

P.E.R.C. NO. 83-134

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-82-142-65

PROFESSIONAL FIRE OFFICERS
ASSOCIATION OF NEWARK, LOCAL
1860, I.A.F.F., AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint alleging that the City of Newark violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it did not promote a battalion chief to deputy chief and when it transferred that employee to roving battalion chief. The Commission concludes that the Professional Fire Officers Association of Newark, Local 1860 did not prove by a preponderance of the evidence that anti-union animus motivated these personnel actions.

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Appearances:

For the Respondent, John J. Teare, Esq.,
Corporation Counsel (Rosalind L. Bressler, Esq.)

For the Charging Party, Brian C. Doherty, Esq.

DECISION AND ORDER

On December 17, 1981, the Professional Fire Officers Association of Newark, Local 1860, I.A.F.F., AFL-CIO ("Local 1860") filed an unfair practice charge against the City of Newark ("City") with the Public Employment Relations Commission. The charge alleged, in pertinent part, that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended, ("Act"), specifically subsections 5.4(a)(1), (2), (3), (4), and (7),^{1/} when: (1) on June 13, 1980, it transferred

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

Charles Plath, a battalion chief, to the position of roving battalion chief and (2) on April 27, 1981, it failed to promote Plath to the position of Deputy Chief allegedly because of Plath's activities on behalf of Local 1860.

On January 11, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On January 25, 1982, the City filed an Answer in which it denied that it discriminated against Plath because of his union activities.^{2/}

On February 26, April 21, April 23, and June 23, 1982, Commission Hearing Examiner Alan R. Howe conducted a hearing and afforded all parties an opportunity to present evidence, examine witnesses, and argue orally. All post-hearing briefs were filed by August 23, 1982.

On November 12, 1982, the Hearing Examiner issued his recommended report and decision. H.E. No. 83-14, 9 NJPER 1 (¶14000 1982). He found, based in large part on his assessment of the credibility of the witnesses, that the City's personnel actions concerning Plath were not substantially motivated by his union activities. In particular, he found that the Chief of the Fire Department detailed Plath to the post of roving battalion chief on June 13, 1980 primarily because of a confrontation he had with a Deputy Chief the previous day and that the Director

^{2/} The City did not question the timeliness of the charge under N.J.S.A. 34:13A-5.4(c) because the parties had previously settled a court suit with the understanding that Local 1860 would file the instant charge.

refused to promote Plath to Deputy Chief, a managerial position, because he did not believe Plath was qualified for that job. Accordingly, he recommended dismissal of the Complaint.

On February 4, 1983, having received two extensions of time, Local 1860 filed Exceptions to the Hearing Examiner's report. On February 28, 1983, the City filed a response.

Local 1860's Exceptions consist mostly of disagreement with the Hearing Examiner's factual findings. Our thorough review of the record, however, confirms that the Hearing Examiner's findings of fact, with a few inconsequential exceptions,^{3/} are substantially supported by the evidence. We adopt and incorporate these findings, as modified in footnote 3, here.

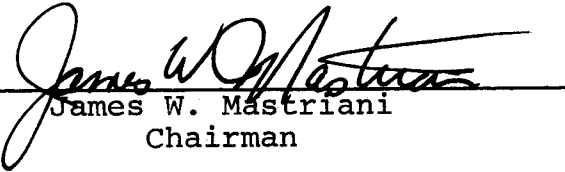
3/ The Hearing Examiner erred in finding (no. 13) that Chief Kossup testified "without contradiction" that he received 15-20 telephone calls from Plath in January and February 1980 concerning such matters as smoke detectors and signal fire responses; Plath testified somewhat vaguely, that he made a lesser number of calls. The Hearing Examiner also erred in finding (no. 19) that Deputy Chief Angelo Ricco was Plath's immediate superior at the Training Center; Ricco was Plath's superior at Fire Department Headquarters from February 5 to February 20, 1981. We specifically adopt, however, the Hearing Examiner's credibility determinations (nos. 14 and 15) with respect to: (1) the testimony of Deputy Chief Morgan concerning his decision not to file insubordination charges against Plath, and (2) the testimony of Local 1860's president concerning whether Local 1860 requested Plath to submit memoranda criticizing his superiors in May and June, 1980. In addition, we agree with the Hearing Examiner's decision (no. 25) to discount the testimony of Plath's immediate superior at the Fire Department Training Center and see no reason, as Local 1860 requests, to reopen the record to receive the testimony of Deputy Chief Kinnear.

