L.D. NO. 90-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE LITIGATION ALTERNATIVE PROGRAM

In the Matters of

CITY OF CAMDEN,

Petitioner-Respondent,

-and-

Docket Nos. SN-89-12, SN-89-13, CO-89-122

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 788, AFL-CIO,

Respondent-Charging Party.

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-89-2

CAMDEN FIRE OFFICERS ASSOCIATION, LOCAL 2578, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO,

Respondent.

Appearances:

For the City of Camden, Murray, Murray & Corrigan, Esqs. (Robert E. Murray, of counsel)

For Local 788, Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs. (Mary L. Crangle, of counsel)

For Local 2578, Laskin & Botcheos, Esqs. (George J. Botcheos, of counsel)

LITIGATION ALTERNATIVE PROGRAM DECISION

During the administrative processing of the above unfair practice charge and scope of negotiations petitions,

the City of Camden and Locals 788 and 2578, agreed to submit all outstanding disputes to the Litigation Alternative Program of the Public Employment Relations Commission. In addition, the City and Local 788 submitted several unresolved grievances for determination. On May 31, 1989, I issued an Administrative Order reflecting this agreement between Local 788 and the City of Camden. Thereafter, Local 2578 agreed to join this proceeding as a full participant for issues affecting the fire officers. The voluntary agreement between all three parties, as reflected in the Administrative Order and letters of agreement, represent the voluntary submission of the parties. Accordingly, all of the issues decided below have been properly submitted for final and binding decision by voluntary agreement of the parties and are properly before me for determination.

Hearings were conducted on all unresolved issues on June 28, July 20, August 14, and August 30, 1989. At the hearings the parties' positions were fully presented, argued, and relevant documentation was submitted in support of the parties' respective positions.

At the outset, I wish to commend the parties for their cooperation. Their positions were thoroughly and expertly presented.

Issues Raised Between Local 788 and the City of Camden

A. Interference Allegations

Local 788 (the "Union") has alleged that the City of Camden has interfered with its ability to function as the exclusive collective negotiations representative for firefighters. The Union claims the City has denied access to City representatives, personnel records, mailboxes and administrative offices thereby frustrating its ability to function as the employee representative for unit members.

An example of such denial is the claim that the City refuses to meet with the Union except by prior appointment. The Union believes that this condition precludes discussion of issues which need to be immediately defused, or those such as safety, where serious repercussions could arise if not dealt with immediately. The Union also claims that doors to the fire administration offices have been deliberately locked to exclude the Union and that the Chief has not been responsive to requests for meetings to discuss grievances. The Union also objects to the City's requirement that all such meetings be tape recorded. The Union acknowledges that the Chief has other interests than dealing with the Union, but that he has not honored his statutory responsibility to deal with Local 788 when required.

The City responds that the limits which it has set on the Union were a necessary response to what it terms unprofessional and disruptive behavior by the Union's President. The City cites several instances in which the President was allegedly boisterous and intimidating thereby interfering with the ability of the fire administration to conduct its business. It believes its response placing restrictions on access was reasonable and necessary, including disciplining the President for behavior it believes was not protected activity.

It is apparent that the administrative actions of the City and the numerous grievances of the Union in response to those actions are the inevitable consequence of an obvious breakdown in their day-to-day labor-management relationship. When such breakdown occurs, the respective roles of each party to that relationship are neither respected nor fulfilled. In such a relationship, for example, "shop talk" which might normally involve vigorous interchanges of positions, can degenerate into personal acts of confrontation. The former may be acceptable, but the latter is clearly not. Active representation, which unit members expect from their union, may evolve into acts of disruption which management does not want to tolerate. Management may

respond with actions which have the effect of denying the Union its statutory right and responsibility to represent its membership. Such mutual failure inevitably leads to a distressed grievance procedure. The net effect of such a relationship is escalating litigation and no resolution. The energies of the parties are diverted from performing services which they are required to deliver.

