

D.U.P. No. 2007-2

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

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and-

Docket No. CO-2006-197

MAPLEWOOD TOWNSHIP PBA LOCAL NO. 44,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge alleging that the Township violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act when it set seniority in rank by qualification rather than by date of hire. The Township had set the ranking in early 2005. The PBA was aware of the ranking at that time but did not file a charge until early 2006. The Director concluded that the charge was untimely and refused to issue a complaint.

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Appearances:

For the Respondent,  
Genova Burns & Vernioia, attorneys  
(Sandro Polledri, of counsel)

For the Charging Party,  
Marc D. Abramson, consultant

REFUSAL TO ISSUE COMPLAINT

On February 6, 2006, Maplewood Township PBA Local No. 44 (PBA) filed an unfair practice charge against the Township of Maplewood (Township), alleging that the Township violated N.J.S.A. 34:13A-5.4a(1) and (5)<sup>1/</sup>. The PBA specifically alleges that the Township unilaterally changed its past practice

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<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; (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."

regarding seniority in rank upon multiple simultaneous promotions.

The Township denies that it violated the Act and asserts that the charge is untimely and that, in any event, the PBA waived its right to negotiate by signing a settlement agreement concerning the multiple promotions issue, and by accepting the Township's seniority ranking when the newly promoted sergeants selected shifts and vacation time in accordance with that ranking.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated June 12, 2006, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. The PBA was granted multiple requests for extensions of time to respond. On July 28, 2006, the PBA filed a response setting forth additional legal argument, but providing no new information to support the charge. On August 8, 2006, the Township filed a timely reply refuting the PBA's additional legal

argument.<sup>2/</sup> Based upon the following, I find that the complaint issuance standard has not been met.

The PBA represents all rank and file and superior officers employed by the Township excluding the Chief of Police. The PBA and Township are parties to a collective negotiations agreement effective from January 1, 2003 through December 31, 2006.

Article V of the parties' agreement is entitled "Retention of Benefits". It provides in part that "all working conditions under which the officers are presently operating shall be maintained and continued by the Employer during the term of this Agreement."

Article X, entitled "Seniority", provides in pertinent part:

Seniority in rank shall be used for purposes of providing preferential treatment for the most senior employee in his respective rank in the selection of vacations, demotions, recalls, scheduling of regular days off and any other substantial employee advantages.

The collective agreement is silent as to how to calculate seniority in rank upon multiple promotions within rank.

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<sup>2/</sup> By letter of August 11, 2006, the PBA questioned the timeliness or appropriateness of the Township's August 8th response. The Township was entitled to respond to the additional PBA arguments as part of the conduct of this investigation. N.J.A.C. 19:14-1.6. It did so quickly without requests for additional time. The Township's August 8th response was not controlled by N.J.A.C. 19:14-2.3. That rule only applies after the Director refuses to issue a complaint, and gives a charging party the opportunity to appeal from the Director's decision.

On February 2, 2005, the parties entered into a settlement agreement resolving an unfair practice charge under Commission Docket No. CO-2004-38 regarding promotional procedures. The parties agreed among other things that the Township could make one final round of promotions the "old way" - e.g. based upon recommendations of the police administration and the governing body's review of personnel files and interviews. The agreement was silent regarding the issue of seniority in rank upon multiple promotions.

On February 15, 2005 at a meeting of the Township Committee, the Township adopted a resolution promoting seven officers to the rank of sergeant. The resolution stated in pertinent part:

**WHEREAS**, it has been determined that the following Police Officers are qualified for the position in the following ranking order set beside their name:

David A. Cross - #1  
Michael A. Marucci - #2  
Michael T. Morrison - #3  
Craig M. Lahey - #4  
Jimmy DeVaul - #5  
Joseph M. Guglielmo - #6  
Dean L. Naddeo - #7

The promoted officers were present at the February 15 meeting and each was given a copy of the resolution by the Town Clerk.

