

H.E. NO. 2006-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY,

Respondent,

-and-

Docket No. CO-H-98-363

PROBATION ASSOCIATION OF NEW JERSEY,

Charging Party.

SYNOPSIS

A hearing examiner denies a motion for summary judgment filed by the New Jersey State Judiciary seeking dismissal of a Complaint alleging that Alice Van Gieson, a CWA shop steward, was reassigned in retaliation for protected activity; specifically, organizing certain Judiciary employees to vote for CWA in a representation election. The charge also alleges that the Judiciary refused to later reassign Van Gieson when a vacancy occurred at her previous work location. The Judiciary's conduct allegedly violates 5.4a(3) and (1) of the Act. Identifying the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), the hearing examiner determined that material factual disputes prohibited granting the motion.

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Appearances:

For the Respondent, George Cohen, DAG

For the Charging Party, Fox & Fox, attorneys
(Daniel J. Zirrith, of counsel)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT

On March 31, 1998, the Probation Association of New Jersey filed an unfair practice charge against the New Jersey State Judiciary. The charge alleges that on December 16, 1997 the Judiciary announced that Alice Van Gieson, a principal probation officer II in the community service section at the Passaic probation office and a CWA shop steward at the Passaic Vicinage, was to be reassigned [involuntarily] to the child support enforcement section, effective January 5, 1998. The charge alleges that from October through December 1997 Van Gieson was "extremely active and visible" in organizing professional supervisors to vote for CWA (in a representation election between

CWA and PANJ) and that her activities were "well known to management." The charge alleges that in December 1997 and January 1998, a bill pending in the State Legislature would transfer child support functions and personnel from the Judiciary to the Department of Human Services.

The charge also alleges that CWA Local 1034 filed a grievance contesting Van Gieson's reassignment. During processing of the grievance, another employee in the title of principal probation officer II, whom Gieson replaced in the child support enforcement section, expressed interest in returning to that section and the Vicinage allegedly refused to reassign Van Gieson. The charge alleges that Van Gieson's reassignment to and subsequent refusal to reassign her out of the child support enforcement section were "retaliatory actions taken against her for protected activity on behalf of CWA Local 1034." The employer's conduct allegedly violates sections 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On October 5, 2000, a Complaint and Notice of Hearing issued. On February 8, 2001, the Judiciary filed an Answer, admitting some allegations, denying others and denying that it violated the Act. The Judiciary also asserted that the charge was not timely filed; that it acted in good faith and that the transfers were implemented pursuant to an exercise of a managerial prerogative.

On August 20, 2004, the Judiciary wrote of its intention to file a motion for summary judgment. On October 7, 2004, the Judiciary filed its motion, together with a brief and supporting certifications. On November 10, 2004, the Association filed a reply opposing the motion, together with a certification. On November 17, the Commission referred the motion to me for a decision. N.J.A.C. 19:14-4.8.

* * * *

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to

the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously--the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. Alice Van Gieson has been employed by the Judiciary for more than thirty years. In 1997 and perhaps earlier, Van Gieson was employed as a principal probation officer II in the Passaic Vicinage. Her title was included in the "professional non-case related" negotiations unit represented by CWA, the majority representative at that time.

On or about September 25, 1997, Van Gieson was appointed as a "Judiciary shop steward" for the "professional supervisors unit" on behalf of CWA, Local 1034. CWA local president James Mulholland issued a memorandum on that date to Judith Stein, Coordinator of Labor and Employee Relations for the Judiciary,

memorializing Van Gieson's designation, together with her address, social security number, job title and work location. The memorandum was copied to Richard Centanni, the Trial Court Administrator for the Passaic Vicinage.

In 1994 and 1995, Van Gieson was a member of the negotiations team for United Judicial Committee. The Administrative Office of the Courts presented Van Gieson an award for her participation in the Committee.

2. During October, November and December, 1997, Van Gieson organized work site meetings of professional supervisors and spoke individually with them to secure their vote(s) for CWA in an upcoming representation election between CWA and the Association. She also posted notices about CWA meetings in the workplace.

3. Sometime shortly before December 19, 1997, Van Gieson learned that she would be reassigned to the "child support enforcement" section. On December 19, Van Gieson filed a step one grievance contesting her "involuntary reassign[ment] to child support." Also on December 19, Van Gieson issued a memorandum to the Vicinage Assistant Chief Probation Officer Richard Traverso advising that she had received "no written communication to verify [her] transfer to the child support unit, [effective] on January 5, 1998."

4. On December 22, 1997, John Krieger, the Vicinage Chief Probation Officer, issued a memorandum to "probation management groups", advising in a pertinent part that four employees in the title of principal probation officer II, including Van Gieson, "will be reassigned" to other "sections." Van Gieson was the only principal probation officer II designated to be reassigned to the "child support enforcement section." Another named principal probation officer II was to be reassigned from the "child support enforcement section" to the "adult services section [of the] municipal court unit." Three newly hired employees in the title of "investigator" were to be assigned to the "child support enforcement section." The memorandum also provides that a principal probation officer I and a senior probation officer would also be reassigned on January 5, 1998.

On August 24, 2001, Counsel for the Judiciary issued a letter to Association counsel, responding to interrogatories served in connection with this case. Counsel for the Judiciary wrote in a pertinent portion that Patrick Niven, a Vicinage Assistant Chief Probation officer and two other named employer representatives, ". . . made the [December 1997] decision concerning the reassignment of Alice Van Gieson."

