

P.E.R.C. NO. 80-117

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF CLARK,

Respondent,

-and-

Docket No. CI-80-2-10

RAYMOND XIFO,

Charging Party.

SYNOPSIS

The Commission, in adopting the Hearing Examiner's Recommended Report and Decision, finds that the Township of Clark violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when, in September, 1979, it failed to promote the Charging Party to the position of Sergeant in the Police Department. The Commission orders the Township to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by the Act, and from discriminating in regard to a term and condition of employment to discourage employees from exercising the rights guaranteed by the Act, particularly by failing to promote Raymond Xifo to the position of Sergeant. The Township was further ordered to promote Xifo to the position of Sergeant with all the rights, benefits and privileges attached to this position retroactive to September 17, 1979, and with back pay from this date, calculated by the difference between his pay as a patrolman during this period and the rate of pay he would have received as a Sergeant if he had been promoted on September 17, 1979. The Charging Party's request for counsel fees was denied.

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RAYMOND XIFO,

Charging Party.

Appearances:

For the Respondent, Pisano & Triarsi, Esqs.
(Mr. John S. Triarsi, of Counsel)

For the Charging Party, Nichols & Blackman, Esqs.
(Mr. Robert B. Blackman, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on July 23, 1979, and amended on December 3, 1979, by Raymond Xifo (the "Charging Party") alleging that the Township of Clark (the "Township") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Charging Party alleges that on or about July 3, 1979, the Township, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3), ^{1/}

1/ These subsections prohibit 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 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.

passed him over for promotion to Sergeant, for the third time, due to his positions as an officer in the PBA for fifteen years and as chairman of the bargaining committee for a number of years.

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 16, 1979. A hearing was held on December 12 and 13, 1979 and January 7, 1980, before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Both parties waived their right to file post-hearing briefs. On January 11, 1980, the Hearing Examiner issued his Recommended Report and Decision,^{2/} which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Exceptions were filed by the Township on February 25, 1980; the PBA responded on March 25, 1980.

The Hearing Examiner found that (1) the Charging Party had for many years been an officer of and active as a negotiator for the PBA in the Township; (2) the Charging Party had been

^{2/} H.E. No. 80-28, 6 NJPER ____ (¶ 1980).

vigorous and "up front" as a negotiator; (3) the Charging Party had been passed over twice previously for promotion despite his qualifications; (4) notwithstanding that the Charging Party was seven and one-half points ahead of his nearest rival on the Civil Service list in 1979, he was again passed over for promotion; (5) the Charging Party's personal productivity rating was twice as high as that of the Patrolman who was promoted to Sergeant; (6) the Charging Party had performed competently as Acting Sergeant for a six month period from January to June 1979; and (7) during the period the Charging Party was Acting Sergeant the performance of the patrolmen in his platoon exceeded the performance of the other three platoons in the Police Department. Based upon credibility determinations, the Hearing Examiner further found that the Township's proffered justification for not promoting the Charging Party, i.e. that he was frequently irrational, rash and over-reactive, was pretextual and after-the-fact.

Based upon these findings of fact, the Hearing Examiner concluded that the Township's action in failing to promote the Charging Party was a result of anti-union animus manifested toward the Charging Party because of his union activities on behalf of the PBA, and also that this action was "inherently destructive" of the rights granted by the Act to the Charging Party and other members of the PBA.

The Commission, finding the exceptions filed by the Township to be without merit, adopts the Hearing Examiner's findings of fact, conclusions of law ^{3/} and recommended order substantially for the reasons stated by the Hearing Examiner in his recommended report and decision.

Most of the exceptions filed by the Township question the credibility determinations made by the Hearing Examiner. Specifically, the Township, in its first and third exceptions, contends that the Hearing Examiner, in findings of fact #5 and 7, erred when, despite the testimony of the Chief and Captain to the contrary, he found credible the testimony of the Charging Party that the Chief and Captain had informed the Patrolmen that job performance under the Productivity Log system would be a factor in further promotions. Similarly, in its fifth exception, the Township questions the Hearing Examiner's determination not to credit the testimony of the Director of Public Safety, the Chief and the Captain, that the principle reason why the Charging Party was not promoted was due to his frequent "irrational, rash and over-reactive" actions.

