IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ED MERA,	:	
	:	
Plaintiff,	:	
	:	NO. 3:CV-00-1507
vs.	:	
	:	
FRANCES LOHMAN, et al.,	:	(JUDGE CAPUTO)
	:	
Defendants.	:	

MEMORANDUM

Presently before the Court are Plaintiff's motion for summary judgment (Doc. 17) and Defendants' motion for summary judgment. (Doc. 22.)

Plaintiff Ed Mera is the former Township Manager of Hanover Township, Pennsylvania.[1] Plaintiff filed the present civil rights action on August 23, 2000, alleging that Defendants Florence K. Lohman, Brian C. McDermott, John J. Sipper, Richard C. Swoboda, members of the Board of Commissioners of Hanover Township, and Hanover Township violated his First and Fourteenth Amendment rights when the Board of Commissioners voted to terminate him from his position as Township Manager in June 2000. (Compl., Doc. 1.) Plaintiff moved for summary judgment on September 25, 2001. (Doc. 17.) Defendants moved for summary judgment on September 28, 2001. (Doc. 22.) Both motions for summary judgment have been fully briefed and are ripe for disposition.

[1]Plaintiff was appointed to the position of Township Manager on a temporary basis on February 24, 1999. (Doc. 23, Ex. A.) However, Plaintiff was permanantly appointed to the position of Township Manager by vote of the Hanover Township Board of Commissioners on November 22, 1999. (Doc. 23, Ex. D.)

LEGAL STANDARD

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 and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). A fact is material if proof of its existence or non-existence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *See id*.

Where there is a material fact in dispute, the moving party has the initial burden of proving that 1) there is no genuine issue of material fact and 2) she is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d Ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.*,

862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *See Anderson*, 477 U.S. at 256-257. The court need not accept mere conclusory allegations or denials taken from the pleadings. *See Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

1. Procedural Due Process

The Fourteenth Amendment Due Process Clause forbids the states from "depriving any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. In order to show a violation of his procedural due process rights with respect to the termination of a specific employment position, a plaintiff must first establish a property interest in his employment. *See Latessa v. New Jersey Racing Comm'n,* 113 F.3d 1313, 1318 (3d Cir. 1997) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701 (1972)). A property interest in employment can be created expressly by state statute or regulation, arise from government policy, or arise from an implied agreement between an employer and an employee. *See Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694 (1972). Pennsylvania law provides that, unless there is specific legislative language to the contrary, at-will public employees do not have a property interest in continued employment. *See Williams v. Philadelphia Housing Auth.,*

834 F. Supp. 794, 797 (E.D. Pa. 1993), *aff'd,* 27 F.3d 560 (1994).

In the present case, Pennsylvania law requires that the office of Township Manager be created by local ordinance, and provides that, among other things, the term of the office shall be regulated by ordinance. *See* 53 PA. CON. STAT. ANN. § 5604. Local ordinance number 007-99 provided that "the Township Manager shall be removed from office only for just cause by a majority vote of all the members of the Board of Commissioners." (Doc. 20 at 1a.) Thus, Plaintiff had a property interest in his job under local ordinance 007-99. However, in the spring of 2000, Defendants amended the ordinance to provide that "the Township Manager shall be subject to removal from office at any time by a majority vote of all the members of the Board of Commissioners." (Doc. 20 at 4a.) In June 2000, the Board of Commissioners voted to replace Plaintiff with Ron Wydo, Esquire. Plaintiff became an at-will employee when the ordinance was amended in the spring of 2000, and, at the time that he was fired in June 2000, Plaintiff did not have a property interest in his job under the Fourteenth Amendment. Thus, the question becomes whether Defendants violated Plaintiff's procedural due process rights when they amended the ordinance in the spring of 2000.

Procedural due process protection does not extend to legislative action. *See Rogin v. Bensalem Twp.,* 616 F.2d 680, 693 (3d Cir. 1980) (citing *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado,* 239 U.S. 441, 36 S.Ct. 141 (1915)).

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of a whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a

> complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic, 239 U.S. at 445. Where a rule of conduct applies to more than a few people, it is legislative action and the due process clause does not apply absent an indication that the legislative process treats an entire class of people inequitably. *See Rogin,* 616 F.2d at 693 (citing *Bi-Metallic*, 239 at 445). Procedural due process protection is triggered where a rule of conduct applies only to a small number of people who are exceptionally affected on individual grounds. *See Bi-Metallic,* 239 U.S. at 446 (citing *Londoner v. Denver,* 210 U.S. 373, 385, 28 S.Ct. 708 (1908)).

