

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Respondent,

-and-

Docket No. CO-2017-230

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 74, INC.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts, as modified, a Hearing Examiner's Recommended Decision and Order dismissing a Complaint issued on an unfair practice charge filed by the Policemen's Benevolent Association, Local No. 74, against the Township of Neptune, which alleged that the Township violated N.J.S.A. 34:13A-5.4a(1), (3), and (5) by removing two unit members from the Monmouth County Emergency Response Team (MOCERT) in retaliation for their role in a letter jointly sent by the PBA and FOP Lodge No. 19 to the Township's Chief of Police and its then-Director of Police, outlining the unions' concerns about the Police Department. In rejecting all but two exceptions filed by the PBA, the Commission finds that the record, on the whole, supports the Hearing Examiner's central findings as to the legitimacy of the Township's business justifications for the removals, and that the removals would have taken place absent the protected conduct. The Commission finds the record evidence to be consistent with a conclusion that a variety of legitimate considerations (expressed in the Township's Answer and as adduced at the hearing, including, among other things, regarding ongoing concerns with scheduling and manpower issues as they were impacted by MOCERT training requirements), influenced the challenged decisions, and that the Township's witnesses testified consistently with and/or did not contradict the reasons provided by the Township in its answer to the charge. The Commission otherwise modifies the Hearing Examiner's decision to reflect that the Township did not sufficiently establish the Chief's disapproval of the fact that officers were attending MOCERT training on their own time as one of the grounds for the decisions he made in 2017 about MOCERT participation; and by striking a brief mention in its findings of fact of testimony concerning mediation efforts related to the charge, as N.J.A.C. 19:14-6.3 prohibits the admission of facts pertaining to offers of settlement or proposals of adjustment absent the agreement of all parties.

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.

P.E.R.C. NO. 2021-8

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POLICEMEN'S BENEVOLENT ASSOCIATION,
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Charging Party.

Appearances:

For the Respondent, Grace, Marmero & Associates, LLP,
attorneys (Michael R. Burns, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP,
attorneys (Brian J. Manetta, of counsel)

DECISION

On April 15, 2020, the Policemen's Benevolent Association, Local No. 74, (PBA), which represents all patrol officers and detectives employed in the Neptune Township Police Department (NTPD), filed exceptions to a Commission Hearing Examiner's recommended Decision and Order, issued on March 5, 2020, H.E. No. 2020-6, 46 NJPER 389 (¶95 2020). The Hearing Examiner recommended the dismissal of a Complaint issued by the Director of Unfair Practices on an unfair practice charge (UPC) filed by the PBA on April 25, 2017 against the Township of Neptune (Township).

The charge alleges that on March 21, 2017, the Township violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (3), and (5), by removing two unit members, Neptune Township Police Department (NTPD) patrol officer/PBA Vice President Robert O'Heney and NTPD patrol officer Ryan Chippendale, from the Monmouth County Emergency Response Team (MOCERT) in retaliation for engaging in protected activity.

The charge alleges that these removals were in retaliation for a letter jointly sent by the PBA and FOP Lodge No. 19 (FOP)^{1/} on August 15, 2016 (hereinafter, the "letter") to the Township's Chief of Police, James Hunt, and its then-Director of Police, Michael Bascom, outlining the unions' concerns about the Neptune Township Police Department (NTPD); more specifically for Officer/Vice President O'Heney's role in authoring the letter and in subsequent meetings between the parties to discuss it, and for Officer Chippendale's involvement in the letter, particularly his input with regard to concerns about the NTPD's radio system.

After a hearing on June 20-21 and August 15-16, 2019, at which the parties examined witnesses and exhibits were admitted into evidence, and the parties' filing of post-hearing briefs,

^{1/} The FOP represents superior officers employed by the Township. It is not a party.

the Hearing Examiner issued a 172-page, comprehensive and exhaustively-detailed Recommended Decision and Order in which he made 292 findings of fact. He found that the Township of Neptune did not violate N.J.S.A. 34:13A-5.4a(3) or N.J.S.A. 34:13A-5.4a(1) by removing Officer/Vice President O'Heney and Officer Chippendale, as well as a third officer, Bryan Maher,^{2/} from MOCERT and by discontinuing NTPD's participation in MOCERT. H.E. No. 2020-6, p. 171. The Hearing Examiner concluded that the PBA failed to demonstrate by a preponderance of the evidence that the Township's course of conduct after the issuance of the letter tended to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Act. Ibid. He also found that the Township established a legitimate and substantial business justification for the challenged actions. Ibid.