Initially, the Commission notes that it is for the trier of fact to weigh testimony based upon his observations of witnesses' demeanor and the like. Absent the most compelling evidence in

^{3/} The Commission, in adopting (infra.) the Hearing Examiner's finding that the Township was motivated by anti-union animus in failing to promote the Charging Party to Sergeant, declines to adopt the Hearing Examiner's finding that this action was "inherently destructive" of protected rights.

the record to the contrary, the Commission will not normally substitute its secondhand reading of the transcript for the Hearing Examiner's credibility judgments. In re Long Branch Bd of Ed, P.E.R.C. No. 77-70, 3 NJPER 300 (1977); In re Hudson Cty Board of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978); In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶4011 1977); In re City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

Moreover, the Commission finds that the record supports the credibility determination of the Hearing Examiner. The Chief testified that quality points for the Productivity Log were awarded based on the patrolman's number of motor vehicle citations, drunk driving citations, criminal arrests and similar law enforcement activities, while quality points were denied based on the patrolman's number of sick days and similar conduct which detracted from his productivity. The Chief further testified that the purpose of this Log was to evaluate the patrolman in order to raise overall and individual productivity.^{4/} In view of this testimony, and the comprehensive nature of the Log itself,^{5/} it strains credulity to believe that the Township would not consider the Log a significant factor in evaluating patrolmen for promotion to Sergeant.

The testimony of two superior officers and a Patrolman, which the Hearing Examiner found credible, supports the Hearing

^{4/} TI, p. 137, lines 4-25, p. 138, lines 21-25, p. 139, line 1.
^{5/} Exhibit CP-4.

Examiner's determination that the Township's proffered justification for not promoting the Charging Party is pretextual and after-the-fact. The Township presented considerable testimony concerning three incidents when the Charging Party allegedly used excessive force. However, none of these incidents was considered of sufficient moment to warrant disciplinary action by the Township. Further, only one disciplinary action, in 1972, involved conduct which could be considered rash or over-reactive.^{6/} This lack of specific examples of "irrational, rash and over-reactive conduct" which were considered egregious enough to warrant discipline, further supports the Hearing Examiner's determination not to credit the testimony of the Township's witnesses concerning this proffered reason for failing to promote the Charging Party.

In its fifth exception the Township contends that the Hearing Examiner, by not considering all the testimony of former Councilman Winters, incorrectly evaluated the import of the conversation between Winters and the Chief concerning the Charging Party and his actions on behalf of the PBA, specifically his conduct on the Bargaining Committee. The Township argues that the testimony of the Chief, the Captain, and Gordon Lechner, a Special Police Officer and a Constable in the Township, cannot

^{6/} This incident involved a verbal outburst which took place at police headquarters in front of other citizens and which caused "embarrassment" to the department. Exhibit R-2.

sustain the inference drawn by the Hearing Examiner that the Township was biased against the Charging Party because of his union activities.

This exception, and certain aspects of the fifth exception, in essence question the weight and sufficiency of the evidence relied upon by the Hearing Examiner. With regard to the conversation between the Chief and former Councilman Winters, it is noted that the Hearing Examiner determined that there was no direct evidence of any Township management official expressly indicating that the Charging Party's union activities were the true reason for his not being promoted to Sergeant. However, this conversation does demonstrate that Township officials had a generally negative attitude towards the Charging Party because of his activities on behalf of the PBA. Moreover, the Hearing Examiner concluded that his findings of fact, as gleaned from all of the evidence presented by both parties, supported an inference so strong as to leave no doubt that the Charging Party's union activities were the primary, if not the sole reason, for his not being promoted to Sergeant in 1979.^{7/}

The Charging Party has the burden of proving the allegations contained in the complaint by the preponderance of the evidence.^{8/} Absent direct evidence of anti-union animus by the Township, the Charging Party can establish a prima facie case based upon reasonable inferences deduced from the evidence

^{7/} Hearing Examiner's Recommended Report and Decision at page 8.

