

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 2483-01
DCR DOCKET NO.: EF05RM-40805
DATED: April 23, 2003

JOANNE L. SERVAIS,)
)
Complainant,)
)
v.)
)
TOWNSHIP OF FAIRFIELD,)
)
Respondent.)
_____)

ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION AND ORDER

APPEARANCES:

James R. Michael, Deputy Attorney General, prosecuting this matter for the NJ Division on Civil Rights, for the complainant (Peter C. Harvey, Acting Attorney General of New Jersey, attorney).

Jose B. Velez, Esq., (Velez & Mendez, attorneys) for the respondent.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, JoAnne L. Servais (Complainant), alleging that the respondent, Township of Fairfield (Respondent), subjected her to unlawful employment discrimination based on her race, Caucasian, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On January 23, 2003, the Honorable Joseph F. Martone, Administrative Law Judge (ALJ), issued an initial decision¹ concluding that Respondent

¹Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "RE" and "PE" shall refer to Respondent's exceptions and Complainant's replies to exceptions, respectively; "TR1" shall refer to the transcript of the January 10, 2002 hearing; "TR2" shall refer to the transcript of the January 18, 2002 hearing; "TR3" shall refer to the May 29, 2002 hearing; "Exhibit R" and "Exhibit P" shall refer to Respondent's and Complainant's exhibits, respectively, as marked at the administrative hearing.

violated the LAD, awarding damages to Complainant and assessing statutory penalties. Having independently reviewed the record and the exceptions and replies of the parties, the Director adopts the ALJ's initial decision as modified herein.

PROCEDURAL HISTORY

On April 22, 1996, Complainant filed a verified complaint with the Division alleging that Respondent terminated her employment as township housing/zoning officer and 911 coordinator based on her race. Respondent filed an answer on June 10, 1996, denying the allegations of unlawful discrimination. The Division conducted an investigation, and on December 17, 1998, issued a finding of probable cause supporting the allegations of the complaint. On May 7, 2001, after attempts to conciliate this case failed, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The ALJ held a telephone prehearing conference on July 18, 2001, and conducted a hearing on the merits on January 10 and 18, 2002 and May 29, 2002. At the close of the hearing, the ALJ directed the parties to submit closing arguments in writing, and after receipt of those submissions, the record closed on September 10, 2002. The ALJ was granted two 45 day extensions to file his initial decision, which he issued on January 23, 2003.

Respondent filed exceptions to the initial decision on February 8, 2003, and Complainant filed a reply to Respondent's exceptions on February 20, 2003. The Director obtained one extension of time to file his final determination in this matter, which is now due on April 24, 2003.

THE ALJ'S DECISION

Factual Determinations

The ALJ set forth a detailed summary of the testimony at pages 2 through 17 of the initial decision, without making specific findings of fact. As part of his legal discussion and analysis, the ALJ did weigh corroborating evidence to reach conclusions regarding the events underlying Respondent's failure to reappoint Complainant to the housing/zoning officer position. The following

factual findings can be gleaned from the ALJ's analysis.

In January of 1996, a majority of Respondent's township committee voted against Complainant's reappointment as housing/zoning officer and appointed Curtis Kennedy, a Black male, to replace Complainant (ID 20, 22). Kennedy had not submitted an application for the position, and his qualifications were suspect. Ibid. Complainant had previously served as Respondent's housing/zoning officer for various periods over several years, and Respondent had no concerns about the quality of Complainant's prior performance in that position (ID 21-22).

On the day following the township committee's vote to replace her, newly appointed Committeemember John Dawson visited Complainant and advised her that, immediately prior to the township committee meeting, Committeemembers Don Taylor and Viola Thomas-Hughes told him that it was a conflict of interest for the township to have Complainant serve as housing/zoning officer and Complainant's husband serve as construction official (ID 21). Dawson informed Complainant that he voted against her based on their representations that her appointment would be a conflict. Ibid. The ALJ characterized the information Taylor and Thomas-Hughes gave Dawson prior to the meeting as "misstating" that reappointing Complainant while her husband served as construction official would constitute an unresolved conflict of interest. Ibid.

Prior to the vote on Complainant's appointment, Committeemember Taylor also met with Committeemembers Pierce and Thomas-Hughes, who are both Black, and enunciated a plan to appoint Blacks to replace Caucasian appointees (ID 8-9, 21). The ALJ further found that Thomas-Hughes apparently supported Taylor's plan (ID 21).

