

P.E.R.C. NO. 2017-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HILLSIDE,

Respondent,

-and-

Docket No. CO-2014-027

FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION LOCAL 35,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's report and recommended decision dismissing a complaint alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5), by unilaterally transferring unit work, namely training officer duties, from captains to deputy chiefs and refusing to negotiate. The Commission finds that although there is a training officer position recognized by the parties' collective negotiations agreement that captains have exclusively been assigned to when the position is filled, captains have not exclusively performed training officer duties during periods when no one held the position. Moreover, the Commission finds that even if the FMBA had proven that training officer duties were exclusively unit work, the Township asserted a governmental policy reason for its decision not to fill the training officer position that outweighs the FMBA's interest in having the position filled.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, LaCorte, Bundy, Varady &
Kinsella, Attorneys At Law, attorneys (Robert
F. Varady, of counsel)

For the Charging Party, Law Offices of Craig
S. Gumpel LLC, attorneys (Craig S. Gumpel, of
counsel)

DECISION

On July 19, 2013, the Firemen's Mutual Benevolent
Association Local 35 (FMBA) filed an unfair practice charge
against the Township of Hillside (Township) alleging that the
Township violated sections 5.4a(1) and (5)^{1/} of the New Jersey
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)

1/ 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; . . . (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."

by unilaterally transferring unit work, namely training officer duties, from captains to deputy chiefs and refusing to negotiate.

On July 11, 2014, the Director of Unfair Practices issued a complaint and notice of hearing. On July 25, the Township filed an answer to the unfair practice charge. A hearing was held on December 3, 2014, July 28 and September 29, 2015. On April 20, 2016, the Hearing Examiner issued a report and recommended decision [H.E. No. 2016-19, 42 NJPER 521 (¶146 2016)] concluding that the Township did not violate sections 5.4a(1) or (5) of the Act when it decided not to appoint a training officer, assigned training officer duties to Deputy Chief DeLane and/or other non-unit employees, and refused to negotiate.

This matter now comes before the Commission on exceptions to the Hearing Examiner's report and recommended decision filed by the FMBA on May 16, 2016. The Township filed opposition to the exceptions on June 29.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, which are recited below (H.E. at 4-23), except as noted in the FMBA's Exceptions to the Hearing Examiner's Findings of Fact, *infra* at 20-31.

FINDINGS OF FACT

1. Hillside Township and the FMBA are, respectively, a public employer and a public employee representative within the meaning of the Act.

2. FMBA Local 35 represents all uniformed fire personnel employed by the Township excluding battalion chiefs, deputy chiefs and the chief of the department. (J-1 at Article 1, Section 1). Deputy Chiefs are represented in a separate unit by FMBA Local 235 (FMBA 235) (2T24).^{2/}

3. The Township and FMBA are parties to a collective negotiations agreement with an effective date of July 1, 2007 through June 30, 2012 (J-1). The parties are currently in negotiations for a successor agreement (2T6).

4. Article III, entitled "Hours of Work and Overtime", at Section 1(C), sets the hours of work for members assigned as training officer as 10-hour day shifts, four days a week between Monday and Friday.

5. Firefighters, captains and deputy chiefs who are not assigned to specialized units work 24 hours on duty and 72 hours off duty (2T24). There are four shifts and three companies per shift (2T26).

6. Article VI, entitled "Salary Schedule", states in pertinent part:

Section 7: Training Officer
Per the practice in existence as of the execution of this Agreement, the Training Officer, or bargaining unit member assigned

^{2/} As noted in footnote 5 of the Hearing Examiner's Report: Transcript references for the December 3, 2014, July 28 and September 29, 2015 hearing dates are, respectively, 1T through 3T.

as Training Officer, shall continue to receive a stipend of 8.5% over his base pay.
[J-1]

This article also provides for salary differentials for unit members assigned to the fire prevention bureau and as emergency medical technicians.

7. Deputy chiefs perform the function of shift commander overseeing the entire shift, while captains are company officers supervising an engine company or a truck company. There is also an ambulance on each shift (2T25).

