

P.E.R.C. NO. 2015-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF FIRE COMMISSIONERS,
FIRE DISTRICT NO. 1, MONROE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2009-332

MONROE TOWNSHIP PROFESSIONAL
FIREFIGHTERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 3170,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case filed by the Monroe Township Professional Firefighters Association, International Association of Firefighters, Local 3170 against the Board of Fire Commissioners, Fire District No. 1, Monroe Township. That decision recommended that the Commission find that the Board violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), (3), (4), and (5), when it employed non-bargaining unit, per diem firefighters to perform firefighter duties historically performed by full-time bargaining unit firefighters represented by Local 3170 and terminated the paid firefighters in retaliation for filing an unfair practice charge regarding the transfer of unit work. The Commission rejects the Board's exceptions, finding that the Hearing Examiner's comprehensive and extensive findings of both direct and circumstantial evidence of hostility to protected activity are supported by references to the transcripts and exhibits. The Commission also finds that the Hearing Examiner appropriately considered the Board's financial evidence and made witness credibility determinations, correctly determined that the relevant evidence regarding local finances and the Board's motivation for the terminations does not include the state budget, and properly applied the Bridgewater standard in determining that the Board violated the Act.

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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Charging Party.

Appearances:

For the Respondent, Joseph D. Youssouf, attorney

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

DECISION

This case is before the Commission on exceptions filed by the Board of Fire Commissioners, Fire District No. 1, Monroe Township (Board) to the Report and Recommended Decision of a Commission Hearing Examiner, H.E. No. 2014-3, 40 NJPER 354 (¶129 2013). The Hearing Examiner recommended that the Commission find that the Board violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (3), (4) and (5)^{1/} when it employed non-bargaining unit, per diem

^{1/} These provisions prohibit public employers, their
(continued...)

firefighters to perform the firefighting duties historically performed by full-time bargaining unit firefighters represented by the Charging Party, Monroe Township Professional Firefighters Association, International Association of Firefighters, Local 3170 (Local 3170) and thereafter terminated the entire paid firefighting force in retaliation for filing an unfair practice charge regarding the transfer of unit work. The Hearing Examiner rejected the Board's cost saving and tax reduction motives as pretextual. The Hearing Examiner recommends that the Commission remedy the unfair practices by ordering the Board to offer reinstatement and back pay to the two full time firefighters. We adopt his recommended decision and will order that the two terminated employees be offered reinstatement with back pay, less mitigation, and that the Board negotiate with Local 3170 for the filling of the third paid firefighter position in the event the

1/ (...continued)
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 to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and, (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Board decides to use at least three (3) firefighters on the weekday, day shift.

Hearing Examiner Perry O. Lehrer conducted 17 days of hearings on October 26 and 28, 2010; February 8, 2011; March 3 and 10, 2011; May 18, 2011; July 19, 2011; August 4 and 11, 2011; September 15, 2011; November 17, 2011; January 12, 2012; February 9 and 23, 2012; March 20, 2012; June 26, 2012; and September 21, 2012.

On October 18, 2013 the Hearing Examiner filed his Report and Recommended Decision which is now before us to adopt, reject or modify. The Hearing Examiner found that:

The Board violated subsection 5.4a(5) and derivatively (1) of the Act, when it unilaterally continued to employ per diem firefighters to fill the third firefighter position on the day shift after the first firefighter's lawsuit was resolved in early 2008 and after Local 3170 demanded that the position be filled with a full-time career firefighter eligible to be in its negotiations unit.

Further, that the Board violated subsections 5.4a(3) and (4) of the Act when it terminated the paid firefighters since Local 3170 had engaged in protected activity under the Act, the Board was aware of the protective activity and the Board was hostile toward the protected activity; Local 3170's protected conduct was a substantial or motivating factor in the Board's decision to dissolve the paid fire department the Board's cost saving and tax reduction motives were pretextual.

The Board has filed exceptions^{2/} and a supporting brief and Local 3170 has filed a brief in opposition to the exceptions.

The Board asserts:

The Hearing Examiner erred in determining that the Board terminated the paid firefighters in retaliation for their protected conduct including filing and pursuing of an unfair practice charge with PERC.

The Hearing Examiner erred in determining that the reasons proffered for terminating the part-paid component of the mixed volunteer and paid fire department were pretextual.^{3/}

The Board titles the argument section in its brief as: "The Hearing Examiner erred in determining that the Board terminated the paid firefighters in retaliation for their exercise of

2/ N.J.A.C. 14-7.3, Exceptions; cross-exceptions; briefs; answering briefs, provides in pertinent part:

(b) Each exception shall specify each question of procedure, fact, law, or policy to which exception is taken; identify that part of the report and recommended decision to which objection is made; designate by precise page citation the portions of the record relied on; state the grounds for the exception; and include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these requirements may be disregarded.