The PBA's exceptions to the Hearing Examiner's decision are as follows:

1. The PBA takes exception to the Hearing Examiner's determination that the PBA failed to show by a preponderance of the evidence that protected activity was a substantial or motivating factor in the Township of Neptune's (Township) decision to remove Vice President O'Heney and Officer Chippendale from the Monmouth County Emergency Response Team (MOCERT), (HE at 150, Finding of Fact 285.)

^{2/} The charge alleges the removals were retaliatory only as to Officer/Vice President O'Heney and Officer Chippendale.

2. The PBA takes exception to the Hearing Examiner's determination that NTPD patrol officers O'Heney, Chippendale and Maher would have been removed from MOCERT, and NTPD's participation in MOCERT would have been discontinued absent the protected activity. (HE 151, Finding of Fact 285.)
3. The PBA takes exception to the Hearing Examiner's determination that the Township did not violate Section 5.4(a)(3) or derivatively 5.4(a)(1) of the New Jersey Employer-Employee Relations Act (Act). (HE 160.)
4. The PBA takes exception to the Hearing Examiner's determination that the Township did not independently violate Section 5.4(a)(1) of the Act. (HE 171.)
5. The PBA takes exception to the Hearing Examiner's introduction of Neptune Township Council meeting minutes that were not introduced by either party at the Hearing. (Finding of Fact Nos. 132, 133.)
6. The PBA takes exception to the Hearing Examiner's reliance on arguments not raised by the Township in promulgating his Recommended Decision. (HE 150-160.)
7. The PBA takes exception to the Hearing Examiner's consideration of settlement discussions between the parties with respect to this Unfair Practice Charge. (Finding of Fact 290.)
8. The PBA takes exception to the Hearing Examiner's recommendation to dismiss the PBA's Unfair Practice Charge. (HE 172.)
9. The PBA takes exception to the Hearing Examiner's failure to provide the requested relief.

On May 7, 2020, the Township filed a brief in response to the PBA's exceptions, arguing that the PBA has not proven the Township violated Sections 5.4(a)(3) or 5.4(a)(1) of the Act, the Hearing Examiner correctly found no independent violation of Section 5.4(a)(1) of the Act, and the Hearing Examiner's review of the evidence did not exceed the scope of his authority.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. We find that the Hearing Examiner's findings of fact, H.E. 2-146, as modified herein, are supported by the record and we adopt them. We further adopt the Hearing Examiner's conclusions of law.

We find that the record, on the whole, supports the Hearing Examiner's central findings, including as to the legitimacy of the Township's business justifications for the removals, which the Hearing Examiner detailed as follows:

I credit Chief Hunt's testimony that his decision to remove patrol officers O'Heney, Chippendale, and Maher from MOCERT and to discontinue NTPD's participation in MOCERT was not motivated by anti-union animus, or designed to retaliate against the PBA or any of its members, in relation to the PBA's August 15, 2016 letter. Hunt admitted that although he was the first chief of police to permit NTPD officers to participate in MOCERT in 2014 on a trial/test-basis, by 2016/2017 it had become clear to him - based in part upon issues and concerns that were raised by Captain McGhee - that it was one of the worst

decisions that he had made. While not an exhaustive list, Hunt based his conclusion on the following factors:

-while his original understanding was that there would never be a time when all of NTPD's MOCERT operators were sent to a call-out,^{3/} Hunt learned in February 2016 that MOCERT had changed its policy and would be utilizing all of NTPD's MOCERT operators for call-outs which in turn would result in additional difficulties with NTPD's scheduling particularly within the Patrol Division as well as increased costs to the Township;

-while he was aware of MOCERT's training requirements in 2014, Hunt found that ensuring NTPD's MOCERT operators each attended 16 hours of training per month as well as one week of training per year (40 hours) created difficulties within the Patrol Division (e.g., although MOCERT members were only permitted to go to training when their shift was above minimum manpower, accommodating MOCERT training requests exacerbated manpower issues/inequities);

-while he was aware of MOCERT's training requirements in 2014, Hunt also found that ensuring NTPD's MOCERT operators each attended 16 hours of training per month as well as one week of training per year (40 hours) created an inequitable distribution of training opportunities among NTPD officers such that MOCERT members had substantially

3/ Call-outs occurred when the MOCERT team was activated to respond to an incident somewhere in the County. MOCERT team members upon receiving notification of a call-out were required to call into NTPD headquarters, speak with the shift commander on duty, and request authorization to respond to that incident. H.E. Finding of Fact 103.

more training hours than non-MOCERT members;

. . .

