

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH AND GEORGE J.
FORRESTER, FIRE DIRECTOR,

Respondents,

-and-

Docket No. CO-78-234-79

DONALD SILVEY AND FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION, BRANCH NO. 9,

Charging Parties.

SYNOPSIS

The FMBA and Donald Silvey, the Association's President, filed an unfair practice charge against the City of Elizabeth and its Fire Director, which alleges that the City and the Director violated the Act by transferring Silvey from his regular work station to another station because of the remarks Silvey made concerning the operation of the Department at a City Council meeting. The Charging Parties also allege that the City failed to reinstate Silvey to the Rescue Squad where he had worked prior to its closing when the Rescue Squad was reactivated, and that the Director made comments concerning Silvey, all because of the exercise of his protected activity.

The Hearing Examiner found that Silvey was transferred as a direct result of his lawful appearance before City Council and that such action violated the Act. The Hearing Examiner also found that the City's failure to reinstate Silvey to the Rescue Squad was done in response to his protected activity and therefore violated the Act. Finally, the Hearing Examiner found that the Director violated the Act by referring to Silvey as a "troublemaker" because of the exercise of his protected activity. The Hearing Examiner recommended that Silvey be reinstated to the Rescue Squad and be made whole for any Acting Captain's pay he would have received had he been reinstated to the Squad at the proper time.

Relying upon the same cases and reasoning cited by the Hearing Examiner, the Commission adopts his recommendations. Although the City excepted to the Hearing Examiner's report, arguing that business justification existed for Silvey's transfer, the Commission found that the City's unlawful motive outweighed any legitimate business reasons that may have existed for Silvey's transfer.

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BENEVOLENT ASSOCIATION, BRANCH
NO. 9,

Charging Parties.

Appearances:

For the Respondents, Frank P. Trocino, City
Attorney (Raymond T. Bolanowski, Assistant City
Attorney, Of Counsel)

For the Charging Parties, Goldberger, Siegel
and Finn, Esquires (Mr. Howard A. Goldberger,
Of Counsel)

DECISION AND ORDER

On March 30, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission, which was supplemented on July 31, 1978 by Donald Silvey and the Firemen's Mutual Benevolent Association, Branch No. 9 (the "Charging Party" or the "Association") alleging that the City of Elizabeth (the "City") and George Forrester, Fire Director (the "Director") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7), by coercing and harassing Mr. Silvey, the Association's President, in the exercise of the rights guaranteed to him by the Act; by transferring Mr. Silvey from his normal work station to

another work station, because of his protected activity; and by refusing to transfer Mr. Silvey back to the Emergency or Rescue Squad, because of his protected activity after the Squad returned to operation in April 1978.

The charge was processed pursuant to the Commission's Rules, and to appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 5, 1978. In accordance with the Complaint and Notice of Hearing, hearings were held in this matter on August 24, and 31, September 22 and October 27, 1978 before Robert Snyder, Hearing Examiner of the Commission, at which time both parties were represented by counsel and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. On December 20, 1978, and January 4, 1979, post-hearing briefs were filed by the Charging Party and the City respectively. On February 26, 1979, the Hearing Examiner issued his Recommended Report and Decision^{1/} which 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 to this Decision and Order and made a part hereof. Pursuant to an approved request for an extension of time, timely exceptions were filed by the City on March 29, 1979.

The Hearing Examiner concluded that the City violated the Act by transferring Silvey from Engine Co. No. 1 on February 9, 1978

1/ H.E. No. 79-34, 5 NJPER 85 (¶10048 1979).

because of the exercise of protected activity, and further violated the Act by failing to transfer Silvey back to the Emergency or Rescue Squad since April 19, 1978, the date the Squad was reactivated. Finally, the Hearing Examiner concluded that Fire Director Forrester made certain comments and interfered with Silvey's and other employees' exercise of protected activity. The Hearing Examiner therefore recommended that Silvey be reinstated to his former position as driver for the Emergency Squad; that he be made whole by paying him the sum of money equal to the amount he normally would have earned if such position would have been available to him had he been reinstated to the Emergency Squad on April 19, 1978; and that the City and the Director cease interfering with and coercing Silvey in the exercise of his protected activity.

Only the City filed exceptions to the Hearing Examiner's report. In its first exception, the City alleged that the Hearing Examiner was incorrect in stating that some of Charging Party Silvey's commendations for his work on the Fire Department had been for his efforts alone. Even assuming that the City was correct and that Silvey received only joint commendations with other men of the Department, that would not adversely affect or necessitate a change from the recommended decision. The receipt of commendations by Silvey either individually and/or in conjunction with other firefighters was utilized by the Hearing Examiner only to indicate that his prior record was that of a competent firefighter generally and as part of the Emergency Squad in particular. Even if the City is correct in this one aspect, the fact remains that the record shows

that prior to the instant dispute Silvey had never received any adverse comment or discipline concerning his work on the Emergency Squad, and had received several commendations. The exception, assuming it is accurate, is not pertinent to the merits of the charge, and is not a sufficient basis upon which to alter the Hearing Examiner's recommendations.

The City next excepts to the terminology used by the Hearing Examiner (the phrase "high tour seniority") concerning Mr. Silvey's ability to become acting captain and his ability to select vacation periods. The Hearing Examiner used that phrase to indicate that Mr. Silvey's seniority position during his employment in the Rescue Squad prior to October 1977 was "high" as compared to most of the men in the Squad. The City apparently believes that the Hearing Examiner meant that the phrase, "high tour seniority", indicated that Silvey had the highest seniority in the Rescue Squad prior to October 1977. However, in note 7 of the Hearing Examiner's decision, he clearly points out that Silvey had less seniority than the most senior fireman on his tour, but that since that most senior fireman often declined the acting captain's position when available, Silvey, as next in line, was offered and accepted that position. Therefore, the record shows that the Hearing Examiner did understand that Silvey was not the most senior fireman on the Rescue Squad, and that "high tour seniority" did not mean "the highest seniority" on that tour. The Commission therefore adopts the Hearing Examiner's findings in Finding Number 9.

In its next exception, the City asserts that the Hearing Examiner did not properly consider the testimony concerning remarks between Mayor Dunn and Fire Director Forrester and that the Hearing Examiner misinterpreted the testimony of Director Forrester in regard to recommendations made to him concerning the possible transfer of Silvey. Additionally, the City alleges that the Hearing Examiner failed to consider testimony of Chief Sisk and Deputy Chief Heuser concerning the recommendations made by them prior to February 8, 1978 regarding the transfer of Silvey from the Rescue Squad. After review of the entire record, it is quite clear that the Hearing Examiner properly considered all of the testimony by Director Forrester and Chief Sisk and Deputy Chief Heuser and reached the appropriate conclusions. Regarding the testimony concerning the conversation between Mayor Dunn and Director Forrester, the City asserts that Forrester's testimony about Mayor Dunn is speculative and hearsay. The Commission might agree with the City if the Hearing Examiner had found that Mayor Dunn personally had committed an unfair practice. However, the charge is against Director Forrester both personally and as an agent of the City; and it is with respect to his own action that Director Forrester testified concerning his telephone conversation with Mayor Dunn. His reiteration of the conversation was given as part of his explanation of what motivated him to initiate the transfer of Silvey. While it may be speculative for Forrester to suggest what Mayor Dunn intended by his call, it is not speculative or hearsay for Forrester to testify what meaning he, Forrester, gathered from the conversation or what action he took in response to it.

