

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CI-H-95-21

LEO J. FARLEY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Borough of Sayreville. The Complaint, based on an unfair practice charge filed by Leo J. Farley, alleged that the Borough violated the New Jersey Employer-Employee Relations Act when, upon the retirement of the Deputy Chief, it did not upgrade Farley's rank and pay to fill that vacancy. The Commission finds that the alleged unfair practice occurred more than six months before the filing of the charge and that there is no evidence that the charging party was prevented from filing a timely charge. The Commission further finds that the evidence does not support a finding that the Borough's decision to proceed by way of a competitive examination to fill the Deputy Chief position was motivated by hostility to Farley's protected activity.

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

P.E.R.C. NO. 98-18

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CI-H-95-21

LEO J. FARLEY,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy,  
attorneys (Robert T. Clarke, of counsel)

For the Charging Party, Richard J. Kaplow, attorney

DECISION AND ORDER

On November 15, 1994, police Captain Leo J. Farley filed an unfair practice charge against the Borough of Sayreville. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1), (2), (3), (4), (5) and (7),<sup>1/</sup> when, upon

---

<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4)

Footnote Continued on Next Page

the retirement of Deputy Chief Kilcomons, it did not upgrade Farley's rank and pay to fill that vacancy. That action is alleged to be in retaliation for Farley's participation in a prior unfair practice proceeding and because of the police chief's hostility to Farley's son-in-law, the PBA president. The charge also alleges that, in the past, the Borough promoted officers permanently without competitive examinations and that the decision not to promote Farley was motivated by, and will interfere with, the exercise of protected rights.

On January 13, 1995, a Complaint and Notice of Hearing issued. The Borough filed an Answer admitting that it had temporarily assigned officers to higher rank and pay in the past, but denied that its failures to upgrade Farley and to schedule a competitive examination were in retaliation for Farley's protected activity. By way of an affirmative defense, it asserted that the allegations are untimely.

---

1/ Footnote Continued From Previous Page

Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

On May 3 and 4, 1995, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. At hearing, Farley agreed to the dismissal of the 5.4(a)(2), (4), (5) and (7) allegations. The Hearing Examiner dismissed as untimely the allegations that the Borough unlawfully refused to appoint Farley acting deputy chief and pay him upgrade pay. At the conclusion of the hearing, the parties waived oral argument but filed post-hearing briefs.

On November 13, 1996, the Hearing Examiner recommended dismissing the remaining allegation contesting the failure to permanently promote Farley to deputy chief. H.E. No. 97-10, 23 NJPER 55 (¶28037 1996). He found that evidence in support of a number of the untimely allegations showed hostility to Farley's protected activity. Nevertheless, he also found that Farley failed the promotional examination for deputy chief and that his failure precluded any finding of an unfair practice.

On December 13, 1996, Farley filed exceptions. He asserts that the Hearing Examiner erred in dismissing as untimely the allegations regarding the Borough's refusal to appoint him as acting deputy chief. He argues that because the position had not yet been filled permanently, the failure to appoint him in a temporary capacity was a continuing violation of the Act. He further asserts that the Hearing Examiner erred in finding that neither the failure to appoint him as deputy chief nor the opening up of the promotional tests to junior officers showed discriminatory conduct. Finally,

Farley asserts that nothing about the way Chief Sprague had been promoted to deputy chief in 1979 precludes the finding of an unfair practice.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-10).

The first exception involves the allegations concerning a temporary upgrade in rank and pay to deputy chief status. We agree with the Hearing Examiner that the allegations are untimely.

N.J.S.A. 34:13A-5.4(c) provides that a Complaint shall not issue, and accordingly a violation cannot be found, based on any unfair practice occurring more than six months before the filing of the charge, unless the charging party was "prevented from filing such charge." On February 9, 1994, Farley filed a grievance contesting the Borough's failure to upgrade him to deputy chief. The Borough denied the grievance and the PBA demanded binding arbitration. On November 2, the Borough and PBA entered into a settlement agreement which, among other things, provided for the withdrawal of Farley's claim with prejudice. On this record, it appears that the decision not to upgrade Farley to deputy chief occurred in early 1994. The unfair practice charge was not filed until more than six months later and there is no evidence that Farley was prevented from filing the charge earlier. We reject the charging party's contention that the facts support a finding that the Borough's actions amount to a continuing violation of the Act.

The second exception contests the Hearing Examiner's conclusion that the charging party did not prove a violation of subsections 5.4(a)(1) or (3). We agree with the Hearing Examiner that no violations were proven.

