

P.E.R.C. NO. 78-67

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

Docket No. CO-77-299-6

-and-

OLD BRIDGE P.B.A., LOCAL 127,

Charging Party.

SYNOPSIS

In the absence of exceptions filed by either party, the Commission adopts the finding 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 the P.B.A. was estopped from asserting that the Township had unilaterally changed its seniority system. This estoppel was based on the fact that the P.B.A. had not contested promotions in 1974 and the processing of grievances in 1976 based on this alleged unilaterally changed seniority system. The Hearing Examiner found, and the Commission affirms, that these unfair practice changes were, therefore, not timely, pursuant to N.J.S.A. 34:13A-5.4(c).

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OLD BRIDGE P.B.A., LOCAL 127,

Charging Party.

Appearances:

For the Respondent, Louis J. Alfonso, Esquire

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.  
(Nancy I. Oxfeld, Of Counsel)

DECISION AND ORDER

On April 14, 1977, the Old Bridge P.B.A., Local 127 (the "PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Township of Old Bridge (the "Township") 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 PBA contends that the Township violated N.J.S.A. 34:13A-5.4(a) (1), (2) and (7).<sup>1/</sup> The PBA contends that the

<sup>1/</sup> These subsections prohibit 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. (7) Violating any of the rules and regulations established by the commission." Subsequent to the hearing, the parties stipulated that the subsection (7) allegation in the charge was an error and that subsection (5) should be substituted instead. Subsection (5) provides: "(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."

Township instituted an illegal system of seniority based on the test scores received on competitive examinations for promotion which violates the Township's own ordinances, the collective bargaining agreement between the parties, and past practices between the parties. The PBA alleges that previously seniority was based on continuous service in rank. The PBA also alleges that the Township unilaterally changed the agreed upon shift schedules, and such change was based upon said illegal system of seniority. Finally, the PBA alleges that this unilateral change was instituted by the Township to harass the PBA.

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 July 21, 1977.

Pursuant thereto, a hearing was held before Alan R. Howe, Hearing Examiner of the Commission, on September 19, 1977, at which time the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were filed by the PBA on November 8, 1977, and by the Township on December 16, 1977. On January 24, 1978, the Hearing Examiner issued his Recommended Report and Decision, which report included findings of fact, 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 is made a part hereof.<sup>2/</sup>

The Township elected not to file exceptions to the

2/ H.E. No. 78-19, 4 NJPER 65 (Para. 4031 1978).

Hearing Examiner's Recommended Report and Decision. After being granted two extensions of time to file exceptions, extending to February 24, 1978, the PBA failed to file exceptions.

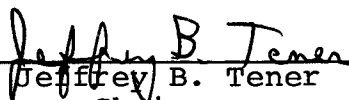
Upon careful consideration of the entire record herein the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by him.

The Hearing Examiner found that the PBA was estopped from asserting that the Township had unilaterally changed its seniority system due to the fact that the changes occurred as early as June 3, 1974. Promotions to the rank of Sergeant in 1974 were based on this "test score" seniority system. Furthermore, in 1976, grievances by two sergeants were sustained by the Township on the basis that shift assignments must be based on the "test score" seniority system, and not on the length of continuous service. The PBA grievance committee was present at the grievance hearing before the Township Manager, yet there was no evidence adduced that the PBA ever contested the decision rendered on June 18, 1976 concerning the two sergeants. The Hearing Examiner also concludes that these unfair practice charges are not timely, pursuant to N.J.S.A. 34:13A-5.4(c). Accordingly, the Hearing Examiner recommended that the Complaint be dismissed in its entirety.

ORDER

For the reasons 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

  
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Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Schwartz voted for this decision. Commissioners Graves and Hipp voted against this decision.

DATED: Trenton, New Jersey  
April 20, 1978  
ISSUED: April 25, 1978

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

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

-and-

Docket No. CO-77-299-6

OLD BRIDGE P.B.A. LOCAL 127,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the P.B.A. alleging that the Township of Old Bridge unilaterally altered its system of seniority in the scheduling of shifts for sergeants. The Hearing Examiner found that the seniority system had been changed by the Township from being based upon continuous length of service to competitive test scores and that the change was made by the Township in June 1974.

