P.E.R.C. NO. 2006-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and- Docket No. CO-2003-065

JACKSON TOWNSHIP PBA LOCAL 168,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Jackson violated the New Jersey Employer-Employee Relations Act when it relieved the President of Jackson Township PBA Local 68 of his Range Master and Extra Duty Coordinator duties and took away his take-home vehicle in retaliation for comments he made as PBA president at an August 12, 2002 Township Committee meeting. The Commission concludes that the president's activity was protected by the Act. The Commission orders the Township to reinstate the president's Range Master and Extra Duty Coordinator Designee duties, return his take-home vehicle, and make him whole for the one hour a month of compensatory time lost and any other losses suffered from the removal of his duties and removal of his take-home car. The Commission dismisses allegations in the unfair practice Complaint concerning the PBA vice-president.

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 (James L. Plosia Jr, of counsel)

For the Charging Party, Klatsky Sciarrabone & De Fillippo, attorneys (David J. De Fillippo, of counsel)

DECISION

On September 4, 2002 and January 31, 2003, Jackson Township PBA Local 168 filed an unfair practice charge and amended charge against the Township of Jackson. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4), (5), (6), and (7),[1/] when it relieved PBA President Joseph Oleksy

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) (continued...)

of his Range Master and Extra Duty Coordinator duties and took away his take-home vehicle in retaliation for comments he made as PBA President at an August 12, 2002 Township Committee meeting. The amended charge alleges that the employer violated the Act when it did not provide a take-home vehicle to PBA Vice-President Frank Cipully, allegedly in violation of the parties' past practice and in retaliation for the PBA's filing of the initial unfair practice charge and a grievance on Cipully's behalf.

On May 22, 2003, a Complaint and Notice of Hearing issued. On July 1, the employer filed its Answer. The employer denies that Oleksy was the Extra Duty Coordinator and that all Service Division officers were provided with take-home vehicles. It asserts that it acted for legitimate business reasons and that the Complaint raises contract claims that must be raised through the negotiated grievance procedures.

1/ (...continued)
Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On October 29, 2003 and May 12 and 13, 2004, Hearing Examiner Arnold H. Zudick conducted a hearing.[2/] The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On June 8, 2005, the Hearing Examiner issued his Report and Recommended Decision. H.E. No. 2005-14, 31 NJPER 155 (¶69 2005). He found that the Township violated 5.4a(3) and, derivatively, a(1) when it removed Oleksy's Range Master and Extra Duty Coordinator Designee duties and took away his take-home vehicle in retaliation for his speaking as PBA President at the August 12, 2002 Township Committee meeting and criticizing police officials and police department matters. He recommended dismissing the remaining allegations.

On June 21, 2005, the Township filed exceptions. It does not take issue with the Hearing Examiner's findings of fact, but asks that we include several additional findings. It asserts that no adverse action was taken against Oleksy or Cipully; Oleksy's speech at the meeting was false and unprotected; and the PBA did not prove that taking back Oleksy's take-home vehicle was a result of his comments at that meeting.

On June 24, 2005, the PBA filed an answering brief. It asserts that the actions against Oleksy not only adversely

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2/ At hearing, the Hearing Examiner dismissed the 5.4a(6) and (7) allegations.

affected him, but were intended to send a strong message to any other PBA members who might be contemplating criticizing the police department and governing body. It further asserts that Oleksy's comments were protected and that taking back his take-home vehicle was the result of these comments.[3/]

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 4-54). We add these facts.

The Township asks us to find that as of August 2002, Oleksy had no call-out responsibilities. Call-out responsibility refers to the need to report to duty outside regular work hours. We add that fact to Finding 8.

The Township asks us to find that Oleksy's statements to the Township Committee were generally misleading and untrue. We decline to make that generalization. We have made specific findings about Oleksy's statements and those findings speak for themselves.

The Township asks us to find that relieving Oleksy of his Range Master and Extra Duty assignments has freed him up to perform other administrative functions. We add that fact to Finding 34.

3/ We deny the Township's request to supplement the record post-hearing with a series of newspaper articles.

The Township asks us to find that Oleksy admitted that he said things that he should not have said at the Township Committee meeting, and that "given a chance to do so, he would not have said some of the things he said at the August 12 meeting." Exceptions at 4. We decline to make that finding. On cross-examination, Oleksy was asked whether "[l]ooking back you would have done things differently on August 12?" He responded, "Probably yes, most definitely" [1T177]. Oleksy did not testify that he should not have said certain things or that, given another chance, he would not have said certain things.

