I.R. NO. 2003-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LONG BRANCH,

Respondent,

-and-

Docket No. CO-2003-131

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL NO. 68 AND LONG BRANCH FIRE OFFICERS ASSOCIATION, FMBA LOCAL NO. 68A,

Charging Parties.

SYNOPSIS

The Charging Parties alleged that the City of Long Branch repudiated the collective negotiations agreements and retaliated against it and employees engaged in protected activity when it required fire lieutenants to be reassigned from fire headquarters to one of the satellite fire stations and it reassigned certain rank-and-file firefighters from the satellite fire stations to rotationally serve at fire headquarters. The Commission Designee found that the reassignments may implicate an exercise of the City's inherent managerial prerogative since they may have been designed to enhance the level of supervision and for training purposes. The Designee also found that it did not appear that the Charging Parties had established that the City's actions were motivated by union animus. The Charging Parties' application for interim relief was denied.

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Charging Parties.

Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys
(James L. Plosia, Jr., of counsel)

For the Charging Parties,
Fox and Fox, LLP, attorneys
(Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On November 20, 2002, the Firemen's Mutual Benevolent Association, Local No. 68 (FMBA) and Long Branch Fire Officers' Association, FMBA Local No. 68A (FOA) and individual firefighters and fire officers filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Long Branch (City) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (2), (3), (4)

and (5).[1/] The charging parties allege that the City repudiated their collective negotiations agreements and retaliated against their members when it required fire lieutenants to be reassigned from fire headquarters to one of the satellite fire stations and it reassigned the rank-and-file firefighters from the various satellite fire stations to rotationally serve at fire headquarters.

The unfair practice charge was accompanied by an application for interim relief and sought temporary restraint. On November 21, 2002, in accordance with my conversation with the City, the City agreed to delay the implementation of the assignment changes until after the scheduled return date on the charging parties' application for a temporary restraining order. The return date for oral argument on the temporary restraining order was conducted on November 26, 2002. At the conclusion of oral argument, I denied the charging parties' request for a temporary restraining

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (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."

order. On November 26, 2002, I executed an order to show cause on the charging parties' application for interim relief and set a return date for December 18, 2002. The parties submitted briefs, affidavits and exhibits in accordance with Commission Rules and argued orally on the scheduled return date. The following facts appear.

FMBA Local No. 68 is the exclusive collective negotiations representative for all paid firefighters employed by the City of Long Branch. The Long Branch Fire Officers Association, FMBA Local No. 68A is the exclusive collective negotiations representative for all paid lieutenants and captains employed by the City's fire department. Local 68 represents 18 rank-and-file firefighters and Local 68A represents 4 lieutenants and 1 captain. In addition to the paid fire force, the City has a cadre of approximately 143 volunteer fire fighters.

The City has eight firehouses; five of which are staffed by paid firefighters and three are used by the volunteers. Fire headquarters is located at Station 4. Prior to the change, the lieutenants were assigned to work at fire headquarters and one paid fire fighter was assigned to each of the four other fire stations on a permanent basis. Firefighters and lieutenants work a shift calling for 24 hours on, followed by 72 hours off.

On October 20, 2002, Chief Samual Tomaine issued a memorandum asking the lieutenants to indicate a satellite firehouse to which they wished to be assigned. On November 18, 2002, Tomaine

issued another memorandum in which he asked Fire Captain Johnson to advise him of the fire station selections made by the lieutenants. Additionally, he indicated that the implementation of the fire station reassignments for lieutenants would take effect on November 22, 2002.2/

Other than wages, language contained in the FMBA's and FOA's collective negotiations agreement is identical. Article XIX, Section 5(b) states the following:

> The City shall have the right to fill openings which occur in a firehouse because of death, retirement, resignation or redeployment of personnel. Where qualifications are equal, seniority will be used to fill that position in said firehouse insofar as practicable, subject to the approval of the Chief Administrative Officer or the Public Safety Director.

