

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2003-186

NEWARK FIREFIGHTERS UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a Motion to Dismiss at the conclusion of Charging Party's case and recommends that the Commission find that the Respondent did not violate Sections 5.4(a)(1) and (5) of the Act by ordering the permanent, involuntary transfer of numerous firefighters between companies and tours. The Hearing Examiner found that based on a scope of negotiations determination in P.E.R.C. No. 2005-2 regarding these same transfers, Respondent had a managerial prerogative to transfer for the reasons articulated -- to promote cross training, improve efficiency, decrease response time and increase diversity. Even assuming the evidence in the light most favorable to Charging Party, that three of the four articulated reasons were not legitimate, the evidence supports that achieving diversity was the main, if not only, reason motivating the transfers, and the Commission has ruled that transfers effectuated for that articulated reason creates a managerial prerogative. The Hearing Examiner rejected Charging Party's argument that the Bridgewater analysis is the standard of review where the charge asserts a violation of 5.4(a)(1) and (5) of the Act. Also, the Hearing Examiner found that clear contract language permitted the Fire Director to transfer without recourse to an asserted past practice of seniority bidding preferences. In any event, she found that the express terms of the parties' agreement was not inconsistent with the past practice as described by Charging Party's witnesses. Finally, the Hearing Examiner determined that Charging Party waived its right to assert a negotiations obligation having negotiated the contract language through numerous contract terms without change.

A Hearing Examiner's Decision on a Motion for Summary

Judgment which resolves all the issues in the Complaint becomes a recommended decision, pursuant to N.J.A.C. 19:14-4.8(e). A 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
JoAnne Y. Watson, Corporation Counsel
(Carolyn McIntosh, Asst. Corp. Counsel)

For the Charging Party,
Fox & Fox, attorneys
(Craig Gumpel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION
AND DECISION ON MOTION TO DISMISS

On January 27, 2003^{1/} and April 23, 2004 the Newark Firefighters Union (NFU) and certain named individuals filed an unfair practice charge and amended charge against the City of Newark (City) (C-1)^{2/}. The charge as amended alleges that the

1/ The unfair practice charge was accompanied by an application for interim relief and sought temporary restraints. On April 3, 2003, a Commission Designee denied the request for interim relief, concluding that the NFU had not established a substantial likelihood of success on the merits. I.R. No. 2003-11, 29 NJPER 162 (147 2003).

2/ "C" refers to Commission exhibits received into evidence at
(continued...)

City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, 5.4a(1), (3) and (5)^{2/}, by transferring various firefighters on the basis of race, political affiliation or union activity and by unilaterally changing terms and conditions of employment without negotiations, namely, transferring firefighters in contravention of the parties' past practice regarding seniority bidding procedures.

On June 7, 2004 a Complaint and Notice of Hearing issued (C-1). The original charge contained several counts. The Director, however, issued the Complaint only as to certain allegations in Count II to the extent they allege that Firefighters Roberson, Willis and Bruton were reassigned and/or not reassigned based on their union activity and as to all of Count III which alleged a

^{2/} (...continued)
the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the respective days of hearing are referred to as "1T", "2T" and "3T".

^{3/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees 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."

unilateral change in past practice regarding seniority bidding procedures in transfers.

On June 21, 2004 the City filed its Answer, (C-2), denying that it violated the Act. Specifically, the City denies (1) that it transferred firefighters for union activity and (2) that there is a past practice regarding seniority based bidding for transfers. It asserts that transfers are managerial prerogative and/or within the sole discretion of the Fire Director under the parties' collective negotiations agreement. The City also raises several affirmative defenses, including that it acted lawfully under the parties' collective agreement and in the exercise of its managerial prerogative to transfer and deploy personnel in a manner consistent with governmental policy.

On October 12, 2004, Charging Party withdrew Count II in its entirety and requested that the hearing proceed only as to Count III of its charge (C-3).

On November 1, 2004 the City filed a Motion for Summary Judgment seeking dismissal of the Complaint together with a Request for a Stay with the Commission. On November 1, 2004 the Motion and Request for Stay were referred to me for a decision, pursuant to N.J.A.C. 19:14-4.8.

The City relies on a scope of negotiations determination in City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102, 2004) issued in August 2004. That decision held that the transfers at

issue in this unfair practice charge were non-negotiable managerial prerogative where the City transferred certain firefighters to promote cross-training, improve efficiency, increase diversity and decrease response time. The Commission granted the City's request for a restraint of binding arbitration of grievances filed by the NFU regarding the transfers.

