

P.E.R.C. NO. 84-159

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Respondent,

-and-

Docket No. CO-80-325-49

F.M.B.A. BRANCH NO. 7,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that F.M.B.A. Branch No. 7 filed against the City of Plainfield. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act when it assigned certain alleged police duties to its firefighters. Under all the circumstances of this case, including a Civil Service Commission decision concerning the nature and extent of the employees' firefighting duties, the Commission found that the F.M.B.A. had not proved the allegations of its charge by a preponderance of the evidence.

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Appearances:

For the Respondent, Murray & Granello, Esqs.

For the Charging Party, Loccke & Correia, Esqs.
(Manuel A. Correia, of Counsel)

DECISION AND ORDER

The FMBA Branch No. 7, F.O.A. ("FMBA") has filed an unfair practice charge against the City of Plainfield ("City") with the Public Employment Relations Commission. The charge alleged, in part, that the City violated subsections 5.4(a)(1) and (5) ^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it assigned certain alleged police duties to its firefighters.^{2/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

^{2/} The charge also alleged violations of subsections 5.4(a)(2), (3) and (7), but no evidence was introduced to substantiate these allegations so we will not consider them further.

On November 22, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On December 17, 1982, the City, after receiving an extension of time, filed its Answer. The City admitted assigning certain additional duties to firefighters, but denied that these duties were "police" duties. The City also asserted that it had a contractual and managerial prerogative to make the assignments in question and that the Civil Service Commission, the appropriate forum for resolving job classification issues, had already determined ~~that~~ the assignments in question were within the firefighter job classification.

On March 7, 1983, the City filed a Motion for Summary Judgment seeking dismissal of the Complaint for the reasons set forth in its Answer. The Chairman referred this motion to Hearing Examiner Joan Kane Josephson who denied it.

On July 6, 1983, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but the City filed a post-hearing brief.

On January 20, 1984, Hearing Examiner Arnold H. Zudick^{3/} issued his report and recommended decision. H.E. No. 84-37, 10 NJPER ____ (¶ ____ 1984) (copy attached). Accepting the Civil Service Commission's conclusion that the additional duties were properly within the firefighter job classification and concluding

3/ Following Hearing Examiner Josephson's October 17, 1983 resignation, Hearing Examiner Zudick was assigned pursuant to N.J.A.C. 19:14-6.4 to prepare a report and recommended decision.

that the City had a managerial prerogative to make assignments within that job classification, he recommended dismissal of the Complaint.

On February 14, 1984, after receiving an extension of time, the FMBA filed exceptions. It asserts that the Hearing Examiner erred in concluding that the City was not obligated to negotiate over safety patrol duties; relying on the allegedly erroneous Civil Service determination; and finding that the gravamen of the case involved the Civil Service issue of whether the firefighters were working out of their job title, rather than whether their working conditions had been altered.

On February 22, 1984, the City filed a response supporting the Hearing Examiner's findings, analysis, and conclusions.

We have reviewed the record. The Hearing Examiner's findings of fact, with one typographical error,^{4/} are accurate.

Under all the circumstances of this case, we agree with the Hearing Examiner that the FMBA has not proved by a preponderance of the evidence that the assignments in question violated the Act. While the Civil Service Commission did not technically address the question of the City's compliance with our Act, its determination that the duties in question properly pertained to the title of "firefighter" is of substantial importance to this case and is entitled to substantial deference. Hackensack v.

4/ The name of the FMBA president is Ben Capua, not Capu.

Winner, 82 N.J. 1 (1980).^{5/} Given that determination, and based on our review of the record, we believe that the City acted within its managerial prerogative under Township of West Orange, P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982) to assign firefighting personnel to firefighting-related duties.^{6/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was opposed. Commissioner Butch was not present.