Legal Conclusions

The ALJ concluded that Complainant presented direct evidence that Respondent failed to reappoint her in 1996 because of her race (ID 22). The ALJ evaluated the circumstantial evidence as well, and concluded that Complainant established a prima facie case of reverse race discrimination, including the requisite showing that Respondent was the unusual employer that

discriminated against Caucasians. Shifting the burden of production to Respondent, the ALJ concluded that Respondent failed to articulate any valid nondiscriminatory reason for not reappointing Complainant in 1996.

Based on the direct evidence, as well as Respondent's failure to articulate a legitimate nondiscriminatory reason to rebut the circumstantial evidence, the ALJ concluded that Respondent was motivated solely by race discrimination in not reappointing Complainant to the housing/zoning officer position in 1996 (ID 22).

EXCEPTIONS AND REPLIES OF THE PARTIES

Respondent takes exception to the ALJ's determinations that Complainant was an employee subject to reappointment or termination and that Respondent terminated or failed to hire Complainant when it appointed someone else to her position in January of 1996 (RE1-2). Respondent also contests the ALJ's conclusion that Respondent is the unusual employer who discriminates against the majority (RE 3-4). Respondent further challenges the ALJ's reliance on Robert Pierce's testimony to conclude that Committeemember Taylor was biased against Caucasian appointments and planned to replace Caucasian appointees, arguing that Taylor's overall voting record did not show a pattern of discrimination against Caucasians and that Pierce is not a credible witness (RE 4-6 and 12-13). Citing their votes for Complainant on prior occasions as evidence to the contrary, Respondent takes exception to the ALJ's finding that Committeemembers Taylor and Thomas-Hughes voted against Complainant's appointment in 1996 based on her race (RE 6-7).

Respondent also challenges the ALJ's finding that political party affiliation did not control the 1996 housing/zoning officer appointment (RE 7-10). Respondent contends that the ALJ should have given more weight to Thomas-Hughes' testimony about complaints against Complainant, and Thomas-Hughes' concern that Complainant's reappointment posed a conflict of interest (RE 10-11). Respondent also contends that the ALJ gave undue weight to Complainant's hearsay testimony

regarding her conversation with Committeemember John Dawson, and asserts that the testimony in question unfairly prejudiced Respondent (RE 11).

Finally, Respondent takes exception to certain conclusions of the ALJ, contending that they are not supported by the evidence in the record. Specifically, Respondent disputes the ALJ's statements that Complainant served as housing/zoning officer for several years; that Committeemember Don Taylor was scheduled to testify at the hearing but failed to appear; that Committeemember Dawson voted to appoint Curtis Kennedy to the housing/zoning officer position, and that Viola Thomas-Hughes only testified about one complaint she received about Complainant (RE 1-2 and 13-14).

THE DIRECTOR'S DECISION

The Director's Factual Findings

The Director adopts the ALJ's factual findings as summarized above, with certain additions and modifications. First addressing issues raised in Respondent's exceptions, the Director finds that the record supports modifying certain aspects of the ALJ's factual discussion. As Respondent noted, the minutes of the January 16, 1996 township committee meeting reflect that although Committeemember John Dawson voted against Complainant's appointment, he also voted against Curtis Kennedy's appointment. Kennedy was appointed on the votes of Committeemembers Taylor, Thomas-Hughes and Munson (Exhibit R-9). Accordingly, based on the undisputed evidence in the record, the Director rejects the ALJ's statement on page 21 of the initial decision that Dawson voted in favor of Kennedy's appointment.

As Respondent also noted, the hearing transcripts reflect that Dawson, rather than Committeemember Taylor, was scheduled to testify as a witness for Respondent but did not appear (TR3-7 to 8). There is no indication in the record that Taylor was actually scheduled to appear at the hearing, although it appears from the ALJ's comments at the hearing that Respondent listed Taylor as a potential witness in pre-hearing documents (TR2-108 to 109).

The Director has also considered Respondent's challenge to the ALJ's finding that Viola Thomas-Hughes testified about only one resident's complaint, and that it was actually about Complainant's husband refusing to conduct an inspection because of an inaccessible driveway. (RE 14; ID 22). Review of the hearing transcripts disclosed that Thomas-Hughes testified that there were other complaints, including one filed by someone named Pierce and one filed by a family named "Michlette or something like that." (TR2-96). However, Thomas-Hughes gave no specifics about the substance of any complaints or how they related to Complainant's role as housing/zoning officer, other than to say that the individuals who complained had problems with the zoning office, regarding "people working for them." (TR2-95 to 96). When specifically asked on direct examination whether any such complaints involved a conflict between Complainant serving as housing/zoning officer while her husband served as construction code official, Complainant answered yes, without giving any information about such complaints (TR2-76). Accordingly, the Director modifies the ALJ's summary of the testimony on this issue and finds that Viola Thomas-Hughes testified that the township received other complaints regarding Complainant and/or the appearance of conflict, but gave no details about the substance of any such complaints (TR2 -75 to 77; TR2 -95 to 96). The Director also clarifies that the details about the complaint regarding Richard Servais' failure to conduct an inspection, filed by someone named Michalek², came from the testimony of Pearl Reiger (Respondent's former deputy clerk) and Richard Servais, rather than from Thomas-Hughes (TR3-39 to 41; TR3-46 to 47).