On November 3, 2004 I conducted a telephone conference with the parties because the first scheduled date of hearing was November 9, 2004. The NFU disputes the reasons for the transfers as set forth by the scope determination. It also objects to the Request for a Stay because the Motion was filed within days of the first scheduled hearing date and relied on a Commission decision issued two months previously. The City offered no explanation for the timing of its filing. I denied the Motion and Request for a Stay. I determined that for administrative efficiency and due to the late filing, it was not appropriate to adjourn the start of the hearing. I also found that there were material facts in dispute.

On November 9 and 10 and December 9, 2004, I conducted a hearing. Charging Party introduced exhibits and its witnesses were examined and cross-examined. At the conclusion of Charging

Party's case-in-chief, Respondent moved to dismiss. Briefs and replies were filed by February 2, 2005.^{4/}

Based upon the record, I make the following:

FINDINGS OF FACT

1. The Newark Firefighters Union (NFU) is the exclusive representative of all rank-and-file firefighters employed by the City of Newark. David Giordano is the current NFU President and is assigned full-time to the union office (1T26-1T27).

2. The City and NFU are parties to a collective negotiations agreement effective January 1, 2003 through December 31, 2004 (CP-1).

Article XXII, "Transfers", provides in whole:

SECTION 1 Transfers will be made at the discretion of the Director.

SECTION 2 As vacancies occur, notice of such vacancy will be posted in each firehouse.

^{4/} Respondent filed its brief and supporting exhibits as a motion for summary judgment with the Chair of the Commission on January 21, 2005. However, since Respondent moved to dismiss at the conclusion of Charging Party's case in chief, I am construing Respondent's submissions as support for its motion to dismiss before me pursuant to N.J.A.C. 19:14-4.7. I do not consider the certifications of Edward Dunham or Lowell F. Jones attached as exhibits B and D to Respondent's brief. On a motion to dismiss, I only consider the evidence in the record. Exhibit C which is a supplemental affidavit of Edward J. Dunham is in evidence as CP-26 and is before me. Also, I take administrative notice of exhibit A which is the Commission's scope determination issued in City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), appeal pending App. Div. Dkt. No. A-000493-04T3.

Article XXIII, "Management Rights", retains and reserves to the City certain powers, rights and authority generally and, specifically, in Section 1(b) the right to transfer employees. Section 2 provides that the exercise of the rights and powers set forth in this Article and "the use of judgment and discretion in connection therewith shall be limited only by the terms of this Agreement and then only to the extent such terms hereof are in conformance with the Constitution and laws of New Jersey and of the United States."

Article XLIII, "Fully Bargained Provisions", provides in pertinent part:

This Agreement represents and incorporates the complete and final understanding and settlement by the parties. During the term of this Agreement, neither party shall be required to negotiate with respect to any matter whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated.

Article XX, "Seniority", defines seniority as accumulated length of service with the department and provides in pertinent part:

This definition of seniority shall apply to all terms and conditions of employment established by this Agreement for which seniority is a factor.

Seniority is a factor in the collective agreement in Articles pertaining to salary steps and vacation picks (1T106).

For instance, Article XIV, "Vacations" at Section 2, entitled Procedures for Choosing Firefighters, provides in pertinent part:

Members who choose a split vacation shall not pick again until all members on the same tour have had their first pick. The order of seniority shall again govern the second pick.

The agreement contains no language pertaining to seniority bidding procedures in transfers or work assignments.

3. In January 2003, the Fire Department was divided among four Battalions (1st, 3rd, 4th and 5th)^{5/} covering the City geographically (CP-25, 1T28). Battalions were designated as first responders in their geographic coverage areas (1T29). Each Battalion consisted of between seven and eight companies. Four engine and two ladder companies responded on the first alarm, sometimes from more than one Battalion (1T98). Each subsequent alarm brought companies from farther away (1T98-1T99). The areas of coverage were mixed residential and commercial with the exception of a couple of units such as Rescue 1 (Hazmat) which was located in the central business district (1T97).

The City employed between 460 and 470 firefighters assigned either to a company within the City's eighteen (18) firehouses or to various non-fire company units such as Arson, Community Relations, Special Services, Training Academy, Code Enforcement,

^{5/} The 2nd Battalion was disbanded sometime before January 2003.

Line Division, Fire Prevention and Life Safety, Labor Relations, Planning and Research and Fireboat (CP-1, 1T28, 1T42).

