

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and-

Docket No. CI-2020-023

DANIEL J. BURKE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants Burke's appeal of the Director of Unfair Practices' refusal to issue a complaint on his unfair practice charge against the Township. Burke's charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it laid him off in retaliation for his union activities. Finding that Burke's charge was timely filed and that he submitted evidence of his protected activity and of his relationship with the Township to support his allegations of hostility towards his protected activity, the Commission finds that Burke's allegations, if true, may constitute unfair practices. The Commission orders Burke's 5.4a(3) charge remanded to the Director for issuance of a 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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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, Jr., of counsel; Kyle J. Trent, on the brief)

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

DECISION

On April 14, 2022, the Charging Party, Daniel J. Burke (Burke), appealed the April 4, 2022 decision of the Director of Unfair Practices (Director) refusing to issue a complaint on an unfair practice charge Burke filed against the Township of Jackson (Township). D.U.P. No. 2022-12. Burke's March 2, 2020 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., subsections 5.4b(1), (2), (3), and (4), when it terminated his employment as part of a layoff plan, in retaliation for his union activities. The Director assumed that Burke's charge

against the Township intended to allege violations of the same subsections of 5.4a of the Act.

Burke's appeal of D.U.P. No. 2022-12 was accompanied by a brief, Burke's May 7, 2020 certification, and Exhibits 1 through 9, with Exhibit 9 including Exhibits 9A through 9R. The Township's April 19, 2022 opposition to the appeal was composed of a brief, one exhibit, and no certifications.

We summarize the pertinent facts as follows. Burke was employed by the Township in the Civil Service title of Municipal Engineer from November 12, 2002 until August 30, 2019. In March 2007, the Township appointed Burke to the part-time position of Director of the Department of Community Development. In 2015, Burke filed an amended representation petition with the Commission seeking to form a union, the Jackson Township Municipal Supervisors Association (JTMSA), via card check authorization, as the majority representative of an unrepresented group of about seventeen supervisory employees of the Township. The Township objected to Burke's representation petition, including challenging the inclusion of Burke's Director of Community Development (DCD) position, and objecting to the validity of authorization cards solicited by Burke. D.R. No. 2016-4, 42 NJPER 389 (¶110 2015). In September 2015, while Burke's contested representation was pending before the Director of Representation, the Township removed Burke from his part-time

DCD title. On December 7, 2015, the Director of Representation certified the JTMSA as the majority representative for the supervisors unit, including Burke's DCD position. D.R. No. 2016-4 (Docket No. RO-2015-004).

In January 2016, Burke was selected as the chief negotiator and shop steward for the JTMSA. On January 5, 2016, Burke, on behalf of the newly certified JTMSA, wrote to the Township's Mayor, Michael Reina, advising him that the Commission recently approved JTMSA's petition to represent certain supervisory employees, and setting forth some JTMSA goals such as: "requiring management to enter into a meaningful dialogue and ultimately contract"; "regain parity in wage increases, benefits and working conditions with the employees of the other bargaining units of the Township"; and "moderate some of the inconsistencies and attain more fair treatment for our members." The letter notified Mayor Reina that the JTMSA would soon be organizing its internal structure and then would contact him "to commence contract negotiations." Mayor Reina e-mailed Burke acknowledging his receipt of Burke's letter on January 8, 2016, and stating: "You will have to forgive [me] when I say I am a bit confused with your letter as it contains notes of attaining a sought after goal which I am happy for you, and then, your continued disdain for my administration." Burke responded: "I don't understand your comments. And should you wish to discuss them, based on your

obvious misrepresentation of my remarks, I will insist on representation." Mayor Reina replied:

Let me be absolutely clear here. Don't try to play your word games with me. I don't misrepresent anything my friend. Your words are clear and unmistakable. I'm confident our meeting will clear any confusion up.

In January 2019, the Township and JTMSA ultimately agreed to a collective negotiations agreement (CNA) for the period of January 1, 2016 through December 31, 2019.