We also agree with the Hearing Examiner's conclusion that Local 1860 failed to prove that Plath's protected activities were a substantial or motivating factor in either the decision to detail him to roving battalion chief or the decision not to promote him to Deputy Chief.^{4/} Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Suskin, Newbaker and Butch voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey
April 19, 1983
ISSUED: April 20, 1983

^{4/} Given this finding, we need not consider whether to follow NLRB v. Ford Motor Co., 683 F.2d 156, 110 LRRM 3202 (6th Cir. 1982), a case which held that the NLRB lacked power to order an employee promoted to a position (in that case supervisor) outside the protections of the federal Labor-Management Relations Act, 29 U.S.C. §151, et seq.

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

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CITY OF NEWARK

Respondent,

-and-

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PROFESSIONAL FIRE OFFICERS
ASSOCIATION OF NEWARK, LOCAL 1860
I.A.F.F., AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent City did not violate Subsections 5.4(a)(1), (2), (3), (4) and (7) of the New Jersey Employer-Employee Relations Act when it failed to promote Battalion Chief Charles F. Plath to Deputy Chief in April and December 1981. Although Plath had been active on behalf of the Local in varying degrees since 1978 the Hearing Examiner was not persuaded that Plath's union activities were a "substantial" or a "motivating" factor in the City's decision not to promote him to Deputy Chief. Plath had a long history of friction with management, in particular an incident in June 1980, which resulted in his being "detailed" from a regular assignment to Roving Battalion Chief. The Fire Director of the City, in refusing to promote Plath, testified that while Plath had a good knowledge of the job he was lacking in being able to cooperate with management and to exercise good judgment. Finally, the Hearing Examiner held that he could not under the law order the City to promote an employee to a supervisory position outside of the collective negotiations unit. Thus, even if the City had been deemed to have violated the Act no remedy could have been ordered.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

STATE OF NEW JERSEY
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CITY OF NEWARK,

-and- Respondent,

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Appearances:

For the City of Newark
John J. Teare, Esq., Corporation Counsel
(Rosalind L. Bressler, Esq.)

For the Charging Party
Carroll, Panepinto, Pachman, Williamson & Paolino, Esqs.
(Brian C. Doherty, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 17, 1981 by the Professional Fire Officers Association of Newark, Local 1860, I.A.F.F., AFL-CIO (hereinafter the "Charging Party" or the "Local") alleging that the City of Newark (hereinafter the "Respondent or the "City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent on June 13, 1980 transferred Charles Plath, a Battalion Chief, to the position of Roving Battalion Chief, and thereafter, on April 27, 1981, the Respondent failed to promote Plath to the position of Deputy Chief, all of which is alleged to have occurred because of Plath's activities on behalf of the Local, particularly by testifying at interest arbitration

proceedings and preparing exhibits for these proceedings, all of which was alleged ^{1/} to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) of the Act.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 11, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on February 26, April 21, April 23, and June 23, 1982 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs and affidavits by September 24, 1982.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing and after consideration of the post-hearing submissions of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Professional Fire Officers Association of Newark, Local 1860, I.A.F.F., AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Charles F. Plath is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

1/ These subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(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) 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.

"(7) Violating any of the rules and regulations established by the commission."

4. The most recent collective negotiations agreement between the City and the Local, which has been reduced to writing, covers the calendar year 1978 (J-1). The Recognition Clause is found in Article 2, Section 2.01, which provides, in pertinent part, as follows:

"The City hereby recognizes the Union as the sole and exclusive bargaining agent for all officers employed by the Newark Fire Department, including Deputy Chiefs,^{2/} Battalion Chiefs, Captains... but excluding all Fire Fighters and other non-supervisory employees, managerial executives, craft and professional employees and Policemen, as per certification Docket R-124, dated June 8, 1970." (Emphasis supplied).

5. Plath was first hired as a Fireman on March 1, 1959. Thereafter, on March 11, 1968 he was promoted to Captain and became covered by the Recognition Clause in the agreement between the City and the Local as defined in J-1, supra. On January 14, 1974 Plath was promoted to Battalion Chief. On February 1, 1976 Plath was demoted back to Captain for economic reasons and on March 9, 1977 he was promoted back to Battalion Chief.

