

P.E.R.C. NO. 88-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF,

Respondent,

-and-

Docket No. CI-H-88-8

JANE HANKERSON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint, based on an unfair practice charge, filed by Jane Hankerson against the Middlesex County Sheriff. The charge alleged that in retaliation for Hankerson's protected activity, she was reassigned and then not returned to her original responsibilities. The Commission, in agreement with a Hearing Examiner, finds that the personnel actions were motivated by legitimate operational concerns.

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Appearances:

For the Respondent, Dominic J. Cerminaro, Esq.

For the Charging Party, James A. Key, Jr., Esq.

DECISION AND ORDER

On September 8, 1987, Jane Hankerson, a sheriff's officer, filed an unfair practice charge alleging that her employer, the Middlesex County Sheriff, violated subsections 5.4(a)(1), (3) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when allegedly in retaliation for her protected activity, she was reassigned and then not returned to her original responsibilities.^{2/}

^{1/} These subsections 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; (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; and (7) Violating any of the rules and regulations established by the commission."

^{2/} Other allegations in the charge were settled.

On October 22, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.^{3/} The employer filed an Answer denying that its personnel actions were discriminatory and alleging that it had a contractual right to reassign employees as needed.

On January 12, 1988, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses, introduced exhibits and waived oral argument and post-hearing briefs.

On March 9, 1988, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 88-44, 14 NJPER ____ (¶ ____ 1988). He found that Hankerson had engaged in protected activity when, taking the PBA's advice, she declined to answer certain questions at a disciplinary hearing. But he concluded that this activity did not motivate either the initial reassignment or the later decision not to return her original responsibilities. Instead, the Hearing Examiner found the Sheriff made these personnel decisions based on his determinations that Hankerson was the best employee for the assignments given.

^{3/} The Director also consolidated this case with certain other cases involving the Sheriff and Policemen's Benevolent Association Locals 165 and 165A. Those other cases were settled so this case proceeded separately.

On March 28, 1988, Hankerson filed exceptions. She asserts that the Sheriff punished her as an example to other PBA members who followed the PBA's advice at disciplinary hearings.

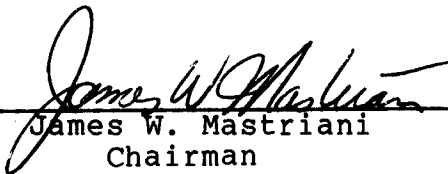
We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-12) are accurate. We adopt and incorporate them here.^{4/}

Based on our review of the record, and assuming that Hankerson engaged in protected activity, we agree with the Hearing Examiner that the personnel actions were motivated by legitimate operational concerns. We therefore dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

^{4/} The Hearing Examiner accepted, rather than ignored, testimony that the Sheriff said, after the disciplinary hearing, that he wanted disciplinary measures handed out that day and that he wanted Hankerson off her detail. We add that the captain in charge of courthouse security testified that he had no need for an additional officer.

H.E. NO. 88-44

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF,

Respondent,

-and-

Docket No. CI-H-88-8

JANE HANKERSON,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss allegations that the Middlesex County Sheriff transferred Jane Hankerson and later refused to reinstate her to her prior responsibilities in retaliation for her exercise of protected activity. The Hearing Examiner finds that the Charging Party did not make a prima facie case for the allegations, since the evidence did not establish that the Sheriff was hostile toward the exercise of protected activity. Should the Commission find that a prima facie case was established, the Hearing Examiner finds that the Sheriff would have transferred Hankerson and refused to reinstate her to her prior responsibilities even in the absence of protected activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-44

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF,

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-and-

Docket No. CI-H-88-8

JANE HANKERSON,

Charging Party.

Appearances:

For the Respondent, Dominic J. Cerminaro, Esq.

For the Charging Party, James A. Key, Jr., Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 8, 1987, Jane Hankerson (Charging Party) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Middlesex County Sheriff (Respondent) violated the New Jersey Employer-Employee Relations Act (Act). Charging Party alleged that Respondent transferred her in retaliation for her exercise of protected activity and, contrary to contractual provisions and in retaliation for protected activity, later failed to return her to her original responsibilities ^{1/} in

^{1/} While the Charging Party also alleged certain other improper conduct by the Sheriff's Department, those matters were resolved prior to hearing and are no longer before the Commission.

violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (7)^{2/}.

