

H.E. NO. 2014-3

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

In the Matter of

BOARD OF FIRE COMMISSIONERS,
FIRE DISTRICT NO. 1,
MONROE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2009-332

MONROE TOWNSHIP PROFESSIONAL
FIREFIGHTERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 3170,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Monroe Township Board of Fire Commissioners, District No. 1, violated subsections 5.4a(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act when it employed non-bargaining unit, per diem firefighters to perform the firefighting duties historically performed by full-time bargaining unit firefighters and thereafter terminated the entire paid firefighting force in retaliation for filing an unfair practice charge regarding the transfer of unit work. The Hearing Examiner rejected the Board's cost saving and tax reduction motives as pretextual.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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
Joseph D. Youssouf, Esq.

For the Charging Party
Fox and Fox, attorneys
(Daniel J. Zirrith, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 23, 2009, the Monroe Township Professional Firefighters Association, International Association of Firefighters, Local 3170, Fire District #1 (Local 3170), filed an unfair practice charge against the Monroe Township Board of Fire Commissioners District #1 (Board).^{1/} The charge alleges that the

^{1/} The attorneys corrected the names of the parties on the
(continued...)

Board violated N.J.S.A. 34:13A-5.4a(1), (3) and (5),^{2/} when it failed to fill two vacant positions with full-time, permanent career firefighters and by unilaterally assigning unit work to two non-unit part time firefighters. The charge also alleges that the Board took retaliatory action toward Local 3170 and threatened to dissolve the paid career staff if Local 3170 continued to assert its rights under the Act.

On September 21, 2009, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1)^{3/} on the 5.4a(1) and (5) allegations, and specifically dismissed the 5.4a(3) allegations. The parties entered into settlement negotiations.

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- 1/ (...continued)
record to be the Monroe Township Professional Firefighters Association, International Association of Firefighters, Local 3170 and the Board of Fire Commissioners, Fire District No. 1, Monroe Township (1T6).
- 2/ 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."
- 3/ "C" refers to Commission exhibits, "J" designates exhibits jointly submitted by the parties, "CP" refers to Charging Party's exhibits, and "R" refers to Respondent's exhibits; all of which were received into evidence at the hearing.

On March 16, 2010, Local 3170 filed an amendment to its original charge providing specific examples of retaliatory acts by the Board and alleging that the retaliation intensified since the filing of the charge, culminating in the termination of the full time firefighting career staff. The amendment claims that the Board's actions violate subsections 5.4a(3) and (4)^{4/} of the Act. Pursuant to N.J.A.C. 19:14-1.5(a) and 6.3(a)8, I permitted Local 3170 to amend its charge.

The Board filed its Answer and Affirmative Defenses on March 31, 2010 (C-2). In it, the Board denies violating the Act, maintaining that it has the authority to create or not create paid positions as it determined necessary; and that the dissolution of the paid fire department was for reasons of economy and tax dollar savings, and not done in retaliation for Local 3170 engaging in protected activity under the Act.

I conducted a hearing on October 26 and 28, 2010; February 8, 2010; March 3 and 10, 2011; May 18, 2011; July 19, 2011; August 4 and 11, 2011; September 15, 2011; November 17, 2011; January 12, 2012; February 9 and 23, 2013; March 20, 2013; June

^{4/} These provisions prohibit public employers, their representatives or agents from: "(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."

26, 2012; and September 21, 2012. At the hearing, the parties examined witnesses and presented documentary evidence. After extensions of time were provided upon request, the parties simultaneously filed post hearing briefs on March 15, 2013. Based upon a review of the record, I make the following:

FINDINGS OF FACT

1. The Board is a public employer and Local 3170 is an employee organization within the meaning of the Act (1T12).^{5/}
2. Local 3170 represents all full-time firefighters employed by the Board (J-1, J-7).

The Board and Local 3170 are parties to a labor contract covering March 1, 2006 to December 31, 2009 (J-1). The contract provides in pertinent parts:

ARTICLE II
MANAGEMENT RIGHTS

A. The Employer hereby retains and reserves unto itself, without limitation, all power, rights, authority, duties and responsibilities conferred upon by the laws and Constitution of the State of New Jersey and of the United States, including, but without limiting:

1. The executive management and administrative control of the Fire Department its properties and facilities and activities of its employees utilizing personnel methods and means of the most appropriate and

^{5/} "T" stands for transcript. The number preceding the "T" represents the day of hearing and the number that follows the "T" indicates the page of the transcript.

efficient manner possible as may from time to time be determined by the Board.

2. To make rules of procedure and conduct, to use improved methods and equipment, qualifications for employment and promotions, to determine work schedules and shifts, as well as duties (i.e., job descriptions), to decide the number of employees needed for any particular time to be in sole charge of the quality and quantity of the work required.

* * *

4. To hire all employees, whether permanent, temporary or seasonal, to promote, transfer, assign or retain employees.

7. To lay off employees in the event of lack of funds or under conditions where continuation of such work would be inefficient and nonproductive, so long as such lack of work or funds is bona fide.

* * *

D. The parties recognize that the exercise of managerial rights is a responsibility of the Commissioners on behalf of the taxpayers and that the Commissioners cannot bargain away or eliminate any of its managerial rights.

E. Temporary Employees

In the absence of permanent employees, the Board reserves the right to hire temporary employees to do such work normally performed by permanent employees.

ARTICLE II (A.) DUTIES AND RESPONSIBILITIES OF FIREFIGHTERS

1. The following specification of duties and responsibilities of firefighters is not all inclusive. The duties and responsibilities specified below are intended

to provide guidance and a general overview of the job expectations of firefighters employed by the Board of Fire Commissioners of Fire District No. 1 Monroe Township. Duties and assignments may vary as circumstances demand and Management reserves unto itself the right to assign tasks and responsibilities as the need may arise.

A. . . . [When not assisting in the extinguishing of fires], Firefighters are required to perform . . . other routine tasks as may arise from time to time attendant upon their duties as Firefighters.

B. Subject to the direction of the Board or a Superior Officer or Supervisor, Firefighters shall be responsible for the following tasks:

* * *

21. Maintains daily log of all fire station activities by recording information such as time and nature of alarms, units responding, arrival and departure times and names of visitors, time and nature of phone calls etc.

ARTICLE III
ASSOCIATION RIGHTS AND RESPONSIBILITIES

* * *

B. The Association will be responsible for acquainting its members with the provisions of this Agreement, and shall be responsible insofar as possible for the adherence to the terms of this Agreement by such members, and the Association recognizes that the condition set forth in this article shall be subject to the mission of the Board.

* * *

D. Proposed new rules or modifications of existing rules covering negotiable working

conditions shall be negotiated with the Association before they are established.

ARTICLE VIII
VACATIONS

F. If vacation time is not used by the end of the year, the employee may carry over a maximum of five (5) vacation days and/or will receive the remaining days, not to exceed a total of ten (10) days in a lump sum check paid by the first pay period in January at the employee's regular hourly rate of compensation for the year that the vacation time accrued and was not used.

ARTICLE XVII
DISCRIMINATION AND COERCION

* * *

B. The Employer and the Union agree that all employees covered under the Agreement have the right without fear of penalty or reprisal to form, join, and assist any employee organization or to refrain from any such activity. There shall be no discrimination by the Employer or the Union against any employee because of the employee's membership or activity or non-activity in the Union.

ARTICLE XXXI
IN SERVICE TRAINING

* * *

D. A certification incentive shall be paid the first pay period of January of each year for employees who obtain any or all of the following specified certifications or licenses:

- | | | |
|----|-------------------------|----------|
| a. | EMT or higher | \$200.00 |
| b. | Fire Inspector | \$750.00 |
| c. | Level 1 or 2 Instructor | \$200.00 |
| d. | Hazmat Technician | \$200.00 |

ARTICLE XLVI
DURATION, TERM and RENEWAL

A. . . . This Agreement shall remain in full force and effect during the period of negotiations.

4. There are three Fire Districts in Monroe Township: Fire District Nos. 1, 2 and 3. The fire districts operate independently and are managed by three separate boards of commissioners (2T182-184, 3T51-53, 3T68, 3T86).

5. Prior to 1998, Fire District 1 was exclusively a volunteer fire company. Volunteers provided fire protection 24 hours a day, 7 days a week as needed (3T85-86, 4T68-69). As the Township grew, more particularly the part of the Township which Fire District 1 covered, and the volunteer firefighters were unable to cover weekday, daytime hours due to their jobs, the Board determined that it needed to hire career firefighters to work daytime hours to ensure coverage and public safety (J-2; 4T67-68, 4T71, 9T83). Michael Mangeri was appointed as the district's first paid firefighter effective March 30, 1998 (J-2; 4T67, 6T9). A second paid firefighter, Joseph Calella, was hired as Fire Administrator effective May 4, 1998 (J-6; 4T67, 6T9).

As a matter of Fire District 1 policy, three firefighters are necessary in order to drive a fire apparatus to the scene of a fire (4T75-76, 9T124-125, 10T109). During 1998, Fire District 1 employed paid per diem firefighters to augment full-time, permanent paid career firefighters Mangeri and Calella during

their shift (3T85; 4T72, 5T31-32). In July 1999, the Board appointed David Shapter as a full-time paid firefighter, effective August 1, 1999 (J-4; 3T83, 4T72). Thus, as of August 1999, the full-time paid firefighting staff of District 1 consisted of 3 firefighters. The Board continued to employ per diem firefighters as needed to fill in for any of the full-time firefighters who were absent from work (out sick or vacation etc.) (R-34; 4T75-76, 11T109, 11T116-132).

6. The paid firefighting staff of District 1 worked Monday through Friday, 7 a.m. to 3:30 p.m. The fire district's volunteer squad covered all other hours including weekends and holidays that the paid staff did not work (3T155, 3T193, 5T61-62, 8T109-110, 15T23-24).

Back in 1998 when the paid career shift was created there were approximately 40 volunteers (4T69). Membership in the volunteer squad fluctuates; in March 2010 the squad had grown to approximately 50 members (4T70, 9T140, 10T105, 15T84).

The volunteer fire squad is led by the volunteer Fire Chief and volunteer Deputy Chief. Joseph Sensale was the Fire Chief until 2007. Lonnie Pipero was the Fire Chief from 2007 to 2011 and Scott Kivet was Deputy Fire Chief from 2008 to 2010 (J-9; 2T126, 3T95, 3T208, 3T210, 5T89, 8T111, 9T78, 9T82, 14T46). The Fire Chief is in charge of all firefighting operations in Fire District 1. He is the commanding officer at the scene of a fire

in District 1 and has authority over the paid firefighting staff (3T209, 6T12, 9T156-157, 14T46-47).

7. In contrast to Fire District 1's composition of 3 full time, permanent firefighters and 40 to 50 volunteer firefighters, Fire District 2 employs approximately 17 career firefighters and has about 10 volunteers. Fire District 3 is exclusively a paid fire department which employs approximately 32 firefighters (2T183-184, 3T68-69).

8. Local 3170 has represented the career paid firefighters in Districts 2 and 3 since before the year 2000. On February 8, 2000, the Board passed a resolution recognizing Local 3170 as the exclusive majority representative of the full time career firefighters employed by District 1 (J-7; 3T88, 4T73). Mangeri and Shapter took turns serving as shop steward for the union since 2004 (4T74).