It would be simple to review each particular incident and to place blame. This procedure, however, is not a trial and if I were to merely assess guilt, the impact would be to place further strain on the relationship.

Accordingly, after consideration of all of the evidence, I decide the following with respect to the interference allegations made by the Union.

1. The doors to the fire administration offices will be unlocked. While the City feels justified in its actions, the locking of the doors has become a cold war symbol. This is a necessary step if the relationship here is to improve in accordance with the guidelines set forth below.

2. A procedure must be established between the City and Union whereby access is permitted but regulated. Such a procedure must acknowledge the respective roles of the Union and the City. The Union simply cannot expect that the City

be immediately responsive to all of its concerns. Simply put, everything is not a crisis. The Union cannot expect that the Fire Department's energies be constantly directed towards grievance processing and information production. On the other hand, the City must recognize the legitimate need of the Union to serve its membership. A procedure must be established which provides for frequency, regularity and also flexibility to deal with bonafide emergency situations.

Two meetings per month, one hour each in duration, at mutually convenient dates and times should be sufficient at this point in time to promote responsible mutual dialogue. Virtually all non-emergency communication can be accommodated within this framework. This is not meant to exclude actions involving serious health and safety matters or to delay communication over immediate negative actions contemplated by the City against an employee where prompt union input is appropriate and necessary.

3. Local 788 believes it has been denied information relevant to the processing of grievances. Here, the Union shall submit any such requests in writing and the City is obligated to make a prompt response to such requests. The Union should strive to avoid making requests which are unnecessarily onerous or beyond the scope of entitlement.

4. Meetings between the City and the Union shall not be tape recorded unless the parties mutually agree.

5. Since I have set forth a framework directed towards improving in the relationship between the City and the Union, I do not believe that further action with respect to pending discipline against the President is warranted and I direct that they be rescinded. This should not be construed as a determination that his conduct was appropriate. In fact, the President's conduct was a contributing factor. While the President may have felt provoked, his actions, especially in front of representatives from outside the City, contributed to a "get even" approach by City representatives. Access must be handled responsibly by both City and Union representatives. There is simply no room for "self help" actions designed to promote physical confrontation. There are lawful procedures which the Union may pursue if it feels the City is avoiding its obligation to deal with, or retaliating against, the Union. Adherence in the future to the above framework for access should alleviate the tension which produced the incidents which led to his discipline, and to avoid future incidents which might lead to discipline.

Additionally, the Union has alleged that the City has denied union leave to union officers in violation of past

practices and has disparately applied contractual leave provisions. Since this issue deals with administration of the contract on a case-by-case basis, any specific denial of such leave which the Union believes violates the contract must be pursued through the grievance and arbitration procedures. The only specific allegation here involves a denial of leave time to William Bain to attend a CLU meeting on October 1, 1989. But it does not appear that Bain was scheduled to work when the meeting actually took place. Thus, I do not find a basis to find a contractual violation. The contract is specific that union officials "shall further be excused from duty to attend meetings of the Central Labor Union only for the duration of such meetings." The City and the Union are encouraged to discuss situations when union leave is requested to avoid future disputes and unnecessary verification by the City.

The Union has alleged that the City has not provided advanced notice to the Union of disciplinary proceedings and timely copies of such notices. The City is directed to do so. The Union is required to fairly represent such employees and cannot do so without proper and timely notice.

The Union has alleged that its President has not received overtime as required by the Fair Labor Standards

Act. This matter must be resolved by seeking an advisory opinion from the United States Department of Labor which has jurisdiction over such matters.

The Union has alleged disparate enforcement of standards for firefighters compared with superior officers and discriminatory treatment with respect to discipline. While there is no direct evidence of such a pattern of activity, the parties are directed to adhere to a policy which does not discriminate nor differentiate based upon rank or status.

The Union has alleged that access has been restricted to its mailbox. Since I have addressed the issue of access, this particular allegation should be resolved. The Union is entitled to access. Secretaries who work in fire administration should not have their work interrupted by Union access to its mailbox.