Shortly thereafter, the seven sergeants attended a formal swearing-in ceremony at Town Hall where the resolution was read verbatim. The February 15 promotion represents the first time so many officers had been promoted to the same rank at one time.

Beginning the week of March 14, 2005, the newly promoted sergeants selected their vacations and tours for the remainder of the 2005 calendar year pursuant to the ranking order assigned by the Township Committee by the February 15, 2005 resolution.

On or about March 14, 2005 Vincent DeCicco became the President of the PBA. Prior to this time, DeCicco held the position of PBA secretary but was not involved in labor relations. On April 4, 2005, DeCicco became aware that there was an issue as to seniority arising out of the February 15 promotions. He researched the issue and learned that the last multiple promotion - two officers simultaneously promoted to sergeant - was in February 1994 and, at that time, the officers were assigned seniority in rank by date of hire.

On or about April 11, 2005 DeCicco spoke with Chief Cimino regarding this issue. According to DeCicco, Cimino told him that he did not see a problem with honoring seniority by hire date as long as the Township Committee approved how it would be implemented.

Subsequently, on or about May 9, 2005, when DeCicco had not heard from Cimino, he spoke to Mayor Profeta who allegedly told DeCicco that neither he nor the Township Committee had a problem with applying seniority in rank by hire date for shift and vacation selection. According to DeCicco, the Mayor as well as the Chief told him that they simply had to decide whether it

should be done by resolution, ordinance, or by a departmental rule or regulation.

Discussions continued periodically regarding the status of the seniority in rank issue. DeCicco explains that "each and every time I raised said issue either the Mayor or Chief informed me that they were working on it."<sup>3/</sup>

DeCicco sets forth the following course of events in his affidavit:

8. There came a time sometime in October 2005 that a PBA schedule committee was developed with the Police Administration in the hope of implementing a trial schedule beginning in January 2006. It was recognized that the implementation of said schedule would greatly affect the recently promoted Sergeants if they were not placed in their respective rank by seniority. Having not heard from the Mayor or the Chief, I wrote a letter to the Mayor on November 4, 2005. I received no response.

9. It should be noted that monthly PBA meetings were held during my term as President. At these meetings, the issue regarding seniority was discussed with the members.

10. On or about January 5, 2006, for the first time, I received a verbal response from the Chief that he had a problem with the concept of using seniority by rank for multiple promotions.

On or about January 19, 2006 DeCicco wrote to the Chief indicating that the PBA considered his refusal to accept seniority by rank for multiple promotions to be a unilateral

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<sup>3/</sup> Affidavit of DeCicco at paragraph 7.

change in terms and conditions of employment and demanded negotiations. When the Chief did not respond to the letter, the PBA filed the instant charge on February 6, 2006.

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Based upon the above, I dismiss the instant allegations for failure to meet our complaint issuance standard. The Act provides for a six-month statute of limitations for unfair practice charges to prevent the litigation of stale claims.<sup>4/</sup>

N.J.S.A. 34:13A-5.4(c) states in pertinent part:

. . . 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 months period shall be computed from the day he was no longer so prevented.

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair practice occurred, provided the person(s) affected thereby are aware of the action. The date of action is known as the "operative date," and the six-month limitations period runs from that date. To be timely, a charge must ordinarily be filed within six months of the operative date.

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<sup>4/</sup> The PBA's contends that untimeliness is not a consideration in the issuance of a Complaint where the allegations, if true, would constitute a violation of the Act. The six month statute of limitation is a statutory, not discretionary, requirement. Borough of Manasquan, H.E. No. 97-1, 22 NJPER 297, 301 (¶27159 1996). It is a threshold issue which must always be considered by the Commission.



Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the charging party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on its rights. The Court still expected charging parties to diligently pursue their claims.