Firehouse contained from one to several companies. Three companies are closed on every tour on a rotational basis (1T96). There are four (4) shifts, also known as tours (1T94, 1T123). If fully staffed, a fire company consists of four firefighters and one captain (1T29). The Captain supervises the company and is responsible for sitting next to the driver on a truck and directing the driver to the scene of the fire (1T100-1T101).

Fire fighters working in the same company become a team. Working closely together, they learn each others abilities thus strengthening crew integrity (1T101). Training is scheduled throughout the year for those assigned to either an engine or ladder company (1T99).

There were a total of approximately one hundred eight (108) companies on various tours: engine companies, truck companies and Rescue 1, Truck 1 (3rd Battalion) which is the Hazmat unit (CP-25, 1T30). Engine companies are responsible for pumping water; truck companies supply ladders and tools (1T79). Firefighters reassigned from engine to truck companies receive training upon reassignment. The Hazmat unit requires specialized training and

certification for permanent assignment. Only certified firefighters can suit up.^{6/}

In January 2003 the work schedule for firefighters assigned to line duty was ten-hour days and fourteen-hour nights (1T30). Beginning in February 2003, firefighters began working a different shift/tour: twenty-four (24) hours on duty and seventy-two (72) hours off duty (1T30).

4. On January 15, 2003 Fire Director Edward J. Dunham issued Executive Order No. 426 entitled Transfers and Assignments, which ordered the transfer of fifty-six (56) firefighters between companies and tours effective January 31, 2003 (CP-2, 1T91).^{7/} The transfers were permanent and involuntary as opposed to details which are temporary reassignments (1T32).^{8/} Dunham never consulted with or notified the NFU before ordering the transfers nor did he negotiate the impact of the transfers (1T105). A demand to negotiate any

^{6/} Hazmat members operate in three zones, hot, warm and safe. The safe zone does not require firefighters to suit up (1T125). The Hazmat unit also receives a stipend of four thousand dollars (\$4,000.00) (1T124). To work in the warm or safe zone, there is no certification required (1T125-1T126).

^{7/} The Executive Order also transferred 10 captains and 48 probationary firefighters. The NFU does not represent captains. As to probationary firefighters, the NFU concedes that the seniority bidding procedure does not apply to them.

^{8/} Details occur when firefighters are on vacation or sick leave (1T32). The NFU has no in-put in temporary reassignments or details. They are at the discretion of the Director (1T33).

change to the past practice regarding seniority bidding in transfers was made by the NFU a year earlier when Chief Jones indicated a change to consideration of transfer requests to a first-come, first served basis.^{2/} The record does not indicate a demand to negotiate the impact of any change.

Dunham ordered the transfers without regard to considerations of seniority bidding preferences. Specifically, of the fifty-six (56) firefighters transferred, twenty-seven (27) firefighters were transferred regardless of seniority preferences (CP-23, CP-24, 1T73, 1T78). For instance, Chief Dunham transferred the least senior firefighter in twenty-two (22) fire companies comprised of firefighters of all one race to ensure diversity in all companies (CP-26, 1T78, 1T82).

Also, Luther Roberson, a union officer assigned to the union office as per Article V of the parties' agreement, requested a transfer back to his original tour in the Hazmat unit but was offered a transfer to another tour in the Hazmat unit, while less

^{2/} Approximately one year previously, in October 2001, Chief Jones met with Giordano and expressed the view that he was going to change transfer procedures giving priority to transfer requests by submission date, using seniority only as a tie-breaker (1T60-1T61). Giordano objected to the change in what he termed a past practice and demanded negotiations before any change was implemented. This was confirmed in a November 2001 letter to Jones from NFU counsel (CP-29). The NFU never received a response to its letter to Jones (1T62). Chief Jones did not effectuate a transfer utilizing the "new procedures" (CP-3, CP-29). There were no transfers in the Department between October 2000 and January 2003 (1T62).

senior officers were assigned to Roberson's original tour (CP-1, CP-24, 1T84-1T86). In the past when a NFU officer returned to line-duty from permanent assignment in the union office, he was reassigned to his original tour if it was vacant (1T51, 1T85-1T86). Roberson's original tour was in the Hazmat Unit, Tour 1, Truck 1.^{10/} The three firefighters who were transferred to Roberson's preferred post were Hispanic and African-American with less seniority than Roberson (1T86, 1T90). Roberson who is African American was offered another post in the Hazmat unit (Tour 1, Truck 3), but declined the assignment. He remained in the union office (1T115-1T116).

