

D.U.P. NO. 93-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF GLASSBORO,

Respondent,

-and-

Docket No. CI-92-37

JOSEPH GRASSO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge alleging that a public employer unlawfully refused to promote an employee. The charging party alleged that the refusal was in retaliation for his protected activity, violating subsections 5.4(a)(1), (3) and (7) of the Act.

The Director found that the alleged protected activity occurred too long ago to be relevant and that no other facts justified issuing a complaint. He also noted that promotional criteria are not mandatorily negotiable.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF GLASSBORO,

Respondent,

-and-

Docket No. CI-92-37

JOSEPH GRASSO,

Charging Party.

Appearances:

For the Respondent,
Ragonese, Scaffidi & Albano, attorneys
(Timothy D. Scaffidi, of counsel)

For the Charging Party,
Kozlov, Seaton, Romanini & Brooks, attorneys
(Gilbert Brooks, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 2, 1991, Joseph Grasso filed an unfair practice charge alleging that on or about July 1, 1991, the Borough of Glassboro Police Department ("Borough") unlawfully refused to "elevate" him from the rank of detective sergeant to detective sergeant first class. The Borough has allegedly "failed to bargain in good faith" and has allegedly violated subsections 5.4(a)(1), (3) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

On October 26, 1992,^{2/} we issued a letter tentatively dismissing the charge. No response was filed.

Grasso was a Borough patrol officer from 1970-1979 and PBA Local 178 president from 1973-1979 and again from 1984-1990, when he was a detective.

In 1985, the Appellate Division issued Grasso v. Borough of Glassboro, 205 N.J. Super. 18, rejecting a disciplinary termination of Grasso by the Mayor and Council and reinstating him as a police officer. The Court found that the Borough had not properly implemented N.J.S.A. 40A:14-118.

In April 1990, Grasso resigned the PBA presidency when he was promoted to detective sergeant. Grasso then served for an unspecified time as the PBA "executive administrator."

Detective sergeants are included in the recognition clause of the 1990-92 collective negotiations agreement between the Borough and PBA Local 178. (That recognition clause covers patrol officers, detectives, detective sergeants and investigators.) Article 30 of the Borough-PBA agreement states that within six months of the signing of the contract, the PBA and the Borough will select a committee to "instrument a promotional procedure." Grasso asserts that no methodology was ever agreed upon and the Borough refused to

^{2/} On February 5, 1992, the Borough filed a response denying that it engaged in any unfair practices. The parties subsequent efforts at resolving the case were not successful. On July 29, 1992, the Borough filed an updated statement of position.

bargain in good faith on this issue. The Borough and the PBA executed the collective agreement in May or June 1990.

The Glassboro Police Sergeants' Association represents a collective negotiations unit of platoon sergeants, sergeants first class and/or detective sergeants first class. The unit specifically excludes detective sergeants. A collective agreement was executed by the Sergeants' Association and the Borough in May 1990. Only titles included in the Sergeants' Association agreement are eligible for promotion to lieutenant.

Grasso alleges that the Borough, by signing both agreements, "carved out detective sergeants from the benefits of the Sergeants' Association contract by limiting detective sergeants to detective sergeant first class and by not providing a way for detective sergeants to reach the rank of detective sergeant first class..."

In November 1990, the Borough Chief of Police "decided to elevate" the other detective sergeant - Paul Boerner - to detective sergeant first class, "despite the fact he was less experienced than Sgt Grasso." In December 1990, Grasso discussed the matter with the Borough Solicitor. Grasso alleges that the Solicitor "agreed with the suggestion that detective sergeants be afforded the same promotional opportunity set forth in the Sergeant Contract." (i.e., a detective sergeant serving 18 months in grade would achieve the rank of detective sergeant first class). Grasso alleges it was "understood" that he "would be elevated to the rank of detective sergeant first class on July 1, 1991." The Borough allegedly refused to elevate Grasso and its act is allegedly "arbitrary, capricious and unreasonable."

Grasso asserts that the Borough's July 1, 1991 refusal to elevate him "is not the first time the Borough has singled [him] out...." He points to the litigation indentified earlier at 205 N.J. Super. 18.

The Borough denies it engaged in unfair practices. It asserts that "detective sergeants" were never included in the recognition clause of the Sergeants' Association contract and Grasso would have to be "promoted" to the detective sergeant first class title if the position was available. The Borough also asserts that Grasso was a PBA representative during the negotiations for the 1990-91 Borough-PBA agreement and was one of the members of the PBA committee for recommending criteria for promotions and had not transmitted any recommendations. The Borough also denies that it retaliated against Grasso for engaging in protected activities.

The standard for determining whether adverse personnel activities violate subsection 5.4(a)(1) and (3) of the Act was stated in In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party must prove by a preponderance of evidence on the record that activity protected by the Act was a substantial or motivating factor in the adverse action. See UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987). The timing of personnel actions is sometimes circumstantial evidence of union animus. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

Grasso contends that his prior litigation with the Borough proves his having been "singled out." The Appellate Division

decision in that case was issued in 1985. The current police chief was not chief in 1988. This incident is too remote to give it much weight as an indication of union animus. Although Grasso remained an active PBA representative after 1985, he has not alleged that any particular event or sequence of events prompted retaliation by the Borough. Grasso's resignation from the PBA local presidency in 1990 occurred more than fifteen months before the Borough allegedly refused to elevate his rank. No proximate facts have been alleged to indicate that his participation in PBA or other protected activities resulted in discrimination by the Borough. Accordingly, we refuse to issue a complaint on this aspect of the charge.

Grasso also alleges that the Borough "failed to bargain in good faith" by refusing to elevate his rank and by not agreeing to a "promotional procedure."

N.J.S.A. 34:13A-5.4(a)(5) provides that an unfair practice charge arises only where any employer fails to negotiate in good faith with the majority representative. Such a charge can only be filed by the party to whom these rights and obligations flow, i.e., the majority representative. As an individual employee, Grasso lacks standing to maintain a claim that the Borough has "failed to negotiate in good faith." Accordingly, we refuse to issue a complaint on this aspect of the charge.^{3/}

Promotional criteria are not mandatory subjects for negotiations; promotional procedures, however, are negotiable.

State of N.J. v. State Employees Assn., 78 N.J. 54 (1978).

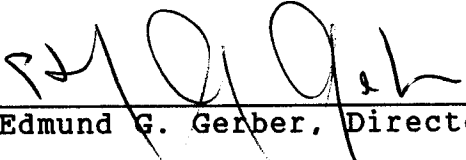
Moreover, majority representatives cannot arbitrate grievances

concerning non-negotiable terms and conditions of employment. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). A public employer has the managerial prerogative to select and apply appropriate promotional criteria. It may also determine qualifications to fill positions and determine when and if such positions must be filled. See N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987).^{4/}

No facts suggest that the Borough has unlawfully promoted any employee or negotiated in bad faith.

Accordingly, I find that the Commission's complaint issuance standard has not been met and I refuse to issue a complaint on the allegations of this charge.^{5/} The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: November 18, 1992
Trenton, New Jersey

^{3/} This paragraph assumes that Grasso had enumerated subsection 5.4(a)(5) in his charge.

^{4/} A police officer's challenge of a non-Department-of-Personnel employer's selection for promotion may be litigated under N.J.S.A. 40A:14-129. See Gaskill and Anderson v. Bor. of Avalon, App. Div. L-311119-73 (8/12/76).

^{5/} N.J.A.C. 19:14-2.3.