P.E.R.C. NO. 97-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF CHERRY HILL,

Respondent,

-and- Docket No. CO-H-95-271

FRATERNAL ORDER OF POLICE,
LODGE No. 28,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the Township of Cherry Hill's motion for summary judgment and dismisses a Complaint based on an unfair practice charge filed by the Fraternal Order of Police, Lodge No. 28. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act when it unilaterally implemented a "master police officer evaluation program" without negotiations over criteria, procedures and/or its impact. The Commission finds that decisions to change promotional criteria and the weight given to various criteria are not mandatorily negotiable. The Commission also finds that the FOP failed to request negotiations over severable economic consequences of the exercise of a managerial prerogative and thus the Township did not refuse to negotiate in good faith concerning terms and conditions of employment.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, DeCotiis, Fitzpatrick & Gluck, attorneys (Judy A. Verrone, of counsel)

For the Charging Party, Markowitz & Richman, attorneys (Stephen C. Richman, of counsel)

DECISION AND ORDER

On February 14, 1995, the Fraternal Order of Police, Lodge No. 28, filed an unfair practice charge against the Township of Cherry Hill. The charge alleges that on or about February 1, 1995, the Township unilaterally implemented a "master police officer evaluation program" ("MPO") without negotiations over "criteria, procedures and/or its impact" and thus violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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. (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."

On June 15, 1995, a Complaint and Notice of Hearing issued. On June 30, the Township filed an Answer asserting that the charge is untimely because the program had been in effect for 20 months before the charge was filed. It also asserted that past practice permitted it to implement the program; the parties' collective negotiations agreement authorized it to "determine qualifications and conditions of assignment, to promote and to transfer"; and the issues raised by the charge are non-negotiable.

On November 27, 1995, the Township moved for summary judgment. The motion was referred to Hearing Examiner Jonathon Roth. See N.J.A.C. 19:14-4.8.

On February 23, 1996, the Hearing Examiner recommended granting the motion and dismissing the Complaint. H.E. No. 96-16, 22 NJPER 119 (¶27061 1996). He found that the Township had a prerogative to use the MPO program as a criterion for making promotions or special assignments and no evidence showed that such promotions or special assignments had resulted in a unilateral dispensation of benefits. He also found that even if there were mandatorily negotiable issues severable from the decision to use the MPO, the FOP had not sought negotiations over those issues.

On March 6, 1996, Lodge 28 filed exceptions asserting that summary judgment should not be granted. It specifically asserts that the Hearing Examiner erred in finding that: (1) Lodge 28 failed to request negotiations; (2) the promotions and/or special

assignments given to MPO program participants primarily concerned non-negotiable changes in duties; (3) the promotions and/or special assignments given to MPO Program participants did not result in a unilateral dispensation of benefits; (4) the compensation flowing from the promotions and/or special assignments did not fall outside of any negotiated contractual amount; and (5) the charging party's claim that the impact of the program resulted in specialized training and financial rewards was vague and did not raise a genuine issue of material fact. On March 27, the Township filed a response urging adoption of the recommended decision.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-7) with this minor modification. The record does not establish that superior officers were part of the advisory committee established by the chief before implementation of the MPO program.

We agree with the Hearing Examiner that the charge was timely filed. Lodge 28 is not contesting the implementation of the MPO program on June 1, 1993, but alleges changes in February 1995.

Lodge 28 alleges that on February 1, 1995, a Township representative announced that promotions and/or special assignments would be granted only to employees enrolled in the MPO program. Thus, enrollees selected for such promotional or special assignment opportunities will receive specialized training and financial rewards. Lodge 28 contends that such training and rewards

constitute severable negotiable consequences triggering an obligation to negotiate.

Decisions to change promotional criteria and the weight to be given various criteria are not mandatorily negotiable. State of New Jersey, Dept. of Law & Public Safety v. State Troopers NCO Association, 179 N.J. Super. 80 (App. Div. 1981); Town of Westfield, P.E.R.C. No. 94-5, 19 NJPER 413 (¶24184 1993); Montclair Tp., P.E.R.C. No. 93-28, 18 NJPER 492 (¶23225 1992). Participation in the MPO program is one criterion used to assist the Township in determining assignments and promotions.