-while he initiated NTPD's participation in MOCERT on a trial/test-basis in 2014, Hunt found (based in part upon the December 5, 2016 MOCERT call-out) that the lack of formal MOCERT policies and/or NTPD's officers' failure to observe informal MOCERT controls was an issue that had to be addressed immediately by issuing formal policies and guidance regarding MOCERT-related activities and ultimately by evaluating NTPD's continued participation in MOCERT;

-while he was aware that reassigning NTPD officers from MCPO, DEA and/or the Street Crimes Unit to the Patrol Division would alleviate the Patrol Division's manpower issues, Hunt found that the benefit of maintaining these assignments outweighed any detriment to the Patrol Division; in contrast, while he was aware that discontinuing NTPD officers' participation in MOCERT would provide limited, albeit immediate, relief for the Patrol Division's manpower issues, Hunt found that the benefit (if any) to the Township/NTPD of maintaining NTPD's participation in MOCERT was not outweighed by the detriment to the Patrol Division's manpower issues; and

-since 2014/2015, NTPD had begun participating in SMCASP/ASRT, a program that was similar to MOCERT which Hunt found provided greater value/benefit to the Township/NTPD than MOCERT.

Accordingly, I credit Hunt's testimony that his intention was to completely discontinue NTPD's participation in MOCERT in January 2017. However, based upon the request/

suggestion of MOCERT Command Staff, Hunt decided to permit two NTPD officers (one operator and one technician) to continue with MOCERT until the end of 2017/beginning of 2018 in order to allow MOCERT an opportunity to retain new members as replacements. I also credit Hunt's testimony that patrol officers O'Heney, Chippendale, and Maher were removed from MOCERT in March 2017 because not having to accommodate their MOCERT-related activities would provide limited, albeit immediate, relief for the Patrol Division's manpower issues; and that Sergeant Faulhaber and detective Taylor were permitted to continue with MOCERT until the end of 2017/beginning of 2018 because accommodating their MOCERT-related activities would have no impact on the Patrol Division's manpower issues.

[H.E. at 139-141, Finding of Fact 285.]

We add the following.

The PBA claims the Hearing Examiner's decision is flawed by an error in treating as hearsay an admission allegedly made by a party-opponent, specifically Captain McGhee, and incorrectly imposing the burden of refutation of that evidence on the PBA. This exception concerns Officer/Vice President O'Heney's testimony that McGhee admitted to O'Heney that it was because Chief Hunt was angry about the letter that he was both removed from MOCERT and was not permitted to teach his fellow officers a "Methods of Instruction" (MOI) class in "officer down" techniques. The PBA stresses that McGhee, in his own testimony, did not dispute O'Heney's allegations and that this constitutes direct evidence that O'Heney's protected activity (authoring the

letter) was a substantial and motivating factor in the decision to remove him from MOCERT.

The PBA, citing N.J.R.E. 803(b), argues that Officer/Vice President O'Heney's testimony about Captain McGhee's admission was an exception to the hearsay rule as it contained the admission of a party-opponent, and as such the Township, not the PBA, had the burden to affirmatively rebut O'Heney's testimony. By its failure to do so, the PBA argues, the Hearing Examiner should have drawn an adverse inference against the Township. We note that the rules of evidence are not controlling here.^{4/} Regardless, we find that even if the Hearing Examiner erred in treating O'Heney's testimony as hearsay, and even if the Township's failure to refute this evidence warranted an adverse inference, it was harmless error because, for the reasons set forth herein, we find that a preponderance of the evidence on the entire record supports the Hearing Examiner's finding that the adverse action would have taken place absent the protected conduct.^{5/} In re Bridgewater Twp., 95 N.J. 235, 240-245 (1984);

^{4/} See, N.J.A.C. 1:1-15.1(c) ("Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules"); and N.J.A.C. 19:14-6.6(a) ("The parties shall not be bound by rules of evidence whether statutory, common law, or adopted by the Rules of Court.")

^{5/} On the issue of O'Heney and the MOI course, we find the evidence reasonably supports the Hearing Examiner's
(continued...)

Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015).

