

P.E.R.C. NO. 82-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EAST RUTHERFORD,

Respondent,

-and-

Docket No. CO-81-87-74

EAST RUTHERFORD PBA LOCAL 275,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Commission adopts the recommendations of a Hearing Examiner and determines that the Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) when it failed to promote Patrolman Cosentino to the rank of sergeant in September 1980. The parties entered into a settlement agreement before PERC in September 1979 which provided that Cosentino was provisionally promoted to sergeant; subsequently, Civil Service found the promotion to be invalid as a violation of their regulations. The Commission holds that when a settlement agreement reached before this agency conflicts with State laws or regulations, such a settlement is null and void.

The Commission also finds that the Borough's failure to promote Cosentino to sergeant in September 1980 was not retaliative against Cosentino for his exercise of protected activities. Instead, the Borough established a valid merit and fitness justification for its refusal to promote Cosentino.

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Appearances:

For the Respondent, Alfred A. Porro, Jr., Esq.

For the Charging Party, Osterweil, Wind & Loccke, Esqs.
(Manuel A. Correia, Esq.)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on September 25, 1980 by the East Rutherford PBA Local 275 (the "PBA"), alleging that the Borough of East Rutherford (the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The PBA alleged that the Borough had failed to promote Patrolman Arthur Cosentino to the rank of sergeant because Cosentino engaged in protected activities on behalf of the PBA, and further alleged that the Borough failed to implement a settlement agreement between the Borough and the PBA which provided that Cosentino would be promoted to sergeant allegedly in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (5).^{1/}

^{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

(Continued)

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on December 16, 1980. Pursuant to the Director's order, hearings were held on March 23 and 24, 1981 in Newark, New Jersey before Commission Hearing Examiner Edmund G. Gerber. At these hearings, the parties were given opportunities to examine witnesses, present relevant evidence and argue orally. Briefs were submitted by the parties by July 6, 1981.

The Hearing Examiner's Recommended Report and Decision, H.E. No. 82-4, 7 NJPER ____ (¶ ____ 1981), a copy of which is attached hereto and made a part hereof, was issued on August 11, 1981. Exceptions to the report were filed by the PBA on September 3, 1981 and a response thereto was filed by the Borough on September 24, 1981. The case is now properly before the Commission for determination.

In his report, the Hearing Examiner concluded that the Borough did not violate N.J.S.A. 34:13A-5.4(a)(3) because the Borough established a valid merit and fitness justification for its refusal to promote Cosentino. The Hearing Examiner also

1/ (Continued) to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discrimination 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) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

concluded that the Borough did not violate N.J.S.A. 34:13A-5.4 (a) (5) because the Borough complied with a Department of Civil Service directive when it rescinded Cosentino's promotion to sergeant. The Hearing Examiner also concluded that no evidence was presented to support violations of N.J.S.A. 34:13A-5.4(a)(1), (2) and (4).

The underlying facts of this case are not in dispute. On August 17, 1978, the PBA filed an Unfair Practice Charge with the Commission, alleging that four officers, including Cosentino, had been unlawfully denied promotions because they engaged in protected activities on behalf of the PBA. On September 27, 1979, the Borough and the PBA entered into a settlement agreement, whereby the PBA withdrew the Unfair Practice Charge it filed in August 1978, and the Borough agreed, inter alia, to promote the four officers mentioned in the Unfair Practice Charge, including Cosentino. The promotions were made retroactive to July 12, 1978, with back pay to that date for all four officers. The Borough then submitted the promotions to Civil Service for approval. Cosentino's promotion was made from a Civil Service list for promotion to sergeant dated January 2, 1974, in which Cosentino was ranked number two.

Cosentino served as a sergeant with provisional Civil Service status until June 11, 1980, when he was demoted to the position of patrolman. The demotion reflected a Civil Service ruling rendered on June 10, 1980, wherein Civil Service held that Cosentino's promotion had to be made off a list promulgated on January 24, 1980 and issued on February 5, 1980, rather than from

the January 2, 1974 list. Cosentino was ranked fourth on the January 1980 list.

