

D.U.P. NO. 2022-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and-

Docket No. CI-2020-023

DANIEL J. BURKE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by a former employee against his former employer, the Township of Jackson (Township). The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., when it terminated his employment as part of a layoff plan, in retaliation for his union activities. The Director finds the allegations are outside of the Commission's six month statute of limitations. Further, even if the allegations were timely, the charge does not set forth specific facts establishing a nexus between the employee's union activities and the elimination of his position.

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Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys
(Arthur R. Thibault, of counsel)

For the Charging Party,
Law Offices of F. Kevin Lynch, attorneys
(F. Kevin Lynch, of counsel)

REFUSAL TO ISSUE COMPLAINT

On March 2, 2020, Daniel J. Burke (Burke) filed an unfair practice charge against his former employer, the Township of Jackson (Township). The charge alleges that on August 31, 2019, the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., 5.4b(1), (2), (3), and (4)^{1/} when

^{1/} These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority (continued...)"

it terminated his employment as part of a layoff plan, in retaliation for his union activities.^{2/}

On April 30, 2020, the Township filed a letter denying that it engaged in any unfair practices and urging our dismissal of the charge against it. It contends that even if the allegations asserted by Burke are true, a complaint should not issue because the charge is untimely and procedurally defective.

The Commission (Commission or PERC) has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. I find the following facts:

Burke was employed by the Township in the Civil Service title of Municipal Engineer from November 12, 2002 until August 30, 2019. In 2014 and 2015, Burke filed a representation

1/ (...continued)
representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ Burke specifically alleges that the Township violated 5.4b(1), (2), (3), and (4). I assume that he intends to allege that the Township violated 5.4a(1), (2), (3), and (4) because 5.4b proscribes certain conduct by employee organizations, not public employers.

petition and amended petitions seeking certification by card check authorization of Jackson Township Municipal Supervisors (JTMS) as the majority representative of an unrepresented group of about seventeen supervisory employees of the Township. JTMS was certified as the majority representative in December, 2015. The applicable collective negotiations agreement extended from January 1, 2016 through December 31, 2019. Burke was the chief negotiator and shop steward for JTMS.

On June 28, 2019, the Township notified the New Jersey Civil Service Commission (CSC) that “. . . due to a restructuring of its operations for reasons of efficiency and economy, the Jackson Township anticipates the elimination of 2 permanent positions resulting in the layoff of 2 employees.” The proposed reorganization eliminated the in-house portion of the Township’s Department of Engineering, and outsourced its functions to a third-party vendor. The two titles affected in the proposed reorganization were Municipal Engineer, the title held by Burke, as well as Engineering Aide, held by another employee - whose title was not represented by a union. According to the notification, meetings regarding the layoff plan were conducted with JTMS on May 17 and 21, 2019. During those meetings, budgetary concerns and alternatives to layoffs were discussed, but the meetings concluded without an agreement on a viable alternative to the layoffs. On July 3, 2019, the CSC notified

the Township that its layoff plan was approved; the JTMS president was copied on the notification. On July 11, 2019, the Township's Business Administrator formally notified Burke that his Municipal Engineer position was being eliminated as part of a layoff, effective at the close of the working day on August 30, 2019. In September, 2019, Burke filed an appeal of the layoff action with the CSC; that appeal is currently pending at the Office of Administrative Law as a contested case.

ANALYSIS

N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in a pertinent part:

[N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 337-338 (1978), the New Jersey Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

Burke filed his unfair practice charge on March 2, 2020. Any alleged unlawful conduct by the Township occurring prior to September 2, 2019 could not be the subject of a complaint under our Act unless he was equitably "prevented" from filing a timely charge. All of the events set forth in the charge occurred on or before August 30, 2019, the date of Burke's layoff. No facts suggest that Burke was prevented from filing a charge within the statutory period. Accordingly, the charge is not timely filed and must be dismissed. See PBA, Local 105 D.U.P. 90-16, 16 NJPER 380 (¶21152 1990) (charge found to be untimely when filed one day after the statute of limitations had expired). See State of New Jersey (Dep't of Treasury), D.U.P. No. 2020-1, 46 NJPER 25 (¶8 2019), adopted P.E.R.C. No. 2020-12, 46 NJPER 149 (¶34 2019); see also Somerset Cty., D.U.P. No. 2018-5, 44 NJPER 252 (¶71 2018) (final agency decision).

Even if the charge is considered to be timely filed, I must dismiss it because Burke has not alleged facts indicating that the Township eliminated his position as a result of his exercise of activities protected by the Act. A public employer has a non-negotiable prerogative to reduce the overall number of employees through layoffs. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers

Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). But an employer does not have a right to exercise a managerial prerogative for anti-union reasons. Allegations that anti-union animus taint the exercise of a managerial prerogative are reviewed under tests established by our Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (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.

No facts suggest that the Township outsourced the functions of the Department of Engineering because of Burke's union activities. Burke asserts that the "only reasonable conclusion [he] can arrive at is that . . . [he was] targeted for removal by the Administration solely for [his] Union activities." However, Burke alleges no specific facts establishing a nexus between his union activities and the elimination of his position. In fact, the layoff eliminated the entire Department of Engineering, including an Engineering Aide who was not represented by the JTMS, or by any other union.

Burke's 5.4a(2) and (4) claims are also unsupported. No facts indicate that the Township sought to dominate or interfere with the formation, existence, or administration of any employee organization; no facts support the allegation that the Township discharged or discriminated against Burke based upon the filing or signing of an affidavit, petition, or complaint under the Act.

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.
N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: April 4, 2022
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by April 14, 2022.