Nevertheless, after reviewing the entire record and considering Respondent's exceptions as discussed above, the Director finds no substantial basis for rejecting or modifying the ALJ's factual finding, based on the testimony of witnesses other than Thomas-Hughes, that Respondent had no concerns about Complainant's performance as housing/zoning officer (ID 21-22).

²It appears that Michalek is the complaining party Viola Thomas-Hughes referred to as "Michlette" (TR2-96).

Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). The Director may not reject factual findings based on the ALJ's determinations regarding the credibility of lay witnesses unless the specific factual finding is arbitrary, capricious, unreasonable, or is not supported by sufficient competent and credible evidence in the record. N.J.A.C. 1:1-18.6(d). As the ALJ relied on the hearing testimony of three other witnesses, William Hallman, Pearl Reiger and Robert Pierce, in addition to Complainant's testimony (ID 22; TR2-11 to 12 and 33 to 34; TR3-41; TR1-110 to 111), the Director does not find sufficient basis in the record to reject the ALJ's factual determination concerning Complainant's performance as housing/zoning officer.

To clarify the basis for this final decision, some supplemental factual findings are warranted. Respondent's housing/zoning officer position was a paid, part time position appointed by majority vote of the township committee for a one year term commencing each January (TR1-11). Complainant was first employed by Respondent as the housing/zoning officer for a one year term beginning in January 1986 (Exhibit R-1). She did not serve as housing/zoning officer in 1987, (Exhibit R-2), but was again appointed housing/zoning officer effective January 1988.³ In 1989, Complainant ran for a seat on the township committee, was elected, and was sworn in effective January 1990 (Exhibit R-4). She remained on the township committee through 1992 (Exhibit R-5). Complainant did not serve as housing/zoning officer in 1993, but was appointed as housing/zoning officer for 1994 and 1995 (Exhibits R-6, R-7, R-8).

³In 1988, Complainant was appointed housing/zoning officer for a two year term, Exhibit R-3, but Complainant testified that the township committee later determined that two year terms were not permitted for this appointment. It is unclear whether Complainant served as housing/zoning officer for 1989 (TR1- 48).

At a regular meeting on March 21, 1995, the township committee unanimously voted to appoint Complainant's husband, Richard Servais, to a four year term as construction code official (Exhibit P-14). Regarding his appointment, the minutes of that meeting specifically state: "All DCA procedures have been complied with and there is no conflict of interest." Ibid.

In late December 1995, the township committee published a newspaper advertisement for the position of housing/zoning officer, stating that applications would be accepted until January 10, 1996 (Exhibit P-5). Complainant submitted an application after she learned of the advertisement (TR1-70).

At the January 2, 1996 township reorganization meeting, a resolution to appoint Complainant for housing/zoning officer was tabled (Exhibit R-11). At the January 16, 1996 meeting, the township committee voted on that resolution, but it did not pass. Committeemembers Pierce and Munson voted for Complainant's appointment; Committeemembers Taylor, Dawson and Thomas voted against Complainant's appointment (Exhibit R-9).

The Legal Standards

The LAD prohibits an employer from discharging an employee based on race. N.J.S.A. 10:5-12(a). An employee may attempt to prove employment discrimination by direct evidence or by circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). To prevail in a direct evidence case, the complainant must present evidence which, if true, demonstrates without inference or presumption "...not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid. Where a complainant presents such evidence, the burden shifts to the respondent to persuade the decisionmaker that it would have made the same decision even if it had not considered the impermissible factor. Id. at 209.

In the more common situation, direct evidence is unavailable and a complainant presents circumstantial evidence of unlawful discrimination. In such cases, the New Jersey courts have

adopted the methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green⁴, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), as a starting point for analyzing cases brought under the LAD. See Clowes v. Terminix International, Inc., 109 N.J. 575, 595 (1988). This methodology involves a burden-shifting analysis, with a complainant first bearing the burden of establishing a prima facie case. McDonnell Douglas v. Green, *supra*, 411 U.S. at 802.