The Union has alleged that the City refused to permit firefighter Nelson Savidge to return to work. Mr. Savidge retired shortly after this incident and the matter shall be considered moot.

The Union has alleged that firefighters have been required to meet individually with City representatives concerning contractual matters. While the Union is entitled

and obligated to represent employees who may be subject to discipline, it appears that the Moreland matter did not involve discipline. Instead, he entered the Employee Assistance Program and as such the City's actions did not constitute discipline.

The Union has alleged that the City has imposed discipline on witnesses at OAL hearings for those that did not wear dress uniforms. The City has made a distinction between internal and external functions. At internal functions, firefighters may where work uniforms and at external functions, such as formal administrative hearings, they are required to wear a Class A uniform. The City should have the right to promulgate such a policy and the Union henceforth must adhere so long as it is consistently applied. Any prior disciplinary action, if taken, shall be rescinded.

The Union has alleged that on certain occasions a grievance has been resolved at the higher steps of the grievance procedure but the Chief has refused to implement grievances which have been resolved. An example of such involves the Moreland matter. In that case, Moreland, by agreement, was to be on active pay status for the period of time in which he was receiving treatment. However, the Chief

removed him from the payroll. To avoid such conflict in the future, the City shall coordinate its efforts in the grievance procedure to insure an implementation of grievances which have been resolved.

B. Allegations of Unilateral Changes In Terms and Conditions of Employment

Local 788's three initial allegations are directed towards access and the conduct of union business. Issues concerning access and union business shall be resolved pursuant to the procedures I have directed on pp. 5-7.

The Union has also challenged the City's promulgation of a notice on uniform inspection. This notice appears to be reasonable and the challenge is without merit. Unit members shall adhere to the terms of the notice. Any pending discipline with respect to this issue shall be rescinded.

The Union contests the Departmental Order concerning seat belts and related issues on fire equipment. This is one of many Orders which the Union has contested. Some of these Departmental Orders primarily deal with managerial prerogatives and policy and to some extent impact on working conditions.

It is apparent that these disputes might would not arise if the City and the Union adhere to the provisions of

Article XI - Rules and Regulations - in the collective bargaining agreement. This article recognizes the right of the City to establish and enforce reasonable and just rules and regulations and that an opportunity be provided to the Union for discussion and consultation. The agreement also directs compliance with such rules and a review procedure. The parties are directed to comply with Article XI. In some cases, the Departmental Orders did not involve new issues and in any event, departmental orders which have been promulgated cannot by remedied at this juncture. Any new Departmental Orders which are promulgated shall be administered within the guidelines set forth in Article XI. This is so even if the Departmental Orders are a reiteration of prior policy.

The Union contests disciplinary action invoked against firefighters (Allen, Gryckiewicz, Davis, Jackson, Baylor, Gforer, Miller, Ward, Rossi, Smaritto, Williams and Pearson) who were allegedly disciplined without prior notice of any change in rules, especially with respect to AWOL. After review of the evidence with respect to these unit members, I direct the following action.

The discipline with respect to firefighter Allen is moot.

Firefighter Gryckiewicz was properly disciplined. He was paid for four hours and the four hours for which he was not paid he was absent.

Firefighter Davis shall be treated in a similar fashion as Gryckiewicz. If he did not work he shall not be paid. If he did work he shall be paid for the hours which he worked.

Firefighter Jackson was disciplined without just cause. While the City is correct that it may discipline employees for being absent without leave, the facts in this particular case do not support the City's action. Jackson was to report to work at 8:00 a.m. Upon realizing that he could not be in on time, he called in and was given until 8:15 to report. The firefighter on the prior shift held over. Jackson arrived at 8:12 a.m., dressed for work and reported at 8:20 a.m. Under these facts, especially since there appears to be no economic loss and there was continued coverage, Jackson should be reimbursed with full back pay.

Firefighters Gforer and Miller are no longer employed and the pending disciplinary action with respect to each shall be considered moot.

