

H.E. NO. 2005-13

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

In the Matter of

TOWNSHIP OF HANOVER,

Respondent,

-and-

Docket No. CO-H-2004-150

HANOVER TOWNSHIP PBA  
LOCAL NO. 128,

Charging Party.

**SYNOPSIS**

A Commission Hearing Examiner denies a motion for summary judgment filed by Charging Party, Hanover Township PBA Local No. 128. The charge alleges that Respondent, Township of Hanover, engaged in conduct that violated N.J.S.A. 34:13A-5.4a(1) through (7) when it refused to comply with the PBA's request for a copy of "all test scoring, oral test questions, scoring sheets, scoring calculations and other documents used to formulate the final scoring" in a promotional examination and screening for the rank of Sergeant administered during the Spring of 2003.

The Hearing Examiner concludes that summary judgment is not appropriate as there remain unresolved substantial and material factual issues pertaining to the PBA's assertion that the information is relevant to its responsibility to administer the collective negotiations agreement, and to the defenses raised by the Township that it is not obligated to turn over some or all of the information as it is not within the Township's possession or control and is confidential under state law, an executive order and pertinent case law.

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Appearances:

For the Respondent,  
Laufer, Knapp, Torzewski & Dalena, L.L.C., attorneys  
(Frederick M. Knapp, of counsel)

For the Charging Party,  
Klatsky, Sciarrabone & DeFillippo, attorneys  
(David J. DeFillippo, of counsel)

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

On November 17, 2003, Hanover Township PBA Local 128 (PBA) filed an unfair practice charge with the Public Employment Relations Commission alleging that the Township of Hanover (Township) violated N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5), (6) and (7), part of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by declining the PBA's request for a copy of "all test scoring, oral test questions, scoring sheets, scoring calculations and other documents used to formulate the final scoring" in a promotional process for the rank of Sergeant

administered during the Spring of 2003. The PBA made its request after the Township issued a revised promotional list to correct errors made in tabulating the scores of candidates on the initial list. The revision changed the rankings of the candidates who were initially in positions 5, 6, and 7.

On March 30, 2004, a Complaint and Notice of Hearing issued. A hearing was scheduled for May 24, 2004.

On April 29, 2004, the PBA moved for summary judgment asserting that there were no substantial and material issues of fact in dispute and, as a matter of law, it was entitled to a finding that the Township had violated the Act by refusing to provide it with the information it sought and an order directing that the Township provide the requested materials.

On May 3, 2004, the Township moved to extend the time for filing its Answer. It enclosed a proposed "Explanatory Answer," a December 23, 2003 letter constituting its statement of position pursuant to N.J.A.C. 19:14-1.6(a)(2), supplemented by a March 8, 2004 letter. On May 4, 2004, I granted the motion. The Answer responds to each of the paragraphs of the unfair practice charge, sets forth affirmative defenses and asserts that the Complaint should be dismissed.

On May 6, 2004, and pursuant to N.J.A.C. 19:14-4.8, the PBA's motion for summary judgment was referred to me for a

decision. On May 7, 2004, the Township filed a brief and supporting documents in opposition to the PBA's motion.<sup>1/</sup>

Summary judgment will be granted:

[I]f 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)]

In weighing summary judgment motions, all inferences must be drawn against the moving party and in favor of the opposing party. The motion must be denied if a genuine issue of material fact exists. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Brill holds that the fact finder 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. If that issue can be resolved in only one way, it is not a "genuine issue" of material fact.

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<sup>1/</sup> On May 13, 2004 the Township's attorney submitted a letter and certain documents providing details on the promotional process. On May 24, 2004, the PBA responded and renewed its request for a decision on its motion. On June 28, 2004, counsel for the PBA submitted a letter to the chief of police, also dated June 28, 2004, from a candidate who, according to the letter, was ranked fourth on the promotion list. On July 7, 2004 the Township's attorney responded with a letter addressing the matters raised by the officer, but urging that the letter be disregarded as immaterial to the motion. I have not considered the issues discussed in this exchange of correspondence in deciding this motion.

**FINDINGS OF FACT**

These undisputed or admitted facts are drawn from the parties' pleadings and submissions.

1. The PBA is the majority representative for all Patrolmen, Detectives and Sergeants employed by the Hanover Township Police Department.

2. The Township and the PBA are parties to a collectively negotiated agreement that covers the period between January 1, 2001 and December 31, 2003.