Moreover, both Mayor Dunn and Director Forrester are agents of the City.^{2/} The record also establishes that even if this exception were accepted, Director Forrester had concluded, independent of the Mayor's call, that Silvey should be transferred,^{3/} and that this decision was reached immediately after and in direct response to Silvey's presentation to the City Council concerning the overtime and Emergency Squad issues in the Fire Department.^{4/} Therefore, the finding of a violation by the Hearing Examiner was appropriate and is adopted herein.

The record also clearly establishes that the Hearing Examiner did consider the testimony of Chief Sisk and Deputy Chief Heuser and was well aware of the fact that recommendations had been made concerning the transfer of Silvey from the Rescue Squad prior to February 8, 1978. However, the fact remains that despite these recommendations no action was taken by the City to transfer Silvey to any other work station prior to February 8. The City only acted after Silvey had made his remarks before the City Council and this was protected activity.^{5/} There is no evidence that Forrester or Mayor Dunn even knew of these conversations between Sisk and Heuser and certainly none that indicates that these conversations are what motivated Director Forrester to act on February 9th.

^{2/} This is an administrative proceeding and the rules of evidence as to hearsay are not strictly applied. N.J.S.A. 52:14B-10(a), N.J.A.C. 19:14-6.6.

^{3/} Transcript (T) pp. 397-398, 434, 437.

^{4/} T. pp. 401-405, 428-434.

^{5/} See In re Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

Upon review of this entire exception and the relevant facts and testimony, the Hearing Examiner was correct in concluding that the transfer of Silvey from Engine Company No. 1 to Engine Company No. 2 was done in response to Silvey's exercise of his protected activities and was therefore an unfair practice within the meaning of the Act.^{6/} Moreover, despite any earlier recommendations concerning the transfer of Silvey, the fact remains that Silvey was not transferred until immediately after he had presented his remarks concerning the operation of the Fire Department before the City Council on February 8th. Therefore these exceptions are without merit and the Hearing Examiner's recommendations on these issues are adopted for the reasons set forth herein and in his recommended decision.

In its next exception, the City alleges that the Hearing Examiner erred in finding that Forrester said that he would not have transferred Silvey if he had not received a call from the Mayor. The City asserts that the transfer of Silvey was really Forrester's decision. Moreover, the City again asserted that the Hearing Examiner failed to consider certain testimony concerning legitimate reasons for transferring Silvey.

Regarding the first issue, assuming the City is correct in asserting that Forrester made his own decision to transfer Silvey independent of the Mayor's position,^{7/} that finding alone would not change the fact that the reason for the transfer was in response to

6/ In re Board of Education of the Borough of Haddonfield, P.E.R.C. 77-36, 3 NJPER 71 (1977).

7/ T. pp. 397-498, 434, 437.

Silvey's lawfully protected appearance before the City Council. As indicated previously, both the Mayor and Director Forrester are agents of the Respondent City. Whether Forrester had already decided to retaliate against Silvey and the Mayor's call only reinforced that decision, or the call was what actually caused him to act is not really significant to a finding that the City had violated the Act. Either pattern establishes that the transfer of Silvey was initiated in retaliation for his protected activities on behalf of the FMBA.

Regarding the second issue, the City argues that the Hearing Examiner failed to adequately credit Chiefs Sisk and Heuser when they testified that Silvey was transferred because his experience was needed in Engine Co. No. 2 to replace a probationary fireman. A review of the record reveals that the Hearing Examiner did properly consider the information in question. However, as previously stated, even if legitimate reasons for Silvey's transfer existed, which is not clear, the record establishes that it was the unlawful motive (transferring Silvey because he presented his views before City Council), and not legitimate reasons which caused the discriminating action herein. The City's asserted business justifications are unpersuasive and appear to be pretextual in that they are after the fact justifications and are insufficient to outweigh the evidence of an illegal motivation.^{8/}

Accordingly, these exceptions do not justify a different conclusion from that recommended by the Hearing Examiner and the

^{8/} See In re Haddonfield, supra.

Commission adopts those recommendations.

In its final exception, the City raises several issues. First, the City excepts to the Hearing Examiner's finding that Silvey lost certain seniority rights when he was transferred from Engine Company No. 1 to Engine Company No. 2. The City alleges that Silvey suffered no change in seniority as a result of the transfer. It is true that Silvey did not lose any seniority with respect to the entire Fire Department as a result of the transfer, but the Hearing Examiner was not referring to his overall seniority. Rather, the record reflects, and the Hearing Examiner found that certain terms and conditions of employment, opportunity for temporary increases in pay by serving as acting captain and priority in scheduling vacations, were dictated by department seniority relative to the other firefighters within the particular company to which a firefighter was assigned. He further found that the transfer to Engine Company 2 did adversely affect these terms and conditions of Silvey's employment because his seniority did not rank him as high in Engine Company 2 as it had in his previous assignments; and he therefore lost opportunities to earn additional compensation and temporarily placed him lower in the order of scheduling vacations. Therefore, this exception is also rejected.

The City also excepted to the Hearing Examiner's acceptance of the amendment to the charge during the course of the hearing. The record indicates that the Charging Party submitted a supplemental charge in late July prior to the first day of hearing. This supplemental charge pertained to facts which had occurred subsequent to

the filing of the initial charge, but constituted a continuation of the same source of conduct in that it alleged that the City had refused to return Silvey to the Rescue Squad after that unit was reactivated on April 19, 1978. The Hearing Examiner accepted this supplement as an amendment to the charge pursuant to a motion made by the Charging Party at the commencement of the hearing. The Commission finds that the Hearing Examiner acted within his authority as provided by Commission Rules.^{9/} The City was given an opportunity to answer the amended charge, to present witnesses and other evidence of its own on these allegations, and to cross-examine the Charging Party's witnesses on these matters. Therefore, it does not appear that the amendment presented any undue surprise to the City or prevented the City from presenting an appropriate defense to the amendment, and was the best way of disposing of all issues relevant to this particular course of action.

Next, the City excepted to the Hearing Examiner's recommendation that Silvey be ordered reinstated to the Rescue Squad rather than Engine Company No. 1, and that he be made whole for any loss of any "acting captain" opportunities he would have had if he had been returned to the Rescue Squad on April 19, 1978. The City argued that Silvey was transferred from Engine Company No. 1 and not from the Rescue Squad and therefore the Commission could only order that he be reinstated to Engine Company No. 1. The City, therefore, also argued that Silvey was not entitled to any acting captain's pay because his seniority had remained unchanged.

^{9/} See N.J.A.C. 19:14-2.2, and 19:14-6.3. See also footnote 2 of the Hearing Examiner's Recommended Report and Decision.

Again, the City is correct that Silvey was originally transferred from the Rescue Squad to regular duty in Engine Company No. 1 (to which the Rescue Squad had been technically attached) when the Rescue Squad was discontinued as part of an overall cost cutback, and that the discriminatory transfer was really from Engine Company No. 1 to Engine Company No. 2. But the City's exception fails to recognize that the Rescue Squad was reactivated on April 19, 1978 and Silvey was the only former member who desired to be returned who was not transferred back to that unit. (As indicated, it was this series of events which constituted the allegations of the supplemental charge.) Further, the record establishes that in addition to the misallocation of overtime, one of Silvey's other complaints to City Council was the fact that the safety of all firefighters was jeopardized by the discontinuation of the Rescue Squad.

Forrester testified that Silvey should not have been returned to the Rescue Squad because of his age.^{10/} However, the evidence showed that the Rescue Squad prior to October 1977 consisted of at least three men who were older than Silvey and who had been given the opportunity to return to the Squad when it was reactivated in April 1978.^{11/} The evidence shows that all other firemen who were on the Rescue Squad prior to October 1977, except Silvey, were offered the opportunity to return to the Squad in April 1978.^{12/} Although not all firemen actually returned to the Squad, all except Silvey

^{10/} T. pp. 416-417.