^{8/} N.J.A.C. 19:14-6.8.

presented.^{9/} As previously enumerated, the Hearing Examiner made numerous findings of fact which more than adequately support the conclusion that, based on the Civil Service tests, the productivity log for the Charging Party, his performance as Acting Sergeant, and the productivity of the platoon he supervised, the Charging Party was eminently qualified for promotion to Sergeant, and was significantly more qualified than any other patrolman in the Department, including the Patrolman who was promoted. The record further supports the Hearing Examiner's finding, from the testimony of the Township's own witness, that the Charging Party was viewed by management as a PBA activist, especially as a member of the Bargaining Committee. After these findings, the burden then shifted to the Township to present a "legitimate business justification" for not promoting the Charging Party.^{10/} Based in part on credibility determinations, affirmed by the Commission herein, the Hearing Examiner found that the Township had not established such a justification.^{11/} Considering this additional fact, in conjunction with the initial evidence presented by the Charging Party, the Commission, in agreement with the Hearing Examiner, concludes that the Charging Party has met its burden of proof.

^{9/} In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978); In re Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978), affmd App. Div. Docket No. A-4824-77 (1/9/80); In re North Brunswick Twp. Board of Ed, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4025 1978), affmd App. Div. Docket No. A-698-78 (4/11/79) and In re Lakewood Bd of Ed, P.E.R.C. No. 79-17, 4 NJPER 459 (¶4208 1978), affmd App. Div. Docket No. A-580-78 (9/24/79).

^{10/} See cases cited in footnote #9.

^{11/} The Commission, in affirming this finding, also relies on the Township's inability to present evidence of serious incidents where the Charging Party was disciplined for "irrational, rash and over-reactive conduct."

In its second exception the Township questions the Hearing Examiner's failure to consider that the Patrolman who was promoted instead of the Charging Party had served as Senior Patrolman in Charge of Platoon prior to his promotion to Sergeant. It suffices to say that this exception again relates to the sufficiency of the evidence, which the Commission has already considered. Moreover, the question in a section (a)(3) charge of employer discrimination is not whether the employee promoted was qualified, but whether another qualified employee was passed over due, at least in part, to his engaging in protected union activities.^{12/}

Finally, the Township questions the remedial authority of the Commission to order the promotion of the Charging Party to Sergeant.^{13/} The Commission's authority to issue a remedial order of this nature has recently been affirmed in Brookdale Community College v. George Abel and PERC, P.E.R.C. No. 78-80, 4 NJPER 423 (¶4123 1978), affmd. App. Div. Docket No. A-4824-77 (1/9/80). Further, the Commission notes that, while the decision in City of Hackensack v. Winner, et al., ___ N.J. ___ (Supreme Court Docket No. A-126/127, January 22, 1980), does, to

^{12/} In re Brookdale Community College, supra.

^{13/} The Township contends that it can comply with our order to promote the Charging Party to Sergeant only by passing an ordinance to add another Sergeant's position to the Table of Organization, or by demoting the Patrolman who was promoted instead of the Charging Party. The Township points out that the appointment of this Patrolman to Sergeant was done pursuant to the applicable Civil Service rule which permits the appointment of any of the top three candidates on the Civil Service list.

As the Commission noted in In re City of Elizabeth, P.E.R.C. No. 79-93, 5 NJPER 231 (¶10128 1979), it is for the Township to determine what action it must take in order to comply with our order.

some extent, affect the Commission's exclusive jurisdiction to hear cases of alleged discrimination against employees for union activities, it in no way limits the Commission's remedial authority in such cases; nor does Hackensack modify the Supreme Court's earlier decision, Galloway Twp. Bd of Ed and Galloway Twp. Assn. of Educational Secretaries, 78 N.J. 1 (1978), in which the Court stated that the Commission has broad remedial powers in cases involving section (a)(3) charges of employer discrimination. Rather, Hackensack reaffirms that PERC's statutory remedial powers, to redress economic injury and to prevent wrongful discrimination, are fully commensurate with its broad jurisdictional grant.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the Township of Clark:

1. Cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to promote Raymond Xifo to the position of Sergeant in the Township of Clark Police Department.