The elements of a prima facie case are flexible, and will vary in differing factual circumstances. Texas Department of Community Affairs v. Burdine, *supra*, 450 U.S. at 254. While the first prong of a prima facie case normally requires a showing that a complainant is a member of a protected class, in a reverse discrimination case (*i.e.*, where the complainant is a member of a class that historically has not been victimized by discrimination), the complainant must instead show background circumstances supporting a suspicion that the employer is the unusual employer which discriminates against the majority. Erickson v. Marsh and McLennan Co., Inc., 117 N.J. 539, 552 (1990); Bergen Commercial Bank v. Sisler, 157 N.J. 188, 217 (1999).

In the context of a termination or failure to reappoint, the remainder of the prima facie case requires proof that the complainant was performing his or her job at a level which met the employer's legitimate expectations, he or she was terminated or not reappointed, and the employer thereafter had others perform his or her job duties. Clowes v. Terminix, *supra*, 109 N.J. at 597.

Once a complainant has established a prima facie case of unlawful discrimination, he or she has created a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the respondent to articulate some legitimate nondiscriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, *supra*, 450 U.S. at

⁴Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

253-54; see Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). Although the respondent need not prove that he or she was actually motivated by the proffered reasons, the respondent must, through the introduction of admissible evidence, raise a genuine issue of fact as to whether it discriminated against the complainant. Burdine, supra , 450 U.S. at 255.

By meeting this burden of production, the respondent rebuts the presumption of discrimination raised by the complainant's prima facie case. In order to prevail, the complainant must then prove by a preponderance of the evidence that the respondent's articulated reasons for its action were pretextual and that the employer's true motivation and intent were discriminatory. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981).

The Director's Legal Conclusions

A. Direct Evidence

The Director adopts the ALJ's conclusion that Complainant presented sufficient direct evidence to establish that Respondent failed to reappoint her in 1996 because of her race. The ALJ relied on Committeemember Pierce's testimony that immediately prior to the meeting at which Robert Taylor and two other committeemembers voted against Complainant's appointment, Taylor presented the Black members of the township committee with a plan to replace as many non-Black employees as possible with Black appointees⁵ (ID 20, TR 1-108 to 110). Regarding Complainant's appointment in particular, Taylor stated that he would appoint Mickey Mouse before he would appoint a white person, and that Mickey Mouse would be preferable to Complainant (TR1-105, 110). The ALJ specifically found that evidence showing that non-Blacks were employed in other township positions did not effectively rebut Pierce's testimony regarding the announced plan to replace

⁵By virtue of Taylor's role as a member of the township governing body, Pierce's hearing testimony about Taylor's specific discriminatory statements is not inadmissible hearsay, as Taylor's statements constitute statements of a party opponent. N.J.R.E. 803(b). The same exception to the hearsay rule applies to Complainant's testimony that Committeemember Dawson reported to her that Taylor and Thomas-Hughes advised him that reappointing Complainant would pose a conflict.

Caucasians with Blacks (ID 21).

Respondent challenges the ALJ's reliance on Pierce's testimony, and argues that Pierce is not credible, both because he was biased against Thomas-Hughes and because his testimony regarding the number of Blacks and Caucasians Respondent employed in various years was inaccurate (RE 12-14). After review of the record, the Director concludes that any numerical errors in Pierce's testimony regarding the racial breakdown of Respondent's workforce do not render his other testimony unworthy of credence, and are insufficient to warrant rejecting the ALJ's credibility determination. Nor is the testimony regarding a later financial dispute and related lawsuit between Pierce and Thomas-Hughes sufficient to reject the ALJ's conclusion that Pierce was a credible witness.

On the basis of Pierce's testimony regarding Taylor's statements, the Director concludes that Complainant presented direct evidence that Taylor voted against Complainant's appointment based on her race. Respondent has not effectively rebutted this direct evidence since it has presented insufficient evidence to establish that Taylor would have voted against Complainant's appointment even if he had not considered her race. Moreover, because two of the remaining four committeemembers voted in favor of Complainant's reappointment, Complainant would have been reappointed by a 3-2 majority if Taylor had voted in favor of her appointment. Accordingly, the direct evidence that Taylor's vote was racially motivated is sufficient to conclude that race was a determinative factor in Respondent's decision to replace Complainant with Curtis Kennedy.

B. Circumstantial Evidence

The Director also adopts the ALJ's conclusion that the circumstantial evidence established that race was the determinative factor in Respondent's decision to replace Complainant with a Black appointee. As a Caucasian, Complainant is a member of a class that has not historically been victimized based on race. Accordingly, it is appropriate to use the reverse discrimination analysis to evaluate the circumstantial evidence. To meet the first prong of her prima facie case,

Complainant must present background information to support the conclusion that Respondent was the unusual employer that discriminated against Caucasian employees.