6. When Plath was promoted to Captain he had placed 29th on the Civil Service list and was passed over once. When he was promoted to Battalion Chief he had placed 16th on the Civil Service and was promoted in order.

7. Plath first became active in the affairs of the Local in 1978 when he was elected Secretary in September of that year. He remained as Secretary until January 1979 when he resigned for the reason that he perceived a conflict between Battalion Chief and holding office in the Local.

8. Prior to and after January 1979 Plath served on the Local's Negotiations Committee where he worked on the preparation of various exhibits for negotiations and interest arbitration, which dealt with workloads in the Newark Fire Department and other cities throughout the United States. He had been asked to undertake this task of preparing exhibits dealing with workload by the President of the

^{2/} The City sought to remove the Deputy Chiefs from the collective negotiations unit through a clarification of unit petition filed on April 22, 1980 (Docket No. CU-80-76) on the ground that Deputy Chiefs are "managerial executives." A Hearing Officer recommended that the City's request be granted (H.O. No. 82-2, 7 NJPER 481 [1981]), and his recommendation was affirmed by the Director of Representation on October 23, 1981 (D.R. No. 82-18, 7 NJPER 640). These decisions were received in evidence as Exhibit J-1A.

Local, Edward Jankowski.

9. In preparing these exhibits for the Local, supra, Plath performed his work in the administrative offices of the Fire Department with the knowledge and permission of the Department. Plath spent approximately 16 hours of his own time in the administrative offices of the Fire Department in preparation for the 1979 interest arbitration proceedings between the City and the Local.

10. In May 1980 Plath was appointed by the Local to be its representative to community groups in Newark that were concerned with the City's decision to close fire companies in selected neighborhoods. Plath spoke to these community groups and his activities in this regard were known to the administration of the Fire Department.

11. In 1978 the position of Deputy Chief was open and on April 15, 1978 Plath took the Civil Service examination. In December 1978 Civil Service posted a list, which indicated that Plath was 3rd. This list was corrected in February 1979, which then indicated that Plath's position was 5th. This list was valid for three years and expired in December 1981 pursuant to Civil Service regulations. During the period that this list was effective, nine individuals were promoted to Deputy Chief, four of whom ranked above Plath and five of whom ranked below Plath.

12. During the time period when the Civil Service list for Deputy Chief was effective (February 1979 to December 1981) Plath's activities on behalf of the Local included those described in Findings of Fact Nos. 7-10, supra, together with his appearance as a witness for the Local in the 1980 interest arbitration proceedings on November 10, 1980 where Plath also examined another witness on behalf of the Local (CP-1).

13. Stanley J. Kossup became the Chief of the Fire Department on December 28, 1979. Kossup testified without contradiction that in January and February 1980 he received 15 to 20 telephone calls from Plath regarding smoke detectors in the Newark Housing Authority, "Signal 5" responses to schools, lack of mutual aid in connection with Irvington, and other matters.

14. In May and June 1980 Plath sent a series of written memos to Kossup

regarding the subject matter of Plath's telephone calls to Kossup in January and February 1980, supra (see CP-2, CP-3, CP-4, CP-5, CP-6, and CP-9). Kossup made only one written response on June 5, 1980 (CP-7). Also, in May and June 1980 Kossup met several times with Deputy Chief David J. Kinnier, Plath's immediate superior, regarding Plath's memos to Kossup, supra.^{3/}

15. Plath's last memo to Kossup, CP-9, supra, was dated and sent on June 12, 1980. In this memo Plath requested verification of the Fire Department policy on the processing of summonses to the Newark Housing Authority for lack of smoke detectors. On June 13, 1980 Plath was called into Kinnier's office and was informed that the administration was not going to respond in writing to his June 12th memo (CP-9). During this meeting with Kinnier, Deputy Chief James E. Morgan telephoned and spoke with Plath. The conversation, which became very heated, centered on the question of smoke detectors at the Newark Housing Authority and chemical dumping. Plath was critical of the pace of installation of smoke detectors, notwithstanding that 12,400 smoke detectors had been installed by May 1980. Plath also stated that he was going to go to the newspapers in connection with three people having died from fires at the Newark Housing Authority. Morgan took personal offense at Plath's insinuation that Morgan was somehow responsible. Morgan, after terminating his conversation with Plath, promptly telephoned Kossup and requested that he talk to Plath. Kossup asked Morgan for a written report, which was received in evidence as Exhibit R-3, and which does not contain anything suggesting insubordinate behavior on the part of Plath. Morgan testified credibly that he made no reference to Plath's conduct because he did not want to "hurt" Plath and that it was not his nature to jeopardize somebody's career.