DATED: Trenton, New Jersey
June 25, 1984
ISSUED: June 26, 1984

^{5/} The FMBA contends that a January 24, 1984 opinion of the New Jersey Attorney General undercut the Civil Service determination which it did not appeal. We disagree. The Attorney General, in response to an inquiry from the Department of Civil Service, ruled that the City could not properly use the title of Public Safety Officer for employees of a new agency within the City's Department of Public Safety who perform both law enforcement and firefighting duties. This ruling does not apply to the instant case since the Civil Service Commission had already ruled that the safety patrol duties in question did not transform the firefighters from firefighters performing duties related to firefighting into public safety officers performing law enforcement duties unrelated to firefighting duties. Thus, the factual predicate -- the performance of law enforcement duties unrelated to firefighting duties -- underlying and necessitating the Attorney General's opinion is absent here.

^{6/} We also note that this case does not involve any demand to negotiate over increased workload or additional compensation.

STATE OF NEW JERSEY
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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City did not violate the New Jersey Employer-Employee Relations Act when it assigned certain patrol and escort duties to firefighters on the Fire Safety Patrol. The Hearing Examiner found that the assignment of firefighters to patrol duties relating to their normal responsibilities is a managerial prerogative. The Hearing Examiner also notes that the Civil Service Commission has jurisdiction over the job classifications of the affected employees and has, in another matter, already held that the duties complained of herein appropriately fall within the definition of a "firefighter."

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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(David F. Corrigan, Of Counsel)

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HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 1, 1980, by the F.M.B.A. Branch No. 7 ("FMBA") alleging that the City of Plainfield ("City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The FMBA has alleged that the City unilaterally altered the working conditions of certain firefighters by assigning them police-type functions all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) of the Act. ^{1/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

The FMBA alleged first, that the City violated the Act by bargaining to impasse regarding changes in unit employees' Civil Service job titles. Second, the FMBA alleged that the City unlawfully unilaterally changed the working conditions of fire-fighters performing safety patrol functions by requiring them to perform police-type functions which allegedly exposes them to hazardous situations for which they are not trained or equipped to handle. The City denied committing any violation of the Act and asserted that the Charge did not set forth a cause of action, that the Commission does not have jurisdiction in this matter, and that the parties' collective agreement permitted the City's actions.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 22, 1982 and assigned to Hearing Examiner Joan Kane Josephson. A pre-hearing conference was then held on January 12, 1983, and the FMBA apparently dropped its assertion that the City unlawfully bargained to impasse. Subsequently, on March 7, 1983, the Commission received a Motion for Summary Judgment filed by the City in this matter seeking dismissal of the Complaint. Thereafter, by letter dated March 10, 1983, the Chairman of the Commission, pursuant to N.J.A.C. 19:14-4.8(a), referred the Motion to Hearing Examiner Josephson. On May 31, 1983, the Hearing Examiner issued her decision (Exhibit J-6) denying the Motion and ordered a hearing. The hearing was held in this matter on July 6, 1983, in Newark, New Jersey, at which time the parties were given the opportunity to

examine and cross-examine witnesses, present relevant evidence and argue orally. The City filed a post-hearing brief which was received on August 22, 1983. ^{2/}

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The City of Plainfield is a public employer within the meaning of the Act and is subject to its provisions.
2. The F.M.B.A. Branch No. 7 is an employee representative within the meaning of the Act and is subject to its provisions.
3. The City and the FMBA are, and have been, parties to collective agreements covering firefighters employed by the City. The three most recent agreements covering those employees, the 1980 agreement Exhibit J-3, the 1981 agreement Exhibit J-2, and the 1982-1983 agreement Exhibit J-1, contain the same clause (Article 8) setting forth additional duties. That Article provides for firefighters to participate in a Safety Patrol, and it lists the duties of the patrol which primarily include detection of fires and false alarms, responding to the Rescue Squad, assisting the police with traffic control and accident investigations at accident scenes,

^{2/} On approximately October 17, 1983 Hearing Examiner Josephson resigned from the Commission, and pursuant to N.J.A.C. 19:14-6.4 the undersigned Hearing Examiner was assigned to complete this matter.

reporting to the police indications of criminal activity within their assigned area, checking alarm boxes, doing inspections, and checking on vacant houses and abandoned vehicles.

