

P.E.R.C. NO. 2017-8

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CI-2015-042

PHILIP S. MANDATO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants summary judgment in favor of the Sheriff's Office and dismisses unfair practice charges alleging that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3), by rescinding a Sheriff's Officer's impending transfer, reassigning him, and suspending him for four days. The Commission finds that these claims were not filed within the six-month period of limitations prescribed by N.J.S.A. 34:13A-5.4(c).

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)

For Philip S. Mandato, C. Elston & Associates, LLC, attorneys (Cathlene Y. Banker, of counsel)

DECISION

This case comes to us by way of the Middlesex County Sheriff's Office's (MCSO) motion for summary judgment in an unfair practice case filed by Philip S. Mandato (Mandato). The charge alleges that the MCSO violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically section 5.4(a)(1) and (3), by imposing excessive and disparate discipline where anti-union animus was a motivating or substantial factor in the Sheriff's actions; namely, rescinding

Mandato's impending transfer to Investigations, reassigning him from his post in Courts, and suspending him for four days.<sup>1/</sup>

#### PROCEDURAL HISTORY

Mandato filed his charge on March 23, 2015.<sup>2/</sup> On October 13, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 28, the MCSO filed an answer denying Mandato's allegations and asserting that some or all of his claims were barred by the statute of limitations.

On January 25, 2016, the MCSO filed a brief and exhibits in support of its motion for summary judgment. For purposes of its motion, the MCSO accepted as true certain factual allegations of the charge. Mandato filed an opposition brief on February 5. The MCSO filed a reply brief on February 22.<sup>3/</sup>

On the same date, February 22, Mandato filed an amendment to his charge. On March 16, 2016, the Hearing Examiner notified the parties that she had accepted the amendment and that the parties

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1/ These provisions of the Act 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 guaranteed to them by this act."

2/ Mandato filed a second unfair practice charge on March 27, 2015 (CI-2015-043) but later withdrew it.

3/ The MCSO's motion was initially referred to the Hearing Examiner but later to the full Commission for decision. See N.J.A.C. 19:14-4.8(a).

had until April 1 to file any supplemental arguments to the summary judgment motion. Since neither party has filed any supplemental arguments addressing the amendment to the charge, we do not address the amendment in this decision, and we treat the MCSO's motion as one for partial summary judgment.

#### FACTS

Mandato has been employed by the MCSO as a sheriff's officer since September 2003. From at least that time to the present, the Policemen's Benevolent Association, Local No. 165 (PBA) has been the majority representative for sheriff's officers and investigators employed by the MCSO. In or around 2009, Mandato terminated his membership in the PBA and joined the Fraternal Order of Police, Lodge No. 59 (FOP), a minority labor organization of sheriff's officers and investigators employed by the MCSO.

The MCSO and the PBA executed a collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2016. Article XXV of the CNA is entitled "Grievance Procedure," step four of which permits the PBA to request binding arbitration.

The MCSO is comprised of the following divisions: Courts, Transportation, Investigations, Identification, Process, Administration, and Communications. As of July 2014, Mandato was serving in the Courts division. For the prior year to a year and

a half, his post in that division had been the holding cells in the main courthouse. In or around July 2014, Mandato bid for a transfer from Courts to Investigations. On August 8, 2014, the Sheriff announced bid awards and permanent personnel assignments. Mandato was one of twenty-three employees, and the only FOP member, assigned to Investigations. He was to report to his new assignment on August 18. However, on August 13, Mandato received a telephone call from an Internal Affairs sergeant advising him that the Sheriff was removing him from his assignment in Investigations based upon an allegation that Mandato had placed a "nail of redemption" in the holding cells.<sup>4/</sup> The Sheriff filled the opening in Investigations with another sheriff's officer who was a member of the PBA and then under investigation by Internal Affairs for permitting a person with an open warrant to leave the main courthouse.

On August 18, 2014, Mandato reported for duty at his post near the holding cells but was told that the Sheriff had reassigned him effective immediately to a different post in the main courthouse until further notice. On August 19, Mandato was

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4/ According to the bid announcement, the new assignments were to take effect August 17. As Mandato acknowledges in his brief, the Sheriff rescinded the transfer from Courts to Investigations.

Mandato included a photocopy of the nail of redemption as an exhibit to his charge. It is a medallion that sits atop what he describes as a 2" by 2" prayer card. The medallion appears to be a hand-wrought flat nail.

given written notice that he was the subject of an Internal Affairs investigation. On August 22, Mandato submitted a report regarding his knowledge concerning the nail of redemption and admitted that he had found the item inside the desk drawer at his post and hung it on a dry erase board, where it remained undisturbed for several months. On September 9, Mandato was interviewed by Internal Affairs regarding this incident.

