

P.E.R.C. NO. 84-72

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF RAHWAY,

Respondent,

-and-

Docket No. CI-83-44-90

RAYMOND C. SAVACOOOL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge Raymond C. Savacool filed against the City of Rahway. The charge had alleged that the City discriminatorily bypassed Savacool for promotion to Deputy Chief of the fire department in favor of an officer of the majority representative of fire department employees. The Commission holds that Savacool failed to prove his allegations by a preponderance of the evidence.

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Appearances:

For the Respondent, Alan J. Karcher, Esquire  
(Louis N. Rainone, Of Counsel)

For the Charging Party, Goldberger, Siegel & Finn,  
Esqs. (Howard A. Goldberger, Of Counsel)

DECISION AND ORDER

On February 8, 1983, Raymond C. Savacool ("Savacool") filed an unfair practice charge against the City of Rahway ("City") with the Public Employment Relations Commission. Savacool alleged that the City violated subsections 5.4(a)(1), (2), and (3)<sup>1/</sup> when it bypassed him for promotion to Deputy Chief of the City's fire department in favor of an employee, John Ross, who was an officer of the majority representative of fire department employees.

On May 11, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On May 24, 1983, the City filed its Answer. It

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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."

denied that the promotion improperly rested on an illegal preference for an employee engaged in union activities and asserted to the contrary that the promotion properly rested on the superior leadership capabilities of the employee chosen.

On September 15, 1983, Hearing Examiner Alan R. Howe conducted a hearing. The parties stipulated certain facts, examined a witness, and presented exhibits.<sup>2/</sup> Both parties submitted letter briefs.

On October 25, 1983, the Hearing Examiner issued his report and recommended decision, In re City of Rahway, H.E. No. 84-26, 9 NJPER \_\_\_\_ (¶ \_\_\_\_ 1983). He recommended dismissal of the Complaint because, he found, Savacool failed to make out a prima facie case of a violation of subsections 5.4(a)(1) and (3) and the promotion of Ross over Savacool was not based on an illegal preference but was primarily based on his unavailability since he lived 35 miles from Rahway. The Hearing Examiner also found that Savacool presented no evidence to support a violation of subsection 5.4(a)(2).

On November 14, 1983, after receiving an extension of time, Savacool filed exceptions. Savacool asserted that the Hearing Examiner incorrectly concluded that he failed to make out a prima facie showing that his right to refrain from protected activity was a motivating factor in the City's decision, and that he failed to prove that the decision to by-pass him was based on an illegal preference. Savacool also excepted to the Hearing

<sup>2/</sup> At the time of the hearing, this matter was also pending before the Civil Service Commission. Both parties agreed, however, that PERC was the appropriate forum for resolution of this issue.

Examiner's conclusion that the primary reason for not promoting him was his unavailability. Savacool did not file any exceptions to the Hearing Examiner's recommendation that the subsection 5.4(a)(2) allegation be dismissed.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-4) are accurate and we adopt and incorporate them here.<sup>3/</sup>

We hold that, under all the circumstances of this case, Savacool has not proved by a preponderance of the evidence that he was illegally denied a promotion because the City wished to encourage employees to participate in pro-union activity.<sup>4/</sup> The only evidence of the City's allegedly illegal favoritism is a letter from the Chief to Savacool stating that Ross was promoted instead of Savacool because:

A review of your service record indicates adequate job performance with few exceptions. However, the position of shift commander requires strong leadership and decision making. Candidate number two has demonstrated this leadership capability and is recognized by his fellow officers in that they have elected him to the position of officer representative for the bargaining unit.<sup>5/</sup>

<sup>3/</sup> We specifically add that Ross was an officer of the majority representative of fire department employees. This fact was alleged in the Complaint and not denied. It is deemed admitted. N.J.A.C. 19:14-3.1.

<sup>4/</sup> We have reviewed the entire record in making this determination. Given our conclusion, it is not necessary to decide whether Savacool technically made out a prima facie case of the City illegally promoting a union official. We do agree with Savacool that the Hearing Examiner erred in finding that Savacool's lack of union activities or union office undercut his case; indeed, it is Savacool's refraining from supporting the majority representative that is at the heart of his allegations.


<sup>5/</sup> We do not agree with the Hearing Examiner that unavailability, rather than leadership capability as set forth in this letter, was the primary reason for denying Savacool promotion.

