

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY CIVIL SERVICE ASSOCIATION
and NEW JERSEY STATE EMPLOYEES ASSO-
CIATION and the STATE OF NEW JERSEY,

Respondents,

Docket No. CI-77-18-24

-and-

JOHN C. SHELL,

Charging Party.

SYNOPSIS

In the absence of exceptions filed by either party, the Commission adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision in an unfair practice proceeding. The Hearing Examiner found, and the Commission affirms, that, under the criteria established in Dairylea Cooperative, Inc., 219 NLRB No. 107, 89 LRRM 1737 (1975), involuntary reassignment of work location is tantamount to a lay-off, so that a contractual provision granting "super seniority" to shop stewards in cases of reassignment is lawful and enforceable.

Therefore, the Commission concludes that the Associations did not interfere with, restrain and coerce the Charging Party in the exercise of rights guaranteed to him by the Act and did not refuse to negotiate in good faith, in violation of N.J.S.A. 34:13A-5.4(b) (1), (3) and (5), by failing to represent the Charging Party in a grievance procedure with respect to reassignment of his work location instead of reassigning a shop steward with less seniority. Further, the Associations and the State did not violate the Act by enforcing this "super seniority" provision of their agreement. Accordingly, the Commission adopts the Hearing Examiner's Recommended Order and dismisses the complaint in its entirety.

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Appearances:

For the New Jersey Civil Service Association and the
New Jersey State Employees Association, Fox and Fox, Esqs.
(Mr. David I. Fox)

For the State of New Jersey, William F. Hyland, Attorney
General (Melvin E. Mounts, Deputy Attorney General)

For John C. Shell
(Mr. John C. Shell, pro se)

DECISION AND ORDER

On May 5, 1977, John C. Shell (the "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the New Jersey State Employees Association (the "Association") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Charging Party alleged that the Association ^{1/} violated N.J.S.A. 34:13A-5.4 (b) (1), (3) and (5) ^{2/} by failing to represent him in a grievance

^{1/} The Hearing Examiner granted the Association's motion that the name of the Respondent be amended to include the New Jersey Civil Service Association.

^{2/} These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or
(Continued)

procedure with respect to the reassignment of his work location. He asserted that a shop steward with less seniority should have been reassigned, notwithstanding the fact that this action was taken in accordance with a contractual provision granting "super seniority" to shop stewards in cases of reassignment.

It appearing that the allegations, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 21, 1977.

Pursuant to the Complaint and Notice of Hearing, a hearing was held before Alan R. Howe, Hearing Examiner of the Commission, on October 27, 1977 at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by the Association on December 12, 1977 and by the State on January 6, 1978.^{3/} On January 13, 1978 the Hearing Examiner issued his Recommended Report and Decision, which Report included findings of fact and conclusions of law and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part

2/ (Continued) coercing employees in the exercise of the rights guaranteed to them by this Act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission.

3/ The Hearing Examiner granted the Association's motion that, in view of the relief sought by the Charging Party, the State of New Jersey should be joined as a Respondent. However, the Charging Party did not elect to amend the charge to allege corresponding violations by the State under N.J.S.A. 34:13A-5.4(a).

hereof.^{4/}

None of the parties has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3.

Upon careful consideration of the entire record herein, the Commission adopts the findings of facts and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by him. Specifically, the Commission notes that, in this factual setting, a reassignment of work location from one office to another is the equivalent of a lay-off. We agree with the application of the rationale in Dairylea Cooperative, Inc., 219 NLRB No. 107, 89 LRRM 1737 (1975), in that the reassignment has the affect of disrupting the effective enforcement and administration of the collective negotiations agreement at a particular location by depriving that location of its shop steward. Therefore, the contractual provision which granted shop stewards "super seniority" in cases of reassignment was valid and lawful. Since the parties complied with this contractual provision by reassigning the Charging Party instead of a shop steward with less seniority, the Association did not commit an unfair practice by failing to represent the Charging Party in his grievance. Accordingly, the complaint is dismissed in its entirety.

^{4/} H. E. No. 78-18, 3 NJPER ____ (1978).

ORDER

For the reasons hereinabove set forth, the Commission hereby adopts the aforementioned Hearing Examiner's Recommended Order and It is Hereby Ordered that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener and Commissioners Forst, Hartnett, Hipp, Hurwitz and Parcels voted for this decision. None opposed.