The New Jersey Supreme Court has identified examples of evidence which could support the conclusion that an employer is the unusual employer who discriminates against the majority. These include evidence that an employer engaged in a pattern of discrimination against the majority, Erickson, supra, 117 N.J. at 553; the relative qualifications of the complainant and his or her replacement, Sisler, supra, 157 N.J. at 219; or a showing that the employer had some specific reason or inclination to discriminate against the majority. Ibid.

The record reflects that Complainant had several years of experience in the housing/zoning officer position, and that she completed specific training and received certifications related to the housing/zoning officer position which her Black replacement did not possess (TR1-10 to 14). The record further reflects that no information about the Black replacement's qualifications was presented to the township committee prior to his appointment, and he had no particular experience, training or qualifications which would make him equally qualified or more qualified than Complainant (ID 22; TR2-87; TR1-120 to 121; TR1-14). Hence, evidence of the relative qualifications of Complainant and her replacement supports the assertion that Respondent was the unusual employer that discriminated against the majority. Furthermore, Pierce's testimony regarding Committeemember Taylor's announcement of a plan to replace Caucasian appointees with Blacks adds further support to this conclusion (TR1-104 to 105). Accordingly, the Director concludes that Complainant has met her prima facie burden of establishing that Respondent was the unusual employer who discriminated against the majority.⁶

⁶Complainant attempted to present evidence at the hearing purporting to show that Respondent rejected another non-Black applicant for the housing/zoning officer position, David Dean, and that Dean had relevant training and work experience which would make him more qualified than the Black appointee who replaced Complainant. The ALJ ruled that such evidence would not be relevant, and did not permit Dean to testify or admit his resume into evidence (TR3-22 to 28). It appears to the Director that, providing a proper foundation were laid for such evidence, Dean's testimony and resume could be probative of the relative qualifications of the candidates, and would be relevant to Complainant's proofs of

Respondent argues that Complainant was not an employee under N.J.S.A. 10:5-12(a) because the housing/zoning officer position has always been a one year appointment and did not require the appointee to keep set hours. Nevertheless, the record makes clear that Complainant was protected by that section of the LAD. As the ALJ noted, this case involves elements of both failure to hire and termination (ID 19). From either perspective, the LAD's employment provisions protect job applicants as well as current employees. Moreover, the LAD does not exempt from its protections employees with flexible hours or those who are hired for a finite term. Although employees hired for a fixed term may not have an expectation that their employment will necessarily continue after the term expires, the LAD ensures that if the employer continues to employ anyone in the position, race or any other protected characteristic will not be considered in filling the position. Moreover, Complainant's status as an employee is documented by the W-2 wage and tax form for her 1995 employment in the housing/zoning officer position (Exhibit P-4). Accordingly, Complainant has established that she was an employee under N.J.S.A. 10:5-12(a), and that Respondent was the unusual employer that discriminated against Caucasians.

The Director adopts the ALJ's findings on the remaining elements of Complainant's prima facie case. First, the Director concludes that Complainant was performing her job at a level that met Respondent's legitimate expectations (ID 22). While Respondent contends that it received complaints about Complainant's performance, it has presented no specific evidence of such complaints. Moreover, its contention is contradicted by the testimony of Pearl Rieger and Thomas Hallman, stating that they were unaware of performance-related problems or complaints which would cause her to not be reappointed (TR2-11 to 12 and 33 to 34; TR3-41). Accordingly, there is insufficient evidence in the record regarding the existence or substance of such complaints to

background circumstances showing that Respondent was the unusual employer who discriminated against the majority. Since the Director adopts the ALJ's determination that Complainant presented sufficient evidence to meet her prima facie burden, there is no need for the Director to remand this matter to permit the testimony or to otherwise disturb the ALJ's ruling on this issue.

overturn the ALJ's finding that Complainant performed at a level that met Respondent's legitimate expectations. Next, there is no dispute that Complainant was not reappointed to the housing/zoning officer position in 1996, and that Respondent appointed Curtis Kennedy, a Black male, to that position instead of Complainant. Accordingly, the Director concludes that Complainant has established a prima facie case of race discrimination.

The Director next considers whether Respondent successfully rebutted Complainant's prima facie case. The ALJ concluded that Respondent did not meet its burden of articulating a legitimate nondiscriminatory reason for not reappointing Complainant (ID 22). Respondent takes exception to this conclusion, and argues that it had nondiscriminatory reasons for not reappointing Complainant - - because she was not a Democrat, and because Respondent received complaints and perceived there to be a conflict in appointing Complainant as housing/zoning officer while her husband served as the Township's construction official (RE 10-11).