On October 22, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.^{3/} On October 28, 1987, the Middlesex County Sheriff filed an Answer, asserting generally that the Sheriff had a contractual right to reassign employees as needed. On January 12, 1988, I conducted a hearing in Trenton, New Jersey, where both parties had opportunities to examine and cross-examine witnesses, present documentary evidence and argue orally. The parties waived oral argument and the filing of briefs, and the record closed with the receipt of the transcript on February 19, 1988.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The Middlesex County Sheriff is a public employer within the meaning of the New Jersey Employer-Employee Relations Act.

^{2/} These subsections 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; (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; (7) Violating any of the rules and regulations established by the commission."

^{3/} The Director also issued an Order consolidating this matter with certain other matters involving the Middlesex County Sheriff and Policemen's Benevolent Association Locals 165 and 165A. By agreement of the parties, the instant matter proceeded separately.

2. Jane Hankerson is employed by the Middlesex County Sheriff, and has been a Middlesex County Sheriff's Officer for nearly 18 years. Her responsibilities have included night security functions at the Middlesex County Courthouse, transportation of inmates from the Courthouse to the County Jail and/or medical facilities, and courtroom security. In 1985, the Charging Party was assigned to the night security function at the Courthouse. Pursuant to agreements between the Sheriff and PBA Local 165 (the majority representative of sheriff's officers), night security personnel worked two consecutive days from 4 p.m. through to 8 a.m. the following morning. The 32 hours worked over two consecutive days entitled officers to earnings for 40 hours a week (Transcript (T) 20, 144-146, 193).

3. The Sheriff's Department has long required that a female officer escort any female inmate from the jail to the Courthouse or to medical facilities as necessary. Given a limited number of female officers, Sheriff Joseph Spicuzzo adjusts his staff daily as the need for female officers arises. Spicuzzo calls Captain Vincent DiPane, who is in charge of Courthouse security, "almost on a daily basis and probably 80% of [his] calls to Captain DiPane involve [Spicuzzo] trying to take a female out of the Courthouse to provide the necessary assignments to female sheriff's officers to move female inmates." Captain DiPane acknowledged that female officers are constantly borrowed from his section. The problem became acute in early 1987, when the rising female inmate

population, without a corresponding increase in the number of female officers employed by the Sheriff, caused a constant shortage of female officers. The Sheriff attempted to resolve this problem with PBA Local 165 and female officers early in 1987. At least three plans were implemented, but proved unsuccessful. By the spring of 1987, the retirement of two female officers and chronic physical problems of a third female officer made female officers in even shorter supply. In early May 1987, Spicuzzo resolved that he would temporarily correct the problem by transferring another female officer into transportation from an area where a female officer was not critical. The night security shift at the Courthouse, which has no particular need for female officers (i.e. no escort function), seemed to Spicuzzo the most likely source; at the time it was staffed by two males and two females. Spicuzzo determined that Hankerson was the better choice of the two females for transportation because she had over five years experience in transportation and was in far better physical condition than the other female officer in Courthouse security (T28-29, 31, 36, 39, 50-54, 67, 127, 182 and 199).

4. Throughout April and May of 1987, PBA Local 165 and the Sheriff had an ongoing dispute concerning the availability of officers to work overtime. The Sheriff's position in the dispute was that officers who refused to answer calls to their homes when they were there were subject to discipline; PBA's position was that, in the absence of standby pay, officers were under no obligation to

answer their phones for overtime assignments. As a result of this dispute, the Sheriff conducted approximately 175 hearings resulting in discipline for the vast majority of those involved. The PBA counseled unit members to refuse to answer questions at the hearings concerning their whereabouts on the basis of constitutional and civil rights. Many of the disciplinary hearings conducted by Spicuzzo in April and May of 1987 involved female officers who refused to answer questions concerning their whereabouts at specific times. Most of the hearings resulted in reprimands and suspensions of officers, which were later rescinded by agreement of the parties. In addition to Hankerson, one other sheriff's officer was transferred between departments after the hearing of May 26, 1987. That employee also refused to answer the questions concerning his whereabouts at specific times (T44, 49, 65, 143, 175 and 216; CP-4).