In September 1980, the Borough promoted two patrolmen from the January 1980 list to sergeant. Cosentino was not promoted, although he was eligible for promotion from the January 1980 list. Subsequent to the Borough's September 1980 appointments, the PBA brought the instant unfair practice charge.

As modified,^{2/} we adopt the above findings of fact made by the Hearing Examiner below and turn now to his conclusions of law and the PBA's exceptions thereto. The Hearing Examiner found that the Borough did not violate N.J.S.A. 34:13A-5.4(a)(5) when it failed to promote Cosentino to sergeant in September 1980. The PBA excepts to this finding.

The Hearing Examiner found that the Borough complied with the settlement agreement when it promoted Cosentino in September 1979. Subsequently, the Borough was ordered by Civil Service to demote Cosentino. The Hearing Examiner held that the settlement agreement was thus null and void, since "[a]greements which contravene Civil Service regulations are illegal. State of New Jersey v. State Supervisory Assn, 78 N.J. 54 (1978)."

The PBA contends that, since the Borough could have promoted Cosentino to sergeant notwithstanding the Civil Service ruling, the Borough should have promoted Cosentino consistent with

^{2/} Our review of the record reveals a few minor deviations in the dates of various events as noted by the Hearing Examiner below (e.g., the Hearing Examiner found that two sergeants were promoted in August 1980, but testimony indicates that the promotions were made in September 1980). We find that these deviations are not substantive, and, with slight modifications, we adopt the Hearing Examiner's findings of fact.

the settlement agreement. In effect, the PBA argues that the settlement agreement remained in effect after the Civil Service ruling, and that the Borough failed to act in good faith when it did not promote Cosentino to sergeant subsequent to the Civil Service ruling.

The Public Employment Relations Commission is charged, inter alia, with responsibility for "the prevention or prompt settlement of labor disputes...." N.J.S.A. 34:13A-2. Consistent with these responsibilities, the Commission strongly advocates the voluntary resolution of labor disputes. Moreover, the Commission recognizes that the unfair practice forum before this agency may often give much needed meaning to voluntary settlement agreements.

Nonetheless, under the totality of the circumstances herein presented, the Commission adopts the Hearing Examiner's recommended finding that the Borough did not violate N.J.S.A. 34:13A-5.4(a)(5). When a settlement agreement reached before this agency conflicts with State law or regulations, such a settlement is null and void. The parties to the void settlement may then agree to resettle their differences; alternatively, the parties may fail to resettle and instead litigate the original issue(s). Should a settlement agreement fail through no fault of the parties to that agreement, as in the instant case, then those parties are free, as the PBA has done in this instance, to then litigate the matter(s) in question.

Indeed, this case illustrates the procedures detailed above. After the settlement agreement failed, the PBA litigated the underlying issue of whether or not Cosentino had been discriminated against because he exercised protected rights on behalf

of the PBA.^{3/} Thus, even when a settlement agreement before PERC fails for reasons beyond the parties' control, a charging party before PERC will be entitled to its day in court.

Turning to the litigation of the underlying charge, the Commission adopts the Hearing Examiner's recommended finding that the Borough did not violate N.J.S.A. 34:13A-5.4(a)(3). We concur with the Hearing Examiner's conclusion that the Borough established valid justification for its refusal to promote Cosentino to sergeant in September 1980. Witnesses offered by both the Borough and the PBA testified, on both direct and cross examination, that the two patrolmen promoted to sergeant in September 1980 were more fit for the promotion than Cosentino. Assuming, arguendo, that the PBA proved that Cosentino's protected activity was a "substantial, i.e., a motivating factor..." in the Borough's decision to promote two patrolmen over Cosentino, the Borough has successfully demonstrated by a preponderance of the evidence that its decision was based on the merit and fitness of the three patrolmen and not in retaliation for Cosentino's protected activity. See In re East Orange Public Library v. Constance Taliafaro, 180 N.J. Super. 155, 163 (1981).