^{3/} Kossup testified credibly that he thought Plath's memos in May and June 1980, supra, were the result of "individual action" by Plath to correct certain perceived departmental deficiencies, which did not appear to be connected with union activity. An examination of these memos gives no hint that Plath was pursuing the subject matter on behalf of the Local. The Hearing Examiner does not credit the testimony of Robert L. Doherty, the current President of the Local, on rebuttal, that Plath issued the May and June memos "...as a union matter" and "at union request" (4 Tr. 66).

16. Kossup concluded on the same day, June 13, 1980, that Plath was guilty of insubordination and that discipline was warranted. Kossup advised Kinnier and it was decided to "detail" Plath to the assignment of Roving Battalion Chief with the rank and pay remaining the same. Kossup acknowledged that Plath's memos of May and June 1980, supra, were a factor in his decision to "detail" Plath but stated that it was primarily the confrontation with Morgan that precipitated Kossup's action. Further, although Kossup was aware of Plath's union activity, supra, he credibly denied that he was motivated in the "detailing" of Plath by his union activity.^{4/}

17. On June 18, 1980 Plath filed a grievance over his having been "detailed" to Roving Battalion Chief (CP-10). Plath alleged that the reason for his having been "detailed" was "...in retaliation over my work on behalf of the Union in preparing materials relating to Fire Deaths, inadequate response to alarms and other materials for the 1980 binding arbitration process." The grievance was denied by Morgan on June 23, 1980. Thereafter an appeal of Morgan's denial was made to Director John P. Caufield on June 26, 1980 and this, too, was denied (CP-11). Thereafter, the matter proceeded to arbitration in December 1980, but was discontinued since the matter involved discipline, which was not subject to arbitration under the agreement. A Complaint was filed in the Superior Court on January 14, 1981 (CP-12) and, pursuant to a stipulation of settlement on September 11, 1981 (CP-14), it was agreed that the matter would proceed to "PERC."

18. Between November 19, 1980 and February 5, 1981 Plath and Kossup exchanged several memos regarding Plath's claim for one hour of overtime (CP-16). The Hearing Examiner does not attach much significance to the memos regarding Plath's overtime claim, notwithstanding that counsel for the parties have briefed the matter in considerable detail.

19. Plath continued to work in his assignment as a Roving Battalion Chief

^{4/} See footnote 3, supra.

until February 20, 1981 when he sustained a hernia injury while fighting a fire. He was then placed on light duty and transferred to the Fire Department Training Center where he remained until April 13, 1981 when he went to Toronto for a hernia operation. At the Training Center his immediate superior for the first several weeks was Deputy Chief Angelo Ricca. Thereafter, for the balance of 1981 Plath's immediate superior was Deputy Chief Joseph J. Pierce.

20. On February 25, 1981 Ricca issued a written reprimand to Plath for reporting to duty on that date in "mixed attire, part uniform-part civilian" (CP-15). Plath testified that other members of the Fire Department had not been reprimanded for the same conduct. However, Kossup testified credibly that Plath was not the first individual to be reprimanded for like conduct. Also, on February 25, 1981, Ricca sent a memo to Kossup stating that Plath was exhibiting uncooperative and disruptive behavior and was becoming argumentative over work assignments (R-1).

21. Sometime between April 19 and April 26, 1981, after Plath had returned from Toronto, Pierce stated in a telephone conversation with Plath, that he had heard a rumor that Plath was going to be "skipped" for promotion to Deputy Chief. Plath then contacted Kossup, who informed him that the decision to promote was up to Caufield. Plath was given permission to contact Caufield, who confirmed that Plath was to be "skipped."

22. On April 27, 1981 five individuals were promoted to Deputy Chief from the Civil Service list. These individuals ranked Nos. 1-4 and No. 6 on the list with Plath ranking No. 5. ^{5/}

23. Kossup acknowledged that he recommended to Caufield that Plath not be promoted to Deputy Chief in April 1981. In his discussion with Caufield, Kossup based his negative recommendation on Plath's erratic and disruptive behavior.