As to Complainant's political party affiliation, Respondent's attorney contends that evidence regarding which party held a majority on the township committee in various years and the party affiliations of the appointees in those years shows that the township committee made its appointments along party lines. However, thorough review of the record discloses no evidence that any committeemember voted against Complainant's reappointment because he or she preferred to appoint a Democrat. At this stage of the analysis, Respondent bears only the burden of producing evidence of a nondiscriminatory reason, and need not persuade the decisionmaker that it was actually motivated by that reason. Nevertheless, Respondent must still present some admissible evidence at the hearing which, if believed, would permit the decisionmaker to conclude that one or more of the committeemembers voted against Complainant because she was not a Democrat. Burdine, supra , 450 U.S. at 255. Respondent has presented no evidence that any committeemember even considered party affiliation in voting against Complainant, and its attorney's post-hearing statistical summary of the party affiliations of appointees is not a substitute for that

minimal showing.

The Director does find, however, that Respondent met its burden by producing at least some evidence that Complainant was not reappointed because of complaints or conflicts of interest. The record reflects that Viola Thomas-Hughes, who was mayor in 1996, was asked specifically at the hearing why she did not vote to reappoint Complainant (TR2-68). Thomas-Hughes testified that there were “several reasons” but specified only that there were “certain complaints coming in and in 1996 there was - - I decided to vote no for her reappointment.” Ibid. When questioned further about whether any complaints she referred to in her earlier testimony concerned Complainant serving as housing/zoning officer while her husband served as construction official, she answered in the affirmative, without further explanation (TR2-76).

While Thomas-Hughes’ testimony on this issue is quite vague, the Director concludes that it does at least minimally articulate a non-discriminatory reason for Thomas-Hughes’ vote. In addition, the minutes of the executive session of the township committee’s January 16, 1996 meeting show that the township committee discussed the conflict issue and considered, but rejected, tabling the housing/zoning officer appointment to get an advisory opinion from the New Jersey Department of Community Affairs Local Government Services regarding whether Complainant’s appointment would present a conflict (Exhibit R-20). Although this evidence does not establish that the perceived conflict was the true motivation for the committee’s vote, the Director concludes that the evidence of the township committee’s discussion of the conflict issue, combined with Thomas-Hughes’ testimony as to her own reason for voting against Complainant, is sufficient evidence to meet Respondent’s burden of producing evidence of a non-discriminatory reason for the township committee’s action. Based on this evidence, the Director rejects the ALJ’s conclusion that Respondent did not meet its burden of articulating a legitimate, non-discriminatory reason for not reappointing Complainant. Accordingly, the presumption of a discriminatory motive created by Complainant’s prima facie case is rebutted and the burden shifts to Complainant to

establish that Respondent's articulated reason is pretext for race discrimination.

After thorough review of the record, the Director concludes that Complainant has met her burden of proving pretext. Committeemember Robert Pierce testified that the conflict issue regarding Complainant and her husband had been a concern to him and another committeemember in 1995, but had been resolved by the Department of Community Affairs (DCA) (ID 20; TR 1-124 to 126). This is corroborated by the minutes of the March 21, 1995 meeting at which the township committee unanimously voted to appoint Richard Servais as construction code official while Complainant was already serving as housing/zoning officer (Exhibit P-14). Those minutes specified that "All DCA procedures have been complied with and there is no conflict of interest." Ibid.

Respondent has not pointed to credible evidence in the record which would warrant rejecting the ALJ's finding, supported by the testimony of Robert Pierce as well as Complainant, that there was no unresolved spousal conflict at the time of the vote on Complainant's reappointment (ID 21). Respondent focuses on letters from DCA submitted into evidence at the hearing, and argues that those letters addressed only potential conflicts regarding Richard Servais' construction business. The Director agrees with Respondent that DCA's February 15, 1995 letter to Mr. Servais discussed only conflict issues regarding his construction business (Exhibit P-12A). DCA's March 9, 1995 letter (Exhibit P-12) is phrased more broadly, but appears to respond to Richard Servais' March 2, 1995 letter to DCA addressing his construction business (Exhibit P-12B). However, even if those letters are silent on the spousal conflict issue, they do not rebut Pierce's testimony, accepted as credible by the ALJ, that prior to Mr. Servais' appointment DCA also considered any potential conflict based on his relationship to Complainant. Complainant's testimony corroborates Pierce's testimony on this issue (TR1-123 to 124).

In addition, although both Pierce and Complainant testified prior to Viola Thomas-Hughes' testimony, Thomas-Hughes did not contradict their testimony on that issue. Nor did any other of Respondent's witnesses contradict the testimony presented in Complainant's case-in-chief that the spousal conflict issue had been previously cleared by DCA.