5. Dunham's articulated reasons for the January 2003 transfers were to promote cross-training, improve efficiency, increase diversity, and decrease response time by making firefighters more familiar with various locations (CP-26, 1T78, 1T123). See also, City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), appeal pending App. Div. Dkt. No. A-000493-04T3. In particular, Dunham felt that transfers promote cross training by exposing firefighters to different leadership styles,

^{10/} NFU President Giordano had previously spoken to Dunham about moving Roberson back to his assignment in the Hazmat unit (1T89). Dunham, according to Giordano, indicated that Roberson would not be moved back because Roberson was caught tearing down the Mayor's campaign signs (1T90). Giordano also spoke to Deputy Chief Espolini who stated that Roberson's transfer request was denied for reasons of diversity (1T88).

residential versus commercial firefighting experiences and companies that handle higher volumes of calls (CP-26).

As to diversity, Dunham viewed segregation and racism as a Departmental problem which the City was mandated to eliminate by a Justice Department Consent Decree and by directive of Mayor Sharpe James (CP-26). Segregation in firehouses was linked to disparate treatment in promotional opportunities (CP-26). In Dunham's memorandum to Mayor James listing the Department's major accomplishments for 2003, Dunham highlighted the racial integration of all fire companies (CP-27). Mayor James lauded this accomplishment in his annual State of the City address (CP-28).

6. Dunham's transfer list differed from a list previously prepared and submitted to him by Fire Chief Lowell Jones on January 9, 2003 (CP-2, CP-22, 1T63). According to Giordano, unlike Dunham's January 15, 2003 Order, none of Jones' transfer recommendations reassigned firefighters involuntarily - e.g. firefighters who had not put in a transfer request were not on the list (CP-2, CP-22, 1T64).

The Jones list and attached memorandum were never officially issued nor did Jones as Chief have the authority to order transfers; pursuant to the collective agreement, the discretion to transfer was and is solely with the Director (1T117-1T119). Nevertheless, in the attached memorandum, Jones expressed that he

prepared his list to accommodate concerns about diversity, specialized training, and deployment of manpower in light of heightened security concerns. Also, Jones stated that "[u]nits that have been training together and that have achieved a high level of efficiency was maintained and where we could comply with diversity we did so." (CP-22). Most of the reassignment transfers on Jones' list complied with seniority bidding preferences (1T64).

7. When Dunham's transfer list was issued on January 15, 2003, Giordano felt that the City's main motivation for the transfers was to meet diversity goals in the fire companies, although the City never explained its diversity goals to the NFU nor notified it in writing of its goals (1T103, 1T105). He felt, however, that diversity could have been achieved through the assignment of new hires (1T103-1T104).

Also, Giordano disputes the City's other reasons for effectuating the transfers, namely, familiarizing firefighters with different sections of the City and different types of neighborhoods to decrease response time and improve efficiency. He testified that there are fire hydrants located on every block/street in the City and all companies operate in mixed residential/commercial zones (1T97, 1T102). Additionally, there is a Captain in each truck who is responsible for guiding drivers to the fire scene (1T99-1T102, 1T121). Drivers are rotated

throughout the year either monthly or by shift (1T120). Also, depending on the size of a fire, the first due response brings in one or more companies from different battalions which then expands to a wider geographic area bringing in companies from farther out on a second or third alarm, thus familiarizing firefighters with large areas of the City (1T98-1T99). Finally, temporary assignments and details which occur throughout the year expose firefighters to other companies and equipment. They are trained when they move from a truck company to an engine company (1T99-1T100)

8. David Giordano has been NFU President since 1993 (1T26). Among his many duties, Giordano negotiates and administers the collective negotiations agreements (1T26-1T27). During his tenure, Giordano has negotiated four (4) agreements including the parties' current contract (CP-1, 1T112). Article XXII, "Transfers", has remained the same in the agreements negotiated by Giordano (1T112). None of the agreements contained language regarding seniority bidding procedures for transfers (1T114).

9. Stanley Kossup preceded Dunham as Fire Director and was the only other Director that Giordano served under during his presidency (1T111). Kossup held the combined title of Director and Chief (1T118). During this period, Kossup and Giordano handled permanent transfers in the same manner (CP-3 through CP-18). Firefighters would fill out transfer request forms for

positions which were either vacant or filled (CP-19, 1T34).

Vacancies were caused by retirement, promotion, death in the line of duty, and resignation (1T36). The NFU kept a staffing board of all vacant positions (1T37).