^{5/} At the time of these promotions Plath was on sick leave and did not return to light duty until September 1981.

Kossup also testified that, in his opinion, Plath's past behavior affected his judgment.

24. Caufield testified that he could not appoint Plath to the position of Deputy Chief in April 1981, or December 1981, infra, because of the strong negative recommendation by Kossup and Caufield's knowledge of Plath over many years. Caufield stated that a Deputy Chief should: (1) have a good knowledge of the job, which Plath had; (2) be able to get along with and lead men by example, which Plath lacked; (3) be cooperative with management, which Plath was not; and (4) have good judgment, which Plath did not possess. Caufield distinguished the prerequisites for the position of Deputy Chief from those of Battalion Chief, stating that they were dramatically different since a Deputy Chief is part of management and often acts as Chief of the Fire Department. The Hearing Examiner here refers to footnote 2, supra, noting again that Deputy Chiefs have been removed from the collective negotiations unit as "managerial executives." Caufield acknowledged that Plath was qualified to be a Battalion Chief and that as a Battalion Chief Plath had temporarily acted as a Deputy Chief on occasion.

25. As found previously, Pierce was Plath's immediate superior at the Fire Department Training Center for most of the year 1981. However, the Hearing Examiner attaches little weight to Pierce's testimony (4 Tr. 40-42) that Plath exhibited all of the prerequisites for appointment to Deputy Chief as testified to by Caufield (Finding of Fact No. 24, supra). Plath was either disabled or on light duty during 1981. Plath's Training Center duties are not to be compared with those performed by Plath as Battalion Commander of the 4th Battalion, the busiest in Newark (4 Tr. 22), until he was "detailed" to Roving Battalion Chief in June 1980.

26. Caufield further testified that he knew Plath was active in the union, but stated that he had previously promoted other employees who were active in the union,

giving as an example, Deputy Chief Edward Wall.

27. Kossup and Caufield each acknowledged on cross-examination that during the past 20 years there had not been an instance in the Firefighting Division of an individual on the Civil Service list being passed over or skipped for promotion to Deputy Chief.^{6/}

28. On October 16, 1981 Plath, who was then on light duty at the Fire Department Training Center, was reprimanded by Ricca for being "...argumentative and contrary almost to the point of insubordination" (R-2).

29. In December 1981 Plath was one of the sources for a series of three articles in the New York Times, which were critical of the Newark Fire Department. Plath is identified only as a Battalion Chief and no reference is made to Plath as a spokesman for the Local. Other union officials are so identified. These articles appeared on December 6, December 13, and December 20, 1981 (CP-17).

30. On December 21, 1981 four additional promotions to Deputy Chief were made from the Civil Service list. The City again "skipped" Plath and appointed individuals, who ranked Nos. 7-10 on the list, as Deputy Chiefs.^{7/}

31. The Hearing Examiner has attached no weight to the testimony of Pierce that Kossup had said to him "...that they were going to teach Charles Plath a lesson..." (4 Tr. 47) since the post-hearing affidavits of the parties indicate that any such statement by Kossup was made after the issuance of the Complaint. Thus, the testimony of Pierce in this regard, even if credited, is not relevant to the motivation of the Respondent at the time that Plath was denied promotion to Deputy Chief in April and December 1981.

6/ Caufield did testify that he knew of three instances of individuals passed over for promotion, two in the Line Division and one Chief Dispatcher.

7/ Although the Unfair Practice Charge alleges only that Plath was "skipped" for Deputy Chief on April 27, 1981, the "skipping" in December 1981 was fully litigated. The Respondent never raised an objection at the hearing and has defended its action in its post-hearing briefs. See Multi-Medical Convalescent & Nursing Center of Towson, 225 NLRB 429, 93 LRRM 1170 (1976) and Englewood Board of Education, P.E.R.C. No. 76-18, 2 NJPER 53 (1976), aff'g. H.E. No. 76-2.

Did the Respondent City violate Subsections(a)(1) and (3) of the Act^{8/} when the Fire Department Director "skipped" Charles Plath for promotion to Deputy Chief in April 1981 and December 1981?