9. Fire Administrator Calella was primarily responsible for administrative tasks of the department such as scheduling of firefighters, purchasing supplies and equipment, and keeping the logbook. Mangeri would assist him especially when Calella was absent from work. Shapter, too, helped with administrative functions but to a lesser degree than Mangeri and primarily when Calella and/or Mangeri were unavailable (3T40, 4T95, 5T13, 5T77, 6T9-10).

10. Sometime in 2004, Calella went out on medical leave due to an injury. His position was filled with a per diem firefighter, but not necessarily the same per diem everyday (R-34; 3T93, 4T76-77, 6T145, 10T102-103). During this time, Mangeri became primarily responsible for the administrative duties performed by Calella, and was assisted by Shapter (CP-8; 4T46, 5T24, 5T77, 5T82, 6T10). For a brief period of time, Calella returned to work on light duty. He never again resumed his firefighting duties and eventually left his employment with District 1 due to a disability. While Calella was on light duty, the Board employed a per diem firefighter which technically brought the complement up to four paid firefighters (3T100, 4T76-77, 10T102-103). After Calella left his employment with District 1, the Board continued to fill his position with per diem firefighters instead of hiring a full-time permanent career firefighter (R-34; R-35; R-36; 3T100, 4T77, 4T81, 6T125-126, 6T142-143, 8T143).

11. At the time of Calella's injury, District 1 did not have a formal light duty policy. As a result of the Board's experience in managing Calella's employment during his injury, it adopted a light duty policy by resolution on May 21, 2008. The policy was developed with input from Local 3170 (R-6; 5T119-121).

12. N.J.S.A. 40A:14-70 et seq., authorizes municipalities to create fire districts run by fire commissioners. Boards of

Fire Commissioners consist of 5 persons who are elected to 3 year staggered terms. Fire Commissioners are responsible for the administrative functions of the district such as preparing and managing the fire district's budget. Fire districts have the power to levy a fire tax upon property owners within the district, which is a key source of revenue to the district. Each third Saturday in February, the voters in a fire district have the opportunity to elect fire commissioners and approve the fire district's budget.

Newly elected commissioners assume their position at the first Board of Commissioners' meeting after the election which, in the case of Fire District 1, is typically held in March. To fulfill its statutory obligation to prevent and extinguish fires, fire districts may contract with a volunteer fire company and are also authorized to establish paid positions within the district.

N.J.S.A. 40A:14-81.1. Monroe Fire District 1 did both at different points in time (J-2; J-4; J-5; J-15; 2T176, 2T181, 4T151, 5T178, 7T98-99, 7T113, 8T50, 8T68-69, 8T122-123, 8T219, 9T159-160, 9T171-172, 10T68, 10T148, 10T152-153, 15T175-176).

13. In February 2005, Charles DiPierro and Raymond Perry were elected to the Board (3T89, 4T77-78, 10T89). They were selected to be the Board's liaison to the paid staff (3T90, 3T93, 4T5-6, 4T78, 10T97, 12T60, 15T26, 15T190). Perry is a volunteer fireman in District 1. He is familiar with the operations of the

firehouse (R-28; R-29; 8T220, 9T174, 15T158). DiPierro, on the other hand, is a lifelong resident and businessman in town with limited knowledge of the operations of the fire department. To learn more about firefighting and better familiarize himself with the workings of the fire department, DiPierro regularly went to the fire station during the paid shift and spoke with the career firefighters (3T90-91, 3T161, 4T27-28, 4T78, 10T88-90, 10T97-99). He developed a good, friendly relationship with the two remaining paid career firefighters, Mangeri and Shapter. DiPierro regularly brought donuts to the firehouse, ate lunch with Mangeri and Shapter and celebrated "Turkey Day" (the day before Thanksgiving) with the career firefighters (3T90-91, 3T161, 3T203, 4T78, 5T170, 10T98, 12T38).

Commissioner DiPierro became Chairman of the Board of Fire Commissioners in 2007. He continued to serve as Chairman at all times relevant to this case and throughout this hearing (10T91).

14. In 2006, Fire administrator Calella initiated legal action against the Board. One of the possible outcomes of Calella's lawsuit was his reinstatement as a full-time career firefighter. Though Local 3170 wanted Calella's position to be filled with a full-time paid career firefighter, it agreed to not pursue that appointment until the conclusion of the Calella litigation and acceded to his vacancy being filled with per diem

firefighters (4T81, 5T69-70, 5T174, 6T70, 8T113, 8T142, 10T141-142, 11T159).

15. Under New Jersey state law and in accordance with National Fire Protection Association (NFPA) guidelines, four firefighters must be at the scene of a structural fire before attempting to enter the structure to extinguish the blaze. This is known as the "2 man in/2 man out rule" designed for the safety of the responding firefighters (R-37, 2T155, 3T157, 3T187, 5T68, 6T133, 6T157, 6T161-162, 14T104-107, 16T28, 16T30-33, 16T49).

16. At its April 18, 2007 meeting, the Board unanimously passed a motion to hire one more per diem firefighter per day during the paid shift. This brought the paid force to four firefighters consisting of two permanent career firefighters (Mangeri and Shapter) and two per diems (J-8; R-35; 2T70, 2T106, 3T6, 3T96-97, 3T99, 4T10, 4T76, 5T91, 6T27-28, 6T145, 11T151, 11T173-174, 15T8, 15T53 15T120). The Board's reasoning for adding a fourth fighter was explained at its next regular meeting in May 2007 and testimony during the hearing. It added a fourth fighter to ensure that the department would have at least 3 firefighters available during the day to roll out apparatus and respond to fires. There had been occasional manpower problems when either of the two career firefighters were on vacation and/or out sick (J-9; 3T98, 4T77, 5T99-100, 8T142, 8T186, 10T106-107, 11T172, 15T9, 15T54, 15T77-78).

17. On January 16, 2008, Calella received an involuntary disability retirement from the Police and Fireman's Retirement System effective and retroactive to February 1, 2007 (CP-13; 4T80). By letter dated March 3, 2008, the Board notified Local 3170 that Calella had withdrawn his lawsuit and that the Board no longer had any employment or financial obligations to him (CP-40; 4T32, 4T82-83, 5T70-71, 5T175, 6T71, 17T26, 17T29).

As a result of the conclusion of the Calella litigation and in response to receiving the Board's March 3rd letter, Local 3170 President James Grande, Mangeri and Shapter attended the Board's March 2008 meeting. During the open public session of the meeting, Grande requested that the Board fill Calella's former position with a full-time career firefighter, thereby having the work once again performed by a negotiations unit member (4T86, 5T175-176, 6T71, 17T66, 17T78-79). The Board advised that it would consider the request (6T72, 17T79).

On March 26, 2008, Fire Commissioner Joseph Leatherwood advised Mangeri via email that the Board did not have an interest in filling Calella's vacancy with a third full-time firefighter and that the issue will be put "on the back burner for now" (CP-4; 4T87, 10T115-117, 15T14-17, 15T20).

Despite Commissioner Leatherwood's email, Local 3170 had reason to believe that the Board was still considering filling Calella's position with a full-time career firefighter. Local

President Grande continued to have informal discussions with Board members (6T72). During the public portion of the May 21, 2008 Board meeting, Commissioner Vincent Dilieto stated that the Board would be soliciting prices for the testing of paid professional firefighters. Grande understood the statement to mean that the testing was for hiring a new full-time firefighter (CP-20; 6T72-73). Further comments about securing a company to test firefighters for employment opportunities in District 1 were made at the Board's regular June 2008 meeting, which the union took to mean that the Board was moving forward with the hiring of a third full-time career firefighter (CP-21; 6T76-78).

18. Up to this point in time, the relationship between the Board, particularly its liaisons, and the paid full time firefighters was open and friendly, and relatively free of formalities. Fire District 1 enjoyed labor peace as the Board and Local 3170 were able to work out their differences when they arose. For example, contract negotiations in the past went smoothly resulting in an agreement (J-1), the parties worked cooperatively in filling Calella's position during the pendency of his litigation and the Board had solicited Local 3170's input in developing a light duty policy (3T161-163, 3T203, 4T25, 4T78, 4T81, 10T95-98, 10T102).

19. Sometime in June 2008, Grande, Mangeri and Shapter met with Commissioner DiPierro and Volunteer Chief Pipero. They were

informed that the Board had been discussing whether to hire a third full-time firefighter with the volunteer Fire Chief and that the Board concluded that it did not need to fill the position with a permanent employee. Those discussions occurred without including the union (6T79).

20. Local 3170 retained the law firm of Fox and Fox to represent it in pursuing filling the Calella vacancy with a full time permanent firefighter (6T80). Attorney Fox sent the Board a letter dated June 27, 2008 requesting that the Board deal exclusively with Local 3170, the recognized majority representative, with regard to filling the Calella vacancy and that it cease violating the Open Public Meetings Act and the New Jersey Employer-Employee Relations Act (R-8). The Board responded by letter dated July 15, 2008 and by reading both letters aloud during the public portion of the Board's July 16, 2008 meeting (6T81).

21. Local 3170 did not think that the public reading of letters from attorney to attorney was an appropriate or productive way to handle the circumstance (6T81). Thus, after the meeting President Grande approached Chairman DiPierro to discuss what had just transpired (6T82). In their conversation, DiPierro advised Grande that the Board did not appreciate receiving Fox's letter and that it was looking into the possibility of eliminating the career staff. DiPierro also

indicated that any future actions taken by the union's attorney would not help getting the third firefighter position filled or to retain the existing career staff (6T83).

22. Attorney Fox wrote another letter dated July 30, 2008 in response to the Board's July 15th correspondence (CP-22). Fox wrote that Local 3170 would prefer to meet and negotiate over the issue of filling Calella's vacated position with a bargaining unit member rather than litigate over the issue. But, Fox cautioned that ". . . [the Board's] actions may leave us no alternative but to file an Unfair Practice charge and to seek other alternative relief."

Local 3170 did not receive a reply to its July 30th letter (CP-23; 6T95). There was no communication between the Board and Local 3170 on the issue of hiring a third full time firefighter from July 30, 2008 to October 12, 2008 (6T97).

By letter dated October 13, 2008, Attorney Fox sent another letter to the Board's attorney, Youssouf, reiterating the union's position regarding filling Calella's vacancy and that Local 3170 will take legal action unless the Board meets and discusses the issue (CP-23). This time, the Board did respond by correspondence dated October 14, 2008 (CP-24). In it, Attorney Youssouf indicated that the Board would welcome the opportunity to meet and discuss the issues raised in Fox's October 13th correspondence as soon as possible. He also advised that former

District 1 employee Calella had filed a new law suit against the Board on August 19, 2008 seeking, amongst other relief, reinstatement to his former position (CP-24; 5T72, 6T105-106, 6T149-150, 6T152, 12T163-164, 17T30).

23. The parties met at Attorney Youssef's office on October 29, 2008, to discuss the hiring of a third full time paid firefighter. Attending on behalf of the Board were Youssef and Commissioners DiPierro and Perry. President Grande, Attorney Fox and Mangeri attended on behalf of Local 3170. By the end of the meeting it was agreed that Youssef and DiPierro would recommend to the Board that it hire a third career firefighter. Youssef and DiPierro asked only that Local 3170 forbear on any further action and keep the agreement confidential until after the February 2009 election in order to insure that the budget would be approved by the voters. They then invited the Local 3170 representatives to attend the executive session at the next monthly Board meeting (scheduled for November 19, 2008) to discuss the issue with the entire Board (3T101-102, 4T89-90, 5T176-177, 5T179, 6T106-107, 17T32-33, 17T81-83).