In its exceptions to the Hearing Examiner's recommendation, the PBA emphasizes certain testimony to the effect that Cosentino has performed satisfactorily for the Borough and could adequately perform the duties of sergeant.

^{3/} While the original charge, Docket No. CO-79-37, lists four individuals who were allegedly discriminated against by the Borough in regard to promotions, three of four have received their promotions. In the present proceeding, the PBA has only pursued its allegation as to Cosentino.

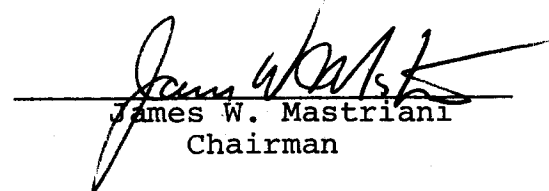
However, a decision to promote from a pool of qualified candidates all of whom have met the basic Civil Service requirements is normally a comparative inquiry. The preponderance of the evidences supports the Hearing Examiner's finding that the patrolmen who were promoted were reasonably and in good faith judged by the Borough to be better qualified.

As for the remaining unfair practices alleged under N.J.S.A. 34:13A-5.4(a)(1), (2) and (4), we adopt the Hearing Examiner's conclusion that the PBA presented no evidence which suggested violations of these subsections.

ORDER

Accordingly, for the reasons set forth above, the Commission hereby orders that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Newbaker, Parcels and Suskin voted in favor of this decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
November 10, 1981
ISSUED: November 12, 1981

H. E. No. 82-4

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

In the Matter of

BOROUGH OF EAST RUTHERFORD,

Respondent,

-and-

Docket No. CO-81-87-74

EAST RUTHERFORD PBA LOCAL 275,

Charging Party.

SYNOPSIS

In 1979 the East Rutherford PBA and the Borough of East Rutherford entered into a settlement agreement disposing of an unfair practice charge pending before the Public Employment Relations Commission. As part of that settlement agreement, Patrolman Cosentino was promoted to the rank of sergeant. In the spring of 1980, Civil Service announced that the promotion of Cosentino was not in compliance with Civil Service regulations and ordered that the city demote Cosentino to the rank of patrolman. The Borough complied. In August 1980, the Borough promoted two patrolmen other than Cosentino to the rank of sergeant. The PBA brought the instant action alleging that the Borough had a duty to promote Cosentino under the 1978 settlement agreement. The Hearing Examiner recommends that the Commission find that the failure of the Borough to promote Cosentino in August of 1980 was done in compliance with Civil Service regulations and, therefore, the Commission could not order the Borough to promote Cosentino in order to comply with the 1978 settlement agreement.

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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Appearances:

For the Respondent, Alfred A. Porro, Jr., Esq.

For the Charging Party, Osterweil, Wind & Loccke, Esqs.
(Manuel A. Correia, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 25, 1980, the East Rutherford PBA Local 275 (Charging Party or PBA) filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Borough of East Rutherford (Respondent or Borough) violated N.J.S.A. 34:13A-5.4(a) et seq. when it failed to promote Arthur Cosentino to the rank of sergeant pursuant to a settlement agreement, entered into between the Borough and the PBA. This agreement entered into in September of 1979, was executed as a settlement of an unfair practice filed by the PBA in 1978 wherein it was alleged that the Borough bypassed four employees for promotion in the police department for their exercising of protected rights. It was specifically alleged

that the Borough's failure to promote Cosentino violated § 5.4(a) (1), (2), (3), (4) and (5) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 25, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 23 and 24, 1981, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties submitted briefs which were filed by July 6, 1981.