3/ The Board's brief stated, "The Board's arguments as to each of the above Exceptions are set forth in the Legal Argument section below." Since the Board provided a general exception, and then made numerous arguments within its brief under one point heading entitled "Exception I," we will do our best to consider the Board's exceptions.

protected conduct in filing and pursuing an unfair practice charge with PERC and that the reasons proffered by the Board in support of its actions were pretextual."

Findings of Fact

We begin with the standard we apply in reviewing the Hearing Examiner's Findings of Fact. We cannot review these findings de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due to fact-finder's credibility determinations and "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div.

2005), certif. den. 186 N.J. 609 (2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

In re Tp. of Bridgewater, 95 N.J. 235 (1984), is the guide for assessing if adverse personnel actions are motivated by discrimination for the exercise of protected activities in violation of subsections 5.4a(3) and, derivatively, (1) of the Act.^{4/} A Charging Party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile towards the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other

^{4/} The New Jersey Supreme Court in In re Hunterdon County Bd. of Chosen Freeholders, 116 N.J. 322, 334-335 (1989), approved the Commission's application of the Bridgewater standard for subsections 5.4a(4) and (5) under the Act as well.

motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

The Hearing Examiner issued a 79 page Report and Recommended Decision and made 66 comprehensive findings of fact supported by references to the transcripts and exhibits introduced into evidence. H.E. at 4-55, 40 NJPER at 356 to 367. His findings of fact are accurate. We adopt and incorporate the Hearing Examiner's comprehensive findings of facts and summarize the facts that are relevant to this appeal as follows.

The Board first alleges that the Hearing Examiner erred because, in determining that the Board "terminated the paid firefighters in retaliation for their filing of an unfair practice charge with PERC," he cited statements and conversations, made by a Board Commissioner after the paid firefighters were terminated that were overheard by third parties. The Hearing Examiner, H.E. at 71-72, 40 NJPER at 371, concluded:

[Commissioner] DiPierro's comments on election day regarding the firefighters' wage proposal in negotiations (citing it as the reason for their termination) are revealing. Though they were made after the decision to eliminate the firefighters, the remarks demonstrate a disposition hostile to participating with unions in the give and take process required by collective negotiations.

The record supports a finding that the Board was hostile to the protected activities of Local 3170, Mangeri and Shapter.

The Hearing Examiner's comments were made in the Analysis section of his report and refer to Finding of Fact 56. H.E. at 44-46, 40 NJPER at 365.

We reject the Board's exception. There is ample evidence in the record to support the Hearing Examiner's Finding of Facts. Additionally, he made comprehensive and extensive Findings of Fact throughout his Report supported by references to the transcripts and exhibits. His findings, many of which are based upon credibility determinations of the witnesses, include both direct and circumstantial evidence of hostility to protected activity. (e.g., See Findings of Fact 28, 31, 38 and 66; H.E. at 21-23, 27-28, 52-55, 40 NJPER at 360-361, 366-367). The proffered reason to terminate the full-time firefighters, without prior formal notice to them or to Local 3170, was pretextual, as the Fire District, based on the Board's own witness and accountant, had never been in financial distress. H.E. at 50, 40 NJPER at 366.

The Board next asserts that the Hearing Examiner erred "In commenting upon the proofs proffered by the Board in support of its decision to terminate the paid staff, the Hearing Examiner found that the Board "...provided insufficient evidence that the taxpayers of Fire District 1 were losing their properties

and/or jobs in unprecedented, record numbers.'" H.E. at p. 72, 40 NJPER at 371. The Board asserts that in arriving at his conclusions he "[I]gnored and dismissed out of hand the reasons articulated in the Board's Resolution of February 17, 2010 and the sworn testimony of the Commissioners themselves."

We reject this exception. The Hearing Examiner specifically considered these issues in detail in Finding of Fact 62, H.E. at 48-50, 40 NJPER at 366.

We find that the Hearing Examiner appropriately considered the financial evidence presented and made witness credibility determinations based on the witness testimony and the evidence.

The Board's next exception is that the Hearing Examiner erred when the Board made a motion for the Hearing Examiner to take judicial notice of The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (1st ed. 2011).^{5/} The Board argued before the Hearing Examiner that the federal report made specific reference to New Jersey at page 399: "In 2010, New Jersey Governor Chris Christie proposed chopping \$11 billion - or a quarter - of the state budget to eliminate a deficit." The Hearing Examiner denied the Board's motion, stating in pertinent part, "I need to understand what was -- the

^{5/} Local 3170 objected to the Hearing Examiner taking judicial notice of the Financial Crisis Inquiry Report.

whole case is what was the motivation of the employer at the time that they severed the employment of these firefighters.... I don't need to rely on the national economy. I don't need to rely on the state economy. I need to rely on the employer's books and the finances and what they believed. So on that basis it's really one of relevance." (7T18).

