

H.E. NO. 2010-1

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

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and-

Docket No. CO-2006-197

MAPLEWOOD TOWNSHIP PBA LOCAL 44,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Township of Maplewood violated 5.4a(1) and (5) of the Act when it unilaterally prescribed seniority in rank of seven officers simultaneously promoted to sergeant on February 15, 2005. The Hearing Examiner further recommends that the Township be ordered to rescind the prescribed seniority in rank and re-rank the officers according to their total continuous service to the Township from their date of hire.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Public Employer,  
Genova, Burns & Vernoia, attorneys  
(Sandro Polledri, of counsel)

For the Charging Party  
Marc D. Abramson, Consultant

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On February 6, 2006, the 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 Act) when it unilaterally changed its past practice regarding seniority in rank upon multiple

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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."

simultaneous promotions to sergeant on February 15, 2005. The Township denies that it violated the Act and asserts that the charge is untimely.

In a decision dated September 1, 2006, the Director of Unfair Practices dismissed the charge as untimely, Maplewood Tp., D.U.P. No. 2007-2, 32 NJPER 296 (¶123 2006) (C-3).<sup>2/</sup> The PBA appealed the Director's decision to the Commission. The Commission remanded the charge to the Director to issue a complaint preserving the timeliness issue for litigation at a plenary hearing. Maplewood Tp., P.E.R.C. No. 2007-28, 32 NJPER 360 (¶151 2006) (C-4).

On December 20, 2006, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). The Township filed its Answer and Affirmative Defenses on January 16, 2007 (C-2). The parties attempted to resolve the dispute. Once it became apparent that settlement efforts were not going to be successful, the parties requested time to conduct discovery, which I granted. Answers to the Township's first set of interrogatories were completed on January 28, 2008. A pre-hearing conference and hearing scheduled for February 20, 2008 was adjourned at the request of the parties so that they could

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<sup>2/</sup> "C" refers to Commission exhibits, "J" designates exhibits jointly submitted by the parties, "CP" refers to Charging Party's exhibits and "R" refers to Respondent's exhibits, all of which were received into evidence at the hearing.

complete discovery. After a few more mutually agreed upon adjournments, I conducted a hearing on January 21 and April 1, 2009. At the hearing, the parties presented evidence and legal argument. Post hearing briefs were simultaneously submitted on June 5, 2009. Based upon a review of the record, I make the following:

#### FINDINGS OF FACTS

1. The Township is a public employer within the meaning of the Act (1T12).<sup>3/</sup>

2. The PBA is an employee representative within the meaning of the Act (1T13). At the time of the filing of the charge, the PBA represented all of the police ranks, except the police chief, in one negotiations unit. The ranks are patrolman, sergeant, lieutenant and captain (J-1; J-2; J-3; J-4; J-5; 1T21-1T22).

I take administrative notice that the Township filed a Petition for Clarification of Unit on April 25, 2006 which resulted in the Director of Representation ordering that the PBA's negotiations unit be clarified to exclude captains, lieutenants and sergeants. Maplewood Tp., D.R. No. 2007-13, 33 NJPER 105 (¶36 2007), req. rev. den. Maplewood Tp., P.E.R.C. No. 2008-2, 33 NJPER 203 (¶72 2007). The Township voluntarily

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<sup>3/</sup> "T" represents the transcript, preceded by a "1" or "2", signifying the first or second day of the hearing, followed by the page number(s).

recognized the Maplewood Township PBA 44A Superior Officers Association as the exclusive majority representative of all superior officers except the police chief sometime in 2007. The Association joins in this unfair practice charge (1T7-1T9; 1T21-1T23).

3. The Township and PBA have been parties to five labor agreements from January 1, 1991 until December 31, 2006. Each of the five successive contracts contains the identical Article X. Seniority clause which provides:

Seniority is defined as an employee's total length of continuous service with the Township beginning with his date of hire. It is agreed that any employee who voluntarily resigns or who is discharged for just cause shall suffer loss of seniority rights. Any employee who is granted a leave of absence without pay shall not enjoy such credit while he is on such leave.

Senior 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.

When a member retires and is replaced by a new hiree, all members within said rank shall succeed in the days off schedule to the entitlement of the next senior officer.  
[J-1; J-2; J-3; J-4; J-5; 1T41-1T43].

All five agreements also contain the same Article V.