Here, the charge was filed on February 6, 2006. The charge alleges that the Township changed the practice of calculating seniority in rank where there are multiple promotions. Specifically, the charge alleges that when the seven officers were promoted to sergeant on February 15, 2005, their seniority in rank as to each other should have been calculated, as in the past, by date of hire, not by order of qualification for promotion. The PBA was aware of the ranking, and the basis of the ranking, in February 2006. In fact, DeCicco knew by April 4, 2005 that the ranking system for the new sergeants had been set on February 15, 2005 by qualification for the position rather

than by date of hire which he claimed was the prior practice. Thus, the operative date for DeCicco/the PBA to file a charge over an alleged change in determining seniority ranking began on February 15, but may have been as late as April 4, 2005, making the deadline for filing a charge as late as October 4, 2005.

The PBA contends that it engaged in discussions with the Chief and Mayor throughout 2005 and was led to believe that the Township agreed with its position and was willing to restore the earlier seniority calculation method. It maintains that it is only when Chief Cimino told DeCicco on January 5, 2006 that the Chief had a problem with the concept of calculating seniority in rank by date of hire that the unfair practice occurred. The PBA argues, therefore, that the operative date in this instance was January 5, 2006. Thus, it contends that its charge is timely.

The Township disagrees. It argues that the PBA and the seven officers were aware of the Township's position with respect to seniority in rank on February 15, 2005, the date upon which the officers were promoted and ranked as evidenced by the Township's resolution, which did not assign seniority by dates of hire.

Both the PBA and the Township cite County of Somerset, H.E. No. 2005-4, 30 NJPER 377 (¶120 2004) in support of their respective positions. In Somerset, a hearing examiner granted a motion for summary judgment and dismissed a charge as untimely. The charge alleged that the employer and union agreed to a

definition of seniority which deprived charging party of a promotion to the rank of sergeant. The hearing examiner determined that the charge was filed over six months after the date that the union and employer reached their final positions with regard to the number of seniority points charging party was entitled to receive as a promotional candidate. He further determined that since that date, there were no factual or legal material change in the union's or employer's position, and charging party alleged no facts indicating that he was prevented from timely filing his charge.

Relying on Somerset, the PBA contends that the operative date was not until the Township made a "final decision" against the PBA, namely when Chief Cimino told DeCicco in January 2006 that the Township would not agree with the PBA's request to calculate seniority in rank by hire date. The Township disagrees. It points out that in Somerset, the operative date was found to be the date charging party's promotional seniority scores were reduced and seniority points were posted. The Township therefore argues that here, the operative date is the February 15, 2005 resolution establishing the seniority ranking among the newly promoted sergeants.

The Township's position has merit. The PBA and the individual officers were aware as early as February 2005 that the Township had ranked them by qualification for promotion to the position, a ranking which did not reflect seniority by date of

hire. The resolution approving the promotions clearly sets forth the officers' rankings. Each officer was present at the February 15, 2005 meeting and was given a copy of the resolution. If there was a change in practice, it occurred on February 15, 2005.

Even if the newly promoted sergeants were unclear about how the Township intended to treat their seniority in rank after the February meeting, they certainly had notice of the Township's intentions when they made their 2005 tour and vacation picks in March 2005 consistent with the rankings set at the time of their promotions.

PBA President DeCicco admits that in April 2005 he was aware that seniority in rank growing out of the February 2005 promotions was an "issue". He began a dialogue with first the Chief and then the Mayor in order to resolve the issue. Although, in DeCicco's opinion, both the Chief and Mayor agreed with the PBA's position in this regard, no settlement was reached which would have restored the old method of counting seniority; that is, no facts support that vacation and tour selections for 2005 were redone as a result of the discussions or that the parties entered into an agreement to recalculate the seniority in rank of the seven sergeants in the future.