As the Hearing Examiner noted, a majority representative must demand negotiations over severable economic consequences of the exercise of a managerial prerogative. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984); City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); see also Town of Kearny, P.E.R.C. No. 91-42, 16 NJPER 591 (¶21259 1990); Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987). The Hearing Examiner found no evidence that Lodge 28 requested negotiations after the alleged change in the MPO Program. Lodge 28 excepts to this finding, asserting that any demand for negotiations would have been futile. We reject that exception. The charging party has not presented any evidence that negotiations over any mandatorily negotiable issues, rather than over the establishment of the MPO program itself, would have been

futile. Accordingly, we conclude that the Township did not refuse to negotiate in good faith concerning terms and conditions of employment.

We need not address Lodge 28's other exceptions. The Township's motion for summary judgment is granted.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz abstained from consideration.

DATED: September 26, 1996
Trenton, New Jersey
ISSUED: September 27, 1996

H.E. NO. 96-16

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

In the Matter of

TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-H-95-271

FOP LODGE 28,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission grant a Motion for Summary Judgment filed by the public employer. The majority representative's unfair practice charge alleged that the employer unilaterally implemented an evaluation program without negotiations over "impact."

The Hearing Examiner recommended that the charge was timely filed but that the dispute concerned the exercise of a managerial prerogative and that the majority representative did not demand negotiations over severable economic consequences.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 96-16

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BEFORE A HEARING EXAMINER OF THE
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In the Matter of

TOWNSHIP OF CHERRY HILL,

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Appearances:

For the Respondent, DeCotiis, Fitzpatrick & Gluck, attorneys (J.S. Lee Cohen, of counsel)

For the Charging Party, Markowitz & Richman, attorneys (Stephen C. Richman, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION ON MOTION FOR SUMMARY JUDGMENT

On February 14, 1995, the Fraternal Order of Police, Lodge No. 28, filed an unfair practice charge against the Township of Cherry Hill. The charge alleges that on or about February 1, 1995, the Township unilaterally implemented a "master police officer evaluation program" without negotiations over "criteria, procedures and/or its impact." The Township's action allegedly violates 5.4(a)(5) and (1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq.

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. (5) Refusing to

Footnote Continued on Next Page

On June 15, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On June 30, the Township filed an Answer, denying the allegations. It argues that the charge is untimely because the program "has been in effect since in or about June, 1993," twenty months before the filing date. It also argues that "past practices" permit the Township to create similar programs; that the collective agreement authorizes it to "determine qualifications and conditions of assignment, to promote and to transfer"; that alternatively, the issues raised by the charge are "non-negotiable."

On November 27, 1995, the Township filed a Motion for Summary Judgment with the Commission. On November 28, the motion was referred to me for a decision. N.J.A.C. 19:14-4.8.

On December 20, 1995, the FOP filed a brief, opposing the motion. On January 10, 1996, the FOP filed a sworn affidavit, the text of which was included in the brief.

On January 16, 1996, the Township filed a reply to the FOP brief. On February 1, 1996, the FOP filed a reply to the Township's letter.

1/ Footnote Continued From Previous Page

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."

> Summary judgment will be granted:
>
> ...if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law... [N.J.A.C. 19:14-4.8(d)].

Rulings on motions for summary judgment require that all inferences be drawn against the moving party and in favor of the party opposing the motion--in this case, FOP, Lodge No. 28. No credibility determinations are made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(d). Whether a "genuine issue" exists (which precludes summary judgment) depends on whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). A motion for summary judgment should be granted with extreme caution -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 17 N.J.Super. (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Applying these standards, and relying upon the briefs and supporting documents filed in this matter, I make the following:

FINDINGS OF FACT

1. The Fraternal Order of Police, Lodge No. 28 is the majority representative of all police officers employed by the Township of Cherry Hill, a public employer within the meaning of the Act.

2. In March 1993, the Township Police Chief William Moffett announced a Master Police Officer Program ("MPO") and sought representatives from superior officer and rank-and-file units for a five-member advisory committee. The task of the committee was to "collect all officer input, review same for relevance to program objectives, and facilitate modifications of the program accordingly" (memorandum, March 31, 1993).

3. On April 8, 1993, FOP president Robert Fox wrote a letter to police lieutenant John Stewart advising of his selection of four named officers for the "MPO advisory committee." On April 20, Lieutenant Stewart issued a memorandum, confirming the names of seven committee members, six of whom are included in the FOP unit. Between April 8 and May 28, 1993, the Committee recommended revisions in the "technical proficiencies" section of the program. The recommendations were approved.