Retention of Benefits clause which states:

Except as otherwise provided herein, all working conditions under which the officers are presently operating shall be maintained

and continued by the Employer during the term of this Agreement at not less than the highest standards in effect at the commencement of these negotiations resulting in this Agreement.

The provisions of all municipal ordinances and resolutions pertaining to the Police Department, except as specifically modified herein, shall remain in full force and effect during the term of this Agreement and shall be incorporated in this Agreement as if set forth herein at length. [J-1; J-2; J-3; J-4; J-5; 1T43-1T44].

4. Determining which officer is senior in rank is important because it is used to delineate the order in which tour shifts and vacation times are selected, that is, the more senior officer in rank is permitted to make his selections ahead of the less senior officers in the same rank. (1T38-1T39; 1T80-1T81; 2T11).

5. Between February, 1992 and February, 2005, the Township promoted more than one officer to the same rank at the same time on three occasions (1T51-1T52; 1T88; 1T91, 1T107; 2T54). On February 4, 1992, the Township promoted Patrolmen James V. Wavra and Walter Mueller to sergeant (CP-1; 1T31; 1T49; 1T75-1T76; 1T85-1T86). In February, 1998, the Township promoted Sergeants Joseph Tracey and Walter Mueller to the rank of lieutenant (1T33; 1T50; 1T87-1T88; 1T101). In each instance, the officer with the most continuous service with the Township from date of hire was considered senior in rank to the other officer promoted at the

same time (1T29-1T30; 1T79-1T80; 1T82; 1T86; 1T88; 1T102). This allowed the officer senior in rank to select his tour shift and vacation ahead of the officer with whom he was promoted (1T38-1T39; 1T80-1T81; 2T11).

While the officers who were promoted did not observe or participate in the promotional selection deliberations, it was not an accident or coincidence that the more senior officers involved in the multiple promotions made in 1992 and 1998, were given seniority in rank (1T62-1T63; 1T91-1T92; 1T104). I credit Lieutenant Wavra's un rebutted testimony that he was initially given seniority in rank over Captain Mueller when they were promoted together to sergeant in 1992, though Mueller was more senior on the job. Within a week of the promotion, then-Police Chief Richard Richardella reversed the ordering of Wavra and Mueller with regard to seniority in rank because Mueller had more continuous time on the job with the Township (1T80-1T82).<sup>4/</sup> I also credit Captain Mueller's and Lieutenant Tracey's testimony that seniority on the job was the factor used to distinguish

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<sup>4/</sup> I recognize that Lieutenant Wavra's testimony regarding his conversation with Police Chief Richardella is hearsay. I nevertheless make the finding of fact because there is no other reasonable explanation for the quick reversal in ranking of Wavra and Mueller. This finding is also supported by Captain Mueller's and Lieutenant Tracey's testimony and the fact that the senior officer invariably maintained his seniority in all multiple promotions until the February 15, 2005 promotions.

between officers simultaneously promoted to the same rank (1T86-1T88; 1T93-1T94; 1T101-1T102).

6. Seniority on the job was used to distinguish between officers promoted to the same rank at the same time until the third multiple promotion made on February 15, 2005 (1T30-1T31; 1T59; 1T93-1T94; 1T107-1T108). In settlement of a prior unfair practice charge, this multiple promotion was to be made like all others before it, or as the parties referred to it in a settlement agreement, "the old way" (J-6; 2T15). The February 15, 2005 multiple promotion differed from the other two prior multiple promotions made in 1992 and 1998 in that it involved seven instead of two officers and seniority on the job was not used to determine seniority in rank of the promoted officers. The Township Committee, acting as the promotional selection committee, determined the order of seniority in rank (1T29-1T31; 1T51-1T52; 1T87-1T89; 1T163; 2T14-2T16; 2T19, 2T54; 2T73; 2T89). This precipitated the PBA's filing of the subject unfair practice charge.

On February 15, 2005, the following patrolmen were promoted to sergeant in this order of seniority in rank (in descending order, from most to least senior) designated by the Township Committee:

David A. Cross  
Michael A. Marucci  
Michael T. Morrison  
Craig M. Lahey

Jimmy DeVaul  
Joseph M. Guglielmo  
Dean L. Naddeo

[J-7; R-2; R-3; 1T34; 2T19; 2T22-2T23].