The request forms were then submitted through the chain of command to the Planning and Research Unit (Planning) which was and is responsible for the assignment of firefighters (1T34).^{11/} Planning submitted copies of any requests to the NFU which maintained them in a binder sorted chronologically by company and position (CP-19, 1T41)).

When the Director announced transfers would take place, Giordano sat down with the head of the Planning Unit and without the Fire Director to determine the available positions and the most senior firefighter, if any, bidding on any particular position (1T41). With the exception of specialized units such as arson or community relations^{12/} or in the case of probationary firefighters who did not bid but were assigned by the Director to positions, the most senior firefighter would get his transfer bid (1T41-1T42). The Director then approved the transfer list (CP-3

11/ If a firefighter no longer desired to bid for a position, he would submit a report rescinding his transfer request (CP-19-22, 1T39).

12/ Hazmat (Rescue 1) was not considered a specialized unit (1T109).

through CP-18). According to Giordano, Kossup never ordered the involuntary transfer of firefighters (1T44).

10. Giordano's immediate predecessor as NFU president was John Gerow. He worked for the City as a firefighter from 1952 until he retired in 1992 (2T3-2T4). From 1979 until his retirement Gerow served as a union officer, first as vice-president in 1979, then as president in 1982 (2T4-2T5).

Gerow worked under three Fire Directors as NFU President: John Caulfield (1982-1986), Claude Coleman (1986-1986) and Stanley Kossup (1987-1992) (2T9-2T10, 2T26). He negotiated at least four collective agreements (2T24). Each agreement contained Article XXII, "Transfers" (2T24). The contractual language was the same as the language in the parties' current agreement (CP-1, 2T24-2T25).

11. During his years as NFU President, Gerow followed the same procedure as Giordano in regard to firefighter transfers. He kept a binder of transfer requests (2T25). When the Fire Director decided to effectuate a transfer, Gerow met with Head of Planning John Valent in Fire Headquarters to create a transfer list (2T25). Seniority preference was considered in all assignments except special units, like arson and community relations (2T13, 2T15, 2T30). Also, probationary firefighters would be assigned solely by the Director (2T15). Caulfield, Coleman and Kossup played no role in developing the transfer list

2T27-2T28). However, the Directors determined when transfers would take place. Gerow understood that the Directors possessed the final authority to decide who would be transferred and to what unit (2T29). In other words, according to Gerow, in his experience the Directors could have chosen less senior firefighters for transfer to particular positions, but they never did (2T36-2T37).

ANALYSIS

In New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979), the Commission set forth the standards for determining whether to grant a motion to dismiss at the conclusion of the Charging Party's case as follows:

. . . the Commission utilizes the standards set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). Therein, the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent . . . of the evidence, but only with its existence, viewed most favorably to the party opposing the motion". Id. at 198.

See also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535-542 (1995) and Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999).

The Dolson Court stated:

The test is whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be

deduced therefrom, reasonable minds could differ, the motion must be denied. Id. at 5.

Applying the Dolson standards, the following are undisputed facts: (1) Fire Directors Caulfield, Coleman and Kossup, Dunham's predecessors, all ordered permanent as well as temporary transfers; (2) In each case where permanent transfers were ordered, the head of the Fire Department's Planning Unit met with the NFU president to review previously submitted transfer request forms and prepare a list by seniority of those bidding on positions; (3) Caulfield, Coleman and Kossup approved the transfer lists prepared by the Planning Unit and the NFU; (4) Fire Director Dunham ordered the permanent, involuntary transfer of numerous firefighters between companies and tours effective January 31, 2003 without regard to seniority bidding preferences; (5) Dunham transferred the least senior man in twenty-two (22) companies in part to eliminate racism and segregation in the Department; (6) The parties collective agreement contains language reserving to the Director the discretion to transfer firefighters. The only procedural exception requires notices of vacancies be posted (Article XXII entitled "Transfers" and Article XXIII entitled "Management Rights"); (7) The agreement is silent on seniority bidding procedures in transfers; and (8) The above contract language remained unchanged in at least eight

collective agreements during the terms of two NFU presidents, Gerow and Giordano.