DATED: Trenton, New Jersey
February 16, 1978
ISSUED: February 17, 1978

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

In the Matter of

NEW JERSEY CIVIL SERVICE ASSOCIATION and
NEW JERSEY STATE EMPLOYEES ASSOCIATION
and the STATE OF NEW JERSEY,

Respondents,

- and -

Docket No. CI-77-18-24

JOHN C. SHELL

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices against the Associations and the State of New Jersey. The Charging Party, a Senior Interviewer assigned to the Elizabeth Office of the Division of Employment Services of the Department of Labor and Industry, had alleged illegality in a contract provision between the Associations and the State of New Jersey which required the reassignment of the Charging Party from Elizabeth to Newark vis-a-vis the shop steward of the Charging Party who had less actual job classification seniority than did he. The contract accorded to the shop steward "super seniority" over other fellow employees in cases of involuntary routine reassignment.

The Hearing Examiner concluded that the criteria of the case of Dairyalea Cooperative, Inc., 219 NLRB No. 107, 89 LRRM 1737 (1975), cited by the Charging Party, were fully satisfied in that the reassignment of work location of a shop steward was tantamount to a lay-off and therefore legal under Dairyalea Cooperative, Inc. In Dairyalea the National Labor Relations Board had held that super seniority, to be lawful, must be limited to cases of lay-off or recall. The Hearing Examiner concluded that reassignment of a shop steward from one work location to another was tantamount to lay-off and therefore consistent with Dairyalea. He therefore recommended dismissal of the charge of unfair practices, finding the contract provision granting super seniority to a shop steward to be lawful and enforceable.

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.

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Appearances:

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(David I. Fox, Esq.)

For the State of New Jersey
William F. Hyland, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For John C. Shell
(John C. Shell, pro se)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 5, 1977 by John C. Shell (hereinafter the "Charging Party") alleging that the New Jersey State Employees Association (hereinafter the "Respondent Association") 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 Association had interfered with, restrained and coerced employees in the exercise of rights guaranteed to them by the Act and had refused to negotiate in good faith by failing to represent the Charging Party in the grievance procedure with respect to a routine reassignment of work location because of a contract clause, which effectively grants "super seniority"

to the shop steward in cases of such routine assignment. The foregoing was alleged to be a violation of N.J.S.A. 34:13A-5.4(b) (1), (3) and (5) of the Act. ^{1/}

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 21, 1977. Following the issuance of the Complaint and Notice of Hearing, the Respondent Association gave notice to the State of New Jersey, as a party to its contract, of the pendency of the Complaint and Notice of Hearing. As a result, the State of New Jersey filed a statement of position with the Hearing Examiner prior to hearing.

Pursuant to the Complaint and Notice of Hearing, a hearing was held on October 27, 1977 in Newark, New Jersey, at which time, in addition to the Charging Party and the Respondent Association, a Deputy Attorney General appeared for the State of New Jersey. A motion was made ^{2/} and granted that the charge be amended to join the State of New Jersey as a Respondent (hereinafter the "Respondent State"). ^{3/} A motion was further made ^{4/} and granted that the name of the Respondent Association be amended to include the New Jersey Civil Service Association (hereinafter together the "Respondent Associations"). At the said hearing all parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. ^{5/} Post-hearing briefs

^{1/} These subsections prohibit employee organizations, their representatives or agents from:

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

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the Commission."

^{2/} By the Respondent Association without objection by the Charging Party.

^{3/} The State did not oppose the motion although it reserved its right to assert the six-month statute of limitations: N.J.S.A. 34:13A-5.4(c). It should be noted that the Charging Party did not elect to amend the charge to allege corresponding violations by the State of N.J.S.A. 34:13A-5.4(a).

^{4/} Also, by the Respondent Association without objection by the Charging Party or the Respondent State.

^{5/} Only the Charging Party argued orally.

were submitted by the Respondent Association on December 12, 1977 and by the Respondent State on January 6, 1978.

An Unfair Practice Charge ^{6/} having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing and after the filing and consideration of briefs by the two Respondents, in addition to the oral argument of the Charging Party, 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 FACTS

1. The New Jersey Civil Service Association and the New Jersey State Employees Association are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

2. The State of New Jersey is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

3. John C. Shell is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The Respondent Associations and the Respondent State are parties to a current collective negotiations Agreement, which covers a State-wide professional unit of approximately 9500 professional employees who work in some 770 job titles or classifications (J-1, Appendix I).

5. The aforesaid professional unit includes the Division of Employment Services of the Department of Labor and Industry, which has offices in the 21 counties of the State. There is at least one office in each county with the more populous counties having more than one office. (RA-1).