Had seniority on the job been utilized to determine seniority in rank, the order of promoted officers (from most to least senior) would be:

David A. Cross  
Michael A. Marucci  
Craig M. Lahey  
Michael T. Morrison  
Joseph M. Guglielmo  
Dean L. Naddeo  
Jimmy DeVaul [1T35-1T37]

Sergeants Lahey, Guglielmo and Naddeo would benefit from a reordering of seniority in rank based upon seniority on the job while Sergeants Morrison and DeVaul would end up in a less preferred position to select work shifts and vacation times (R-4; 1T37, 1T57; 2T36-2T38).

7. There was no evidence presented to suggest that anything but seniority on the job was used to distinguish between simultaneously promoted officers in the same rank or that the Township had prescribed the ordering of promoted officers in rank before the February, 2005 multiple promotions. However, evidence was introduced by the Township which established that the Township had on three occasions (January 15, 2003, February 25, 2005 and June 3, 2005) prescribed seniority in rank of patrolmen who were hired on the same day (R-8; R-9; R-10; 2T52-2T53).

8. Patrolman Vincent DeCicco became president of the PBA in March 2005 and served in that capacity until June, 2006 (1T106). In April, 2005, he learned of the issue regarding seniority in rank with the February, 2005 sergeants promotions. He met with Police Chief Robert Cimino in an effort to resolve the ordering of the promoted sergeants by using continuous service on the job to distinguish seniority in rank. DeCicco testified that he met with Cimino about six times between April and November, 2005, or about once a month, to discuss resolution of this issue (1T107-1T108; 1T114-1T115; 1T137-1T138). Cimino did not deny meeting DeCicco that many times, but could only recall two such meetings, one in April, 2005, and one in the fall of 2005 (2T31-2T34; 2T77). However, the two agreed on the substance of what was said during those meetings: that Chief Cimino had no problem reordering the promoted sergeants based upon seniority on the job but it was up to the Township Committee to authorize the change (1T108; 1T110; 1T138-1T139; 1T158-1T160; 2T32; 2T34-2T35; 2T77-2T78; 2T80-2T81; 2T89). I also credit DeCicco's unrebutted testimony that Cimino indicated that the Township Committee was working on resolving the seniority in rank issue and that it was trying to decide whether to implement the change by Township resolution, ordinance or departmental regulation (1T110-1T111; 1T114-1T116; 1T138-1T139).

9. DeCicco wrote a letter dated April 18, 2005, to the then-mayor of Maplewood, Fred Profeta, explaining the PBA's position on seniority in rank for the recently promoted sergeants and requesting that the sergeants be reordered in accordance with their seniority on the job. DeCicco did not receive a reply to his letter (CP-3; 1T111-1T113). DeCicco testified that he either spoke or met monthly with Profeta between May and November, 2005, about resolving the promoted sergeants' seniority in rank. DeCicco's conversations with former Mayor Profeta were separate and apart from those he had with Chief Cimino (1T111; 1T114-1T115; 1T130-1T134). DeCicco also testified that Mayor Profeta assured him that the Township would reorder the promoted sergeants' seniority in rank based on seniority on the job once the Township Committee figured out how best to implement the change (1T111; 1T113-1T114; 1T116; 1T135-1T137).

I credit DeCicco's testimony. He was a credible witness. The Township's only witness, Chief Cimino, corroborated the substance of DeCicco's conversations with him. The Township did not call Mayor Profeta as a witness or refute DeCicco's testimony regarding his conversations with the Mayor with any other evidence. Therefore, I find that as late as the fall of 2005, probably November, DeCicco was led to believe by the Township that the seniority in rank for recently promoted sergeants would be changed based upon seniority on the job.

10. In October, 2005, the PBA began working with the police administration in developing a trial work schedule for 2006. In developing the work schedule, officers needed to select their tour shifts and vacation leaves so resolution of the newly promoted sergeants' seniority in rank became that much more urgent (1T116-1T120). Then-PBA President DeCicco met with the police administration and Chief Cimino to discuss the unresolved issue of sergeants' seniority in rank. He did not receive a definitive answer so he wrote a letter dated November 4, 2005 to then-Mayor Profeta. DeCicco did not receive a reply to his letter (CP-4; 1T120-1T123).

The PBA did not pursue the issue during the holiday season (from Thanksgiving until the end of 2005). However, during the first week of January, 2006, DeCicco met with Cimino to discuss the reordering of the promoted sergeants. In that meeting and for the first time, DeCicco was informed that seniority on the job would not be used to reorder the promoted sergeants' seniority in rank. Cimino also told him that the Township would not change the originally prescribed order of seniority in rank. Up until this time, neither the Chief or Mayor had indicated that there would be a problem with changing the order of the promoted sergeants based on seniority (the longest continuous service with the Township) (1T123; 1T161; 1T163; 1T175).