24. President Grande, Treasurer Scott Volkmann and unit members Shapter and Mangeri attended the November 19, 2008 executive session as requested by the Board representatives at the October 29th meeting. The union representatives knew in advance that Youssef would not be at the November meeting, but

did not know that DiPierro also would be absent. Commissioner Perry who attended the October 29th meeting at Youssouf's office was at the November 19th executive session (3T103-105, 3T236, 4T91, 5T180-181, 6T109-110, 6T163, 6T165, 17T33-34, 17T82).

The primary spokesperson for the Board in the executive session was Commissioner Robert LeBrun. The Board claimed to have no knowledge about the meeting which took place October 29th nor the agreement and recommendation that the parties reached there (3T104-105, 3T236, 4T91-92, 5T177, 5T181, 6T110, 6T163, 8T115, 8T190-191, 17T734, 17T82). Commissioner Perry did not speak during the executive session (6T165, 17T34-35). The Board advised Local 3170 that it had no intention of hiring a third permanent firefighter. Grande explained that if that was the Board's position, the union would have no choice but to take legal action. LeBrun replied, "Go ahead and sue us, do what you have to do" (4T92, 5T182, 6T110-111, 6T163, 8T114-115, 8T191, 17T82-83).

25. The next day, November 20, 2008, Attorney Fox wrote a letter to Attorney Youssouf inquiring as to what had changed between the October 29th meeting and the executive session. Fox noted in his correspondence the obvious breakdown in communication between the Board representatives who attended the October 29th meeting and the remainder of the Board present at the executive session (CP-25; 4T92, 6T111).

26. Local 3170 presented evidence of certain statements made by Fire Commissioners which were denied as being made by Board witnesses. In addition, Local 3170 introduced evidence which could raise an inference of anti-union animus that Board witnesses offered business justifications and denied any connection to union activity. In evaluating the evidence and making credibility determinations, I am influenced by my belief that the Board misled the public and did not act in a forthright manner at its January 20, 2010 Board meeting regarding its intention to eliminate the paid fire staff and notice it agreed to give the public. Those findings are more fully discussed at Findings of Fact #50 and #54 contained herein and color my view of certain Board evidence.

27. Firefighter Shapter testified that on November 20, 2008, the day after the November 19th executive session, he had a conversation with Chairman DiPierro about appointing a third career firefighter. DiPierro informed him that the Commissioners were considering getting rid of all of the paid career staff so that they were not going to add a third career firefighter. This was the first Shapter had heard that the Board was thinking about dissolving the paid fire force (3T105-106). I credit Shapter's testimony.

28. Shapter also testified that on December 5, 2008, DiPierro told him that if the union president and attorney "Keep

pushing issues with the hiring of the third man, the Board is thinking of pushing the union out of the station up to the other end of town" (3T107, 3T114-115). DiPierro testified that he did not say this to Shapter (10T144, 12T41). As will be more fully discussed in Findings of Fact #31 and #38, Shapter testified that DiPierro made other threatening statements on February 19, 2009 and May 22, 2009. Those statements were corroborated by other witnesses. DiPierro essentially denied making statements of this ilk throughout his testimony. Based upon my determination that he participated in misleading the public in findings #50 and #54 and my findings in #31 and #38, I credit Shapter's testimony that DiPierro made the "pushing the union out of the station" remark.

29. Mangeri had been doing the payroll for the District on and off between 1998 until 2004. When Fire Administrator Calella went out on medical leave in 2004, Mangeri took over performing the payroll function (5T76-77, 6T9-10).

By email dated December 28, 2008, Mangeri was advised that Joanne Hayes, a secretary employed by District 1, would be taking over doing the payroll in 2009. No further explanation was ever given to Mangeri for the change (CP-14; 4T23, 4T94-95, 5T76-77, 6T10-11).

30. By letter dated January 13, 2009, Attorney Fox wrote to Attorney Youssouf apprising him that Local 3170 will file an unfair practice charge and grievance alleging that the Board has

violated the Act and the parties' agreement by filling bargaining unit positions with part time non-unit members and threatening unit members for their exercise of rights guaranteed under the Act unless the parties resolve those issues. The letter was written to give the Board one "last chance" before Local 3170 commenced legal action (6T119).

31. Shapter testified that on February 19, 2009, he was in the fire house with paid per diem firefighter Shaun Dlablik. Chairman DiPierro was also on the premises on the telephone in the Fire Prevention office. Volunteer firefighter George Cure walked in, and noticing that a television was missing, commented ". . . they got rid of the mail and took the TV away from you." When DiPierro got off the phone he stated for all to hear ". . . there's going to be a lot more changes and this is the beginning of the end" (3T116-117, 3T173, 3T202, 3T226). DiPierro denied making that comment (10T148-150, 12T30). Dlablik's testimony corroborated Shapter's version of what had transpired on February 19th (2T71, 2T73, 2T75-76, 2T93, 2T100). I credit Shapter's and Dlablik's testimonies and find that the statement was made by DiPierro.

32. On March 12, 2009, Attorney Fox wrote to Attorney Youssouf apprising him that Local 3170 would be filing an unfair practice charge with PERC, but remained desirous of resolving the issues short of litigation (CP-27). On March 23, 2009, Local

3170 in fact filed the unfair practice charge which accused the Board of violating the Act by unilaterally assigning bargaining unit work to non-bargaining employees and retaliating against Local 3170 through threats and intimidation (C-1).

33. DiPierro gradually stopped coming to the fire station as frequently as he once did. Instead of visiting the firehouse 3 or more times per week, he would come once a week to once every two weeks. He also stopped having lunch with the career firefighters. Mangeri testified that DiPierro told him that he ceased coming as often because of the filed unfair practice charge (2T69-70, 2T83, 3T178, 4T27-30, 4T78, 5T170-172, 10T97-98). DiPierro testified that he was not upset or annoyed by the unfair practice charge filed against the district (10T153-154, 12T47-48). I do not credit his testimony. I credit Mangeri's testimony and find that DiPierro stopped coming as frequently to the fire station in part because of the filed unfair practice charge.

34. Firefighter Mangeri was injured on or about April 16, 2009. The emergency room physician recommended that Mangeri either take some time off from work or go on temporary light duty. Mangeri left a message and notified the Fire Chief and the Board via email of his injury and his intention to put himself on light duty commencing the next day April 17, 2009. He remained on light duty until June 1, 2009 (CP-16; R-2; 4T111-112, 5T121-

126, 12T76-78). The Fire District used a per diem firefighter to replace Mangeri while he was injured and on light duty assignment (R-36; 5T138).

Firefighter Shapter had a scheduled day off on May 8, 2009. One of the two per diem firefighters scheduled to work on May 5, 2009 called out sick leaving only two firefighters. At the very start of the paid shift on May 5th, Mangeri notified the Fire Chief and Board via email that there would be only two firefighters on duty that day and asked whether he should call in another per diem. Chairman DiPierro quickly replied by email stating "Joanne, please let the per diems know that we don't need them on May 8th." With Mangeri injured and Shapter out on May 8th, this marked the first time since the establishment of a part paid fire department that the weekday, day shift was covered exclusively by volunteer firefighters (CP-15; 3T138, 4T18, 4T108-110, 6T64, 6T127-129). Commissioners LeBrun and DiPierro testified that they were able to arrange for volunteers to cover the shift. DiPierro testified that the motivating force was that the shift needed a firefighter driver so that apparatus could roll out in the event of a fire. However, DiPierro did not have a meaningful answer when asked why the Board replaced the entire paid shift with volunteers instead of getting one volunteer driver and bringing in two or three paid per diem firefighters (J-10; 8T172, 11T180-181, 11T183-184).

35. While on light duty on May 15, 2009, Mangeri requested six days off between May 22 and June 30, 2009. Mangeri was looking to use his personal leave and vacation times. In the past, approval of time off of this nature was granted promptly and with little question. This time, Mangeri had to ask for the time off more than once and Chairman DiPierro questioned why Mangeri needed it. Additionally, DiPierro approved the time off piecemeal and in some instances a day or two before the time off was needed. For example, Mangeri needed to take off a half of a day on May 22 to watch his children and DiPierro did not approve his leave until 2:45 p.m. on May 20 (CP-17; 4T115-118).

36. Both Shapter and Mangeri prepared the work schedules for the per diems and themselves since 2004 when Fire Administrator Calella was in and out of work for medical reasons. They were asked to do the scheduling by Board liaisons. On an unspecified date in May 2009 but before May 20, they were informed by Joanne Hayes, secretary for the district, that she would be taking over the responsibility of preparing the schedules. It was unusual to be informed of such a change by a secretary and not a Board liaison. No explanation was ever given to Shapter or Mangeri for the change though during the public portion of the May 20, 2009 Board meeting, Chairman DiPierro stated that Shapter and Mangeri are firefighters and scheduling is not their responsibility (J-10; 4T38-41, 4T119-121, 5T82).

37. President Grande and Firefighter Shapter attended the Board's regular monthly meeting on May 20, 2009. During the public portion of the meeting, Grande asked the Board why the per diems were told not to report to work on May 8, 2009 and why scheduling duties were taken away from the career firefighters. He was told by Commissioner LeBrun that the per diems were not needed that day because there were enough volunteer firefighters to cover the shift. Commissioner DiPierro answered Grande by stating that scheduling was not the responsibility of firefighters (J-10; 3T138-139, 3T181, 5T130).

38. Two days later, on May 22, 2013, Shapter and 2 per diem firefighters Adams and Scharf were working at the firehouse. Chairman DiPierro visited the fire station that day (3T135-136). Shapter testified that DiPierro said to him: "your union and career [staff] are putting up a wall between the [Board of Fire] Commissioners." According to Shapter, DiPierro then asked why Grande was questioning the Commissioners at the May 20th Board meeting and queried, "Who is he to question the Board?" Shapter then testified that DiPierro stated, "This is not good for your future here . . . you know that your contract is up December 31, [2009] and that might be it" (3T137). Scharf, who was standing about four feet away, overheard DiPierro's comments and testified that they were made in a threatening and demeaning tone (3T11-12, 3T14, 3T23, 3T34). DiPierro testified that he did not threaten

Shapter nor make those comments (10T158, 10T160, 12T41). I credit both Shapter's and Scharf's testimonies.

39. I take administrative notice that the parties attended an exploratory conference held by PERC on May 28, 2009. Attending for Local 3170 were Grande and Mangeri. The exploratory conference is a step in the processing of unfair practice charges pursuant to Commission rule N.J.A.C. 19:14-1.6.

40. The next day, on Friday, May 29, 2009, Mangeri was working on light duty at the fire station when Commissioner LeBrun hand delivered to him a letter from the Board's attorney advising that as of the next work day, Monday, June 1, 2009, he (Mangeri) was no longer eligible for light duty. The letter further advised Mangeri that he could not return to work until he was cleared by the Board's health care provider. Until he was cleared for regular duty, his time off would be charged against his accumulated sick leave (CP-16; 4T111-112). LeBrun's only comment when handing Mangeri the letter was "if you have any questions, call the attorney" (4T111). No further explanation was ever given to Mangeri as to why the Board terminated his light duty assignment (4T114).

It was unusual to have Commissioner LeBrun deliver the Board attorney's letter because he was rarely at the fire house during the weekday day shift. LeBrun worked during the day on weekdays and was not around often. Also, LeBrun was not the Board

liaison. Commissioners DiPierro and Perry were the liaisons at the time (4T112-113, 6T25, 8T101).

