-55, 48 NJPER 39 (¶10 2021) (finding a predominately disciplinary transfer based on supervisor's direct allegations of misconduct, including insubordination and

falsifying a work order); East Orange Bd. of Ed., P.E.R.C. No. 2020-13, 46 NJPER 151 (¶35 2019) (finding a predominately disciplinary transfer based on a teacher's contemporaneous suspension, along with the transfer, for threatening a student); Phillipsburg Bd. of Ed., P.E.R.C. No. 2019-51, 45 NJPER 421 (¶114 2019) (finding a predominately disciplinary transfer based on a verbal altercation between a vice principal and a custodian); Trenton Bd. of Ed., P.E.R.C. No. 2018-46, 44 NJPER 412 (¶115 2018) (finding a predominately disciplinary transfer based on a verbal altercation between a principal and a teacher involving profanity, screaming, and the police being called). Unlike those cases, where readily apparent incidents of misconduct were closely followed by a transfer, here the record does not establish that R.C. was directly reprimanded, disciplined, or that the Board considered her following the Clarke vice principal's directive to be misconduct.

The sole evidence proffered by the Association to demonstrate the Board's displeasure with R.C.'s actions and disciplinary intent is the Board general counsel's email calling the incident "disturbing." However, the email explicitly states that R.C. requested the information "at the request of the [vice principal]" and expresses disappointment with a lack of understanding of the contact tracing protocol. The email does

not contain any direct allegations of misconduct and does not sufficiently establish disciplinary intent by the Board.

The Board's certified facts establish that it did not reprimand, discipline, or accuse R.C. of wrongdoing in connection with the incident. The Board certifies that R.C.'s transfer was for educational, operational, and staffing reasons. The Board certified that R.C., at the March 25 meeting with Winters, expressed a reluctance to work with the newly transferred vice principal from Spruce, with whom she did not get along during that vice principal's previous tenure at Clarke.^{2/} The record shows that the Board had a need to replace the vice principal at Clarke, due to her administrative leave, and chose the Spruce vice principal because of her previous familiarity at Clarke. In tandem with that transfer, R.C. was transferred to eliminate any potential personnel issues given her expressed issues with Spruce's vice principal in the past. The Board's interest in diminishing or avoiding conflict in the work environment is a valid educational, operational, and non-disciplinary reason for a transfer. See Paterson State Op. Sch. Dist., P.E.R.C. No. 2018-19, 44 NJPER 227 (¶65 2017) (finding a non-disciplinary transfer based on the effects of a dispute between two teachers on the

^{2/} Notably, other than a blanket denial of the Board's certified facts in the Association's briefs, R.C. submits no certification denying this claim, or any other of the Board's claims.

school environment); Asbury Park Bd. of Ed., P.E.R.C. No. 2010-87, 36 NJPER 225 (¶79 2010) (finding non-disciplinary transfer based on escalating tensions and complaints between two teachers that was adversely affecting staff and students); 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) (finding a non-disciplinary transfer based on a teacher's difficulty getting along with and communicating with co-workers, resulting in complaints). Thus, we find that the Board had valid non-disciplinary reasons for R.C.'s transfer, and conversely, the Association has not sufficiently established, by a preponderance of evidence, that the Board transferred R.C. as discipline for following her supervisor's directive.

ORDER

The Association's contested transfer petition is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioners Ford, Jones and Papero voted against this decision.

ISSUED: February 24, 2022

Trenton, New Jersey