In the present case, Defendants' adoption of an ordinance making Plaintiff an at-will employee was not a legislative action, and the procedural due process clause applies. As the town manager, Plaintiff was the only person affected by the ordinance at the time it was passed. Indeed, there is evidence that Defendant Lohman stated that "her team plans to look at options for getting rid of . . . Mera."[2] As a state employee who could only be fired for-cause under the original ordinance, Plaintiff had a property interest in his employment. Thus, under the procedural due process clause, Plaintiff was, at minimum, entitled to notice and an opportunity to be heard. *See Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 546, 105 S.Ct. 1487 (1985).

In the present case, it is unclear whether Plaintiff received notice and an opportunity to be heard when the ordinance was amended to make him an at-will

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[2]The November 24, 1999 newspaper article that Lohman's quote appeared in is hearsay, as it is an out-of-court statement offered to prove the truth of the matter asserted. *See* FED. R. EVID. 801(a). However, Lohman's statement is admissible as an admission by a party-opponent. *See* FED. R. EVID. 801(d)(2). Hearsay statements can be considered on a motion for summary judgment if they would be admissible at trial. *See Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 223 n.2 (3d Cir. 2000).

employee. Both parties' motions for summary judgment regarding Plaintiff's procedural due process claim will be denied.

2. First Amendment

A. Appropriate Job Requirement

Defendants move for summary judgment on the grounds that political affiliation is an appropriate job requirement for the position of Township Manager.

"[P]romotions, transfers and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75, 110 S. Ct. 2729, 2737 (1990) (extending holding of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980)). However, there is an exemption to the general prohibition against politically motivated discharge where the employee holds a confidential or policy-making position. *See Wetzel v. Tucker,* 139 F.3d 380, 383 (3d Cir. 1998) (citing *Elrod v. Burns,* 427 U.S. at 367-68). In determining whether this exception applies, the inquiry is whether the hiring authority can show that party affiliation is an appropriate requirement for effective performance of the office, and not whether the label "policymaker" or "confidential" fits a particular position. *See Wetzel,* 139 F.3d at 383 (citing *Branti v. Finkel,* 427 U.S. 507, 518, 100 S.Ct. 1287 (1980)). The court's inquiry should focus on the public office in question, and not on the actual past duties of the particular employee involved. *See id.* at 384. However, evidence regarding actual past duties may be informative. *See id.* The defendant bears the burden of proving that party affiliation is an appropriate requirement for the effective service of the public office involved. *Laskaris v. Thornburgh*, 733 F.2d 260, 265 n.4 (3d

Cir.), *cert. denied*, 469 U.S. 886, 105 S. Ct. 260 (1984).

There is a genuine issue of material fact as to whether party affiliation is an appropriate requirement for the position of Township Manager. The Town Manager is responsible for day-to-day administration of the Township's affairs, and at times may be called upon to pick up supplies, post notices and pick up mail. (Doc. 23, Ex. F at 32; Doc. 26 at 1a-6a.) This does not end the Court's inquiry, however, as an employee who oversees day-to-day operations may still fall within the exception if his office is also involved in policy work. *See Assaf v. Fields,* 178 F.3d 170, 178 (3d Cir. 1999) (citing *Waskovich v. Morgano,* 2 F.3d 1292, 1300, 1302 (3d Cir. 1993)). While there is uncontradicted evidence that the Town Manager does not have the authority to make final policy decisions, there is also uncontradicted evidence that advising the Board of Commissioners on policy decisions is a key part of the Town Manager's role. (Doc. 20, 1a-2a, 4a-6a; Doc. 26, 1a, 4a.) The Town Manager's responsibilities include: attending and participating in all Board Meetings; attending particular committee meetings, upon the Board's request, to provide input on specific issues; keeping the Board informed regarding the conduct of Township affairs and making recommendations to the Board of Commissioners, based on his reports, regarding "the welfare of the Township;" preparing and submitting a proposed fiscal budget to the Board, and administering the budget after it has been approved by the Board; and negotiating collective bargaining agreements on the Township's behalf, subject to the Board's approval. (Doc. 20 at 2a, 5a-6a.) This evidence suggests that the political affiliation is an appropriate job requirement for the office of Township Manager. However, at least one Defendant has stated that political affiliation is **not** an appropriate job requirement for the position of Township Manager.

(Doc. 26, 7a.) Statements by a member of a hiring authority to the effect that political affiliation is not a proper requirement for a particular government position are "significant," and cannot be lightly dismissed. *Boyle v. County of Allegheny, Pennsylvania,* 139 F.3d 386, 389 (3d Cir. 1998). In light of this contradictory evidence, I find that there is a genuine issue of material fact as to whether political affiliation is a proper requirement for a particular government position. Defendants' motion for summary judgment on this issue will be denied.