This letter does not, standing alone, prove illegal favoritism. Leadership capability is a proper consideration in making a promotion to such a high level position as deputy chief and leadership in a union may properly be considered as one indicium, among others, of this capability. There is no evidence that the City wished to encourage other employees to engage in pro-union activity as a result of this promotion; that the promotion was part of an arrangement with the majority representative; or that the City had a practice of automatically promoting union officers. Accordingly, under all the circumstances of this case, we conclude that Ross's promotion did not violate the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey  
December 9, 1983  
ISSUED: December 12 1983

STATE OF NEW JERSEY  
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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsections 5.4(a)(1), (2) and (3) of the New Jersey Employer-Employee Relations Act when it bypassed Savacool for promotion to Deputy Chief on December 24, 1982. There was adequate basis in the record for a finding that Savacool was bypassed because of his "unavailability," which arose from his having his residence in Neptune, some 35 miles from the City of Rahway. The Chief of the Fire Department, in setting forth written reasons for why Savacool was bypassed, made reference to the designee as having leadership capability which was recognized by his fellow officers in that they elected him to the position of officer representative for the bargaining unit. The Hearing Examiner found that the Charging Party failed to prove a violation of the Act by a preponderance of the evidence, notwithstanding that the Chief made the foregoing statement in writing with respect to the selection of the designee as officer representative for the bargaining unit. Absolutely no details as to the union activity of the designee were proven. The Hearing Examiner was left to speculate on whether union activity was a factor in the promotion of the designee over Savacool.

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.

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For the City of Rahway  
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(Louis N. Rainone, Esq.)

For Raymond C. Savacool  
Goldberger, Siegel & Finn, Esqs.  
(Howard A. Goldberger, Esq.)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 8, 1983 by Raymond C. Savacool (hereinafter the "Charging Party" or "Savacool") alleging that the City of Rahway (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 City on December 24, 1982 bypassed Savacool for appointment to Deputy Chief of the City's Fire Department, notwithstanding that he was number one in rank on the Civil Service list. On January 4, 1983 the Chief of the Fire Department, in giving the reasons why Savacool was not selected, stated that the designee "...has demonstrated...leadership capability and is recognized by his fellow officers in that they have elected him to the position of officer representative for the bargaining

unit," all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act.<sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, as amended, a Complaint and Notice of Hearing was issued on May 11, 1983. Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 15, 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 October 17, 1983.

An Unfair Practice Charge 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 Rahway is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. Raymond C. Savacool is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
3. Savacool has been employed in the City's Fire Department since December 1, 1953. Savacool was appointed a Captain on September 18, 1963 but resigned thereafter due to personal reasons. He was reappointed a Captain in January 1965.

1/ These Subsections prohibit public employers, their representatives or agents from:  
"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.  
"(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."



4. The Fire Department consists of one Chief, five Deputy Chiefs, twelve Captains and forty firemen. Prior to the instant case the last Deputy Chief was appointed in August 1979.

5. Savacool and several other members of the Fire Department, including Captain John P. Ross, participated in a competitive Civil Service examination for the position of Deputy Chief in 1982. On December 9, 1982 the Civil Service Department of Certification certified that Savacool ranked number one and that Ross ranked number two on the Civil Service list. Ross has been a member of the Fire Department since April 22, 1968 and a Captain since October 1975.

6. Because of the relative inexperience of the Chief of the Fire Department, James T. Heller, in matters of promotion, Heller contacted Paul McGlynn of the Civil Service Department of Certification and had several telephone conversations with him between mid-December 1982 and December 24, 1982. Thus, these conversations occurred after the ranking of the candidates on the list dated December 9, 1982, supra.

7. Heller testified that, in making the promotion to Deputy Chief, he considered the factors of on-the-job performance, demonstrated leadership, reports and availability. In speaking with McGlynn from Civil Service, supra, Heller read to McGlynn a draft of a letter to Savacool, which explained why Savacool was being bypassed for promotion to Deputy Chief (see CP-1, infra). According to Heller, McGlynn had made several suggestions to him by way of explaining Heller's decision to bypass Savacool. McGlynn stated that Heller could use either non-availability or non-residency inasmuch as Savacool resides in Neptune, which is thirty-five miles from Rahway.

8. Ross was promoted to Deputy Chief by Heller on December 24, 1982. On the same day Savacool telephoned Heller after having heard that he was being bypassed. When asked for his reasons, Heller stated that the critical area was "availability" and, further, that he, Heller, had heard a rumor that one of the firemen under Savacool had not appeared for an assignment and Savacool had failed to make a report on this incident.

9. On January 4, 1983 Heller sent Savacool a letter setting forth the reasons why Savacool was bypassed for promotion as required by N.J.A.C. 4:1-12.15(d) (CP-1). In the said letter Heller stated, in pertinent part, as follows:

"A review of your service record indicates adequate job performance with few exceptions. However, the position of shift commander requires strong leadership and decision making. Candidate number two has demonstrated this leadership capability and is recognized by his fellow officers in that they have elected him to the position of officer representative for the bargaining unit."