4. On or about June 1, 1993, the Chief issued "General Order 93-07", establishing a Master Police Officer Program. The program is to "provide the non-supervisory officer with a voluntary, challenging, and progressive career development plan." The order declared that the classification of Master Police Officer is the "capstone" in a program "containing five interim levels of

achievement classified from Police Officer 1 through Senior Police Officer." The program would be a "clear alternative for those officers who are blocked from advancement due to lack of promotional opportunities or who do not otherwise desire to become supervisors."

The order advises that "police officers and investigators must meet all program requirements for advancement...Satisfactory participation in the program will afford the officers preferential status when seeking special assignments and/or promotion within the department..." (my emphasis). The document incorporates by reference a 36 page program manual, plus appendices.

5. Through June 1993, about 35 police officers filed applications for the MPO program. On or about February 17, 1994, FOP representatives, including counsel, complained about flaws in the MPO program to Chief Moffitt and Lt. Stewart. FOP president Fox filed an affidavit asserting, "at the meeting, Police Chief Moffitt specifically denied that it would be necessary to participate in the program in order to receive a promotion or advancement within the CHPD" (Fox affidavit, ¶11). He also certifies that the Chief rejected a request that the program "be put on hold" pending a resolution of the issues.

7. On or about February 23, 1994, an FOP representative issued a memorandum to unit employees, identifying at least eight "legal issues that we found wrong with the current program", including "changes in work conditions that are merely implemented and not negotiated, as per P.E.R.C." The memorandum advises that

"the current program, despite good intentions, has significant flaws..." It protests the "physical tests", warning of career-ending injuries and "40% disability" payments.

8. On February 24, 1994, Lt. Stewart mailed a letter to FOP counsel, inviting further discussion over "purported legal defects of the existing program, with an eye toward making modifications which would cure said defects."

FOP counsel did not respond.

9. In a "Winter 1994" New Jersey FOP newsletter, an article appeared entitled, a "Program of Unreasonable Competition Among Patrol Officers is Opposed by Cherry Hill Lodge." Included in the article were several paragraphs devoted to the conduct of an attorney who allegedly "caused the lodge to miss its opportunity to fight at the first level...[B]riefs [being prepared] for a hearing before the state Public Employment Relations Commission (PERC) were never filed." The article states, "[First vice president Mark] DeFrancisco said that in order for the matter to go before PERC, the filings would have [sic] to have been made within six months of the June 1993 start-up of the Master Police Officer Program." The article further states that another attorney--FOP counsel in this matter-- is "preparing to take the matter to state court, which allows filing within two years of the program's start."

10. On May 9, 1994, the Chief issued an Order (94-71), listing 18 named officers, 3 investigators and 5 sergeants who "advanced in the MPO program."

11. On January 13, 1995, FOP president Fox sent a letter to the department's Internal Affairs Commander, "requesting an internal investigation of the newly adopted MPO program." Fox wrote that the program violates "state and federal laws."

12. On or about February 1, 1995, police lieutenant Chris Hardy announced to officers at night watch roll call that "only MPO program participants will be rotated into and considered for appointment to the position of investigator."

13. Chief Moffitt certifies that the announcement, "if made...was without authorization." He reiterates that the policy, as expressed in General Order 93-07 (see finding 4) "affords a preference in special assignment and/or promotions within the department." (affidavit of 1/12/96).

14. All promotions (3) and special assignments (6) within the department between February 1995 and February 1996 were offered to program participants only.

ANALYSIS

The Township urges that the charge is not timely filed because the program was implemented in June 1993. It also argues that the program is a managerial prerogative not subject to negotiation and even if negotiations were mandatory, the FOP waived that right.

The FOP contends that the charge is timely filed because "the impact" of the program -- that only program participants will be rotated into investigator positions -- was first known on

February 1, 1995. While conceding the Township's right to implement an evaluation system, the FOP argues that it seeks to negotiate "any economic impact." It cites "specialized training", "financial rewards", "promotion" and "advancement."

The charge is timely filed. The FOP is not contesting the unilateral implementation of General Order 93-07 on June 1, 1993. Any charge concerning terms and conditions in the Order is beyond the statutory period. The FOP conceded as much in its Winter 1994 newsletter.