^{11/} T. pp. 448-450, 531-532.

^{12/} T. pp. 125, 306, 451, 523-525.

had the opportunity, which even further demonstrates the City's unlawful treatment of Silvey. Additionally, Silvey was highly trained for this type of work and had performed it well over the years. His assignment to that unit also facilitated the performance of his duties as FMBA President, a fact known to the City.^{13/} The Commission adopts the Hearing Examiner's finding that the failure to transfer Silvey back to the Rescue Squad after it was reactivated was part of the on going discrimination against him for his exercise of protected rights, and the Hearing Examiner was correct in recommending that Silvey be reinstated to the Rescue Squad rather than just Engine Company No. 1.

Having reached this conclusion, the Hearing Examiner also recommended that Silvey be made whole for the amount he would have earned in performing "acting captain" duties that arose on his tour after the Rescue Squad was reactivated. The Commission also adopts this make whole remedy. The record established that, while Silvey did not actually lose seniority through the transfer his relative position in Engine Company No. 2 was worse and he therefore was deprived of opportunities to serve as acting captain, with its concomitant higher compensation, which he had and would have had with the Rescue Squad. Silvey should, therefore, be made whole for any "acting captain" duties that actually arose and which he would have actually received had he been assigned to the Rescue Squad immediately after the reactivation on April 19, 1978. Since the record established that Silvey previously had actually been the second

13/ T. p. 405.

firefighter in seniority in the Rescue Squad and had normally received the "acting captain" assignments only after the more senior person had refused that assignment, the make whole remedy is to be limited to the "acting captain's" assignments he actually would have received as the most senior firefighter on the tour or those that he would have received after April 19, 1978 when a more senior firefighter than he actually refused the assignment.

The City also excepted to that portion of the Hearing Examiner's analysis where he said that the Respondent knew that Silvey's union business would be enhanced from Engine Company No. 1 and the Rescue Squad, and that this contributed to the decision to transfer Silvey away from those locations. In that regard the City asserted that Chiefs Sisk and Heuser provided sufficient business justification for Silvey's transfer and that it was not based upon unlawful motives. However, as discussed above, the Commission has already determined that Silvey's transfer was motivated at least in part by unlawful reasons. In addition, Fire Director Forrester testified that he knew that Silvey could be seen better by Association members at Engine Company No. 1 or the Rescue Squad than at Engine Company No. 2,^{14/} and that by placing Silvey at Engine Company No. 2^{15/} he would be less prone to being "bothered" by Association members.

Although Forrester may have believed that transferring Silvey from Engine Company No. 1 for these reasons was a benefit to Silvey, such is not the case. The effect of the transfer made

^{14/} T. p. 457.
^{15/} T. p. 458.

Silvey's contact with members of his Association more difficult and caused a chilling affect upon the rights of the Association. Therefore, the transfer based upon these reasons was also violative of the Act.

Finally, the City excepts to the Hearing Examiner's recommendation that Silvey's transfer was triggered by his appearance before the City Council on February 8, 1979. This exception is without solid foundation. As the previous discussion and the Hearing Examiner's Report amply demonstrate, Silvey's transfer occurred immediately following his appearance before the City Council and that Fire Director Forrester's unlawful remark also occurred immediately after Silvey's City Council appearance and that both were a direct response to that appearance.^{16/} Although Chiefs Sisk and Heuser may have considered transferring Silvey from the Rescue Squad or from Engine Company No. 1 prior to February 8, 1978, they took no action in that regard, and the Mayor and Forrester didn't even know of their conversation. However, the day after Silvey appeared before the City Council and made comments which were protected within the meaning of the Act, the City took action to remove him from his work station. The City cannot ignore the timing of this situation and Forrester's candid testimony concerning his anger at the remarks. Any lawful motives that may have existed for Silvey's transfer cannot outweigh the City's unlawful action to remove Silvey because of his protected activity.^{17/}

^{16/} T. p. 400.

^{17/} Supra. Note 4.

Upon review of the Hearing Examiner's decision and all of the exceptions filed, the Commission determines that the exceptions are insufficient and without merit. The City alleges throughout its exceptions that it had sufficient legitimate basis to transfer Silvey and that the Hearing Examiner's remedy was inappropriate. For the reasons stated above, however, the Commission determines that not only was the Hearing Examiner correct in finding that Silvey's transfer and failure to be reinstated to the Rescue Squad was a violation of the Act, but that the Hearing Examiner's remedy was also appropriate. The Commission therefore determines, for the reasons stated above, that the City violated N.J.S.A. 34:13A-5.4(a)(3).^{18/}

The Commission also notes that neither party excepted to the Hearing Examiner's recommendation that the allegation that the City violated N.J.S.A. 34:13A-5.4(a)(2), (4) and (7) be dismissed. The Commission therefore adopts the Hearing Examiner's recommendation in that regard for the reasons stated in his decision and dismisses that portion of the complaint.

In addition, the Commission notes that the City did not except to the Hearing Examiner's recommendation that Director Forrester violated N.J.S.A. 34:13A-5.4(a)(1) by describing Silvey

^{18/} Although the Commission has determined and will order that Silvey be reinstated as driver to the Rescue Squad, this does not suggest that employees such as Silvey who are active or protected within the meaning of the Act forever have a right to particular position or assignment. This decision only holds that in the context of the instant circumstances, there were unlawful reasons for Silvey's transfer and failure to be reinstated to the Rescue Squad. The remedy is appropriate for the instant case.

as a troublemaker following his appearance before City Council. Since Forrester did not deny that he made the comment,^{19/} and since such comments have a chilling affect on the rights of employees, then the Hearing Examiner's recommendation was appropriate and is adopted herein.

ORDER

For the foregoing reasons and upon the entire record herein, it is hereby ORDERED that the City of Elizabeth and Fire Director George J. Forrester:

A. Cease and desist from:

1. Interfering with, restraining or coercing Donald Silvey in the exercise of the rights guaranteed to him by the Act by characterizing him as a troublemaker because he made lawful remarks concerning the Fire Department before City Council.

2. Discouraging their employees in the exercise of the rights guaranteed to them by this Act by discriminating in regard to the tenure and terms and conditions of employment of fireman Donald Silvey by unlawfully transferring Mr. Silvey and by refusing to reinstate Mr. Silvey to the Rescue Squad.

B. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

1. Offer to Donald Silvey immediate and full reinstatement to his former position as driver for the Emergency Squad on his tour, without prejudice to any rights or privileges previously

enjoyed by him. ^{20/}

2. City of Elizabeth only shall make whole Donald Silvey by paying to him a sum of money equal to the amount he would have earned in performing the duties of Acting Captain at Captain's pay he would have received had he been reassigned to the Emergency Squad on its reactivation on April 19, 1978 and continuing thereafter until the date reinstatement to his former position is offered to him.

3. Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

4. Post immediately in plain sight, at the offices of the Fire Department of the City of Elizabeth, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by Respondent City's representative or by Respondent Forrester be posted by Respondents immediately upon receipt thereof, and maintained by them for a period of at least sixty (60) consecutive days thereafter

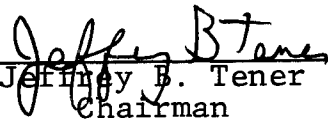
^{20/} The Hearing Examiner had included in his recommended order that the City reassign, if necessary, any employee then performing those duties. The Commission has deleted this aspect of the order. The City must reinstante Silvey to his former position with no loss of privileges or rights previously enjoyed by him. Whether this is done by expanding the Rescue Squad to accommodate the employee presently performing these duties or by reassigning that employee or by making some other adjustment is for the City to determine.

in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced or covered by any other material.

C. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of the Commission's Order, what steps the said Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the complaint alleging that the City of Elizabeth and George J. Forrester were engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(2), (4) and (7) with regard to Donald Silvey's transfer of employment and non-reassignment be dismissed in their entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp and Newbaker voted for this decision. None opposed. Commissioners Parcels was not present.

DATED: Trenton, New Jersey
May 22, 1979
ISSUED: May 23, 1979

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act by taking any unlawful action against them because of their appearance and lawful remarks before City Council.

WE WILL not discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act by transferring them unlawfully or by refusing to reinstate them to their proper position.

WE WILL offer Donald Silvey immediate and full reinstatement to his former position with us as driver of the Rescue Squad on his tour [without prejudice to any rights or privileges previously enjoyed by him] that the Commission has determined was unlawfully denied to him on April 19, 1978, when the Squad was reactivated and thereafter because of his exercise of the rights guaranteed to him by the New Jersey Employer-Employee Relations Act.

WE WILL make Donald Silvey whole for any loss of pay he may have suffered by paying him a sum of money equal to the amount that he would have earned on those occasions he would have actually been assigned as Acting Captain for the Rescue Squad on his tour from the date that he was denied reinstatement as Rescue Squad driver to the date of an offer of reinstatement or he is no longer available for such position, if he would have been the most senior fireman on the tour, or if the most senior fireman actually declined the duties and Mr. Silvey was the next senior fireman.

City of Elizabeth

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

THE CITY OF ELIZABETH and
GEORGE J. FORRESTER, FIRE DIRECTOR,

Respondents,

- and -

Docket No. CO-78-234-79

DONALD SILVEY and FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, BRANCH NO. 9,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends to the Commission that they find that the City of Elizabeth and its Fire Director, George J. Forrester committed unfair practices when the City first transferred the duty station of the Firemen's Mutual Benevolent Association Branch President, Donald Silvey and then, upon reinstatement of the Fire Department's Rescue Squad, failed and refused to reinstate Silvey to his longstanding position as driver of the Squad. The Examiner also recommends that, because of the Fire Director's comment made to a local radio station, characterizing Silvey as a "troublemaker", the Commission find the City and Forrester committed an independent act of interference with employee rights under the New Jersey Employer-Employee Relations Act. The Examiner found that the City's conduct was motivated by Silvey's public presentation of the FMBA's position on matters concerning allocation of overtime and restoration of the Rescue Squad at a pre-caucus meeting of the City Council - an activity protected by the Act. The Examiner recommended that the Commission order the City and Forrester to reinstate the FMBA officer to his former position, the City make him whole for any loss of earnings, and they post a notice to its employees advising them of their compliance with the terms of the 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/or conclusions of law.

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Charging Parties.

Appearances:

For the Respondents

Frank P. Trocino, Esq., Corporation Counsel
(Raymond T. Bolanowski, Esq., Assistant Corporation Counsel, Of Counsel)

For the Charging Parties

Goldberger, Siegel & Finn, Esqs.
(Howard A. Goldberger, Esq., Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On March 30, 1978, Donald Silvey ("Silvey") and Firemen's Mutual Benevolent Association, Branch No. 9 ("FMBA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the City of Elizabeth ("City" or "Respondent") and George J. Forrester, Fire Director ("Forrester" or "Fire Director") have engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et. seq. Specifically, Silvey and the FMBA charge that the City on February 9, 1978 transferred Silvey, FMBA President, from a long-standing assignment and position with Engine Company No. 1 to a position with Engine Company No. 2 because of Silvey's alleged protected conduct over time of voicing objection to improper expenditures of monies and allocation of overtime by Fire Department administrators, and, in particular, his criticism voiced at a February 8, 1978 meeting of the City Council that the Fire Department had improperly allocated overtime assignments and monies

and curtailed use of trained emergency squad personnel and equipment. The charge also claims acts of harrassment against Silvey grounded in his protected conduct described and alleges violations of Section 5.4(a)(1), (2), (3), (4) and (7). ^{1/}

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 5, 1978. An Answer was filed on June 20, 1978, denying the commission of the unfair practices alleged. Hearing was held on August 24, ^{2/} August 31, September 22 and October 27, 1978. Both parties were given an opportunity to examine witnesses, present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Parties on December 20, 1978 and the Respondents on January 4, 1979.

Upon the entire record in the case and from my observations of the witnesses and their demeanor I make the following:

FINDINGS OF FACT

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

2. The Firemen's Mutual Benevolent Association and Donald Silvey are a public employee representative and public employee, respectively, within the meaning of the Act, as amended, and are subject to its provisions.

3. At all times material to this proceeding, the FMBA has been the exclusive representative for collective negotiations concerning the terms and conditions

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

2/ At the commencement of hearing, the charging parties' motion to amend the complaint to conform to the allegations set forth in a supplemental charge filed July 31, 1978, was granted over Respondents' opposition. The supplement alleged that the effect of the transfer described in the original charge was to deny Silvey the opportunity of being employed in his original position as driver for the Emergency Squad which was subsequently reinstated pursuant to an arbitration award. Respondent denied the violation charged in the supplemental complaint.

of employment for all uniformed firemen and certain other employees, employed by the City. The last collective negotiations agreement was in effect from January 1, 1977 through December 31, 1978. It contained, inter alia, a provision requiring employee compliance with reasonable rules and regulations implementing City operation of the fire department except where the rule or order would endanger the employee's safety or be in violation of safety practices; a provision setting forth minimum manpower (or manning) requirements for emergency, truck and engine company; a broad management responsibility provision and a grievance procedure culminating in final and binding arbitration.

4. Firemen are grouped into four separate tours of duty which rotate shifts together. Each tour contains a complement of firemen at each of the City's fire department duty stations, including variously located engine companies and truck companies. By the collective agreement tour seniority normally includes preference on scheduling of vacations and, by custom and practice, preference on assignment of firemen to position of captain on an acting basis in the absence of a captain from a fireman's particular company on his tour. By the agreement also, any fireman so assigned shall be paid for such work at the captain's base rate of pay.

5. The City has also maintained for many years (with recent exception to be noted hereinafter) an Emergency Squad, for each tour of duty, the main responsibility of which has been to respond to emergencies involving danger to life whether related to fire or not. ^{3/}

6. Donald Silvey has been continuously employed as a fireman by the City since July 15, 1958. Silvey was assigned by the end of 1958 to then Emergency Squad No. 1 and, except for two limited temporary transfers out of the squad not exceeding three months in length, remained continually in such assignment until October 12, 1977, at which time the Emergency Squad as a separate entity was discontinued, later to be reinstated in April, 1978. During all this period of time Silvey was the driver for the Squad, required to have intimate knowledge of all City streets, their current conditions and addresses. The Squad complement on his tour and the three other tours consisted of at least three firemen and a captain. During all the time that the Rescue Squad has been in existence, including to date, it has been housed in the same central downtown location as Engine Company No. 1 at 24 South Broad Street, Elizabeth, close to one or more other duty stations.

^{3/} The terms Rescue Squad or Squad will be used interchangeably with Emergency Squad.

