

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2003-186

NEWARK FIREFIGHTERS UNION, et al.

Charging Party.

SYNOPSIS

The Newark Firefighters Union claimed that the City of Newark instituted a new program pertaining to involuntary, permanent transfers of unit employees between fire houses and that unit members were transferred or denied transfer because of either their race, political activity, or both. The City conceded that the transfers were partially motivated by its policy goal to eradicate racial discrimination in the fire department and to promote cross-training, create greater capacity for efficiency in fire suppression, and to enhance response time. The Commission Designee found that while race-based personnel actions are generally prohibited, in certain limited circumstances, they may be made. He made no finding as to the propriety of race-based personnel actions in this case. He also found that the basis for making the transfers may implicate managerial prerogatives. Accordingly, he found that the NFU had not established a likelihood of success on the transfer issue and denied the NFU's application for interim relief on that issue. The NFU claimed that one firefighter was denied his request for a transfer and two others were transferred because of their political activity. The City denied that these three employees were treated differently because of their political activity. The Commission Designee found that no irreparable harm was shown for the employee who was denied a transfer and that there existed a substantial and material factual dispute between the parties regarding the basis for the other two employees' transfers. Consequently, the Commission Designee denied the NFU's application for interim relief regarding these three unit employees.

I.R. NO. 2003-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2003-186

NEWARK FIREFIGHTERS UNION, et al.

Charging Party.

Appearances:

For the Respondent, JoAnne Y. Watson, Corporation
Counsel, (Pamela Mosley-Gresham, Assistant Corporation
Counsel)

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

INTERLOCUTORY DECISION

On January 27, 2003, the Newark Firefighters Union and additional named individuals (NFU or Union) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Newark (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), specifically violating 5.4a(1), (3) and (5)^{1/}. The NFU alleges

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees (continued...)"

that the City violated the Act by unilaterally changing terms and conditions of employment without negotiations. The NFU contends that the City instituted a new program pertaining to involuntary, permanent transfers of unit employees and also assert that unit members were transferred or denied transfer because of either their race, their political activity, or both.

The unfair practice charge was accompanied by an application for interim relief and sought temporary restraints. On January 30, 2003, the parties presented oral argument on the Union's application for a temporary restraining order. On that same date, I denied that application. Later on January 30, 2003, I executed an order to show cause and scheduled a return date on the NFU's application for interim relief for February 28, 2003. Due to inclement weather, the return date was rescheduled to March 17, 2003. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules and argued orally on their scheduled return date. The following facts appear.

The NFU is the exclusive representative of all rank-and-file firefighters employed by the City. The City employs

1/ (...continued)
in the exercise of the rights guaranteed to them by 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."

approximately 467 firefighters assigned to 18 firehouses. Each firehouse contains between one and three fire companies. Each company generally consists of one fire officer and four rank-and-file firefighters.

Probationary firefighters are initially assigned by the fire director to a fire house after completing their training period. The probationary firefighters are assigned to a company in which a vacancy exists and are not given an opportunity to "bid" on an assignment to any particular company. Probationary firefighters have no seniority above incumbent firefighters and, therefore, are limited to vacancies where more senior firefighters have not "bid" for the positions. The NFU contends that the City has never instituted an involuntary, permanent transfer of a non-probationary firefighter to a company or tour. The NFU argues that during the course of the year, firefighters (both probationary and non-probationary) are assigned to companies and tours on a temporary basis. Temporary assignments are made at the discretion of the fire director. All firefighters on temporary assignments are subject to being "bumped" from their positions when permanent transfers are made. Permanent transfers occur once per year and are accomplished through the submission of bids by the firefighters seeking permanent transfer. In situations where more than one firefighter bids for the same

vacancy, the NFU contends that seniority is the deciding factor as to who gets the permanent assignment to the vacant position.

The City claims that it does not have a seniority based bidding process for transfers to permanent vacant positions. While the City permits firefighters to submit a transfer request form to indicate a desire to move from one location to another, the City approves such transfer request at the discretion of the fire director. The City cites Article XXII, Transfers, contained in the collective negotiations agreement which states that:

Transfers will be made at the discretion of the Director.

Thus, the City asserts that it has made both voluntary and involuntary transfers but such transfers are based on the need of the department and not based on the firefighters' seniority. The department does not consider seniority in making transfer decisions.

On January 15, 2003, Executive Order No. 426, Transfers and Assignments, (Notice No. 2003-005) was issued by City Fire Director Edward J. Dunham ordering the transfer of numerous firefighters between companies and tours effective January 31, 2003. The transfers were permanent and involuntary and did not provide for bidding or the consideration of seniority in employee assignments.