The Township asks us to find that Captain Dunton testified that Oleksy's statement about the Township's lack of follow-up about an issue involving uniforms was a "bald-faced lie." The Hearing Examiner already so found. Finding 26.

The Township asks us to find that Captain Dunton testified that the mayor had never told him to remove Oleksy either as Range Master or Extra Duty Coordinator Designee, and testified that he never told Oleksy that the mayor wanted him out as Range Master. We add to Finding 32 that Dunton testified that he did not tell Oleksy that the mayor wanted him out as Range Master. However, the Hearing Examiner credited Oleksy's testimony that Dunton had told him that the mayor wanted him out of the range. Dunton corroborated Oleksy's testimony when Dunton testified that the mayor's name came up in their conversation and the mayor had

concerns about his ability to maintain levels of trust and credibility in Oleksy since Oleksy had told significant lies in a public forum.

In the absence of PBA exceptions, we adopt the Hearing Examiner's recommendations to dismiss the 5.4a(2), (4) and (5) allegations and the a(3) allegations concerning Officer Cipully. We now address the a(3) allegations concerning Officer Oleksy.

N.J.S.A. 34:13A-5.4a(3) prohibits a public employer 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." Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation will not 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 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 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 us to resolve.

We begin with the Township's claim that Oleksy's statements to the Township Committee were false and that the Act does not protect false statements by a public employee, even if made in the guise of union activity.

When an employee's conduct as a union representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the representative's employment. Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981). Even where a representative's public comments criticizing the employer are false, the representative may still be protected from retaliation as an employee. Florham Park Bd. of Ed., P.E.R.C. No. 2004-83, 30 NJPER 230 (¶86 2004) (association president's statement on behalf of association wrongly criticizing teachers' workshop was

protected activity); cf. Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995) (grievance chairperson's comment at public school board meeting that assistant superintendent was "lying scuzzball" was protected activity); contrast Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), certif. den. 65 N.J. 573 (1974) (intemperate and venomous remarks about administration at orientation meeting not protected); compare Walls Manufacturing Co., Inc. and ILGWU, AFL-CIO, 137 NLRB 1317 (1962), enf'd 321 F.2d 753 (D.C. Cir. 1963), cert. den. 375 U.S. 923 (1963) (employees do not forfeit statutory protection by making false or inaccurate allegations concerning their employer in connection with appeals or complaints to government agencies). The Township did not prove that its concerns about Oleksy's "trustworthiness," triggered by his statement to the Township Committee, related to his positions as Range Master and Extra Duty Coordinator Designee. Nor did it prove that Oleksy had been untrustworthy in those positions or that any false or misleading comments he made in representing the PBA would spill over into his job performance. Accordingly, we adopt the Hearing Examiner's recommended finding that Oleksy's activity was protected by the Act.

We now turn to the Township's claim that Oleksy did not suffer any injury when he lost the Range Master and Extra Duty Coordinator Designee assignments and the use of a take-home

vehicle so a violation cannot be found. It specifically asserts that without any accompanying change in work hours, compensation, or overtime entitlement, a change in assignment cannot be an adverse action for purposes of an unfair practice charge. We disagree.

Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. It may not, however, change an assignment in retaliation for protected activity. See, e.g., Belleville Bd. of Ed., P.E.R.C. No. 89-92, 15 NJPER 161 (¶20068 1989) (violation for transferring union representative who relayed employee complaints to management); Mt. Olive Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990) (violation when superintendent recommended teacher transfer in retaliation for activity as union president); Middlesex Cty., P.E.R.C. No. 81-87, 7 NJPER 93 (¶12037 1981) (violation for transferring shop steward from workhouse to jail in retaliation for processing grievances); see also Hudson Cty., P.E.R.C. No. 2004-14, 29 NJPER 409 (¶136 2003) (employer does not have right to exercise managerial prerogative for anti-union reasons). See generally Local 195 at 423-425 (concurring opinion of Justice Handler endorsing private sector case law in which discriminatory transfers and reassignments were held to violate National Labor

Relation Act). Oleksy lost one hour per month of compensatory time he had earned as the Extra Duty Coordinator Designee, and some overtime he had earned as Range Master in setting up firearms schedules. He was replaced in the Extra Duty Coordinator Designee assignment by a superior officer. Reassignments from these responsible and visible positions were intended to discourage employees from speaking out in the way Oleksy did as PBA president and would tend to have such an effect.

