SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0523-15T2

WILLIAM S. BARNETT,

Plaintiff-Appellant,

v.

COMMISSIONERS OF FIRE DISTRICT NO. 1 IN HARRISON TOWNSHIP,

Defendant-Respondent.

Argued March 21, 2017 – Decided October 27, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1374-13.

John F. Pilles, Jr., argued the cause for appellant.

Eric J. Riso argued the cause for respondent (Platt & Riso, PC, attorneys; Mr. Riso, on the brief).

PER CURIAM

Plaintiff William S. Barnett appeals from the August 21, 2015 order of the Law Division granting partial summary judgment

to defendant Commissioners of Fire District Number 1 in Harrison Township, dismissing two counts of plaintiff's complaint with prejudice.

We repeat the essential facts from our prior opinion, Harrison Twp. Fire Dist. v. Barnett, No. A-2950-13 (App. Div. Apr. 22, 2015):

> William S. Barnett was employed by the Harrison Township Fire District (HFD) as a paid part-time firefighter. On February 28, 2013, while off-duty, Barnett was leaving the parking lot of the Telford Inn when he hit a curb, causing him to lose control of his vehicle. He proceeded onto the grass in front of the Telford Inn before striking a utility pole. He attempted to continue onto Bridgeton Pike but the vehicle became disabled.
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> Police responded and determined that Barnett was under the influence of alcohol. He was arrested and charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50. On May 2, 2013, Barnett pled guilty to DWI in municipal court and his driver's license was suspended for ninety days.
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> As a condition of employment, HFD requires its employees to hold a valid driver's license. A disciplinary hearing was scheduled for May 31, 2013, to determine what sanctions would be imposed as a result of Barnett's DWI conviction. One week before the hearing was scheduled, HFD filed an order to show cause seeking to stay the disciplinary hearing. HFD also sought declaratory relief determining that Barnett, as an "at will" employee, was not entitled to notice or a hearing with respect to any disciplinary action HFD might take against him.

The Law Division judge denied the motion for a stay, finding that the only harm HFD would suffer if the hearing went forward were monetary damages, and that HFD had failed to show that the law was settled or that there was a likelihood of success on the merits. The judge found that Barnett was entitled to procedural due process, because his employment

> isn't employment subject to a term. . . . This is a position that Mr. Barnett took expecting that he would be continued in that employment, but for the fact that he was, perhaps, unwise in his conduct on a particular day, that job now appears to be in jeopardy.
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> [H]e then, at least, has that reasonable expectation of continued employment that now gives him an opportunity to be able to now speak to the discipline that gets imposed against him.

The disciplinary hearing went forward on May 31, 2013. At the hearing, Barnett conceded that he had pled guilty to DWI and his license was suspended for ninety days. Hearing Officer Todd J. Gelfand, Esquire, found that HFD has the "lawful authority and discretion to set forth and enforce job requirements for its personnel in a rational, non-discriminatory way . . . [and] has done so by imposing a requirement of valid driving privileges." Gelfand recommended that Barnett be suspended for however long his license was suspended (ninety days or longer) on the ground of an inability to perform his duties.

HFD had also filed a second charge against Barnett of conduct unbecoming a public officer. Gelfand found that HFD had failed to provide sufficient notice to Barnett of the additional disciplinary charge and recommended that Barnett be disciplined only on the basis of the "inability to perform

duties" charge. He made no recommendation as to "misconduct or any other type of 'fault-based' charge or charges." The Board of Fire Commissioners of Harrison Township adopted Gelfand's recommendation by resolution on August 15, 2013.

HFD then charged Barnett again with conduct unbecoming, and sought his termination. Gelfand conducted a second disciplinary hearing on July 17, 2013. Relying on municipal firefighter statutes, N.J.S.A. 40A:14-19 and 14-28.1, Gelfand concluded that HFD was within its discretion to determine how seriously it wanted to punish Barnett for his off-duty misconduct. Gelfand recommended that Barnett's removal from HFD be sustained. The Board of Fire Commissioners adopted Gelfand's second recommendation on August 15, 2013.

