

P.E.R.C. NO. 84-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF SUMMIT,

Respondent,

-and-

Docket No. CI-83-25-101

THOMAS P. MC NEELY,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge that Thomas P. McNeely had filed against the City of Summit. The charge had alleged that the City discriminatorily denied McNeely a promotion to sergeant because of his pro-union activity. The Chairman, adopting a Hearing Examiner's recommendation in the absence of exceptions, found that the charge had not been proved by a preponderance of the evidence.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF SUMMIT,

Respondent,

-and-

Docket No. CI-83-25-101

THOMAS P. MC NEELY,

Charging Party.

Appearances:

For the City of Summit, Thomas J. Savage, Esq.

For the Charging Party, Smith, Kramer, Morrison & Posner,
Esqs. (Charles R. Kramer, Jr., of Counsel)

DECISION AND ORDER

On November 9 and 29, 1982, Thomas P. McNeely, a patrolman in the Summit Police Department, filed, respectively, an unfair practice charge and amended charge with the Public Employment Relations Commission. The charge, as amended, alleges that the City of Summit ("City") violated subsections 5.4(a)(2) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it denied him a promotion to the rank of sergeant, allegedly because of his pro-union activity.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization" and "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

On May 26, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On June 6, 1983, the City filed its Answer. It admitted that it refused to promote McNeely, but denied this refusal was motivated by anti-union animus.

On August 29, 30 and 31, 1983, Commission Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

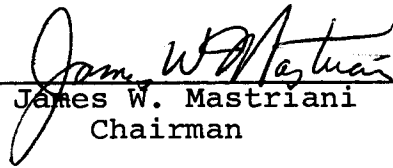
On November 17, 1983, the Hearing Examiner issued a report recommending dismissal of the Complaint, H.E. No. 84-28, 9 NJPER _____ (¶ _____ 1983) (copy attached). He found that the Charging Party failed to prove that his protected activity was a "substantial" or "motivating" factor in the City's decision not to promote him.

The Hearing Examiner served a copy of his report on all parties and notified them that exceptions, if any, were due on or before November 30, 1983. No exceptions were filed.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to review the record and recommended decision in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact are accurate and I adopt and incorporate them here. Based on these findings of fact, I agree with the Hearing Examiner that the alleged unfair practice has not been proved by a preponderance of the evidence. In the absence of any exceptions, I adopt his recommendation and dismiss the Complaint.

ORDER

The Complaint is dismissed.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 9, 1984

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

In the Matter of

CITY OF SUMMIT,

Respondent,

-and-

Docket No. CO-83-25-101

THOMAS P. MCNEELY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent City did not violate Subsections 5.4(a)(2) and (3) of the New Jersey Employer-Employee Relations Act when it failed to promote McNeely, a Patrolman, to the position of Sergeant from the 1981 promotion list. The City was not motivated to retaliate against McNeely because of his activities on behalf of PBA Local 55, particularly, as Chairman of the Negotiations Committee. The Charging Party failed to make a prima facie showing sufficient to support an inference that McNeely's protected activities were a "substantial" or a "motivating" factor in the decision of the City not to promote McNeely to the position of Sergeant. Further, the Hearing Examiner found that the City's action was not pretextual in nature, i.e., the City had a legitimate business justification in failing to promote McNeely.

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

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

In the Matter of

CITY OF SUMMIT,

Respondent,

-and-

Docket No. CO-83-25-101

THOMAS P. McNEELY,

Charging Party.

Appearances:

For the City of Summit
Thomas J. Savage, Esq.