With respect to the take-home vehicle, the Township asserts that use of such a vehicle should not be construed as a term and condition of employment because the parties had never negotiated about it and there was no past practice governing the assignment of such vehicles. Again we disagree. The employer may have had a contractual or managerial prerogative to take back Oleksy's vehicle, but exercising that prerogative in retaliation for the exercise of protected activity violates the Act. Oleksy may not have been entitled to a take-home vehicle under the Township's criteria for assignment of those vehicles, but he did not lose his car because of the application of those criteria. He lost it in retaliation for his remarks as PBA president before the Township Committee.

The employer argues that the timing of its decision to take back Oleksy's car is only one factor to consider in determining

motivation. We agree, but believe that it is a critical factor in this case. The Township asserts that police officers without call-out duties are not entitled to take-home vehicles. Yet Oleksy did not have any call-out duties for more than a year before his car was taken away. On direct examination, the Police Director testified that the decision to remove Oleksy's take-home vehicle was based on recommendations made before the Township Committee meeting. The Hearing Examiner did not credit that testimony, noting that the Director testified on cross-examination that he did not recall if the decision was made on August 19, 2002, the day the Director removed Oleksy from his two assignments. The Hearing Examiner found that the Director's "I don't recall" response was given to avoid having to answer "yes." We accept this credibility determination.

Finally, the Township objects to the portion of the Hearing Examiner's proposed remedy recommending that Oleksy's take-home vehicle be returned for at least one year. The Township argues that the one-year period is arbitrary. We will order return of the vehicle, but will not specify a period during which Oleksy must be allowed to retain it. We will not preclude the Township from attempting to develop a uniform non-discriminatory take-home vehicle policy and implement it department-wide at some point in the future.

ORDER

The Township of Jackson is ordered to:

A. Cease and Desist from:

1. Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by removing Joseph Oleksy's Range Master and Extra Duty Coordinator Designee duties, as well as his take-home vehicle, in retaliation for his comments as PBA president at the August 12, 2002 Township Committee Meeting.

2. Discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by removing Joseph Oleksy's Range Master and Extra Duty Coordinator Designee duties, as well as his take-home vehicle, in retaliation for his comments as PBA president at the August 12, 2002 Township Committee Meeting.

B. Take the following action:

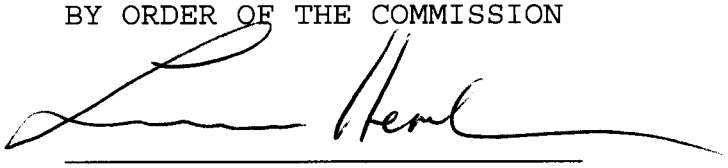
1. Reinstate Oleksy's Range Master and Extra Duty Coordinator Designee duties and return his take-home vehicle, and make him whole for the one hour per month of compensatory time he lost having been removed from the Designee duties since August 2002, and for any other losses he suffered from the August 19, 2002 removal of his duties and from the August 26, 2002 removal of his take-home car.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Mastriani voted in favor of this decision. Commissioner Watkins abstained from consideration. None opposed. Commissioner Katz was not present.

DATED: September 29, 2005
Trenton, New Jersey
ISSUED: September 29, 2005

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by removing Joseph Oleksy's Range Master and Extra Duty Coordinator Designee duties, as well as his take-home vehicle, in retaliation for his comments as PBA president at the August 12, 2002 Township Committee Meeting.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by removing Joseph Oleksy's Range Master and Extra Duty Coordinator Designee duties, as well as his take-home vehicle, in retaliation for his comments as PBA president at the August 12, 2002 Township Committee Meeting.

WE WILL reinstate Joseph Oleksy's Range Master and Extra Duty Coordinator Designee duties and return his take-home vehicle, and make him whole for the one hour per month of compensatory time he lost having been removed from the Designee duties since August 2002, and for any other losses he suffered from the August 19, 2002 removal of his duties and from the August 26, 2002 removal of his take-home car.

CO-2003-065
Docket No.

TOWNSHIP OF JACKSON
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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