The Hearing Examiner found ample evidence that chief Sprague was hostile to Farley because of his protected activity and the activity of his son-in-law, PBA president Kelly. However, other than the scheduling of a competitive examination, none of the allegations concern actions that took place within six months of the filing of the charge. Evidence occurring more than six months before the filing of the charge cannot constitute independent violations, but may be evidence of discriminatory motivation infecting a personnel decision occurring within the six-months limitation period. State of New Jersey (DEPE), P.E.R.C. No. 93-116, 19 NJPER 347 (¶24157 1993). As for the use of a examination to fill the deputy chief position, the record supports the Hearing Examiner's finding that an examination was used in the past. In addition, there is insufficient evidence to support a conclusion that opening up the examination to junior officers was motivated by a desire to block Farley's promotion. Accordingly, we accept the conclusion that Farley's failure to qualify for promotion precludes a finding that he is entitled to such a promotion.

The final exception contends that nothing about the way the chief had been promoted impedes finding an unfair practice. We have not relied solely on how Sprague was promoted to conclude that

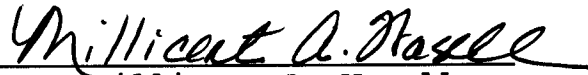
Farley did not prove that the Borough's use of a competitive examination was illegally motivated. The Borough's attorney told the Borough that it had to proceed by way of a competitive examination. Whether the attorney was wrong or right, the evidence does not support a finding that the Borough's decision to follow that advice was motivated by hostility to protected activity.

Under all these circumstances, we adopt the Hearing Examiner's recommendation to dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: August 28, 1997  
Trenton, New Jersey  
ISSUED: August 29, 1997

H.E. NO. 97-10

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CI-H-95-21

LEO J. FARLEY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss an unfair practice charge filed by Leo J. Farley against the Borough of Sayreville. Farley contends that he was unlawfully denied a promotion to the rank of deputy police chief. The Hearing Examiner found that the Borough asked the Department of Personnel to conduct a promotional exam which is consistent with the Borough's prior practice and Farley did not receive a passing score on the exam.



H.E. NO. 97-10

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CI-H-95-21

LEO J. FARLEY,

Charging Party.

Appearances:

For the Respondent,  
Apruzzese, McDermott, Mastro & Murphy, attorneys  
(Robert T. Clarke, of counsel)

For the Charging Party,  
Richard J. Kaplow, attorney

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On November 15, 1994, Leo J. Farley, an individual, filed an unfair practice charge with the Public Employment Relations Commission alleging that the Borough of Sayreville committed an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7).<sup>1/</sup> Farley alleged that the Borough

---

<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to

failed to follow its practice of "upgrading" a police officer into a vacant next higher position after the retirement of Deputy Chief Joseph A. Kilcomons in February 1994. Farley asserts that he should have been upgraded to the position of acting deputy chief and paid the appropriate compensation.

He further alleged that the Borough never conducted civil service examinations in the past to fill a vacant deputy chief position. However, the Borough refused to promote Farley to deputy chief, pursuant to Department past practice and instead it scheduled an open competitive examination pursuant to N.J.A.C. 4A:2.7. Farley asserts that these actions were taken by the Borough in retaliation for Farley's participation in an unfair practice proceeding before this Commission in violation of N.J.S.A. 34:13A-5.4(a) (1), (2), (3), (4), (5) and (7) of the Act.

A Complaint and Notice of Hearing was issued on January 13, 1995. The Borough filed an answer admitting that in the past it had temporarily assigned officers to a higher rank and pay as acting

---

1/ Footnote Continued From Previous Page

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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

officers but denied that it failed to appoint Farley because he engaged in protected activity. It also admitted it scheduled a promotional exam for the position of deputy chief, but denied it scheduled the exam in retaliation against Farley for engaging in protected activity. By way of an affirmative defense, it argued that the Complaint must be dismissed as untimely.

Hearings were conducted on May 3 and 4, 1995 and briefs were received by July 7, 1995.

At the hearing, the Charging Party voluntarily withdrew its allegations that §5.4 (2), (4), (5) and (7) of the Act were violated (2T47).

A motion to dismiss the Charging Party's case was granted at the conclusion of the Charging Party's case as to the allegations that the Borough refused to appoint Farley acting deputy chief and refused to pay Farley upgrade pay.

These allegations are untimely and no good cause was demonstrated by the charging party as to why the charge was not timely filed.<sup>2/</sup> State of New Jersey (Div. on Civil Rights) and CWA and Maria Jones, P.E.R.C. No. 94-116, 20 NJPER 273 (¶25138 1994), aff'd 21 NJPER 319 (¶26204 App. Div. 1995), pet. for certif.

---

<sup>2/</sup> N.J.S.A. 34:13A-5.4(c) provides that:

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 prevented.

pending. The motion was denied, however, as to the allegation that the Borough committed an unfair practice when it failed to promote Farley.

#### FINDINGS OF FACT

1. The table of organization of the Police Department of the Borough includes the positions chief of police and deputy chief of police. The deputy chief fills in for the chief in his absence and is in charge of one of the two divisions in the department (1T13). There are two captains in the department.