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7. As a member of the Rescue Squad, over the years Silvey has volunteered for and received special training provided from time to time by outside organizations, designed to improve the skills especially of squad members. The training has included detection of radiation, Red Cross first aid and life saving techniques, heavy duty rescue, and emergency medical training. In the squad's work, various items of special equipment, not provided general engine and truck companies, are provided and used, including resuscitators, inhalaters, special oxygen equipment and hydraulic and cutting tools. In July, 1975, the City made a substantial capital investment in a specially equipped heavy duty rescue vehicle, financed in part by State Highway Funds. By General Order #8M-75, dated July 23, 1975, then Fire Chief Charles Malone directed that, as a result of the purchase, the name of the squad be changed from "Emergency Squad #1" to "Elizabeth Fire Department Rescue Squad" and that personnel assigned rescue duties meet certain qualifications not normally required of the average firefighter. To implement that requirement the Order referred to a five point program covering Red Cross standard and advanced first aid; cardiopulmonary resuscitation; childbirth; defensive driving and extrication. These skills were included in an 81 hour Emergency Medical Technician (E.M.T.) course which the Order noted were to be given to all squad personnel, resulting in a State Certification. The Certification was now required for a fireman to become a permanent member of the squad.

8. As a member of the Emergency Squad, Silvey alone, and in conjunction with other firemen, over the years has received various commendations and special recognition from the Fire Department because of outstanding service in the performance of his duties, including rescues from burning premises, contribution to saving of lives through prompt application of appropriate resuscitation techniques and other first aid practices at the scene of fires and other emergencies. ^{4/} Certain of these official commendations were received by Silvey in 1973, 1974 and 1975. At no time prior to February 9, 1978, had Silvey received any notice, warning or discipline, oral or written, critical of his work performance, other than his activity in connection with a certain protest of implementation of a Departmental decision to consolidate certain emergency and fire fighting functions, taken by him and other firemen sometime in 1977, which resulted in a disciplinary suspen-

^{4/} In one rescue, which did not result in an official commendation, Silvey located then Deputy Fire Chief Edward Sisk (who succeeded Malone in July, 1977 as Chief) in a burning building, and with other members of the squad, got him safely to a hospital.

sion of Silvey and one other fireman for four days. However, Silvey's conduct in that incident ^{5/} which resulted in his disciplining was not relied upon by the City as a ground for its action with regard to Silvey, which forms the basis of the instant charge and complaint. (see e.g. response of City counsel to a question posed by the undersigned appearing at pages 390 and 391 of the official minutes of the hearing ^{6/}). Neither had Silvey ever been advised by the City that there was any

5/ By General Order #21-F77 dated February 10, 1977, implemented by then Fire Chief Malone's General Order #22-M77 of the same date, City Fire Director Forrester directed that due to an emergent economical situation existing in the Fire Department and the fact that monies allocated for overtime for the first quarter of the calendar year had been already fully expended, effective February 12, 1977, Engine Company No. 1 and the Rescue Squad would become a two piece company with a combined minimum manning of one captain and four firemen per tour, two riding the Rescue Squad vehicle and two riding the Engine Company pumper. Also, by General Order #9-M75, of August 18, 1975, amended February 3, 1977, Engine Company No. 2 had become a two piece company, combining under a single captain and three firemen the operation of two pieces of equipment which theretofore had been considered two separate units, each with its own compliment of captain and three firemen. Sometime shortly after implementation of Orders 21-F77 and 22-M77, Silvey and as many as nine other firemen refused to take over operation of the Rescue Squad on their tours with a minimum of two men on their tour and walked off. After Silvey requested Director Forrester not to suspend the other firemen involved, only Silvey and fireman Michael Vasilevich were disciplined for the incident. In the ensuing arbitration of their grievance, by an award dated April 4, 1978 Arbitrator Edward Levin sustained their disciplining for "just cause" as against a defense that the Order merging rescue squad and engine company violated contract provisions mandating minimum manning and requiring safe procedures and practices. While noting his sympathy for the frustration of employees specifically trained to perform higher professional services when they see their function in jeopardy, he concluded that the danger felt was insufficient to justify a by-passing of the proper means of redress while maintaining departmental order and discipline. However, Arbitrator Levin did find that the unilateral action of the City embodied in the General Order cited effectively diluted the contractual manning requirements by altering the number of personnel required on a piece of equipment. He awarded a rescission of General Order 9-M75 as amended and General Order 22-M77. Even before the award, after Silvey's protest and refusal to take out the equipment, Forrester met with subordinates, and pending the arbitration, decided the squad would be out of service if there was insufficient manpower to bring a tour's complement up to three firemen, thereby concurring with Silvey's argument on minimum manning. After February, 1977, the Rescue Squad, even on its reduced consolidated basis, was hardly used. Then in October, 1977, the City closed down the Rescue Squad and stored its vehicle because of the dissatisfaction of the squad firemen with first reporting to the Engine Company, and then, because they were excess, being temporarily reassigned on a daily basis to other units. On April 19, 1978, shortly before the City claimed it actually received a copy of the Arbitration Award, the squad was reinstated and fully restored to its contractual complement of four men per tour and independent status.

6/ Hereinafter denoted as "Tr".

problem with the manner in which he had been performing his work by virtue of his age, 47 years at the time of hearing, or his physical ability.

9. By 1977, or even earlier, Silvey had reached a seniority standing in the Rescue Squad which resulted in his having the opportunity of becoming acting captain at captain's pay whenever the Captain on his tour was off. ^{7/} He also had high tour seniority in selecting his choice of vacation.

10. For the past 12 years Silvey has been the President of the FMBA. From time to time, at least twice a year, and more frequently during the two years preceding February 8, 1978, Silvey had appeared on behalf of the FMBA before the City Council, pleading the Association's and firemen's views with respect to operations and management of the Fire Department, particularly as it affected the employees' terms and conditions of employment. Some of Silvey's remarks were critical of the handling of the Department by its Fire Director who had held the position since 1967.

11. On July 26, 1977, Silvey addressed the City Council in the public speaking portion of its meeting. The official minutes show he complained of what he termed the abuse of "overtime" by superior officers in the Fire Department; the closing of companies and the removing of the Emergency Squad from service to the citizens of Elizabeth although the squad, with ten men, was volunteered and sent to New York City for two days during the recent blackout. He alleged that the director is not doing his job properly: allowing the chief to run the Department with the director having no control over "overtime" expenditures. He concluded by stating that the citizens are being "ripped off." On November 22, 1977, Silvey again addressed the City Council. He pleaded with the Council to reinstitute the Emergency Squad, noting that the equipment and manpower is available for this vital service. He then scored the poor management of the Fire Department by the present director, the abuse of overtime by superior officers, and the waste of manpower, equipment and money as the result of this poor direction, citing recent instances of belated and inadequate responses to emergencies.

12. On February 2, 1978, Silvey, as President of the FMBA wrote John Dwyer, the City Clerk, requesting permission to attend the pre-caucus meeting of the City Council scheduled for February 8, 1978 in order to bring "Abuse of Overtime Dollars in the Elizabeth Fire Department" to the attention of the Council members. Silvey

^{7/} Although Silvey had less seniority than the most senior fireman on his tour, that fireman regularly declined the Acting Captain position when available. As a consequence, Silvey, with the City's knowledge, regularly assumed the position in the tour captain's absence.

was granted leave and addressed the Council on the evening of February 8. He had brought with him and distributed to each Council member a report including an analysis the FMBA had made of overtime expended for the year 1977 broken down by monies distributed to superior officers on the one hand and rank and file firemen on the other and individual overtime figures for each member of the force by tour. These figures compiled from payroll lists given to the FMBA showed 413 overtime jobs for officers and 705 overtime assignments for firemen. Yet, officers received \$54,803.06 (or 43% of the total) and firemen received \$72,945.00 (or 57% of the total). Among his remarks, Silvey noted that while officers were getting 43% of overtime assignments they comprised only 25% of the workforce and that firemen who received 57% of such assignment comprised 75% of the workforce. ^{8/} City Clerk Dwyer's official notes of this meeting record that "Fireman Donald Silvey was allowed to speak and complained of the use and abuse of overtime by superior officers in the Fire Department (distributing copies of the attached reports) as well as the lack of snow blowers or plows for use by the Fire Department. He railed about incompetent management and the continued shutdown of the emergency squad." In his remarks Silvey stressed that if there exists a financial problem in the City, money diverted to officer overtime should go instead to put the Emergency Squad back to work and stop working double companies. Silvey noted that the Director and Chief had argued that since the Department was so short of firemen it couldn't continue the Emergency Squad. Yet, if officers' overtime was cut back, the monies so saved could be used to continue the squad.