In 1978 the Association filed an Unfair Practice Charge alleging that four officers, two patrolmen, Cosentino and Dennis Taormina, and two sergeants were unlawfully denied promotion to the ranks of sergeant and lieutenant, respectively, because they engaged in protected activities on behalf of the PBA. On September 27, 1979, the parties entered into a stipulation of settlement in which the Borough recognized that "employees of the Police Department of the Borough of East Rutherford have the right, freely and without fear of penalty or reprisal, to form, join and assist any employee

^{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) discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

organization...(and) pursuant to the foregoing statutory requirements and in an effort to resolve the dispute raised by the instant unfair practice charge, the Borough agreed to promote" the four officers mentioned in the unfair practice charge. The Borough furthermore agreed to make each promotion retroactive to July 12, 1978, "thereby affording the appropriate back pay to each of the above-named individuals." The settlement agreement was signed for the Borough by their attorney, Alfred Porro. The four officers including Cosentino were all granted retroactive promotions pursuant to the agreement.

At the time of the settlement agreement, the most recent Civil Service list for promotion to sergeant was effective January 2, 1974. On that list Taormina ranked number one and Cosentino was ranked number two. Normally this list would have been effective for only three years but Civil Service extended the life of the list for an extra year and a half since the Attorney General had brought suit in another action to compel the Borough to promote someone from it. ^{2/} The list expired on August 28, 1978, when the Borough appointed the number three man on the list, John LaGreca, as sergeant. In making this appointment the Borough bypassed Taormina and Cosentino upon Mr. Porro's representation that Taormina and Cosentino were not bypassed for political purposes or in retaliation of their participation in contract negotiations." Civil Service accepted LaGreca's appointment and dropped its action against the Borough.

On June 12, 1980, Cosentino was reduced to the position of

2/ Civil Service had conducted a desk audit on December 9, 1975, and determined that Patrolman Trotter was acting as a supervisor of police officers and classified Trotter as a police sergeant. The Borough disputed this determination and the action was brought by the Attorney General.

patrolman, pursuant to a Civil Service ruling dated June 10, 1980. In the June 10, 1980 Civil Service ruling, it was held that the promotion of Taormina and Cosentino could only be made pursuant to a list promulgated in February, 1980. On this new list Taormina still was listed as number one so his promotion was not questioned. Cosentino however was ranked fourth on the list and Civil Service rejected Cosentino's promotion. The Borough complied with the Civil Service ruling and demoted Cosentino.

In August of 1980 two patrolmen other than Cosentino were promoted by the Borough even though, after Taormina's promotion, Cosentino was eligible for promotion on the February 1980 Civil Service list. Thereupon the Charging Party brought the instant unfair practice charge claiming that the Borough had an obligation under the settlement agreement to promote Cosentino in August of 1980.

The Civil Service rulings were never raised as an issue by the parties. What is to be decided here is only 1) whether the Borough had an obligation to promote Cosentino in August of 1980 pursuant to the 1979 settlement agreement and 2) whether the Borough discriminated against Cosentino.

There is no question that this Commission has a duty to guard and preserve voluntary settlements, if at all possible. Jannarone v. W. T. Co., 65 N.J. Super. 472 (App. Div. 1961), certif. denied sub nom Jannarone v. Calmoneri, 35 N.J. 61 (1961); Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974). It is the position of the Borough that they did comply with the settlement agreement. After Civil Service held Cosentino's promotion was invalid and he was reduced in rank, the Borough argues it was compelled to promote

in accordance with Civil Service regulations. Civil Service Rule 4:1-8.4 states that in addition to the score of competitive examination, records of service and such other tests of fitness may be evaluated as necessary for promotion. The Borough claimed it based its August promotion on such other qualifications. The PBA alleged that the Borough discriminated against Cosentino when it declined to appoint him in August, 1980. It submitted evidence only with respect to Cosentino and his relationship with the Borough, there was no attempt at the hearing to introduce evidence as to the other officers who were subjects of the 1978 unfair practice charge.