Mangeri was on light duty for about 43 days. During that time, he worked on projects assigned by the Board and Fire Chief. He was productive and did everything that was asked of him. At the time his light duty assignment was terminated, not all of the projects he was working on were completed. There was light duty work still available for him to do (4T114, 5T125, 6T22-23).

41. On June 17, 2009, the Board passed a resolution rescinding the light duty policy. The light duty policy was established only the year before. When the Board originally developed the light duty policy, it involved Local 3170. No notice was given to Local 3170 or its members before the policy was rescinded (R-6; 4T122, 5T119-120, 5T140-141, 5T150, 6T31, 6T59).

42. Sometime in late June 2009, secretary Joanne Hayes informed Mangeri and Shapter that there would no longer be a second per diem firefighter, or fourth fighter, on the weekday, day shift starting July 1, 2009. Nothing in the fire district, such as number of buildings, population or number of fire calls, had diminished nor had the safety reasons or coverage issues during vacation or sick leave change since 2007 when the Board decided to add a fourth per diem firefighter. No explanation for eliminating the fourth firefighter was ever given to Mangeri or

Shapter by the Board (3T99, 3T144-145, 3T194, 4T123-125, 6T29, 6T133).

43. The Board began considering eliminating the paid fire department in May 2009 (CP-29; 8T150-151, 15T135). Sometime during the summer of 2009, it instructed its accountant, Joseph Massoni, to prepare an analysis of all costs associated with retaining paid firefighters (R-13; 7T187, 8T37-38, 8T117, 10T114, 15T134). The Board also requested Volunteer Fire Chief Pipero to prepare an operations report outlining the number and type of fire calls in the district, when they occur, and the skills or qualifications of each volunteer firefighter (R-27; R-28; 8T117, 9T106, 9T109-110, 9T120-121, 10T114, 10T127, 12T121, 15T63). Massoni knew that he was asked to prepare the cost analysis report in contemplation of eliminating the paid staff (7T184-185, 8T43). Chief Pipero came to realize that he was asked to prepare his operations reports in contemplation of dissolving the paid department by the kind of questions he was being asked by the Commissioners (9T153-155). Both reports were completed and presented to the Board during a closed executive session in December 2009 (7T185, 8T45-47, 8T119, 9T152).

44. During the last six months or so of 2009, DiPierro, as Board Liaison, reached out directly to Mangeri and Shapter to discuss negotiations for a successor contract. DiPierro negotiated directly with Mangeri for the last contract. This

time, however, Mangeri and Shapter wanted the assistance of the President of Local 3170 and/or its attorney during negotiations (R-9; 5T159, 12T92, 13T16-17). By letter dated November 9, Mangeri, on behalf of Local 3170, wrote to DiPierro requesting to commence negotiations and soliciting dates upon which the parties could meet and negotiate a new contract (CP-18; 4T127 5T160). After several email exchanges, the parties scheduled the first negotiations session for December 29, 2009 (R-9; 4T127-128, 5T159-168).

45. On December 16, 2009, Volunteer Deputy Fire Chief Scott Kivet was in the fire station before the Board's regularly scheduled monthly meeting. He overheard Commissioner Dilieto and Fire Chief Pipero discussing terminating the paid career firefighting staff. Kivet directly asked Dilieto whether the rumors were true that the Board was considering dissolving the paid department, to which Commissioner Dilieto replied, "it might be done tonight" (2T129-130, 2T133-134, 2T169). Kivet was upset and proceeded to walk out of the fire house to call Firefighter Shapter when Chief Pipero joined him and confirmed that the Board was going to eliminate the career firefighters and said, "Nothing [is] going to stop it" (2T134, 2T148, 2T169, 9T152).

Kivet immediately contacted Shapter and advised that he should get his union leadership down to the Board meeting because the Board is considering terminating the paid staff (2T134-135,

3T146, 3T207). Shapter called President Grande and Firefighter Mangeri. Grande was unavailable, but Mangeri and Shapter attended the December Board meeting. The Board did not discuss nor was any action taken regarding terminating the career firefighters at the meeting (3T145-147, 4T132-133).

46. The parties met on December 29, 2009 for their first negotiations session. Attending on behalf of Local 3170 were President Grande and Firefighter Mangeri and representing the Board were Commissioners Costello and DiPierro. At the start of the session and before contract proposals were exchanged, Commissioner Costello insisted that Local 3170 justify why the Board should continue to have a part paid fire force (4T128, 5T160-161, 6T43, 6T136, 10T18-19, 12T47, 17T4-5). Grande and Mangeri were taken aback by Costello's precondition to negotiations because they came to negotiate the terms of a new contract and not to justify their existence (4T131, 6T66, 6T135-136, 6T165-166, 6T169, 10T19). Commissioner DiPierro testified that Costello's comment made everyone in the room uncomfortable (12T47).

Nevertheless, Local 3170 presented its proposals which consisted of language changes, duration and wage increases. Local 3170 proposed a three year contract with a 5% salary increase for each year or a four year agreement with a 5% increase per year for the first three years and 5.5% wage

increase in the fourth year (4T129, 6T166, 6T168, 12T9). The Board did not make any proposals or respond to Local 3170's proposal. Instead, DiPierro and Costello indicated that they would take the proposals back to the entire Board for consideration (4T129, 6T166, 6T173). The negotiations session lasted about an hour and a half (6T166).

47. During the first week in January 2010, Volunteer Deputy Fire Chief Kivet, began circulating a petition in the Fire District 1 community informing the public that the Board was contemplating eliminating the paid firefighters, explaining the valuable service which Mangeri and Shapter provided to the department and public, and requesting the public's support in retaining the paid career firefighting staff (CP-3; J-17; 2T137-138, 3T208, 4T133, 9T147-148, 15T163). Also in early January 2010, Shapter and Mangeri were invited to a special meeting of Fire District 1's voluntary fire squad to explain the history and reasoning behind the creation of the part paid department and given the opportunity to advocate why they should be retained (4T133, 15T157-158, 15T160). Word about the possibility of dissolving the paid department was spreading throughout the community (2T142, 2T152-153, 9T163).

48. As per the parties' contract, up to 10 days of unused vacation time can be cashed in from one year to the next. Payment is in a lump sum check paid by the first pay period in

January. Similarly, the parties' contract requires that the stipend for Fire Inspector certification be paid by the first pay period in January (J-1, See Finding of Fact 3, 13T118).

Throughout their employment, Shapter and Mangeri invariably received payment for unused vacation time and Fire Inspector certification in January (3T148-149, 4T140-141, 4T141-142, 6T137). Though the timing of the payment of longevity is not prescribed in the parties' contract, by custom and practice, it too was paid in January (J-1; 3T148-149, 4T142, 6T136-137).

In January 2010, Shapter and Mangeri were not paid their longevity or Fire Inspector stipend. Despite numerous requests for payment from Mangeri and Grande, Shapter and Mangeri were not paid until June 2010, six months after payment was due and three months after they had been terminated (3T149, 4T141, 4T142-143).

Chairman DiPierro offered multiple and differing explanations for the late payments. He testified that the contract did not prescribe a time frame in which the Fire Inspector stipend was to be paid until he was shown the contract provision which requires that it be paid in January (J-1; 13T105, 13T118). Then, he testified that the Board did not have to adhere to the terms of the contract because it had expired on December 31, 2009 until it was pointed out that the contract provides that the ". . . Agreement shall remain i[n] full force and effect during the period of negotiations" (J-1; 13T25,

13T118-120). Ultimately, DiPierro testified that the longevity and Fire Inspector payments were not paid in January 2010 as a negotiations strategy (13T26). I do not credit DiPierro's explanation that the payments were withheld as a negotiations strategy. If that were so, payments would have been made on or about the time Mangeri and Shapter were terminated in early March 2010. The payments were not made until June 2010.

49. Back in the early years of the paid fire department, Fire Administrator Calella and Firefighter Mangeri created a logbook to catalogue the daily activities of the paid force as well as phone calls and visitors to the fire house. Maintaining the logbook became a provision in the parties' contract (J-1, see Finding of Fact 3; 3T124-125, 4T46, 4T137, 4T139, 5T12-13, 10T161, 11T100, 17T20). At one time, the logbook was left out and accessible, but eventually the paid firefighters kept it locked in a cabinet because visitors to the fire station would look through it. It was the paid firefighters' view that the information contained in the logbook was for the Board's benefit, somewhat confidential, and at least not generally public information (4T137-138, 5T14, 5T47-48, 12T67).

The career firefighters had a key to the cabinet in which the logbooks were stored, as did the Board liaisons, Commissioners Ray Perry and Charles DiPierro (5T19-21, 12T67).

Any other Commissioner could view the logbooks by requesting to see them (5T14-16, 5T21, 8T169-170).

On January 14, 2010, DiPierro sent an email to Mangeri requesting that he bring the logbook for 2009 to the January monthly Board meeting scheduled for January 20th. Never before had the Board requested that a logbook be produced at a Board meeting (CP-19; 4T137, 5T27-28, 12T105-106). On January 17, 2010, DiPierro sent another email to Mangeri reminding him to bring the 2009 logbook with him to the January 20th Board meeting and to "forward all programs and passwords on all of our computers to the Board" (CP-19; 5T27-28, 12T106). DiPierro requested the computer passwords from Mangeri even though he knew that Commissioner Perry had them since 2008 and that the passwords had not changed (12T110-111).

50. Monthly meetings of the Board are typically not well attended by the public. The January 20, 2010 meeting, however, was well attended due to the rumors that the Board was considering eliminating the paid fire force. Over a hundred people attended the meeting exceeding the capacity limits of the room (1T31-32, 1T142, 1T166, 2T163, 2T180, 3T147, 4T133-134, 9T163, 13T63-64, 13T123). At the meeting, Kivet presented his petition supporting the retention of the paid staff (J-16; 2T152).

Fire District 1 had received approval of its proposed budget from the State. The Board intended to approve the budget at the meeting so that the budget could be put before Fire District 1 voters for approval in February. The budget hearing was opened up during the meeting so that members of the public could comment or ask questions about the budget only. In answers to questions, the attending public were told that there was no reduction in force reflected in the budget and that money to compensate the career firefighters and per diem firefighters was included in the 2010 budget. At least one Fire District 1 taxpayer commented that he would be willing to pay higher taxes to keep the career staff (J-16; 1T69-70, 1T202, 2T23-24, 4T150, 10T53, 15T148). The 2010 budget was unanimously approved by the Board (J-16; 4T103, 4T148, 4T151, 7T113).

Later in the meeting, Chairman DiPierro read an open letter to the public addressing the rumor that the Board was considering eliminating the career fire force, after which the meeting was opened for public comment (J-16; J-17; 1T33, 2T149-150, 3T147, 4T134).

There were no limits placed on the number of people who were allowed to speak. There were also no time limits placed on the speakers. Eleven people spoke that night all addressing the issue of eliminating the paid staff. Not one member of the public spoke in favor of terminating the paid firefighters (J-16;

1T61-62, 1T85, 10T53, 13T77-79, 13T124). The public's sentiment to retain the paid firefighters was clear to the Board (13T80).

The attending public was told by Board representatives that the rumors regarding the dissolution of the paid fire staff were unfounded and that there was nothing before the Board that moves in the direction of terminating them at this time. In answer to the question of what the Board's intention was regarding the paid firefighters, Commissioner DiPierro replied that the Board's intention was to provide fire protection with career staff, volunteers and mutual aid (J-16; 1T72, 1T202, 2T63, 2T139-140, 4T134, 6T167, 15T148, 17T20).