For Thomas P. McNeely
Smith, Kramer, Morrison & Posner, Esqs.
(Charles R. Kramer, Jr., Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 9, 1982, and amended on November 29, 1982, by Thomas P. McNeely (hereinafter the "Charging Party" or "McNeely") alleging that the City of Summit (hereinafter the "Respondent" or the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent has made promotions from Patrolman First Grade to the rank of Sergeant from one list in 1978 and another list in 1981 in rank order of score except that McNeely has been passed over four times since 1981, notwithstanding that he is number two on the 1981 list. McNeely alleges that the "passing" was due solely to his extensive activities on behalf of PBA Local No. 55, Inc. (hereinafter the "PBA") since 1978, all of which is alleged to be a

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

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 26, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on August 29, 30 and 31, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by November 9, 1983.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Summit is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. PBA Local No. 55, Inc. is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Thomas P. McNeely is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. On June 2, 1976 the PBA was certified as the collective negotiations representative for a unit of Lieutenants, Sergeants and Patrolmen in the City's Police Department (Docket No. RO-76-93).
5. Prior to being certified as collective negotiations representative, supra,

^{1/} These subsections prohibit public employers, their representatives or agents from:

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

and for two years thereafter, the PBA engaged in informal negotiations with the City, which were never consummated in a formal collective negotiations agreement. In 1978 negotiations commenced, which resulted in a one-year written agreement for the year 1979. A second collective negotiations agreement was negotiated and reduced to writing for the years 1980 and 1981. A third agreement, which was introduced in evidence as Exhibit J-1, is effective for the term January 1, 1982 through December 31, 1983.

6. The City is not subject to the New Jersey Civil Service Laws and Regulations.

7. McNeely was hired as Patrolman on June 1, 1969 and, at the time of the hearing was a Patrolman First Grade. Prior to January 1, 1982 McNeely was assigned to the Uniformed Division in the City's Police Department, but since January 1, 1982 McNeely has been assigned to the Detective Bureau.^{2/}

8. As of 1983 there were 51 employees in the City's Police Department, including the Chief, one Deputy Chief, five Lieutenants, seven Sergeants and thirty-seven (37) Patrolmen (see 1982 Table of Organization, Exhibit R-6).

9. McNeely has been a member of PBA for many years and since 1974 has held the following offices and positions: Secretary - 1974-75; Trustee - 1980-83; State Delegate - 1980-82; and Chairman of the Negotiations Committee - 1978 to date.

10. When McNeely assumed the position of Chairman of the Negotiations Committee in 1978 he initiated a survey comparing the City's Police Department with other municipalities as to wages and fringe benefits, and concluded that the PBA should, for the first time, seek a written collective negotiations agreement with the City because the PBA was "behind" other municipalities. In furtherance of this objective, McNeely prepared a written document for Mayor Lehr and the Finance Committee of the Council. Before this had been done, the Mayor said to McNeely that he had heard that the PBA was going to seek a written contract and "invoke PERC." Before entering into negotiations in 1978, the PBA decided to hire an attorney, Richard D. Loccke. The City, for the first time, also hired an attorney, Thomas J. Savage.

^{2/} McNeely was a PBA State Delegate at the time of his assignment to the Detective Bureau, which he agreed was preferable to working in uniform.

11. The negotiations commenced in 1978 and, after an impasse was reached, the Commission appointed a mediator at the request of the PBA. Before interest arbitration occurred, a voluntary agreement was reached for the year 1979. In the negotiations, Loccke was the spokesman for the PBA and Savage was the spokesman for the City. Patrolman Richard Asarnow, the President of the PBA from 1978 to 1982, testified without contradiction that, even after Loccke came into the negotiations in 1978, McNeely made presentations for the PBA in negotiations with the City. Asarnow also testified that in the 1978 negotiations there were "heated" discussions, which he acknowledged on cross-examination were merely "disagreements." The 1980-81 collective negotiations between the parties resulted in an Interest Arbitration Award with the Arbitrator having adopted the economic position of the City. The 1982-83 negotiations, which resulted in Exhibit J-1, were consummated without the necessity of interest arbitration but, however, only after the PBA threatened "legal action." This was clarified by McNeely to mean threats by the PBA to initiate interest arbitration.