11. After their meeting, DeCicco sent a letter dated January 19, 2006 to Cimino demanding negotiations on the issue of seniority in rank for those sergeants promoted in February, 2005 (CP-5; 1T124). When he did not get a response, the PBA filed the subject unfair practice charge on February 6, 2006 (C-1; 1T125).

#### ANALYSIS

The PBA maintains that it has filed a timely unfair practice charge and that the evidence demonstrates that the Township changed the parties' practice of using seniority on the job to determine seniority in rank on the occasions of multiple promotions. The Township argues that the charge is untimely and that it has the managerial prerogative to rank the officers as part of the promotional process. It also contends that the PBA did not establish that the parties had a practice of using employee seniority on the occasions of multiple promotions.

For the reasons that follow, I find that the unfair practice charge is timely and that the Township violated subsections 5.4a(1) and (5) of the Act when it prescribed seniority in rank of the newly promoted sergeants on February 15, 2005.

#### Timeliness

A Complaint cannot issue if the alleged unfair practice occurred more than six months before the filing of the charge, unless the charging party was prevented from doing so. N.J.S.A. 34:13A-5.4(c). The six month limitation is a statutory, not a

discretionary, requirement. Bor. of Manasquan, H.E. No. 97-1, 22 NJPER 297 (¶27159 1996). Settlement discussions do not toll the statute of limitations. Maplewood Tp., P.E.R.C. No. 2007-28, 32 NJPER 360 (¶151 2006) and Monmouth Cty. Sheriff, D.U.P. No. 2003-3, 28 NJPER 395 (¶33141 2002). In considering the issue of timeliness in this very case, the Commission wrote that if the Township's representatives had agreed to the PBA's position and that only the details of implementing the settlement needed to be worked out, the PBA's charge would be timely. Maplewood Tp. The Commission reasoned that under those circumstances the PBA would have no reason to think that a dispute still existed and would therefore have no cause to file an unfair practice charge. Id.

Here, PBA President DeCicco was assured by Township representatives Police Chief Cimino and Mayor Profeta that the newly promoted sergeants would be re-ranked according to seniority on the job and that the Township Committee was just trying to figure out the best way to implement the change. He was assured of this at least through the fall of 2005 and wasn't told otherwise until his conversation with Chief Cimino during the first week in January, 2006. The unfair practice charge was filed on February 6, 2006.

The Township argues that the charge should be dismissed because the PBA knew since February 15, 2005 the order of the promoted sergeants and by not filing a charge until almost a year

later the PBA slept on its rights. Further, the Township contends that PBA President DeCicco knew all along that neither Chief Cimino nor Mayor Profeta had the authority to make the change but rather it would take the act of the Township Committee.

The Township presented those arguments to the Commission. The Commission has ruled that if the evidence supports the PBA's position on timeliness, the charge shall be considered timely filed. Maplewood Tp. I have determined that the facts surrounding this issue are substantially as alleged by the PBA. Township representatives agreed to re-rank the newly promoted sergeants in accordance with the PBA's view of how it had been done in the past (based on seniority on the job) and indicated that the Township Committee was working on how best to implement the change. Therefore, I conclude that the charge is timely.

#### Managerial Prerogative

The New Jersey Supreme Court outlined the steps for a scope of negotiations analysis for police and firefighters in Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 92 (1981).<sup>5/</sup> There the Court stated:

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<sup>5/</sup> The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [Id. at 92-93; citations omitted]

The Courts and Commission have repeatedly held that promotional criteria are not negotiable while promotional procedures are negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981); City of Orange, P.E.R.C. No. 2003-91, 29 NJPER 283 (¶85 2003); Town of Westfield, P.E.R.C. No. 94-5, 19 NJPER 413 (¶24184 1993); Montclair Tp., P.E.R.C. No. 90-9, 15

NJPER 499 (¶20206 1989). As the Court in Dept. of Law & Public Safety, Div. of State Police noted:

Thus, with respect to candidates for promotion, [the employer] is free to establish standards involving its own assessments of subjective factors -- e.g., intelligence, courage, ability to deal with people -- as well as objective criteria -- e.g., seniority, experience -- and to attribute as high or low a percentage to the subjective or objective criteria, respectively, as it deems fit. Id. at 90.

