

H.E. NO. 2005-4

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

In the Matter of

COUNTY OF SOMERSET,  
SOMERSET COUNTY SHERIFF,  
Respondent,

-and-

Docket No. CI-2002-57

SOMERSET COUNTY CORRECTIONS' OFFICERS  
PBA LOCAL NO. 177,  
Respondent,

-and-

PATRICK J. DONLAN,  
Charging Party.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission grants Motions for Summary Judgment filed by Somerset County, the Somerset County Sheriff and PBA Local 177. The Hearing Examiner found that Charging Party Patrick J. Donlan did not file the unfair practice charge within the 6 month statute of limitations prescribed by the New Jersey Employer-Employee Relations Act. Consequently, the Hearing Examiner recommends that the Commission dismiss the unfair practice charge.

A Hearing Examiner's Decision on a Motion for Summary Judgment which resolves all the issues in the Complaint becomes a recommended decision, pursuant to N.J.A.C. 19:14-4.8(e). A 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 Chair 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.

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PATRICK J. DONLAN,

Charging Party.

Appearances:

For the Respondent, Somerset County  
Ogletree, Deakins, Nash, Smoak & Stewart, attorneys  
(Mark Diana, of counsel)

For the Respondent, PBA Local 177  
Klausner & Hunter, attorneys  
(Stephen B. Hunter, of counsel)

For the Charging Party,  
(Brian M. Cige, attorney)

**HEARING EXAMINER'S DECISION**  
**ON MOTION FOR SUMMARY JUDGMENT**

On June 3, 2002 and on December 11, 2002, Patrick J. Donlan (Donlan) filed an unfair practice charge and amended charge, respectively, against the County of Somerset, the Somerset County Sheriff (collectively referred to as the County), and PBA Local

177 (PBA) alleging that Respondents colluded to deny him a promotion to the position of sergeant by agreeing to a definition of seniority which deprived him of adequate seniority credit for prior service as a corrections officer. Donlan alleges that the agreement on the definition of seniority violated past practice and was negotiated without his knowledge. Donlan further contends that the PBA refused to provide him with information relating to the promotional process as it affected him. Donlan asserts that on May 29, 2002, Respondents entered into a memorandum of agreement which was contrary to his interest in obtaining a promotion. Donlan contends that he was not informed of any change in the promotional scoring system until the "final" scoring was posted by Warden Gordon VanderGoot in December 2001. Donlan claims that the PBA breached its duty of fair representation by refusing to process his grievance contesting the scoring of seniority for purposes of promotion. As a consequence of the actions of the Respondents, officers Petties, Picone, Straz and Davia, all of whom were actively involved in PBA activity, were wrongfully promoted to sergeant notwithstanding their having less seniority than Donlan. Donlan contends that the County's actions violate N.J.S.A. 34:13A-

5.4a(1) and (7)<sup>1/</sup> and that the PBA's actions violate N.J.S.A.  
34:13A-5.4b(1), (3) and (5).<sup>2/</sup>

On May 7, 2003, a Complaint and Notice of Hearing issued. On January 29, 2004, the County filed a Motion for Summary Judgment together with certifications and exhibits. On February 2, 2004, this matter was assigned to me. On March 12, 2004, the PBA also filed a Motion for Summary Judgment supported by certifications and exhibits. On April 19, 2004, the Charging Party filed its brief in opposition to the Respondents' Motions for Summary Judgment.

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)]

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1/ These provisions 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; (7) Violating any of the rules and regulations established by the commission."

2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (5) Violating any of the rules and regulations established by the commission."

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider 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." If that issue can be resolved in only one way it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Educational Services Commission, P.E.R.C. No. 83-65, 9' NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, affidavits and other submissions, I make the following:

**FINDINGS OF FACT**

1. Donlan is employed by the Somerset County Sheriff's Office/Somerset County as a corrections officer at the Somerset County Jail. Local 177 is currently the majority representative of the Somerset County corrections officers and Donlan is included in the collective negotiations unit it represents.

2. On February 26, 1998, the County and the PBA executed a memorandum of agreement which settled the terms of the 1998-2000 collective negotiations agreement. As part of that agreement, the parties agreed to institute a seniority-based annual shift and regular day off (RDO) bidding program. The memorandum provided that seniority will be defined as the date of continuous employment as a corrections officer at the Somerset County Jail. Seniority for supervisors is defined as time in rank.