2. Leo J. Farley holds the position of captain. He has been on the police force for over 32 years and has been a captain for over 10 years. He is in charge of the patrol division. His responsibilities include scheduling and disciplining of 57 officers in the division.

3. Prior to 1988, Farley's personal and professional relationship with Chief of Police Douglas Sprague was very good and Farley considered Sprague a friend.

However, in November 1988, Patrolman Charles Kelly, who is president of PBA Local 398, became engaged to, and subsequently married, Farley's daughter. At that time, Farley was called into the Chief's office. Deputy Chief Kilcomons and Captain Connors were in attendance. Farley was asked if his daughter became engaged to Patrolman Kelly, the PBA president. When Farley said yes, "they all kind of laughed. They thought it seemed to be humorous. I didn't think it was" (1T114).

Farley's relationship with Chief Sprague began to deteriorate at that time (1T114).

4. In September 1992, Sprague called Farley into his office and stated there was going to be an investigation of the unauthorized release of an internal report, written by Farley, to a local newspaper. The investigation was to be performed by Sergeant Burns who was also in attendance along with Lt. Dunworth [Farley testified that both officers are very close to Sprague]. During the meeting, Sprague told Farley "I know you want my job and you're not going to kid me. You'll never have my job and I'll do everything in my power to make sure you're not chief or deputy chief for one day" (2T118).

Sprague testified he made this statement because he believed Farley was responsible for the newspaper leak (2T60). However, no one was ever formally charged with giving information to the press (2T65, 2T112).

5. In November 1992, Kelly was the subject of voluminous disciplinary charges. The Borough sought Kelly's discharge from the police department. Chief Sprague gave Farley the charges and was told to serve Kelly with them. Farley did so, but he found it very humiliating (1T116).

PBA Local 398 filed an unfair practice charge with the Commission alleging the action taken against Kelly was unlawfully motivated. Kelly also filed an action against the Borough in Federal District Court.

In the Spring of 1993, Farley testified on behalf of Local 398 and Kelly at the Commission hearing on the unfair practice charge. On May 24, 1995, the Commission found, in Borough of Sayreville, P.E.R.C. No. 95-97, 21 NJPER 213 (126135 1995), that the Borough committed an unfair practice when Chief Sprague instituted the disciplinary action against Kelly. It found the Borough's actions were in retaliation for Kelly's participation in protected activity.

6. Farley believes he is not shown the same fairness by Sprague as other officers. He is not invited to meetings. He drives one of the older police cars in the department. Everyone underneath him drives a newer car (1T119). Although new cars have been purchased by the department, Farley was never assigned one. Farley heard the Chief refer to him as the "F-ing captain and his son-in-law or the F-ing president and his father-in-law". Farley is not allowed to look at time books or overtime records without first getting permission of the Chief.

Sprague stated that if Farley wanted a new car, Farley could have asked him for one (2T110). Sprague concedes that he uses profanity, but claims that he refers to several other officers the same way. Sprague admits there was a change in his relationship with Farley, but testified that the change was because Farley's attitude toward his job started deteriorating; he was too lenient with giving time off to the officers in his division (2T125). Farley "just wants to be one of the boys" (2T126). Sprague also was

critical of Farley's failure to inform a police officer of his Miranda rights when the officer was the subject of an internal investigation. Criminal charges growing out of the investigation were dropped because the officer was not informed of his rights (2T118).

Sprague's testimony is not convincing. There never was a finding that Farley leaked the report to the newspaper. Sprague's attitude about Farley's car is disingenuous. Similarly, Sprague's defense of the use of obscene language is unconvincing. Although some of Sprague's criticisms of Farley are valid, on balance, and in light of the Commission's finding of Sprague's unlawful hostility in Sayreville (I take administrative notice of those findings), I find that Sprague's hostility was motivated, at least in part, by anti-union animus.

7. Councilman Olchskey would routinely talk with Farley in Farley's office. Once, in October or November 1993, just before Deputy Chief Kilcomons retired, Farley asked Olchskey during such a meeting what his chances were of becoming deputy chief. Farley acknowledged that since the chief and he did not get along, it would be difficult to get a recommendation from Sprague. Nevertheless, Farley wanted to know the mayor and council's assessment. Olchskey replied that the mayor and council had very strong feelings about Kelly, his involvement with the PBA, and the problem Kelly caused when he instituted the lawsuits. Farley's position would be better if things quieted (1T125). Farley responded that he would never

8. speak to Kelly in regards to his action as PBA president. Olchskey replied that he wouldn't get much help if he couldn't get Kelly to take it easy (1T126).