2. Take the following affirmative action:

a. Forthwith promote Raymond Xifo to the position of Sergeant in the Township Police Department, with all the rights, benefits and privileges attached to this position, retroactive to

September 17, 1979, and with back pay from this date, calculated by the difference between his pay as a patrolman during this period and the rate of pay he would have received as a Sergeant if he had been promoted on September 17, 1979.

(b) Post at all places where notices to employees of the Police Department are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, after being signed by the Township's authorized representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Township to insure that such notices are not altered, defaced or covered by other material.

(c) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Township has taken to comply herewith.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp and Parcels voted for this decision. Commissioner Newbaker voted against the decision.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 7, 1980

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, or discriminate in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to promote Raymond Xifo to the position of Sergeant in the Township of Clark Police Department, because of his exercise of such rights.

WE WILL forthwith promote Raymond Xifo to the position of Sergeant in the Township Police Department with all the rights, benefits and privileges attached to this position retroactive to September 17, 1979, and with back pay from this date, calculated by the difference between his pay as a patrolman during this period and the rate of pay he would have received as a Sergeant if he had been promoted on September 17, 1979.

TOWNSHIP OF CLARK

(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

TOWNSHIP OF CLARK,

Respondent,

- and -

Docket No. CI-80-2-10

RAYMOND XIFO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Township violated Subsection 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it failed to promote Raymond Xifo to the position of Sergeant in the Police Department on or about September 17, 1979. The Hearing Examiner found that Xifo had for many years been an officer of and active as a negotiator for the P.B.A. in the Township and that he had been vigorous and "up front" as a negotiator. Further, the Hearing Examiner found that Xifo had been passed over twice previously for promotion and that, notwithstanding that he was seven and one-half points ahead of his nearest rival on the Civil Service list in 1979 he was again passed over for promotion. It was also found by the Hearing Examiner that Xifo had performed competently as Acting Sergeant for a six-month period from January to June 1979 and that his productivity rating was twice better than that of the Patrolman who was promoted to Sergeant instead of Xifo.

The Hearing Examiner concluded that the Township's action of failing to promote Xifo was a result of anti-union animus manifested toward Xifo because of union activities on behalf of the P.B.A. and, further, was "inherently destructive" of Xifo's and other's rights protected by the Act, citing as precedent the Commission's decision in 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), pet. certif. granted 78 N.J. 404 (1978). By way of remedy, the Hearing Examiner ordered the Township forthwith to promote Xifo to the position of Sergeant in the Police Department with back pay representing the difference between his pay as Patrolman and that which he would have received as Sergeant since September 17, 1979.

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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RAYMOND XIFO,

Charging Party.

Appearances:

For the Township of Clark
Pisano & Triarsi, Esqs.
(John S. Triarsi, Esq.)

For Raymond Xifo
Nichols & Blackman, Esqs.
(Robert B. Blackman, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 23, 1979, and amended on December 3, 1979, by Raymond Xifo (hereinafter the "Charging Party" or "Xifo") alleging that the Township of Clark (hereinafter the "Respondent" or the "Township") had 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 on July 3, 1979 and again on September 17, 1979 passed over Xifo, a Patrolman, and promoted to Sergeant another Patrolman, who was second on the Civil Service list, notwithstanding the fact that Xifo had served as an Acting Sergeant for a considerable period of time, the foregoing action of the Respondent allegedly being based on Xifo's activities on behalf of the P.B.A. for 15 consecutive years, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

^{1/} These Subsections prohibit 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.
(continued next page)

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 August 16, 1979. Pursuant to the Complaint and Notice of Hearing, hearings were held on December 12 and 13, 1979 and January 7, 1980 ^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

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 oral argument 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 Township of Clark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Raymond Xifo is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Xifo was hired by the Township as a Patrolman in April 1964 and has served continuously in that position since that date. The testimony establishes beyond doubt that during this period Xifo was a "good cop." Commencing with his first year of employment Xifo has held the following positions seriatim with the P.B.A. local representing the Patrolmen and Sergeants employed by the Township: Sergeant-at-Arms; Treasurer; Secretary; Financial Secretary; and for four years was President. Xifo was Vice-President from 1972 to 1978. He has either been on the Negotiating Committee or its Chairman for all of the years of his employment

1/ (continued)

"(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."