8. Article 16 of the Department's Rules and Regulations is entitled "Training Program Procedures" (CP-1). It references the officer in charge of training as the training coordinator which is another term for training officer (2T29).^{3/}

CP-1 states that the training coordinator in conjunction with the chief is responsible for establishing probationary and on-going training programs for all personnel. CP-1 also sets out the specific duties of the training coordinator regarding a continuing education program for all fire personnel which is to be developed by the training coordinator in conjunction with the chief and his supervisory staff. Finally, CP-1 confirms the

3/ As noted in footnote 6 of the Hearing Examiner's Report: On July 10, 2013, in a letter to the FMBA attorney, the then Township Attorney maintained that the training coordinator position and training officer position were not the same (CP-22). Witnesses, however, testified that the terms are interchangeable (2T29, 2T97, 3T13-3T14). Accordingly, I find as a fact that the terms are the same.

hours of work for the training coordinator as the same as the Fire Prevention Bureau (four 10-hour days, Monday through Friday) or as set by the chief (CP-1; 2T26-2T27).

9. The training program was created around 1988 or 1989 (CP-5; 2T29, 2T13-2T14). Both the parties' 1990-1992 CNA and the 1993-1996 CNA provided for a training officer position together with hours of work for the training officer, but did not provide extra compensation for the position (CP-3, CP-4; 2T37, 2T38-40). The 1996-2000 CNA for the first time provided for a stipend of 8.5 percent over base salary for the training officer (CP-2; 2T31-2T32). None of these CNAs, including the current agreement, require that a training officer has to hold the rank of captain (2T140-2T141, 2T146). Specifically, Article VI, section 7, provides for the 8.5 percent stipend for the "Training Officer or bargaining unit member assigned as Training Officer" (J-1). Since the bargaining unit consists of both captains and firefighters, I infer that either rank can hold the training officer position, although to date only captains have been assigned to this role (see fact no. 11 below).

10. In order to be assigned as a training officer, the chief solicits applications from interested parties (CP-10; 2T73, 3T57). The chief is solely responsible for the appointment of a training officer, since there is no contractual or statutory requirement that the position be filled (3T58). The chief can

decline to appoint a training officer (3T57-3T58). After reviewing applications, the chief requests applicants to write about their qualifications which he then reviews. There are no particular qualifications required for the position (3T46).

When the chief finds a qualified candidate that he wants to appoint, he requests the Mayor's approval. If approval is given, the matter is put before the Township Council for a formal resolution approving the position as well as setting the salary for the position (3T57-3T59).

11. The parties stipulated as to the succession of training officers from the time the program was instituted in 1988 to the present time (CP-15, CP-16, CP-17, CP-18; 2T60-2T62, 2T66-2T67):^{4/}

A. Captain Douglas Ferrigno was the first training officer assigned from 1988 to 1993.

B. Captain Donald Miller was assigned as training officer from 1994 to 1997.

C. Then Captain Jude DeLane was the assigned training officer from 1998 to mid-year of 2006.

D. Captain Richard Von Den Stienen was assigned as training officer from 2006 to 2008.

E. Captain Thomas Mateer was the assigned training officer from 2009 to February 2013 when he retired.

^{4/} As noted in footnote 7 of the Hearing Examiner's Report: Ferrigno and DeLane are now deputy chiefs. Both testified as witnesses for Charging Party.

12. There have been gaps in time between training officer assignments when no one filled that role. For instance after Miller, there was a long gap before DeLane was appointed as training officer (3T30). When DeLane left the assignment due to his promotion to deputy chief, there was also a gap before his replacement - Von Den Stienen - was assigned to the training officer position (3T30). According to Charging Party's witness, Deputy Chief Ferrigno, during the gaps between training officers as well as presently, training continued but was carried out by others, including deputy chiefs, captains and firefighters (3T21-3T22). Any member of the department could and did conduct the training which varied depending on the topic and who was willing to do the training (3T64, 3T69). During these gap-periods between training officers, the chief disseminated an annual training schedule to the shifts who would then conduct training (3T57, 3T63).

13. Generally, there are two types of training - tour or departmental training and company training (2T69, 3T35). Tour training is given to the entire department and includes, for example, scuba use safety, hazardous material training, right to know, confined space operations, high angle rescue and maintenance as well as search and rescue (CP-8; 2T69, 2T131, 3T23, 3T34, 3T43-3T44). Some of this training is mandated by law (3T32, 3T47-3T48). Ordinarily, tour training is scheduled by the

training officer in conjunction with the chief and is conducted by the training officer (CP-8; 3T33-3T34).