13. A reporter from Elizabeth Radio Station WJDM was present at the February 8 Council meeting and early the next day telephoned in a report to the Station's News Director, Mary Barbieri Young, who taped the report as it was given over the telephone. Young, a subpoenaed witness for the Charging Parties, testified that the essence of the report was Silvey's remarks critical of Forrester. ^{9/}

^{8/} Based upon the parties' stipulation, as to numbers of officers and firemen employed by the City in 1977, the percentages as ratios of each category in the workforce are inaccurate by 4 percentage points, officers comprising 29% and firemen comprising 71% of the workforce. It is significant to note however that with respect to Silvey's contentions made at the February 8th meeting and the FMBA report distributed, the record is devoid of any evidence, and the Respondent has not contended - in fact, its counsel denied any such implication - that either Silvey or the FMBA acted in reckless disregard of the truth or in any manner other than in good faith. In any event, the inaccuracy is de minimus and fails to detract in any substantial manner from the points Silvey used the statistics to illustrate.

^{9/} The tape, used in broadcasts by the Station on February 9, was destroyed in the normal course prior to issuance of Young's subpoena.

Young prepared a news report for broadcast at 7:14 AM on February 9. The report included Young's introductory remarks that "The Elizabeth City Council held a delayed agenda session last night and heard from the head of Firemen's Mutual Benevolent Association Local Nine. Correspondent Scott Rosenberg Reports..." and was followed by the reporter's taped report. At 9:00 AM Young again gave this report over the air. Director Forrester's wife heard the 9:00 AM news broadcast. She telephoned her husband and told him about the broadcast, including the opening remarks by a female member of the staff and a report of the differences between Silvey and her husband.

14. Forrester stated that he understood from his wife's call that the remarks by the female newscaster included a statement to the effect that Director Forrester and Fireman Don Silvey are at it again, carrying on their discourse with each other. ^{10/} The Director then testified as follows:

"I just made up my mind that I was going to take some action because this was the third or fourth time I had been maligned over the air, printed in the Council records and so forth, stating that I didn't know what I was doing and claims made that I was taking care of the officers financially on overtime, and several insinuations that I just didn't know my job." (Tr. 397-398).

On cross-examination, Forrester added to his prior testimony. He testified on a call from his wife she asked him "when are you going to do something about this abuse you're taking from this fellow?...she said, once again, you don't know what you're doing, you're wrongfully handling the overtime money, and a few other repetitions of what he had said at other times, but the thing that really rankled... was the comment of the radio broadcaster that, well, they're at it again...and I had never publicly said a damn thing about him when he did about me." (Tr. 433-434). Forrester on direct stated that he then started to make notes of various times Silvey had appeared before the Council and made declamatory (sic) remarks and was all set to call the Chief to have some action taken when he received a second call from his wife "again stating that I must do something." (Tr. 368).

15. Then, Forrester received another call, this one from City Mayor Thomas G. Dunn. On cross-examination Forrester testified that just before the

^{10/} It is apparent that Reporter Rosenberg so characterized the dispute between Forrester and Silvey, since Young's typed remarks for 7:14 and 9:00 AM do not contain such a reference.

Mayor's call;

"I started to figure things out, how am I going to get this man out, he's so controversial?" (Tr. 434).

Forrester further testified that the gist of Dunn's remarks was that he wanted Silvey removed from "that fire station," (Tr. 435) i.e. the one housing Engine Company No. 1 and the recently discontinued Rescue Squad. ^{11/} According to Forrester, Dunn wondered out loud, "how far is this thing going to go." When Forrester asked what he meant, Dunn said "I want Silvey removed from the Broad Street Station, see what you can do about it." (Tr. 436). Forrester added that Dunn was his boss, had nominated him for his office, to which he had been appointed with the approval of the City Council, and "it would be rather difficult to tell him, I'm sorry," noting also that he concurred in his Mayor's order. ^{12/} After the Mayor's call Forrester then telephoned Mary Barbieri Young at Radio Station WJDM and finally telephoned Chief Sisk to remove Silvey from the squad and his duty station. ^{13/} In his conversation with Young, Forrester, with the understanding he was being taped for later broadcast, told the Station's News Director that he was getting fed up with this constant repetition of what Silvey said and he wanted to get in a word or two on his own. Among other responses, Forrester explained why he had not reinstated the Emergency Squad, questioned the accuracy of Silvey's overtime figures and noted that Silvey was very anxious to run the fire department with his accusations. When confronted at the hearing,

^{11/} At the time of the call, the parties were then awaiting Arbitrator Levin's award which, inter alia, involved the issue as to whether the City's consolidation of the squad and engine company had breached the contract. Silvey had also been assigned for many years to this most central City duty station which facilitated his legitimate conduct of FMBA business.

^{12/} Forrester testified to differences with Silvey related to outspokenness and leadership among the firemen on matters affecting the emergency squad at least since 1971. Forrester also admitted that from past discussions he was aware of some animosity and difficulty between the Mayor and Silvey which had been obvious for years.

^{13/} This sequence of events reflects Forrester's uninterrupted narrative given on direct examination. Under cross-examination the sequence changed in that the Director now testified that after a call from his wife he called the station, then received the call from the Mayor before finally calling the fire chief. I credit this latter sequence which was provided after further reflection. In any event, I do not believe the change to be significant in terms of the conclusions I have ultimately reached herein.

Forrester did not deny, but did not specifically recall that he had called Silvey a "troublemaker". Young's 12:00 noon and 5:00 p.m. news broadcasts contained the Director's taped remarks including, according to Young's testimony, his statement that Silvey was a troublemaker. I credit Forrester's use of the phrase.

16. After calling the station and receiving a call from the Mayor, Forrester called Chief Sisk and ordered Silvey removed from the squad and the Broad Street Fire Station. As Forrester testified, "when I got the call from the Mayor, I called the Chief up and I said that I think it's time we took some action." (Tr. 402). He also admitted on cross-examination that if he had not received a call from the Mayor, he would not have called the Chief to transfer Silvey (Tr. 463). Shortly afterwards, Sisk advised Forrester that Silvey was being transferred to Engine Company No. 2 down in the Bay Way area of Elizabeth, and Forrester replied, "that's up to you." (Tr. 406). By letter dated the same day, February 9, 1978, Forrester officially informed Silvey he was transferred to Engine Company No. 2, effective February 11, 1978, to his same tour and hours. By a letter of the same date, Forrester also transferred probationary fireman Patrick Foley from Engine Company No. 2 to Engine Company No. 1 effective the same date. When Silvey received written notice of the transfer he had a conversation with Chief Sisk. Silvey commented that he had never seen before a directive moving a fireman which came from the Director. Sisk said he didn't have anything to do with the transfer, it was the Director's transfer. Sisk also denied on the stand that he had ever previously discussed with or recommended to Forrester a transfer of Silvey. (Tr. 506).