12. McNeely testified without contradiction that sometime in 1978 or 1979 Frank J. Formichella, the Chief of the Police Department since November 1978, said to McNeely, "I see you everyday, I know what a fine job you do. But the Council only sees you in negotiations" (1 Tr. 101). The Charging Party contends that this is evidence of anti-union animus on the part of the City. However, Formichella, as a witness for the Charging Party, testified without contradiction that when McNeely came to him and inquired as to whether or not McNeely's sitting on the Negotiations Committee was having any effect on his promotion opportunities, infra, Formichella replied that McNeely "conducted himself as a perfect gentleman...and made a very good impression" (1 Tr. 81). There was no evidence adduced as to when Formichella made this latter statement.

13. Approximately four to five grievances have been filed and processed by the PBA since 1978. McNeely has not been involved in the processing of these grievances, except one that he processed on his own behalf in 1982. The President of the PBA is responsible for processing grievances. Asarnow was the President of the PBA from 1978 to 1982

and Robert Lucid has been the President since Asarnow left office in 1982. Only one grievance had proceeded to binding arbitration as of the time of the hearing, and that involved Patrolman Holmes, which was decided in favor of the PBA on November 19, 1982 (R-2). The grievances that did not proceed to arbitration were settled to the satisfaction of the PBA.

14. The Police Ordinance, adopted by the City Council on December 18, 1973, provides nine "Qualifications Factors" for the promotion of Patrolmen First Grade to Sergeant and above (R-1). These factors are: (1) educational achievements; (2) intelligence; (3) special traits such as ability to understand and follow oral or written directions and an ability to read, understand and interpret written matter; (4) job knowledge; (5) skill and proficiency; (6) personal traits such as honesty, industry, bearing, reputation and standing in the community; (7) physical condition, strength and agility; (8) demonstrated ability to supervise others; and (9) demonstrated ability to work constructively with other Departments of the City and with citizens organizations and the general public.

15. By way of implementation of the Qualifications Factors in the Police Ordinance, supra, the City adopted rules and regulations constituting the promotion policy for the members of the Police Department (CP-1). The Examining Committee (referred to in the hearing as the "Promotion Committee") consists of the Mayor, two members of the Public Safety Committee of the Council, the Chief and the Deputy Chief of the Police Department. The said policy then establishes promotional criteria consisting of categories in the rating of candidates: (a) written examination, which is administered by the County and State Police Chiefs Association (200 points maximum); (b) performance rating - to be made by superior officers of the Police Department on rating sheets, which take into consideration technical skill, job knowledge, supervision and leadership ability, attitude and loyalty, etc. (200 points max.); (c) oral examination to be given by the Examining Committee (100 points max.); and (d) seniority, based on years of service in the Police Department (100 points max.). To be considered,

a candidate must attain 420 points or more out of a possible 600 points. Finally, the promotion policy provides that the Examining Committee will make the final selection for promotion "... from any one of the three eligible candidates having the highest total score above 419..." (CP-1, p. 4) (emphasis supplied).

16. Pursuant to the City's promotion policy a list of candidates for promotion to Sergeant was established in 1977 (CP-7). The ranking of the first six candidates on this list was as follows:

<u>OFFICER</u>	<u>WRITTEN</u>	<u>ORAL</u>	<u>PERFORM. RATING</u>	<u>SENIORITY</u>	<u>TOT. AVG.</u>
Sofie	142	84	191.2	86	503.2
A. Formichella	124	87.4	184.4	89	484.8
Wrisley	116	78.3	176.0	95	465.3
Zimmer	126	78	174.2	86	464.2
McNeely	128	78.9	168.6	83	458.5
D. Formichella	124	80.7	171.0	82	457.7

17. The following promotions were made from the 1977 promotion list in order of rank on the list as follows: Sofie - February 25, 1978; A. Formichella - October 7, 1978; Wrisley - February 10, 1979; and Zimmer - August 1, 1979. Neither McNeely nor D. Formichella were reached before the expiration of the 1977 list.

