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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1728-16T3

IN THE MATTER OF MIDDLESEX
COUNTY SHERIFF'S OFFICE,

Respondent-Respondent,

and

PHIILIP S. MANDATO,

Charging Party-Appellant.

Argued January 23, 2018 — Decided March 19, 2018

Before Judges Yannotti and Carroll.

On appeal from New Jersey Public Employment
Relations Commission, P.E.R.C. No. 2015-042.

Cathlene Y. Banker argued the cause for
appellant (C. Elston & Associates, LLC,
attorneys; Catherine M. Elston and Cathlene
Y. Banker, of counsel; Cathlene Y. Banker, on
the briefs).

Arthur R. Thibault, Jr., argued the cause for
respondent Middlesex County Sheriff's Office
(Apruzzese, McDermott, Mastro & Murphy, PC,
attorneys; Arthur R. Thibault, of counsel and
on the brief; H. Thomas Clarke, on the brief).

Joseph P. Blaney, Deputy General Counsel,
argued the cause for respondent Public
Employment Relations Commission (Robin T.

McMahon, General Counsel, attorney; Joseph P. Blaney, on the statement in lieu of brief).

PER CURIAM

Phillip S. Mandato appeals from a final decision of the Public Employment Relations Commission (Commission), which dismissed his unfair practice charges because they were not filed within the time required by N.J.S.A. 34:13A-5.4(c). We affirm.

I.

Since September 2003, Mandato has been employed by the Middlesex County Sheriff's Office (MCSO) as a sheriff's officer. During that time, Policemen's Benevolent Association, Local No. 165 (PBA 165), has been the majority representative for the MCSO's sheriffs' officers and investigators below the rank of sergeant. The Fraternal Order of Police, Lodge No. 59 (FOP 59), is a minority representative of the MCSO's sheriffs' officers and investigators below the rank of sergeant. In or around 2009, Mandato terminated his membership with PBA 165 and joined FOP 59.

The MCSO is comprised of several divisions, which include the Courts Division (CD) and the Investigations Division (ID). In July 2014, Mandato bid for a transfer from the CD, where he was then serving, to the ID. On August 8, 2014, Sheriff Mildred S. Scott announced the bid awards and permanent assignments. Mandato was

one of twenty-three employees and the only member of the FOP 59 to be assigned to the ID.

On August 13, 2014, Mandato received a call from Internal Affairs (IA) informing him that Sheriff Scott was removing him from his assignment in the ID. According to Mandato, he was reassigned because he had placed a so-called "nail of redemption" in the holding cells.¹ On August 18, 2014, Mandato reported for duty at his post in the holding cells, and he was informed that Sheriff Scott had reassigned him to a different post in the main courthouse "effectively immediately."

On August 19, 2014, Mandato was served with a written notice, dated August 15, 2014, which informed him he was the subject of an IA investigation. On August 22, 2014, Mandato submitted a report stating that he found the "nail of redemption" in the desk drawer at his post and hung it on a board, where it remained for several months. On September 9, 2014, the IA interviewed Mandato.

On September 19, 2014, Mandato was served with a Notice of Minor Disciplinary Action (NMDA). The NMDA charged Mandato with violating the MCSO's rule pertaining to performance of duty for placing the "nail of redemption" on the board in the holding cells

¹ The record indicates that the "nail of redemption" is a "medallion" that sits on top of a two-inch by two-inch prayer card. The "medallion" is apparently a hand-wrought flat nail.

of the main courthouse and suspended him for four days from October 6 to October 9, 2014. Mandato acknowledged receipt of the NMDA on September 19, 2014.

On September 29, 2014, Mandato asked a superior officer if he would be reinstated to his regular shift and post in the holding cells after he served his suspension. Mandato was told the MCSO did not want him working in the holding cells and his regular shift was no longer available.

On October 1, 2014, PBA 165 filed a grievance on Mandato's behalf, seeking a reduction of his penalty from a four-day suspension to a written reprimand. On that same day, Undersheriff Kevin B. Harris denied the grievance. On October 8, 2014, Mandato submitted a revised grievance, which Harris also denied. On November 14, 2014, a final decision was issued denying the grievance. Mandato did not seek arbitration of that determination.

II.

On March 23, 2015, Mandato filed an unfair practice charge with the Commission, alleging he had been subjected to excessive and disparate discipline for which anti-union animus was a motivating or substantial factor, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). Mandato cited the rescission of his transfer from the CD to the ID, his reassignment from his post in the holding cells, and the four-day suspension. Among other relief,

Mandato sought reinstatement to his post in the holding cells and modification of his four-day suspension to a written reprimand. MCSO submitted its answer on October 28, 2015.

In January 2016, MCSO filed a motion with the Commission seeking summary judgment on the ground that Mandato's claims were barred because they were not filed within the time required by N.J.S.A. 34:13A-5.4(c). Mandato opposed the motion. He also sought to amend the charge to include further alleged retaliatory actions. In March 2016, the Commission's hearing examiner allowed Mandato to amend the charges.

On August 18, 2016, the Commission issued a decision and order, granting MCSO's motion and dismissing the charges pertaining to the rescission of Mandato's assignment to the ID, the change from his post in the holding cells, and the four-day suspension. Since the parties had not addressed the amendment to the charges, the Commission remanded the matter to the hearing examiner for further proceedings.