Mr. Vincent Lafata resides in Fire District 1 (J-16; 1T29, 13T56, 13T129). He testified in the hearing and addressed the Board during the public portion of the January 20th meeting. At the meeting, he made it clear that he did not want to be misled by voting in favor of the budget which contained money for paid firefighters only to have the paid staff fired after the budget was passed. Commissioner DiPierro assured him that the money for paid staff was in the budget and Commissioner LeBrun remarked that there is nothing on the agenda to dissolve the career staff (J-16; 1T69-70, 13T133, 15T131, 15T148).

Lafata also asked the Board whether they would give the public specific notice in the event they decide to place the issue of disbanding the paid force on a meeting agenda. The

Board committed to doing this which put the attending public's "mind at ease" (J-16; 1T41-42, 2T63, 4T134-135, 13T55-56).

51. As directed, the logbook was brought to the January 20, 2010 Board meeting. The next day, Mangeri and Shapter were directed to keep a more detailed logbook by Chairman DiPierro. They received an email from DiPierro listing thirteen requirements to keeping the logbook. The requirements were far more extensive than those of the past or specifically enumerated in the parties' contract. Shapter and Mangeri viewed this as a harassing and retaliatory measure because it was issued the day after an unusually well attended, heated Board meeting discussing the possible dissolution of the paid fire department (CP-19; J-1; 3T227, 4T46-47, 4T50-55, 4T138-139, 5T29-30, 5T40-41, 10T161-162, 12T114, 17T20).

52. From the time the paid force was first hired in 1998 until Local 3170 began pushing to have Calella's vacancy filled by a full-time career firefighter in 2008, few workplace changes were directed by the Board. Starting around December 2008, when Mangeri was notified that he would no longer be doing the payroll until January 2010 when the Board required more extensive logbook entries, the Board initiated many new workplace changes, such as who would perform the scheduling, rescinding light duty, using exclusively volunteer firefighters for the day shift and

eliminating the fourth fighter, to name a few (CP-14; CP-19; 4T23-25, 4T31, 4T123, 5T104-105, 6T28-33, 6T50).

53. On February 1, 2010, Mangeri contacted Commissioners Costello and DiPierro in an effort to schedule a second contract negotiations session. The parties never met again to negotiate a successor agreement (CP-31; 4T132, 6T134, 13T17).

54. The next monthly Board meeting was scheduled for February 17, 2010. On February 15, 2010, the following public notice appeared in the local newspaper:

TOWNSHIP OF MONROE
THE BOARD OF FIRE COMMISSIONERS FIRE DISTRICT 1

TAKE NOTICE:

The Board of Fire Commissioners Fire District No. 1 Monroe Township will consider personnel matters at its next regularly scheduled meeting to be held on February 17, 2010 commencing at 7:00 p.m. Official action may be taken at this meeting.

Charles DiPierro, Chairman
(J-11)

Though not nearly as well attended by the public as the previous month, the public turnout for the February meeting was better than usual (1T47, 13T74).

At the meeting, the Board passed a resolution terminating the paid fire department. The Commissioners did not discuss the resolution or invite public comment before voting on it. Commissioners Costello, LeBrun, Dilieto and DiPierro voted in favor of the resolution. Commissioner Perry abstained from

voting (J-12; 1T47-48, 1T204, 4T7, 4T149, 8T131, 10T21, 12T10-11, 15T50-51, 15T181).

The Resolution reads as follows:

RESOLUTION OF THE BOARD OF FIRE
COMMISSIONERS FIRE DISTRICT NO. 1
MONROE TOWNSHIP TERMINATING THE
PART PAID FIRE DEPARTMENT
HERETOFORE ESTABLISHED PURSUANT TO
N.J.S.A. 40A-14-81.1

WHEREAS; Pursuant to the authority granted by N.J.S.A. 40A:14-70.1.b, the Board of Fire Commissioners of Fire District No. 1 Monroe Township contracts with the Monroe Township Volunteer Fire Company No. 1 for the provision of fire suppression services; and

WHEREAS; The Board of Fire Commissioners, acting pursuant to authority granted by N.J.S.A. 40A:14-81.1, established a part-paid fire department for the purpose of supplementing the fire protection services provided by the Monroe Township volunteer Fire Company No. 1; and

WHEREAS; The Board currently employs two full-time paid firefighters who are on duty between the hours of 7:00 a.m. to 3:30 p.m. Monday through Friday and who are supplemented by paid per diem firefighters; and

WHEREAS; N.J.S.A. 40A:14-25 provides, in relevant part: 'The governing body of any municipality, if they shall deem it necessary for reasons of economy, may decrease the number of members and officers of the paid or part-paid fire department of force . . .'; and

WHEREAS; N.J.S.A. 40A:14-81 states that the commissioners of a fire district ' . . . shall have the powers, duties and functions within said district to the same extent as in the case of municipalities . . .'; and

WHEREAS; A primary statutory duty of the Board of Fire Commissioners is to impose and raise taxes to fund the provision of fire protection services within the district and to do so in the most cost effective and efficient manner possible; and

WHEREAS; the Board has determined that the costs of maintaining full-time paid firefighters to supplement the fire protection services provided by the District's highly skilled and dedicated volunteer firefighters exceed the benefits derived and is economically burdensome and unwarranted in these times of severe economic hardship and distress; and

WHEREAS; Termination of the full time paid staff will result in substantial cost savings to the District and will enable the District to reduce its budget and thereby result in a lower fire district tax rate.

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Board of Fire Commissioners of Fire District No. 1 Monroe township that the part-paid fire department heretofore established by Resolution of the Board of Fire Commissioners be, and the same is hereby dissolved and terminated.

BE IT FURTHER RESOLVED that this Resolution shall take effect on March 5, 2010.

[J-13]

No advanced notice was given to the public, Local 3170 or Mangeri or Shapter that the issue of dissolving the paid fire department would be on the agenda (1T42-43, 1T46, 3T150, 4T146, 4T149).

The minutes of the February 17th meeting and the testimonies of LaFata, Mr. John Schiavone, Ms. Lisa DiPierro and Kivet

reflect that the public felt as though they were misled by the Board at the January 20th meeting regarding its intention to eliminate the paid firefighters and the type of notice that would be given in the event the issue was going to be considered at a Board meeting (J-12; 1T46, 1T66-67, 1T133-134, 1T154, 2T63, 2T197).

Chairman DiPierro did not feel as though the Board had misled the public explaining at the February 17th meeting and testifying at hearing that the Board had no intention of firing the paid firefighters as of January 20, 2010. He also stated that the notice for the February 17th meeting satisfied legal requirements and was the kind of notice that the Board committed to provide the public on January 20th (J-12; 13T59-60, 13T132-133). Commissioner Costello at the February 17th meeting and Commissioner Dilieto testified at hearing that they did not mislead the public because the Board was still considering the fate of the paid firefighters as of the January 20th Board meeting (J-12; 15T76, 15T131, 15T145-147, 15T194, 15T197-198).

I find that the Board misled the public at the January 20th meeting both as to its intention and the type of notice it would provide them. The minutes of the January 20th and February 17th Board meetings along with the testimonies of LaFata, Lisa DiPierro, Kivet and Schiavone support this conclusion. And, while the public notice for the February 17th meeting may have

been legally sufficient, it was not the specific notice the public had asked for nor the kind that the Board had committed to providing.

55. February 20, 2010 was election day for Fire District 1. That day, residents of District 1 had the opportunity to elect two Commissioners and vote to approve the 2010 budget. The voters elected Volunteer Deputy Chief Scott Kivet over Commissioner Vincent DiLieto and approved the 2010 budget, which contained money to compensate the two career firefighters and two per diems (J-14; J-15; 2T181, 4T103, 4T148, 8T31-32, 8T149, 15T82, 15T129-130).

56. Fire District 1 resident John Schiavone testified that he ran into Chairman DiPierro at a local bagel shop on election day morning. Schiavone testified that he overheard DiPierro telling patrons and the store owner that the paid firefighters were let go because of the huge pay raises they were seeking in contract negotiations. Schiavone also testified that at an unspecified date after the election a local bank teller told him that DiPierro made a similar comment while in the bank. The minutes from the first regular Board meeting after the election, held on March 27, 2010, reflect that Schiavone commented during the public portion of the meeting that DiPierro said in the bagel shop and bank that "if the firefighters had not asked for a pay raise in excess of 20%," the Board would not have fired them (J-

15; 1T146-149, 1T151, 1T153, 1T157, 1T162-164, 1T175-177, 1T194, 1T203).

Lisa DiPierro is Firefighter Michael Mangeri's sister and is married to Commissioner Charlie DiPierro's first cousin. Lisa and Charlie have known each other since 1972 (2T3, 12T6-7).

The fire house is the polling site for the Fire District 1 election. Lisa testified that on the afternoon of election day she had a conversation with Charlie at the firehouse. She asked him why the Board voted to dissolve the paid fire force three days before. Lisa testified that Charlie explained that the firefighters had asked for too large of raises during negotiations for a new contract. They had asked for 5% per year for three years and 5.5% for an optional fourth year (2T6, 2T11-14).

During his testimony, Charlie denied telling Lisa that the reason for terminating the paid firefighters was because they asked for too large of salary raises during negotiations, specifically 5% per year for three years and 5.5% for an optional fourth year. He also denied making similar statements at the bagel store and bank (12T9, 12T19, 12T21-22).

I credit the testimonies of John Schiavone and Lisa DiPierro and do not credit the testimony of Commissioner DiPierro. John and Lisa's versions of what Commissioner DiPierro had said were very similar. Their versions were further corroborated by the

Board's meeting minutes for March 2010, which memorialized similar statements attributed to Commissioner DiPierro. I find that the evidence establishes that Commissioner DiPierro did state that the reason for eliminating the paid firefighters was because they demanded too large of salary increases during contract negotiations.

57. The inconsistent availability of volunteer firefighters in District 1 during the day on weekdays is what led the Board to create a part paid fire department in the first place. During the time that the paid shift existed, volunteer firefighter response continued to be insufficient to cover that shift. Recognizing this and knowing that the Board was contemplating the elimination of the paid force, Commissioner Dilieto met with the volunteer squad to see if the volunteers were up to the task of covering the paid shift. The squad indicated that they could provide fire service during the day (2T146, 12T160, 15T73, 15T90-93, 15T165-166, 15T182-183, 17T18-19). The Board also sought an agreement with Monroe Township municipal government to release from work its employees who were District 1 voluntary firefighters in the event of a fire call (10T155-156).

On February 22, 2010, Commissioners DiPierro and Costello met with the Fire Chief of Fire District 3, Peter Gasiorowski, to discuss coverage for District 1 during the day or weekdays, 7 a.m. to 3:30 p.m. Though all three fire districts in Monroe

provide mutual aid, DiPierro and Costello offered Gasiorowski \$200,000 per year for primary fire suppression coverage during the weekday, day shift. As part of the offer, District 1 wanted District 3 to hire one of the terminated paid firefighters from District 1. This arrangement never came together. Ultimately, but after the career firefighters had been terminated, the Township did agree to release Fire District 1 volunteers from work in the event of a fire call, which made covering the weekday day shift exclusively with volunteers workable (3T53-54, 3T57, 3T65-66, 8T183, 8T185, 8T187-188, 12T160-161, 15T88).

