P.E.R.C. NO. 2017-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MORRIS,

Charging Party,

-and- Docket No. CO-2015-227

MORRIS TOWNSHIP
SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's motion for summary judgment and denies the SOA's cross-motion for summary judgment. The SOA's charge alleged that the Township disciplined a sergeant in retaliation for exercising rights guaranteed to him by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., in violation of subsections 5.4a(1) and (3) of the Act. The Commission finds that the subject email for which the sergeant was disciplined was not protected by the Act because it was extreme and crude, demonstrated unprofessional and disrespectful behavior, undermined authority, and showed contempt for the administration and township manager. The Commission also finds that the email had the potential to promote disharmonious labor relations and that the Township had a legitimate business justification for disciplining the sergeant because his e-mail was inconsistent with departmental rules of conduct. Accordingly, the Commission dismisses the complaint.

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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Respondent.

Appearances:

For the Respondent, Trimboli & Prusinowski (James T. Prusinowski, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo, LLC (David J. DeFillippo, of counsel)

DECISION

This case comes to us by way of a motion and cross-motion for summary judgment.[1/] On March 23, 2015, the Morris Township Superior Officers Association (SOA) filed an unfair practice charge against the Township of Morris (Township). The charge alleges that the Township brought disciplinary charges against Sergeant Sean O'Hare (O'Hare) in retaliation for his exercise of rights guaranteed to him by the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 et seq., in violation

1/ Pursuant to N.J.A.C. 19:14-4.8(a), the Chair referred the motion and cross-motion to the full Commission.

of N.J.S.A. 34:13A-5.4a(1) and (3).[2/] For the reasons that follow, we grant summary judgment in favor of the Township and deny the SOA's cross-motion.

The Director of Unfair Practices issued a Complaint and Notice of Hearing on December 16, 2015. On March 31, 2016, the Township filed its motion, a supporting brief, and the certification of its labor counsel with exhibits.[3/] On May 16, the SOA filed its cross-motion, a supporting brief with exhibits, and the certification of O'Hare. On June 3, the Township filed a letter brief in response to the SOA's cross-motion.

The essential facts are undisputed. The Township's police officers are represented by the Patrolmen Benevolent Association (PBA). Superior officers in the rank of sergeant, lieutenant,

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2/ 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."

3/ Affidavits or certifications submitted in support of or in opposition to a motion for summary judgment must be based on personal knowledge, and therefore, an attorney's certification will not normally be a proper vehicle to authenticate a party's exhibits or to establish the facts of the dispute. See PBA Local 187, P.E.R.C. No. 2005-61, 31 NJPER 60 (¶29 2005) and cases cited therein. While the better practice is for supporting affidavits or certifications to come from the party, neither the SOA nor the Township has raised an issue as to the authenticity of the other's exhibits.

and captain are represented in one unit. Patrol officers are represented in another unit (rank and file unit). Each unit has its own officers, negotiations committee, and collective negotiations agreement. O'Hare is the SOA's financial secretary and a member of the SOA's negotiations team.[4/]

The Township and the SOA are parties to a collective negotiations agreement that expired on December 31, 2013.[5/] In October 2013, the Township and the SOA began negotiations for a successor agreement. After two meetings that fall, they agreed to suspend negotiations until the Township reached a successor agreement with the rank and file unit.

The Township was represented in negotiations with each unit by Township Administrator Timothy Quinn (Quinn) and the Township's labor counsel. Quinn had served as the Township police chief for three years before becoming Township Administrator.

O'Hare and Heather Glogolich, the president of the rank and file unit, established an email chain comprised of the personal email addresses of every current member of the PBA. The email chain is generally used to discuss issues related to PBA business between monthly meetings.

4/ The record is unclear whether the rank and file unit also had a financial treasurer or whether O'Hare served as financial treasurer for both units.

5/ The parties have entered into a successor agreement.