2/ The delay in the scheduling of hearings occurred because of the necessity of the Charging Party filing an amended charge, which amendment was not filed until December 3, 1979.

except for three years (1973-75). ^{3/}

4. After being passed over for promotion to Sergeant in 1969, Kifo was next considered for promotion in 1973 when he ranked No. 1 on the Civil Service Eligibility List (CP-2). Kifo was again passed over for the second person on the List, namely, Anton W. Danco, whom the appointing authority, the Director of Public Safety, Robert J. Jenney, felt was "more dedicated."

5. In order to improve morale in Respondent's Police Department the Chief and the Captain, John Waterson, instituted in November 1978 a monthly Productivity Log for each Patrolman, which indicates the total points gained for job performance for a given month. A copy of this Productivity Log, covering the period November 1978 through September 1979, was received in evidence as Exhibit CP-4. An examination of CP-4 indicates that Kifo scored a total of 1427 points from November 1978 through September 1979, thus placing Kifo substantially ahead of all other Patrolmen in the Police Department except for one Donald Caridad, who scored 1825 points.

6. Several months prior to January 1979 Kifo was advised that beginning in January he would become Acting Sergeant or Platoon leader for Platoon "B". Kifo assumed this position in January and continued to hold it for six months through June 1979. A further examination of CP-4, supra, discloses that the performance of the Patrolmen in Platoon "B" under Kifo, during this six-month period, exceeded the performance of the other three Platoons, there being a total of four Platoons in the Police Department. Mr. Jenney, Chief Smar and Captain Waterson all acknowledged that Kifo performed competently and well as Acting Sergeant during the foregoing six-month period. This was also the opinion of Patrolman Timothy George, who was in Kifo's Platoon during this period.

7. Kifo testified credibly that immediately prior to the institution of the Productivity Log (CP-4) all of the Patrolmen in the Police Department attended a meeting with the Chief and Captain where the Patrolmen were told that job performance under the Productivity Log system would be a factor in future promotions.

8. Charging Party witness Thomas P. Winters, a former Councilman and a present member of Respondent's Zoning Board, testified credibly, both on direct and cross-examination, that he casually engaged Chief Smar in a conversation in January 1979 with respect to Kifo. At one point Mr. Winters testified that the

^{3/} It was conceded by all who testified regarding Kifo's conduct as a negotiator that he was outspoken and vigorous, and that he was, as acknowledged by the Chief of Police, Anthony T. Smar, "always up front."

Chief responded substantially as follows regarding Xifo and the P.B.A.:

"... 'Well, he's a good cop and he does his job properly...but, if Raymond would only learn to slow down a little bit and react a little differently when he's approached on the Bargaining Committee and fighting on behalf of the P.B.A.,' and so forth, 'If he'd only learn to turn the cheek a little bit, why it would probably resolve some of his problems.'..." (2 Tr. 56).

9. In contemplation of the need for a new promotion to the position of Sergeant in 1979 a current Civil Service list (CP-1) was obtained by the Township. Xifo was No. 1 on the list with a score of 89.296 and Albert Williams, Jr. was No. 2 with a score of 81.906. Following an interview of Xifo and Williams in June 1979 ^{4/} Williams was promoted to Sergeant on July 3, 1979. ^{5/} The Hearing Examiner notes that an examination of the Productivity Log (CP-4) discloses that as of the end of June 1979 Xifo had scored 1138 points compared to 593 points scored by Williams.

10. The Hearing Examiner does not credit the testimony of Mr. Jenney, repeated by Chief Smar and Captain Waterson, that the principal reason that Xifo was not promoted to Sergeant was because Xifo's actions as a Patrolman were frequently "irrational, rash and over-reactive." ^{6/}

4/ In attendance were the Mayor, Bernard G. Yarusavage; Mr. Jenney; Chief Smar and Captain Waterson.