58. March 5, 2010 was Mangeri's and Shapter's last day of work. Other than Commissioner Perry, no one from the Board came to speak to them between the passing of the resolution terminating them on February 17th and their last day. There was no exit interview or instruction. No one advised them of their post-employment COBRA rights or the procedure to turn in their equipment, keys or uniforms (3T153).

59. Having been duly elected by the voters of Fire District 1 on February 20, 2010, Scott Kivet replaced Dilieto as Fire Commissioner. Kivet's first Board meeting as Fire Commissioner was on March 17, 2010. Kivet testified that on an unspecified date during a closed executive session of the Board, DiPierro referred to Local 3170 President Grande as an "asshole." DiPierro's reference was made in the context of the Board

discussing future court appearances and strategies associated with the recent firefighter layoff (2T182, 2T192). I credit his testimony.

60. Local 3170 filed an amendment to its original unfair practice charge on March 16, 2010. The amendment alleges that the Board intensified its retaliatory acts against the paid firefighters because of the filing of the unfair practice charge in 2009 and has resulted in the Board terminating the paid firefighting staff (C-1).

61. On March 19, 2010, resident Lafata met with Chairman DiPierro to see whether there was a way to reinstate the paid career firefighters and meet the needs of the Board. The voting taxpayers of District 1 expressed their desire to have the paid staff by approving a budget with money in it to compensate the paid firefighters for 2010 (1T54-55, 1T105-106, 15T199). The Board had the authority to rescind the resolution dissolving the paid fire department and rehire the career firefighters. The Board declined to reinstate the paid firefighters explaining that it could not justify maintaining a part paid force during "financial hard times" (1T107, 15T199-200).

62. The Resolution eliminating the part paid fire department summarizes the reasons why the Board eliminated the department:

The Board has determined that the costs of maintaining full-time paid firefighters to

supplement the fire protection services provided by the District's highly skilled and dedicated volunteer firefighters exceed the benefits derived and is economically burdensome and unwarranted in these times of severe economic hardship and distress.
[J-13]

In their own words, the sum total of the testimony given by the Commissioners during the hearing provides the same reasons for eliminating the paid staff (8T112-113, 8T120, 8T130-131, 10T16-17, 10T61-62, 10T112-113, 12T10-12, 12T147, 15T70-72, 15T77, 15T134-135). In addition, accountant Massoni, Commissioners Costello and Dilieto testified that the Board eliminated the paid staff in order to reduce operating costs and pass along the savings to the taxpayers of District 1 (7T117, 10T13, 7T186, 7T189, 10T21, 10T23-24, 15T71, 15T74, 15T100).

To support the claim of severe economic hardship and distress, the Board attempted to show that residents lost their jobs and homes in unprecedented, record numbers. But the Board did not provide sufficient evidence of this to convince me that this was occurring in Fire District 1. There was very little concrete evidence of residents losing their jobs. The abandoned buildings provided were a mix of commercial and residential properties with no dates given for when they became abandoned. The record also was insufficient to show how many residential properties were in foreclosure in District 1 during 2008 through the beginning of 2010. The testimony of the Fire Commissioners

in this regard was based upon anecdotal evidence, their observations from driving around town and general notions of a down national or regional economy (R-26; 8T154-156, 8T160-166, 9T59-62, 9T65-68, 10T112-113, 15T70-71). In other words, the Board did not provide concrete specific evidence of economic distress occurring in Fire District 1.

According to the Board's own witness and accountant, Massoni, Fire District 1 has never been in financial distress. The surplus for budget year 2008 was \$1,070,960. The surplus as of December 31, 2009 was \$1,405,781, up almost \$335,000 (8T7-10). The total assessed property valuation in District 1 went up about \$18,000,000 from 2008 to 2009 and increased another \$3,000,000 from 2009 to 2010 (J-14; R-10; R-11). The proposed fire tax rate in District 1 for 2010 was \$.139, down from \$.16 from the preceding year (2009) (J-14; R-10; 7T113-114). Among the three Fire Districts in Monroe Township, District 1 consistently had the lowest fire tax rate before the creation of, during and after the elimination of the part paid fire department (2T191, 2T197-198, 8T138, 17T95).

63. The 2010 budget approved by the voters included \$210,000 for salary and wages for the two career firefighters and two per diems. When factoring in the money also budgeted for benefits and considering that some of the money was spent for a small portion of the year, there was still over \$200,000 in

savings that could be used to reduce taxes in future budget years (J-14; 7T72, 7T155-156, 7T175, 7T180, 8T84, 10T27).

The following budget year, 2011, the Board purchased a new vehicle for the Fire Chief costing \$70,000 and new radios for \$90,000 (R-12; 7T147, 8T13-14, 17T13). It also purchased a new brush truck for \$140,000 with voter approval (R-12; 7T116, 8T74-75). Even with those purchases, the Board was able to reduce the tax rate by \$.03 for 2011 by using its reserves which had been increased by the money saved from eliminating the paid firefighters (J-14; R-12; 7T145, 7T147-148, 7T176, 7T180, 8T13-14, 8T84). If the Board hadn't made the purchases, it could have passed on even greater tax savings to its residents by using that money to further reduce the tax rate (8T20-22).

64. The Board never mentioned to Local 3170 or Mangeri and Shapter that it may have to terminate all paid firefighters because of financial hardship. Board representatives never raised the subject during contract negotiations at the end of 2009. The first time Local 3170, Mangeri or Shapter heard that the paid firefighters were being eliminated because of economic reasons was during the February 20, 2010 Board meeting when the resolution eliminating the part paid fire department was read to the public (17T4-5, 17T75-77, 17T86-87, 17T92).

65. Both the Volunteer Fire Chief and Fire Commissioners who were also voluntary firefighters testified that the response

time of volunteers to fire calls is slower than that of the paid force. Fast response time is critical to effective fire suppression and the saving of lives and property (2T144-145, 2T147-148, 14T60-61, 14T89-90, 14T103, 15T86-87). I credit that testimony.

66. Overall, I found that the witnesses for Local 3170 were more credible than those who testified on behalf of the Board. At times, witnesses for the Board parsed their words or were evasive, made grand or exaggerated claims that were later pared down or completely recanted or did not give meaningful or responsive answers to questions asked during examination. In addition to examples already presented in this report, I offer the following summary which is not intended to be exhaustive.

Commissioner DiPierro testified that the paid firefighters' workplace attitudes changed after the charge was filed and that they became uncooperative with the Fire Chief especially with regard to absences from work. DiPierro testified that there were a few times that Mangeri did not show up for work and gave no notice by calling in or otherwise (12T72, 12T76). He later conceded in testimony that there was only one example of Mangeri not calling in when he was sick and that was the sole example of how Mangeri and Shapter did not cooperate with the Chief after the unfair practice charge was filed (12T88, 12T90-91).

When asked why the Board didn't simply ask Commissioner Perry for the computer passwords, Commissioner DiPierro replied, "I don't know as -- I don't know why we didn't ask Ray, we didn't -- you know" (12T110).

On January 12, 2012, Commissioner DiPierro testified that the firefighters began writing inappropriate comments in the logbook and that he told them to stop "at least a couple dozen times." Commissioner DiPierro testified further that he directed them to stop via "many emails" (12T62-63). He was asked to produce the emails and given about six weeks to do so. At the hearing held on February 23, 2012, DiPierro denied stating that he had sent many emails and was able to produce only one email (J-19; 14T5). He then suggested that he had sent more than one email but might have deleted them. Yet, he had other emails relevant to the case dated before and after the email he produced, making his suggestion unconvincing (14T6, 14T38, 14T40-44).

As noted in finding of fact 57, Peter Gasiorowski is the Fire Chief of Fire District 3. He is also the custodian of District 3 records and has the responsibility of handling OPRA requests for the fire district (13T39, 13T88, 13T141). Starting on November 10, 2010 and continuing through December 29, 2011, DiPierro filed a multitude of OPRA requests with District 3 (CP-34; 3T62, 13T42, 13T85-104). DiPierro testified that he needed

the information in part because he served on a Consolidation Study Panel, but the panel was not reconstituted and reactivated until after DiPierro began submitting a concentrated amount of OPRA requests (13T44-45, 13T137-138, 13T141-142).

The Board produced Harry Carter as an expert in the area of fire service and protection. In qualifying Mr. Carter as an expert, he was questioned extensively about his familiarity of the National Fire Protection Association (NFPA) and the guidelines it promulgates. Carter has been a member of NFPA since 1969 and has testified before it in developing standards and policies regarding firematics (16T13-15). Firefighter response time was a prominent issue litigated in this case. Carter testified that NFPA policy 1720 does not contain requirements for the time firefighters leave the front door of the firehouse. The policy does contain such requirements. Carter also defined response time differently than NFPA - 1720. When these discrepancies were pointed out to Carter, he replied "Sir, experts make mistakes" (R-37; 16T78-79).

On cross-examination, Commissioner Dilieto did not adequately explain what had changed or happened between the January 20, 2010 Board meeting where the public was told that there was nothing to indicate that the Board was considering terminating the paid fire department and the February 17, 2010 Board meeting where the Board in fact dissolved the paid

department. He also did not credibly explain how a lengthy pre-typed resolution terminating the paid firefighters was prepared and ready to be voted on at the February 17th meeting (15T144-149).

Commissioner LeBrun testified that he was unaware that the Fire District 1 had a light duty policy for its firefighters. Yet, he was a commissioner when the Board adopted the policy and was the commissioner that moved to a vote the resolution which rescinded the policy (R-6; 8T167-168). LeBrun also could not recall why the Board officially requested that the logbooks be brought to the January 20, 2010 meeting nor did he adequately explain why the computer passwords were requested in January 2010 (8T170).

ANALYSIS

A) Unit Work: Alleged Subsections 5.4a(1) and (5) Violations.

Local 3170 claims that the Board violated N.J.S.A. 34:13A-5.4a(5) and derivatively (1), when it assigned unit work to non-unit members, the per diem firefighters, instead of hiring a full-time permanent replacement for Fire Administrator Calella. The Board maintains that it did not violate the Act by using the per diems because it has a managerial prerogative to determine staffing levels and the parties' labor contract reserves to it the discretion to hire temporary employees to fill vacancies.

For the reasons that follow, I find that the Board violated subsection 5.4a(5) and (1), derivatively, when it continued to use per diem firefighters and refused to hire a full-time, permanent replacement for Calella in 2008.

N.J.S.A. 34:13A-5.4a(5) prohibits public employers, their representatives or agents from:

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.

In Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), must be applied on a case by case basis to determine whether a transfer of duties from police officers to civilian employees is mandatorily negotiable. Jersey City at 574. In so holding, the Supreme Court disapproved of PERC's sole reliance on the "unit work doctrine" in analyzing police civilianization cases. Since that time, the Commission has applied Local 195's balancing test in transfer of unit work cases involving police and non-police employees alike. See, Howell Tp., P.E.R.C. No. 2013-68, 39 NJPER 465 (¶147 2013), Rutgers University, P.E.R.C. No. 2003-70, 29 NJPER 158 (¶46 2003), Somerset Cty., P.E.R.C. No. 2002-15, 27 NJPER 377 (¶32138 2001), City of Passaic, P.E.R.C. No. 2000-8, 25 NJPER 373 (¶30162 1999) and Bor. of Bogota, P.E.R.C. No. 99-77,

25 NJPER 129 (¶30058 1999), aff'd. 26 NJPER 169 (¶31066 App. Div. 2000), certif. denied 165 N.J. 489 (2000).

Local 195 states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Here, there is no preemption argument so the analysis will proceed in balancing the parties' interest. The full-time career firefighters have an interest in preserving the weekday, daytime firefighting duties for themselves so that they are needed and do not lose their jobs. By continuing to use per diem firefighters to fill Calella's vacant position after Calella's first lawsuit was resolved in early 2008, the Board decided to operate the paid shift at a reduced cost, but not pursuant to a reorganization plan or a change in the way it delivered fire services during the day. It still was providing weekday, daytime fire services with a paid staff. The full-time career firefighters' concern about

being replaced by lower cost firefighting personnel was not merely theoretical in this case because that is exactly what was done with the position formerly occupied by Calella -- albeit through attrition. On balance, I find that the full-time firefighters' interest outweighs the Board's interest and that negotiations over shifting firefighting work to lower cost per diem firefighters would not significantly interfere with the determination of governmental policy. Therefore, I further find under the facts of this case that the shifting of firefighting duties on a permanent basis to part-time firefighters is mandatorily negotiable.