It is clear from the record that Cosentino is forthright and outspoken as a leader of the PBA. He is the only PBA officer who was part of the 1978 settlement agreement who still holds an office in the PBA. He is state delegate and chairman of the negotiating committee. He has successfully grieved Borough practices on a number of occasions. Further, Cosentino has challenged his status as a patrolman since 1972 when, while serving as a desk officer he filed a complaint with Civil Service in which he claimed he was performing the duties of a sergeant.

The evidence is abundantly clear however that Cosentino had problems as an employee. Even witnesses called by the PBA who are PBA officers admitted that "Cosentino has been a little lax" and "unreliable." Three officers have asked their superiors that they not be on the same shift with Cosentino. He had a poor record in responding to backup calls of fellow officers. ^{3/} Cosentino also

^{3/} The PBA witnesses who testified as to Cosentino's limitations as a police officer included Trotter, Pletsch, Taschler, Taormina, Lendick and Logatto.

has had a long history of illness with a resultant high rate of absenteeism (Cosentino owed the Borough 74 sick days at the time of the hearing). It was not alleged by the Borough that this absenteeism was less than legitimate, rather it reflects on the difficulties the Borough might have if Cosentino's absences continued were he to resume a sergeant's supervisory duties.

On the other hand, the testimony of all witnesses (including PBA officers) substantiate the Borough's position that the two officers who were promoted to sergeant were more fit than Cosentino. Strictly on the basis of the evidence before me I am satisfied that when the Borough promoted two other employees over Cosentino in August 1980, the decision to promote was made on the basis of merit and fitness.

Even if the PBA established a prima facie case herein, I find the Borough has established that its justification for its actions were valid and that the Borough's refusal to promote Cosentino to sergeant in August 1980 was not motivated, even in part, by a desire to retaliate against Cosentino for his exercise of protected rights. Township of Teaneck and Sylvester Gray, P.E.R.C. No. 81-142, 7 NJPER ____ (¶ 1981).

I find that the Borough did not unilaterally alter a term and condition of employment without negotiations in violation of § 5.4(a)(5) when it failed to follow the June 1979 settlement agreement in bypassing Cosentino. The Borough is compelled to follow the regulations of the Civil Service Commission. Agreements which

contravene Civil Service regulations are illegal. State of New Jersey v. State Supervisory Assn., 78 N.J. 54 (1978).

It is noted that Civil Service's handling of eligibility lists in this matter is rather frustrating.

The 1979 settlement agreement was signed under the auspices of this Commission, four months before the promulgation of the February 1980 list. More significantly, the unfair practice charge was first filed with the Commission on August 17, 1978, eleven days before the 1974 list expired with the appointment of LaGreca. Civil Service Rule 4:l-11.7 states:

4:11-11.7 Limited revival of expired employment lists

(a) The institution of a...court action concerning the...status of an employment list shall not stop the running of time of such list. However ...an employment list, in litigation...which expires while the appeal is pending shall be revived by the Chief Examiner and Secretary upon the subsequent entry of judgment favorable to a claimant in the court action.... Such revival shall be limited to the purpose of permitting execution of the judgment of the court or order of the Commission.

(b) The Commission may also revive an employment list beyond its expiration date if there has occurred bona fide error which had unjustly denied any eligible of certification or appointment

It would seem that our sister agency could have on the basis of comity considered that a supervised settlement of this Commission qualifies under Rule § 11.7 and find that a question pursuant to the 1974 list was in litigation while that list was still valid and therefore revive the old list. It is significant that there was no


testimony to indicate that Cosentino, as well as Taormina, were not the most qualified officers eligible for promotion in September 1979 when the promotions were made.

Civil Service chose not to apply § 11.7 and this agency cannot compel them to do so.

There was no evidence adduced at the hearing to demonstrate independent violation of § 5.4(a)(1) or violation of § 5.4(a)(2) and (4).

Recommendations

It is therefore recommended that the Commission dismiss the Complaint in its entirety.


Edmund G. Gerber
Hearing Examiner

DATED: August 11, 1981
Trenton, New Jersey