DISCUSSION AND ANALYSIS

The Respondent City Did Not Violate Subsections(a)(1) And (3) Of The Act When The Director Of The Fire Department "Skipped" Charles Plath For Promotion To Deputy Chief In April And December 1981

It appearing to to the Hearing Examiner that this is a case of "dual motive," the Charging Party must, by preponderance of the evidence, meet the "causation test" enunciated by the National Labor Relations Board (NLRB) in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980).^{9/} In Wright Line the NLRB adopted the analysis of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involved the following requisites for determining employer motivation: (1) the General Counsel (Charging Party) must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same disciplinary action would have taken place even in the absence of protected activity.

Based upon the Wright Line - Mt. Healthy analysis, the Hearing Examiner finds

8/ There was no evidence adduced by the Charging Party in support of a violation by the City of Subsections(a)(2), (4) and (7) of the Act and the Hearing Examiner will, accordingly, recommend dismissal of these allegations.

9/ The Appellate Division adopted the Wright Line analysis in "dual motive" cases in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), which the Commission has followed in cases beginning with Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669 (1981).

and concludes that the Charging Party has failed to demonstrate by a preponderance of the evidence that the Respondent City by its Director of the Fire Department violated Subsections(a)(1) and (3) of the Act when the Director "skipped" Charles Plath for promotion to Deputy Chief on April 27, 1981^{10/} and December 21, 1981.

Although the Charging Party alleged in the Unfair Practice Charge that the Respondent transferred Plath on June 13, 1980 to the position of Roving Battalion Chief because of Plath's activities on behalf of the Local, the Charging Party does not in its post-hearing briefs contend that this was violation of the Act, which should be remedied. Again, although the Respondent did not plead the six-month limitation defense with respect to the June 13, 1980 allegations, the Hearing Examiner would have to invoke the limitation sua sponte based upon Teaneck (see footnote 10, supra) thus, barring a remedial order. It is however, well settled that incidents occurring more than six months before the filing of an Unfair Practice Charge may be considered as background in determining whether or not an alleged violation of the Act has occurred within the six-month period subsequent: see Machinists' Local v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 416, 45 LRRM 3212 (1960).

The Events Prior To June 13, 1980 As Background

Between September 1978 and May 1980 Plath served on the Local's Negotiations Committee where he worked on the preparation of various exhibits for negotiations and the 1979 interest arbitration proceedings and was the Local's representative to community groups in Newark. Plath made a series of telephone calls to Kossup, followed by memos, between January and June 1980. These activities were well known to the administration of the Fire Department. (See Findings of Facts Nos. 7-10, 13, 14, supra).

The Hearing Examiner has found as a fact that although Kossup was aware of Plath's union activities prior to the June 13, 1980, when Plath was "detailed" to Roving

10/ Although the Respondent did not plead the six-month limitation defense under Section 5.4(c) of the Act, the Hearing Examiner notes that the Unfair Practice Charge was filed on December 17, 1981 and that he could invoke the limitation sua sponte: Township of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351, 353 (1981), aff'd App. Div. Dkt. No. A-4891-80T2 (1982). But see, Zaccardi v. Becker, 88 N.J. 245, 256 (1982).

Battalion Chief, Kossup credibly denied that he was motivated by Plath's union activities (see Finding of Fact No. 16, supra). Kossup credibly testified that it was Plath's confrontation with Morgan on June 12, 1980 that precipitated the "detailing" of Plath (see Findings of Fact Nos. 15 & 16, supra). While Kossup acknowledged that Plath's memos of May and June 1980 were a factor in Kossup's decision, the Hearing Examiner has credited Kossup's testimony that he thought Plath's memos in May and June 1980 were the result of "individual action" by Plath unconnected with his union activities (see footnote 3, supra). An examination of these memos (see CP-2, CP-3, CP-4, CP-5, CP-6 and CP-9) gives no indication that Plath was pursuing the subject matter on behalf of the Local. The Hearing Examiner does not credit the testimony of Robert L. Doherty, the President of the Local at the time of the hearing, that Plath issued the May and June memos "...as a union matter" and "at union request" (see footnote 3, supra). The Hearing Examiner has not credited Doherty because his testimony, coming on rebuttal, appeared to be an after thought and a belated attempt to buttress the Charging Party's case in chief. It is noted that Plath did not so testify. Further, Doherty, as a witness for the Charging Party in chief, failed to testify that Plath's memos of May and June 1980 were "a union matter."