On September 7, 2016, Mandato filed a motion in this court for leave to appeal from the Commission's decision and order of August 18, 2016. MCSO and the Commission opposed the motion. On October 12, 2016, we denied the motion.

On October 20, 2016, the Commission issued a revised decision and order to reflect that one of the Commissioners had recused

himself from voting on the matter. Thereafter, Mandato withdrew the remaining charge, and the hearing examiner closed the case. This appeal followed.

III.

On appeal, Mandato argues that the Commission erred by finding that his claims based on his reassignment and suspension were not filed within the time required by N.J.S.A. 34:13A-5.4(c). He contends the limitations period on his claim regarding his reassignment did not begin to run until he learned his reassignment was permanent, and the limitations period on his suspension did not begin to run until that suspension went into effect.

Mandato further argues that the Commission erred by finding that there was no genuine issue of material fact as to whether he knew or should have known his reassignment was permanent when he was reassigned on August 18, 2014, and the rescission of his awarded bid for a transfer to ID is admissible as background evidence.

We have considered these arguments in light of the record and the applicable legal principles. We conclude that Mandato's arguments are without merit. Accordingly, we affirm the Commission's decision and order substantially for the reasons stated by the Commission. R. 2:11-3(e)(1)(D). We add the following.

The scope of our review of an administrative agency's final determination is strictly limited. In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We will not reverse an agency's decision unless we find that "it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." Thurber v. City of Burlington, 191 N.J. 487, 501 (2007) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). An agency's legal conclusions are, however, subject to de novo review on appeal. Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142, 165 (2013) (quoting In re Taylor, 158 N.J. 644, 658 (1999)).

Our review of an agency's decision is limited to three inquiries:

- (1) whether the agency's action violates express or implied legislative policies;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.

[R & R Mktg. v. Brown-Forman, 158 N.J. 170, 175 (1999).]

In addressing these questions, the court must give "substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007).

Here, the Commission found that Mandato's unfair practice charges were not filed within the time required by N.J.S.A. 34:13A-5.4(c). The statute provides in pertinent part:

The [C]ommission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the [C]ommission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than [six] months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the [six]-month period shall be computed from the day he was no longer so prevented.

[Ibid.]

In this matter, Mandato raised unfair practice charges regarding his reassignment from the holding cells to the main courthouse, his four-day suspension, and the rescission of his awarded bid for a transfer to the ID. Before the Commission, Mandato conceded that the last of these three claims was not filed within six-months after the transfer was rescinded.

On appeal, Mandato argues that his charge regarding the reassignment from the holding cells was timely filed. As we noted previously, the record shows that on August 18, 2014, Mandato reported to the holding cells and he was informed that Sheriff Scott had reassigned him to a different post in the courthouse "effective immediately." Mandato did not file his charge regarding the reassignment within six months after August 18, 2014.

On appeal, Mandato argues that the limitations period did not begin to run until September 29, 2014, when he asked his superior officer if he would be returned to his post in the holding cells after he served his four-day suspension. Mandato was told he would not be returned to the holding cell.

The Commission properly found that the limitations period began to run when Mandato was reassigned. The Commission noted that an employee need not be told whether a change in assignment is permanent before the limitations period begins to run.

As the Commission stated in its decision, "there is no reason to focus on the duration of a reassignment, including whether it is temporary or permanent, since its unlawfulness would not ordinarily turn on its duration." The Commission noted that taken to its logical conclusion, an employee could extend the time for filing a charge merely by asking if a change in assignment was

temporary or permanent, thereby allowing the employee "to resurrect a stale charge."

Mandato argues that there is a genuine issue of material fact as to whether he knew or should have known that his reassignment on August 18, 2014, was permanent. However, as the Commission noted in its decision, for purposes of determining whether an unfair practices charge was filed within the time required by N.J.S.A. 34:13A-5.4(c), it is immaterial whether a reassignment is permanent or temporary. The Commission correctly stated that if the change of assignment is unlawful it is irrelevant whether the change is permanent or temporary.

Mandato further argues that the Commission erred by finding that his unfair practice charge regarding the four-day suspension was untimely. The record shows that on September 19, 2014, Mandato was served with the NMDA, which stated that he had been charged with violating the MCSO's rule regarding performance and duty. The NMDA stated that he was suspended for four days, from October 6 to October 9, 2014.

Mandato contends the time within which an unfair practice charge must be filed did not begin to run on the date he was served with the NMDA, but rather on October 6, 2014, when the suspension went into effect. The Commission concluded, however, that the operative date for purposes of the statute of limitations was

September 19, 2014, because the NMDA served on that date was not a preliminary notice of disciplinary action and there was nothing conditional about the suspension. The Commission found that on the date he was served with the notice, Mandato was told he was being suspended, and the filing of a grievance challenging the suspension did not toll the statute of limitations. The record supports the Commission's determination.

Mandato contends, however, the Commission's decisions regarding the timeliness of his claims regarding his reassignment and suspension are not consistent with the Commission's decisions in other matters. He also contends that the rescission of his awarded bid for a transfer to the ID is admissible as background evidence to show the Sheriff's alleged anti-FOP bias.

These arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION