

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT  
OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-79-113-55

NEW JERSEY LAW ENFORCEMENT PRIMARY  
LEVEL SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Chairman of the Commission, in the absence of timely exceptions, adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order for the reasons cited by the Hearing Examiner. The Chairman agrees that the Association failed to prove by a preponderance of the evidence that Sgt. Davis was transferred to the second shift and denied the opportunity to return to the first shift as a result on the part of the State to discourage him in the exercise of rights protected by the Act. Therefore, the Complaint was ordered dismissed in its entirety.

P.E.R.C. NO. 80-132

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Charging Party.

Appearances:

For the Respondent, The Honorable John J. Degnan,  
Attorney General (Michael L. Diller, Deputy Attorney  
General)

For the Charging Party, Robert B. Reed, Esquire

DECISION AND ORDER

On November 8, 1978, the New Jersey Law Enforcement Primary Level Supervisors Association, affiliated with the New Jersey State Policemen's Benevolent Association, Inc., (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the State of New Jersey (Department of Corrections) (the "State") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), N.J.S.A. 34:13A-1 et seq. Specifically, the Association alleges that the State violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by refusing to transfer an officer of the Association to the first shift so that he could perform his necessary functions as an officer and representative of the Association.

It appearing 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 February 7, 1979. A hearing was held before Commission Hearing Examiner Edmund G. Gerber on April 16 and 17 and May 9, 1979, at which time all parties were given an opportunity to present evidence, to examine and cross-examine witnesses and to argue orally. Briefs and supplemental briefs were filed with the Hearing Examiner by November 20, 1979. The Hearing Examiner issued his Recommended Report and Decision on March 11, 1980, H.E. No. 80-33, 6 NJPER \_\_\_ (¶ \_\_\_ 1980), a copy of which is attached to this Decision and Order and made a part hereof. The report was served upon the parties and the case was transferred to the Commission. N.J.A.C. 19:14-7.1. Neither party has filed proper exceptions to the Hearing Examiner's Recommended Report and Decision. N.J.A.C. 19:14-7.3 provides, in part, that any exception which is not specifically urged shall be deemed to have been waived and that any exception which fails to comply with the requirements set forth in the rules may be disregarded. The Association did file a one-page letter in response to the Hearing Examiner's Recommended Report and Decision, taking exception to the Hearing Examiner's recommended order that the complaint be dismissed. The letter refers to briefs and letter memoranda which had been filed with the Hearing Examiner. This letter does not meet the requirements for the filing of exceptions and will not be considered as such. Additionally, on April 17, 1980, without having sought an extension of time within which to file, the Association filed another document labeled exceptions. This document also cannot be considered as proper exceptions. See N.J.A.C. 19:14-7.3(a).

In accordance with N.J.S.A. 34:13A-6(f), the Commission has delegated to the undersigned the authority to render decisions on behalf of the Commission in cases where exceptions to the Hearing Examiners' Recommended Reports and Decisions have not been filed.

The Hearing Examiner found that Sgt. Davis was transferred from the first shift to the second shift on September 25, 1978. In October of that year, he was elected Executive Secretary of the Association and he renewed an initial request that he be transferred back to his first shift, this time, and for the first time, requesting the transfer on the basis of his increased Association duties.<sup>1/</sup> The Hearing Examiner concluded that the Association failed to prove by a preponderance of the evidence that Sgt. Davis was transferred to the second shift and denied an opportunity to return to the first shift as a result of a desire on the part of the State to discourage him in the exercise of rights protected by the Act. Therefore, he recommended that the complaint be dismissed.

Based upon an independent review of the entire record and noting particularly the absence of acceptable exceptions, the undersigned adopts the findings of fact, conclusions of law and recommended order of the Hearing Examiner substantially for the reasons cited by him. Specifically, the undersigned agrees with the Hearing Examiner that an alleged violation of the contract - and

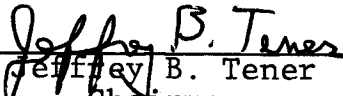
<sup>1/</sup> Initially he had based his request for a transfer on his community activities as well as his desire to be with his family without mentioning Association duties.

it is by no means clear that the language of the contract supports the position of the Association - does not evidence the commission of an (a)(3) violation. Additionally, there was inconsistent evidence regarding the transfer of employee organization officers in other units and there is different contract language in effect covering different units of employees. The size of units also renders comparisons imperfect. There is also no evidence that Sgt. Davis will not be able to carry out his Association duties while working on the second shift. Finally, the evidence does not support the contention that the conduct of the State is part of a systematic effort to interfere with the Association in its operations.

ORDER

Based upon the above, IT IS HEREBY ORDERED that the complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

  
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Jeffrey B. Tener  
Chairman

DATED: Trenton, New Jersey  
April 18, 1980

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

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-and-

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NEW JERSEY LAW ENFORCEMENT  
PRIMARY LEVEL SUPERVISORS  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Commission that they dismiss a charge brought by the Primary Level Supervisors Association alleging that the State of New Jersey committed an unfair practice when it refused to transfer Sgt. Ernest Davis, an officer of the Association, to the day shift so that he might more efficiently carry out his Association duties. The Hearing Examiner did not find that there was a duty on the part of the State to make such a transfer under the factual circumstances established at the hearing.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the State of New Jersey (Department of Corrections)  
John J. Degnan, Attorney General  
(Michael L. Diller, Esq., D.A.G.)

For New Jersey Law Enforcement Primary Level Supervisors Association  
Robert B. Reed, Esq.

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

The Primary Level Supervisors Association, affiliated with the New Jersey State Policemen's Benevolent Association, Inc. (Association) filed the instant action with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended (Act), specifically N.J.S.A. 34:13A-5.4(a)(1) and (3) <sup>1/</sup> by refusing to transfer an officer of the Association, Sgt. Ernest Davis, to the first shift so that he might conduct "his lawful and legitimate function as an officer and representative of the Association."

It appearing 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

<sup>1/</sup> 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."

was issued on February 7, 1979. Hearings were held on April 16 and 17 and May 9, 1979, at which time all parties were given an opportunity to examine witnesses, present evidence and argue orally. Briefs and supplemental briefs were received by November 20, 1979.

It is undisputed the parties to this action are respectively a public employer and public employee representative within the meaning of the Act.

Sgt. Davis was employed at the Adult Diagnostic and Treatment Center (ADTC) in Avenel, an institution in the New Jersey Prison System, as a correction officer. In June of 1978 the Association representing a unit of sergeants in different State law enforcement agencies entered into a contract with the State of New Jersey. At this time Sgt. Davis was appointed both institutional representative and member of the negotiating team by the president of the Association. On September 25, 1978, Davis was transferred from the first shift with hours from 6:20 a.m. to 2:20 p.m. to the second shift, with hours from 2:20 p.m. to 10:20 p.m.

Davis approached Robert O'Keefe, the chief at ADTC who had responsibility for shift assignments, and asked the chief to reconsider his transfer to the second shift. The first time they spoke Davis did not mention his Association duties. Rather, he spoke of his community activities which had to be curtailed because of his new hours as well as his inability to be with his family. Davis spoke to O'Keefe several times, but each time O'Keefe denied Davis' request.

In October, Davis was elected Executive Secretary of the Association and again he renewed his request to be transferred back to the first shift, this time on the basis of his increased Association duties. Once again this request was denied. In November the Association commenced the instant action, claiming the refusal to transfer Davis back to the first shift was motivated by anti-union animus.

The Association has argued that: 1) the State's refusal to transfer Davis back to the first shift violates the collective negotiations contract; 2) the State has not treated the Association in a manner consistent with the treatment of its sister PBA association, the Law Enforcement Unit; 3) it is a burden on Sgt. Davis to carry out his duties while on the second shift and he cannot effectively function as an Association officer; and 4) the State's conduct is part of a systematic effort to disrupt and interfere with the operation of the Association.

1) The contract between the Association and the State contains two pertinent clauses:



Article VII-C. Transfer and Reassignment (for Association Officers)

- (1) The State and the Association recognize that Association Officers have in their relationship to their jobs a need for continuity in the assigned location which exceeds that of fellow employees. It is agreed, therefore, that Association officers mutually agreed upon will not be routinely transferred involuntarily.
- (2) The State and the Association recognize the need to utilize all personnel to meet operational requirements effectively ... Movement of such Association officers may be necessary and appropriate (generally on a temporary basis) in exception to the guidelines agreed to in paragraph C-1. The exceptions in the paragraph will not be used arbitrarily.

Article XXX

- (2) ...Where...assignments are not mutually agreed to the appointing authority will make reassignments in the inverse order of job classification.

The Association has not claimed that there was a unilateral change in the terms and conditions of employment in violation of §5.4(a)(5) of the Act. Thus, a breach of the negotiations agreement does not constitute, per se, an unfair practice. See, Association of Westinghouse Salaried Employees v. Westinghouse Electric Company, 348 U.S. 437 (1955), 34 LRRM 2643. Any finding of a contract violation here would only be evidentiary of the commission of an unfair practice.

Article VII refers strictly to assigned work location and makes no mention of shift assignments. The undersigned does not see how this language relates to Sgt. Davis' transfer.

As to Article XXX, O'Keefe testified that part of Davis' responsibilities on the day shift were coordinating the Volunteers Service Program, as well as the scheduling of both visitors to the institution and inmate trips. O'Keefe felt that Davis did not perform well handling the variable problems that arise in the day shift and he felt that Sgt. Brelsford on the second shift would do a better job under such circumstances. The two men had their assignments switched.

Sgt. Brelsford was the only person on the day shift with less seniority than Davis at the time of Davis' request for transfer. The State claims the application of Article XXX in this instance is inappropriate. In order to return Davis on the day shift the State would have to return Brelsford to the second shift, thereby defeating the purpose of the transfer. The State's argument is a rational

one and is not pretextual (see below). (It must be noted that there is a grievance procedure in the contract that provides for binding arbitration but the Association chose not to grieve the State's interpretation of the contract.)

Accordingly the State's acting upon their interpretation of the contract is not evidentiary of an unfair practice. <sup>2/</sup>

2) The Association introduced evidence that all union officers in the Law Enforcement Unit were allowed to transfer to the first shift. The State was able to demonstrate one case where a union officer in the Law Enforcement Unit was denied a request to transfer to the day shift. More importantly, the State did show that the language of the Law Enforcement Unit contract was different from the Association's, it expressly provides that Law Enforcement Unit officers will not have their shift assignments changed.

Further the units are not comparable in terms of size. There are 1,800 employees in the Law Enforcement Unit and only 170 in the Association's unit. More specifically, ADTC has a total of six sergeants. The logistics of allowing men to transfer to different shift assignments in the Association unit is not comparable to the Law Enforcement Unit. The president of the Association, Sgt. Sudol, was transferred to the day shift upon his request, unlike Davis, but there are 26 sergeants at Trenton State Prison where Sudol works, not six.

3) Davis was inconvenienced in his union duties by being on the second shift but the Association did not prove that he could not carry out his Association duties. There were two sergeants on each of the three shifts so he would not have greater unit member contact on any other shift. The Charging Party also argued that Davis could more easily meet with management if he worked on the first shift. But management worked from 8 a.m. to 4 p.m. So, there is an overlap of an hour and forty minutes in which to conduct union business. The one area where Davis did suffer in his Association duties was attendance at union meetings and negotiations sessions, both of which are held in the evening. The contract does provide that an employee can take leave for union business and apply for compensatory or other leave time. The State does not have an inherent obligation to alter its legitimate administrative needs to satisfy Davis' scheduling problem.

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<sup>2/</sup> There is also a provision in the contract that limits temporary transfers to six months, but there is nothing in the evidence that Davis' transfer was a temporary transfer and the provision is inapplicable to the instant case.

4) The Association argued that the State's actions, although individually not unfair practices, were part of an illegal pattern of conduct motivated by anti-union animus. In addition to the testimony discussed above, Davis testified that on one occasion he had received a written reprimand from O'Keefe because he requested compensatory time when he was late returning to work after attending a meeting with a PERC staff member. Davis testified that he had given advanced notice to his lieutenant that he might be up to an hour and a half late and in fact returned to his work station one and one-half hours late. The testimony showed however that the meeting had ended early enough for Davis to easily have returned to work on time, and Davis knowingly did not request the time off ahead of time to the proper administrative agent. Davis also testified that when he was originally assigned to the second shift O'Keefe had told him he would run the commissary as part of his duties.<sup>3/</sup> Davis argued that running the commissary was out of title work. O'Keefe responded that he would not have to work in the commissary but he would still be transferred. On apparently another occasion,<sup>4/</sup> Davis complained about the transfer to O'Keefe. O'Keefe responded that Davis had a poor attitude and Davis was going to the second shift anyway and, further, although Davis couldn't recall the words, O'Keefe said "that he was not going to let us (the Association) tell him what to do or any other association for that matter." O'Keefe testified that he did not know that the sergeants had formed an association when the transfer was announced. As noted above, when Davis first requested that his shift not be changed, Davis argued that his community and family activities would suffer and apparently didn't say anything about the Association. O'Keefe admitted that Davis did tell him he (Davis) was an officer of the Association but everytime Davis talked to O'Keefe Davis said he had a different position in the Association and O'Keefe wasn't sure what position he held if any. At the hearing Davis did have a hard time expressing himself as to what titles he held in the Association and I find O'Keefe's testimony credible, at least as to his confusion as to the Association and Davis' position in it. Moreover, there is nothing else in evidence which would indicate that O'Keefe knew of Davis' union activity when he made the decision to transfer Davis. O'Keefe did tell Davis he

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<sup>3/</sup> The commissary was open for inmates during the second shift.

<sup>4/</sup> Davis and O'Keefe had a series of meetings. Davis' testimony is confused as to when this conversation took place. The burden is on the Charging Party to prove each of its allegations. The Association failed to demonstrate when the conversation occurred.


would assume responsibilities for running the commissary among other duties on the second shift, but it is understandable that O'Keefe would not tell Davis that he was being transferred for his work performance. O'Keefe's remarks, although ambiguous, are evidentiary of hostility toward the exercise of protected rights, but they do not prove Davis's shift transfer or the State's failure to return Davis to the first shift were motivated in part by a desire to interfere with the exercise of protected rights.

Sgt. Sudol also testified of a chance meeting in a hallway while he was with the president of the Law Enforcement Unit. An official of the Department of Corrections passed by and said hello to the president of the other local and not to Sudol. Sudol claims this was evidence of how the other union was favored by the State. Sudol testified about the denial of release time but the State demonstrated that such denial was due to the Association's failure to follow the contractual requirement for release. Finally Sudol testified that over the past several months all the officers of the Association were meted out discipline. But there was no testimony as to what the disciplines were for, whether they were legitimate or what was their final disposition. Absent more in the way of proof, it is hard to draw an inference of unfair practices on any of the matters testified to by Sudol.

The Association has failed to prove by a preponderance of evidence that the transfer of Sgt. Ernest Davis to the second shift and the refusal of the State to return Davis back to the first shift was motivated in whole or in part by a desire to discourage the exercise of rights protected by the Act. It is therefore recommended that the Commission issue the following

Recommended Order

The Complaint in this matter is dismissed in its entirety.

  
Edmund G. Gerber  
Hearing Examiner

DATED: March 11, 1980  
Trenton, New Jersey