The PBA's exceptions, including those relating to its contention that the Township's reasons for removing Officer/Vice President O'Heney and Officer Chippendale from MOCERT are unsupported/pretextual, are preponderantly based on challenges to the Hearing Examiner's credibility determinations. We "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c). In accordance with our precedent, "Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments." West Orange Bd. of Ed., P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37

5/ (...continued)
determination to credit Chief "Hunt's testimony that O'Heney was not sent to the MOI course solely so that he could instruct NTPD officers regarding officer-down rescue techniques that he learned in MOCERT; that O'Heney was in fact next in line to go to the MOI course; that sending NTPD officers to the MOI course was consistent with, and part of, NTPD's efforts to gain accreditation that began in 2014 and came to fruition in 2016; that there was limited space available for NTPD FTOs to attend the MOI course; that approximately 20 NTPD FTOs had attended the MOI course before O'Heney and Chippendale attended the course in November 2016; and that O'Heney continued to operate as a FTO and to train NTPD officers after he completed the MOI course." H.E. Finding of Fact 217.

2018), citing Ridgfield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den., 186 N.J. 609 (2006).

We are not compelled to substitute our judgment for that of the Hearing Examiner on his credibility determinations merely because the Hearing Examiner, as the PBA repeatedly stresses, credited the testimony of PBA witnesses in some instances and Township witnesses in others. For example, the Hearing Examiner credited the testimony of both Township and PBA witnesses (including Captain McGhee, a Township witness) about their firsthand observations of Chief Hunt's and Director Bascom's demeanors during the first meeting with union leadership to discuss the letter (in September 2016) to find that Hunt and Bascom were upset about the letter. This does not compel a conclusion that it was arbitrary, capricious or unreasonable for the Hearing Examiner to also credit Captain McGhee's testimony that Chief Hunt never personally expressed to him that Hunt was angry or held a grudge about the letter.

We are satisfied that the Hearing Examiner adequately explained the bases for his credibility determinations. Upon our review of the entire record, we find the PBA has not met its burden of establishing that they are arbitrary, capricious or unreasonable, or unsupported by sufficient, competent, and

credible evidence in the record to a degree that would preclude the Commission from adopting them.

The PBA asserts that the Hearing Examiner's findings that Chief Hunt and Director Bascom were "upset" during a series of meetings at which the letter was discussed (in September and October of 2016, and in February of 2017) constitute direct evidence of hostility to protected activity. We disagree. Regarding these meetings, we are satisfied that the evidence in the record as a whole supports the Hearing Examiner's conclusions that:

Chief Hunt and then-Director Bascom were within their rights as employer representatives to comment upon the PBA's letter as they did [during the meetings]. See Black Horse Pike Reg. Bd. of Ed. During the closed-door NTPD Command Staff meetings on September 1, September 15, and October 27, 2016 and February 17, 2017 when the PBA's letter was discussed, the parties were essentially engaged in grievance discussions. Accordingly, Hunt, Bascom, McGhee, and Gualario (management officials) met Blewitt, O'Heney, Cox, and Claffey (union officials) as equals and were permitted to exchange views freely and frankly.

[H.E. at 168.]

And:

Hunt and Bascom were free to criticize the conduct of PBA/FOP representatives and/or the presentation (i.e., mode, manner, means, forum, timing) and content of the PBA's letter; they were also free to investigate and gather more information in an effort to immediately address issues that they perceived as having some merit. Hunt and Bascom did not threaten the employment status

of Blewitt, O'Heney, Cox, Claffey or any other PBA/FOP member during any meeting or in any correspondence. No evidence was adduced that any PBA/FOP member was disciplined as a result of those meetings or the PBA's letter. Moreover, Hunt and Bascom's defensive behavior, in-kind criticism, and correspondence was precipitated by the way in which the PBA's letter was presented as well as certain substantive issues that they found absurd or meritorious.

[H.E. at 169.]

We agree with the Hearing Examiner that the mere fact that Chief Hunt and Director Bascom were upset, angry about or critical of the letter, on its own, does not constitute direct evidence of anti-union animus or hostility to protected activity. Cf.