On June 14, 2014, O'Hare sent an email from his personal computer and email account to the entire PBA membership using the union email chain.[6/] The email contained both a picture and text. O'Hare is standing in the foreground of the picture. Behind him is a pool with a water fountain. O'Hare is positioned in front of the fountain so as to give the illusion that he is urinating. The urine is streaming upward. With his other hand, he is giving a thumbs up. The text of the email was as follows:

> PBA #133's latest correspondence with BA Quinn.....
>
> Wash your mouth out with this Tim!
> Gargle with it!
>
> If you have to swallow, just swallow like 2% of it.
>
> Jerk off.
>
> Be safe!
> SPO

O'Hare intended the reference to 2% in the email to be understood as the 2% limitation on salary increases when the terms of a successor negotiations agreement are established pursuant to the Police and Fire Public Interest Arbitration Reform Act. See N.J.S.A. 34:13A-14 to -21. Although the Township was not in interest arbitration, Quinn stated during the first negotiations session with the SOA and again in June 2014, when the Township was in negotiations with the rank and file

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6/ A copy of the email is appended to this decision. O'Hare's email address has been redacted.

unit, that the Township would not exceed the 2% limit imposed during interest arbitration. O'Hare certified that the Township's stance was extremely frustrating to the members of the PBA and SOA because it would be difficult to achieve any salary increases if the Township held firm to its position and that he expressed his frustration with the Township and Quinn in the email.[7/] Quinn further certified that the email was sent in response to an email thread among PBA members.

On September 8, 2014, Quinn received a copy of the email but without the email thread to which it responded. The email was sent anonymously through regular mail to Quinn's office. The Township's chief of police initiated an internal affairs investigation. A police captain conducted the investigation and concluded that O'Hare violated Departmental Rule and Regulation 3.2.6, "Conduct Unbecoming a Police Officer," and recommended that disciplinary action be taken against him. After reviewing the internal affairs report and an audio-recording of O'Hare's internal affairs interview, in which O'Hare admitted preparing and disseminating the email to PBA members, the chief directed the preparation of disciplinary charges. On December 1, O'Hare was served with a Notice of Charges and Hearing setting forth a charge of violating Rule 3.2.6 and proposing a penalty of 20 days

7/ Presumably, O'Hare was concerned a 2% salary increase would only cover the cost of step increments on the salary guide.

suspension without pay.[8/] The Notice was signed by the chief of police.

The Township and the rank and file unit settled the terms of a successor agreement on April 15, 2015. The SOA and the Township settled the terms of a successor agreement a short time thereafter.

On July 22 and 23, a departmental hearing was conducted. O'Hare did not testify at the hearing, but his internal affairs interview was submitted in evidence, along with other exhibits.[9/] On November 23, the hearing officer issued his decision, finding that O'Hare violated Rule 3.2.6 and that his conduct was not constitutionally protected speech. On January 19, 2016, the hearing officer issued his recommendation regarding the penalty, which was that O'Hare receive a five-day suspension without pay. On March 16, the Township adopted a resolution accepting the recommended decision and penalty of the hearing officer. On March 24, O'Hare filed a complaint in the Superior Court, Law

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8/ During the departmental hearing that ensued, the chief testified that he thought he had proposed a ten-day suspension without pay and could not explain why the Notice set forth a twenty-day suspension. During the penalty phase of the hearing, the Township urged the imposition of a ten-day suspension.

9/ The Township included the hearing officer's decisions, among other documents, with its motion. Both parties included with their respective motion papers portions of the transcript of the departmental hearing. At our request, the Township provided us a complete transcript of the two-day hearing.

Division, appealing the discipline pursuant to N.J.S.A. 40A:14-150.[10/]

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(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder 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 fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact.

The Act entitles public employees to "form, join and assist any employee organization or to refrain from any such activity." N.J.S.A. 34:13A-5.3. Employees are entitled to choose a majority representative to negotiate for them over new or successor

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10/ In its initial brief, and again on June 30, 2016, the Township requested that this matter be stayed pending the outcome of the disciplinary appeal in the Law Division. The SOA opposed the request. On July 5, the Chair denied it. We have not been apprised of the status of the disciplinary appeal.

contracts, proposed new rules or modifications of existing rules, grievances disciplinary disputes, and other terms and conditions of employment. Id.

N.J.S.A. 34:13A-5.4a(3) prohibits an employer from retaliating against an employee for exercising his or her rights as guaranteed under N.J.S.A. 34:13A-5.3. The seminal case for deciding whether a violation of N.J.S.A. 34:13A-5.4a(3) has occurred is Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235, 241-45 (1984). Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

Sometimes the record demonstrates that both motives unlawful under our Act and other 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. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-

union animus was a motivating or substantial reason for the personnel action.

