P.E.R.C. NO. 2020-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY COUNTY TECHNICAL HIGH
SCHOOL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-055

CAPE MAY COUNTY TECHNICAL HIGH
SCHOOL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Cape May County Technical High School Board of Education's motion for summary judgment on an unfair practice charge, filed by the Cape May County Technical High School Education Association, which alleges that the Board violated N.J.S.A. 34:13A-5.4a(1) and (3) when it reduced a unit member's 12-month secretarial position to a 10-month position in retaliation for engaging in protected activity. The Commission denies summary judgment because numerous material issues of fact are disputed, including whether the Board had a legitimate, non-retaliatory business reason for its action, and whether the Association consented to the Board's decision. The Commission remands the matter to a Hearing Examiner for a hearing.

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, Grucio, Pepper, DeSanto & Ruth, P.A., attorneys (Nicole J. Curio, of counsel and on the brief)

For the Charging Party, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel and on the brief; Hop Wechsler, on the brief)

DECISION

This case comes to us by way of a motion for summary judgment. On August 21, 2018, the Cape May County Technical High School Education Association (Association) filed an unfair practice charge against that school's Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] when, on May 7, 2018, it reduced

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, (continued...)

the 12-month secretarial position of a unit member, K.M., to a 10-month position for the 2018-2019 school year. The charge alleges that the Board took this action in retaliation for K.M.'s May 4, 2018 signing of a salary verification form upon which she noted that she signed without prejudice to challenge her placement on a recently-negotiated salary guide (for her 12-month position, as indicated on the form) for the 2016-2017 and 2017-2018 school years.

It appearing that the allegations of the unfair practice charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 31, 2019.

On January 10, 2020, the Board filed a motion for summary judgment, in lieu of answer, together with a supporting brief, exhibits, and the affidavit of its Superintendent, Dr. Nancy Hudanich. On February 26 the Association filed an opposing brief, exhibits, and the certifications of K.M. and the president of the Association, Sharon Lee Kustra. On March 13 the Board

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1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(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."

filed a reply brief. On March 16 the Chairman referred the motion to the full Commission.

In its supporting brief, the Board, citing Tp. of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), argues that the Association has not made a prima facie showing that protected conduct was a motivating factor or substantial factor in the Board's decision to reduce K.M.'s position to a 10-month from a 12-month one.

The Board points to the fact that K.M. was one of three secretaries who placed similar signing statements on their salary verification forms, of whom "only two [K.M. and A.B.] were moved from a twelve (12) month position to a ten (10) month position and of those two, only one [K.M.] has raised any issue with the move or the Board's motive." The Board cites this as evidence of "no retaliation, . . . no anti-union animus," asking why, if the Board were "that upset" about it, all three were not "retaliated" against in the same manner, and why only one of the two affected employees raised the issue of retaliation.

The Board further asserts that it had a legitimate business and educational reason for the move and, therefore, it would have taken place regardless of K.M.'s questioning of her placement on the new wage guide. The Board states, in its briefs, that it determined that K.M. need not have a 12-month position, as she is assigned to the School Based Youth Services Program, a primarily

student-based program, and students are only present ten months out of the year. It further stresses that the Association not only took part in "the discussion prior to [K.M.] being moved to a ten (10) month position, but . . . also negotiated the changes of the position, and another position, with the Superintendent and memorialized them in writing." That writing, a Rider to the parties' current CNA, includes the following provision: "the Association agreed not to contest the reassignment of these individuals from a 12 month to a 10 month position." Given these facts, the Board asserts that allowing the complaint to proceed would be against public policy, because it would permit the Association to, in effect, use the complaint as a vehicle to render "null and void" a duly-negotiated agreement about the terms of employment of the 10-month position.

The Association argues that summary judgment is not appropriate because genuine issues of material fact are in dispute, including, among other things, the issue of whether the Association, by signing the Rider to the CNA which set the terms and conditions of employment for the newly-created 10-month position, consented to the Board's reduction of K.M.'s position. In this regard, Kustra certifies that her understanding of the Rider's provision that the Association agreed "not to contest" such reassignments "was that it did nothing more than restate the law — namely, that, as long as the Board had a legitimate

business reason, such as financial reasons, . . . it had the right to do so"; but the Association never "'consented' to the Board's taking such an action for retaliatory purposes." Kustra further certifies that A.B., the other employee whose position was reduced from a 12-month to a 10-month, chose not to contest it (beyond her signing statement) for personal reasons.

The Association also argues that the legitimacy of the Board's purported business and educational reasons for the move is belied by its changing and/or inconsistent explanations for it. The Association asserts that the Superintendent first claimed it was necessary "to save the district money, then reject[ed] the possibility of using additional state funding to keep the position a 12-month position" (Association's Br., p. 6). The Association also cites evidence contradicting the Superintendent's assessment that K.M.'s services were not needed in the summer months. In this regard, the Board in its supporting brief states that the program is primarily student based, a fact to which the Superintendent attests (Hudanich Aff., ¶12). But the Board's brief adds the following, which is not found in the Superintendent's affidavit: "Students are not present at school twelve (12) months – they are only present ten (10) months," and this is why "the Board determined that the position did not need to be a twelve (12) month position" (Board Br., p. 9). In its reply brief, the Board again asserts that

students are not present in the summer months, and insists that fact is undisputed. However, the Association does dispute it.

K.M. certifies that students do participate in the Youth Services Program in the summer months, during which time K.M. performs data processing duties related to their summer activities, as well as other tasks related to the prior and upcoming school years, among other things (K.M. Cert. ¶3).

Finally, the Association, relying upon N. Caldwell Bd of Ed., H.E. No. 89-14, 14 NJPER 678, 680 (¶119285 1988), asserts that the Bridgewater standard does not apply at the summary judgment stage of the proceedings because, even assuming the Association has not yet established a prima facie case of retaliation under the Bridgewater standard, nothing in the record suggests that the Association could not do so in its case in chief, after a full hearing. Id. (denying school board's motion for summary judgment on unfair practice charge alleging retaliatory transfer).

Summary judgment will be granted if there are no material facts in dispute and the moving party is entitled to relief as a matter of law. Our regulation on summary judgment motions, N.J.A.C. 19:14-4.8(e), 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.

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) specifies the standard for determining whether a "genuine issue" of material fact precludes summary judgment. The fact finder 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied 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); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Applying these standards to the record facts, we deny the Board's motion for summary judgment. We find that numerous material issues of fact in this matter are disputed, the most significant being the issue of whether the Board had a legitimate, non-retaliatory business reason for reducing K.M.'s position. An additional disputed fact is whether the

Association, by signing the Rider, consented to the Board's decision to reduce K.M.'s position, given the parties' differing understandings of relevant language in the Rider. The parties' conflicting assertions on these points raise credibility questions which may not be disposed of summarily. See, Hillsborough Tp., P.E.R.C. No. 2017-59, 43 NJPER 418 (¶116 2017), citing, New Jersey State (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014). Therefore, we cannot conclude on this record, at this early stage in the proceedings, that the Board is entitled to relief as a matter of law. We make no findings as to the merits of the charging party's claim that the Board retaliated against K.M. for engaging in protected activity, in violation of 5.4a(1) and (3); and the charging party bears the burden of proving the elements of the violation. Bridgewater, supra, 95 N.J. at 242.

ORDER

The Cape May County Technical High School Board of Education's motion for summary judgment is denied. This matter is remanded to the Hearing Examiner for a hearing.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 28, 2020

Trenton, New Jersey