The parties returned to the Law Division on October 25, 2013, for argument on whether HFD was required to afford Barnett a hearing prior to imposing discipline. We have not been provided with a transcript for this hearing. As Barnett had already been provided with notice and a hearing at the time of oral argument, we are left to surmise that neither party raised the issue of mootness before the judge.

On January 30, 2014, the judge placed an extensive oral decision on the record comprising fifty pages of transcript. The judge supplemented the decision with a two-page written summary dated January 31, 2014.

The judge found that Barnett was entitled to notice and a hearing but was an at-will employee. The judge noted that although N.J.S.A. 40A:14-17 created a presumption of continued employment for municipal firefighters, there was no corresponding provision in the fire district statutes. As such, the judge found that the notice and

> hearing protections afforded by N.J.S.A. 40A:14-19 likewise applied only to municipal, but not fire district, employees.
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> The judge determined that N.J.S.A. 40A:14-28.1 explicitly mentions fire district employees to the extent that they may violate internal rules and regulations. As such, that provision "control[led] this case and obligated [HFD] to provide a timely complaint" notifying Barnett of the charges against him because Barnett was charged with violating HFD's internal rules and regulations. Implicit in that obligation was Barnett's "right to respond, which by other nomenclature, is 'a hearing.'" The judge was careful to clarify that no notice or hearing would be required to discipline an HFD employee charged with misconduct other than violating internal rules and regulations.
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> [slip op. at 1-6].

Barnett appealed, claiming "Paid or Part Paid Fire Department and Force" includes those departments and forces which are under direct municipal control as well as fire districts. HFD cross-appealed maintaining the motion judge erred when he determined that Barnett was entitled to a hearing as to his suspension.

Without reaching the merits, we dismissed the appeal as moot. We noted that when Barnett's appeal was filed, an actual controversy existed as to whether HFD was required to provide Barnett with a hearing to discipline him. By the time the appeal reached us, Barnett had been provided with two

disciplinary hearings; first, prior to his ninety-day suspension on May 31, 2013, and then prior to his termination on July 17, 2013. Barnett, supra, slip op. at 9.

While that appeal was pending, Barnett filed a complaint in lieu of prerogative writs seeking reinstatement to employment and damages. Barnett also alleged his removal violated the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 34:19-14, as it came in retaliation for his opposition to his suspension and for filing an Open Public Records request (the CEPA count).

We permitted that litigation to proceed and noted that the "parties are free in that other case to raise any germane issues, including their mutual contention that the trial court's legal analysis of Barnett's employment status is vague or internally inconsistent." Id. slip op. at 12

Defendants then moved for partial summary judgment, seeking dismissal of the two non-CEPA counts. The motion judge granted the motion and dismissed both counts, noting that he had previously held that Barnett was an at will employee and, as such, was not entitled to a disciplinary hearing.

On appeal, Barnett argues:

POINT I

THE CLAUSE READING "PAID OR PART PAID FIRE DEPARTMENT AND FORCE" WITHIN N.J.S.A. 40A:14-19 INCLUDES THOSE FIRE SUPPRESSION PERSONNEL EMPLOYED BY FIRE DISTRICTS AS WELL AS BY MUNICIPAL DEPARTMENTS.

POINT II

THE APPELLATE DIVISION HAS PREVIOUSLY RECOGNIZED THE APPLICATION OF N.J.S.A. 40A:14-19, ET SEQ, TO FIRE DISTRICTS WHICH PRECEDENT OUGHT NOT BE OVERRULED AND/OR IGNORED.

POINT III

EVEN ASSUMING, ARGUENDO, THAT N.J.S.A. 40A:14-19, ET SEQ, WAS PROPERLY CONSTRUED AS LIMITED TO MUNICIPAL "PAID OR PART PAID FIRE DEPARTMENT OR FORCE," SAME SHOULD BE MADE APPLICABLE TO FIRE DISTRICTS.