In Bridgewater, the Township was in negotiations with the Public Works Association over initial terms and conditions of employment for parks and public works employees. The director of the parks department called a meeting with the parks employees. During the meeting, envelopes were handed out to the employees notifying them of pay increases, which had not been negotiated with the union. One of the employees who had been active in organizing the union interrupted the meeting, protesting that it was illegal without an Association representative being present. Shortly after the meeting, and without the notice required by the employer's handbook, the employee was transferred and reduced in pay. We determined that the employee's protest of the Township's illegal unilateral pay increase was protected by the Act, that the reasons given by the Township for its action were pretextual, that is, were in fact not relied upon, and that they did not constitute legitimate business justifications. Finding substantial evidence in support of our factual findings, and agreeing that the test we adopted for determining whether an unfair labor practice has been committed when dual motives are asserted, the Court affirmed our conclusion that the Township violated N.J.S.A. 34:13A-5.4a(1) and (3).

The case law that has developed under the Act regarding a retaliation charge has usually centered around conduct or speech occurring during negotiations and grievance hearings. In that context, we provided the following guidance:

> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the other's actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment.
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> . . . .
>
> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.
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> [Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).]

In Black Horse Pike, the Board placed two letters in the personnel file of a teacher criticizing him for his comments at a meeting convened by the school principal to discuss another

teacher's resignation without having provided the requisite advance notice. The recipient of the letters also served as the union vice president and was attending the principal's meeting in that capacity. During the meeting the resigning teacher became upset, whereupon the union vice president announced an end to the meeting. When the principal attempted to press his point about a teacher's obligation to her students, the vice president responded that he was present to represent the teacher, not students, and that his role and that of the Association was to protect the teacher in question. Initially, the Association took no action regarding the letters. However, it filed an unfair practice charge alleging violations of N.J.S.A. 34:13A-5.4a(1) and (3) after the Association vice president overheard the principal comment about him that the principal wanted to "kill that son-of-a-bitch" and his supervisor respond that he did not think the vice president would ever be a teacher. In our analysis, we noted that sending the critical letters was not itself a violation of the Act. Rather, it was the subsequent conversation between the principal and the employee's supervisor and the placement of the letters in his personnel file indicating that the Board intended the letters to be reviewed when his performance was being evaluated that resulted in our conclusion that the Board had violated the Act.

While Bridgewater and Black Horse Pike provide an analytic framework for evaluating when adverse action against an employee constitutes retaliation due to the employee having engaged in protected activity, those precedents are distinguishable given that their facts are so unlike those here. Nothing that the employees did in Bridgewater and Black Horse Pike was remotely offensive or potentially affected the behavior of other employees relative to the employer or the relationship between the employer and the majority representative.

We have found slightly more analogous behavior to that here to be protected where it was provoked by the employer or its representatives. For example, in Carteret Borough, P.E.R.C. No. 2016-28, 42 NJPER 231 (¶66 2015), we found that a police officer's conduct was protected activity when he engaged in a heated exchange with the mayor at a public meeting calling him a "joke" and telling him to "please shut up" after the mayor continued to interrupt him. Similarly, in State (Stockton State College), P.E.R.C. No. 2011-78, 37 NJPER 200 (¶63 2011), we found that a painter who also served as president of the local affiliate was engaged in protected activity when he approached his supervisor about the hiring of temporary workers and the supervisor's future son-in-law even though the discussion deteriorated into a shouting match during which each party hurled profanities toward the other. And in Middletown Tp. Bd. of Ed.,

P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. denied, 149 N.J. 35 (1977), we found that the association's grievance co-chairperson, a district teacher, was engaged in protected activity when during a heated board meeting, he called the author of the district's annual Vandalism, Violence, and Substance Abuse Report a "lying scuzball" and alleged that a board member had a conflict of interest and should not be participating in negotiations. The teacher denied knowing who drafted the report, while an assistant superintendent testified that it common knowledge he prepared it. We concluded that the board violated the Act when eight months after that meeting, a letter of reprimand was issued to the teacher citing the lying scuzball comment. We also found that "even if the remarks were not protected, the Board would not have issued a reprimand eight months later absent its hostility to intervening Association activity," which included prohibiting the Association from posting an unfair practice charge concerning other contested employer conduct on an Association bulletin board in school.

While some leeway has been allowed for adversarial and impulsive behavior during negotiations and grievance meetings and, as in Carteret Borough and Middletown Tp. Bd. of Ed, at public meetings at which employee representatives have addressed union concerns, such representational conduct may lose its

statutory protection if it indefensibly threatens workplace discipline, order, and respect. Thus, for example, in State of New Jersey (Department of Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001), we found that an employee lost the protection of the Act when he engaged in a harangue with a supervisory employee, refusing a request to lower his voice and yelling in locations accessible to patients and staff of the facility at which he was employed as a teacher.