On September 19, 2014, Mandato was served with a Notice of Minor Disciplinary Action (notice) signed by the Sheriff. The notice imposed a four-day suspension without pay from October 6 to 9, 2014 based upon the following charge:

Performance of Duty 3:2.1. Placing the "Nail of Redemption" on the grease board in the holding cell of the MCH.<sup>5/</sup>

Mandato acknowledged receipt of the notice on September 19. On September 29, Mandato asked a Lt. Rizzo whether he would be returned to his regular shift and post near the holding cells after serving the suspension. Mandato was told that the MCSO did not want him working in the holding cells and that his regular shift was no longer available.

On October 1, 2014, the PBA filed a "step two" grievance at Mandato's request, seeking a reduction of the penalty from a four-day suspension to a written reprimand. The grievance was

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5/ Mandato served a 2-day suspension for the same rule violation for bringing a pair of blunt-tip children's scissors into the holding cells on August 4, 2011.

denied the same day. The PBA did not move the grievance to arbitration.

#### LEGAL ARGUMENTS

The MCSO argues that the Complaint in this matter should be dismissed because Mandato failed to file his original unfair practice charge within the six-month period of limitations prescribed by N.J.S.A. 34:13A-5.4(c). Specifically, it maintains that the charge, filed on March 23, 2015, is untimely because:

- Mandato was told on August 13, 2014 that he was not being transferred to Investigations, and therefore, he had until February 13, 2015 to file a related unfair practice charge;
- Mandato was removed from his post near the holding cells on August 18, 2014, and therefore, he had until February 18, 2015 to file a related unfair practice charge; and
- Mandato received notice of his suspension on September 19, 2014, and therefore, he had until March 19, 2015 to file a related unfair practice charge.

In response, Mandato concedes that the MCSO's rescission of Mandato's reassignment to Investigations occurred outside the six-month limitations period for the filing of an unfair practice charge with respect to his allegations pertaining to that action. However, with respect to the change of his post in Courts, and relying upon State of New Jersey (Dept. of Transportation), H.E. No. 2014-6, 40 NJPER 393 (¶136 2014), adopted P.E.R.C. No. 2014-85, 41 NJPER 48 (¶12 2014), app. pending (App. Div. Dkt. No. A-5655-13T4), Mandato argues that the statute of limitations did

not begin to run until September 29, 2014, the date on which he inquired whether the change of post was permanent. As for his suspension, and relying primarily upon State of New Jersey (Office of the Public Defender), P.E.R.C. No. 2009-32, 34 NJPER 439 (¶137 2008), Mandato argues that the statute of limitations did not begin to run until October 6, 2014, when the suspension was implemented, because the penalty could have been modified or the matter otherwise settled via the grievance process.

In reply, the MCSO contends that unlike State of New Jersey (Dept. of Transportation), there are no facts to suggest that Mandato was led to believe that the change of post was not permanent or that he would be returning to his former post in the near future. The MCSO also argues that Mandato knew or should have known that the change of post was permanent when it was ordered by the Sheriff and that his later inquiry of Lt. Rizzo about being reinstated to the former post cannot serve to enlarge the limitations period.

As for the discipline, the MCSO responds that unlike State of New Jersey (Office of the Public Defender), Mandato was given a final, not preliminary, notice of discipline and therefore, that decision actually supports the MCSO's position that the limitations period began to run when Mandato received the notice on September 29, 2014, and not when the suspension was served beginning on October 6. The MCSO also argues that Mandato knew



or should have known of any retaliation or disparate treatment based upon anti-union animus when he received the notice as opposed to later, when the penalty was imposed or the grievance process exhausted.

#### STANDARD OF REVIEW

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).<sup>6/</sup> 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. Summary judgment "serves the valid purpose ... of protecting against groundless claims and frivolous defenses" but "should be denied

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<sup>6/</sup> See also N.J.A.C. 19:14-4.8(e), which provides:

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 relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

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).

#### ANALYSIS

N.J.S.A. 34:13A-5.4(c) provides in pertinent part:

Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no 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.

[Emphasis added.]

At the outset, we note that the parties do not contend that there are material facts in dispute as to the timeliness issue. Likewise, Mandato makes no claim that he was prevented from filing the charge by the dates, respectively, February 18 and March 19, 2015, on which the MCSO argues the limitations period lapsed with regard to the change of post and the four-day suspension, respectively. Therefore, the only issue presented is when the six-month limitations period began to run with respect to those claims.

We agree with the MCSO that the cases on which Mandato relies to establish the timeliness of his charge are factually distinguishable. We first consider State of New Jersey (Dept. of Transportation), involving the reassignment of a pro se individual charging party from a field project to an administrative office.