3. On March 3, 1998, then Captain John C. Niko issued a memorandum to all staff regarding the selection of shift preferences by seniority. Niko stated that a seniority list for the jail will be made available to all employees and that anyone disputing his/her designated seniority must submit a written notice to him and the PBA president not later than March 18, 1998. The seniority list which accompanied Niko's memorandum showed a seniority date of September 12, 1994 for Donlan.

4. On March 5, 1998, Donlan submitted a memorandum to Niko disputing his assigned seniority date. Donlan's memorandum stated, in relevant part:

On April 16, 1982, I was hired as a Correction Officer for the Somerset County Sheriff's Department. On May 1, 1990, I transferred to the Sheriffs I.D Bureau. On September 12, 1994, I transferred back to the jail. In June of 1995 I was informed that my seniority would remain unchanged according to standard operating procedure section 14, page 5 number 1:3.27 in reference to seniority and time served.

\* \* \*

Due to seniority since my return to the jail, I have been given preference for vacation and other time off. Also due to seniority, in August of 1995 I was assigned to the day shift with Fridays and Saturdays as my regular days off. Therefore I find it necessary to dispute the seniority list posted March 3, 1998 which states my date of hire being September 12, 1994.

5. As a corrections officer, Donlan worked in the corrections division and was enrolled in the Police and Firemen's Retirement System. When Donlan transferred to the identification bureau on May 1, 1990, he left the corrections division and was assigned to the law enforcement division and was consequently transferred into the Public Employees Retirement System. In September 1994, Donlan transferred back to the jail as a corrections officer and his pension was again transferred into the Police and Firefighters Retirement System.

6. Donlan's objection to Niko's March 3, 1998 seniority list was considered by the PBA. In a March 31, 1998 letter to Niko, PBA President Anthony Davia wrote:

Please accept the attached list as the revised and approved seniority list.

As you know there has been some controversy regarding this new seniority definition which is part of our 1998 contract. Be advised that the PBA has resolved all internal questions on individual's placement on the seniority list.

The enclosed seniority list dated March 31, 1998 is approved by the PBA and should be

used in all cases where seniority is an issue.

7. Personnel Order 14:4 contained in the jail's SOP issued on August 10, 1995, provided as follows:

Whenever there is a decision to affect promotions to a higher rank the following procedure will be followed:

1. When it is determined that a vacancy in position is to be filled, a notice of the vacancy will be posted.
2. Officers wishing to be considered for promotion will be required to submit a request or resume to his/her superior within thirty days of the posting.
3. Seniority with the department will be the major consideration in promotions.
  - a. The most senior applicant will be credited with a total of 51 points in recognition of his/her seniority.
  - b. The applicant with the second most seniority will be credited with a total of 50 points in recognition of his/her seniority.
  - c. Other applicants will receive seniority credit in descending order.
  - d. Applicants hired on the same date will receive the same seniority credit.
  - e. Applicants with less than five years seniority are not entitled to seniority credit.
4. Correction officers/sheriff's officers/other employees.



- a. With reference to correction officers the Warden will award applicants up to 19 points based upon his evaluation of the applicant's work history and job capability.
- b. With reference to sheriff's officers or other employees of the chief sheriff's officer will award applicants up to 19 points based upon his evaluation of the applicant's work history and job capability.

\* \* \*

- 8. The statistical scores of all applicants involved in the above-mentioned procedures will be made available upon request to the Warden (in the case of the jail) or the chief sheriff's officer (in the case of the sheriff's department).

8. Personnel Order 14:1 contained in the SOP issued on August 10, 1995, section 1:3, Definition of Terms, provides at 1:3.6 the definition of "department" as the Somerset County Jail. Section 1:3.27 defines "seniority" as "seniority in the department is established by rank and second by time served in rank whether on a regular, assigned or temporary basis."

9. On October 4, 1999, in accordance with SOP 14:4, a notice was posted announcing a vacancy for sergeant in the jail. Interested officers were advised to notify the warden not later than November 15, 1999. Donlan and approximately 14 other corrections officers applied for the sergeant's position. On January 7, 2000, Warden VanderGoot posted the seniority points of

all applicants. VanderGoot calculated Donlan's seniority score based upon his original date of hire at the jail (April 16, 1982) which resulted in an award of 50 points as the second most senior applicant.

10. On January 11, 2000, PBA President Davia filed a grievance contesting the number of seniority points awarded to Donlan. The PBA contended that the County violated the definition of seniority contained in the February 26, 1998 memorandum of agreement. On the same date, Warden VanderGoot sent a memorandum to Sheriff Lund regarding the PBA's grievance. The warden agreed with the PBA's position that the definition of seniority contained in the memorandum of agreement should control the calculation of seniority for employees applying for the sergeant's position. Thus, the warden believed that points should be awarded for continuous time worked in the jail division, not continuous time worked in the sheriff's department. On February 4, 2000, the sheriff sustained the PBA's grievance, stating that ". . . seniority with the jail would supercede seniority with other county employment for purposes of [the sergeant's] promotional examination."

11. On October 6, 2000, Warden VanderGoot posted a memorandum concerning promotions. The memorandum indicated that Donlan had been assigned to the position of acting sergeant.

12. In June 2000, the presidency of PBA Local 177 passed from Anthony Davia to Frank Apisa. On October 17, 2000, PBA President Apisa filed a grievance contesting the sheriff's delay in posting the promotional scores for the sergeant's position reflecting the revised seniority points resulting from the settlement of the January 11, 2000 grievance. By filing the October 17, 2000 grievance, Apisa sought the posting of the promotional scores for sergeant so that all individuals involved would be informed of their standing.

13. On October 27, 2000, Chief Niko posted a notice in the officers' dining room showing the promotional seniority scores for all officers applying for the sergeant's position. Niko announced to all correction officers during muster that the notice had been posted. Using an initial employment date of September 1994, rather than April 1982, Donlan was awarded 42 points for seniority by the County, resulting in his placing last in seniority score ranking among the other correction officers seeking promotion. On or shortly after October 27, Donlan approached Niko to complain about the reduction in the number of points awarded him for seniority. Donlan concedes in his answer to interrogatory no. 23, propounded by the County, that he was aware of the posting on October 27, 2000.

14. On November 3, 2000, Apisa sent VanderGoot a letter contending that the October 27, 2000 posting listing the

seniority points for promotion was incorrect for several corrections officers. Apisa's letter listed all of the corrections officers seeking promotion and the number of seniority points which the PBA asserted applied to each employee. The PBA contended that Donlan should receive 40 points not 42 points, thus keeping Donlan last on the list for seniority points awarded. Donlan was not contemporaneously issued a copy of Apisa's letter.

15. Also on November 3, 2000, the PBA filed a grievance contesting Donlan's promotion to acting sergeant. On December 4, 2000, the sheriff issued a written response to the PBA's grievance. In denying the grievance, the sheriff held that on September 28, 2000, Donlan began working in a supervisory capacity on a full time basis and, accordingly, was assigned the title of acting sergeant pursuant to the terms of the collective negotiations agreement. On December 20, 2000, the PBA moved its grievance contesting Donlan's acting sergeant appointment to arbitration (AR-2001-351).

16. On April 6, 2001, the PBA filed an unfair practice charge (CO-2001-285) against the County, contesting the sheriff's refusal to post the seniority scores pertaining to the sergeant's promotional process as proposed by the PBA in its November 3, 2000 letter to VanderGoot.

17. On November 8, 2001, the County and the PBA executed a memorandum of agreement resolving the parties' 2001-2003 collective negotiations agreement. Additionally, the parties settled several other disputes, including the pending arbitration concerning Donlan's promotion to acting sergeant (AR-2001-351) and the unfair practice charge regarding the sheriff's alleged failure to post the revised seniority scores (CO-2001-285). The County agreed to

. . . calculate and post all results of any and all promotion tests which have taken place commencing October 1999, pursuant to the contractual provisions, the operating procedures in effect on the date from which these grievances arose, including but not limited to the proper and correct points for seniority, oral testing, written testing and employee attendance, and to show all results.

18. Pursuant to the settlement agreement, the County promptly calculated the final promotional scores for all employees seeking advancement to the sergeant's position. On November 15, 2001, Chief Niko posted a revised spread sheet entitled "Final Promotional Scores" showing employees' seniority date, seniority rank, seniority points, points received for the oral and written tests, attendance points and total score. Niko announced to all corrections officers, including Donlan, during muster that the spread sheet had been posted in the officers' dining room. The seniority points listed on the November 15, 2001 spread sheet reflected differences of one or two points for

most of the promotional candidates as compared to the October 27, 2000 posting. Donlan and others had points deducted from their seniority scores. In Donlan's case, the seniority points went from 42 on the October 27, 2000 listing to 40 points on the November 15, 2001 spread sheet. Donlan's seniority ranking, however, did not change; he remained last on both listings. On or soon after November 15, 2001, Donlan approached Niko and raised the same complaint as he did in October 2000 about the number of points awarded to him on the basis of seniority.