The charge asserts that the City violated the Act when Fire Director Dunham ordered the permanent involuntary transfer of firefighters without regard to seniority bidding procedures as it contends was the past practice of the parties. The City denies the past practice but asserts, in any event, it had a managerial prerogative to transfer certain firefighters. It contends that the January 2003 transfers were intended to improve efficiency, promote cross training, increase diversity, and decrease response time. The City relies on the Commission's scope of negotiations determination regarding these same transfers in City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), appeal pending App. Div. Dkt. No. A-000493-04T3. The Commission found that challenging the transfers for the reasons articulated by the City would substantially limit the City's policy making powers. It concluded that the City had a managerial prerogative to make these transfers without consideration of seniority bidding preference. The Commission's decision, the City contends, is controlling in this matter.

Section 5.3 of the Act requires that "proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative." Employers may not unilaterally change prevailing terms and conditions of

employment because to do so would circumvent the statutory duty to bargain. Galloway Tp. Bd. of Ed. V. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). A term or condition of employment may be set by agreement or by past practice. Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), aff'd 166 N.J. 112 (2000), 26 NJPER 453 (¶31177 Sup. Ct. 2000). However, an employer will not be found to have violated 5.4(a)(5) where the term or condition of employment is not mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982).

Police offices and fire fighters have a broader scope of negotiations than other public employees. City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981). Where a public employer and the majority representative of its firefighters have negotiated over a subject that is not mandatorily negotiable, yet is not preempted by statute or regulation, that provision can be enforced unless doing so would substantially limit the employer in attaining governmental policy goals. In addition, negotiability rulings are made on the facts of each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); Troy v. Rutgers, 168 N.J. 354, 383 (2001).

The substantive decision to transfer or reassign employees and the criteria for selecting employees to transfer is generally not mandatorily negotiable, although related procedures are

mandatorily negotiable. See Jersey City, supra, at 568-574; Local 195, IFPTE v. State, 88 N.J. 393, 417 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The NFU rejects the City's argument that the Commission's decision in P.E.R.C. No. 2005-2 is controlling. It asserts that the Commission effectively recognized that the City, if acting for the articulated reasons, had a managerial prerogative to transfer, but the Commission added that "[we] express no opinion on the legitimacy of any of the City's reasons for the transfers or the availability of any other forum to challenge those reasons." Id. at 295. The NFU extrapolates from that dicta that it is appropriate, when analyzing whether it has made out a prima facia 5.4(a)(5) violation, to utilize the shifting burden analysis as articulated in In re Bridgewater Tp. 95 N.J. 235 (1984). That analysis, it contends, requires the City to establish that it effectuated the January 2003 transfers for legitimate, not pretextual reasons. The NFU challenges the legitimacy of the City's reasons in this hearing as pretextual.

The Commission determined in P.E.R.C. No. 2005-2 that the reasons articulated by the City for the January 2003 transfers created a managerial prerogative. ^{13/} The legitimacy of those

^{13/} The NFU contends that the past practice of seniority bidding in transfers is consistent with Commission decisions holding
(continued...)

reasons may be at issue in the context of alleged 5.4(a)(3) violations because the exercise of a managerial prerogative cannot be done solely to discriminate against an employee for the exercise of rights protected by the Act. The Bridgewater analysis, however, is not the standard of review where the charge, as in this case, asserts a violation of 5.4(a)(5) of the Act. Charging Party amended the charge before the hearing to withdraw certain 5.4(a)(3) factual allegations. The record evidence does not support such allegations. The test in this case, as plead, is whether there was a past practice regarding seniority bidding preferences and whether there was a negotiations obligation triggered by a unilateral change in that

13/ (...continued)

that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. See generally, Camden Cty. Sheriff, P.E.R.C. No. 2004-65, 30 NJPER 33, 34-36 (¶10 2004); see also, City of Asbury Park, P.E.R.C. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp. 2d. 245 (¶204 App. Div. 1990); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993), recon. granted, P.E.R.C. 93-103, 19 NJPER 267 (¶24133 1993); City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994). Charging Party accurately summarizes the law established by these cases, but has reached a conclusion in applying the law which is contrary to the Commission's holding in P.E.R.C. No. 2005-2, supra. There the Commission determined that, for the reasons articulated by the City - promote cross-training, improve efficiency, increase diversity, and decrease response time - challenging the January 2003 transfers would substantially limit the City's policymaking powers. The Commission has, therefore, determined that enforcing a seniority bidding past practice in this case, under these circumstances, would compromise the exercise of a managerial prerogative.

practice. Issues of managerial prerogative and/or contract defenses, legal defenses raised even when construing the facts in the light most favorable to Charging Party, are, therefore, appropriate considerations in a review of the record.