Firefighter Baylor received a written reprimand and this disciplinary action shall be sustained.

Firefighters Ward and Rossi did not report for work and disciplinary action with respect to each shall be sustained.

Firefighter Smaritto was fined three day's pay for allegedly refusing a transfer from one firehouse to another. The facts show that Smaritto did in fact accept the transfer but did engage in verbal resistance. The facts further demonstrate that there are circumstances which mitigate against the severity of the discipline. The discipline shall be reduced to a written reprimand and any future refusal or resistance on his part shall be subject to progressive discipline.

Firefighter Williams is vice-President of Local 788. When the President was out of town attending a convention, Williams served as acting President and requested administrative leave for union business and the request was approved by the Chief. The Chief later revoked his prior approval because he became uncertain as to whether it was appropriate for him to have approved the request for leave time. The Chief sought the advice of the City's Business Administrator. The Business Administrator, on August 1, 1988, issued a letter to Williams setting forth existing policy with respect to administrative leave. However, Williams did not work on July 31 and August 1 and was fined

three days for failing to report to work. I am certain after review of this incident that the sequence of events which led to the discipline were the result of confusion. The policy was clarified in the Business Administrator's letter and any future disputes over the application of that policy may be grieved. Because of the confusion with respect to the Williams incident, I direct that the disciplinary penalty be waived.

Firefighter Pearson, according to the Union, was unlawfully denied the right to be on IOD status. After returning to work from a prior injury, Pearson then experienced additional medical problems. The City denied Pearson IOD status. The Union alleges a violation of the collective bargaining agreement. I am unable to ascertain whether Pearson's most recent problem was a result of his prior injury or is a new medical problem. This factual medical dispute with respect to Pearson which should be resolved by submission to the City's medical representative. A fresh determination shall be made and any dispute with respect to that determination shall be directed to the parties' grievance procedure.

C. The Fire Marshal's Office

The Union has grieved the City's reassignment of four Fire Prevention Specialists from rotating to permanent day shifts. The remaining Fire Prevention Specialists work permanent day shifts. The collective bargaining agreement addresses the issue of work schedule for Fire Prevention Specialists as follows:

> Section A(2) the Fire Prevention Specialist U.F.D. shall be assigned to either one of the four platoons as scheduled in Section 1, Article V or to a work week of Monday through Friday 0800 to 1600 hours. The replacement of shift workers during vacation, holiday, and other prior approved leave shall continue as has been the practice since June 1985.

The Union contends that Article V provides for the retention of existing work schedules and does not authorize the City to unilaterally change those schedules. The City disagrees, asserting that the language permits the City to assign a Fire Prevention Specialist to either type of shift.

Additionally, the City challenged the negotiability of the grievance and filed a scope of negotiations petition. The City claims a managerial prerogative pertaining to governmental policy by its decision to have inspections performed during daytime hours. The City claims that there is little if no fire inspection performed during the night

and that the main function of the Fire Prevention Specialists at night is to perform arson investigations. While the City does not seek to abandon arson investigations, it claims that these investigations can be more efficiently performed by utilizing the call-back procedure in the contract.

The Union strenuously contests the City's policy arguments. Essentially, the Union argues that the interests of the fire department and the public are better served by Fire Prevention Specialists working at night as well as during the day. The Union further argues that even if a significant policy reason were to exist, the adverse affect on working hours dictates that the issue should be negotiable.

While the Union has established that the City's decision with respect to scheduling does impact on the employees' working conditions, the predominant issue here is the City's decision as to when it will provide the services of fire inspection. As such, this decision is a managerial prerogative. The City, however, is obligated to abide by negotiated procedures dealing with compensation in the event it decides to assign a Fire Prevention Specialist at night on an on-call basis.

The Union has alleged denial of access to employees employed in the offices of the Fire Marshal. The City

asserts that denial of access was necessary because of irresponsible and disruptive behavior by Union representatives.