Twenty-four transferred employees are at issue in the Union's unfair practice charge and application for interim

relief. The NFU contends that 21 were identified for transfer solely on the basis of race. The Union argues that racially grounded transfers violate the parties non-discrimination clause contained in the collective agreement. The Union has filed grievances contesting the alleged racially based transfers. The NFU claims that three other firefighters were transferred because of their political activity.

The City concedes that it was partially motivated by its policy goal to eradicate racial discrimination in the fire department. The City cites an on-going Federal law suit filed by the Vulcan Pioneers as a case in point. Apparently, the suit claims that segregation in the fire houses and on various tours is linked to disparate treatment in promotional opportunities. The City also claims that it is operating under a consent decree which it entered into with the Federal Department of Justice requiring the City to eradicate racial discrimination within the fire department.

The City further contends that while it was partially motivated by its effort to achieve racial diversity in the fire houses and on various tours, it also instituted the transfers to promote cross-training, create greater capacity for efficiency in fire suppression, and provide greater familiarity with the various locations in the City so that improvement in response time could be realized. The City asserts that the transfers

expose firefighters to various styles of leadership and provide firefighters with an opportunity to obtain experience in both commercial and residential areas.

As noted, the NFU claims that in addition to the 21 firefighters who were transferred on the basis of race, three additional firefighters were transferred due to their political activity and, in one case, also due to participation in union activity. Firefighter Luther Roberson is a union officer temporarily assigned to work in the union office. Roberson's previous assignment was to truck one, tour one, a hazmat (hazardous materials) unit. Roberson submitted a request to return to his previous assignment because of a new provision negotiated into the successor collective negotiations agreement which provided for a \$4,000 hazmat stipend. The Union contends that previously all union officials who returned to the field from the union office were given their prior assignment upon request. Roberson sought to bump one of the three less senior probationary firefighters assigned to truck one, tour one. The NFU contends that Roberson was denied transfer back to his previous assignment because prior to the May 2002 mayoral election, he was identified as having removed one of Mayor Sharpe James' campaign signs from the building in which Roberson lives.

The Union claims that Firefighter James Willis, assigned to engine company 21, tour four, actively worked on behalf of

Mayoral Candidate Cory Booker. Willis served as a volunteer district coordinator for the Booker campaign. Willis' off-duty political activity was known to the fire department's administration. Willis was involuntarily, permanently transferred to engine company no. 17, tour four.

Firefighter Clarence Bruton was permanently assigned to engine company no. 17, tour four. He had been temporarily, voluntarily transferred to engine company no. 18, tour four. Bruton submitted a written request to make engine company no. 18, tour four his permanent assignment. The NFU contends that Bruton personally supported Booker during the Newark mayoral campaign, and asserts that Bruton's work on Booker's campaign was public and known to members of the fire department's administration. Bruton's request to permanently transfer to engine company no. 18, tour four was denied and he was permanently, involuntarily transferred to engine company no. 21, tour four.

The City denies that it involuntarily transferred or refused any transfer request because of an employee's political activities. The City asserted during oral argument that it denied Roberson's transfer request because he would have to be re-certified in several hazmat areas before he was qualified to work in the hazmat unit. In response to the Union's contention that three firefighters were transferred because their political activities were supportive of Corey Booker's candidacy, the City

argues that the other 21 firefighters who were involuntarily transferred must have been James' supporters; yet they were transferred nonetheless. Thus, the City asserts that political activity was not a factor in the decision. The City contends that firefighters were transferred on the basis of the least senior member of the fire house affected by the executive order.

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).

An employer has a non-negotiable, managerial prerogative to transfer employees and to make assignments based on the employees' education, training, and experience. Trenton Housing Authority, P.E.R.C. No. 84-140, 10 NJPER 356 (¶15165 1984); Local 195, IFPTE v. State, 88 N.J. 383 (1982); Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). The

City puts forth basically two reasons for transferring most of the employees at issue in this proceeding:

1. To increase the level of racial diversity at many of its fire houses, and
2. To promote cross-training, improve fire suppression efficiency and enhance familiarity with the various locations in the City resulting in response time improvement.

Employers are generally forbidden from discriminating against employees with respect to terms, conditions, or privileges of employment or by classifying employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee on the basis of race. See 42 U.S.C. Section 2000e-2(a). A materially adverse change "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" and "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices . . . unique to a particular situation." Galabya v. New York City Bd. of Ed., 202 F.3d 636, 640 (2d Cir. 2000). A transfer that does not result in a reduction of pay or benefits may be an adverse employment action so long as the transfer alters the terms and conditions of employees in a materially negative way. See de la Cruz v. New York City Human Resources

Admin., Dep't of Social Servs., 82 F.3d 16, 21 (2d Cir. 1996) (transfer to "less prestigious" unit of social services department with reduced opportunities for professional growth was an adverse employment action." Racial and ethnic distinctions of any sort are inherently suspect. Regents of the University of California v. Bakke, 438 U.S. 265, 291, 98 S. Ct. 2733 (1978). A racial classification must be narrowly tailored to further a compelling governmental interest. Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227, 115 S. Ct. 2097 (1995). The remediation of past discrimination is the only compelling State interest explicitly recognized as such by the Supreme Court. See United States v. Paradise, 480 U.S. 149, 167, 107 S. Ct. 1053 (1987).