19. On February 12, 2002, Donlan filed a step one grievance with Warden Henry Glen, ValderGoot's replacement. Donlan contested the reduction in seniority points awarded. Donlan argued that the January 5, 2000 award of 50 points was correct and that the subsequent award of 40 points on November 15, 2001 was incorrect. Donlan contended that his 1982 hire date in the jail should have been the basis of his seniority calculation and not merely the period of continuous employment served in the jail beginning in 1994.

20. On March 1, 2002, Warden Glen issued a response to Donlan's grievance. Glen's response comprehensively reviewed the chronology pertinent to Donlan's receipt of 40 points for the seniority component of the promotional process. In denying Donlan's step 1 grievance, Glen concluded that he was bound by previous agreements made among the PBA, the sheriff and the

warden whereby the parties determined to use for the promotional process the seniority definition developed initially to apply to the annual shift and regular day off bidding process.

Consequently, the parties previously agreed to use a corrections officer's continuous service as the determining factor in calculating points awarded in the promotional process for seniority accrued.

21. Subsequent to the receipt of Glen's response to his grievance, Donlan filed a step 2 grievance with Sheriff Frank J. Provenzano, Sr. On March 16, 2002, Provenzano issued a decision denying Donlan's grievance for the reasons set forth in Glen's decision.

22. On March 28, 2002, Donlan advised Warden Glen that the PBA had denied his request to file a step 3 grievance (arbitration) and that he intended to seek legal representation on his own behalf.

23. On March 25, 2002, the PBA filed an unfair practice charge (CO-2002-258) against the County and the Sheriff regarding the promotional process. The charge related to what was referred to as the "warden's points." The promotional process provided for the warden to award 19 points; 15 points based on a written examination and up to 4 points based on each candidate's attendance records. The PBA alleged that the County unilaterally

imposed a change in the methodology of evaluating which absences were "excused absences."

24. During the course of processing CO-2002-258, the parties met under the auspices of the Commission for the purpose of attempting to resolve the underlying issues of the dispute. On May 29, 2002, the parties executed a memorandum of agreement which contained terms resulting in the settlement of unfair practice charges CO-2002-258 and CO-2001-285 and several pending arbitration matters. The agreement resolved the 4 point attendance component of the sergeant's promotional process, maintained the promotional list showing the candidates' point rankings, and confirmed the promotion of at least four candidates to the rank of sergeant.

25. On June 17, 2002, Warden Glen announced the promotion of four corrections officers to the position of sergeant. Glen indicated that the promotions would be done pursuant to the results of the promotional process which started in 1999. Since Donlan was not among the top four candidates, he was returned to the rank of corrections officer.

#### **ANALYSIS**

N.J.S.A. 34:13A-5.4c provides, in relevant part, the following:

. . . no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from



filing such charge in which event the 6 month period shall be computed from the day he was no longer so prevented.

The Legislature included a six month statute of limitations in the Act to prompt charging parties to file charges expeditiously and to prevent the litigation of stale claims. The Legislature provided only one exception to the six-month limit - cases in which a party is prevented from filing a charge. City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (§24270 1993). Equitable considerations are relevant when determining if a person has been "prevented" from filing a timely charge and should be weighed against the Legislature's objectives in imposing a limitations period. In Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978), the New Jersey Supreme Court described how a person is "prevented" from filing a charge:

The term 'prevent' may in ordinary parlance connote that factors beyond the control of the complainant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon fairness of imposing the statute of limitations. Cf. Bernette v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S.Ct. at 1055, 13 L.Ed. 2d. at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been 'prevented' from filing his charges with PERC in a timely fashion. [Id. at 340.]

In Kaczmarek, the diligent pursuit and timely filing of a charge, although in an inappropriate forum, justified the tolling of the statute of limitations as the plaintiff "at no time 'slept on his rights.'" Kaczmarek, 77 N.J. at 341. Equitable principles were applied so as to find that Kaczmarek had filed his charge in a timely manner.

Moreover, "complaint issuance does not end or foreclose the examination into the timeliness of a charge. The six month limitation is a statutory, not discretionary, requirement." Borough of Manasquan, H.E. No. 97-1, 22 NJPER 297, 301 (¶27159 1996).

The limitations period normally begins from the date the alleged unfair practice occurred, provided the person affected is or should have been aware of the action. The date of the action is known as the "operative date," and the six month limitations period runs from that date. Therefore, in order to be timely filed, a charge must be filed within six months of the operative date. Charges filed after that date are generally untimely unless the charging party demonstrates that it was "prevented" from filing the charge prior to the expiration of the statute of limitations.