Company training is done on a particular shift and is conducted by the company commander who is a captain and sometimes by a deputy chief or firefighter, whoever has the expertise. This type of training is conducted pursuant to a monthly schedule generated by the training officer (if there is one) in conjunction with the chief (2T69-2T70, 3T24-3T25, 3T36). Examples of company training include policies and procedures, familiarization with new equipment, small tools, fire extinguishers, chain saw use and roof tools (CP-9; 2T72, 3T45, 3T69).

In the past, when company training was completed, a T201 form would be filled out by the company officer indicating the month and year the training was given, who gave the training, on what topic and the members who were present for the training. The form was signed by the captain as well as someone from the training division and submitted to the deputy chief and then submitted to the chief for verification (CP-12; 2T78-2T79). Since September 2013, a revised form known as a T202 is being utilized (CP-14). This form contains essentially the same information, but has no requirement that it be submitted to the training division (CP-14).

14. Assigned training officers issue training schedules for both tour and company training as well as keep records of training that was done (CP-11 through CP-14). Presently, with no training officer, training records are being forwarded to the Chief (3T46).

15. There has been no one assigned to the training officer position since Mateer's retirement in 2013, although training has continued and is being handled by Deputy Chief DeLane as well as other deputy chiefs, captains and firefighters. These trainers do not work training officer hours or receive the 8.5 percent stipend but are paid overtime if warranted by their work schedule (CP-19; 2T91, 2T151, 3T46-3T48, 3T52-3T53).

16. Although he has made many requests to fill positions from the bottom up, Chief Dominick Naples has not appointed anyone to the position of training officer since Mateer's retirement, because the Township has not given him the fiscal ability to do so and also because of related manpower concerns (3T59, 3T61-3T62).

17. Specifically, at the present time, the Hillside Fire Department is not fully staffed. The department currently has 33 firefighters, 8 captains, 4 deputy chiefs and a chief. At 46, the department is two below what it should be at 48 which is required by a Federal Emergency Management Agency (FEMA) grant that the Township is receiving to pay 12 firefighter salaries

(2T142-2T144, 3T62). In fact, the Township had to get a waiver from FEMA, because it was supposed to replace firefighters as they retired but has been unable fiscally to do so (3T62). The Department has not hired firefighters or promoted staff in more than two years (3T60). Indeed, without outside grant funding, the Township presently lacks the ability to pay firefighters their salaries (3T62).

18. Because of the current manpower shortage, in order to appoint a captain or firefighter to the position of training officer, Naples would have to take a firefighter or captain off the fire suppression side of the department which hampers emergency response on a daily basis (3T60). Thus, his decision not to appoint a training officer at this time is both fiscal and because of the manpower shortage (3T65-3T68).^{5/} Naples explained this to FMBA Albrecht who disagreed with him (2T141-2T142).

19. Presently without an assigned training officer, Naples issues an annual training schedule and distributes it to the shifts (3T49, 3T63). Basically, training falls on the company

5/ As noted in footnote 8 of the Hearing Examiner's Report: In its Answer, Respondent admitted that it assigned training duties to a deputy chief, because there was no one qualified from the bargaining unit to assume these duties. This rationale is not supported by testimony adduced at the hearing from witnesses for both Charging Party and Respondent. Training duties have been assigned at present to all ranks, including captains and firefighters as well as deputy chiefs. Accordingly, I accept as fact Chief Naples' explanation for assigning training to all ranks and for not appointing a training officer at present.

officer to train on specific topics or a deputy chief who ensures that the required departmental training gets done on the shift (3T64-3T65). Deputy Chief DeLane has performed a lot of the training, although training has been dispersed among all ranks (CP-23, CP-24; 3T48, 3T50, 3T52-3T53).

20. On January 14, 2013, FMBA President Albrecht wrote Naples regarding his intentions to fill the vacant training officer position and encouraging him to do so (CP-20). Albrecht inquired as to when the position would be available to qualified candidates (CP-20).^{6/} Albrecht received no response to this letter (2T92).