POINT IV

BY ONLY GIVEN EFFECT TO ONE PART OF A UNIFIED STATUTORY SCHEME, THE COURT BELOW CREATED AN INCONGRUOUS RESULT.

POINT V

BOTH FIRE SUPPRESSION AND LAW ENFORCEMENT PERSONNEL HAVE BEEN CHARACTERIZED AS PARAMILITARY ORGANIZATIONS ENGAGED IN ULTR-HAZARDOUS EMPLOYMENT FUNCTIONS PROVIDING ESSENTIAL PUBLIC NEEDS, AND ACCORDINGLY, THE SAME TENURE RIGHTS OUGHT BE PROVIDED TO FIREFIGHTERS AS POLICE PERSONNEL

REGARDLESS AS TO THE TYPE OR CHARACTERIZATION OF GOVERNMENTAL ENTITY FUNCTIONING AS PUBLIC EMPLOYER.

POINT VI

THE TRIAL JUDGE ERRED BY DECLINING TO REVIEW THE PROPERTY OF GOVERNMENTAL ACTION EXERCISED BY THE DISTRICT SUB JUDICE INCIDENTAL TO ITS TERMINATION OF BARNETT'S EMPLOYMENT.

We "review[] an order granting summary judgment in accordance with the same standard as the motion judge." Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid.; R. 4:46-2(c). A trial court's determination a party is entitled to summary judgment as a matter of law is "not entitled to any special deference," and is subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

When evaluating a motion record, we view the facts in a light most favorable to the non-moving party, "keeping in mind '[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion . . . would require submission of the issue to the

trier of fact.'" Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015) (first alteration in original). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

Barnett first argues that both municipal fire departments and fire districts are protected by the rights granted in N.J.S.A. 40A:14-19, which provides in pertinent part:

> Except as otherwise provided by law no permanent member or officer of the paid or part-paid fire department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the paid or part-paid fire department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment or position therein except for just cause as hereinabove provided and then only upon a written complaint, setting forth the charge or charges against such member or officer.

"Fire department or force" is defined as "the officers and members organized to fight fires in the municipality." N.J.S.A. 40A:14-55.

Conversely, N.J.S.A. 40A:14-28.1 explicitly states that

> A person shall not be removed from employment or a position as a paid member of a paid or part-paid fire department or force, whether that department or force be created, established and maintained by a municipality, fire district, regional entity, county, authority, or the State, or suspended, fined or reduced in rank for a violation of the internal rules and regulations.
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> [emphasis added.]

N.J.S.A. 40A:14-28.1 also sets forth a requirement that a complaint against an employee of the fire department must be filed within forty-five days of receiving notice of the alleged violation.

The motion judge determined that if N.J.S.A. 40A:14-19 applied to municipalities and fire districts, the Legislature would have referenced both. As a result, the judge determined that Barnett was entitled to a hearing on the charge that he violated internal rules and regulations by failing to maintain a driver's license, however because he was an at-will employee for the first district, he could be terminated without notice or a hearing on the conduct unbecoming charge. We doubt that the Legislature intended such inconsistency in enacting both statutes.

When interpreting a statute, we strive to "determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge,

Inc., 197 N.J. 543, 553 (2009). "[W]e look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008). "Regardless of whether the language is plain or whether ambiguities cause us to seek guidance from sources other than the words the Legislature has chosen, our 'primary task . . . is to effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" Bosland, supra, 197 N.J. at 554 (quoting State v. Hoffman, 149 N.J. 564, 578 (1997)).

"[E]very effort should be made to harmonize the law relating to the same subject matter. Statutes in pari material are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent." N.E.R.I. Corp. v. N.J. Highway Auth., 147 N.J. 223, 248-49 (1996). The principles of in pari materia apply in greatest strength when the relevant statutes were enacted at the same time, however "it may appropriately be applied even when the statutes were adopted at different times and make no reference to each other." Id. at 249 (quoting Mimkon v. Ford, 66 N.J. 426, 434 (1975)).