Moreover, in its post-hearing submission, Respondent did not argue or even acknowledge that Respondent's articulated reason for replacing Complainant was a real or perceived conflict of interest. Instead, at that point Respondent stated only that Complainant "felt that some of the members of the Governing body felt that there was a conflict..." (Respondent's Closing Argument at 4). Respondent did at that point challenge Complainant's testimony that DCA had issued an opinion letter indicating there was no spousal conflict, but did not argue that such a conflict was the reason she was not reappointed. Instead, in its closing argument Respondent argued that Complainant was not reappointed because of her political party affiliation.

In its exceptions, Respondent does argue that in addition to political party affiliation, Respondent did not reappoint Complainant because Viola Thomas-Hughes perceived that appointing Complainant posed a conflict of interest (CE 10-11). However, in apparent contradiction to this argument, Respondent also takes exception to the ALJ's finding that Committeemember Dawson voted against Complainant's appointment because Committeemembers Taylor and Thomas-Hughes told Dawson that it would be a conflict for Complainant to be reappointed while her husband served as construction official (CE 11)⁷. If in fact Taylor and Thomas-Hughes believed Complainant's appointment would pose a problem because of a spousal conflict, there would be nothing improper about them informing Dawson of their beliefs, and it would be logical for Respondent to urge acceptance, rather than rejection, of this evidence. The contradictory nature of these arguments is some additional evidence of pretext.

⁷ Regarding Respondent's contention that the ALJ erred when he "denied" Respondent the opportunity to present Dawson's rebuttal testimony by telephone or deposition, the record reflects that Dawson was scheduled to testify for Respondent on the final day of the hearing and the ALJ delayed the proceedings waiting for Dawson, but he did not appear. Respondent was unable to reach the witness or determine the reason for his failure to appear, and requested that he be permitted to testify by telephone or deposition at some unspecified future time. Noting that there was no indication that Dawson would be reachable for substitute testimony at any particular time, the ALJ did not grant Respondent's request, but stated that he would reconsider the request if, within 24 hours, Respondent presented good cause for Dawson's failure to appear (TR3-10 and 49 to 50). There is no indication in the record that Respondent applied to the ALJ for substitute testimony once it learned the reason for Dawson's absence, nor has Respondent presented the Director with evidence of the reason for Dawson's failure to appear on the hearing date. The Director concludes that the ALJ's decision to close the record without Dawson's testimony was proper. N.J.A.C. 1:1-14.4; N.J.A.C. 1:1-14.6.

Respondent's contention that a June 16, 1996 letter of reprimand from DCA to Richard Servais is evidence that the township committee had genuine concerns about the spousal conflict is also without merit. That letter addressed Richard Servais' 1995 "inadvertent noncompliance" with state regulations prohibiting him from approving work done by a subcontractor of his sons' contracting company, and neither expressed nor implied any reference to Complainant or the housing/zoning office (Exhibit R-21). The Director concludes that, because these letters from DCA are apparently irrelevant to the spousal conflict issue, they are insufficient to warrant rejecting either the ALJ's finding that the township committee had previously addressed and resolved the spousal conflict question, or the ALJ's finding that Taylor and Thomas-Hughes "misstated" that issue when they informed Dawson that they were concerned about it (ID 21).

Further, the township committee's manner of addressing this and other potential conflicts of interest belies Respondent's contention that it was truly concerned about a conflict posed by Complainant's reappointment while her husband served as construction official. Committeemember Dawson asked for clarification regarding the spousal conflict issue at the January 16, 1996 executive session at which the township committee discussed Complainant's nomination (Exhibit R-20). The attorney advising the township committee suggested tabling the nomination or making a temporary appointment pending receipt of an advisory opinion on the issue from DCA, and suggested that if the committee believed there might be a conflict, it could have "an ethical duty to our constituents to first air that" rather than limiting discussion of any conflict to the closed executive session. Ibid. The committee rejected the attorney's advice and instead decided to return to the open meeting to vote on the appointment, without either raising the ethical question before the public, or getting an advisory opinion from DCA. Ibid. In the closed executive session, Committeemember Pierce stated that "we all know which way... we're gona [sic] vote." Ibid.

In its other appointments, the township committee generally did not find it problematic to have close family members serving in various township positions which would interact with each other, and did not even find it necessary to have township committeemembers abstain from voting

on the appointments of their parents or children (see, e.g., TR 2-79 to 83; TR1-160 to 163). In this light, the committee's rejection of its attorney's suggestion to get an advisory opinion from DCA on the spousal conflict issue, and its failure to even raise any perceived conflict as an issue in the public meeting, lends credence to the conclusion that the township committee was not truly concerned about whether there was an ethical conflict in having Complainant and her husband appointed to their respective positions, but instead had other reasons for voting against her.