The Union, for the reasons set forth in Section A of this decision, must have access to unit employees in order to fairly represent them. The Union alleges that since it does not have access, these employees have been encouraged to deal directly with City representatives leading to direct dealing. This is perhaps an inevitable consequence of the denial of access to the Fire Marshal's office. The Union's right to access is conditioned upon Union representatives exercising this right in a responsible and lawful manner.

The Union has alleged that the City has unlawfully refused to promote firefighters to positions in the City's Fire Marshal's office. Central to this claim is the allegation that the promotions have not been made because the Union President is eligible and the City is retaliating against him by refusing to promote anyone. The City disputes this claim and has advanced reasons for not making the promotion. These firefighters have been placed on a civil service eligibility list and the list includes the Union's President. Four such vacancies now exist. At this point in time, this allegation is premature since the eligibility list

remains in effect. At this juncture, I find no evidence linking the refusal to fill the vacancies because of the Union President's name being on the eligibility list. However, the parties are referred to existing law on this subject which is absolutely clear: lawful union activity shall not play a role in any determination to promote or not to promote.

The Union has alleged that the City has instigated efforts to remove employees in the Fire Marshal's office from the bargaining unit. While this allegation appears to be without merit, it is now moot since a representation petition filed by these employees (PERC Docket No. RO-90-33) has been dismissed since the unit sought was not appropriate. D.R. No. 90-17, 16 NJPER ___ (¶_____ 1990).

Assignment and Allocation of Overtime

Locals 788 and 2578 (Fire Officers) each have filed grievances against the City concerning the assignment and allocation of overtime. In response, the City has filed scope of negotiations petitions challenging the negotiability of the grievances. The parties have fully briefed these issues and have argued orally with respect to the merits of their positions. The grievances of Local 788 and 2578 are

distinct and rise out of different circumstances. However, since each grievance potentially affects the interests of the other unit, and for the purposes of this proceeding, the issues have been consolidated.

The Local 788 Grievance

Local 788's grievance concerns Article V, B(5) of the collective bargaining agreement. This provision states:

> Where overtime is required or if there is an emergency in a given unit, firefighters from the bargaining unit shall be hired.

Local 788 claims that the City has violated this provision.

Each fire company has a complement of one captain and four firefighters. When one firefighter who is regularly assigned does not report, that firefighter is not replaced and there is no overtime opportunity. If the captain who is regularly assigned does not report for work, one of the four firefighters from that company is assigned to act as captain. This situation is similar to the above since no overtime opportunity exists because the company remains operational with a captain and three instead of four firefighters. In another situation, where a captain and a firefighter are both scheduled to be off, a vacancy exists in the captain's position and is filled by assigning either a

captain or another firefighter depending upon the availability of manpower and the desires of employees.

None of the above situations are in dispute, nor are the focus of Local 788's grievance. Instead, the grievance concerns a situation where a firefighter has already been designated as acting captain because of a temporary vacancy in a captain's position on a particular shift and additionally, a firefighter regularly assigned to that shift also does not report. Under this circumstance, the company which would normally consist of five (one captain and four firefighters), but would still be operational with four (one acting captain and three firefighters), is suddenly reduced to three, one acting captain (a firefighter) and two firefighters. Under these circumstances, the City returns the acting captain (a firefighter) back to the rank of firefighters and call in a captain to replace the captain or the firefighter who would have been designated as acting captain.

Local 788 contends that the failure by the City to designate the firefighter as acting captain and then call in another firefighter is a violation of Article V, B(5). In support of this position, Local 788 contends that this language was incorporated into the agreement through a

Consent Award issued by an interest arbitrator dated December 11, 1987 and that this language requires the assignment of a firefighter to serve as acting captain under the above circumstances, rather than calling in a captain to serve as acting captain.

Local 788 rejects the City's position that the collective bargaining provision is not lawfully negotiable. Central to its argument is that the grievance merely attempts to protect work traditionally performed by unit employees. In other words, since a firefighter can be acting captain when only the captain is out, then it should also be lawful to have the firefighter serve as acting captain when a captain and a firefighter are both off. In support of its position, Local 788 cites well-settled case law concerning the issue of work preservation.