Article 8 clearly states that Safety Patrol is not a police function, and that firefighters will not be trained in the use of firearms nor required to have one in their patrol vehicle(s). That Article further states that assignment to the Safety Patrol will be done on a rotating basis, that no firefighter will be assigned to patrol for more than four hours each day, and that the patrols will operate from 8:30 a.m. to 12:30 p.m., from 1:30 p.m. to 5:30 p.m., and from 7:30 p.m. to 11:30 p.m.

The record shows that the safety patrol provision was first negotiated into the parties' collective agreement in 1976. The purpose of the patrol was to handle fire-related duties such as those listed above, but also to serve as the "eyes and ears" for the police by patrolling an area and making visual observations of any criminal activity and then reporting any such activity. (Transcript "T" pp. 49-50, 52, 58, 60, 67). In fact, Charles Allen, the City's Director of Public Affairs and Safety testified that the mere presence of the Safety Patrol has a discouraging effect on the commission of crimes (T p. 51).

4. The facts show that the Safety Patrol uses red firefighter cars which are equipped with such firefighting equipment as fire coats and boots, an ax, oxygen, and a first aid kit. (T p. 74). There are usually two men in a car, one man from an engine company, and one man from a truck company, and they patrol the area of the City to which their truck and engine are assigned.

(T pp. 36, 49). There are approximately three fire Safety Patrol cars, but normally only one car is out during each of the four hour shifts. (T pp. 64, 72-73). Those cars are equipped with a radio that enables the firefighters to report any incidents to fire headquarters which then will notify the police of any reported criminal activity. (T pp. 59-60). The Safety Patrol cars are also equipped with a police monitor to enable the firefighters to hear the police calls, and to know whether they should avoid an area, or move in to make visual observations. (T pp. 38-39).

5. The facts also show that the firefighters on the Safety Patrol do not receive any police or weapons training, they are not required to apprehend criminals, they are not required to investigate criminal activity, and they have been directed not to engage in hot pursuit of any vehicle. (T pp. 14-15, 29-30, 51, 67). Although they do perform some minor traffic control when necessary, their main function vis-a-vis the police is to make observations and report criminal activity to the police.

The record further showed that although some firefighters had voluntarily attempted to apprehend criminals, there was no evidence that any firefighter has ever been injured while on the Safety Patrol. In fact, both firefighters who testified at the hearing, FMBA President Ben Capu, and chief negotiator Larry Zampella, indicated that they have never attempted to apprehend a criminal, and Capu could only recall one incident, a purse snatching, where a firefighter made such an attempt. (T pp. 17, 37, 41). Finally, both Capu and Zampella indicated that the priority of the Safety Patrol is still firefighting, and in the event a Safety Patrol's

truck or engine is called to a fire, the Safety Patrol participants are expected to cease their patrol functions and report to the fire. (T pp. 19, 34).

6. In addition to the general duties of the Safety Patrol listed hereinabove, there are certain specific functions performed by the Patrol intended to prevent or diminish the likelihood of criminal activity. Because of the increase in criminal activity near the Planned Parenthood facility, and the Board of Education building, the Safety Patrol has been required to patrol those areas and be present near those facilities to report any criminal activity while they are opening and closing. (T pp. 15, 17, 53). Moreover, in 1979 the City, in response to citizen concerns, instituted a citywide Home Escort Service to enable citizens who are concerned for their safety to request an escort to their homes between the hours of 5:00 p.m. and 11:30 p.m. The Safety Patrol is required to assist in providing the escort service. (T p. 18, Exhibits CP-2A-2E).

7. The facts show that in addition to the regular duties of the Safety Patrol, the firefighters are also required to participate in the "directed patrol." Where the Safety Patrol is a normal everyday function assigned by the Fire Department, the directed patrol is required only when needed and is assigned by the Police Watch Commander. (T pp. 24, 71). The directed patrol is actually only the Police Watch Commander directing the regular Fire Safety Patrol to patrol a specific area or street within its patrol area, or to park at a particular area and report any criminal activity. (T PP. 24, 52, Exhibits CP-1, CP-4). The directed patrols have been in existence since 1976, and a grievance challenging such

assignments was denied. (T pp. 25-27).