5/ Due to a deficiency in the Ordinance authorizing the 1979 vacancy for Sergeant, Williams did not assume the position of Sergeant on July 3, 1979. Subsequently, another Ordinance was adopted and Williams was again promoted and assumed the position of Sergeant as of September 17, 1979. With respect to the promotion process, Chief Smar testified that he recommended Williams over Xifo based upon four factors: sick time; temperament; personality and how each man "handled things." Captain Waterson also recommended Williams. In May 1979 Captain Waterson requested and received from the three Lieutenants and four of the Sergeants in the Police Department an evaluation of Xifo and Williams "as leaders" with a recommendation (R-6). Lt. Harry Matthews recommended both Williams and Xifo equally; Det. Sgt. Robert Hartong, Sr. recommended Xifo; Sgt. A. Wesley recommended Xifo; Sgt. Anton Danco equivocally recommended Williams; Sgt. Alfred Yersevich recommended Williams; Lt. Frank Halloran recommended Williams; and Lt. Fred Asal recommended Xifo. A retired Lieutenant, Robert Bartkus, whose recommendation was not solicited would have recommended Xifo (CP-5). It is noted that although the foregoing recommendations (R-6) were utilized by Chief Smar and Captain Waterson, Mr. Jenney did not learn of these recommendations until after he appointed Williams as Sergeant on July 3, 1979.

6/ Charging Party witnesses Lt. Fred Asal, Det. Sgt. Robert Hartong, Sr., and Patrolman Donald Caridad testified that they never observed Xifo acting irrationally.

11. During Xifo's period of employment as Patrolman he has been disciplined on three occasions while Williams has been disciplined only once. ^{7/}

THE ISSUES

1. Did the Respondent Township violate the Act when it failed to promote Raymond Xifo to the position of Sergeant in the Police Department on July 3, 1979 and again on September 17, 1979? If so, what shall the remedy be?

2. Can the award of attorneys fees, as requested by the Charging Party, be sustained under the law of New Jersey?

DISCUSSION AND ANALYSIS

The Respondent Township Violated Subsection (a)(3) Of The Act, And Derivatively Subsection (a)(1), When On July 3, 1979 And Again on September 17, 1979 It Failed To Promote Raymond Xifo To The Position Of Sergeant In The Police Department

The Commission has previously considered a promotion case where the Charging Parties were union activists and were passed over: 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), pet. certif. granted, 78 N.J. 404 (1978). The Commission there sustained the conclusion of the Hearing Examiner that Subsections (a)(1) and (3) of the Act were violated. In restating the standard for a Subsection (a)(3) violation ^{8/} the Commission said:

"Under the Haddonfield decision, a Section 5.4(a)(3) violation may be found if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that the effect of the employer's action was 'inherently destructive' of rights guaranteed to employees by the Act..." (Emphasis supplied) (3 NJPER at 144).

^{7/} Xifo lost three paid holidays for a sleeping incident in 1964 (R-1); he lost five vacation days for conduct unbecoming an officer and neglect of duty in 1972 (R-2); and he received an official reprimand for writing a notation on an envelope containing material for delivery to a Councilman in 1977 (R-3). Williams lost five vacation days for violating the hair style standard in 1972 (R-4). Although there was considerable testimony regarding Xifo's use of excessive force in an incident in Rahway in 1976 and at Jack's Tavern in Clark in 1975, it is noted that Xifo was not disciplined on either occasion.

^{8/} The Commission's first decision on the Subsection (a)(3) standard was set forth in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71, 72 (1977).

In City of Hackensack the Charging Parties were officers and negotiators of long standing in their union and were passed over for promotion. The Hearing Examiner found and concluded that the employer violated Subsection (a)(3) of the Act both by having manifested anti-union animus and, without regard to such animus, an effect of the employer's action was "inherently destructive" of employee rights under the Act. ^{9/} The Commission affirmed the Hearing Examiner on both points. The Hearing Examiner, in the case sub judice, notes that the Commission, in finding that the conduct of the City of Hackensack was "inherently destructive" of employee rights under the Act, observed of the Charging Parties therein:

"...They were clearly the leaders of the union activities within the Hackensack Fire Department, being highly visible and vocal...and negotiating with management...Against this backdrop, the fact of their having been singled out to be skipped cannot help but having a chilling effect on other employees desirous of engaging in union activities."
(3 NJPER at 145).