18. In or around March 1981 the next promotion list was promulgated (CP-8).

The ranking of the first six candidates on this list was as follows:

<u>OFFICER</u>	<u>WRITTEN</u>	<u>ORAL</u>	<u>PERFORM. RATING</u>	<u>SENIORITY</u>	<u>TOT. AVG.</u>
D. Formichella	196	87.3	163	86.3	532.6
McNeely	178	82.3	161	86.6	508.1
Yannotta	166	85.7	163	93.0	507.7
Horn	166	77.7	169	91.3	504.0
Schneller	186	72.7	152	92.1	502.8
McCandless	176	79.3	156	86.3	497.6

19. The following promotions were made from the 1981 promotion list, which were not made in order of rank on the list, as follows: D. Formichella - May 16, 1981; Yanotta - April 1, 1982; Horn - April 1, 1982; and Schneller - November 1, 1982. Of those promoted from the 1982 list only Schneller had been active on behalf of the PBA, having served on the Negotiations Committee from 1978 to 1982.

20. Chief Formichella testified credibly that after the promotion of D. Formichella to Sergeant on May 16, 1981 McNeely, being second in rank on the 1981 list, was considered in the "pool" of the three top candidates at the time of three subsequent promotions of Yannotta, Horn and Schneller.

21. Janet L. Whitman, a member of the City Council from 1976 to 1982, and a member of the Public Safety Committee from 1980-82, testified credibly that, as a member of the Examining Committee at the time of the four promotions from the 1981 list, there was no policy of promotion in order of rank on the list. She further testified that she did not know that McNeely was the Chairman of the Negotiations Committee or a PBA State Delegate. She described the procedure for the selection of candidates for promotion to Sergeant, namely, an interview with each candidate where about five questions were asked and, before the ranking was completed based on score points, the Chief would make a report on each candidate. Thereafter, a secret ballot was taken, with each of the five members of the Examining Committee ranking the candidates in order of preference (one to three). In 1981 and 1982 Whitman tallied the ballots, which were immediately destroyed. Both Chief Formichella and Whitman were insistent that union activities of any of the candidates were never discussed or considered in the deliberations of the Examining Committee.

22. By way of explanation as to why McNeely was not selected from the 1981 list for promotion to Sergeant, Chief Formichella testified that McNeely needed a little more "maturity" for that position, and he also noted that McNeely needed more supervision than other police officers. Finally, he noted that McNeely doesn't set a good example for the Police Department, giving as his reason two instances where McNeely

failed to appear for an off-duty assignment (R-4 and R-11).

23. There was received in evidence a number of performance ratings or evaluations of McNeely by several Sergeants and Lieutenants of the Police Department covering the period 1975 to 1982 (CP-4, CP-9, CP-10 to CP-13, R-5, R-10 and R-13). These ratings of McNeely range from "good" on the earlier forms, used in 1975-77, to many categories of "exceeds standards" on the forms used from 1980 to 1982.

24. There was also received in evidence various commendations and awards to McNeely, including those from the Mayor, the Chief and various superiors in the Police Department, covering the period 1977 through 1981 (CP-5, CP-16 to CP-22).

25. McNeely has never been formally disciplined for infractions of the rules and regulations of the Police Department. However, as noted above, he has been censured twice for failure to appear at an off-duty assignment (R-4 and R-11, supra).

26. When McNeely was asked on cross-examination to explain his use of the word "solely" in reference to union activities being the only reason that he was not appointed Sergeant from the 1981 promotion list (see original Unfair Practice Charge), he stated that he consulted the Police Ordinance (R-1, supra) and utilized the nine "qualifications factors," supra, to compare himself to the other candidates, who were promoted. This comparison led him to the conclusion that his union activities were the only reason, which could account for his having been "passed" three consecutive times. Also, McNeely acknowledged on cross-examination that the 1977 and 1981 promotion lists (CP-7 and CP-8) do not include in the test scores all of the nine "qualifications factors" in the Police Ordinance, supra.