The Hearing Examiner, relied upon Town of Bloomfield, P.E.R.C. No. 76-39, 2 NJPER 138 (1976), in addition to concluding that the P.B.A. was estopped to assert a change in seniority by its inaction since 1974. The Hearing Examiner noted that the charge was also time barred under the six months' statute of limitations in the Employer-Employee Relations Act.

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 conclusions of law.

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

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

- and -

Docket No. CO-77-299-6

OLD BRIDGE P.B.A. LOCAL 127,

Charging Party.

Appearances:

For the Township of Old Bridge  
(Louis J. Alfonso, Esq.)

For the Old Bridge P.B.A. Local 127  
Rothbard, Harris & Oxfeld, Esqs.  
(Nancy I. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 14, 1977 by the Old Bridge P.B.A. Local 127 (hereinafter the "Charging Party" or the "PBA") alleging that the Township of Old Bridge (hereinafter the "Respondent" or the "Township") has 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 Township unilaterally altered the seniority system, contrary to past practice, and that the Township further based its shift schedule for Sergeants upon the seniority system as unilaterally altered, all of which is alleged to be a violation of N.J.S.A.

34:13A-5.4 (a)(1), (2) and (7) of the Act. 1/

It appearing the allegations of the above charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 21, 1977.

Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 19, 1977 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. A post-hearing brief was submitted by the Charging Party on November 8, 1977 and by the Respondent on December 16, 1977.

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 the consideration of briefs by 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:

FINDING OF FACTS

1. The Township of Old Bridge is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

1/ These subsections prohibit 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.

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

Subsequent to the hearing the parties stipulated that the subsection (7) allegation in the charge was an error and that subsection (5) should be substituted instead. Subsection (5) provides:

"(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."



2. The Old Bridge P.B.A. Local 127 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The collective negotiations agreements of the parties have never contained any provision with respect to seniority. <sup>2/</sup> Seniority has been a matter of practice over the years under the Rules and Regulations adopted by the Township on September 20, 1962.

4. Paragraph 15 of the aforesaid Rules and Regulations of the Township provides, in connection with responsibility of command within the Police Department, that seniority in the Police Department shall be determined "...first by rank, secondly by continuous service in rank." (Emphasis supplied).

5. The same Rules and Regulations provide in Paragraph 16 that the order of rank within the Police Department shall be as follows: (a) Chief of Police; (b) Captain of Police; (c) Captain of Detectives; (d) Lieutenant; (e) Sergeant and (f) Patrolman.

6. At least until 1974, seniority, based on "continuous service in rank," was followed for purposes of promotion, shift schedules and vacations.

7. Effective June 3, 1974, seven Patrolmen were promoted to Sergeant. The badge numbers, issued for seniority purposes in the rank of Sergeant, were based upon the test scores received on competitive examinations given for the promotion rather than upon length of continuous service. The foregoing was set forth in a letter of June 3, 1974 to each of the promoted Patrolmen from the then Township Manager, Lawrence A. Kenyon. No convincing evidence was adduced that the PBA took issue with Kenyon's having based seniority upon test scores rather than upon "continuous service in rank." <sup>3/</sup>

<sup>2/</sup> The most recent agreement was submitted by the parties as a post-hearing Joint Exhibit.

<sup>3/</sup> Sergeant James Lynch testified that the PBA was "assured" by the Chief of Police that Kenyon was "in error" and that "seniority would prevail...(meaning) time on the job" (Tr. 32). The Hearing Examiner finds that even assuming Lynch was accurate in his testimony, the Chief of Police had no authority to overrule the Township Manager, and the PBA should have so known. Support for this finding may be found in the action of Kenyon's successor, John Morse, who overruled the Chief of Police in 1977 on the very issue of the proper criteria for seniority (See Findings of Fact Nos. 13 and 14 infra).

8. In December 1975 shift assignments of Sergeants were changed. The criteria for shift assignment was seniority based on length of continuous service.