From 2016 through 2018, Burke and the JTMSA represented Burke and other JTMSA members regarding multiple issues related to the Township's disciplinary actions and other terms and conditions of employment. (Burke Exhibits 9H; 9I). Burke certifies that "each time the Administration was made to withdraw the action by the Union." Burke certifies that the Township attempted to "discipline and harass" him during this period in order to "weaken the bargaining unit." On May 15, 2019, the Township informed the JTMSA that at a May 17 meeting it would be discussing potentially outsourcing the Township's engineering function and the elimination of two permanent positions. On June 28, 2019, the Township notified the CSC that it was eliminating its in-house engineering division and outsourcing those functions to a professional engineering firm and 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 notice proposed two positions for elimination: the Engineer position held by Burke, and one Engineering Aide position not represented by a union. On July 3, 2019, the CSC notified the Township that its layoff plan was approved. On July 11, 2019, the Township formally notified Burke that his Municipal Engineer position was being eliminated as part of a layoff, effective at the close of business on August 30, 2019.

Burke certifies that the Township did not provide him or the JTMSA with a fiscal analysis for the estimated cost savings it submitted to the CSC. Burke certifies and submitted evidence purportedly supporting his contention that the Township paid more for the outside engineering firm than the cost of the salary and benefits of himself and the laid off Engineering Aide. (Burke Exhibit 9N). During August and September 2019, prior to and immediately following his layoff, Burke and the JTMSA President engaged in meetings and correspondence with the Township regarding the Township’s alleged refusal to pay Burke for his accrued unused leave time upon his layoff. (Burke Exhibit O). In September 2019, Burke appealed his layoff to the CSC; it is currently pending in the OAL as a contested case.

Burke mailed his unfair practice charge, via United States Postal Service (USPS) Certified Mail, to the Commission and to the Township on Tuesday, February 25, 2020. (Burke Exhibit 1).

The Certified Mail receipt provided Thursday, February 27, 2020 as the "Estimated Delivery Date" of the charge to the Commission. (Burke Exhibit 1). The Commission received Burke's charge and marked it as filed on Monday, March 2, 2020. The Township filed an April 30, 2020 response with the Director denying that it engaged in unfair practices and asserting that the charge was untimely. The parties subsequently engaged in settlement conferences with a Commission staff agent on September 23, 2020, December 1, 2020, and January 27, 2021. In his August 21, 2021 response to the Commission's status update letter, Burke notified the Commission that he intends to continue to pursue his charge. (Township Exhibit 1). Burke's letter also noted his unsuccessful attempts at settling both his Commission case and his CSC case with the Township. Id. The parties engaged in two more settlement conferences with a Commission staff agent on January 19, 2022 and February 17, 2022, which did not resolve the dispute. D.U.P. No. 2022-12 was issued on April 4, 2022.

On appeal, Burke asserts that his unfair practice charge was timely filed with the Commission because his certified mail receipts show that it was mailed in time. Burke argues that, under Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978), his unfair practice filing did not violate the statute of limitations because: Burke at no time "slept on his rights"; Burke's mailing on February 25 showed proper diligence in

pursuing his claim; the record shows no purposeful delay or bad faith in the two years he relied upon the Director of Unfair Practice's apparent acceptance of his filing as timely; and there has been no showing that the Township was in any way prejudiced by the timing of Burke's filing.

Substantively, Burke asserts there was sufficient evidence presented to allow a complaint to issue on his allegation that his layoff was in retaliation for protected union activities. He argues that he produced evidence in support of his allegations while the Township made no showing that the adverse action would have taken place absent his protected conduct. Burke contends that there is more than a preponderance of the evidence that protected conduct was a motivating factor. He asserts that the Township exhibited hostility towards him for his formation of the union and his subsequent protected conduct as a JTMSA member and leader, that the Township never put forth alternatives to laying off and refused to provide the union with a requested financial analysis justifying the layoff, and that the Township replaced him with a different municipal engineer at higher cost. Burke cites Commission decisions wherein layoffs were found to have been motivated by anti-union hostility and/or pretextual.