5. On January 5, 1998, Van Gieson was reassigned from the community service section to the child support enforcement section.

6. On January 13, 1998, Assembly Bill No. 1164, "an Act concerning child support reform. . ." was formally introduced in the New Jersey Legislature. The proposed legislation provided for the transfer of child support positions from the Judiciary to the Department of Human Services and defined rights of transferred employees to transfer back to the Judiciary. The legislation indicates that such "transfer(s) back" depended upon "vacancies" in the Judiciary and the exercise of that employer's "discretion."

7. CWA and PANJ had lobbied for provisions in the legislation "ensuring opportunities" to child support staff to transfer out of that enforcement unit and into "non-child support positions so that they could maintain their careers in the Judiciary."

8. On an unspecified date between January 5, 1998 and March 31, 1998, the majority representative advised "management" that the principal probation officer II who was transferred or assigned away from the child support section at or about the same time Van Gieson was transferred into the section wished to be returned to the child support section (See finding no. 4). The Judiciary did not reassign Van Gieson back to her previous position.

9. On June 9, 1998, Michael Costabile, the Passaic Vicinage Human Resources Manager, issued a memorandum to Van Gieson,

advising that no "meeting" would take place ". . . at this time since there is a pending unfair labor practice charge."

10. On June 18, 1998, Chief Probation Officer John Krieger issued a memorandum to Costabile regarding a "response to CWA charges that Van Gieson's reassignment to the child support enforcement section was in retaliation for her union activities." Krieger wrote that Van Gieson was reassigned in January, 1998 because "her skills were better-suited to child support enforcement." He also wrote that "the probation division was unaware of Van Gieson's union involvement until February 1998, a full month after her reassignment to child support enforcement." He wrote that the employer was first aware of Van Gieson's "union involvement" when she requested a leave of absence in connection with "union-related activities" sometime in February 1998.

11. The child support enforcement section of the Judiciary has not been transferred to the Department of Human Services. Assembly Bill No. 1164 did not become law.

12. On October 25, 2001, Van Gieson filed a grievance protesting the conduct of Vicinage Chief Probation Officer Patrick Niven in a discussion between them regarding the performance of a unit employee. On November 27, 2001, the grievance was sustained; the "disposition" was a "verbal reprimand" of Niven.

Employment Opportunity Commission (EEOC), alleging that she had been "unlawfully discriminated against, harassed and retaliated against because of [her] sex/female" and was "continually denied promotions to [named and unnamed] positions." She also alleged that she had been "continually differentially treated" in work and case load assignment and "retaliated against" for "complaining about discriminatory treatment and for opposing unlawful discriminatory practices."

14. In April, 2003, employer representatives Krieger and Costible met with PANJ counsel and Van Gieson. The attendees agreed that Van Gieson would be reassigned to the Wayne field office (probation division) of the Passaic Vicinage, effective June 30, 2003. Van Gieson has been reassigned to that office.

15. On August 24, 2004, the EEOC issued a "Dismissal and Notice of Rights" form to Van Gieson, advising that it was "unable to conclude that the information obtained establishes violations of the statutes . . ."

ANALYSIS

The Judiciary contends that the Association's allegations are based upon proposed legislation that was never adopted and has not been reintroduced. Van Gieson has remained employed by the Judiciary and accordingly, "no basis for the Complaint exists." It also contends that the allegation that the

Judiciary's failure to reassign Van Gieson from the child support enforcement section back to the community service section is "for her protected activity on behalf of CWA Local 1034" is meritless and not supported by any material fact.

The Association replies that the Judiciary has not provided the factual or legal support necessary to grant a motion for summary judgment.

The standard for establishing whether an employer has violated 5.4a(3) and derivatively a(1) of the Act is set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of that activity and the employer was hostile to the exercise of protected rights. Id. at 246.

The motion must be denied. I disagree with the Judiciary that "no basis for the Complaint exists" because the proposed legislation never passed. The Association has alleged that the Judiciary unlawfully reassigned Van Gieson in January 1998 and unlawfully refused to reassign her back to her original work location sometime before March 31, 1998. The issue is whether

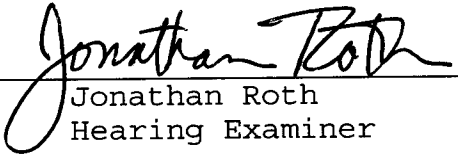
those allegedly adverse employment actions violate the standard set forth in In re Bridgewater Tp.

A material factual dispute has been raised by the parties' filings. A dispute regarding the Judiciary's knowledge of Van Gieson's role as shop steward is illustrated by CWA Local 1034's September, 1997 letter to employer representatives advising of Van Gieson's status and the Chief Probation Officer's June, 1998 memorandum advising that the probation division was unaware of Van Gieson's "union involvement" before February, 1998 (see finding nos. 1 and 10). A dispute concerning the motive for the assignment also exists; the Judiciary has certified that Van Gieson was "better-suited" for the child enforcement section and the Association has asserted that at the time of Van Gieson's assignment, pending legislation would have changed her employer to the Department of Human Services and that she was the only principal probation officer II among the four assigned that date who faced that prospect.

Accordingly, genuine issues of material fact prohibit the granting of the Judiciary's motion. A hearing shall be scheduled in this matter.

DECISION

The Judiciary's motion for summary judgment is denied.


Jonathan Roth
Hearing Examiner

Dated: August 19, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by September 1, 2005.