9. On December 8, 1975, Sergeant John Kenny, who had been promoted to Sergeant on June 3, 1974 along with six other Patrolmen, as noted above, filed a grievance alleging that his seniority had been violated since it was not based on the test scores which were utilized for promotion on June 3, 1974. A Sergeant Thomson filed a similar grievance on the same date. 4/

10. On June 18, 1976, Kenyon rendered a decision sustaining the grievances of Kenny and Thomson. 5/ Seniority was recognized in each case based upon the test scores of Kenny and Thomson, which were the basis for the promotions made on June 3, 1974, supra. The PBA grievance committee was present at the grievance hearing before Kenyon. No evidence was adduced that the PBA ever contested the said decision of Kenyon of June 18, 1976 under the grievance procedure. 6/

11. Notwithstanding the sustaining of his grievance, Sergeant Kenny did not exercise his "test score seniority" in order to change his shift.

12. As a result of a heart attack, the Chief of Police, George Gillard, was off duty from May through October 1976 and returned to light duty in November 1976. As a result, he was unaware of Kenyon's disposition of the Kenny and Thomson grie-

4/ The Agreement in Article XX, Section A recognizes the right of an individual employee to file a grievance and represent himself, provided that the PBA is notified and given an opportunity to be present at all steps of the grievance procedure.

5/ See Article XX, Step #4.

6/ Article XX, Step #5 provides for a final decision by the Town Council. Sergeant James Lynch, who was present on June 18, 1976 as a member of the PBA grievance Committee (R-3), testified on cross-examination that he filed a grievance "...after the Answer from Sergeant Thomson's grievance had come in" (Tr. 27; see also, Tr.26). There was never any further elaboration on the filing of this grievance on re-direct examination, nor was any explanation provided as to why the PBA did not appeal Kenyon's Step #4 Answer to the Town Council (Step #5, supra). Standing alone, the Hearing Examiner does not find Sergeant Lynch's testimony, supra, to be evidence that the PBA contested the June 18, 1976 decision of Kenyon under the grievance procedure.

vances on June 18, 1976, supra.

13. On December 1, 1976, Chief Gillard sent a memo to Charles Spinola, PBA President, confirming the results of a meeting between them on November 30, 1976, which memo set forth a new shift schedule based on seniority, the criteria of which was length of continuous service and not test scores.

14. Sometime prior to March 1977, the new Township Manager, John Morse, overruled Police Chief Gillard's aforesaid memo of December 1, 1976. Morse based his action upon the decision of the prior Township Manager, Kenyon, who had sustained the Kenny and Thomson seniority grievances of June 18, 1976, supra. The PBA filed a grievance which was denied.

15. On March 29, 1977, Captain Robert Cotton, acting for the Township, issued a memo recognizing seniority among all Sergeants based upon test scores and not length of continuous service. Thereafter the instant charge of unfair practices was filed on April 14, 1977.

#### THE ISSUE

Did the Township violate the Act by basing seniority on test scores rather than length of continuous service in the matter of shift schedules for Sergeants in March 1977?

#### DISCUSSION AND ANALYSIS

##### Positions of the Parties

The PBA contends that the Township has unilaterally altered the seniority system in the matter of the scheduling of shifts for Sergeants in 1977. It is alleged, by way of amplification, that the seniority system has always been based upon length of continuous service. Beginning in 1974, the Township instituted a change whereby seniority was based on test scores as a result of competitive examina-

tion and not length of continuous service. The PBA distinguishes Town of Bloomfield, P.E.R.C. No. 76-39, 2 NJPER 138 (1976) and cites Local 195, IFPTE & Local 518, SEIU and State of New Jersey, P.E.R.C. No. 77-57, 3 NJPER 118 (1977).

The Township cites Town of Bloomfield, supra, as supporting its position, and contends that the charge should be dismissed because the Township has since at least 1964 based seniority upon scores and not upon length of continuous service.

The Township has not violated the Act

In reaching the conclusion that the Township has not violated the Act, as alleged, the Hearing Examiner has weighed carefully the contending arguments of the parties. Unfortunately for the PBA, the record does not support its contentions. Accordingly, the PBA has not met its burden of proving the allegations in the complaint by a preponderance of the evidence. N.J.A.C. 19:14-6.8.