The Township asserts that Burke's charge was untimely because the Commission's March 2, 2020 receipt date, not the February 25, 2020 mailing date, is the filing date. The Township



argues that the Commission's continued processing of the charge was only due to Burke's attempts to settle it and his CSC appeal, but does not mean that the Commission ever accepted his charge as timely filed. The Township contends that because all of the events complained of in the charge occurred prior to September 2, 2019 (i.e., his August 30, 2019 layoff and earlier), then a filing date of March 2, 2020 is beyond the N.J.S.A. 34:13A-5.4(c) six-month statute of limitations.

Substantively, the Township asserts that even if the charge were timely filed, a complaint should not issue because Burke has not alleged facts indicating that the Township eliminated Burke's position in retaliation for protected activity. It argues that Burke's submitted documents in support of his charge are "voluminous but largely irrelevant and unsupportive." The Township notes that it has a non-negotiable managerial prerogative to layoff employees as long as it is not done for anti-union reasons. The Township acknowledges that Burke engaged in protected conduct related to "personnel matters and grievances," but contends that there is no indication that his layoff was related to his protected union activities. It asserts that the layoff could not have been in retaliation for Burke's protected conduct because it outsourced its entire engineering function, which included laying off a second employee, the Engineering Aide, along with Burke.

The Commission has authority to issue a complaint where it appears that a 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. Where no complaint is issued, the charging party may appeal to the Commission, which may sustain the refusal to issue a complaint or may direct that further action be taken. N.J.A.C. 19:14-2.3(b).

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 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 charge in which event the 6 month period shall be computed from the day he was no longer so prevented.

"The Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed." State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff'd 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). "The determination of whether a party was "prevented" under the Act from filing a timely charge with the Commission, includes "all relevant considerations bearing upon the fairness of imposing the statute of limitations." Kaczmarek, 77 N.J. at 340. Relevant considerations include whether a charging party sought timely

relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. See, e.g., Kaczmarek; State of N.J. (Juvenile Justice). “[I]t would be derelict for the Court to apply strictly and uncritically a statutory period of limitations without considering conscientiously the circumstances of the individual case and assessing the Legislature’s objective in prescribing the time limitation as related to the particular claim.” Kaczmarek, 77 N.J. at 338.

N.J.A.C. 19:10-3.1 of the Commission’s rules is entitled “Rules to be liberally construed.” N.J.A.C. 19:10-3.1(b) provides:

(b) When an act is required or allowed to be done at or within a specified time, the commission may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the act (N.J.S.A. 34:13A-1 et seq.).

In this case, six months following Burke’s August 30, 2019 layoff would be February 30, 2020, which does not exist. That meant Burke’s charge was effectively due Saturday, February 29, 2020 (2020 was a “leap year”), a day earlier than it would have been in any other month. Under Commission rules, if the deadline for a submission falls on a weekend or holiday, it is due at the

end of the next business day. N.J.A.C. 19:10-2.1(a). Monday, March 2, 2020 was the next business day, and is when the Commission received Burke's charge. Thus, if Burke had projected 6 months forward from the operative date of his layoff to calculate his period for filing, his charge would be timely filed on Monday, March 2, 2020. However, the Director strictly applied the "more than 6 months prior" statute of limitations in N.J.S.A. 34:13A-5.4(c) such that an unfair practice occurring prior to September 2, 2019 was considered untimely. Applying N.J.A.C. 19:10-3.1(b), we find that "strict adherence" to a 6-month look-back deadline from the Commission's receipt date of Monday, March 2, 2020, would "work surprise or injustice or interfere with the proper effectuation of the act."

Moreover, applying the Supreme Court's reasoning in Kaczmarek to these circumstances, we find that the purposes of the Act are not effectuated by strictly interpreting N.J.S.A. 34:13A-5.4(c) to deny Burke the opportunity to pursue his charge. Burke filed his charge within a reasonable time from the operative date (i.e., it is not a "stale claim") because it was received within 6 months of Burke's August 30, 2019 layoff based on Commission rules for deadlines falling on weekends. No additional time passed that would have prejudiced the Township or prevented it from a fair opportunity to defend itself against the charge. Burke's February 25, 2020 certified mailing date, while

insufficient to count as the filing date, also demonstrates that he did not "sleep on his rights."

This case is also distinguishable from PBA, Local 105, D.U.P. No. 90-16, 16 NJPER 380 (¶21152 1990), cited by the Township, in which a claim was dismissed after being filed two days late. In that case, the charging party mailed her charge on the due date, rather than several days early as in the present case. That case involved a charge that was due on a weekday at the end of February (February 28, 1990) based on an operative date of August 29, 1989. By contrast, in this case Burke had until Saturday, February 29, 2020 based on his August 30, 2019 operative date. As discussed above, with the deadline falling on the weekend, Burke's charge had to be received by the next business day, Monday, March 2, 2020, to be timely.

We next address the substantive issues of whether a complaint should issue on Burke's unfair practice charge. N.J.S.A. 34:13A-5.4a(3) prohibits public employers, their representatives, or agents, from: "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."

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, 240-246 (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. 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. Id. at 241. 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.

A public employer has a non-negotiable managerial prerogative to layoff employees and to subcontract government services. Local 195, IFPTE v. State, 88 N.J. 393, 407-08 (1982); Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), aff'd, 20 NJPER 410 (¶25208 App. Div. 1994), certif. denied, 137 N.J. 312 (1994). However, a public employer does not have a right to exercise its managerial prerogative to layoff employees in retaliation for protected union activity. See,

e.g., Monroe Tp. Bd. of Fire Com'rs, P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54 2014), aff'd, 443 N.J. Super. 158 (App. Div. 2015), certif. den., 226 N.J. 213 (2016); 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).

Protected activity under the Act may include individual conduct - such as complaints, arguments, objections, letters or similar activity - related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. N.J. Turnpike Auth., P.E.R.C. No. 2022-38, 48 NJPER 393 (¶90 2022); State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005); and No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd, NJPER Supp.2d 63 (¶45 App. Div. 1979).

In this case, the record thus far includes evidence of Burke's protected union activity and the Township's knowledge of it. Burke has also presented certified statements and documentary submissions allegedly demonstrating the Township's hostility to his protected activity and that its outsourcing of its engineering function was pretextual. Burke submitted evidence of tense e-mail exchanges between the Mayor and himself in January 2016 concerning collective negotiations between the newly certified JTMSA, that he had organized, and the Township. (Burke Exhibit 9G). Burke submitted evidence of his advocacy and

representation of both himself and other JTMSA members in response to the Township's disciplinary actions and other issues concerning terms and conditions of employment from 2016 through 2018 prior to his 2019 layoff. (Burke Exhibits 9H; 9I). Burke certified and submitted documents regarding his contention that the Township paid more for the outside engineering firm than the cost of the salary and benefits of himself and the laid off Engineering Aide. (Burke Exhibits 3; 9N). The Township, on the other hand, provided no certifications or other documents in rebuttal to Burke's certification and documentary submissions.

The Director determined that Burke alleged no specific facts alleging a nexus between his union activities and the elimination of his position. However, given this preliminary record, while we do not find that Burke has established such a nexus, we find that Burke has alleged specific facts concerning his protected union activities, his relationship with Township management, and his layoff that could support such a nexus. The Township has not demonstrated, at this early stage of the proceedings, that the layoff would have occurred anyway in the absence of its alleged hostility to Burke's protected activity.

In accordance with our complaint issuance standard, we find that it appears that the allegations of the charge, if true, may constitute unfair practices on the part of the Township, requiring formal proceedings in order to afford the parties an



opportunity to litigate relevant legal and factual issues.

N.J.A.C. 19:14-2.1. These include whether the Township's alleged hostility towards Burke's protected activities motivated its ultimate adverse action (layoff) against Burke, whether the stated reasons for the layoff were pretextual, and, if not, whether the layoff would have occurred anyway based on legitimate, non-discriminatory reasons. Bridgewater, 95 N.J. at 242. Therefore, we remand to the Director for the issuance of a complaint on Burke's 5.4a(3) charge only.

ORDER

The unfair practice charge is remanded to the Director of Unfair Practices for issuance of a Complaint on Burke's 5.4a(3) allegation.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Voos voted in favor of this decision. None opposed. Commissioner Papero was not present.

ISSUED: June 30, 2022

Trenton, New Jersey