On October 4, 1999, the County announced that a sergeant's vacancy existed. On January 7, 2000, Warden VanderGoot announced the points awarded to each candidate based upon seniority. The

posting showed Donlan as having received 50 points. Relying upon the memorandum of agreement executed by the PBA and the County on February 26, 1998, the PBA contended that the seniority calculation methodology contained in the memorandum for RDO and shift selection would likewise apply for the seniority component of the promotional process applicable to the sergeant's vacancy. Thus the PBA disputed the January 7, 2000 seniority point awards, generally, and the 50 points awarded to Donlan, specifically. By February 4, 2000, the PBA and the Sheriff had resolved their dispute regarding the calculation of seniority for all promotional candidates, including Donlan.

On October 27, 2000, another listing of the points awarded to candidates applying for the sergeant's position was posted and showed Donlan receiving 42 rather than 50 points, thus moving him from second place to the bottom of the list. The October 27, 2000 memorandum was posted at a location generally available to all corrections officers and was known to Donlan. After having viewed the memorandum, Donlan complained to Chief Niko about the change in the number of seniority points awarded to him.

After October 27, 2000, a further dispute arose between the PBA and the County over the number of seniority points awarded to promotional candidates on the basis of seniority. The dispute's impact upon Donlan pertained to whether he should appropriately receive 42 or 40 seniority points. In either case, Donlan

remained in last place among promotional candidates on the basis of seniority points awarded. While various disputes over the promotional procedure between the County and the PBA persisted, generating numerous pieces of correspondence (of which Donlan was not apprised), the basic issue of Donlan's hire date of September 12, 1994, as asserted by the PBA, rather than April 16, 1982, as Donlan contended, was not an issue of dispute between the PBA and the Sheriff. While Donlan obviously knew that the culmination of the promotional process was impeded by the disputes between the PBA and the County, he had no basis to believe that either the PBA or the County had changed its position regarding the hire date applicable to Donlan's promotional candidacy, that a significant change in the number of seniority points awarded to him would occur, or that his relative seniority ranking among the other candidates for sergeant would change. Accordingly, since March 31, 1998, when the PBA sent Niko a seniority listing of corrections officers showing Donlan's seniority date as September 12, 1994, the PBA had consistently maintained that position thereafter. Relevant here is that Donlan was apprised of the PBA's position on October 27, 2000. Donlan's objection to the hire date, and the points awarded to him, remained consistent since October 27, 2000. Consequently, I find that October 27, 2000, constitutes the operative date in this matter.

Donlan's unfair practice charge and amended charge seek as a remedy the change of his employment date for purposes of calculating seniority and a concomitant change in the number of seniority points awarded to him for purposes of promotion to the sergeant's position. Donlan became aware that the number of points awarded to him for seniority on January 7, 2000 was reduced on October 27, 2000. Since October 27, 2000, there occurred no material change factually or legally in the PBA's and the Sheriff's positions with respect to the number of seniority points to which Donlan was entitled to receive in his candidacy for the position of sergeant. See Township of Old Bridge, P.E.R.C. No. 78-67, 4 NJPER 186 (¶4092 1978). Donlan's claim did not change. Donlan alleged no facts indicating that he was prevented from filing his unfair practice charge within six months from the operative date.

Accordingly, I find that Donlan did not file an unfair practice charge within the 6 month statute of limitations from the operative date. Accordingly, as a matter of law, the County's and the PBA's motions for summary judgment must be granted and the instant charge must be dismissed.

#### **CONCLUSIONS OF LAW**

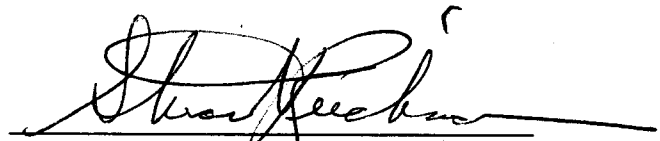
1. Somerset County Corrections Officers' PBA Local No. 177 did not violate 5.4b(1), (3) or (5) of the Act.

2. Neither Somerset County nor Somerset County Sheriff violated 5.4a(1) or (7) of the Act.

3. The unfair practice charge was filed outside of the six month statute of limitations, N.J.S.A. 34:13a-5.4c.

**RECOMMENDATION**

I recommend that the Commission **ORDER** that the Complaint be dismissed.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman  
Hearing Examiner

Dated: August 12, 2004  
Trenton, New Jersey