In that case, the Director of Unfair Practices initially refused to issue a complaint, finding the charge untimely. D.U.P. No. 2008-7, 34 NJPER 135 (¶57 2008). He focused on a reassignment that occurred in November 2005, more than a year before the filing of the initial charge on May 25, 2007, and found that the charging party had not alleged any circumstances indicating that she was prevented from filing a timely charge. 34 NJPER at 137. We remanded because the charging party also alleged that in January 2007, her position was changed from temporary to permanent in retaliation for her having filed grievances and other complaints. But we noted that if a complaint was issued on remand, the parties could still litigate over when the charging party knew or should have known that she was permanently reassigned. P.E.R.C. No. 2009-16, 34 NJPER 291 (¶104 2008).

Following a second remand, a complaint was issued, and hearings were held. At the close of the hearing, the State moved to dismiss the charge, urging that it was untimely. The Hearing

Examiner granted the motion. She found that the charging party knew or should have known that her reassignment was permanent no later than June 26, 2006, when her supervisor testified at a grievance hearing that the charging party would not be going back into the field in the near future. H.E. No. 2014-6, 40 NJPER 393 (¶136 2014). The Hearing Examiner did not consider, based upon the testimony and exhibits adduced at the hearing, whether the charging party knew or should have known in November 2005 that her removal from the field was meant to be permanent. Nor did we, in adopting the Hearing Examiner's decision, reexamine our initial decision remanding the matter to determine if the facts established at the hearing confirmed our initial view of the case.

As it pertains to Mandato's charge, we did not hold or suggest in State of New Jersey (Dept. of Transportation) that an employee must be told a change is permanent before the limitations period begins to run. Such a blanket rule would not be consistent with N.J.S.A. 34:13A-5.4(c). Indeed, in the absence of any claim that the employee was prevented from filing the charge within the requisite period of time, there is no reason to focus on the duration of a reassignment, including whether it is temporary or permanent, since its unlawfulness would not ordinarily turn on its duration. Mandato's argument, taken to its logical conclusion, would allow an inquiry as to the

permanency of a change in assignment to resurrect a stale charge. In any event, and in contrast to State of New Jersey (Dept. of Transportation), nothing Mandato was allegedly told of his removal from the holding cell post on August 18, 2014 was equivocal, and the limitations period to challenge the change of post began to run that day. Therefore, his claim as to the change of post is out of time.

Turning to Mandato's suspension, we likewise find his reliance on State of New Jersey (Office of the Public Defender), P.E.R.C. No. 2009-32, 34 NJPER 439 (¶137 2008) unhelpful. In that case, we held that the issuance of a preliminary notice of disciplinary action did not trigger the running of the limitations period. We explained:

[Upon receipt of a] preliminary notice of disciplinary action, [the charging party] had not in fact been disciplined - she was put on notice that discipline may occur. The opportunity for a hearing or to settle the matter was still available to her. It was the final notice of disciplinary action . . . that was the operative event for our statute of limitations purposes.

In contrast to State of New Jersey (Office of the Public Defender), the notice of minor discipline issued to Mandato was not preliminary or conditional in nature. It served to inform him that as of the date of its receipt, Mandato had received a penalty, one that was minor by definition under the civil service law. Compare N.J.A.C. 4A:2-2.5 (requiring issuance of

preliminary and final notices for major disciplinary action), with N.J.A.C. 4A:2-3.1 (requiring only a notice of minor discipline in State service). Moreover, the fact that the PBA filed a grievance on Mandato's behalf that was not fully disposed of until November 14 does not toll the statute of limitations. See e.g., Teamsters Local No. 469, D.U.P. No. 2008-4, 34 NJPER 1 (¶1 2008) (citing State of New Jersey (Stockton College)), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 326 (1978)).

Accordingly, we find that issuance of the notice on September 19, 2014 was the operative or triggering event for our statute of limitations purposes. Mandato was required to file any related unfair practice charge by March 19, 2015. Given that he waited until March 23 to file a charge, his claim as to the suspension is out of time.

#### ORDER

Granting Mandato all reasonable inferences, we find that there are no material facts in dispute and that the MCSO is entitled to summary judgment with regard to the rescission of the reassignment, the change of shift and post, and the discipline. The MCSO's motion for summary judgment is granted, and the complaint is dismissed, with respect to those three events.

Since the parties have not addressed the amendment of the charge, we refer it back to the Hearing Examiner for disposition in accordance with N.J.A.C. 19:14-4.8(g).

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself.

ISSUED: August 18, 2016

Trenton, New Jersey