It is clear beyond doubt that seniority "by continuous service in rank" was the criteria for promotions, shift schedules and vacations until 1974. The genesis of this criteria was paragraph 15 of the Rules and Regulations of the Township, adopted on September 20, 1962. There never was any provision for seniority in the collective negotiations agreement between the parties but it is clear that seniority, which is a term and condition of employment, can arise from sources other than the collective negotiations agreement. 7/

The PBA's initial problem in the instant case is that on June 3, 1974 seven Patrolmen were promoted to Sergeant and the seniority criteria was changed from continuous service in rank to the test scores received in competitive examinations. There is no convincing evidence that the PBA took issue with the decision of the Township Manager on June 3, 1974 to change criteria. (See Finding of Fact No. 7, supra.)

7/ Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975); appeal dismissed as moot, App. Div. Docket No. A-8-75 (1976), cert. den. N.J. (1976). Galloway Township Board of Education, P.E.R.C. No. 76-32, 2 NJPER 186 (1976); Galloway Township Board of Education v. Galloway Township Education Association, 149 N.J. Super. 352 (App. Div. 1977), cert. granted S.Ct. 75 N.J. 29 (1977), vac. as moot.

To make matters more difficult for the PBA in sustaining its position, the Township in December 1975 changed shift assignments for Sergeants. The criteria for such change in shift assignment was seniority based on length of continuous service. On December 8, 1975, grievances were filed by two Sergeants protesting the use of length of service and not test scores. On June 18, 1976, the Township Manager rendered a decision sustaining the grievances of these two Sergeants. Seniority was recognized in each case based upon test scores. Representatives of the PBA were present at the grievance hearing before the Township Manager. There was no evidence that the PBA ever contested the decision of the Township Manager under the grievance procedure as it clearly had a right to do under Step #5. <sup>8/</sup>

The instant charges of unfair practices arise from a March 29, 1977 memo of a Police Department Captain, recognizing seniority among all sergeants based upon test scores and not length of continuous service. This memo originated from a ruling of successor Township Manager Morse, by which he reversed a memo from the Police Chief, dated December 1, 1976, that had based seniority for shift scheduling purposes on length of continuous service and not on test scores. The Chief of Police, it should be noted, had been off duty for seven months, particularly during the period when City Manager Kenyon sustained the grievances of the two Sergeants on June 18, 1976.

The Hearing Examiner finds that the PBA is estopped by its prior inaction in 1974 and 1976 from asserting, at this time and in this proceeding, that the Township has unilaterally changed its seniority system. <sup>2/</sup> As noted previously, the change occurred first in 1974 when the seven Patrolmen were promoted to Sergeant on June 3, 1974. The Hearing Examiner has found that the PBA did nothing to contest this change in seniority criteria. Again in 1976 the PBA did nothing to protest the grievance

<sup>8/</sup> See footnote 6, supra.

<sup>2/</sup> The Hearing Examiner also concludes that the PBA is time-barred under N.J.S.A. 34:13A-5.4(c).

decision of the Township Manager (June 18, 1976), which was a Step #4 decision in the grievance procedure. The PBA could have appealed to the Township Council as provided in Step #5 of the grievance procedure.

The Hearing Examiner relies on Town of Bloomfield, supra, in support of the conclusion reached in the instant case. The Hearing Examiner notes that the Local 195 case, cited by the PBA, supra, which was a Scope of Negotiations proceeding, stands only for the proposition that seniority is a term and condition of employment. It has no probative force in resolving the instant case.

\* \* \* \*


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

CONCLUSIONS OF LAW

1. The Township did not unilaterally change its seniority system in the matter of shift schedules for Sergeants within six months of the filing of the instant charge of unfair practices on April 14, 1977.
2. The Township did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) and (5).

RECOMMENDED ORDER

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

  
ALAN R. HOWE  
Hearing Examiner

DATED: January 24, 1978  
Trenton, New Jersey