5. On May 26, 1987, the Sheriff conducted many of these disciplinary hearings including one for the Charging Party. The Charging Party refused to answer the question concerning her whereabouts when her phone had not been answered. When Hankerson left the hearing room, Spicuzzo told his assistant, Chief Scott, that he wanted "disciplinary measures to be handed out today and I want her [Hankerson] off that [night security] detail." He made the order after the disciplinary hearing because "it was on my mind." Later that day, Spicuzzo's secretary typed up a transfer notice for

Hankerson, reassigning her from night security at the Courthouse to transportation (T45-47, 88-92; CP-2 and CP-8).^{4/}

6. On June 1, 1987, Hankerson reported to transportation and continued that function through June 29, 1987. She requested and bid for a transfer back to the night security position. Although she had the most seniority, the position was given to a less senior male. Late in June 1987, Spicuzzo reviewed her case and decided that "if it was going to personally help Jane out not to get the permanent assignment of transportation and be assigned to the courts we would try to help her out that way...." By June 29, 1987, and at her request, Hankerson was permanently assigned to the day Courthouse security complement, which requires her to escort and guard prisoners. Compared to the night security positions at the Courthouse, transportation and day security functions offer less opportunities for overtime, no night differential, and a five-day week as opposed to a three-day workweek (T36-37, 69-70, 202, 209-211 and 223; CP-3 and CP-11).

^{4/} While Hankerson testified that, standing in the hallway after her disciplinary hearing, she heard the Sheriff use the word "punishment," she could not identify a context for the word (i.e. whether it referred to the suspension or the transfer - T196 and 216). Moreover, while the record contains Hankerson's hearsay testimony of the comments of Chief Scott concerning Hankerson's transfer (T200-201), Chief Scott was not called to testify by the Charging Party. Since there is no residuum of credible evidence upon which a factual finding may be based, I make no finding of facts as to comments of Chief Scott. Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976).

7. The collective agreement covering sheriff's officers in Middlesex County provides that, in the selection of applicants for job vacancies, "seniority will be given prime consideration." In the same article, the contract provides: "It shall be the sole right of the Sheriff of the County of Middlesex to re-assign employees between units of the Department provided that such reassignments are in accordance with recognized State Civil Service procedures." Sheriff Spicuzzo has often filled job vacancies with candidates who have less seniority than other applicants, but whose abilities, in Spicuzzo's opinion, are better suited to the position (A-3 (Article XXV); T55-57 and 146-149).

ANALYSIS

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will 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, citation omitted. If the charging party meets this burden, the onus "shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." Id. at 242.

There is no direct evidence here that protected conduct by the Charging Party was a substantial or motivating factor in her transfer from night security to transportation. I proceed to review the circumstantial evidence.

The record establishes that the Charging Party engaged in protected conduct when, on the advice of her majority representative, she refused to answer certain questions at her grievance hearing on the basis of constitutional and civil rights. Since Spicuzzo conducted approximately 175 hearings, including Charging Party's, he was definitely aware of the coordinated PBA approach, and that the Charging Party followed the PBA's advice (see Finding of Fact Numbers 4 and 5).

In addition to evidence that the Charging Party engaged in protected activity and that the Respondent knew of that activity, the Charging Party must also demonstrate that the Respondent was hostile towards the exercise of protected activity. The Charging Party seeks to establish hostility based upon the timing of Spicuzzo's order to transfer her. Timing of adverse personnel actions is an important factor in evaluating motivation. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18182 1987), motion for recon. den., P.E.R.C. No. 88-50, 13 NJPER 849 (¶18328 1987); State of New Jersey (Seaman), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); and Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986).