17. Upon his transfer Silvey became and continues to date as a hoseman in Engine Company No. 2. He has not driven a vehicle or performed any other emergency squad assignments. For one month in his new assignment, Silvey had the third seniority position among firemen on his tour. Since then, as a result of the terminal illness and death of the second senior fireman, Silvey has become second in seniority, the same status he had prior to the merger and suspension of the squad, but, because the most senior fireman, contrary to his counterpart in the emergency squad up to 1977, has not waived his opportunities to become acting captain, Silvey has had no opportunity to serve in that capacity. As to vacation selection, Silvey has suffered a reduced seniority standing among men in his new company on his tour but to date it has not affected adversely his choice of time of vacation.

18. As earlier noted, on April 19, 1978, the City reinstated the Rescue Squad at the South Broad Street site. At no time did Respondent consider (Tr. 451, 465) or its Chiefs discuss (Tr. 495) transferring Silvey back to his job as driver

for the squad in spite of the fact that all firemen who had previously served on the squad prior to its suspension who wanted to return were given the opportunity of doing so, including those firemen who transferred out from Engine Company No. 1 because of dissatisfaction after the consolidation. (Tr. 523-525; 532). Chief Sisk, in particular, was personally aware of Silvey's interest in returning to the squad, even before the filing of the instant charge on March 30, 1978. Among the present members of the squad are at least three firemen, including one captain, older than Silvey.

19. The City's witnesses stressed that Silvey had appeared for years before the Council, and had even criticized the Director's administration of the department on other occasions, particularly in 1977, without adverse action being taken against Silvey; that the vigorous job of emergency squad member required younger members than Silvey; that Chief Sisk had had prior discussions with Silvey's then tour Chief, Joseph Heuser, about transferring Silvey to Engine Company No. 2 because of the need for an experienced man there with E.M.T. background, particularly in view of the terminal illness of an experienced fireman and to provide probationary fireman Foley with other experience; ^{14/} and, because of the availability of a group of E.M.T. trained personnel, that Heuser had recommended the department consider rotating men to the squad to provide them with experience for future years.

ANALYSIS

I am convinced, based upon the foregoing recital of facts, that the City's decision to transfer Silvey from Engine Company No. 1 to Engine Company No. 2 effective February 11, 1978, and its failure and refusal to reassign Silvey back to the Emergency Squad on and after April 19, 1978 when the Squad was reinstated, were both motivated by the exercise by Silvey of rights protected by the Act. ^{15/}

Weighing alone the case presented by the Charging Parties in their

^{14/} Deputy Chief Heuser in fact testified that in November or December 1977, he requested Silvey's reassignment. Chief Sisk recalls only a discussion of the "possibility" of such a transfer (Tr. 485). No transfer of Silvey resulted from these discussions. Engine Company No. 2 covers accidents and fire on the New Jersey Turnpike involving special hazards to fire fighters.

^{15/} Under either test established by the Commission warranting a finding of violation of subd. (a)(3) - motivation in whole or in part by a desire to discourage the exercise of protected rights, or conduct which had the effect of discouraging such exercise - the Respondents' liability has been established. Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71, 72 (1977).

case-in-chief, without regard to the testimony presented by Respondent witnesses, a finding of improper motivation has been established by a preponderance of the evidence. Thus, although there is some evidence that Fire Department Chiefs had discussed a possible Silvey transfer before the events of February 8 and 9, 1978, no action was taken at the time and Silvey was never informed of any intention to transfer him. There is no evidence that Fire Director Forrester or Mayor Dunn had been privy to the discussion between Chief Sisk and Tour Chief Heuser, Sisk, in fact, denying that he had ever discussed or recommended the transfer to Forrester. And, in any event the consideration of a possible transfer of Silvey revolved around Silvey's skills and experience and the use to which they might be put at Engine Company No. 2, at a time when the Emergency Squad was not in operation, thus adding strength to the conclusion, contrary to an implication the City sought to present, that Silvey's age and physical condition should not have weighed against his return to the rescue work.

The trigger for Silvey's transfer was his appearance and presentation at the February 8, 1978 Council pre-caucus meeting. ^{16/} The timing of the Fire Director's transfer order, coming as it did the next day, and his agitated expressions of concern about Silvey's presentation, voiced to the Radio Station, coupled

^{16/} There can be no doubt that Silvey's remarks, including his criticism of the Director, the mis-allocations of overtime and the need and financial ability of the City to reinstate the Emergency Squad, was conduct protected by the Act. See Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977). Silvey's comments were intimately related to employees' terms and conditions of employment. Even if Silvey's views had been solely concerned with managerial decisions, West Windsor Tp. v. P.E.R.C., 78 N.J. 98 (1978) teaches us that "New Jersey public employees possess a constitutional right by virtue of their governmental employment which they would not otherwise possess as citizens - the right to compel government, in its capacity as their employer, to sit down and listen to their grievances and proposals" as well as "...the right to seek to influence governmental decision making to the same extent and through the same means as all other citizens - through the customary political channels and through the public input provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et. seq." Id. at 112 and 111. See also Dunellen Ed. Assn. v. Dunellen Bd. of Ed., 64 N.J. 17, 31-32 (1973). Finally, nothing in Silvey's remarks, even though highly critical of the Fire Director's conduct of his office, exceeded the bounds of protected conduct and the City has not argued that they did. Such expression, in any event, was clearly within the ambit of fair comment on public officials under the New Jersey (Eadie v. Pole, 91 N.J. Super 504 (App. Div. 1966) and Federal (N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964))) Constitutions and, generally, is clearly within the area of constitutionally protected free speech. See Givhan v. Western Line Consolidated School District et al, - U.S. - (1979), 793 GERR 29 (1-15-79); Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968).

with his characterization of Silvey as a "troublemaker", confirm that the reassignment was a response to Silvey's protected activity. As the City failed to even consider Silvey's return to the squad in April, 1978 although permitting all other prior squad members who desired, the opportunity of returning, and as its defense of age and physical condition are insubstantial and unpersuasive, the only reasonable explanation is that Silvey's protected conduct which resulted in his transfer also was the contributing cause of his retention in Engine Company No. 2, even after the squad was reactivated. The Respondent knew Silvey's conduct of FMBA affairs would be enhanced from the more central and accessible combined location of Engine Company No. 1 and Rescue Squad and this fact, as well, contributed to its decisions as to Silvey's duties and duty station made in February and April, 1978.

That the transfer of Engine Company No. 2 constituted a more onerous change in terms and conditions of employment has also been established by the record. Not only did Silvey suffer actual loss of earnings by virtue of the lost opportunities to function as acting captain at captain's pay, known to the City, but equally important, he lost the opportunity to practice those special skills and duties which he had exercised with distinction over a twenty year period, and his stature as labor organization leader was damaged by not only making his work location less accessible to his membership but by manifesting to other employees the risks and dangers in speaking out to the political body on matters of common and basic interest to the unit members.

But even apart from all the foregoing, established on the Charging Parties' case-in-chief, the Respondent's own witnesses have independently established violations of the Act. Director Forrester was frank in making clear that Silvey's criticisms of his operation of the Fire Department had finally reached a point at which, with the prodding of his wife, he was groping for some form of retaliation against Silvey. That process was short-circuited by his receipt of an order from the Mayor on February 9, 1978, the day following Silvey's presentation and immediately following the February 9th broadcast of the dispute, to transfer Silvey out of the Broad Street Station. ^{17/} Inasmuch as Mayor Dunn did not testify or otherwise explain his precipitate order, and given all the other circumstances in this

^{17/} Director Forrester's testimony in this regard given during the City's presentation of its defense as to the basis for the transfer, conflicts sharply with his counsel's opening statement attributing the decision to transfer Silvey to the Fire Director in conjunction with the Chief and tour Chief and because of a need for a more experienced man at Engine Co. 2. (Tr. 29).

case, the only conclusion warranted is that the Mayor retaliated against Silvey because of his statement of position on the overtime and emergency squad issues which had received a wide public airing. The Mayor's comment, however, "how far is this thing going to go" (Tr. 436), adequately explains his motivation at the time he issued the transfer order as being based upon concern that Silvey had ruffled political feelings and embarrassed the City Administration with his and the FMBA's expressions of views and opinions and as they were reported on the air.