Charging parties assert that the above-quoted contract provision provides the most senior firefighter or fire officer with the option to choose the firehouse in which he or she wishes to work. The charging parties contend that Article XIX, Section 5(b) clearly provides for the use of seniority in filling assignments. Charging parties argue that the contract language is unequivocal and the decision of the City to reassign firefighters and fire officers constitutes a unilateral repudiation of Article XIX.

2/ As noted above, the actual implementation was held in abeyance pending the return date on the charging parties' application for a temporary restraining order which was heard on November 26, 2002.

Charging parties further contend that the City's decision to institute the reassignments was motivated by a retaliatory intention. In or about May 2002, the charging parties were apparently vocal in their protest against the City's decision to close firehouses when the assigned firefighter was out due to illness or vacation rather then bring in a replacement on overtime to keep the firehouse open. Also, in the Summer 2002, the charging parties filed a claim with the Public Employees Occupational Safety and Health Administration against the City for non-compliance with the "two in, two out" rule.3/

The City denies that it repudiated Article XIX of the collective negotiations agreement or that its decision to reassign firefighters and fire officers between headquarters and various fire stations was motivated by a retaliatory intention. The City argues that the clause is not unequivocal and is subject to interpretation. The City asserts that the contract clause cited by charging parties pertains to vacancies which arise at particular firehouses and does not relate to the instant situation. The City contends that no vacancy has arisen as the result of its determination to reassign fire fighters and fire officers. Moreover, the City contends that its decision to reassign firefighters and fire officers was done in the exercise of its managerial prerogative. The City claims that once fire officers are

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3/ This rule relates to the number of firefighters to be present during a structural fire.

assigned to a particular firehouse, they will have the ultimate responsibility for the operation of that station and be better able to supervise and manage the firehouse and the employees assigned thereto. Additionally, the City asserts that firefighters assigned to the fire headquarters will have a greater opportunity to train on an important piece of apparatus, a "bucket ladder," which is housed at fire headquarters.

The City contends that it began planning for the firehouse reassignments in May 2002, before any of the alleged protected activity cited by the charging parties occurred. Additionally, it was not aware that the charging parties brought a complaint to PEOSHA until approximately October 2002, after it had announced the firehouse reassignments.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The charging parties contend that the City has repudiated Article XIX, Section 5(b) of the collective agreement when it reassigned fire officers and firefighters to different firehouses without due consideration of employee seniority. In response, the City asserts that the reassignments constituted an exercise of its inherent managerial prerogative to enhance the level of supervision at the satellite fire stations. Further, the City claims that fire fighters reassigned to the headquarters station are better able to receive training in an important piece of equipment used by the City to fight fires.

It appears that the reassignment of fire fighters and fire officers may implicate an exercise of the City's inherent managerial prerogative. Actions taken which are designed to enhance the level of supervision constitute an exercise of management prerogative. See Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980). Moreover, the City's decision to reassign employees to enhance training may also implicate an exercise of managerial prerogative. See City of New Brunswick, I.R. No. 99-18, 25 NJPER 260 (¶30108 1999).

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on

the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. Timing is also an important factor in assessing motivation. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987).

Thus, the assessment of the employer's motivation in determining whether it has violated a(3) of the Act is critical. However, by its very nature, establishing the employer's motivation is a fact intensive exploration and does not readily lend itself to a grant of interim relief. Here, the County contends that it began planning for station house reassignments prior to the time at which the charging parties contend it engaged in specific actions constituting protected activity. Ultimately, the City's motivation must be ascertained by a hearing examiner or the Commission at the conclusion of plenary hearing. At this juncture, however, it is premature to make such a determination as to the City's motivation.

Consequently, for all of the reasons discussed above, I find that the charging parties have not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Accordingly, I decline to grant the charging parties application for interim relief. This case will be processed through the normal unfair practice mechanism.

ORDER

The charging parties' application for interim relief is denied.

Stuart Reichman
Commission Designee

DATED: January 8, 2003
Trenton, New Jersey