The Supreme Court in Jersey City, 154 N.J. at 580-581 and the Commission since the Jersey City decision have discussed approvingly the striking of the same balance in cases in which an employer merely substituted a non-unit employee for a unit employee with no change in the responsibilities or duties attendant to a position and with the objective of reducing labor costs. See, Rutgers University, City of Passaic and Bor. of Bogota.

I will now analyze the facts of this case under the unit work doctrine or rule. The unit work rule provides that an employer must negotiate with a majority representative before using non-unit employees to perform work traditionally performed by unit employees alone. The object is to provide the union with

an opportunity to negotiate an acceptable alternative, one that would not result in job loss and reduction in union membership. Jersey City, 154 N.J. at 576; City of Passaic, 25 NJPER at 374.

There are three exceptions to the rule that the transfer of unit work is mandatorily negotiable. They are: (1) the union has waived the right to negotiate over the transfer; (2) historically, the work was not within the exclusive province of unit personnel; and (3) the employer is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577, Bor. of Bogota, 25 NJPER at 132.

Local 3170 did not waive its right to negotiate over the transfer of unit work. A waiver "can come in a number of different forms" but it "must be clear and unmistakable." North Arlington Bd. of Ed., H.E. No. 97-18, 23 NJPER 156 (¶28077 1997). For example, if the parties' contract clearly allows the employer to make the changes, the union does not have the right to negotiate over the shifting of unit work. Monmouth Cty. Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992).

When Calella first went out on injury leave in 2004, Local 3170 allowed the Board to use per diem firefighters as temporary substitutes (as it always had) to fill in for sick or vacationing full-time firefighters. While Calella continued to be out on extended injury leave or working light duty assignments, Local 3170 continued to not object to the Board using a per diem

because Calella's return to full firefighting duties was presumed, though uncertain. After Calella filed a lawsuit in 2006 to regain his full-time firefighting position, Local 3170 permitted the Board to continue to use per diems in Calella's former slot with the understanding that once the litigation was resolved the third firefighting position would be filled with a full-time career firefighter -- either with Calella because he prevailed or a new full-time replacement. Once Calella's first lawsuit was withdrawn and Local 3170 was notified by the Board that the Board no longer had any more financial obligations to Calella, Local 3170 immediately demanded that the Board stop using per diems to fill the third firefighter position and fill it with a full-time career firefighter. Local 3170's acquiescence was always given in an effort to work cooperatively with the Board and as a temporary solution. Under these facts, Local 3170 did not clearly and unmistakably waive its right to negotiate over the permanent transfer of work to part-time firefighters.

The Board argues that Local 3170 has waived its right to negotiate over the transfer of work to per diems because the parties' contract authorizes the Board to hire temporary employees "in the absence of permanent employees" (J-1, Article II E.). While I agree with the Board that the contract provision authorizes the Board to temporarily fill positions, it does not

explicitly and unmistakably authorize the Board to permanently replace negotiations unit employees with non-unit employees. Therefore, I do not find a waiver based upon contract language.

The second exception to the unit work doctrine is that historically the job was not within the exclusive province of the unit personnel. Here, at all times after Shapter was hired as a full-time permanent firefighter in 1999 until 2007 when the Board added a part-time fourth firefighter, fire services were exclusively provided by three full-time permanent firefighters Monday through Friday, 7 a.m. to 3:30 p.m. The only exceptions were that part-time (per diem) firefighters were used as substitutes for absent career firefighters who were out sick, injured or on vacation and those volunteer firefighters who responded to fire calls.

The controversy in this case centers around the Board's refusal to fill the third firefighter slot on the weekday, day shift with a full-time permanent firefighter and instead transferring that work to per diem firefighters on a regular basis. The fact that the Board increased the staffing of the paid shift to four firefighters with the use of a per diem firefighter from 2007 to 2009 does not diminish the fact that the paid shift was historically comprised of three full-time career firefighters. As for the volunteers who responded during the day, they are not employees of the Board and do not fall within

the purview of the unit work doctrine which seeks to protect against the transfer of unit work to employees outside of a negotiations unit.

The third exception to the unit work rule -- the employer transferred unit work to outside of the unit pursuant to a reorganization plan -- is not involved in this case. The Board has not claimed that it used per diem firefighters in Calella's former position as part of a reorganized way to deliver fire services during the day.

The Board argues that the paid shift never consisted of four (4) full-time firefighters and that Local 3170's claim to fill two (2) vacancies in its original charge was not supported by the evidence. I agree but as noted above the real controversy in this case is over the filling of the third firefighter position on the day shift, not the elimination of the fourth position.

The Board also argues that it has the managerial prerogative to determine the number of firefighters that will comprise the paid shift. Generally, a public employer has the non-negotiable right to determine the number of employees needed to work a shift. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981); No. Hudson Reg. Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000), Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998), City of Linden, P.E.R.C. No. 95-18 20 NJPER 380 (¶25192 1994). But here, the Board's prerogative to

have at least three paid firefighters work the day shift is not being challenged. What is being challenged is the composition of the paid fire staff -- going from three full-time permanent firefighters to two full-time permanent firefighters and one part-time firefighter. The Board does not have a managerial prerogative to transfer the firefighting duties of employees represented by Local 3170 to other paid employees outside of the bargaining unit. That transfer of duties to non-unit employees is mandatorily negotiable.

Under the facts of this case, I find that the Board violated subsection 5.4a(5) and derivatively (1), when it unilaterally continued to employ per diem firefighters to fill the third firefighter position on the day shift after the first Calella lawsuit was resolved in early 2008 and after Local 3170 demanded that the position be filled with a full-time career firefighter eligible to be in its negotiations unit.

B) Termination of Paid Firefighters: Alleged Violations of Subsections 5.4a(3) and (4) of the Act.

Local 3170 argues that the paid fire department was dissolved in retaliation for the union insisting that the third firefighter position on the day shift (Calella's vacancy) be filled by a full-time firefighter and for pursuing the issue to the point of filing an unfair practice charge thereby embroiling the Board in litigation. The Board denies that Local 3170's exercise of rights under the Act had anything to do with its

decision to eliminate the paid fire force and maintains that it terminated the paid firefighters in order to reduce operating costs and the fire tax burden on District 1 property owners.

In re Tp. of Bridgewater, 95 N.J. 235 (1984), sets forth the standard for determining whether personnel actions are motivated by discrimination against the exercise of protected activities in violation of subsections 5.4a(3) and, derivatively, 5.4a(1) of the Act. Our Supreme Court has approved of PERC's application of the Bridgewater standard in analyzing alleged violations of subsection 5.4a(4) of the Act as well. In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 332, 335 (1989). That standard provides:

A Charging Party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile towards the exercise of the protected rights. In re Tp. of Bridgewater, at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action

would have taken place absent the protected conduct. Id. at 242. This affirmative defense need not be considered, however, unless the Charging Party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the Commission to resolve. [Id.]

In assessing an employer's motive, timing is an important factor and may give rise to an inference that a personnel action was taken in retaliation for protected activity. East Orange Bd. of Ed., P.E.R.C. No. 2009-24, 34 NJPER 374 (¶121 2008).

In applying these legal principles to the facts of this case, I find that Local 3170 has proven by a preponderance of the evidence on the record that protected conduct was a substantial or motivating factor in the Board's decision to dissolve the paid fire department. Consequently, I further find that the Board violated subsections 5.4a(3) and (4) of the Act when it terminated the paid firefighters in February/March 2010.

1. Engaged in Protected Activity

Commencing in March 2008 and continuing until they were terminated in February 2010, Shapter and Mangeri, themselves, and through their union representative, Local President Grande, and attorney Fox, engaged in activity protected by the Act. Almost immediately after being notified by the Board that the Calella litigation had concluded, they requested that the Board hire a full-time career firefighter and cease using a per diem

firefighter to fill the third firefighter position on the day shift. Shapter, Mangeri and Grande attended the Board's regular meeting in March 2008 and made the request. They kept pursuing the issue via emails to the Commissioners, especially Commissioner Leatherwood, and in meetings with Board liaison Chairman DiPierro through June 2008.

Sometime in June 2008, it became clear that the Board was not inclined to fill the Calella vacancy with a full-time paid firefighter so the firefighters and Local 3170 enlisted the assistance of legal counsel. Attorney Fox sent a series of letters to the Board starting at the end of June 2008. The parties met in October 2008 and again in November 2008, but were unsuccessful in resolving the issue of the type of paid firefighter to fill the third slot. Attorney Fox again wrote a couple of "last chance" letters to the Board in an effort to avoid litigation. Ultimately, Local 3170 filed an unfair practice charge in March 2009.

Mangeri, Shapter and Local 3170 continued to actively pursue the matter until the paid force was dissolved in 2010. Notably, they addressed a number of workplace issues during the public portion of Board meetings during 2009 and attended an exploratory conference conducted by PERC in May 2009. In short, Mangeri, Shapter and Local 3170 continuously asserted rights protected by

the Act from March 2008 until March 2010 and never abandoned the cause to have unit work performed by unit employees.

2. Board Knew of the Activity

The Board was aware of the protected activity. Mangeri, Shapter and Grande directly discussed with the Board the filling of the third paid position. The Board met with them, responded to emails on the subject, replied to some of their attorney's correspondence, answered the unfair practice charge and attended the exploratory conference.

3. Board's Hostility Toward Protected Conduct

There is both direct and circumstantial evidence on the record which establishes that the Board was hostile toward Local 3170 and Mangeri and Shapter's exercise of rights protected under the Act. In many instances, Commissioners made statements and the Board instituted workplace changes within days of Local 3170, Mangeri or Shapter asserting themselves regarding employment matters. The timing, kind of statements made and number of workplace changes implemented in a short period of time combine to give rise to an inference of hostility on the Board's part.

It was undisputed by the parties that prior to 2008 there was labor peace in Fire District 1. During that time, the parties had a friendly working relationship and cooperatively worked together to resolve issues as they arose. Their relationship began to deteriorate when Local 3170's attorney

began writing to the Board and pressing the issue of filling the third firefighter position with a full-time employee who would be a member of the bargaining unit. As early as July 16, 2008 at its regular meeting, the Board read to the public a letter it had received the previous day from counsel to Local 3170 regarding the filling of the vacant position. After the meeting, Chairman DiPierro warned President Grande that more letters from the Local's attorney would only aggravate the situation and could lead to the elimination of the paid staff.

The day after Shapter attended the November 19, 2008 Board executive session where Commissioner LeBrun remarked, "go ahead and sue us, do what you have to do," Commissioner DiPierro advised Shapter that the Board was considering getting rid of all of the paid firefighters. About two weeks later on December 5th, Commissioner DiPierro further cautioned Shapter that if the union kept pushing the issue of hiring a third full-time firefighter, the Board will push "the union out of the station up to the other end of town."

On January 1, 2009, payroll duty was taken away from Mangeri without explanation. He was informed of the change via email instead of personally by a Board liaison as had been done in the past.

On January 13, 2009, Local 3170's attorney apprised the Board that it would be filing an unfair practice charge if it did

not cease using non-bargaining unit employees to perform bargaining unit work. A month later, on February 19th, Chairman DiPierro warned Firefighter Shapter that "this is the beginning of the end."

The Board's hostility and acts of retaliation intensified and escalated after Local 3170 filed its unfair practice charge on March 23, 2009. Setting a tone, Board liaison DiPierro stopped visiting the firehouse as often and ceased eating lunch with the paid firefighters.

On May 8, 2009, while Mangeri was on light duty assignment and Shapter was off from work, the Board operated the day shift exclusively with volunteer firefighters. It was the first time since the establishment of the paid force that the weekday, day shift was covered by volunteers. Also, in May 2009, the Board became less responsive and more exacting in approving requested time-off by the firefighters. Sometime before May 20, 2009, the Board took away scheduling duties from Mangeri and Shapter. They were not given an explanation as to why the duties were assigned to a secretary and no one from the Board informed them of the change. The secretary told them.

President Grande and Firefighter Shapter attended the May 20th regular meeting of the Board. During the public portion of the meeting, Grande asked the Board why no paid staff was used on May 8th and why the scheduling duties were taken away from

Mangeri and Shapter. Two days later, on May 22nd, DiPierro told Shapter that "Your union and career [staff] are putting a wall between the [Board of Fire] Commissioners" and warned him that, "This is not good for your future here . . . you know that your contract is up in December 31, [2009] and that might be it."

DiPierro exhibited further hostility toward Local 3170 by rhetorically asking Shapter, "Who is he to question the Board," referring to union President Grande.

On May 28, 2009, the Board expended resources in defending itself against Local 3170's unfair practice charge by attending an exploratory conference at the PERC office in Trenton. The next day, Mangeri was informed that he could no longer work light duty assignments effective June 1st and that if he had any questions he should call the Board attorney. Mangeri was given no explanation for that decision and was abruptly pulled from projects he was working on while on light duty. Two weeks later, on June 17th, the Board rescinded the light duty policy which was enacted only the year prior. Though Local 3170 was included in the process of developing the policy, it received no notice from the Board that it was going to be rescinded.

Sometime in late June, the secretary to the Board informed Mangeri and Shapter that effective July 1, 2009, the Board will eliminate the fourth firefighter on the day shift. No explanation was provided. The reasons that gave rise to the

Board adding the fourth firefighter had not changed or diminished.

At the one and only negotiations session for a new contract held on December 29, 2009, as a precondition to negotiating, Commissioner Costello demanded that the union justify why the Board should continue employing paid firefighters. Even Chairman DiPierro (who was there) testified that Costello's comment made everyone uncomfortable. At that session, the Board did not make any proposals nor did it respond to the proposals presented by Local 3170.

The Board did not pay the firefighters their longevity or inspector's stipend in January 2010 as required under the contract and past practice. The Board ignored numerous requests for payment made by Mangeri and Grande, and did not pay the firefighters until three months after they had been terminated in June 2010. Also, in January 2010, the Board added thirteen new requirements to keeping the logbooks following a particularly well-attended Board meeting in which the public demanded that the paid firefighters be retained.

The proximity of all of the workplace changes to protected activity connotes hostility. See, East Orange Bd. of Ed.

The last and ultimate act of retaliation by the Board was terminating the paid firefighters eleven months after their union had filed an unfair practice charge with PERC. DiPierro's

comments on election day regarding the firefighters' wage proposal in negotiations (citing it as the reason for their termination) are revealing. Though they were made after the decision to eliminate the firefighters, the remarks demonstrate a disposition hostile to participating with unions in the give and take process required by collective negotiations.

The record supports a finding that the Board was hostile to the protected activities of Local 3170, Mangeri and Shapter.

I next turn to the Board's business justification for abolishing the paid fire department. The Board's reasons for dissolving the paid department were that it could not justify the cost in hard economic times and desired to pass along the cost savings to the taxpayers of District 1 in the form of tax relief. I reject the Board's explanation as pretextual and find that it violated subsections 5.4a(3) and (4) of the Act.

The Board provided insufficient evidence that the taxpayers of Fire District 1 were losing their properties and/or jobs in unprecedented, record numbers. The Board itself consistently carried a budget surplus of over \$1,000,000 per year, which trended upwards in the years relevant to this case (2008-2010). The Board's accountant admitted that the Board was never in financial distress. There were no "times of severe economic hardship and distress" established on the record.

The taxpaying public's sentiment to keep a daytime paid force was clear to the Board. Those taxpayers who spoke at the January 20, 2010 Board meeting made it clear. If the Board had any doubt about what the taxpayers of District 1 desired after the meeting because those who spoke were not representative of the taxpayers at large, that doubt was removed when the 2010 budget was approved by the voters on February 17, 2010. The 2010 budget included money to pay the full-time and per diem firefighters for another year. It is specious for the Board to claim that economic hardship drove its decision.

If economics were of such a concern, one must wonder why the Board decided to terminate the firefighters only a few days before it would know whether or not the budget passed and therefore know whether or not it had the money to continue to retain them. In a similar vein, once the Board knew the budget passed, there was no doubt what the citizenry desired or what the District could afford, yet the Board did not rescind the resolution terminating the firefighters.

The Board's proffered motive of reducing taxes is equally unbelievable. Firstly, the Board knew there would be no tax relief in 2010 because the tax rate for that year was already set based upon a budget that included compensation for the paid firefighters. Secondly, it offered to pay Fire District 3 substantially the same amount of money for fire protection in

2010 as the cost of retaining its own paid force. Thirdly, the Board in fact spent most of the savings derived from terminating the paid firefighters on a new vehicle for the Fire Chief and radios. The Board did not act as though it was trying to pass the savings onto the taxpayers of the fire district. Its behavior does not support a finding that reducing taxes was a genuine motive behind eliminating the paid fire force.

I also find the Board's reasons to be pretextual because it never once mentioned the possibility of dissolving the paid department because of financial concerns to Grande, Mangeri or Shapter. The parties communicated on a number of issues throughout 2009. The subject did not even come up as late as December 29, 2009 when the parties had a contract negotiations session which lasted about an hour and a half.

Neither Local 3170, Mangeri nor Shapter were given any notice of the Board's decision to terminate them. The first that they learned that they would be no longer employed because of financial reasons was the public reading of the resolution terminating them. The abruptness and lack of transparency surrounding their termination erodes the credibility of the Board's proffered reasons.

Even the Board's treatment of Mangeri and Shapter after it terminated them illustrates that the decision was predicated upon hostility and ill-will rather than unbiased business

considerations. During the two weeks Mangeri and Shapter were still working at the firehouse before their termination became effective, only Commissioner Perry spoke to them. Mangeri and Shapter were not treated by the Board as employees customarily are who are severed due to economic reasons as opposed to performance issues. They were not given an exit interview or advised of their post-employment COBRA rights, nor were they informed on where to return keys, uniforms and equipment. They were simply ignored.

The Commission recently adopted a hearing examiner's recommended decision which found that the employer terminated employees for their protected activity. Passaic Cty. Supt. of Elections, P.E.R.C. No. 2014-1, __ NJPER __ (¶ _____ 2013).

There, like the case here, the employer changed its operations by subcontracting a function out to a private vendor and laying off its employees. Also like here, the employer's explanation for the layoff was to cut costs. The hearing examiner rejected the employer's explanation as pretextual because the Superintendent was secretive about the subcontracting and concealed those plans from the employees, and in part because of the way in which the employees were terminated -- without notice and with no reason given. In adopting the hearing examiner's decision, the Commission wrote:

Both direct (hostile statements) and
circumstantial (close timing of protected

activity and retaliation) evidence supports the Hearing Examiner's conclusion [that] the Superintendent was hostile to protected activity.

* * *

The Hearing Examiner's recommended remedy of offering reinstatement to the laid off employees with back pay and substantially the same working conditions that were present prior to their discriminatory terminations effectuates the purposes of the Act. [Id.]

The parallels of the facts of this case to the circumstances in Passaic Cty. are compelling (terminating employees who engaged in protected activity and transferring their work to non-employees under the guise of saving money, lack of transparency and no notice to union or effected employees). Based on all of the above, I conclude that the Board terminated the paid firefighters in retaliation for their activities protected by the Act and reject the Board's reasons as pretextual.

CONCLUSIONS OF LAW

The Board violated N.J.S.A. 34:13a-5.4a(5) and (1) derivatively, when it continued to hire per diem firefighters as the third firefighter on the paid shift in March 2008 without negotiating with Local 3170. It also violated subsections 5.4a(3) and (4) of the Act when it terminated the paid firefighters in retaliation for their protected conduct including the filing and pursuing of an unfair practice charge with PERC.

RECOMMENDED ORDER

I recommend that the Commission **ORDER:**

A. The Board of Fire Commissioners, Fire District No. 1, Monroe Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to hire a full-time firefighter to fill the third position on the paid shift.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the paid firefighters in retaliation for their protected activities.

3. 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, more specifically terminating the paid firefighters for filing and pursuing an unfair practice charge with PERC.

4. Refusing to negotiate in good faith with Local 3170 over terms and conditions of employment of its members, particularly by unilaterally employing a per diem firefighter on a regular basis as the third firefighter on the paid weekday, day shift.

B. That the Board take the following affirmative actions:

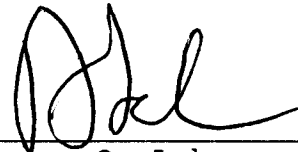
1. Offer to reinstate Firefighters Michael Mangeri and David Shapter who were terminated effective March 5, 2010, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

2. Make the terminated employees who accept offers of reinstatement whole for all salary and benefits due from March 5, 2010 to the present, less mitigation, with interest at the rate set by Court rules.

3. In the event the Board determines to use at least three (3) firefighters on the weekday, day shift, negotiate in good faith with Local 3170 over the filling of the third paid firefighter position.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

5. Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this order.



Perry O. Lehrer
Hearing Examiner

DATED: October 18, 2013
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 October 28, 2013.



NOTICE TO 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 cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to hire a full-time firefighter to fill the third position on the paid shift.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the paid firefighters in retaliation for their protected activities.

WE WILL cease and desist from 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, more specifically terminating the paid firefighters for filing and pursuing an unfair practice charge with PERC.

WE WILL cease and desist from refusing to negotiate in good faith with Local 3170 over terms and conditions of employment of its members, particularly by unilaterally employing a per diem firefighter on a regular basis as the third firefighter on the paid weekday, day shift.

WE WILL offer to reinstate Firefighters Michael Mangeri and David Shapter who were terminated effective March 5, 2010, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

WE WILL make the terminated employees who accept offers of reinstatement whole for all salary and benefits due from March 5, 2010 to the present, less mitigation, with interest at the rate set by Court rules.

WE WILL in the event the Board determines to use at least three (3) firefighters on the weekday, day shift, negotiate in good faith with Local 3170 over the filling of the third paid firefighter position.

Docket No. CO-2009-332

Board of Fire Commissioners, Fire District No. 1, Monroe Township
(Public Employer)

Date: _____

By: _____

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 the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372