Additionally, despite the discussions with the Chief and Mayor, DeCicco concedes there were continuing discussions with the membership concerning seniority during monthly union meetings. Also, in October 2005, when a joint management-labor

committee was formed to discuss implementation of a new trial work schedule in 2006, the PBA recognized that the implementation of the new schedule would affect the newly promoted sergeants if their seniority was not recalculated. DeCicco then wrote the Mayor about this concern.

It is clear from the continuing discussions both internally among PBA members and externally between DeCicco as PBA representative and the Chief and Mayor that the PBA knew that by April 2005 there was no resolution of the issue. Nothing prevented the PBA from filing this charge within six months of February or even April 2005 after the picks were made based on the February listing. The Chief's January 2006 statement to DeCicco did not change any practice. To the extent there was a prior practice of ranking seniority in position by date of hire, that practice was unilaterally changed by the Township on February 15, 2005. The PBA knew that then, and DeCicco certainly knew it by April 4, 2005. The Chief's January 2006 statement could only trigger a new operative date of the seniority issue if the claimed practice of seniority by hire date had already been restored and the Chief changed it back again.<sup>5/</sup>

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<sup>5/</sup> A new operative event would also not be triggered by the 2006 tour and vacation selections. See generally, Bowen Products Corp., 113 N.L.R.B. 731 (1955) cited with approval by the U.S. Supreme Court in Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. National Labor Relations Board, 362 U.S. 411 (1960). In Bowen, an employee recalled from layoff was improperly  
(continued...)

Nevertheless, the 2005 settlement discussions did not prevent the PBA from protecting its interests by filing an unfair practice charge within six months from February 15 to April 4, 2005. The Commission has held that pursuing grievances and voluntary resolution of alleged unfair practices does not constitute a tolling of the six-month statute of limitations. New Jersey Dept. of Human Services, P.E.R.C. No. 85-48, 10 NJPER 638 (¶15306 1984); Camden Vocational Bd. of Ed., P.E.R.C. No. 83-28, 8 NJPER 558 (¶13256 1982); see also City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993); Monmouth Cty. Sheriff, D.U.P. No. 2003-3, 28 NJPER 395 (¶33141 2002).

Citing Kaczmarek, the PBA requests that I toll the statute of limitations because of equitable considerations, namely that DeCicco was newly elected as President when the seniority-in-rank issue arose, and he was induced by the Mayor and Chief to believe the parties had reached an agreement on this issue. The Township disputes that an agreement was reached and that DeCicco was misled.

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5/ (...continued)  
placed at the bottom of a seniority list. He attempted to obtain his proper seniority rating, but several months later was laid off again. Had his seniority been properly calculated originally, he would not have been laid off. The charge was filed within six months of the layoff, but more than six months after the original determination of seniority status. The Board dismissed the complaint as untimely finding that the operative event - the seniority determination - was outside the statute of limitations, and the layoff was a consequence of the claimed unfair practice which does not give rise to a timely filing.

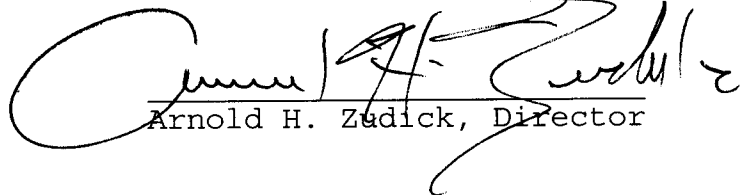
In Kaczmarek, the Court tolled the statute of limitations because the plaintiff diligently pursued his claim and timely filed a charge, albeit in an inappropriate forum. The Court determined that the plaintiff had not slept on his rights. In this instance, the facts do not support that an agreement was reached nor do the facts demonstrate that DeCicco was prevented, induced or misled from taking legal action during 2005 to protect the rights of his membership by filing a charge while still pursuing a settlement.

Based on the above, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegation of this charge.<sup>6/</sup>

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Arnold H. Zedick, Director

DATED: September 1, 2006  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 11, 2006.

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<sup>6/</sup> N.J.A.C. 19:14-2.3