Turning now to the Township's failure to promote Xifo to Sergeant in the instant case, the Hearing Examiner finds and concludes that the Township's conduct with respect to Xifo violated Subsection (a)(3) of the Act, both by having manifested anti-union animus toward Xifo and by being "inherently destructive" of rights guaranteed to Xifo and other employees by the Act. Further, by its conduct the Township derivatively violated Subsection (a)(1) of the Act. ^{10/} In support of this finding and conclusion the Hearing Examiner relies on the following:

1. Xifo has held office in the P.B.A. from the first year of his hire in 1964 through 1978. He has been on the negotiating team, either as a member or chief negotiator, for all of his years of employment except for three years (1973-75). His conduct as a negotiator on behalf of the P.B.A. has always been vigorous and, as Chief Smar acknowledged, he was "always up front." Further indication of the nature of Xifo's conduct as a negotiator appears in Chief Smar's conversation with Mr. Winters in January 1979 where the Chief said of Xifo that while he was a "good cop and he does his job properly" he would fare better in his negotiations with the Council "If he'd only learn to turn the cheek a little bit...it would probably resolve some of his problems." (See Findings of Fact Nos. 3 and 8, supra).

^{9/} See 2 NJPER 232, 241, 243 (1976).

^{10/} See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

2. It is undisputed that Xifo was not only a "good" Patrolman but that the Township in the latter part of 1978 advised Xifo that he was to become Acting Sergeant of Platoon "B" in January 1979, which position he held for six months through June 1979. Further, it is undisputed, based on the "Productivity Log (CP-4), that the points logged by Xifo from November 1978 through September 1979 were exceeded by only one other Patrolman. During the first six months of 1979, when Xifo was Acting Sergeant for Platoon "B", the Productivity Log discloses that the Patrolmen in Platoon "B" performed better than the Patrolmen in the other three Platoons. It was acknowledged by Mr. Jenney, Chief Smar and Captain Waterson that Xifo performed competently as Acting Sergeant during these six months. Additionally, comparing Xifo's and Williams' performance on the Productivity Log, Xifo accumulated 1138 points from November 1978 through June 1979 while Williams accumulated only 593 points. (See Findings of Fact Nos. 3, 6, 9, supra).

3. The Civil Service lists indicate that in 1973, when Danco was promoted to Sergeant over Xifo, there was a one-point difference between Xifo, who was No. 1, and Danco while in 1979 there was a seven and one-half point difference between Xifo and Williams with Xifo ranked No. 1 (CP-1 and CP-2). The recommendations of the Lieutenants and Sergeants in the Police Department, which were solicited by Captain Waterson in May 1979 (R-6), indicate that three recommended Xifo, three recommended Williams and one felt that both were equally qualified (footnote 5, supra). It is noted that the retired Lieutenant, who was third in command before his retirement in March 1979, recommended Xifo (CP-5).

4. With respect to the disciplinary records of Xifo and Williams, although Xifo had three disciplinary actions while Williams only had one, no basis for comparison in length of service appears on the record since Williams' date of hire was not introduced in evidence. It is noted that Xifo's most recent substantial disciplinary action occurred in 1972 (R-2), the same year of Williams' single infraction (R-4). The Hearing Examiner attaches no significant weight to the "Rahway" and "Jack's Tavern" incidents since no disciplinary action was instituted against Xifo for excessive use of force.

5. The Hearing Examiner has refused to credit Mr. Jenney, who was confirmed by Chief Smar and Captain Waterson, that the reason for Xifo's being passed over for promotion to Sergeant was because of his tendency to act irrationally, rashly and over-reactively. Competent evidence was offered to rebut this by the Charging Party (footnote 6, supra).

Based on the foregoing, the Hearing Examiner is of the firm opinion that the Township's stated reasons for failing to promote Xifo to the position of Sergeant are pretextual and after-the-fact. It is true that Xifo adduced no direct evidence of a management official of the Township indicating expressly that Xifo's activities on behalf of the P.B.A. were the true reason for his not having been promoted to Sergeant. However, the inferences to be drawn from the foregoing recital of facts, based upon the record, are so strong as to leave no doubt that Xifo's union activities were the primary reason, if not the sole reason, for his not being promoted to Sergeant in 1979.

