

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEW BRUNSWICK,

Respondent,

-and-

Docket No. CO-82-198-86

LOCAL 2467 IAFF-SUPERIOR
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Local 2467 IAFF-Superior Officers Association filed against the City of New Brunswick. The Association had alleged that the City violated the New Jersey Employer-Employee Relations Act by transferring the Association's president into the Fire Prevention Bureau because of his protected activity.

The Commission adopts the findings of fact and conclusions of law of its Hearing Examiner. The Commission reiterates its longstanding policy that, lacking compelling evidence, it will not substitute its judgment for a Hearing Examiner's credibility findings. The Commission also once again applies the Wright-Line standard and finds that the transfer resulted from legitimate business reasons rather than anti-union animus.

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Appearances:

For the Respondent, Gilbert L. Nelson City Attorney
(Ralph F. Stanzione, Assistant City Attorney of Counsel)

For the Charging Party
Hartman, Schlesinger, Schollosser & Faxon, P.C.
and Koch, P.C., Esqs.
(Thomas P. Foy of Counsel)

DECISION AND ORDER

On February 9, 1982, Local 2467 IAFF-Superior Officers Association ("Association") filed an unfair practice charge against the City of New Brunswick ("City") with the Public Employment Relations Commission ("Commission"). The Association alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (3), ^{1/} when, on February 2, 1982, 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; and (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."

the Association's president, Laszlo Szedo, to the Fire Prevention Bureau in retaliation for his protected activity.

On March 4, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 14, 1982, the City submitted its Answer. It denied the allegations of retaliation and asserted that legitimate business reasons led to the transfer.

On May 18, 1982, Commission Hearing Examiner Alan R. Howe conducted a hearing at which the parties examined witnesses, presented evidence, and argued orally. Both parties waived the right to file post-hearing briefs.

On May 21, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-53, 8 NJPER ____ (¶ ____ 1982) (copy attached). He recommended that the Complaint be dismissed. He found that although Szedo had been an active president, particularly in processing grievances, his transfer was not based on his union activity, but upon legitimate business reasons.

On June 21, 1982, after receiving an extension of time, the Association filed Exceptions. The Association argues that the Hearing Examiner erred in: (1) ignoring the timing of Szedo's transfer in relation to his exercise of recent protected activity; (2) crediting the testimony of the Acting Chief of the Fire Department that he decided to transfer Szedo several years ago; (3) ignoring the cross-examination of the Business Administrator; (4) finding a legitimate business reason for Szedo's transfer; and (5) failing to find a discriminatory motive for the transfer.

On June 25, 1982, the City filed a response. It argued that the record supported the Hearing Examiner's findings of fact and conclusions of law in all respects.

We have reviewed the record and find substantial evidence supporting the Hearing Examiner's findings of fact and conclusions of law. We incorporate those findings and conclusions here.

Our review of the record leads us to conclude that the Exceptions are without merit. First, a significant portion of the Hearing Examiner's report is based upon his credibility findings in favor of the testimony by Acting Chief Harry and Business Administrator Marcinczyk. Harry testified that the decision to transfer Szedo was his own decision and one which he had considered for several years. Marcinczyk testified that he did not know of Szedo's transfer before it occurred. While Szedo and Captain Lynch testified that Harry told them that the Mayor and Marcinczyk ordered Harry to transfer Szedo, the Hearing Examiner did not credit their testimony. In In re City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶ 11025 1980); and In re Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶ 11089 1980), we held that absent compelling evidence, we would not substitute our reading of the transcript for the Hearing Examiner's credibility judgments. Compelling evidence to overturn the instant credibility findings does not exist.

Second, the Hearing Examiner found, based upon Harry's extensive testimony, that the transfer of Szedo would benefit the

Fire Prevention Bureau. Harry testified that Szedo was transferred to the Bureau to replace Fireman Raneri who had only been a fireman for two years and who needed more experience fighting fires. Further, Harry wanted Szedo in the Bureau because of his firefighting experience, his construction background, and his ability to speak Hungarian. In addition, Harry testified that he saved about \$25,000 by these transfers and that Szedo had, in fact, proved to be an asset to the Bureau.