8. Since the FMBA believed that its firefighters on the Safety Patrol were being required to perform law enforcement duties which included the directed patrols and the Home Escort Service, the FMBA, through its attorney, apparently filed an action before the State Department of Civil Service in 1979 asking to review the matter and to determine the proper classification for the affected employees. The Department of Civil Service responded on May 18, 1981 (Exhibit R-1) and held that the affected employees were properly classified as firefighters.

The facts of that inquiry show that field audits were performed in 1979, and as a result, Civil Service on April 8, 1980, tentatively classified the Plainfield firefighters as "public safety officers." Thereafter, on May 1, 1980, Civil Service had a meeting between the parties which resulted in both parties submitting written position statements on that issue. The last position statement was received on October 3, 1980.

Civil Service reviewed the duties of a "firefighter" and of a "public safety officer" in general, and it reviewed the specific duties of the Plainfield firefighters including their many Safety Patrol duties and responsibilities. Civil Service concluded that "public safety officers" have the authority to apprehend perpetrators, and they have the authority to use and maintain weapons. Since it found that the Plainfield firefighters on Safety Patrol did not have the authority to apprehend, and were not authorized to handle weapons, Civil Service concluded that the Plainfield firefighters were properly classified as "firefighters."

In reaching its decision Civil Service noted that although the duties of the Plainfield firefighters were similar to the duties of the "public safety officer," the Plainfield firefighters did not have any law enforcement duties or responsibilities except those related to firefighting and fire prevention. On the last page of the decision the FMBA was notified of its right to appeal that decision, but the FMBA did not establish that any appeal was taken.

Analysis

Having reviewed the entire record herein the undersigned finds that the §5.4(a)(2), (3) and (7) alleged violations of the Act must be dismissed for lack of any evidence to support that such violations occurred. The 5.4(a)(2) allegation is without merit because no evidence was presented to show that the City in any manner dominated or interfered with the existence or administration of the FMBA. Similarly, the 5.4(a)(3) allegation is without merit because no evidence was submitted to prove that the City discharged, disciplined, or in any manner discriminated against any firefighter because of the exercise of his/her protected activity, nor was there any evidence to suggest that the City assigned any Safety Patrol duties to firefighters in retaliation for the exercise of their protected activity. Finally, the 5.4(a)(7) allegation must be dismissed because the FMBA did not allege any rule or regulation of this Commission which was violated.

In addition, the undersigned finds that the §5.4(a)(1) and (5) alleged violations of the Act must be dismissed for two compelling reasons.

First, this Commission in In re Twp. of W. Orange, P.E.R.C.

No. 83-14, 8 NJPER 447 (¶13210 1982) has already held that the assignment of firefighters to patrol duties which relate to their normal responsibilities is a managerial prerogative. Second, the State Department of Civil Service, not the Public Employment Relations Commission, has the jurisdiction and authority to determine whether the instant firefighters are working out of title, and Civil Service has already issued a decision concerning that issue. Moreover, there has been no showing that any of the Safety Patrol duties were assigned by the City to the firefighters because of union or protected activity.

In Twp. of W. Orange, supra, the Commission found that a clause restricting the Employer's ability to assign firefighters to "fire patrol" was non-negotiable. The Commission held:

The assignment of firefighters to patrol duties is a matter directly relating to their normal responsibilities and it is within the [Employer's] managerial prerogative to determine what duties and responsibilities its firefighters shall undertake. To require the [Employer] to negotiate the firefighters' duties would impinge upon its managerial discretion to determine how to deploy its personnel. 8 NJPER at p. 447.

The result in the instant case must be the same. Most of the Safety Patrol duties are clearly related to firefighting, and although the Commission held in In re Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456, 458 (¶12202 1981), that generally, in non-emergency situations duties unrelated to firefighting may be negotiated, the Civil Service Commission has already determined that the Safety Patrol duties, herein, fall within the definition of a "firefighter." Consequently, the City is not required to negotiate over the existing Safety Patrol duties.