Belleville Ed. Ass'n and Belleville Bd. of Ed., P.E.R.C. No. 2015-79, 42 NJPER 41 (¶12 2015), aff'd, 455 N.J. Super. 387 (App. Div. 2018) (finding direct evidence of hostility in discipline that was disproportionate to the alleged misconduct and that was timed just prior to and after the exercise of protected activity); City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987), recon. den., P.E.R.C. No. 88-50, 13 NJPER 849 (¶18328 1987) (finding direct evidence of hostility where city commissioner threatened to "get even" with and to "get rid" of officers who filed law suit seeking to enforce contractual pension rights); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) (retaliation for protected activity motivated board where all members of association's negotiating team became subjects of discipline or disputed personnel actions

within concentrated period of time, and disciplinary/evaluative documents cited association activity as source of discipline.)

Here, the letter was issued in August of 2016, while the challenged removals from MOCERT did not occur until March of 2017. Meanwhile, the Township's evidence of ongoing difficulties with scheduling and manpower issues during the intervening period, including as they were impacted by MOCERT training requirements, among other things, on the whole reasonably supports the Hearing Examiner's finding that manpower issues in the Patrol Division continued to be a concern through March 21, 2017. There is no evidence in the record of disciplinary action against Officer/Vice President O'Heney and Officer Chippendale, or threats of same.

In its exceptions, the PBA argues that the manpower-related reasons given by the Township for the challenged removals were pretextual because "there were no actual manpower issues in the Patrol Division at the time Chief Hunt removed Vice President O'Heney and Officer Chippendale from MOCERT." We note that the August 15, 2016 letter of the PBA/FOP requested a minimum 15% manpower increase, to 85 officers. As of the date of that letter, the Township had already hired six new officers in 2016. Thus, as of the date of the letter, the Patrol Division had approximately 74 officers, inclusive of the six hired in 2016. Therefore the PBA, according to its letter, believed the hiring of an additional 11 officers, at a minimum, would address the

division's manpower issues. Only five additional officers were hired in 2017. That is still six short of the PBA's requested minimum increase. This belies the PBA's repeated claims in its exceptions that there were no actual manpower issues in the Patrol Division at the time of the challenged removals.

Moreover, we find that the fact that the Township was able to maintain minimum staffing levels despite its MOCERT training and FMLA leave obligations does not render illegitimate the Township's determination that withdrawing from MOCERT would help to alleviate those concerns.

In its exceptions, the PBA argues that at the same time that Chief Hunt removed Officer Chippendale and Officer/Vice President O'Heney from MOCERT, he also removed Officer Maher (who had no involvement with the letter) as a cover for Hunt's "blatant retaliation" against the others; and that to "appease" Maher, Hunt subsequently selected him to be a firearms instructor, an assignment coveted by Chippendale. We find that the Hearing Examiner reasonably concluded from the evidence that Chief Hunt had legitimate business reasons for choosing Maher, as follows:

Hunt testified that Chippendale's "role with the PBA [and/or] his opinions on the radios . . . [did not] have any impact on his ability to become a firearms instructor." Hunt testified that although he makes the final decision regarding who becomes a firearms instructor, "[his] command staff comes to [him] and gives [him] who they believe should be the next person put in there, and [Hunt] usually agree[s] with that." Hunt also testified that Maher "was [not] given [a firearms instructor position] as a consolation prize for when the MOCERT

program was cancelled"; that "Lieutenant Cox" recommended Maher and "[in] discussion[s] [with] [his] captains", Hunt "agreed that we felt Maher was a better fit than Chippendale at that time." [4T33:14 thru 4T35:19]

Lieutenant Cox confirmed that he recommended Maher to be a firearms instructor and that "[t]he leadership of [NTPD] . . . generally follow[s] [his] recommendations." Cox testified that he was approached by Maher before he was appointed as a firearms instructor; that Maher was/is "qualified" and "suited" to be a firearms instructor; and that "someone with more seniority would be given preference over someone with less seniority" for appointment to the position. Cox also testified that Chippendale "would make a good firearms instructor and be able to instruct", but may or may not "[f]it well" with the group because "[Chippendale] wasn't of the same opinions that we were on the range." [1T200:1 thru 1T204:20]

Maher, who was hired on July 11, 2011, had more seniority with NTPD than Chippendale, who was hired on July 23, 2013. [CP-11]

[H.E., Findings of Fact 222-224.]