3. On March 5, 2004, the PBA filed a Petition to Initiate Interest Arbitration (Docket No. IA-2004-081).

4. Since August 2000, Patrolman Christopher Martino, a Township police officer since 1994, has been the PBA's President.

5. After Chief William Pate retired in September 2003, Captain Stephen Gallagher was appointed Acting Chief.

6. As Acting Chief, Gallagher retained his permanent job title as Captain. The department employs one other Captain - Shawn Waldron, who oversees the operations of the Patrol Division. After his appointment, Acting Chief Gallagher continued to supervise the Detective Division.

7. In September 2003, Sgt. Mark Roddy and Sgt. Frank Loughlin were promoted into the Department's two lieutenant positions.

8. The department has four uniformed sergeants and one detective sergeant. The uniformed sergeants and the dates they achieved rank are: Vitanza-August 1994; Zvolonsky-June 1996; Peslis-October 2003; and White-October 2003.

11. There are eighteen officers in the Patrol Division. Four officers are assigned as detectives.

12. In 2002, the Township began a promotional process for lieutenant, resulting in the selection of Roddy and Loughlin.

13. In 2003, the Township initiated a four part promotional procedure for sergeant, consisting of:

1. A written test developed and administered by the New Jersey Chiefs of Police Association (Chiefs Association);
2. An oral examination/interview conducted by the Chiefs Association;
3. An oral interview conducted by Acting Chief Gallagher, Capt. Waldron, Roddy and Loughlin.;
4. A second oral interview by Councilman Tort and Acting Chief Gallagher.

14. The Township also factored each candidate's college credits as well as any internal affairs complaints.

15. At the conclusion of the sergeant promotional process, each candidate's score was compiled and a ranking was made.

16. The initial rankings were altered. One adjustment was made because the officer's score was improperly lowered based on

an internal affairs complaint that had been resolved. Another officer's score was raised to acknowledge his completion of college courses. The changes affected the officers initially ranked 5, 6, and 7 on the promotional list.

17. PBA President Martino, who had been 5th, moved down to 7th. The officers ranked 6th and 7th on the initial list each moved up one spot as a result of the adjustments in their scores.

20. On October 15, 2003, Martino wrote to Acting Chief Gallagher requesting that the PBA be given a copy of "all test scoring, oral test questions, scoring sheets, scoring calculations and other documents used to formulate the final scoring". The letter asserts that the information "was requested to assure that all members involved are treated within the guidelines of our contract."

21. By letter dated November 3, 2003, Chief Gallagher denied the PBA's request for the production of the requested documents, asserting that they were confidential.

#### **Positions of the Parties**

The PBA asserts that it has a right to the information requested and that the Township is statutorily obligated to supply it. It relies on University of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); Burlington Cty. Bd. of Chosen Freeholders and CWA, P.E.R.C. No. 88-101, 14 NJPER 327 (¶19121 1988), aff'd NJPER Supp.2d 208 (¶183 App. Div. 1989); NJ Transit

Bus Operations, Inc., P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989); City of Atlantic City, P.E.R.C. No. 89-56, 15 NJPER 11 (¶20003 1988); City of Newark, I.R. No. 2002-9, 28 NJPER 229 (¶33082 2002); Evesham Tp., D.U.P. No. 93-31, 19 NJPER 167 (¶24084 1993).

The Township notes that the first two phases of the promotional process were conducted by the Chiefs Association and were beyond its control. It asserts that the candidates received their scores at the end of each succeeding step of the examination process. It notes that the corrected scores had no bearing on the promotions that were made from the list, as only the top two candidates were promoted.

The Township contends that the PBA's request covers the interviewers' confidential notes including those of the superior officers on the interview panel who supervise the candidates. It argues that disclosure of the notes could fuel animosity among the ranks and undermine the department's operational efficiency.

The Township asserts that the PBA's request is preempted by statute and executive order. It cites the Open Public Records Act (OPRA) N.J.S.A. 47:1.1 et seq., Executive Order 26 and instructions for custodians of public records,<sup>2/</sup> as authority prohibiting the disclosure of exam questions and other data

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2/ OPRA Handbook for Records Custodians, 2d Ed., (8/22/2002) Appendix B.



pertaining to the administration of a test for public employment.

The Township also notes that, in civil service jurisdictions, analogous information is confidential under N.J.A.C. 4A:4-6.4(e).