While Spicuzzo gave the order to transfer the Charging Party immediately after her disciplinary hearing, the factual pattern does not support an inference that the order was made out of hostility against Charging Party's exercise of protected activity. Charging Party's own witnesses testified that there was a recurrent and pressing shortage of female officers to escort female prisoners in court and to jail and hospitals. Spicuzzo worked for months with the majority representative and female officers to resolve the problem, and three different plans were unsuccessfully implemented. Spicuzzo's decision to reassign the most physically able woman (Hankerson) out of a work area which did not involve contact with female prisoners (night security) seems logical and totally without hostile motive. The fact the transfer was ordered just after the disciplinary hearing, in the context of these facts, is consistent with Spicuzzo's testimony that the transfer was on his mind as he conducted Hankerson's hearing. Having recently resolved to transfer Hankerson, and since he had not yet implemented that decision, Spicuzzo was reminded of the decision by Hankerson's appearance before him (Finding of Fact Numbers 3, 4 and 5). In sum, I cannot conclude that, under the facts presented, the timing of Charging Party's transfer establishes that Spicuzzo was hostile towards her protected activity.

Indeed, other relevant evidence points away from an inference of hostility by Spicuzzo against the Charging Party's protected activity. Out of the approximately 175 disciplinary

hearings, where the vast majority of grievants refused to answer questions as to their whereabouts at specific times, only two employees were transferred. There is no evidence that either Hankerson or the other transferee was a leader in PBA Local 165, or exercised particular vigor in their respective hearings. Finally, within a month of the transfer, Spicuzzo reevaluated Hankerson's situation at her request, and granted her request to work day security at the Courthouse if she could not be returned to night security duty. (See Finding of Fact Numbers 4 and 6.)

In sum, the evidence does not demonstrate that Spicuzzo was hostile towards Charging Party's exercise of protected activity. Accordingly, I recommend that the Commission find that the Charging Party has failed to make out a prima facie case of a subsection 5.4(a)(3) violation, and the Complaint should be dismissed.^{5/}

Should that the Commission find that the Charging Party established a prima facie case, the burden would shift to the Respondent to demonstrate that it would have transferred Charging Party even in the absence of her protected activity. For the reasons reviewed above, I find that the Respondent has sustained that burden. As a highly competent and physically fit female officer, Hankerson was too valuable to Spicuzzo for deployment in the night security function. Instead, he transferred her to

^{5/} While the Charging Party also alleges violations of subsections 5.4(a)(1) and (7) of the Act, these allegations were not pursued at hearing and should also be dismissed.

transportation, where she had five years experience and where he had an acute need for physically fit female officers.

The Charging Party also argues that the Respondent further retaliated against and punished her by failing, upon request and formal bid, to return her to her original night security responsibilities at the Courthouse (see Finding of Fact Number 7). In effect, Charging Party alleges that Article XXV of the contract was violated and that the Respondent was motivated to violate that contractual provision in retaliation against Charging Party's exercise of protected activity.^{6/}

For the reasons stated above, I find that the Charging Party has not made out a prima facie case of a subsection 5.4(a)(3) violation, since the record does not establish hostility by Spicuzzo towards the exercise of protected activity. Should that the Commission find that the Charging Party established a prima facie case, I find that the contract, on paper and in application, supports the Respondent, not the Charging Party. Article XXV provides that seniority is to be given "prime consideration" in the filling of job vacancies; seniority is not the sole criterion under the contract, nor would a negotiated clause to that effect be enforceable. See North Bergen Bd. of Ed., P.E.R.C. No. 88-56, 14

^{6/} While breach of contract claims, standing alone, would not normally be litigated in unfair practice proceedings, specific allegations of bad faith over and above the claimed breach are present here. See State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

NJPER 66 (¶19023 1987). Instead, the same contract article reserves to the Sheriff "the sole right" to reassign employees, and he has often filled job vacancies with employees who had less seniority than other applicants (see Finding of Fact Number 7). Considering the contract language and application together with Spicuzzo's reasons for transferring Hankerson in the first place, I find that the Respondent has demonstrated that it would have refused to reassign Hankerson to her original responsibilities even in the absence of her exercise of protected activity.

RECOMMENDED ORDER

For the reasons stated above, I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.



Mark A. Rosenbaum
Hearing Examiner

Dated: March 9, 1988
Trenton, New Jersey