The conclusion to be drawn from the exercise by Plath of protected activities through June 1980 is that, notwithstanding that the administration of the Fire Department was well aware of Plath's activities, the exercise by Plath of activities protected by Subsection(a)(1) of the Act was not a "substantial" or a "motivating" factor in the Respondent's conduct either in the "detailing" of Plath to Roving Battalion Chief in 1980, or as will be apparent hereinafter, the failure to promote Plath to Deputy Chief in 1981. Even assuming arguendo that Plath's exercise of protected activities was a "substantial" or a "motivating" factor, the Respondent has met the burden of proving that its actions would have occurred even in the absence of Plath's protected activities.

The Facts Pertinent To The Promotion Issue

First, the only additional protected activities of Plath, after his having been "detailed" to Roving Battalion Chief, were the filing of a grievance on June 18, 1980 protesting the "detailing" and his appearance as a witness for the Local in the 1980 interest arbitration proceedings on November 10, 1980 (see Findings of Fact Nos. 12 & 17, supra). The Hearing Examiner concludes that Plath's having been one of the sources for a series of three articles in the New York Times in December 1981 did not constitute protected activity since Plath was only identified as a Battalion Chief with no reference to his having been a spokesman for the Local; other union officials were identified as such (see Finding of Fact No. 29, supra). Also, the Hearing Examiner has not considered as protected activity the exchange of memos between Plath and Kossup over Plath's claim for one hour of overtime (see Finding of Fact No. 18, supra).

Plath was placed on light duty and transferred to the Fire Department Training Center on February 20, 1981 where he remained until April 13, 1981. There Plath was the subject of several reprimands in February 1981 (see Finding of Fact No. 20, supra). After learning from Pierce in mid-April 1981 of a rumor that he, Plath, was going to be "skipped" for promotion for Deputy Chief Plath spoke to Caufield, who confirmed that Plath was to be "skipped" (Finding of Fact No. 21, supra). Thus, on April 27, 1981, while Plath was on sick leave, five individuals, who ranked above and below Plath, were promoted to Deputy Chief from the Civil Service list (Finding of Fact No. 22, supra). On December 21, 1981 four additional promotions were made to Deputy Chief with Plath having been "skipped" and those ranking behind him having been appointed (see Finding of Fact No. 30, supra).

Although the decision to promote was Caufield's, Kossup had given Plath a negative recommendation for promotion to Deputy Chief based on Plath's erratic and disruptive behavior which, according to Kossup, affected Plath's judgment. (Finding of Fact No. 23, supra). Caufield testified that of the four prerequisites

that a Deputy Chief must possess Plath was lacking in three of these. Caufield distinguished the prerequisites for the position of Deputy Chief from those of Battalion Chief, stressing that a Deputy Chief is part of management. Caufield acknowledged that Plath was a qualified Battalion Chief. (See Finding of Fact No. 24, supra). The Hearing Examiner attaches little weight to the testimony of Pierce that Plath exhibited all of the prerequisites for appointment to Deputy Chief because of the invalid basis of comparison between Plath's job duties at the Training Center compared with those performed by Plath as Battalion Chief of the 4th Battalion, the busiest in Newark (see Finding of Fact No. 25, supra).

Caufield was not motivated in his decision not to appoint Plath to the position of Deputy Chief by Plath's activities on behalf of the Local, Caufield having previously promoted other employees who were active in the union, i.e., Deputy Chief Edward Wall (see Finding of Fact No. 26, supra).

The "skipping" of Plath for promotion to Deputy Chief was unusual in that there had been no such skipping during the past twenty years (see Finding of Fact No. 27, supra).

Finally, Plath on October 16, 1981 received an additional reprimand (see Finding of Fact No. 28, supra).

The Respondent Was Not Illegally Motivated In Failing
To Promote Plath To Deputy Chief

The Charging Party argues that the failure to promote Plath was pretextual inasmuch as (1) Plath's competence was established by his position on the Civil Service list; (2) he was vigorously active on behalf of the Local; and (3) the City's failure to promote him to Deputy Chief was highly unusual in the light of the history of promotions in the Fire Department. The Charging Party cites City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modif. 82 N.J. 1 (1980) and Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (1980), aff'd. App. Div. Docket No. A-3230-79 (1981). In both of these cases a promotion was involved but the facts,

in the opinion of the Hearing Examiner, indicated clearly that there was no doubt but that protected activities were the primary if not the sole reason for the failure of the public employer to promote.