27. The Hearing Examiner finds as a fact that, except for the instant case, which is under review, the City has not during the time period material hereto, namely, since 1978, engaged in any pattern of discrimination against members of the Police Department on account of their activities on behalf of the PBA.

THE ISSUES

1. Has the Charging Party made a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the City's decision not to promote McNeely to Sergeant from the 1981 list?
2. Was the City's conduct in not promoting McNeely to Sergeant based upon reasons which were entirely pretextual?

DISCUSSION AND ANALYSIS

The Charging Party Failed To Establish
 A Prima Facie Showing Sufficient To
 Support An Inference That Protected
 Activity Was A "Substantial" Or A
 "Motivating" Factor In The City's
 Decision Not To Promote McNeely To
 The Position Of Sergeant

The Charging Party's reliance on the following cases ^{3/} is misplaced due to the Appellate Division's adoption of Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981). Wright Line, which was adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., U.S., 113 LRRM 2857 (1983), set forth a causation test in cases of "dual motive." The National Relations Board in Wright Line adopted the analysis of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involved the following requisites in assessing employer motivation: (1) the General Counsel (Charging Party) must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline, herein the refusal to promote McNeely to Sergeant; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity.

3/ See City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as modif., 82 N.J. 1 (1980); Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45 (1980); Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd App. Div. Docket No. A-4824-77 (1980); Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (1980), aff'd. App. Div. Docket No. A-3230-79 (1981); County of Middlesex, P.E.R.C. No. 81-87, 7 NJPER 93 (1981); and Township of Bridgewater, P.E.R.C. No. 82-36, 7 NJPER 600 (1981), aff'd. App. Div. Docket No. A-859-81T2, pet. certif. granted, 91 N.J. 547 (1982).

The Hearing Examiner finds and concludes that McNeely has failed to make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the City's decision not to promote him from the 1981 list to the position of Sergeant. Thus, the Hearing Examiner, in the first instance, finds it unnecessary to consider whether the City has met the burden of demonstrating that McNeely would not have been promoted even in the absence of protected activity.

It is true that McNeely has served as Chairman of the Negotiations Committee of the PBA since 1978 and that he was instrumental in undertaking a survey, which led the PBA to seek its first written collective negotiations agreement with the City. Further, a written contract was obtained for the year 1979 and written collective negotiations agreements have resulted in the years thereafter, including the 1982-83 agreement (J-1). The Hearing Examiner cannot concur in the contention of the Charging Party that the relationship of the parties in negotiations was "uncooperative and antagonistic." Asarnow, the President of the PBA from 1978 to 1982, after testifying that the 1978 negotiations were "heated," thereafter acknowledged on cross-examination that there were merely "disagreements." McNeely acknowledged that the threat of "legal action" in the 1982-83 negotiations meant nothing more than the threat of the PBA to initiate interest arbitration.

Any suggestion that the City viewed McNeely in a negative or hostile way as a result of his conduct in negotiations was, in the opinion of the Hearing Examiner, neutralized by the testimony of Formichella, who, when McNeely asked him whether or not his sitting on the Negotiations Committee was having an effect on his promotional opportunities, stated that McNeely "conducted himself as a perfect gentleman... and made a very good impression" (Finding of Fact No. 12, supra). The Hearing Examiner cannot infer hostility, discrimination or animus toward McNeely from Formichella's statement to McNeely that "I see you everyday, I know what a fine job you do. But the Council only sees you in negotiations."

In short, the only protected activities which McNeely can point to are those in his capacity as Chairman of the Negotiations Committee of the PBA and these do not arise to the level of supporting an inference that his negotiations activities were a "substantial" or a "motivating" factor in the decision of the City not to promote him to Sergeant from the 1981 list. The Charging Party has failed to establish a causal connection between McNeely's exercise of protected activities and the City's decision not to promote him.^{4/}

It is true that McNeely processed one grievance on his own behalf in 1982, which would clearly constitute protected activity. But the Hearing Examiner finds that McNeely played no role in the four or five other grievances that were processed by the PBA since 1978, one of which went to arbitration. The President of the PBA is responsible for the processing of grievances. Except for the one case that went to arbitration in 1982, involving Patrolman Holmes, the other grievances were settled to the satisfaction of the PBA. Thus, there has been no "grievance" problem between the PBA and the City since 1978.