Apart from preemption, the Township also argues that the information sought by the PBA is not within the parameters of an employer's statutory duty to supply information. It relies on Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979). That case held that the National Labor Relations Board (NLRB) abused its discretion when it ordered a public utility to turn over to the union testing information and specific scores, including the results of psychological examinations, conducted as part of an appointment process to low level, but operationally significant, jobs. The employer had offered to release the information if the candidates signed individual waivers but the NLRB directed that the information be disclosed without those restrictions.

#### **ANALYSIS**

A public employer generally has a statutory duty to provide a majority representative with information relevant to the employee organization's representational duties including contract administration and grievance processing. Relevance is liberally construed - the information need only be related to the union's function as the collective negotiations representative and appear reasonably necessary for the performance of this function. Hardin and Higgins, Developing Labor Law 856, 859 (4th

Ed. 2001); J.I. Case Co. v. NLRB, 253 F. 2d 149, 41 LRRM 2679 (7th Cir. 1958). Relevance is based on a discovery-type standard; therefore, a broad range of potentially useful information is normally available to the union. State of New Jersey (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶18284 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988).

The rejection of a request to provide information relevant to contract administration is a refusal to negotiate in good faith.<sup>3/</sup> Morris Cty and Morris Coun. No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den. 182 N.J. 427 (2005); Borough of Island Heights and Island Heights PBA Local 352, H.E. No. 98-6, 23 NJPER 554 (¶28276 1997), aff'd 24 NJPER 333 (¶29157 App. Div. 1998); City of Atlantic City, P.E.R.C. No. 89-56, 15 NJPER 11 (¶20003 1988). See also UMDNJ; NJ Transit Bus Operations.

The duty to supply information is not unrestricted. The information must be in the employer's control or possession. State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841

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<sup>3/</sup> The unfair practice charge alleges that the Township's conduct violated N.J.S.A. 34:13A-5.4a(1) through (7). A breach of the duty to supply information violates N.J.S.A. 34:13A-5.4a(5) and derivatively N.J.S.A. 34:13A-5.4a(1). The PBA makes no argument in support of its motion that the facts and law warrant granting summary judgment on any of the other subsections listed in its charge.

(¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988); N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-12, 13 NJPER 661 (¶18249 1987), aff'g H.E. No. 87-65, 13 NJPER 423, 428 (¶18164 1987). An employer may assert, but must prove, that the requested information is confidential. See State of N.J. (OER) and CWA, P.E.R.C. No. 2000-105, 26 NJPER 306, 307 (¶31124 2000); NLRB v. U.S. Postal Service, 888 F.2d 1568 (11th Cir. 1989).

The Act's unfair practice provisions parallel the National Labor Relations Act (NLRA). 29 U.S.C. §158 and §160. Thus private sector cases are an appropriate guide for administering the Act's unfair practice provisions. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1 (1978).

The NLRB decides duty to supply information cases using a totality of the circumstances analysis that considers the complexity and extent of information sought, its availability and the difficulty in retrieving the information. Samaritan Medical Center, 319 NLRB 392, 398, 151 LRRM 1375 (1995); West Penn Power Company, 339 NLRB No. 77, 2003 NLRB LEXIS 377 (2003). An employer will not be ordered to supply information it does not have. Kathleen's Bakeshop, LLC, 337 NLRB 169 (2002).

To assess if the requested information is relevant, the circumstances existing at the time the information is sought must be considered. See NLRB v. United States Postal Service, 128 F.3d 280, 285 n. 6 (5th Cir. 1997). That case also involved

promotions and confidentiality issues. The union filed a grievance on behalf of an employee with high seniority who would have received the position had it not been given to a junior employee. The union sought access to both employees' personnel files to assess whether the employer made "the most rational choice." Unlike most private employees, postal service workers are covered by federal privacy laws. The court refused to enforce an order requiring disclosure of the information, ruling that some of the information was not relevant.<sup>4/</sup>

The cases cited by the PBA that make substantive rulings on the duty to supply information, do so based on a full records established by testimony or complete factual stipulations.<sup>5/</sup> While Commission and NLRB cases show that a majority representative's right to information should be broadly construed, the information must be relevant, and relevance is often a fact sensitive inquiry.

There are unresolved factual issues that are material to the claim that the Township violated its statutory duty to supply

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<sup>4/</sup> The employer had offered to release the information if both employees signed waivers of their rights, but the union sought and obtained an unconditional disclosure order from the NLRB that the Court refused to enforce. Id. at 283, n.2.