In applying the scope of negotiations analysis, the Commission has also held that seniority in vacation selection and seniority-based shift selection are mandatorily negotiable subjects of bargaining where all qualifications are equal and managerial prerogatives are not otherwise compromised. City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2004); City of Orange. In the City of Newark, the City attempted to restrain arbitration of a grievance filed by the Newark Firefighters Union. The grievance sought to enforce a past practice of permitting firefighters to choose shift assignments based on seniority when all qualifications are equal. In denying the City's request to restrain binding arbitration and assuming for the sake of analysis that a past practice existed, the Commission stated, "Absent an articulated managerial need to deviate from the

alleged seniority system, the Union may seek to enforce the claim through binding arbitration." Id. at 512.

Here, the Township argues that it has a managerial prerogative to rank the promoted sergeants in a particular order so that the higher ranked sergeants would be able to make tour selections and vacation picks before the lesser ranked sergeants. I disagree. The case law does not support the Township's position. The Township has the prerogative to set the promotional criteria and rank the candidates in order to determine whom it will promote to sergeant. The ranking can be used in the selection process. But once the Township promotes officers to sergeant, the PBA can demand to negotiate a seniority-based system of tour selections and vacation picks where qualifications are equal. The Township has not asserted that the issue is preempted by legislation or that special skills are needed on certain shifts. Therefore, I do not see how negotiations on this subject would substantially limit the Township's policymaking powers. The Township is still free to promote whomever it thinks is most qualified. I do not find that the Township has a general or blanket managerial prerogative to prescribe the order in which the newly promoted sergeants select their tour shifts and vacation time.

Past Practice

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Middletown Tp., P.E.R.C. No. 98-77 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

In Middletown Tp., the Commission discussed three types of cases involving allegations that an employment condition has been changed:

In the first type of case, the representative alleges that the employer agreed to provide a benefit by an express contractual commitment or by an implied contractual commitment based on an established practice. Hill and Sinicropi, Management Rights, 20-22 (1986). To prove an implied commitment, the representative must show that the practice has been "(1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Id. at 23-24. If it succeeds, the employer will be bound to maintain the established past practice during

the life of the contract. Section 5.3's duty to negotiate over proposed modifications is not at issue because there is nothing to negotiate -- the representative claims it already has a binding contractual right. The Commission therefore usually defers such contractual claims to the parties' negotiated grievance procedures to resolve. State v. Council of N.J. State Coll. Locs., 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 326 (1978).

In the second type of case, an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim, or cannot prove, an express or implied right to impose that change without negotiations. Such a change triggers the duty to negotiate under section 5.3. As stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment . . . even though that practice or rule is not specifically set forth in a contract. . . . Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

Thus, unlike in the first type of case, the representative need not show an actual contractual entitlement or a binding past practice. Indeed if an entitlement or binding past practice could be shown, what would be left to negotiate? To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating.

In the third type of case, the employer asserts that the representative has clearly waived any right to negotiate. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

This case involves the first two types of cases delineated in Middletown Tp. The third kind of case is not involved here. The PBA argues that Article X, entitled Seniority, of the parties' contract requires the Township to honor seniority in multiple promotions and also claims that the Township unilaterally changed the existing practice of using seniority on the job to determine seniority in rank in multiple promotions.

The Township disputes the PBA's contract claim and asserts that the evidence did not establish a past practice. The Township contends that Article X, Seniority of the parties' contract is silent with regard to seniority in rank upon simultaneous multiple promotions. The Township argues that the first paragraph of Article X defines overall seniority with the employer and the second paragraph just states that seniority in rank will be used for providing preferential treatment in the selection of vacations and any other substantial employee advantages. It does not define how an officer attains seniority in rank, the Township maintains. The Township points out that an officer with longer continuous employment and thus more senior as defined in paragraph one could be lower in seniority in rank if

he was promoted into a higher rank after an officer with less continuous service with the Township.

For the reasons espoused by the Township, I agree that Article X of the parties' contract does not contemplate the issue at hand -- how to determine seniority in rank with simultaneous multiple promotions. The contract does not clearly set this term and condition of employment.

Having concluded that seniority in rank in multiple promotions is not established by the parties' contract, I will examine whether it is an existing employment condition which cannot be changed prior to negotiations or the second type of case described in Middletown Tp.