The City challenges the negotiability of the Union's grievance and Local 788's position on the merits of the contract language. In short, the City believes that it has the right to assign a captain on a temporary basis to fill the position of acting captain since governmental policy dictates that it should have the right to have a captain on duty when necessary. The City has not changed its policy of having the firefighter serve as acting captain when only the

captain is off. On the merits of the grievance, the City contends that Article V, B(5) contains no language requiring the City to make temporary appointments to acting captain solely from the firefighters unit.

I have carefully reviewed the parties' respective positions. Since this proceeding requires a determination on the merits of the grievance, a formal determination on negotiability is not required. Nonetheless, for the purposes of this proceeding, and to clarify review of the grievance on its merits, I will assume that the grievance is lawfully negotiable. There is no factual dispute as to the number of personnel required to man a company and since, in other situations, a firefighter normally serves in an acting captain capacity when a captain does not report there is no harm to the City's prerogatives.

The record, however, does not sustain Local 788's position on the merits of the grievance. The contract language purports to represent a change from the manner in which personnel were assigned prior to the incorporation of Article V, B(5) into the recent agreement. But the language clearly falls short of the interpretation which Local 788 seeks. The language is general in nature and does not specifically address the issue of assignment. In order to

effectuate the modifications Local 788 seeks, such language should be distinct and specific. While I do not doubt the sincerity of Local 788's position that it successfully achieved what it now claims. The contract language simply does not support Local 788's position that it has achieved such a change. Thus, the grievance is denied and dismissed.

The Union has also alleged that the City has repudiated an agreement concerning overtime allocation where a company is depleted as a result of an assignment of firefighters as Chief's aides. However, the facts at present are that Chief's aides positions have been abolished. Thus, this dispute is moot. However, fire officers should not be filling vacancies caused by the assignment of firefighters to Chief's aides positions.

The Local 2578 Grievance

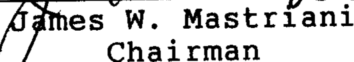
Local 2578's grievance challenges the fire department's Special Order #88-3 concerning overtime guidelines. Special Order #88-3 places a cap of two overtime tours which any fire officer may work in a seven day period. Local 2578 contends that the grievance predominantly involves the issue of which employees will work overtime and that such issue is lawfully negotiable. It also contends that the lifting of the same

overtime cap on Local 788 while retaining it for Local 2578 effectively permits the replacement of captains by firefighters thus raising a work preservation issue.

The City contends that it has a managerial prerogative to determine manpower and staffing requirements and that it has an inherent right to restrict the number of overtime tours to assure that captains are physically capable of performing functions necessary to the operations of the fire department. The City rejects the claim that Special Order #88-3 represents a shift of the unit work of fire officers to firefighters and that it has not affected the amount of overtime which fire officers may work.

The City's position that this grievance is not lawfully negotiable must be rejected. The record supports Local 2578's position that the grievance predominantly involves the allocation of overtime. While the City unquestionably retains the right in a given circumstance to determine whether a fire officer is physically capable of performing the duties of a position and may indeed promulgate a policy which effectuates that right, the facts here do not support its contention that this overtime cap of two shifts reflects such a policy. In fact, the City has allowed overtime more frequently than the overtime cap when manpower shortages occur.

However, I do not find that Special Order #88-3 violates the terms of the collective bargaining agreement. The record reflects that the overtime cap is a continuation of prior special orders placing a substantially similar overtime cap on fire officers. While Local 2578 correctly notes that such an overtime cap was lifted for members of Local 788, that fact standing alone does not represent a contract violation of its own collective bargaining agreement. There is no evidence that the City was motivated by a desire to shift existing overtime opportunities for fire officers to the firefighters. In fact, the record shows that overtime has been kept substantially in balance. The proper forum for Local 2578 to address a change in the overtime cap is collective negotiations.



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 26, 1990