This unfair practice charge and the scope decision under P.E.R.C. No. 2005-2 arise from the same personnel action (the January 2003 transfer order). Both address the legal issue of negotiability. The Commission in its scope decision concluded that arbitration of transfers "based on those [articulated] reasons would substantially limit the City's policymaking powers" and, therefore, the transfer decision was non-negotiable. City of Newark, P.E.R.C. No. 2005-2 at 295. Giordano's testimony suggested that it was not the necessary to transfer firefighters to promote cross training, improve efficiency in fire suppression and increase response time [see fact no.7]. Charging Party contends, therefore, that the City's motion to dismiss should be denied because there is nothing in the record to explain the reasons articulated by Dunham for the transfers. In other words, it questions the articulated managerial needs.

Assuming that evidence in the light most favorable to Charging Party, namely that three of the City's four articulated reasons were not valid or legitimate, Charging Party has, nevertheless, also presented evidence which reflects that

achieving diversity was the main, if not only, reason motivating the January 2003 transfer order. ^{14/}

Although Giordano asserts that the City could have achieved its diversity goals through new hires not transfers, the Commission has ruled that transfers effectuated for that articulated reason - diversity - creates a managerial prerogative. Whether I view the holding of the Commission under the principle of collateral estoppel, law of the case, or simply

^{14/} The NFU contends that the City has advocated inconsistent positions as to whether racial segregation is a problem within the Fire Department. It asserts that Dunham listed desegregation of fire companies in compliance with both a federal consent decree and the Mayor's mandate to integrate the firehouses as one of the reasons for his transfer order. At the same time, in its Answer to a Complaint and amended Complaint filed by the Vulcan Pioneers and certain named individuals (African American firefighters), the City denied that its fire companies were segregated by race and stated that firefighters may request transfers to other firehouses or tours. The NFU asserts that there has been no explanation for the alleged inconsistency and that it should be able to cross examine the City's witnesses to establish the legitimacy of this asserted reason for the transfers. I reject this argument. The 1980 consent decree which the City entered into with the Federal Department of Justice required corrective action to eradicate racism and segregation in the department in hiring, training and promotional practices to settle litigation (CP-26). Dunham addressed this mandate as well as the Mayor's directive to comply with the consent decree, in part, by ordering the January 2003 transfers of the least senior firefighters in companies comprised of firefighters of all one race. It is not inconsistent for the City to have entered into a settlement which required corrective action to address diversity and deny the allegations of a Complaint in on-going litigation before discovery or proofs at trial.

precedential, I am bound by the Commission's determination. See generally, State v. Gonzales, 75 N.J. 181 (1977).

Since the decision to transfer was non-negotiable, an arguable unilateral change in the past practice regarding seniority bidding procedures does not trigger a negotiations obligation, and, therefore, is not a violation of 5.4(a)(1) or (5) of the Act.

Even assuming the reasons articulated by the City were not valid, the City would prevail on its motion. A public employer, also, meets its negotiations obligation when it makes changes permitted under the parties' collective agreement. Sussex-Wantage Regional Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985). The agreement, however, provides a defense only where it specifically and expressly authorizes the change. Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). Where contract terms are not specific or vague, extrinsic evidence such as the parties past practice may be used to clarify the mutual understanding of the parties. See Jefferson Tp. Bd. of Ed., 125 N.J. 299 (1991) (where the New Jersey Supreme Court determined that because the contractual provision permitting bonus longevity payments required employees to provide notice of intent to retire but did not address the legal effect of the notice or whether it could be modified, the past practice of the

Board permitting employees, without conditions or qualifications, to modify or rescind such notices was controlling.)

Articles XXII (Transfers) and XXIII (Management Rights) of the parties' collective agreement were introduced into evidence by Charging Party. Those provisions specifically permit the actions taken by Dunham in the January 2003 transfer order. Article XXII ("Transfers") provides that "[t]ransfers will be made at the discretion of the Director", while Article XXIII ("Management Rights") reserves the authority to transfer as a managerial prerogative. The only negotiated procedural requirement regarding transfers is the posting of notices of vacant positions. Articles XXII and XXIII, however, are not inconsistent with that requirement and are clear and unambiguous. Any practice which circumscribes the exercise of the fire Director's discretion to transfer cannot be enforced under the express terms of the agreement. See Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982) (Commission determined that a past practice which is contrary to the clear, express terms of a collective negotiations agreement must yield to the clear meaning of the contractual agreement).