6. The Agreement provides in Article XXII, Section E that: "The Association has the sole right and discretion to designate Stewards or alternates and specify their respective responsibilities and authority to act for the Association. The parties

6/ As amended at the hearing.
~~As amended at the hearing.~~

agree that the privileges afforded to the Stewards, elsewhere provided, are applicable to a reasonable number of Stewards reasonably acceptable to the State..." Under this provision the Respondent Associations have designated numerous shop stewards, the numbers of which vary according to the size of the location and the number of assigned employees.

7. The Agreement provides in Article XXII, Section B, for leaves of absences for Association activity and, under this provision, designated shop stewards may be given leaves of absence for shop steward training in the processing of grievances and the administration of the Agreement. The shop steward is the only Association representative at Step 1 of the grievance procedure (Article IV, Section H).

8. Reassignment of work location is a term and condition of employment, and Article XI, Section B, Paragraph 2 provides that such reassignments shall be made"... in the inverse order of job classification seniority of the employees affected..." However, with respect to the reassignment of shop stewards the Agreement provides in Article XI, Section D, Paragraph 1, in pertinent part, as follows:

"The State and the Association recognize that Association... Stewards have in their relationship to their jobs a need for continuity in the assigned shift and location which exceeds that of other fellow employees. It is agreed therefore that these Association...Stewards will not be routinely reassigned' ...involuntarily." (Emphasis supplied)^{7/}

9. The Charging Party is a Senior Interviewer and was until February 28, 1977 ^{8/} assigned to the Elizabeth Office of the Division of Employment Services of the Department of Labor and Industry.

10. Under date of February 9, the Charging Party received a Reassignment Notice, which stated in part: "Please be advised that you are being reassigned from the Elizabeth Office of Services Office to the Newark Industrial Office effective

^{7/} The insulation of shop stewards from involuntary reassignment is not absolute. See Article XI, Section D, Paragraphs 2 and 3.

^{8/} All dates hereinafter are in the year 1977.

the Elizabeth Job Services Office to the Newark Industrial Office effective February 28, 1977." ^{2/}

11. There are two shop stewards in the Elizabeth Office, one being Monica Birch, who was, at all times material hereto, the shop steward for the Charging Party. The necessity for two shop stewards is based upon the existence of two managers for the Respondent State with separate delineations of job responsibility and authority. Ms. Birch has been a shop steward in the Elizabeth Office for two to three years and has had extensive training and experience as a shop steward. The loss of either of the two shop stewards in the Elizabeth Office would impair the effective administration of the Agreement.

12. From a job performance standpoint, Ms. Birch and the Charging Party are functionally equivalent, i.e., there are no significant distinctions between their job performance, competence or qualifications.

13. Ms. Birch is junior in actual job classification seniority to the Charging Party.

14. At the instance of the Respondent Associations, the Respondent State agreed to implement Article XI, Section D, Paragraph 1 of the Agreement, supra, as a result of which Ms. Birch, the shop steward, was not routinely reassigned from the Elizabeth Office to the Newark Office, and the Charging Party was so reassigned as previously described.

THE ISSUE

Is Article XI, Section D, Paragraph 1 of the Agreement valid and enforceable where its implementation resulted in the routine reassignment of work location of the

^{2/} From February 28 to June 30 the Charging Party was temporarily assigned to the Linden Office, and on June 30 he returned to the Elizabeth Office, from which he went on vacation until July 25. Upon his return from vacation, the Charging Party was reassigned on July 28, as per the Notice of February 9, to the Newark Office where he now reports one day per week; the other four days he is still at the Elizabeth Office.

Charging Party, who had greater actual seniority than his shop steward, Monica Birch?

DISCUSSION AND ANALYSIS

Positions of the Parties

It is the position of the Charging Party that, by reference to the National Labor Relations Board decision in the case of Dairyalea Cooperative, Inc., 219 NLRB No. 107, 89 LRRM 1737 (1975), enf'd sub nom., NLRB v. IBT, Local 338, ___ F.2d ___, 91 LRRM 2929 (2nd Cir. 1976), Article XI, Section D, Paragraph 1 of the Agreement is invalid and unenforceable where the effect is to deny the Charging Party his actual seniority vis-a-vis the "super seniority" accorded the shop steward at the Elizabeth Office in the matter of a routine assignment of work location. The Charging Party contends that "super seniority" for the shop steward can only be applied in instances of actual lay-off and recall and not in routine reassignments of work location. But for the provisions of Article XI, Section D, Paragraph 1, the Charging Party would have remained in the Elizabeth Office and the shop steward would have been reassigned to the Newark Office.