We reject the Board's exception regarding the denial of its motion. The Hearing Examiner was correct in determining that the relevant evidence to be considered in this case was the Board's finances and what they actually believed regarding their local finances and ultimately what the Board's motivation was in terminating the paid full time firefighters. Extensive evidence of the Board's financial condition was placed into evidence and appropriately considered by the Hearing Examiner in his Report. (e.g., See Findings of Fact 62 and 63; H.E. at 48-51, 40 NJPER at 366).

The Board's next exception relates to the testimony of the Board's witnesses as to why they voted for the Board's February 17, 2010 Resolution (J-13) which terminated the full time paid firefighters. See H.E. No. at 41-42, 40 NJPER at 364. The Board provided 14 questions and answers from the hearing transcripts which generally assert legitimate business reasons and the lack of any anti-union animus for voting for the resolution. We reject this exception. As set forth above, our review is guided

and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). With respect to this exception, other than providing the reference to the resolution and the transcript testimony, based on the entire voluminous record, we find no compelling contrary evidence and will not substitute our reading of the transcripts for the Hearing Examiner's first-hand observations and judgements regarding credibility determinations. See Warren Hill Reg. Bd. of Ed., supra.

The Board's final exception relies upon New Jersey cases that essentially stand for the proposition that a municipal employer may abolish positions or lay off employees for reasons of economy or efficiency if acting in good faith. The cases cited by the Board predominantly pre-date the Act and do not involve improper or illegal motives for personnel actions. We reject this final exception as we find, based on the entire record: that the Hearing Examiner properly applied the Bridgewater standard in determining the Board violated subsections 5.4a(3) and (4) of the Act; that Local 3170 engaged in protected activity under the Act; that the Board was aware of the protected activity; and that the Board was hostile toward that protected activity which resulted in the Board terminating the full time paid firefighters. We also agree with his determination that the Board's proffered reasons for the

termination were pretextual. See H.E. No. at 63-76, 40 NJPER at 369-372.

Having found that the full time paid firefighters were terminated in violation of the Act, we adopt the Hearing Examiner's recommendation that the Board violated subsection 5.4a(5) and derivatively (1) of the Act, when it unilaterally continued to employ per diem firefighters to fill the third firefighter position on the day shift after the first firefighter's lawsuit was resolved in early 2008 and after Local 3170 demanded that the position be filled with a full-time career firefighter eligible to be in its negotiations unit.

ORDER

A. The Board of Fire Commissioners, Fire District No. 1, Monroe Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to hire a full-time firefighter to fill the third position on the paid shift.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the paid firefighters in retaliation for their protected activities.

3. Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act, more specifically terminating the paid firefighters for filing and pursuing an unfair practice charge with the Commission.

4. Refusing to negotiate in good faith with Local 3170 over terms and conditions of employment of its members, particularly by unilaterally employing a per diem firefighter on a regular basis as the third firefighter on the paid weekday, day shift.

B. That the Board take the following affirmative actions:

1. Offer to reinstate Firefighters Michael Mangeri and David Shapter who were terminated effective March 5, 2010, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

2. Make the terminated employees who accept offers of reinstatement whole for all salary and benefits due from March 5, 2010 to the present, less mitigation, with interest at the rate set by Court rules.

3. In the event the Board determines to use at least three (3) firefighters on the weekday, day shift, negotiate in

good faith with Local 3170 over the filling of the third paid firefighter position.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

5. Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

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

ISSUED: September 18, 2014

Trenton, New Jersey



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to hire a full-time firefighter to fill the third position on the paid shift.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the paid firefighters in retaliation for their protected activities.

WE WILL cease and desist from discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act, more specifically terminating the paid firefighters for filing and pursuing an unfair practice charge with PERC.

WE WILL cease and desist from refusing to negotiate in good faith with Local 3170 over terms and conditions of employment of its members, particularly by unilaterally employing a per diem firefighter on a regular basis as the third firefighter on the paid weekday, day shift.

WE WILL offer to reinstate Firefighters Michael Mangeri and David Shapter who were terminated effective March 5, 2010, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

WE WILL make the terminated employees who accept offers of reinstatement whole for all salary and benefits due from March 5, 2010 to the present, less mitigation, with interest at the rate set by Court rules.

WE WILL in the event the Board determines to use at least three (3) firefighters on the weekday, day shift, negotiate in good faith with Local 3170 over the filling of the third paid firefighter position.

Board of Fire Commissioners, Fire
District 1, Monroe Township
(Public Employer)

Docket No. CO-2009-332

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372