We also reject the PBA's argument that the Hearing Examiner improperly admitted evidence (R-70) concerning productivity levels of officers in the Patrol Division, or that Chief Hunt used such evidence in targeting Officer/Vice President O'Heney for retaliation. We find the Hearing Examiner reasonably concluded as follows:

R-70 is an email dated October 12, 2016 from Lieutenant Cox to Captain McGhee, and a forward of that email dated October 24, 2016 from McGhee to Chief Hunt. I overrule the PBA's objection. I find that R-70 and related testimony are relevant and probative with respect to McGhee's evaluation of patrol

officers' production and Hunt's monitoring of MOCERT members' performance as NTPD officers, as well as the Township's basis for removing NTPD patrol officers O'Heney and Chippendale from MOCERT and for discontinuing NTPD's participation in MOCERT.

[H.E. at 84, Finding of Fact 195, n.6.]

We further reject the PBA's exceptions to the extent they contend the Township's proffered business justifications are either inconsistent or may not be considered because they are affirmative defenses which the Township did not identify in its Answer, therefore they were waived. N.J.A.C. 19:14-3.1 states, "The answer shall specifically admit, deny or explain each of the allegations set forth in the complaint, . . . any allegation not specifically denied or explained shall be deemed to be admitted to be true. . . . The answer shall include a detailed statement of any affirmative defenses." (Emphasis added.) We find the Township adequately explained its business justifications in its answer.^{6/}

^{6/} These include: Having patrol officers participate in MOCERT created a burden on Patrol Division schedules due to MOCERT's required training; The depths of time and commitment required to support MOCERT and the limited benefit that the Township received in return. . . . The Chief had originally committed to one or two officers to MOCERT, but had decided to allow five to go; however, after he realized the impact the 700 hours of training per year would have on the Patrol Division, the Chief decided to reduce his commitment back to the original number; Officer/Vice President O'Heney and the other two officers were removed from MOCERT because of manpower, scheduling impact, efforts to offer a fairly equal level of training for all officers, and the limited benefit the Township

(continued...)

Shifting reasons offered by an employer for an adverse personnel action may circumstantially demonstrate union animus. See, e.g., In re 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). But we do not find the explanations given by the Township in its Answer to be false or mutually inconsistent with the testimony of its witnesses, thereby yielding an inference of hostility. Township of Hardyston, I.R. No. 2019-18, 45 NJPER 329 (¶88 2019). Cf. Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003). In Camden the reasons given by different administrators for a

6/ (...continued)

received from MOCERT as compared to other assignments made from the Patrol Division, which include the Street Crimes Units, assignments to the Prosecutor's Office, and assignments to certain federal agencies; The Township's recognition that the level of participation in MOCERT was beyond what was reasonable, and that MOCERT does not address its community policing efforts, efforts to reduce gun violence, reduce gang activity, reduce violent crime, and to address quality of life issues, such as speeding, and other traffic violations; The Chief decided to allow one tactical operator to remain with MOCERT based upon his assignment to the Detective Bureau and one communications technician based upon his assignment to Administration. Allowing these individuals to participate in MOCERT training and resources had less impact on other officers as compared to allowing officers from the patrol division. However, after continued monitoring and reviewing of MOCERT participation, the Chief made a decision to discontinue participation entirely. As of January 2018, there are no officers from NTPD assigned to MOCERT; The decision to remove the officers from MOCERT was based upon the Chief's decision to allocate manpower based upon the needs of the community and the Department.

teacher's reassignment or transfer were starkly divergent: because the person was the best candidate for the job versus because the employee performed poorly in her current job.

Here, we do not find the evidence to be inconsistent with a conclusion that a variety of legitimate considerations (expressed in the Township's Answer and as adduced at the hearing), influenced the decision. Upon our review of the entire record, we agree with the Hearing Examiner that the Township's witnesses testified consistently with and/or did not contradict the reasons provided by the Township in its answer to the charge. See, e.g., H.E. at 124, Finding of Fact 256 (finding Director "Bascom's testimony reliable based in part upon the fact that it is consistent with the record as a whole, including the Township's Answer and Chief Hunt's testimony, regarding the basis for removing NTPD patrol officers O'Heney and Chippendale from MOCERT and discontinuing NTPD's participation in MOCERT.")