Second, and in conjunction with the foregoing reason, the undersigned believes that this case falls squarely within the parameters of the New Jersey Supreme Court's decision in Hackensack v. Winner, 82 N.J. 1, 6 NJPER 124 (¶111067 1980), wherein it established a policy to prevent the litigation of a particular set of facts in more than one administrative agency, and where it held that PERC should have abstained from considering a matter which was more appropriate for the Civil Service Commission.

Having reviewed the issues raised in this Charge and the issues considered by Civil Service in Exhibit R-1, the undersigned believes that the gravamen of the instant matter raises an issue within Civil Service jurisdiction. The issue here really is whether the firefighters are working out of their job title, rather than whether the working conditions were altered. The FMBA alleged in the Charge that the City altered the firefighters working conditions by requiring them to perform police functions. However, Civil Service considered the duties in question in reaching its decision rejecting the FMBA's argument that firefighters were performing police functions and working out of title, and held, that the instant firefighters were performing duties within their job title.

Moreover, the undersigned notes that Civil Service is the proper agency to handle matters of job classification. In State v. State Supervisory Employees Assoc., 78 N.J. 54 (1978), for example, the Court held that

...it is for the Civil Service Commission to establish relevant employment classifications and to set qualifications for specific job categories in each. N.J.S.A. 11:7-1. 78 N.J. at p. 90.

In addition, the Civil Service Commission has the jurisdiction to enforce N.J.S.A. 11:22-12 which provides:

No person shall be appointed or employed under any title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the position which he legally holds.

In conducting the investigation in R-1, Civil Service appears to have been complying with N.J.S.A. 11:22-12 by examining whether the instant firefighters were performing duties that did not pertain to their position. By concluding that the instant firefighters were in the appropriate title, Civil Service was indicating that the duties in question properly pertained to the title of "firefighter." There is no reason, nor legal basis, for PERC to second-guess that conclusion. ^{3/}

Finally, the undersigned notes, but does not rely upon, the City's assertion that the alleged change in job duties raised herein were permitted by Article 8 of the parties' collective agreement. Although the duties concerning Planned Parenthood and the Board of Education may fall within Article 8-1(d), ^{4/} there is no specific clause covering the Home Escort Service. ^{5/} However, for

^{3/} Under Civil Service Rules and Regulations which are set forth in the New Jersey Administrative Code, Civil Service has a procedure available to public employees seeking a reclassification of an existing position based upon changes in job duties, N.J.A.C. 4:1-6.2(2), 4:1-6.4, and 4:1-6.5. Civil Service also has an appeal procedure, N.J.A.C. 4:1-6.5A. It is apparent that the Civil Service investigation of the duties of the Plainfield firefighters, and its decision in R-1, was done pursuant to those rules.

^{4/} Article 8-1(d) provides: "The Safety Patrol shall report all indications of criminal activity within their area of assignments to the police."

^{5/} Article 8-1 does provide in part that the Safety Patrol: "...is merely an expansion of the normal public safety duties of a Firefighter, that is, protecting lives and property."

The undersigned does recognize that one may argue that the Home Escort Service is related to public safety and therefore falls within the above language.

the reasons stated hereinabove, the undersigned does not believe that the City violated the Act by assigning the duties in question to the Safety Patrol.

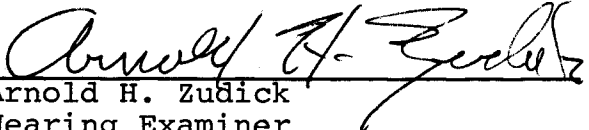
Accordingly, based upon the entire record and the above analysis, the Hearing Examiner makes the following:

Conclusions of Law

The Respondent City did not violate N.J.S.A. 34:13A-5.4 (a) (1), (2), (3), (5) and (7) by requiring firefighters to perform certain patrol and escort functions while on Safety Patrol.

Recommended Order

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


Arnold H. Zudick
Hearing Examiner

Dated: January 20, 1984
Trenton, New Jersey