It is equally clear that McNeely is a "good cop." The City has recognized this by assigning him to the Detective Bureau, a preferable assignment according to McNeely, and this occurred when McNeely was still a PBA State Delegate in January 1982. McNeely has never been disciplined, notwithstanding several infractions where he failed to appear for an off-duty assignment. His performance ratings or evaluations have ranged from "good" to "exceeds standards." He has received various commendations and awards over the period from 1977 through 1981.

Even if the Hearing Examiner were to assumed arguendo that McNeely had made out out a prima facie case under Wright Line, supra, the City has met the burden of demonstrating that McNeely would not have been promoted even in the absence of his exercise of protected activity. The City's promotional policy (CP-1) requires only that the Examining Committee make its final selection "...from any one

^{4/} Compare Township of Clark, supra at footnote 3.

of the three eligible candidates having the highest total score above 419..." Although the promotions to Sergeant from the 1977 list were made in order or rank by test score, there was no evidence adduced that this was a longstanding City policy, which had never abrogated. Thus, no binding past practice is herein involved.

As noted above, the City was only obligated to promote from any one of the three eligible candidates having the highest total score. It is also noted that Schneller, who was also on the PBA's Negotiations Committee at the time of his promotion on November 1, 1982, was in fact promoted on that date. The Hearing Examiner has found as a fact that, except for the instant case, which is under review, the City has not since 1978 engaged in any pattern of discrimination against members of the Police Department on account of their activity on behalf of the PBA (Finding of Fact No. 27, supra). Chief Formichella, who participates as a member of the Examining Committee, advanced several reasons why McNeely was not promoted, namely, that McNeely needed a little more "maturity" for the position of Sergeant and also needed more supervision than other Police Officers (Finding of Fact No. 22, supra).

Taking all of the foregoing into consideration, the Hearing Examiner has no difficulty in concluding that the City has established a legitimate business justification in not having promoted McNeely to Sergeant.

The City's Failure To Promote
McNeely To Sergeant Was Not Based
Upon Pretext

The Charging Party correctly points out that the National Labor Relations Board in Wright Line made a clear distinction between "pretext" and "dual motive" cases. The NLRB stated, in connection with the pretext type of case, that an employer will rarely assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging protected activity. Instead, the employer will generally advance what it claims to be a legitimate business justification for its actions. However, close scrutiny of the evidence may reveal that the asserted justi-

fication "...is a sham in that the purported rule of circumstance advanced by the employer did not exist..." The NLRB then stated that when this occurs the reason advanced by the employer "...may be termed pretextual..."

Even analyzing the evidence in this case from the standpoint of "sham" and "pretext," the Hearing Examiner is not persuaded that the City acted in such a fashion. Chief Formichella's relations with McNeely were on a business and professional level. There was no indication whatsoever from the testimony that the Chief harbored any hostility or bad feelings toward McNeely. Also, there was nothing to indicate that Formichella, as a member of the Examining Committee, said or did anything against McNeely's interest other than to voice his candid opinion regarding McNeely's lack of "maturity" and that he needed more supervision than other Police Officers. Thus, the Hearing Examiner is not persuaded by the arguments of the Charging Party at Point II of its Brief (pp. 20-32) that the City's conduct herein was based upon pretext.

Accordingly, based on the foregoing, the Hearing Examiner finds and concludes that the Charging Party has failed to establish a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the City's decision not to promote McNeely to the position of Sergeant and, further, the City's action was not pretextual. Thus, the Hearing Examiner will recommend that the Complaint be dismissed.

CONCLUSION OF LAW

The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(2) and (3) when it failed to promote Thomas P. McNeely to the position of Sergeant from the 1981 list.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: November 17, 1983
Trenton, New Jersey