The City contends that it made these transfers in order to comply with a consent decree of the Federal Justice Department and to cure past discrimination. It also claims that none of the transferred firefighters suffered any kind of reduction in terms and conditions of employment. I make no finding with respect to the viability of the City's arguments legitimizing the transfers on the basis of race. Ultimately, such determination can only be made subsequent to a detailed exploration of the facts. Such findings have not occurred at this stage of the litigation of this matter. In any event, the New Jersey Supreme Court has identified the State Division on Civil Rights as generally the most appropriate forum for resolving race based claims. See

Teaneck Bd. of Ed. v. Teaneck Teachers Assn., 94 N.J. 9, 17 (1983).

Additionally, the City claims that it has instituted the transfers to promote cross-training, enhance fire suppression efficiency and improve response time. It would appear that the City has a significant governmental policy interest in taking actions which promote those goals. Such issues appear to implicate the exercise of inherent managerial prerogatives. See City of New Brunswick, I.R. No. 99-18, 25 NJPER 260 (¶30108 1999); City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985). Accordingly, I find that the Union has not established that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations regarding this element of its unfair practice charge.

I now address the Union's claims regarding Roberson, Willis and Bruton. The NFU contends that an order should issue requiring the City to transfer Firefighter Roberson out of the union office and back to his truck one, tour one assignment in the hazmat unit so that he would be eligible to receive the negotiated stipend. To satisfy the irreparable harm standard, the Union must demonstrate that the harm which Roberson will suffer could not be rectified at the conclusion of a final Commission determination. However, the Commission has the authority to issue a remedial order at the conclusion of the case

as it pertains to Roberson which would make him whole for any monetary loss suffered. The case law is clear in expressing the ". . . proposition that irreparable harm is not suffered where a monetary remedy can be provided at the end of the case and [this proposition] has been basic to the disposal of applications for interim relief by Commission designees" Newark Bd. of Ed., I.R. No. 83-15, 9 NJPER 253, 255 (¶14166 1983). See also Union Cty. I.R. 99-15, 25 NJPER 192 (¶30088 1999); City of Newark, I.R. No. 99-7, 25 NJPER 81 (¶30033 1998); Boro. of Sea Girt, I.R. No. 98-28, 24 NJPER 440 (¶29202 1998); Montclair Tp., I.R. No. 98-2, 23 NJPER 475 (¶28225 1997); City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976). Consequently, it appears that Roberson will not suffer irreparable harm, one of the requisite elements for a grant of interim relief.

The Union claims that Bruton and Willis were transferred because of their support for candidate Corey Booker during the 2002 mayoral election. The City asserts that none of the transfers were based on which candidate an employee supported in the election. The City contends that other than its goal of promoting racial diversity within the fire houses and its interest in cross-training and efficiency improvements, it identified individual employees for transfer on the basis of the least senior employee in an affected fire house. I make no finding with respect to whether Willis and/or Bruton were

transferred because of their political support for Cory Booker or whether their transfer was solely based upon seniority.^{2/} Rather, I find that there exists a substantial and material dispute of fact regarding the basis for Willis' and Bruton's transfers which cannot be resolved at the interim relief stage of an unfair practice proceeding. See City of Newark, I.R. No. 2002-11, 28 NJPER 257 (¶33098 2002); Union Cty., I.R. No. 2001-16, 27 NJPER 273 (¶32098 2001); Somerset Cty., I.R. No. 2001-12, 27 NJPER 261 (¶32092 2001); Franklin Borough, I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000); Borough of Fair Lawn, I.R. No. 98-1, 23 NJPER 444 (¶28205 1997); Tp. of Dover, I.R. No. 94-4, 20 NJPER 6 (¶25004 1993). The existence of the material factual disputes in this matter undermines the NFU's ability to establish the requisite likelihood of success regarding whether Willis and Bruton were improperly transferred.

Thus, under the above circumstances, the NFU has not, at this early stage of the dispute, established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. With regard to Roberson, the Union has also not established the requisite irreparable harm element. Consequently, for the reasons expressed above, I

^{2/} Nor do I make any finding regarding the issue of whether the Commission has the jurisdiction to remedy claims of individual employee retaliation due to the exercise of personal, political activities.

decline to grant the NFU's application for interim relief. This case will proceed through the normal unfair practice processing mechanism.

ORDER

The Newark Firefighters' Union's application for interim relief is denied.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman
Commission Designee

DATED: April 3, 2003
Trenton, New Jersey

