

P.E.R.C. NO. 2018-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ACADEMY FOR URBAN LEADERSHIP
CHARTER HIGH SCHOOL,

Respondent,

-and-

Docket No. CO-2017-090

ACADEMY URBAN LEADERSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the Charter School seeking to dismiss the Association's unfair practice charge. The charge alleges that the Charter School violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by changing the last day of the school year for staff from June 28 to June 30, 2016 in retaliation for the Association filing a representation petition. The Commission finds there are genuine issues of material fact requiring an evidentiary hearing, including when the Charter School made the change to the calendar in relation to the filing of the petition.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Jackson Lewis (James J. Gillespie,
of counsel)

For the Charging Party, Oxfeld Cohen (William P.
Hannan, Esq., of counsel)

DECISION

This case comes to us by way of the Academy for Urban Leadership Charter High School's (AULCHS) motion for summary judgment. On October 25, 2016, the Academy Urban Leadership Education Association (Association) filed an unfair practice charge against the AULCHS alleging that it violated section 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations

^{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. . . ; and (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
(continued...)

Act, N.J.S.A. 34:13A-1 et seq. when it changed the last day for staff from June 28 to June 30, 2016 in retaliation for the Association filing a representation petition.

On March 28, 2017, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On May 31, the Board filed a Motion for Summary Judgment, together with exhibits, a certification, and brief. On June 26, the Association filed a brief in opposition to the motion, together with exhibits and certifications. On July 6, the Chair referred the motion to the full Commission. N.J.A.C. 19:14-4.8(a).

AULCHS is a charter school located in Perth Amboy, New Jersey. The Association is the duly certified collective negotiations representative for all non-supervisory certificated employees of AULCHS. The parties are presently in negotiations for an initial collective negotiations agreement. The Association initially conducted the organization campaign during the 2015-2016 school year and filed a petition to represent AULCHS employees on March 29, 2016. The Association was certified by PERC as the collective negotiations representative for AULCHS employees on June 1, 2016.

Christopher Tereshko was employed at AULCHS from November 2011 to February 2017. In the 2015-2016 school year, he was the

1/ (...continued)
guaranteed to them by this act.”

lead organizer for the Association. He certifies that prior to the 2015-2016 school year, the last day for teachers was never as late as June 30. He further certifies that at a May 9, 2016 staff meeting, Dr. Collazo, the lead administrator, was asked why the calendar was changed and Collazo responded that the contracts stated that staff members worked until June 30.

The parties are in dispute about when the calendar change was made setting out June 30, 2016 as the last day for teachers. Robert Fink, President of the AULCHS Board of Trustees, certifies that a calendar listing June 30 as the last day for teachers was approved at a May 26, 2015 Board meeting,^{2/} ten months before the Association filed its representation petition. The AULCHS has included as an exhibit a copy of the 2015/2016 school calendar listing June 30 as "the last day of staff as per contract," which also states that it was "BOARD APPROVED 5/26/15."

Tereshko asserts that the original 2015-16 calendar that was approved by the Board on May 26, 2015 provided that June 28, 2016 was the last day for staff, and that the calendar included as a Board exhibit is a copy of the calendar made subsequent to the Association's filing of its representation petition. Tereshko asserts that the original 2015-2016 calendar listed June 28, 2016 as the last day for teachers. The Association included a copy of

^{2/} The minutes from the May 26, 2015 meeting simply state that the Board approved the 2015-2015 school calendar and provide no specifics as to the calendar itself.

the "original" calendar as an exhibit, which also states that it was "BOARD APPROVED 5/26/15." This version of the calendar can still be accessed online.^{3/}

The Association also included a certification of Anthony Massaro, who was employed as an administrator for part of the 2015-16 school year. He certifies that June 30, 2016 was not listed as the last day for teachers on the calendar he had displayed in his office. He recalls having a personal scheduling commitment at the end of June 2016, and remembered noting that he was available at the end of June after referring to the calendar.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of

^{3/} <http://aulcs.org/wp-content/uploads/2016/05/AUL-Calendar-2015-2016.pdf>

protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

N.J.S.A. 34:13A-5.4a(1) prohibits a public employer from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. An employer violates this section, independently of any other violation, if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification and, derivatively, when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J. 235, 240-245 (1984). Bridgewater established that the 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 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. 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 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.

There is a genuine issue of material fact with regard to when the Board made the change to the 2015/2016 calendar designating June 30 as the last day for teachers. On this record, after considering the alternate calendar produced by the Association, as well as Tersehko's and Massaro's certifications, we cannot conclude, as the Board asserts, that it made the calendar change at its May 26, 2015 meeting, several months prior to the Association's filing of its representation petition. However, as the basic legal framework under Bridgewater establishes, even if it is found that the Board made the change subsequent to the filing of the Association's representation petition that does not automatically equate to a violation of the

Act. We remand this matter to the Hearing Examiner for an evidentiary hearing to resolve the factual and legal issues.

ORDER

The Academy for Urban Leadership Charter High School's motion for summary judgment is denied. This case is remanded for an evidentiary hearing.

BY ORDER OF THE COMMISSION

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

ISSUED: August 17, 2017

Trenton, New Jersey