Similarly, in New Jersey Transit Bus Operations, Inc., H.E. No. 85-41, 11 NJPER 362, 365 (¶16128 1985), adopted P.E.R.C. No. 86-31, 11 NJPER 586 (¶16205 1985), the Hearing Examiner found that a former New Jersey Transit (NJT) bus driver failed to make a prima facie showing sufficient to support an inference that any protected activity on his part was a substantial or motivating factor in NJT's decision to discharge him. However, the Hearing Examiner also found that even assuming the driver had made that showing, NJT established that it discharged the driver for legitimate business reasons - his loud and profane outburst toward a supervisor, asking him, "Who the f.... are you to talk to me like that? What am I, a piece of s...." We adopted the Hearing Examiner's report and dismissed the complaint.

In fact, we have never held that an employee is completely immune from adverse action for conduct that goes beyond the bounds of propriety. Rather, we have found such conduct

unprotected or, even if initially protected, to have lost the protection of the Act. For example, in New Jersey Department of Education, P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985), the CWA filed a charge alleging that a teacher who was also a CWA shop steward was reprimanded in retaliation for engaging in protected conduct. The reprimand stated in relevant part:

> It has come to this writer's attention that on April 16, 1982, you exhibited behavior unbecoming a staff member of the New Jersey Job Corps Center on several occasions in less than an eight-hour period of time; further, that your behavior covered a wide range of offenses that would shock a reasonable person:
>
> (1) That you insulted and attempted to intimidate Corpsmembers, accusing them of being irresponsible and used;
>
> (2) That you attempted to bring a visitor on Center, encouraging this visitor to ignore Center rules regarding entry, and encouraging the visitor to become belligerent to a point that endangered and embarrassed all involved.
>
> Given that you violated some basic ethical practices, you should be advised that your behavior is not becoming to a professional educator and employee of the New Jersey Job Corps Center, and should not occur in the future.
>
> Should you choose to continue to exhibit behavior of this nature, action commensurate with your behavior will be taken.

According to the Hearing Examiner's report, the teacher had played an active role in picketing at the Center on April 16, 1982 and "got into a discussion" with the main gate security

guard regarding a requirement, applicable to all visitors pursuant to regulation, that the visiting local union affiliate president produce identification before being permitted entry. See H.E. 85-19, NJPER Supp. 643 (¶170 1984).

Addressing the charge on exceptions filed by the State, the Commission stated:

> [A]n employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative. Black Horse Pike, supra; Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216, 217 (¶11108 1980).
>
> We hold, based on our application of these principles, that the reprimand did not violate the Act.
>
> We do not find, based on our reading of the reprimand, any impermissible connection between [the teacher's] employment status and her role as an employee representative. She was not criticized for engaging in protected activity. Rather, the criticism was directed to her purported violation of established regulations at the Job Corps Center and insulting and intimidation of students at the Center. Accordingly, we dismiss this aspect of the Complaint as well.

Likewise, in Berkley Tp., P.E.R.C. No. 86-13, 11 NJPER 461 (¶16164 1985), we affirmed a Hearing Officer's decision in which he found that a police officer's manner and method of presentation at a Council budget meeting (i.e., speaking for an hour, hollering statements that were out of order, unorthodox and irrational behavior, approaching the microphone in a tone of

anger, verbally chastising members) rendered his activity unprotected because it exceeded the bounds of propriety. Compare, East Orange Bd. of Ed., H.E. No. 2008-009, 34 NJPER 173 (¶71 2008), adopted P.E.R.C. No. 2009-24, 34 NJPER 374 (¶121 2008)(board of education violated 5.4a(1) when its principal repeatedly referred to union's building representative as "Sour Juice" in front of several unit members, among other things; remarking that the term was derogatory and inappropriate to say in front of unit members, amounted to name-calling, sent the message to the principal's subordinates that it was alright to ridicule the building representative, was an attempt to weaken support for the union and interfere with its activities; term served no legitimate purpose and was a reflection of the principal's hostility to building representative; actions were inconsistent with good labor relations.)

We have also considered cases involving the imposition of discipline for union-related communications. In Township of Hillsborough and Hillsborough PBA Local No. 205, P.E.R.C. No. 2000-82, 26 NJPER 207 (¶31085 2000), rev'd 27 NJPER 266 (¶32095 App. Div. 2001), we concluded that Hillsborough Township violated N.J.S.A. 34:13-5.4a(1) and (3) by disciplining a corporal for sending, in his capacity as the PBA president, a letter to a neighboring PBA apologizing for a Hillsborough officer's ticketing of the mother of an officer employed in the neighboring

police department. In the letter, the corporal referred to the ticketing officer as a "bad apple" for breaking the "honor code," which was understood to mean that Hillsborough officers had a practice of not issuing traffic summons to other officers and their relatives. The corporal prepared the letter on his own time and at the suggestion of other PBA members. In concluding that the violations occurred, we found that the corporal was singled out for discipline and that the Township did not have an operational reason for disciplining him. The Township appealed.