In the instant case the Hearing Examiner is not persuaded that the activities engaged in by Plath were the primary reason or the sole reason for his having been "skipped" for promotion to Deputy Chief in April and December 1981. Under the Wright Line-Mt. Healthy analysis, supra, the Hearing Examiner has concluded that Plath's activities were not a "substantial" or "motivating" factor in the City's decision not to promote him. At the time of the promotion in April 1981 Plath's only protected activities on behalf of the Local since May 1980, when he was appointed as representative to community groups in Newark, was the filing of a grievance in June 1980 and appearing as a witness for the Local in the 1980 interest arbitration proceeding on November 10, 1980 (See Findings of Fact Nos. 10, 12 & 17, supra).

While the competency of Plath, as indicated by his standing on the Civil Service list, is not disputed and, indeed, is freely acknowledged by Caufield and while it is undisputed that the City never before had "skipped" a qualified candidate such as Plath for promotion to Deputy Chief, these two factors do not render the City's action illegal under our Act. In so holding the Hearing Examiner has considered the decision of the Commission in Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd. App. Div. Docket No. A-4824-77 (1980) where the Commission noted that when an employer varies from its established procedures in the case of an employee vigorously active on behalf of an employee organization the inference may be drawn that the employer's action was motivated by the employee's union activity. The Hearing Examiner distinguishes Brookdale herein in that the instant Respondent, consistent with Wright Line-Mt. Healthy, has demonstrated that Plath would not have been promoted even in the absence of any protected activity, i.e., the City had a legitimate business justification for "skipping" Plath in April

and December 1981.

The Hearing Examiner has no doubt but that Plath's long history of friction with management level personnel in the Fire Department formed the basis for the decision not to promote him to Deputy Chief. There can be no question but that the "Morgan incident" in June 1980, which resulted in the "detailing" of Plath to Roving Battalion Chief, played a significant role in the decision of Caufield not to promote Plath. Kossup's negative recommendation to Caufield regarding the promotion to Plath stemmed in large part from the "Morgan incident."

Clearly, the City was entitled to promote persons to Deputy Chief who were going to be "cooperative with management" and "have good judgment." Caufield testified that Plath was lacking in both of these prerequisites. The prerequisite of being cooperative with management is clearly a prime consideration in the promotion of an applicant to Deputy Chief since the position of Deputy Chief is part of management. As found above, the Commission has agreed with the City that Deputy Chiefs are "managerial executives," who can not properly be in the collective negotiations unit with other superior officers from Battalion Chief and below.

There is one further consideration, which dictates that the Hearing Examiner dismiss the Complaint herein and that is even if Plath had satisfied completely the Wright Line-Mt. Healthy analysis the Hearing Examiner would have been unable to make an affirmative remedial order in view of the holding of the Sixth Circuit Court of Appeals in NLRB v. Ford Motor Co., 110 LRRM 3202 (July 20, 1982). There the Court held that the NLRB was without authority, under the National Labor Relations Act, to order an employer to promote an employee to a supervisory position outside of the bargaining unit.

Although the Commission is not bound to follow decisions in the private sector, the New Jersey Supreme Court has stated that it is appropriate

to look to the Federal model for guidance in the New Jersey Public Sector: Lullo v. I.A.F.F., Local 1066, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 78 N.J. 1, 9 (1978). The Hearing Examiner herein is persuaded that reliance on Ford Motor Co., supra, is appropriate in this case.

Finally the Hearing Examiner notes that there is nothing inconsistent between the results in this case and that of the Township of Clark, supra, because in Clark the promotion involved was that of Patrolman to Sergeant, both positions being in the collective negotiations unit. The Clark result is consistent with decisions of the NLRB in the private sector: see Mooney Aircraft, Inc., 156 NLRB 326, 61 LRRM 1071 (1965).

Based on all the foregoing the Hearing Examiner will recommend that the Complaint be dismissed.

* * * *


Upon the foregoing, and upon the entire record the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1),(2),(3),(4), and (7) when it failed to promote Charles F. Plath to Deputy Chief in April and December 1981.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: November 12, 1982
Trenton, New Jersey