Specifically, Director Dunham was not bound by the actions of his

predecessors to approve transfer lists prepared by Planning and the NFU based on seniority bidding preferences.^{15/}

Additionally, the past practice, as described by Giordano and Gerow, was not inconsistent with the express terms of the agreement. Directors Caufield, Coleman and Kossup exercised their discretion by approving transfer bids of the most senior officer bidding on a position. If they had rejected the transfers, as proposed, and approved different transfers, the collective agreement would have permitted their actions and obviated any negotiations obligation. Gerow's testimony supports this conclusion. He confirmed that even though, in his experience as NFU president, directors approved the lists submitted and prepared by Planning with the in-put of the NFU which reflected seniority bidding preferences, Gerow understood that the directors had the final authority to approve or disapprove transfers. In January 2003, Dunham exercised his discretion in compliance with the agreement, by transferring the least senior firefighter in companies staffed by officers of all

^{15/} Charging Party asserts that the motion should be denied because the City's articulated reasons only address the reasons Dunham made the transfers, not the reasons for denying transfer requests of twenty-seven firefighters. There is no need, however, to decide whether better or different choices could have been made in the transfer selection process or whether Dunham could have achieved his goals through voluntary versus involuntary transfers because the parties' collective agreement permits the City's actions regardless of the reasons.

one race in order to address various concerns, specifically including diversity. No negotiations obligation was triggered by his actions.

Charging Party cites a recent scope decision which permitted arbitration regarding the reassignment of a Newark firefighter in support of its contention that the past practice of seniority bidding triggered a negotiations obligation. City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2005). In that case, the NFU grieved the reassignment of a firefighter who had returned from sick leave and light duty.^{16/} The Commission found that absent an articulated managerial need to deviate from the alleged seniority bidding system (the City had provided no reasons for the reassignment), the NFU could seek to enforce its claim through arbitration. This case is distinguishable.

First, unlike P.E.R.C. No. 2005-45, the City has articulated reasons - promote cross-training, improve efficiency, increase diversity and decrease response time - for the January 2003 transfers. The NFU challenges some of the articulated reasons as unnecessary and not valid. While the NFU does not challenge diversity as a legitimate reason, it disagrees with the manner of achieving it. There is no suggestion that the transfers were

^{16/} The NFU also grieved the assignment of another firefighter but the Commission found his transfer was not arbitrable because the firefighter was no longer qualified for the position he sought.

effectuated for illegal reasons - e.g. whether the City exercised its managerial prerogative to transfer for discriminatory reasons which would constitute an unfair practice.

P.E.R.C. No. 2005-45 is also distinguishable because in scope decisions the Commission is addressing only the abstract issue of whether a subject matter in dispute is negotiable. It does not consider whether the collective agreement provides a defense for the employer's actions. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Thus, the Commission never considered the City's contract defense, namely the language contained in Articles XXII and XXIII regarding transfers.

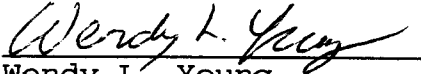
Finally, where the majority representative has waived its right to negotiate, there is no 5.4(a)(5) violation found. If waiver is established, the employer has the right to make a change unilaterally. In Middletown Tp., the Commission held that a waiver will be found if the representative has expressly agreed to a contractual provision authorizing a change. Id. at 30. Here, the contract language contained in Article XXII ("Transfers") and Article XXIII ("Management Rights") was negotiated without change for at least eight contract periods by two NFU Presidents, Giordano and Gerow. Current and past agreements are and were silent regarding seniority bidding procedures: they require neither consultation with the union nor

consideration of seniority in transfers. cf. City of Newark, P.E.R.C. No. 2001-37, 27 NJPER 46 (¶32023 2000) (Commission found fire officer's contract provision requiring consultation with union before effectuating transfers does not in general interfere with governmental policymaking determinations and is negotiable): Even if Charging Party establishes a past practice regarding transfer procedures - e.g. in-put from the NFU and preparation of a list by seniority preference, the NFU, by negotiating Articles XXII and XXIII through numerous contract terms, waived its right to assert a negotiations obligation over a unilateral change in the past practice. Passaic Cty. Bd. of Ed., P.E.R.C. No. 89-98, 15 NJPER 257, 258 (¶20106 1989).

Based on the record adduced by the Charging Party through witness testimony and documents and granting every reasonable inference to the Charging Party, I make the following:

RECOMMENDATION

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) as alleged and the Respondent's Motion to Dismiss is hereby granted. The Complaint is, therefore, dismissed in its entirety.


Wendy L. Young
Hearing Examiner

DATED: March 9, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 22, 2005 .