This testimony was unrebutted. There was no evidence to suggest that Szedo's firefighting experience, construction background, and language skills would not be -- or had not been -- an asset to the Bureau, and there was no evidence to rebut Harry's testimony that the City had saved \$25,000 by the transfers. ^{2/} In view of the Hearing Examiner's credibility findings in favor of Acting Chief Harry, the Association's inability to produce sufficient evidence to rebut his testimony undermines its attempt to prove unlawful motivation. ^{3/}

^{2/} In finding no evidence of anti-union animus and retaliation, the Hearing Examiner noted that Szedo had suffered no loss in pay or increase in working hours. Instead, the transfer had resulted in a change in working hours which diminished Szedo's opportunity to engage in outside employment. We agree with the Hearing Examiner that this loss of opportunity cannot alone establish anti-union animus and retaliation. We are not holding, however, that an employer would not commit an unfair practice if a charging party proved that the transfer was, in fact, specifically designed to punish him for anti-union activities by depriving him of outside employment opportunities.

^{3/} The Association contends that Szedo's ability to speak Hungarian was the reason the City gave for transferring Szedo and then argues that this asserted reason was pretextual since two other employees in the Bureau already spoke Hungarian. We find, to the contrary, that Szedo's ability was a minor reason among many reasons for the transfer and that the record is silent as to who else, if anyone, in the Bureau spoke Hungarian.

Finally, even assuming that Szedo's transfer was partially motivated by his Association activity, (it was not), the City established un rebutted and substantial business justifications for Szedo's transfer which would negate any unlawful motive. See Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), aff'd as modif., 108 LRRM 2513, 662 F.2d 899 (1st Cir. 1981), cert. den. (March 1, 1982); East Orange Pub. Library v. Taliaferro, 180 N.J. Super. 155 (1981); In re Cty. of Bergen - Operating Bergen Pines Cty. Hosp., P.E.R.C. No. 82-117, 8 NJPER 360 (¶ 13165 1982).

For the reasons set forth above and in the Hearing Examiner's report, we hold that the City did not violate subsections 5.4(a)(1) and (3) of the Act. We dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani, Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of the decision. Commissioners Hipp and Graves opposed.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

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LOCAL 2467, I.A.F.F. -
SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City did not violate Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it transferred Laszlo Szedo from Engine No. 1 to the Fire Prevention Bureau on February 2, 1982. The Charging Party had alleged that the transfer was made in retaliation for Szedo's exercise of protected activity as the President of the Local. However, the Hearing Examiner found that the Charging Party failed to prove its allegations by a preponderance of the evidence.

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:

For the City of New Brunswick
Ralph F. Stanzione, Esq.

For the Charging Party
Hartman, Schlesinger, Schlosser & Faxon, Esqs.
(Thomas P. Foy, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 9, 1982 by Local 2467, I.A.F.F. - Superior Officers Association (hereinafter the "Charging Party" or the "Local") alleging that the City of New Brunswick (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, following the retention by the Local of an attorney in mid-January 1982, the President of the Local, Laszlo Szedo, was transferred on February 2, 1982 from his normal assignment to the Fire Prevention Bureau, which transfer was in retaliation for Szedo's having engaged in the protected activity of pursuing his duties as President in negotiating the contract, using the grievance procedure and consulting an attorney, all of which was alleged to be a violation of N.J.S.A. 34:

13A-5.4(a)(1) and (3) of the Act.^{1/}

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 March 4, 1982. Pursuant to the Complaint and Notice of Hearing a hearing was held on May 18, 1982 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

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 oral argument 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 New Brunswick is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. Local 2467, I.A.F.F. - Superior Officers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Laszlo Szedo has been employed in the City's Fire Department for 17 years and is presently a Captain. Prior to February 2, 1982 Szedo had been assigned to Engine No. 1.
4. Szedo has been active in the Local since 1974 and was elected President in 1977 and continues in that office at the present time. As President he has

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

"(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".

conducted contract negotiations, pursued grievances and generally has enforced the agreement.