When asked why she did vote against Complainant's reappointment, Viola Thomas-Hughes testified that there were "complaints coming in," but gave no specifics about any complaints that Respondent allegedly received about either a perceived spousal conflict or Complainant's general work performance. The only evidence presented about the Michalek complaint was irrelevant to Complainant's role as housing/zoning officer (TR3-40 to 41; TR3-46 to 47). The record is bereft of other evidence of specific complaints received about Complainant's performance either in relation to her husband's position or otherwise. Township Administrator William Hallman testified that he supervised Complainant in her housing/zoning officer position and found her to be a good employee with no performance problems, and that he did not recall ever receiving complaints about her performance (TR2-11 to 12, TR2-33 to 34).

In sum, there is sufficient credible evidence in the record contradicting Respondent's contention that it declined to reappoint Complainant in 1996 due to a perceived conflict of interest, complaints regarding such a conflict, or complaints about Complainant's work performance. Coupled with the evidence that Committeemember Taylor, with the support of Mayor Thomas-Hughes, voiced a plan to replace non-Black appointees with Blacks, the Director concludes that a preponderance of the competent credible evidence supports the conclusion that Complainant's race was a determinative factor in Respondent's decision to not reappoint Complainant to the housing/zoning officer position in 1996.

Remedies

A. Back Pay

The LAD provides that, upon a finding that a respondent has engaged in an unlawful employment practice, the Director may provide appropriate affirmative relief, including an award of back pay. N.J.S.A. 10:5-17. Based on the evidence that Curtis Kennedy was reappointed for 1997 and 1998 without advertising the position, Complainant's testimony that she would have been interested in reappointment for those years, and Kennedy's yearly earnings in the housing/zoning officer position, the ALJ awarded Complainant \$4169 yearly for 1996, 1997 and 1998 (ID 22). The ALJ further determined that Complainant failed to establish that she was denied reappointment as Respondent's 911 Coordinator based on her race, and for that reason she was entitled to no back pay or other damages for loss of the 911 Coordinator position (ID 22-23). Complainant has taken no exception to the ALJ's limitation of the backpay award on these bases, and the Director finds that this award is supported by the record. Accordingly, the Director adopts the ALJ's backpay award.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who was able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). Applying the computation method set forth in New Jersey Court Rule 4:42-11, the Director awards Complainant \$4,119.70 in prejudgment interest on the back pay award, through April 23, 2003.

B. Emotional Distress Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole.

Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the “indignity” which may be presumed to be the “natural and proximate” result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318.

Here, Complainant testified that she became nervous and upset as a result of Respondent’s unlawful actions, and these symptoms continued for “a good couple of years” (TR1-36 to 37). She consulted her doctor who prescribed medication for her nerves (TR1-37). Complainant’s husband testified that Complainant became nauseous and went through periodic crying spells after she lost her position with Respondent, and stated that her condition was “pretty bad for about six, seven months” and started to improve a little after her doctor prescribed medication (TR1-173 to 174).

The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant. After reviewing the applicable portions of the record, considering emotional distress damage awards made to other prevailing Complainants and considering the evidence that Complainant experienced physical manifestations of the emotional distress, Director concludes that an award of \$7,500 in pain and humiliation damages is appropriate in this case.

C. Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty of not more than \$10,000 for a respondent’s first violation of the LAD, payable to the State Treasury. N.J.S.A. 10:5-14.1a⁸. After review of the record, the Director agrees with the ALJ that

⁸Although this section was amended effective November 15, 2001 to raise the maximum penalty for a first violation of the LAD from \$2,000 to \$10,000, new or amended civil penalties may generally be imposed for unlawful acts which occurred prior to enactment of the new or enhanced remedy. See, e.g., State Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9, 14 (App. Div. 1981)

a penalty of less than the maximum is appropriate in this case, but finds that Respondent's discriminatory acts warrant assessing a statutory penalty of \$7,500.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful employment discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of \$24,126.70 for her lost wages with interest thereon, and as compensation for her pain and humiliation.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of \$7,500 as a statutory penalty.

4. The penalty and all payments to be made by the Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

DATE: _____

J. FRANK VESPA-PAPALEO, ESQ., DIRECTOR

(remedial or procedural statute may be given retroactive effect without unconstitutionally infringing on vested rights, provided that the new statutory remedy provides redress for acts which were unlawful at the time they were committed).

NEW JERSEY DIVISION ON CIVIL RIGHTS