8. On January 31, 1994, Deputy Chief Kilcomons retired. Farley was the most senior captain and believed that he should be promoted to the position of deputy chief. The Borough Council did not fill the position and discussed the possibility of eliminating it at its February 16, 1994 meeting. The Borough Council issued a public notice that it would consider a proposed ordinance eliminating the deputy chief's position at its March 1994 meeting.

At the February meeting, Kelly asked Borough Councilman Olchskey why are they doing this to Captain Farley. Olchskey replied, "We don't want him." Kelly testified that the ordinance eliminating the deputy chief's position was drafted by Chief Sprague. However Sprague testified he had no role in this decision (2T100).

The PBA, through Kelly, strongly urged the Council not to abolish the deputy chief position (1T20, 1T22) and the Council tabled the resolution at its March meeting.

The issue of abolishing the deputy chief position was raised some years before (1T68) and again during the budget hearing in 1991-92 (2T170).

9. In March 1994, the Borough requested the New Jersey Department of Personnel to give an examination for the position of deputy chief (2T100). Chief Sprague had no role in this decision (2T100).



The last two times there was a vacancy for the position of deputy chief, the Borough asked the Department of Personnel (or Civil Service) to schedule an examination. In 1979, there were two captains, one of whom was Sprague, who took the exam. Sprague received a higher score on the examination and was promoted to the position (2T92-2T94). In 1984, when Sprague was promoted to chief of police, the Borough again called for a civil service examination to fill the deputy chief position, but only one eligible employee (Kilcomons) applied to take the examination. Kilcomons was made deputy chief without taking the examination pursuant to Civil Service Regulations (R-6 in evidence).

Sprague's testimony as to promotions into the deputy chief position was uncontradicted and was supported by independent credible evidence. I credit his testimony.

10. A notice of the examination was posted and an examination was given on November 16, 1994. Unlike past years, the examination was open to junior officers in addition to captains. Nine persons, including Farley, took the examination and seven persons passed. Farley did not pass the examination (R-7).

11. Sprague went on vacation in April 1994. Captain Gawron, who was just appointed captain the previous September, was ordered by the chief to be the captain in charge of the department while Sprague was on vacation.<sup>3/</sup>

---

<sup>3/</sup> Although document CP-3 was testified to, it was not formally moved into evidence. The authenticity and accuracy of the document is not disputed.

Captain Gawron told Farley he did not have the experience to do the chief's job and asked if he needed help, could Farley help him (1T12). Gawron also told the chief he lacked experience to do the job. Nevertheless, Gawron served as captain in charge.

This appointment occurred at the time that Farley was applying for an upgrade to acting deputy chief (1T121). At the time, Farley had 10 years of experience with eight years in the administrative division, and was in charge of three quarters of the police department (1T122).

#### ANALYSIS

Farley failed to prove the allegation of his charge that the Borough altered its usual practice of appointing a deputy chief without an exam. The evidence establishes that the Borough's practice is to call for an examination when there is a vacancy and the Borough followed its established practice. Although Kilcomons was promoted to deputy chief without an exam, an exam was scheduled and, pursuant to civil service regulations, the exam was cancelled when only one candidate (Kilcomons) applied for the position.

There is ample evidence of the Borough's hostility toward Farley, e.g., Sprague's failure to appoint him to captain in charge in April 1994,<sup>4/</sup> Sprague's threats about never promoting Farley,

---

<sup>4/</sup> This allegation would be untimely as a separate unfair practice charge. Chief Sprague appointed Gawron captain in charge on April 8, 1994 and the appointment ran through April 18, 1994. The unfair practice charge was not filed until November 15, 1994, more than six months later.

the use of obscene language, and failure to assign Farley a good police car. Similarly, there is no dispute that the Borough was aware of his protected activity.

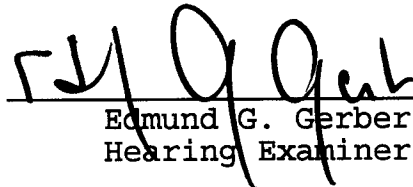
However, hostility alone is not enough. To prove a violation of subsection 5.4(a)(3), Farley first must make a prima facie showing that he was discriminated against. Hostility is one of the elements to show improper motivation for an adverse action, i.e., discrimination. But, Farley failed to prove the alleged adverse action. In re Bridgewater Twp., 95 N.J. 235 (1984).

The Charging Party argues that the Borough altered its established practice by opening the test up to junior officers. This action is evidence of discriminatory conduct. However, Farley failed the examination. Accordingly, the Borough could not appoint him deputy chief. Under these circumstances, this action standing alone does not prove discriminatory conduct. There is no allegation that the test itself was unfair.

The charging party has failed to prove that the Borough committed an unfair practice within the meaning of the Act.

RECOMMENDED ORDER

I recommend the Commission dismiss the Complaint.

  
Edmund G. Gerber  
Hearing Examiner

DATED: November 13, 1996  
Trenton, New Jersey