Simultaneous multiple promotions into the same rank is a rare occurrence in the Township. Based on the collective memories of all witnesses, it had been done only twice before, in 1992 and 1998, prior to the 2005 multiple promotions. The undisputed evidence demonstrated that every time multiple promotions were made into the same rank, the officer with the most continuous service with the Township (or senior officer) maintained his seniority in rank over the less senior promoted officer. Using seniority in the 1998 multiple promotion reinforced the employment condition created by its use in the 1992 multiple promotion. Though it happened only twice, seniority on the job was invariably used to determine seniority

in rank in multiple promotions. I therefore find it to be an existing working condition which cannot be changed without first negotiating.

The Township argues that the February, 2005 multiple promotions differed from all of the previous ones in that it involved seven officers instead of two. It contends that the 2005 promotion of seven officers is more akin to the multiple initial appointment of officers where the Township has established seniority than the two prior multiple promotions. The Township also argues that there is no direct evidence that seniority on the job was used by the Township Committee to distinguish between promotional candidates because none of the witnesses observed or took part in the promotional deliberations.

I do not find the Township's arguments to be persuasive. The number of simultaneously promoted officers into the same rank is not material. The fact remains that a hundred percent of the time it was done the most senior promoted officer retained his seniority in rank. The fact that the Township has in the past prescribed the seniority of new hires is a completely different issue than the one before me. Whether that is a mandatorily negotiable subject and whether the PBA has waived its right to negotiate over it is not for me to decide.

During the hearing, the Township had the opportunity to introduce evidence which shed light on its thought process in the

earlier two multiple promotions. It chose not to do so. Based upon the uncontroverted and credible testimony of Lieutenants Wavra and Tracey, and Captain Mueller, I have found that seniority on the job was used to determine seniority in rank in simultaneous multiple promotions. Accordingly, I further find that the Township violated 5.4a(1) and (5) of the Act when it unilaterally changed the way in which simultaneously promoted officers were given seniority in rank.

As I have not found a breach of an express or implied contractual commitment, I cannot order the restoration of the status quo for the life of the parties' contract. I am limited to enforcing the statutory obligations under section 5.3, restoring the status quo before the Township made the change in seniority in rank and ordering that no further changes be made before the parties first negotiate the subject. Bridgewater Tp., P.E.R.C. No. 2006-62, 32 NJPER 46 (¶24 2006), rev'd 33 NJPER 155 (¶55 App. Div. 2007); Middletown Tp.

#### RECOMMENDATION

I recommend that the Commission find that the Township violated subsections 5.4a(1) and (5) of the Act and order that the status quo ante be restored by ranking the officers promoted to sergeant on February 15, 2005 in the order of their seniority measured by their total continuous service to the Township from their date of hire. I also recommend that the Commission order

that no further changes be made to determine seniority in rank for simultaneously promoted officers without negotiations.

**RECOMMENDED ORDER**

I recommend that the Commission ORDER that:

A. The Township of Maplewood cease and desist from:

1. Interfering with, restraining or coercing its police officers in the exercise of rights guaranteed under the Act.

2. Refusing to negotiate in good faith with the PBA over terms and conditions of employment of its members, particularly by establishing seniority in rank of simultaneously promoted officers to sergeant without negotiations.

B. That the Township take the following affirmative action:

1. Rescind the unilaterally prescribed seniority in rank of the seven officers simultaneously promoted to sergeant on February 15, 2005 and establish their seniority as sergeants based upon seniority on the job (in the order of their total continuous service to the Township from their date of hire).

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized

representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

  
\_\_\_\_\_  
Perry O. Lehrer  
Hearing Examiner

DATED: July 8, 2009  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 20, 2009.



# NOTICE TO EMPLOYEES



**PURSUANT TO  
AN ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE  
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,  
AS AMENDED,**

**We hereby notify our employees that:**

**WE WILL NOT** interfere with, restrain or coerce our police officers in the exercise of rights guaranteed under the Act.

**WE WILL NOT** refuse to negotiate in good faith with the PBA over terms and conditions of employment of its members, particularly by establishing seniority in rank of simultaneously promoted officers to sergeant without negotiations.

**WE SHALL** rescind the unilaterally prescribed seniority in rank of the seven officers simultaneously promoted to sergeant on February 15, 2005 and establish their seniority as sergeants based upon seniority on the job (in the order of their total continuous service to the Township from their date of hire).

Docket No. CO-2006-197

Township of Maplewood  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"