10. On the same date, January 4, 1983, Heller denied in writing Savacool's grievance of December 28, 1982 on the same subject, referring to CP-1 (CP-2 and CP-3).

11. Savacool filed an appeal with Civil Service on January 10, 1983. This appeal was dismissed on January 28, 1983 and thereafter a further appeal was taken by Savacool, which is presently pending. However, it was agreed on the record that the "predominant interest" in the instant dispute was with PERC. Thus, although the Civil Service appeal has not been withdrawn it was stipulated at the hearing that the Commission is the proper forum for the disposition of the instant dispute.

#### DISCUSSION AND ANALYSIS

The Respondent Did Not Violate The  
Act When It Bypassed Savacool For  
Promotion To Deputy Chief In The  
Fire Department On December 24, 1982

The Unfair Practice Charge alleges that the Respondent violated the Act when the Chief of the Fire Department, on January 4, 1983, in giving the reasons why Savacool was not selected for promotion to Deputy Chief, stated that the designee (Ross) "...has demonstrated...leadership capability and is recognized by his fellow officers in that they have elected him to the position of officer representative for the bargaining unit." The Charging Party adduced no evidence as to Savacool's activities on behalf of any union; indeed no union is identified as being the collective negotiations representative. Further, the Charging Party did not identify the office to which Ross was elected and the date thereof. Also, there was no evidence

adduced as to what office or offices Savacool holds or has held. In other words, there is merely the naked statement by the Chief that Ross has been "...recognized by his fellow officers in that they have elected him to the position of officer representative for the bargaining unit."

The Hearing Examiner must necessarily find and conclude that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent violated the Act when it bypassed Savacool for promotion to Deputy Chief for the reasons hereinafter set forth: N.J.A.C. 19:14-6.8.

To the extent that the Charging Party's allegation of a violation of the Act centers on Subsection(a)(3), the Hearing Examiner notes that the Charging Party 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 Respondent's decision not to promote Savacool: see East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), which adopted the "causation test" enunciated by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).<sup>2/</sup>

The Charging Party having failed to make out a prima facie case, supra, the Hearing Examiner need not consider whether or not the Respondent demonstrated a legitimate business justification for its decision to promote Ross over Savacool.

Further, to the extent that the Charging Party's allegation of a violation of the Act focuses on Subsections(a)(1) and (3) under the NLRB decisions in Dairylea<sup>3/</sup> and Gulton,<sup>4/</sup> the Hearing Examiner is of the view that, based on the instant record, the promotion of Ross over Savacool was not discriminatory or preferential in the manner in which the broad grant of superseniority was in the foregoing two NLRB decisions.

<sup>2/</sup> Wright Line was adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., U.S. , 113 LRRM 2857 (1983).

<sup>3/</sup> Dairlea Cooperative, Inc., 219 NLRB 656, 89 LRRM 1737 (1975), enf'd. 531 F.2d 1162, 91 LRRM 2929 (2nd Cir. 1976).

<sup>4/</sup> Gulton Electro-Voice, Inc., 266 NLRB No. 84, 112 LRRM 1361 (1983).

Additionally, the testimony demonstrates that the basic reason for the bypassing of Savacool was his "unavailability." On December 24, 1982, after Savacool learned of the promotion of Ross, a telephone conversation ensued where the Chief stated to Savacool that the critical area in his reason for not promoting Savacool was "availability." It was developed at the hearing that Savacool lives in Neptune, which is 35 miles from Rahway. Although the Chief's January 4th letter to Savacool did not refer to availability as the reason for bypassing Savacool, the record contains adequate support for a finding by the Hearing Examiner that availability was the primary factor in the decision not to promote Savacool and not Ross's union activity.

Based upon the foregoing the Hearing Examiner must recommend dismissal of the Subsection(a)(1) and (3) allegations in the Complaint. Further, there was no evidenced adduced, which would support a finding of a violation of Subsection(a)(2) of the Act, leaving aside the question of whether or not an individual public employee has standing to file an Unfair Practice Charge under this Subsection.

\* \* \* \*

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) when the Chief of the Fire Department promoted John P. Ross to the position of Deputy Chief on December 24, 1982 and in so doing bypassed Raymond C. Savacool.

RECOMMENDED ORDER

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



Alan R. Howe  
Hearing Examiner

Dated: October 25, 1983  
Trenton, New Jersey