We also find the Hearing Examiner could have reasonably concluded from the evidence that Chief Hunt's "intention was to completely discontinue NTPD's participation in MOCERT in January 2017 . . . [but that], based upon the request/suggestion of MOCERT Command Staff, Hunt decided to permit two NTPD officers (one operator and one technician) to continue with MOCERT until the end of 2017/beginning of 2018 in order to allow MOCERT an opportunity to retain new members as replacements," H.E. Finding

of Fact 285, notwithstanding Captain McGhee's testimony that "as of February 7-8, 2017, Chief Hunt had '[n]ot necessarily . . . made a decision as to whether or not . . . to suspend Neptune's participation in MOCERT.'" H.E. Finding of Fact 265. Captain McGhee's testimony, by its use of the qualifier "necessarily," does not refute or establish Chief Hunt's intent on this issue. The Hearing Examiner also reasonably relied on the Chief's emails to and from MOCERT command in January 2017, in which he stated, "I will review this and determine if we even stay with it . . . I'm leaning to opt out so they better consider replacing all of them," as well as Chief Hunt's testimony regarding that email exchange, "in January of 2017 . . . MOCERT, in my opinion, wasn't working for the town, wasn't working for my department, and I was clearly thinking about just stopping everything." H.E. Findings of Fact 258-259.

Nor are we convinced that Chief Hunt's reasons were pretextual based on the fact that two officers (Sergeant Faulhaber and Detective Taylor, both of whom were not in the Patrol Division) whom he allowed to remain in MOCERT after Officer/Vice President O'Heney and Officer Chippendale were removed did so until February of 2018, well beyond the point when, according to Chief Hunt, MOCERT could have recruited and trained replacements. Chief Hunt testified as follows about the retraining issue:

pulling three operators and two technicians from the MOCERT squad before they had the chance to re-up, I don't feel would be fair to them either, and I had expressed that with, you know, conversations with Barry DuBrosky [of MOCERT command], and that's why he even suggested, at least, leave me one and one until we can get re-upped, and that doesn't happen until some time in May, the application process, and then, really, they can't get back in order until October of that year.

[H.E. Finding of Fact 260.]

We find this evidence is inconclusive as to whether (a) MOCERT received enough applications by May to replace the remaining NTPD officers, and/or (b) MOCERT was in fact "back in order" by October of 2017. That is, we are unable to conclude on this record alone that Det. Taylor and Sgt. Faulhaber's remaining in MOCERT beyond October 2017 establishes the requisite preponderance of evidence that Chief Hunt's reason for keeping them in MOCERT was pretextual.

We find the record does not support the PBA's contention that in evaluating Chief Hunt's decision to remove Officer/Vice President O'Heney and Officer Chippendale from MOCERT, the Hearing Examiner erroneously relied on Hunt's testimony about officers out on FMLA leave. FMLA leave is not specifically mentioned in the Hearing Examiner's finding regarding manpower issues as they affected Chief Hunt's decision. H.E. Finding of Fact 285. The Hearing Examiner also noted Hunt's testimony that "although there was reduced manpower in 2016 due in part to FMLA

leave, the NTPD 'always had the schedules staffed appropriately,'" and he credited Chief "Hunt's testimony that NTPD had schedules staffed appropriately in 2016 despite reduced manpower." H.E. Finding of Fact 61, 63. Regardless, as we noted supra, we find that the fact that the Township was able to maintain minimum staffing levels despite its FMLA leave obligations does not render illegitimate the Township's determination that withdrawing from MOCERT would help to alleviate its ongoing manpower issues, whatever their causes.

We reject the PBA's exceptions which object to the Hearing Examiner's consideration of evidence concerning "call-outs" of MOCERT officers in February and December of 2016, and related policy changes by, respectively, MOCERT and NTPD command. We agree with the Hearing Examiner that such evidence, "as well as the subsequent removal of patrol officers from MOCERT and the discontinuation of NTPD's participation in MOCERT, [was] congruous with the record as whole regarding the initiation of NTPD's participation in MOCERT on a trial/test-basis; ongoing assessment of MOCERT members' performance as NTPD officers and how MOCERT was working with/for NTPD; and Hunt's admission that it ultimately became clear that permitting NTPD officers to participate in MOCERT was a poor decision." Finding of Fact 245. We also find that such evidence was probative of the reasons given by the Township in its Answer, including with respect to its evaluation of the "Township's interest in participating in

MOCERT and [its] recognition that the level of participation was beyond what was reasonable.”