5. The 1980-81 collective negotiations agreement was received in evidence as Exhibit J-1. The pertinent portions of this agreement were extended for the year 1982 by an addendum executed on January 9, 1982.

6. Szedo testified without contradiction that during the past six months there have been several unresolved grievance problems, in particular one involving terminal leave (see CP-1).

7. As a result of the ongoing grievance problems the Local decided to retain an attorney in January 1982. After being retained the attorney wrote to the City on January 22, 1982 (CP-2), in which the City was requested to expedite the processing and resolution of outstanding grievances. Stanley R. Marcinczyk, the City's Business Administrator, responded on January 25, 1982, indicating that he understood that the terminal leave matter had been resolved (CP-3). The Local, however, was not satisfied with the response and directed its attorney to proceed to arbitration.

8. On February 2, 1982 at about 8:30 a.m. Frank J. Harry, who had been a Deputy Chief, was summoned to City Hall where he met with the Mayor, John Lynch, and Marcinczyk, the Business Administrator. Harry was informed at that time that he was being designated as Acting Chief of the Fire Department. He was advised that the major issue was overtime, which had been running at the rate of about \$150,000 per year. Harry credibly denied that either the Mayor or the Business Administrator gave him any direction or instructions regarding the transfer of personnel within the Fire Department.

9. Harry immediately proceeded to set up his office and, in accordance with prior ideas on reorganization within the Fire Department, prepared a memo transferring Szedo from Engine No. 1 to the Fire Prevention Bureau, effective February 4, 1982 (CP-4). Harry called Szedo into his office on February 2nd and advised him, in the presence of Shop Steward, Vincent Lynch, of the transfer. The Hearing Examiner does

not credit the testimony of Szedo and Lynch that Harry said he was making the transfer based on an "order ...from City Hall." Harry's version of what transpired at City Hall that morning seems more credible to the Hearing Examiner, namely, that the initiative for the transfer originated with Harry. Further, Marcinczyk testified that no direction to transfer Szedo came from him or the Mayor. Marcinczyk testified that he is advised of transfers of employees after the fact.

10. Harry testified that he has made four additional transfers since becoming Acting Chief on February 2, 1982 and has encountered no problems with the Local except for the Szedo transfer.

11. Harry testified that his reasons for transferring Szedo to the Fire Prevention Bureau was that it is a most important assignment and that he felt that Szedo would be a real asset.

12. The collective negotiations agreement (J-1) contains in Article XXIV, "Management Rights," provisions recognizing the City's right to manage its operation and to direct the work force, including the right to "transfer" with the proviso that such rights "...shall be exercised reasonably, in accordance with this Agreement and for good cause..." (J-1, p. 18).

13. Szedo testified that seniority was not followed in his transfer on February 2, 1980, notwithstanding the language in Article XXVIII, Section 1, which provides, in part, that "...the City may assign fire personnel to specific fire prevention duties other than fire fighting duties and outside of the normal assigned work of those duties to combat and reduce false alarms and investigation of potential fire hazards..." (J-1, p. 20). The Hearing Examiner finds as a fact that this provision of the Agreement does not pertain to a permanent transfer, such as is involved herein, but, rather, as Harry testified, this pertains to such matters as inspections, etc.

14. Szedo's hours of work in the Fire Prevention Bureau are 8:30 a.m. to 4:30 p.m. Monday to Friday whereas at Engine No. 1 Szedo's hours were 10-hour days and

H. E. No. 82-53

14-hour nights totaling 42 hours per week. Szedo testified that he is now unable to do outside construction work during weekdays and has suffered a loss of outside income. Szedo's transfer involved no reduction in pay from the City.