Prior to 1971, N.J.S.A. 40:47-6 (currently codified at N.J.S.A. 40A:14-19), provided, in relevant part, "[n]o person shall be removed from office or employment in any . . . paid fire department of any such municipality nor shall any member of any municipal part paid fire department who is permanently employed by the municipality at a fixed annual salary." N.J.S.A. 40:47-6 (repealed 1971). In 1971, this statute was recodified and reflects the current language of N.J.S.A. 40A:14-19 with respect to the term "paid or part-paid fire department or force." Further, N.J.S.A. 40A:14-70 was implemented to allow the creation of fire districts. In passing these statutes, the Legislature intended to "eliminate[] duplication and inconsistency" and provide an "orderly clarification of the laws concerning county and municipal fire and police departments." S.B. 626, L. 1971, c. 197.

The current version of the statute eliminated the phrases "fire department of any such municipality" or "municipal part paid fire department" and solely refers to a "paid or part-paid fire department." That this change occurred during the same amendments that provided the statutory language to create districts, suggests that the statute was revised to include both municipal and fire districts.

Additionally, N.J.S.A. 40A:14-28.1 was added in 2006, to "apply to firefighters employed by municipal fire departments; municipal fire districts; regional fire districts; . . . a county; or the State." A. 1550.

In Varsolona v. Breen Capital Servs., 180 N.J. 605, 623 (2004), the Court held that "subsequent legislation may be used by a court as an extrinsic aid when seeking to discern earlier legislative intent." In addition, statutory construction principles support "preference of a more specific and more recently enacted section of a statute" to aid in determining legislative intent. State v. One 1976 Pontiac Firebird, 168 N.J. Super. 168, 176 (App. Div. 1979).

N.J.S.A. 40A:14-28.1 was enacted approximately thirty-five years after the recodification of N.J.S.A. 40A:14-19, and we must view the more recent statute, and its inclusion of both municipal fire departments and fire districts, in determining that members of both organizations have a right to hearing under N.J.S.A. 40A:14-19.

Further, in applying the principles of in pari materia, the subsections of the statute should be read together to resolve any inconsistency or ambiguity. See N.E.R.I. Corp., supra, 147 N.J. at 249. This logic follows even though the statues were implemented at different times, in this case almost thirty-five

years apart. See ibid. The above statutes both reference the same subject matter, which includes disciplines and complaints against employees of fire departments, therefore the statutes should be applied in harmony, and to reflect a single legislative intent.

Barnett relies on Horsnall v. Washington Twp. Div. of Fire, 405 N.J. Super. 304 (App. Div. 2009). In Horsnall, the defendant township dissolved the fire district and created a division of fire within the department of public safety. Id. at 309. All fire district employees were notified that they had to apply to the township for employment to serve in the division.

Horsnall, a former captain of the fire district applied for the position of captain in the newly created division, but was not offered a position and was effectively terminated. Id. at 308-10. After Horsnall filed a complaint in lieu of prerogative writs seeking reinstatement, a judge ordered reinstatement with back pay. Id. at 310. The township appealed and we affirmed, concluding that the creation of the Division of Fire to replace a previously existing fire district did not eliminate a fire district fireman's statutory tenure protections under N.J.S.A. 40A:14-19 and 40A:14-25. Id. at 308-9. We held:

> If the Division of Fire chooses to create fewer positions than those that were part of the Fire District, it may do so; however,

> these provisions mandate that firefighters be removed subject to certain rights including a written complaint and hearing, and when firefighting positions are decreased, that members be demoted based on the inverse order of their appointment.
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> [Id. at 319.]

While the facts of Horsnall are distinguishable, we held there that the protections of N.J.S.A. 40A:14-19 apply to employees of a fire district. Ibid. We are satisfied that the Legislature intended for the notice and hearing requirements to apply to both municipal fire departments and fire districts alike and when a firefighter of a fire district is terminated, the firefighter is entitled to the statutory protections of N.J.S.A. 40A:14-19.

We reverse the order granting summary judgment and remand for proceedings consistent with this opinion. We do not retain jurisdiction.