<sup>5/</sup> City of Newark, I.R. No. 2002-9, orders a delay of a disciplinary hearing because information sought by the union had not been turned over. The employer was procedurally barred from contesting the contents of the disclosure. Evesham Tp., makes no substantive rulings.

information relevant to the PBA's duties as the majority representative. There were errors in the initial scoring of the lower ranked candidates on the sergeant's list. The employer apparently corrected those mistakes, but whether they gave rise to any issue of contract administration is not clear.

While it is not required that a union actually file a grievance to receive information from the employer, NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), a showing that some or all of the candidates whose scores were adjusted had a reasonable chance of promotion from the list could affect the PBA's claim.<sup>6/</sup>

It is apparent that the change in the ranking of the 5th, 6th and 7th place officers on the sergeant's promotional list prompted the request for information. However, only the top two candidates have been promoted. The Township employs just four patrol sergeants, two of whom were the applicants ranked first and second on the list in question. The Township has asserted that it had no intention of promoting anyone else on the list. Thus, the ranking of the candidates impacted by the adjustments

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<sup>6/</sup> A majority representative is not limited to requesting information or filing grievances only where an employee is denied a promotion. As promotional procedures are negotiable and enforceable through arbitration, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91, (1978), it follows that information necessary to pursue such a grievance, even if it does not challenge the actual promotion decision, is relevant to the majority representative's contract administration responsibilities.

is a valid consideration when assessing the relevancy of the requested information.

A public employer has a non-negotiable managerial prerogative both not to promote from a current list and to restart the promotional process from the beginning. See, respectively, City of Paterson and Paterson Police PBA, 87 N.J. 78, 97-98 (1981) and Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 92 (App. Div. 1981). Given this latitude, and the uncertainty as to whether anyone ranked 5th or below on the 2003 sergeant's list was hurt by the changed scores, the relevance of the information to the PBA's contract administration duties is an unresolved, substantial and material, factual issue.

The employer's defenses also raise substantial and material factual issues. The Township asserts that the PBA's request covers information that is confidential and/or is not in the control of the employer. Specifically, the PBA has requested all test scoring, oral test questions, score sheets, scoring calculations and any other documents used to formulate the final scoring. The written examination was developed by the Chiefs Association which also conducted an oral examination and interviews of the candidates. Two more rounds of interviews were conducted by superior officers and Township officials.

The employer's assertions give rise to these issues:

1. To what extent would compliance with the PBA's request require the cooperation of the Chiefs Association?

2. To what extent would disclosure compromise the security of the tests administered by the Chiefs Association and its ability to use materials it has prepared in future promotional examinations it may conduct for the Township or other clients?

3. To what extent are the materials requested confidential, and, if they are confidential, how can such privacy interests be preserved, and under what circumstances can they be waived?

The undisputed facts are insufficient to resolve the issue of relevancy and evaluate the employer's defenses to disclosure. All of these issues are material to the charge that the employer has breached its statutory duty to supply information to the majority representative.<sup>7/</sup> The PBA is entitled to demonstrate relevancy under the appropriate standard and the employer must be afforded an opportunity to prove its defenses of confidentiality and lack of control. With these substantial and material factual issues unresolved, I cannot conclude, that, as a matter of law, the Township breached its statutory duty to supply information when it denied the PBA's request for "all test scoring, oral test questions, scoring sheets, scoring calculations and other

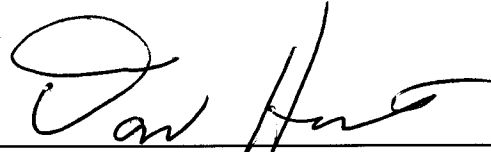
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<sup>7/</sup> The employer has also asserted that disclosure of the interview notes of superior officers would undermine departmental morale. At this stage of the case I am not prepared to say if that concern is a recognized defense to disclosure and/or is pertinent to assessing relevancy.

documents used to formulate the final scoring" of the 2003 promotional process for the rank of sergeant.

**ORDER ON MOTION**

Summary Judgment is denied. The case will be set for hearing.



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Don Horowitz  
Hearing Examiner

Dated: June 3, 2005  
Trenton, New Jersey

As this decision does not fully resolve the issues in the Complaint it may not be appealed to the Commission except by a request for special permission filed within five days of service of this Order. See N.J.A.C. 19:14-4.8(e); N.J.A.C. 19:14-4.6.