DISCUSSION AND ANALYSIS

The Respondent City Did Not Violate Subsections(a)(1) And (3) Of The Act By Its Transfer Of Laszlo Szedo On February 2, 1982

The Hearing Examiner finds and concludes that the Respondent City did not violate Subsections(a)(1) and (3) of the Act by its transfer of Laszlo Szedo, the President of the Local, on February 2, 1982. The Charging Party has failed to prove by a preponderance of the evidence that the transfer was in retaliation for Szedo's exercise of protected activities, namely, vigorously performing his duties as President of the Local around the time of the transfer.

It is undisputed that Szedo was engaged in the exercise of protected activities such as negotiating contracts and processing grievances on behalf of the Local in his capacity as President. The mere fact the Szedo suffered a loss of opportunity to engage in outside employment and earn additional income thereby does not establish that the City was motivated to retaliate against Szedo for the exercise of protected activities when it transferred him to the Fire Prevention Bureau on February 2, 1982. It is true that at the Fire Prevention Bureau Szedo's hours were 8:30 a.m. to 4:30 p.m. Monday through Friday as opposed to his prior hours of 10-hour days and 14-hour nights totaling 42 hours per week. This change in hours prevented him from doing outside construction work. However, the transfer did not result in Szedo suffering a reduction in pay from the City.

The Charging Party correctly cites certain cases, infra, establishing the prerequisites for a Subsection(a)(3) violation. Thus, in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) the Court made generous reference to the decision of the NLRB in Wright Line, Inc., 251 NLRB No. 150, 105

LRRM 1169 (1980). There the NLRB adopted the analysis of the United States Supreme Court in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) where the Supreme Court stated that the burden was upon the moving party to show that his conduct was protected and was a "substantial factor" or a "motivating factor" in the employer's decision to discriminate against the moving party. Thereafter, the employer has the burden of establishing that it would have reached the same decision even in the absence of protected conduct. Stated another way, the employer must establish that it was "...primarily motivated by legitimate business concerns..." Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669, 670 (1981).

The Hearing Examiner concludes that the Charging Party has failed to establish that Szedo's exercise of protected activities as President of the Local was a "substantial factor" or "motivating factor" in the City's decision, executed by Harry, to transfer Szedo on February 2, 1982. Further, even assuming that the Charging Party established that protected activities were a "substantial factor" or a "motivating factor" the City has come forward with a legitimate business justification in having made the transfer, namely, Acting Chief Harry's opinion that Szedo would be a real asset in the Fire Prevention Bureau.

The New Jersey Supreme Court in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) clearly established that the right of a public employer to transfer employees is an inherent managerial prerogative, the exercise of which cannot be the basis of an unfair practice. However, if a transfer is motivated by anti-union animus and is therefore retaliatory or discriminatory then a violation of Subsection(a)(3) is sustained and the Commission has so held: City of Elizabeth, P.E.R.C. 79-93, 5 NJPER 231 (1979).

The Charging Party has established no evidence of anti-union animus toward Szedo by the City and its officials, including the Mayor, the Business Administrator and the Acting Fire Chief. Further, there is no evidence of any retaliation by the City against Szedo for the exercise of protected activities in his capacity as

President of the Local. As indicated previously, the Hearing Examiner cannot base such a finding on the mere fact that Szedo has suffered a loss of opportunity in outside employment since his transfer.

Thus, the Hearing Examiner must recommend that the instant Unfair Practice Charge be dismissed.

* * * *

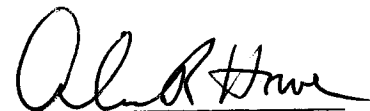
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when the Acting Fire Chief transferred Laszlo Szedo on February 2, 1982 from Engine No. 1 to the Fire Prevention Bureau.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: May 21, 1982
Trenton, New Jersey