As the Mayor's order was never thereafter countermanded, it resulted in the City's refusal to consider Silvey for restoration to his old assignment as squad driver at the fire station from which the Mayor had abruptly ordered him removed.

Similarly, Forrester's characterization of Silvey as a "troublemaker" made to the Radio Station News Director, which was then broadcast on February 9, 1978 ^{18/}, constitutes an independent act of interference, restraint and coercion with Silvey's protected right to address the City Council at public portions of its meeting as to FMBA concerns. ^{19/}

Inasmuch as the Charging Parties failed to adduce any evidence establishing the allegations of violation of subd. (a)(2) and (7) of the Act, their dismissal shall be recommended. Furthermore with respect to the subd. (a)(4) allegation, while it is possible that the Respondent may have been motivated in part by the filing of the original charge on March 30, 1978, in failing and refusing to reinstate Silvey as an emergency squad member at the South Broad Street location on and after its April 19, 1978, reinstatement, the Charging Parties have failed to adduce sufficient evidence to establish such a motivating cause. The refusal to reassign occurring three weeks following the charge, without other evidence, is simply an insufficient basis on which to predicate such a violation and I will also recommend its dismissal.

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

^{18/} A necessary predicate for a finding of violation of subd. (a)(1) is that the coercive statement or act be directed to, or, at least, come to the attention of, employees whose rights are guaranteed by the subdivision. It is clear that Silvey did learn of the remark made by Forrester since it is specifically incorporated as a separate allegation in the charge he jointly filed with the FMBA.

^{19/} Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228, 229.

CONCLUSIONS OF LAW

1. By its action in transferring fireman Donald Silvey from Engine Company No. 1 to Engine Company No. 2, effective February 11, 1978, and by its conduct in failing and refusing to reassign Silvey back to his prior position as driver of the Rescue Squad on his tour when the Squad was reinstated, on and after April 19, 1978, and continuing to retain Silvey in Engine Company No. 2 to the present date, Respondent City of Elizabeth and Respondent George J. Forrester, Fire Director, ^{20/} have discriminated in regard to tenure of employment and the terms and conditions of employment do discourage their employees in the exercise of the rights to join and assist the Firemen's Mutual Benevolent Association, Branch No. 9, an employee organization, guaranteed to them by the Act, and have thereby engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(3), and, derivatively, (a)(1).

2. By describing Silvey as a "troublemaker" on February 9, 1978, immediately following his well publicized appearance on behalf of the FMBA before the City Council, the Respondent City of Elizabeth through George J. Forrester, its Fire Director, and Respondent George J. Forrester have interfered with, restrained and coerced and continue to interfere with, restrain and coerce its employees in the exercise of the rights guaranteed to them by the Act, and have thereby engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

3. The Respondents, by the conduct described in paragraphs 1 and 2, above, have not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2), (4) and (7).

THE REMEDY

I will further recommend that, with respect to remedy, the Respondents cease and desist from engaging in the unfair practices found and take certain affirmative action. That action shall include an offer of reinstatement to Silvey of his former position as driver of the Emergency Squad on his tour, without prejudice to any rights or privileges previously enjoyed by him, reassigning, if

^{20/} Forrester, as Fire Director, in his representative capacity as agent for the City within the meaning of N.J.S.A. 34:13A-3(c) is properly an "employer" for purposes of an independent finding of violation of the Act's unfair practice provisions and the City is responsible for his unlawful conduct, Borough of Avon and William Smith and Michael Fowler, P.E.R.C. No. 78-21, 3 NJPER 373 (1977).

necessary, any employee presently assigned to such position. I shall also recommend that Respondent City of Elizabeth, make Silvey whole for any loss of earnings suffered by him as a result of the unlawful conduct committed by payment to him of a sum of money equal to the amount he would have earned on those occasions he would have functioned as acting captain, receiving captain's pay, in the absence of the captain of the Emergency Squad on his tour from April 19, 1978, the date of its reinstatement, to the date when reemployment as driver of the Squad is offered to him in accordance with the foregoing, or until such time as he is no longer available for such assignment, whichever first occurs. ^{21/}

RECOMMENDED ORDER

Upon the basis of the foregoing recommended Findings of Fact, Conclusions of Law, and Remedy it is recommended that Respondents, City of Elizabeth and George J. Forrester - in his official capacity - shall:

1. Cease and desist from:

a. Discouraging their employees in the exercise of the rights guaranteed to them by this Act by discriminating in regard to hire or tenure of employment or any term or condition of employment.

b. Interfering with, restraining or coercing their employees in any like or related manner, in the exercise of the rights guaranteed to them by this Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Offer to Donald Silvey, immediate and full reinstatement to his former position as driver for the Emergency Squad on his tour, without prejudice to any rights or privileges previously enjoyed by him, reassigning, if necessary, any employee then performing those duties.

b. City of Elizabeth only shall ~~make whole Donald Silvey by paying to him~~ a sum of money equal to the amount he normally would have earned in performing the duties of Acting Captain at captain's pay or any assignments he would have received in the absence of the captain had he been reassigned to the Emergency

21/ This make whole remedy shall, of course, only be effective if the seniority status or know disposition to waive acting captaincy by the other members of the Rescue Squad on his tour whom Silvey would not have replaced had he been reassigned effective April 19, 1978 is such that Silvey would have received one or more acting captain assignments after such date.

Squad on his tour on its reinstatement on April 19, 1978, and continuing thereafter until the date reinstatement to his former position is offered to him in accordance with paragraph 2a, above, or until such time as he is no longer available for such employment, whichever first occurs.


c. Preserve and upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

d. Post immediately in plain sight, at the offices of the Fire Department of the City of Elizabeth, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by Respondent City's representative and by Respondent Forrester be posted by Respondents immediately upon receipt thereof, and maintained by them for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced or covered by any other material.

3. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of the Commission's Order, what steps the said Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the Complaint alleging that the City of Elizabeth and George J. Forrester were engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(2), (4) and (7) with regard to Donald Silvey's transfer to employment and non-reassignment be dismissed in their entirety.

DATED: Newark, New Jersey
February 26, 1979


Robert T. Snyder
Hearing Examiner

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL not discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer Donald Silvey immediate and full reinstatement to his former position with us as driver of the Rescue Squad on his tour /without prejudice to any rights or privileges previously enjoyed by him/ that the Commission has determined was unlawfully denied to him on April 19, 1978, when the Squad was reinstated and thereafter because of his exercise of the rights guaranteed to him by the New Jersey Employer-Employee Relations Act.

WE WILL make Donald Silvey whole for any loss of pay he may have suffered by paying him a sum of money equal to the amount that he would have earned on these occasions he would have been assigned as Acting Captain for the Rescue Squad on his tour from the date that he was denied reinstatement as Rescue Squad driver to the date of an offer of reinstatement or he is no longer available for such position.

CITY OF ELIZABETH
(Public Employer)

By _____

Dated _____

George J. Forrester, (Title) Fire Director

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Trenton, New Jersey (Telephone) 998-8031
If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08608 (Telephone) (609) 292-9830