21. On June 20, 2013, the FMBA's attorney wrote the then Township attorney protesting the assignment of training officer duties to Deputy Chief DeLane, which the FMBA's attorney maintained, was work exclusively performed by fire captains since 1988 (CP-21; 2T92-2T93). The letter attached Article 16 of the Rules and Regulations (CP-1). The FMBA's attorney also requested negotiations over the reassignment of training program duties to a non-bargaining unit member which, he asserted, constituted a unilateral change in terms and conditions of employment (CP-21).

^{6/} As noted in footnote 9 of the Hearing Examiner's Report: On March 24, 2013, Captain Joseph Moran wrote to Chief Naples expressing interest in being considered for the training officer position. Moran received no response (CP-25; 2T119-2T120).

22. On July 10, 2013, the then Township attorney responded to the FMBA's request to negotiate (CP-22). The letter explained that the assignment to the training officer position had always been the sole province of the chief, including whether or not to assign a captain to that position. However, the attorney related that the chief would not assign anyone to that position below the rank of captain.

Next, the Township asserted that Article 16 does not refer to a training coordinator as a captain and that the terms training coordinator and training officer were distinguishable. Specifically, the Township contended that the training coordinator was a deputy chief whereas the training officer implemented training programs established by the chief in consultation with the deputy chief who is assigned to work as training coordinator.^{7/}

The letter denied that training had been exclusively bargaining unit work because deputy chiefs had been conducting training for many years. Training was, the attorney maintained,

^{7/} As noted in footnote 10 of the Hearing Examiner's Report: Deputy Chief Ferrigno credibly testified that there is no position of deputy chief training coordinator and that the position of training coordinator and training officer are interchangeable. He also testified that the training officer reported to the chief (3T13-3T14, 3T17). Accordingly, I do not find that the Township attorney accurately portrayed the two positions in his letter or the chain of command, but find that these facts are not material to the issue as to whether the Township transferred unit work and whether that work was done exclusively by the FMBA.

a shared responsibility. The Township attorney, therefore, denied any negotiations obligation (CP-22).

23. Having reviewed the Township's response, Albrecht disagreed with the Township's conclusions set out in CP-22. He felt that captains have always filled the position of training officer and provided training under the direct supervision of the chief. Albrecht testified that training has always been done by the training officer captain through the training division and never by a deputy chief. Albrecht also determined that Deputy Chief DeLane has been the only deputy chief assigned to do training since Mateer's retirement (CP-23, CP-24; 2T95-2T96, 2T98-2T101).

In reaching the conclusion as to DeLane, Albrecht reviewed company journals from October 23, 2013 through September 16, 2014 and February 21, 2013 to May 30, 2014 and made investigative notes (CP-23, CP-24). These dates represent periods of time both before and after Mateer retired. The company journals or log books contain all the incidents, calls or training done during specific time frames. Albrecht searched the journals to determine the departmental training provided by DeLane. From his examination of the company journals from February 21, 2013 through May 30, 2014, Albrecht identified many instances where DeLane provided departmental training immediately after Mateer's

retirement in February 2013 but not in the period before Mateer's retirement (CP-23, CP-24; 2T107, 2T109).

Based on Albrecht's testimony, I cannot find as fact that DeLane is the only deputy chief providing training since Mateer retired. Charging Party's own witness, Deputy Chief Ferrigno, credibly testified, as did Chief Naples, that both before and after Mateer's retirement and during gaps between the appointment of training officers, training has been performed by more than one deputy chief as well as captains and firefighters (3T21-3T22, 3T47-3T48, 3T53, 3T64). Albrecht himself admitted that there were gaps between training officers, and that training was provided during those periods by others who were not assigned as training officer (2T124, 2T149-2T150).^{8/}

Moreover, I do not give a great deal of weight to CP-24 to the extent that there were entries which were unclear as to who provided training on a particular date (CP-24; 2T118, 2T131). As

^{8/} As noted in footnote 11 of the Hearing Examiner's Report: Deputy Chief DeLane is now President of FMBA Local 235 representing deputy chiefs. He testified that before Mateer's retirement, the training officer would provide all the departmental training (3T43-3T44, 3T47). He also testified that some training was delegated by the training officer (3T47). I find that to the extent DeLane's testimony conflicts with the testimony of Albrecht, Naples and Ferrigno regarding whether the training officer exclusively did departmental training, DeLane's testimony is immaterial, because their testimony is consistent that during the periods when there were no training officers, officers of all ranks performed both company and tour training.

to CP-23, Albrecht admitted that his notes did not reflect all of the training performed by individuals other than Deputy Chief DeLane (2T124-2T125). To the extent that Albrecht's notes taken from the company journals between February 2013 and May 2014 reflect only training by DeLane, I do not find that training was not provided by others holding different ranks during this time frame.