B. Establishing a First Amendment Violation

Plaintiff moves for summary judgment on the issue of whether Defendants violated his First Amendment rights.

In order to demonstrate a constitutional violation of a plaintiff's First Amendment rights, a plaintiff must show: "(1) that he is a public employee, (2) that he was engaged in protected conduct such as maintaining an affiliation with a particular political party, and (3) that his political affiliation was a substantial or motivating factor in the state actor's personnel decision." *Albrechta v. Borough of White Haven*, 810 F. Supp. 139, 145 (M.D. Pa. 1992) (Kosik, J.) (citing *Laskaris*, 733 F.2d at 265). Once the plaintiff has established an inference of unconstitutional conduct, the burden shifts to the defendant to show that it would have reached the same decision regarding the plaintiff's employment status even in the absence of the protected conduct. *See Albrechta,* 810 F. Supp. at 145.

In the present case, it is undisputed that Plaintiff was a public employee at the time in question. While Plaintiff was a registered Republican, like Defendants, he supported the Democratic ticket during the fall 1999 Hanover Township elections by distributing

materials endorsing the Democratic slate of candidates for the Board of Commissioners. (Doc. 20 at 33a; Doc. 23, Ex. G at 49-51.) Thus, I find that the first two prongs have been met. The issue, then, is whether Plaintiff's political affiliation during the fall 1999 elections was a substantial factor in Defendants' decision to terminate him. This is a matter for the jury to decide. *See Baldrassare v. New Jersey,* 250 F.3d 188, 195 (3d Cir. 2001) (citing *Zamboni v. Stamler,* 847 F.2d 73, 79 n.6, 80 (3d Cir. 1988), *cert denied,* 488 U.S. 899, 109 S.Ct. 245 (1988)). Plaintiff's motion for summary judgment will be denied.

3. Qualified Immunity

Defendants move for summary judgment on the grounds that they have qualified immunity.

Government officials performing discretionary functions are entitled to qualified immunity in two circumstances. First, qualified immunity shields officials from liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692 (1999) (quoting *Harlow v. Fitzgerald,* 457 U.S. 102 S.Ct. 2727 (1982)). Second, even when a violation of a constitutional right has been clearly established, an official may be entitled to qualified immunity where "a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession" at the time of the conduct in question. *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) (citing *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 116 (1991) (per curium)).

In the present case, I have found that there are genuine issues of material fact as

to whether Plaintiff's First and Fourteenth Amendment rights have been violated. If Plaintiff is able to establish a violation of his constitutional rights, Defendants will not have qualified immunity. The First and Fourteenth Amendment rights at issue here were well established at the time of Defendants' alleged conduct in 2000. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75, 110 S. Ct. 2729, 2737 (1990) (First Amendment); *Rogin v. Bensalem Twp.,* 616 F.2d 680, 693 (3d Cir. 1980) (Fourteenth Amendment). *See also Air Line Pilots Assoc., Int'l v. Quesada,* 276 F.2d 892, 896 (2d Cir. 1960), *cert. denied,* 366 U.S. 962 (1961) (applying the legislative/adjudicative analysis to determine whether commercial pilots' claimed property rights in their pilot licenses and their collective bargaining agreements violated the due process clause.) Thus, "the contours of current law [at the time of the alleged conduct would have] put a reasonable defendant on notice that his conduct would infringe on the plaintiff's asserted right." *Gruenke v. Seip,* 225 F.3d 290, 302 (3d Cir. 2000). *See also McLaughlin v. Watson,* 271 F.3d 566, 572 (3d Cir. 2001). Defendants' motion for summary judgment on the issue of qualified immunity will be denied.

4. Benefits

Plaintiff moves for "summary judgment for benefits accrued as of the date of his termination." (Doc. 18 at 16.) However, Plaintiff has not identified any legal grounds justifying his recovery, and thus has not met his burden of establishing that he is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. Plaintiff's motion for summary judgment will be denied.

CONCLUSION

Both parties' motions for summary judgment will be denied. An appropriate order will follow.

_____ Date

_____
A. Richard Caputo
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ED MERA,	:	
	:	
Plaintiff,	:	
	:	NO. 3:CV-00-1507
vs.	:	
	:	
FRANCES LOHMAN, et al.,	:	(JUDGE CAPUTO)
	:	
Defendants.	:	

ORDER

NOW, this 4 of April, 2002, IT IS HEREBY ORDERED that:

(1) Plaintiff's motion for summary judgment (Doc. 17) is **DENIED**.

(2) Defendants' motion for summary judgment (Doc. 22) is **DENIED**.

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A. Richard Caputo
United States District Court

Filed April 4, 2002