The FOP is contesting an alleged unilateral change in the MPO program--specifically, that the lieutenant's February 1, 1995 remark at evening roll call means that enrollment in the program is a requirement for promotion and/or special assignment. (The meaning is necessitated by the inference I must draw in favor of the FOP).

General Order 93-07 gives a "preference" to program enrollees in promotions and/or special assignments. In February 1994, the Chief reiterated that enrollment is not a condition for advancement in the department. The issue of fact--which is timely alleged--is whether enrollment in the MPO program is a condition for departmental advancement. Underscoring the issue is the Chief's certification that the lieutenant's remark is unauthorized and inaccurate.[2/]

2/ Promotions and/or special assignments given to enrollees only is consistent with the "preference" expressed in General Order 93-07. Something more would need to be shown to prove the FOP's allegation.

Public employers have a managerial prerogative to evaluate employees, choose evaluators and determine evaluation criteria for the purpose of implementing decisions on matters outside the scope of negotiations. Essex Cty. and AFSCME Council 52, Loc. 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), aff'd NJPER Supp.2d 182 (158 App. Div. 1987). Decisions of public employers to promote or appoint employees are not mandatorily negotiable or reviewable in binding arbitration. State of New Jersey, Dept. of Law and Public Safety v. State Troopers NCO Assn., 179 N.J.Super. 80 (App. Div. 1981). Also non-negotiable are decisions to change the criteria for promotions and the weight to be given various criteria. State of New Jersey, Montclair Tp., P.E.R.C. No. 93-28, 18 NJPER 492 (¶23225 1992); Town of Westfield, P.E.R.C. No. 94-5, 19 NJPER 413 (¶24184 1993). Notice of employer-set criteria is mandatorily negotiable. State of New Jersey.

The FOP is not permitted to negotiate over "promotions", "advancements", or "criteria." Nor would the Township exceed its prerogative by unilaterally determining that enrollment in the MPO program is a qualification for promotion or special assignment.[3/] (Assignments based upon qualifications are not mandatorily negotiable. See Bergenfield Boro., P.E.R.C. No. 93-12, 18 NJPER 441 (¶23197 1992)).

3/ Assuming no "unlawful unilateral change" was possible, one could find that the charge is untimely, because it relates back to the date the program was implemented -- June 1, 1993.

A majority representative has the duty to demand negotiations over "impact" or severable economic consequences of the exercise of a managerial prerogative. Town of Kearny, P.E.R.C. No. 91-42, 16 NJPER 591 (¶21259 1990); Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987). Nothing in this record suggests that the FOP demanded to negotiate after the alleged unilateral change.

The FOP argues that it has the right to negotiate "impact" if employees must participate in the program to advance in the department. It relies on Middletown Tp., P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985).

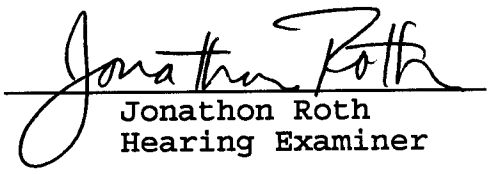
In Middletown Tp., the Commission found that the employer violated 5.4(a)(5) of the Act when it unilaterally granted economic benefits (i.e., compensatory time off, use of employer-owned automobiles) as awards to top-ranking personnel in an evaluation system.

The Commission later explained in Essex Cty. that one must "distin[guish] between evaluations to determine the receipt of mandatorily negotiable benefits and evaluations to determine non-negotiable personnel decisions." Id. at 12 NJPER 539. The Commission focuses on whether the "underlying decision" is within the scope of negotiations. In Middletown Tp. and Essex Cty., the underlying issue was what compensation an employee will receive.

This case is different. Promotions and/or special assignments primarily concern changes in duties -- a non-negotiable

personnel decision. No facts suggest that a promotion or special assignment has resulted in a unilaterally-set dispensation of benefits. No facts indicate that compensation flowing from a promotion or assignment fell outside of any negotiated amount. The FOP's assertion about the "impact" of the program, resulting in "specialized training" or "financial rewards" is vague and fails to raise a genuine issue of material fact.

The Township is entitled to judgment as a matter of law. Accordingly, I recommend that the motion be granted and the charge be dismissed.



Jonathon Roth
Hearing Examiner

DATED: February 23, 1996
Trenton, New Jersey