Basically, it is the position of the Respondent Associations and the Respondent State that a routine reassignment of work location, under the circumstances in this case, is tantamount to lay-off and that, therefore, the provisions of Article XI, Section D, Paragraph 1 are valid and enforceable against the Charging Party. Further, it is contended that even if such a routine reassignment is not tantamount to a lay-off, there is proper justification in this case for the implementation of the said provision of the Agreement.

The Provisions of Article XI, Section D, Paragraph 1 of the Agreement are Lawful, Valid and Enforceable and Consistent with the Decision of the NLRB in Dairyalea.

Since there is no precedent for the disposition of the instant matter under past decisions of P.E.R.C., the Hearing Examiner turns to the private sector,^{10/} in 10/ Lullo v. Int'l. Ass'n. of Firefighters, Local 1066, 55 N.J. 409 (1970)

particular, to Dairylea Cooperative, Inc., supra. An analysis of that case follows.

There the shop steward, in addition to having super seniority for purposes of lay-off and recall, was also accorded preference in the assignment of overtime, the selection of vacation periods, the selection of job assignments, and the selection of shifts, hours and days off. Thus, the shop steward was given favored treatment as to a variety of job benefits that, but for his super seniority, he would not have otherwise enjoyed.

The NLRB, in reaching the conclusion that the breadth of the super seniority case in Dairylea was unlawful, went on to state:

"...(W)e are aware that it is well established that steward super seniority limited to lay-off and recall is proper even though it, too, can be described as tying to some extent an on-the-job benefit to union status. The lawfulness of such restricted super seniority is, however, based on the ground that it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. It thereby not only serves a legitimate statutory purpose but also re-bounds in its effects to the benefit of all unit employees. Thus, super seniority for lay-off and recall has a proper aim and such discrimination as it may create is simply an incidental side effect of a more general benefit accorded to all employees..." (89 LRRM at 1738) (Emphasis supplied).

The Hearing Examiner here takes especial note of the following additional language from the Board's decision in Dairylea:

"...That is not to say, of course, that proper justification may not be forthcoming in some future case involving particular circumstances calling for steward super seniority with respect to terms and conditions of employment other than lay-off and recall. Consequently, there is no occasion here for finding super seniority - even that going beyond lay-off and recall - to be per se unlawful..." (89 LRRM at 1738) (Emphasis supplied).

Based on the foregoing, the Hearing Examiner finds and concludes twofold: first, that under the circumstances of this case, routine reassignments of work locations from one office to another, given the geography of the State of New Jersey, is tantamount to a lay-off within the meaning of Dairylea, and, second, even assuming

that the foregoing were not so, the instant case contains "particular circumstances calling for steward super seniority with respect to terms and conditions of employment other than lay-off and recall." (89 LRRM at 1738) (Emphasis supplied).

It is the opinion of the Hearing Examiner that in order for the Respondent Associations effectively to enforce and administer the Agreement, the shop stewards must be on the job at any given location of the State for the processing of grievances, beginning at Step 1 of the grievance procedure, and otherwise enforcing and administering the Agreement. Routine reassignment of work location of a shop steward from one geographical location to another in the State would operate to deprive the initial location of its shop steward to the same extent as if the shop steward was actually laid-off from his or her job. The fact that one steward would remain in Elizabeth if Ms. Birch was reassigned to Newark does not alter this conclusion (see Finding of Fact No. 11, supra).

Even if routine reassignment of a shop steward is not tantamount to a lay-off, there are clearly present "particular circumstances" of the type contemplated by the Board in Dairylea, which compel the Hearing Examiner to find and conclude that Article XI, Section D, Paragraph 1 serves a valid and proper union objective, namely, the effective enforcement and administration of its collective negotiations Agreement on a State-wide basis. It is noted that all unit employees benefit equally by continuity of administration and enforcement of the collective negotiations agreement, and the Hearing Examiner so finds and concludes.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Associations and the Respondent State did not violate the

Act by jointly enforcing Article XI, Section D, Paragraph 1 of the current collective negotiations Agreement, i.e., the State, at the instance of the Associations, properly reassigned the Charging Party from the Elizabeth Job Service Office to the Newark Industrial Office while at the same time permitting Monica Birch, the Charging Party's shop steward in Elizabeth, to assert her "super seniority" as shop steward in order to remain in Elizabeth.

2. More specifically, as charged, the Respondent Associations did not violate N.J.S.A. 34:13A-5.4(b)(1), (3) and (5).

RECOMMENDED ORDER

The Respondents not having violated the Act, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

DATED: January 13, 1978
Trenton, New Jersey