

H.E. NO. 2013-13

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

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-2010-373

POLICEMAN'S BENEVOLENT ASSOCIATION,
LOCAL 124,

Charging Party.

SYNOPSIS

A Hearing Examiner denies Respondent's Motion for Summary Judgment, finding there are material disputes of fact. The Association alleged that the Chief of Police refused to appoint the Association President to the Canine Officer position based upon his protected activity. The Respondent denies this and maintains the appointment was made based upon qualifications. Thus, a plenary hearing is required.

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Appearances:

For the Respondent
Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys
(Adam S. Abramson-Schneider, of counsel)

For the Charging Party,
Mets, Schiro & McGovern, LLP
(Kevin P. McGovern, of counsel)

MOTION FOR SUMMARY JUDGMENT

On March 26, 2010, Policeman's Benevolent Association, Local 124 (PBA) filed an unfair practice charge with the Public Employment Relations Commission against the Township of Middletown (Township), alleging that the Township violated sections 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee

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

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge alleges that on March 9, 2010, Police Chief Robert Oches (Oches) failed or refused to appoint PBA President Bernie Chenoweth (Chenoweth) to the Canine Officer position because of Chenoweth's protected activity. On May 11, 2010, the Township filed a position statement denying that it violated the Act.

On December 6, 2010, the Deputy Director of Unfair practices issued a Complaint and Notice of Hearing. On December 23, 2011, the Township filed an Answer denying it had violated the Act and asserting several affirmative defenses. On April 16, 2012,^{2/} the Township filed a Motion for Summary Judgment, with a brief, certified statement of Chief Robert Oches and exhibits. On April 25, 2012, the PBA filed a response opposing the Motion, a brief, certified statement of Officer Bernard Chenoweth, and exhibits. On September 17, 2012, the Commission referred the motion to me. 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 that the movant or cross-movant is entitled to its requested

1/ (...continued)
employees from the exercise of the rights guaranteed by this act."

2/ Between January 2011 and April 2012, the matter was assigned to a Hearing Examiner who retired in January 2012. The case was thereafter reassigned to me.

relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995)

("Brill") establishes the standard to be used in deciding whether a genuine issue of material fact precludes summary judgment. We 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. Brill at 540.

A motion for summary judgment should be granted cautiously and is not a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (1981); Essex Cty. Ed. Serv Comm., PERC No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, PERC No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying on the pleadings, viewed most favorably to the PBA, the summary judgment record established the following facts.

FACTS

PBA Local 124 represents all rank and file police officers employed by the Township.

Corporal Bernard Chenoweth is the President of PBA Local 124, and has been employed by the Township for twenty four (24)

years. He is also a member of the SWAT team. Chief Robert Oches is the head of the Police Department.

On November 12, 2009, Oches sent or posted a notice to all sworn officers concerning a "proposed vacancy; canine officer" (Township exhibit 2). The notice provides, in relevant part:

Mission

It shall be the purpose of this agency to assist, detect, and/or investigate potential or actual threats of explosive devices. In the furtherance of that goal the Police Department shall establish a K-9 handler's position and maintain an explosive detecting canine.

Qualifications

- A. Service as a canine handler shall be voluntary.
- B. Prospective canine handlers must:
 - 1. The volunteer must live in the Township of Middletown.
 - 2. Be familiar with the duties and responsibilities of the assignment as set forth in the Standard Operating Procedure Manual.
 - 3. Have an interest in working with canines in law enforcement.
 - 4. Understand that they must devote more than merely assigned on-duty time.
 - 5. Understand that due to the time and expense involved in the training of the handler and canine, changes in duty assignments will not ordinarily be made.

6. Have a minimum of three years of law enforcement experience with the Middletown Twp. Police Department.

7. Have the permission of his/her spouse or life partner, if applicable, to be a handler.

8. Reside in a home with adequate yard space for the placement of department-provided kennel.

9. Respond to call outs in a reasonable time.

C. Canine Handlers shall:

1. Successfully complete an initial training program and attend refresher courses as scheduled.

2. Maintain themselves in such physical condition as to enable them to perform the more strenuous assignments given to canine units.

On November 26, 2009, Patrol Officer Frank Mazza applied for the canine handler assignment. At that time, Mazza had been employed by the Township for four (4) years. On December 8, 2009, Chenoweth also applied for the canine handler assignment.

Between December 15, 2009 and March 9, 2010, Oches and three (3) Deputy Chiefs in the department reviewed all six (6) of the applications sent in response to the notice. Chenoweth and Mazza were the only two applicants recommended to Oches by the Deputy Chiefs.

On March 8, 2010, Oches called Chenoweth in his role as PBA President to announce that the requests for injured light duty

assignments outnumbered the available positions. The two briefly discussed the issue of light duty assignments. Chenoweth informed Oches that if he removed officers from light duty, the PBA would file a grievance.