The Appellate Division of the Superior Court reversed. The Court stated that there was no evidential basis for the finding that the corporal had been singled out for discipline or that PBA members wanted the corporal to apologize for issuing the ticket. Rather, the membership was upset that the ticketing officer had not returned the telephone calls of the neighboring officer whose mother received the summons. The Court also observed that our decision made no mention of the Township's business justification for disciplining the corporal as explained by the Hearing Examiner. Hillsborough wanted the public to know that there was no sanctioned honor code and the police department would apply the law to all citizens evenly. The Court agreed with Hillsborough that the content of the letter was improper and that the discipline of the corporal based on the letter could not support a finding of an unfair labor practice.

Turning to whether O'Hare's conduct was protected, we find that there are some indicia that it was. First, he sent the email from his personal email account to the personal email accounts of PBA members only,[11/] highlighting the 2% cap set by Quinn during negotiations. Although the SOA was not in active negotiations with the Township when O'Hare sent the email, we take notice of the fact that it is not uncommon for the terms reached by the first unit to settle a collective negotiations agreement with an employer to dictate the terms of the other units' collective negotiations agreements. Given O'Hare's position on the SOA negotiations team and as its financial secretary, we can assume he was invested in the status of negotiations. The PBA members who received the email understood that the 2% reference was to the Township's salary offer during negotiations.

Had O'Hare communicated his displeasure with the Township's negotiations position without such graphic vulgarity, profanity, and contempt of the Township Administrator, we likely would have found it to be protected activity.[12/] Given the unique

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11/ While it appears that O'Hare did not intend Quinn to see the email, the post does not state "confidential" or include a disclaimer from further disclosure.

12/ However, the SOA has not tied O'Hare's sending of the email to his duties as financial secretary. Nor has it done so with regard to his role on the SOA's negotiations team. For instance, it has not shown that O'Hare sent the email for the purpose of informing SOA members of the status of

(continued...)

characteristics, content, and consequences of his email, however, we are constrained to find that O'Hare forfeited the protection of the Act. That is to say, we cannot find that our Act was intended to protect an officer's communication to other members, including his subordinates, depicting him urinating, telling his former police chief, now administrator to drink the officer's urine, and calling him a jerk off. The email was extreme and crude, demonstrated unprofessional and disrespectful behavior, undermines authority, and shows contempt for the administration and Quinn. Additionally, the uncivil post was disseminated to the local newspapers and brought undue embarrassment to the Police Department and the Township. Further, the email had the potential of promoting disharmonious labor relations. For these reasons and the fact that the email was also sent to lower ranking officers, we are satisfied that O'Hare's conduct was not protected.

We are aware that at the departmental hearing, PBA President Glogolich testified, generally, that she had heard both officers and supervisors in the Police Department use profanity and make

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12/ (...continued)
negotiations with the Township. And although O'Hare was not on the negotiations team for the rank and file unit, the SOA has not shown that the email was intended to inform rank-and-file officers of the status of their negotiations. It also has not shown that the email was prompted by the thread of which O'Hare claims it was a part. Moreover, O'Hare's own explanation that he was merely trying to be humorous suggests that there was little, if any, other communicative intent behind the post.

disparaging comments about Township officials without being disciplined. However, she also admitted that she was not aware of any officer sending an email comparable to O'Hare's. She also admitted she did not think it was proper for O'Hare to send the email. Lieutenant Hall, the SOA President, when asked at the hearing if the email was inappropriate, answered, "Yes."[13/] Even O'Hare acknowledged that the email was inappropriate. Finally, O'Hare's posting was not impulsive or provoked, and it clearly crossed the line between permissible and impermissible conduct.