In so holding, the Hearing Examiner attaches great significance to the fact that Xifo scored seven and one-half points above Williams in the Civil Service test for 1979 and that Xifo performed competently for six months in 1979 as Acting Sergeant. Further, Xifo accumulated almost double the points of Williams on the Productivity Log during the period from November 1978 to June 1979. It is noted that Xifo and the other Patrolmen were told by the Chief that the Productivity Log would be a factor in future promotions.

The real reason for the failure to promote Xifo to Sergeant in 1979 having been because of his especially vigorous activities as a negotiator for the P.B.A. over many years, the Hearing Examiner concludes that the Township has thus manifested anti-union animus toward Xifo. Further, without regard to the existence of anti-union animus, the Township's refusal to promote Xifo was "inherently destructive" of Xifo's and other employees' rights under the Act to engage in protected activities. The Township's conduct toward Xifo was plainly intended to make it clear to other Patrolmen that vigorous activity on behalf of the P.B.A. might well result in their not being advanced on the promotional ladder.

Therefore, based on all of the foregoing, the Respondent Township violated Subsections (a)(1) and (3) of the Act when it failed to promote Xifo to the position of Sergeant, first on July 3, 1979, and again, after a new Ordinance was adopted, on September 17, 1979.

There Exists No Basis Under The Law Of
New Jersey For The Award Of Attorneys
Fees In This Case

The Charging Party has requested the award of attorneys fees, citing Section 5.4(c) of the Act, which authorizes the Commission "...to take such reasonable affirmative action as will effectuate the policies of this Act..." The

Charging Party urges that the Hearing Examiner thus has the authority to award attorneys fees, without citing Commission precedent or a New Jersey court decision in support of this position.

The Commission has in one decision refused to award attorneys fees, rejecting the recommendation of a Hearing Examiner that attorneys fees be awarded: Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). ^{11/} The Avon case involved a discharge in violation of the Act where back pay was awarded. The Hearing Examiner, citing several New Jersey Supreme Court decisions, had awarded counsel fees to the extent of any interim earnings of the Charging Party during the period from the date of discharge to the date of reinstatement.

The Hearing Examiner in the instant case is confronted with the situation of no discharge and, therefore, no interim earnings against which attorneys fees could be offset. In the absence of any other authority or precedent in New Jersey, the Hearing Examiner herein can find no basis for the award of attorneys fees to the Charging Party herein.

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

CONCLUSIONS OF LAW

The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when on July 3, 1979, and again on September 17, 1979, it failed to promote Raymond Xifo to the position of Sergeant in the Respondent Police Department.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to promote employees, such as Raymond Xifo, because of the exercise of such rights.

^{11/} See H.E. No. 77-21, dated June 24, 1977, which is not reported in NJPER.

2. 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 the Act, particularly, by failing to promote Raymond Xifo to the position of Sergeant in the Police Department.


B. That the Respondent Township take the following affirmative action:

1. Forthwith promote Raymond Xifo to the position of Sergeant in the Police Department, without prejudice to any rights or privileges that he may have enjoyed since September 17, 1979, with back pay from that date, calculated upon the difference between his present pay as Patrolman and the rate of pay he would have received as Sergeant if he had been promoted on September 17, 1979. ^{12/}

2. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, after being signed by the Respondent's authorized representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other material.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

DATED: January 11, 1980
Trenton, New Jersey



Alan R. Howe
Hearing Examiner

^{12/} Consistent with City of Elizabeth, P.E.R.C. No. 79-93, 5 NJPER 231 (1979), the Hearing Examiner makes no recommendation as to what action the Township must take with respect to creating a vacancy in the position of Sergeant in order that Xifo may be promoted in accordance with the Recommended Order.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act and will refrain from refusing to promote employees, such as Raymond Xifo, because of the exercise of such rights.

WE WILL NOT discriminate 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 the Act, particularly by refusing to promote Raymond Xifo to the position of Sergeant in the Police Department.

WE WILL forthwith promote Raymond Xifo to the position of Sergeant in the Police Department with back pay from September 17, 1979, calculated on the basis of the difference between his rate of pay as Patrolman and the rate of pay for Sergeant as of that date.

TOWNSHIP OF CLARK

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780