The parties dispute the course and tone of the conversation. The Township alleges that, "their conversation ended amicably and the [light duty] issue never materialized" (Township's brief page 5, Oches' certification, paras. 13 to 15). The PBA alleges the Chief began the conversation by telling Chenoweth, "we have a problem." Further, "upon hearing that the Union would file a grievance challenging his actions, Chief Oches became very angry and ended the conversation" (unfair practice charge, para. 3, Chenoweth certification paras. 12 to 13).

The next day, March 9, 2009, Oches announced that he had selected Mazza for the canine officer assignment.

On March 10, 2009, Chenoweth sent Oches an email asking why Mazza had been selected over him for the canine assignment. Oches did not answer Chenoweth's query as to why he had not chosen Chenoweth for the canine position, rather, he replied via email, that he thought Chenoweth was in Atlantic City. Chenoweth was in Atlantic City attending a police convention and had learned about Mazza's appointment.

Chenoweth sent several more emails to Oches, explaining where he was and that he had access to email, and repeating his

request for an explanation of why he had not been selected for the canine assignment. Oches did not respond to these emails.

Oches states that he considered the officer's attendance records, operational efficiency (i.e. that Chenoweth was on the SWAT team and would no longer be if he received the canine assignment), and disciplinary record (Oches certification, paras. 9-11, 18).

On March 29, 2010, the PBA filed this unfair practice charge.

ANALYSIS

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 or 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.

If the employer did not present any evidence of another motive 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. 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. Conflicting proofs concerning the employer's motives are for the Hearing Examiner and Commission to resolve.

The motion must be denied. The key material fact at issue - the reason that Oches did not select Chenoweth for the canine handler position - is disputed.

The Township argues that it has a managerial prerogative to select officers for particular assignments, that Chief Oches made his decision on the canine handler assignment based on his review of the two officers' qualifications, including attendance and prior disciplinary actions, and not because of anti-union animus towards Chenoweth. The Township also contends that choosing Chenoweth would have further depleted the SWAT team, which was already staffed at a minimal level. It denies that Oches was angered by the disagreement with Chenoweth over the handling of the issue of light duty assignments, or his threat to file a grievance. The PBA argues that Oches became angry at Chenoweth's

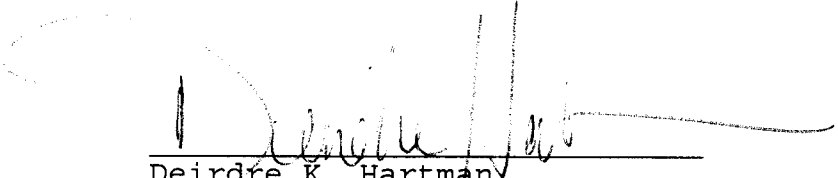
threat to file a grievance, and that the timing of Oches' announcement about the canine position is suspicious and shows his hostility towards Chenoweth's protected activity. The Union argues that Chenoweth was the superior candidate and disputes as pretext or "after-the-fact" justifications the Township's purported reliance on Chenoweth's alleged excessive sick leave, prior discipline and the SWAT team staffing issue. Given the conflicting interpretations of the facts in this case, granting a motion dismissing the entire case is inappropriate.

The proposed facts each party relies upon to support its position are disputed. For example, whether Oches ended a telephone call with Chenoweth "in anger" or whether the conversation ended "amicably." The parties also disagree about whether the timing of the Chief's announcement of the appointment demonstrates hostility, and whether the Township's asserted concern about depleting the SWAT team and its reliance on Chenoweth's sick leave record and prior discipline to disqualify him for the assignment are pretext. These facts are material to the ultimate issue of motive and must be resolved through a plenary hearing.

Generally, in cases of alleged discriminatory motives in personnel actions, the key elements - motive, timing, etc. - are fact-sensitive, making summary judgment impossible or inappropriate. See, 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. den. 149 N.J. 35 (1997) (issuance of reprimand 8 months after union representative called superintendent "lying scuzzball" evinces hostility); Kearny Bd. of Ed., H.E. No. 2008-003, 33 NJPER 303 (¶115 2007) (timing does not support inference of hostility where decision to reduce work hours was too remote - 18 months - after filing of representation petition); Warren Hills Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2005) (hostility inferred and violation found where decisions to explore subcontracting and to subcontract school bus services were made immediately after superintendent learned of organizing effort, and after drivers voted in favor of union representation); Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 233 (¶68 2003) (timing of transfer within 6 months of filing grievance together with conflicting reasons for transfer support inference of hostility); Camden Cty. Sheriff, H.E. No. 2001-013, 27 NJPER 71 (¶32031 2000), aff'd. on other grounds P.E.R.C. No. 2001-055, 27 NJPER 184 (¶32060 2001) (No hostility inferred in Sheriff's transfer of union representative; alleged pretext not proven). These cases underscore that motive and timing are fact-sensitive.

In this matter genuine issues of material fact prohibit the granting of the Township's motion. A hearing will be scheduled.



Deirdre K. Hartman
Hearing Examiner

DATED: January 28, 2013
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 February 4, 2013.