We also note that the SOA has not established that the Township was hostile toward protected activity in general, and we find no impermissible connection drawn by the Township between O'Hare's employment status and his role as an employee representative. Questioned at the departmental hearing about his reaction to the email, Quinn testified that he was concerned that it undermined the Office of the Chief of Police and that rather than positively influencing subordinates, it made the superior officer's command level job more difficult. Likewise, the Police

13/ At the departmental hearing, Hall related an incident at a union meeting many years earlier, during a schism between PBA and FOP members, when a lieutenant said, "You're all a bunch of fuckers and you had the chance to join the FOP." No discipline was imposed, and the officer apologized. We do not find that conduct similar to O'Hare's. We also observe that not only did O'Hare not apologize for his conduct, he said during his internal affairs interview that he would do it again. Moreover, the fact that no discipline was imposed in the earlier case does not support the SOA's claim that the Township was motivated by anti-union animus when it disciplined O'Hare.

Chief emphasized the disrespectful nature of the post and the effect of its dissemination to patrolman. Nothing in their testimony suggested that either one of them was hostile to the union or O'Hare's role as a union official.

We also find that the Township had a lawful motive to discipline O'Hare because his opprobrious email was inconsistent with Departmental Rule 3.2.6, which provides as follows:

> Due to the nature of police work, the need for organizational cohesion and cooperation, the awesome power and public trust granted police officers, the autonomy they often work under and the credibility needed to sustain effective law enforcement; police officers must be held to the highest standard in order for a police department to carry out its law enforcement mission. Accordingly, police officers shall conduct themselves at all times, both on and off duty, with high ethical standards, so as not to bring disrespected upon themselves as police officers or upon the Morris Township Police Department.
>
> Conduct unbecoming a police officer is grounds of disciplinary action and shall be defined as any improper conduct which tends to weaken public respect or confidence in the police department or which adversely impacts the confidence amongst fellow officers. This conduct includes but is not limited to:
>
> - unlawful, disorderly, immoral, deceitful, dishonest or unethical conduct by a police officer that adversely affects the morale, efficiency or good order of the police department or damages the reputation of the officer or department.
>
> - cowardly or other dishonorable conduct by a police officer that injures or puts at risk any person or which tends to lower public confidence in the

> officer or police department or the mutual confidence among police officers.
>
> - slander, false reporting or any means of retaliation by a police officer against any department employee for their official acts.
>
> - The willful violation of the code of conduct as set forth in the Morris Township Police Department manual including the Law Enforcement Code of Ethics.

While the email was allegedly O'Hare's poor attempt at humorous expression of his frustration about the Township's salary position, its derisive comments focused on Quinn, a Township official. Though Quinn is not in O'Hare's direct chain of command, it is necessary to foster civil relations between the Police Department and other arms of the Township's operations. In addition, as set forth in Rule 3.2.6, police officers are held to high ethical standards both on and off duty, so O'Hare's off-duty action does not take his actions outside of the scope of Rule 3.2.6. As the Court stated in Appeal of Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960), an appeal from disciplinary action taken on account of an officer's off-duty conduct:

> It is settled in this State that a police officer's misconduct need not have occurred while he was on duty. Suspension or even removal may be justified where such misconduct occurred while he was off-duty, as here. Were the matter otherwise, the desired goal of upholding the morale and discipline of the force, as well as maintaining public respect for its officers, would be undermined. Nor need a finding of misconduct be predicated upon the violation of any particular rule or regulation, but may be

> based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.
>
> [Citations omitted.]

O'Hare admitted the inappropriateness of his email during his internal affairs interview. During the departmental hearing, Lt. Hall, a defense witness, acknowledged that O'Hare's email was "in poor taste," and PBA President Glogolich, another defense witness, admitted that it was improper too. Glogolich also testified that the email appeared in newspapers. Clearly, the email adversely impacted O'Hare's reputation, the PBA's reputation, and the reputation of the entire police department. It indefensibly threatened workplace discipline, order, and respect. State of New Jersey (Department of Human Services), supra.

Turning to the SOA's second claim, an employer independently violates N.J.S.A. 34:13A-5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill

Tp. The Township had a legitimate business justification for disciplining O'Hare, as more fully discussed above.[14/]

For the reasons expressed in this decision, the Township's motion for summary judgment is granted, and the SOA's cross-motion is denied.

ORDER

The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioners Bonanni and Wall recused themselves.

ISSUED: September 22, 2016

Trenton, New Jersey

14/ The Township also raised an argument that O'Hare's conduct was not constitutionally protected speech. The SOA did not respond to this argument, and we find it unnecessary to address it.

Appendix

From: Sean O'Hare <[redacted]>
Date: June 14, 2014

PBA #133's latest correspondence with with BA Quinn.....

wash your mouth out with this Tim!
Gargle with it!

If you have to swallow, just swallow like 2% of it.

Jerk off.

Be safe!
SPO