We reject the PBA’s contention that the Hearing Examiner improperly considered and admitted into evidence a document (R-126) purporting to establish that MOCERT members had substantially more training hours than non-MOCERT members. Finding of Fact 231. The PBA contends the document is unauthenticated hearsay without any residuum of competent evidence in the record. We disagree. The Hearing Examiner credited Captain McGhee’s testimony about this document, and found it satisfied the residuum rule, as follows:

McGhee’s testimony provides sufficient indicia of reliability/accuracy (i.e., R-126 was initially created in order for NTPD to monitor and track training hours as a result of [not in preparation for] the previously-referenced lawsuits . . . ; McGhee served as NTPD’s training coordinator before being promoted to captain of operations in August 2016; McGhee identified his successor, Sergeant O’Donnell, as the person who currently compiles/organizes NTPD’s training records. . . . McGhee provided sufficient legally competent evidence to support a finding of fact regarding NTPD officers’ number of training hours. . . . Moreover, McGhee testified that R-126 is a document that is “regularly maintained by [NTPD]” and “all training hours that an officer receives . . . are logged into this training sheet.” [3T154:6 thru 3T155:2] Accordingly, I find that R-126 is subject to a hearsay exception. See N.J.R.E. 803(c)(6) (“[r]ecords of regularly conducted activity . . . made in the regular course of business and . . . a regular practice of that business to make it”). The PBA had an opportunity to examine its own witnesses, cross-examine the

Township's witnesses, and to call rebuttal witnesses, including Sergeant O'Donnell. [3T171:6 thru 3T174:6] The PBA did not present any case on rebuttal and has failed to raise any doubt regarding the reliability/accuracy of R-126.

[H.E. Finding of Fact 230, n.8 (emphasis added).]

We are satisfied that the credibility findings underlying the Hearing Examiner's determination to admit R-126 are not arbitrary, capricious or unreasonable, or unsupported by sufficient, competent, and credible evidence in the record.

N.J.S.A. 52:14B-10C.

We reject the PBA's exception to the Hearing Examiner's taking administrative notice of certain Township Committee meeting minutes. (Exception 5, PBA Br. 96.) The PBA relies on N.J.R.E. 201, a rule of evidence defining the categories of facts of which judicial notice may be taken, and N.J.A.C. 19:14-6.6, which applies to our unfair practice proceedings and states, among other things, "Notice may be taken of administratively noticeable facts and facts within the Commission's specialized knowledge." N.J.A.C. 19:14-6.6 also states that the rules of evidence are not controlling, and that a hearing examiner may exclude evidence if its admission would "create a substantial danger of undue prejudice or confusion." The Township's meeting minutes are public records, and the facts adduced therefrom by the Hearing Examiner merely confirmed the record testimony as to

when the letter had become the subject of public discussion. We find this did not unduly prejudice either party.

We grant the PBA's exception to a brief reference, in Finding of Fact 290, to Chief Hunt's testimony about "mediation efforts related to the instant charge." (Exception 7, PBA Br. 98.) The PBA correctly notes that N.J.A.C. 19:14-6.3 prohibits the admission of "any facts, . . . offers of settlement or proposals of adjustment unless mutually agreed by all parties." Although the hearing transcript does not record an objection to such testimony, we find no indication in the record that the parties mutually agreed to admit such facts. Therefore, we modify the Hearing Examiner's decision and strike the second sentence of Finding of Fact 290.

We also grant the PBA's exception which contends we must reject the HE's conclusion that Chief Hunt's decision to discontinue participation in MOCERT was informed (in part) by his disapproval of the fact that officers were attending MOCERT training on their own time. H.E. Finding of Fact 285. Chief Hunt testified that he became aware that this was occurring with the PBA's "initiation of this [unfair practice] complaint," and that he would not have permitted it "if he had been aware of it." H.E. Finding of Fact 95. The Hearing Examiner found that Chief Hunt knew or should have been aware of it, based in part upon a 2015 email discussing it on which Hunt was copied. H.E. Finding of Fact 99, 81. We agree with the PBA that this evidence does

not sufficiently establish it as one of the grounds for the decisions Chief Hunt made in 2017 about MOCERT participation. We modify the HE's decision accordingly. We reject the PBA's Exceptions 3, 4, 8 and 9 because we find that the Hearing Examiner's findings of fact, as discussed and modified herein, are supported by the record and because we further adopt the Hearing Examiner's conclusions of law, for the reasons stated herein.

In conclusion, our review of the record as a whole supports that the Township's reasons for removal of the officers from the MOCERT team were not pretextual. Therefore, the Charging Party has failed to meet its burden that the removals would not have taken place absent the officers' protected conduct. Bridgewater, 95 N.J. at 240-245.

ORDER

The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioners Ford and Jones voted against this decision. Commissioner Papero recused himself.

ISSUED: September 17, 2020

Trenton, New Jersey