HEARING EXAMINER'S RECOMMENDED LEGAL CONCLUSIONS

The Hearing Examiner found that although there is a training officer position recognized by the parties' CNA that captains have exclusively been assigned to when the position is filled, captains have not exclusively performed training officer duties during periods when no one held the position. (H.E. at 17-18) She found that because training officer duties have been shared with non-bargaining unit employees, the Township had no duty to negotiate with the FMBA when these duties were assigned to Deputy Chief DeLane and/or other deputy non-unit employees after the retirement of Captain Mateer. (H.E. at 18)

The Hearing Examiner also found that even if the FMBA had proven that training officer duties were exclusively unit work, the Township had asserted a governmental policy reason for its decision not to fill the training officer position that outweighs the FMBA's interest in having the position filled. (H.E. at 20) She found that Chief Naples was unable to hire or promote to fill

unit ranks given that the Township was unable to meet the salaries of existing firefighters and was already relying upon a federal grant, including a staffing waiver that permitted the Department to employ two fewer total employees than the grant required, to pay 12 firefighters. (H.E. at 20-21) Moreover, the Hearing Examiner found that even if the Township's decision not to staff the training officer position resulted in the loss of the 8.5% stipend to a captain who was assigned as training officer, the Township's decision to maintain operational or line staffing levels for the provision of emergency services and to disperse the training functions on an overtime basis was an exercise of its managerial prerogative to establish staffing levels. (H.E. at 21-23)

STANDARD OF REVIEW

With respect to the Hearing Examiner's findings of fact, we cannot review same de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c).^{9/} Under that statute, we may not reject or modify

9/ N.J.S.A. 52:14B-10(c) provides, in pertinent part:

The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision...after receipt of such recommendations. In reviewing the decision... , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the

(continued...)

any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record^{10/} that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, credible evidence. See also, New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due factfinder's "feel of the case" based on seeing/hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

9/ (...continued)

decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

10/ N.J.A.C. 19:14-7.2 provides:

The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). "[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-5.4a(1). . . ." Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER

550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). An employer violates this provision independently of any other violation if its action tends to interfere with an employee's protected rights and lacks a legitimate and substantial business justification. UMDNJ-Rutgers Medical, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); see also, Cumberland Cty. College, P.E.R.C. No. 2011-65, 37 NJPER 74 (¶28 2011). The charging party need not prove an illegal motive. Id. This provision will also be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-576 (1998), the New Jersey Supreme Court analyzed the transfer of unit work under both the Local 195, IFPTE v. State,

88 N.J. 393, 404-405 (1982) balancing test and the unit work rule. Notably, the unit work rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services." Id. at 577.

FMBA'S EXCEPTIONS TO THE HEARING EXAMINER'S FINDINGS OF FACT

With respect to finding of fact number 6, the FMBA claims that the Hearing Examiner failed to incorporate certain provisions from the parties' CNA, namely Articles I (Recognition and Areas of Recognition), II (FMBA Rights and Duties), X (Prior Practices), and XX (Fully Bargained Provision). However, the Hearing Examiner's specific reference to certain sections in the parties' CNA that establish the training officer's work schedule/hours (Article III) and stipend (Article VI) was not to the exclusion of others. (H.E. at 4-5) While we acknowledge the FMBA's position that there are other general provisions in the parties' CNA that may inform the instant dispute (e.g., Articles I, II, X, XX), those provisions do not conflict with the Hearing Examiner's findings of fact or legal conclusion.

With respect to finding of fact number 9, the FMBA takes exception to the Hearing Examiner's failure to note that the CNAs

between FMBA 235 and the Township do not permit training officer duties to be performed by deputy chiefs as well as the Hearing Examiner's failure to note that past memoranda seeking candidates for the training officer position from the chief of the Department indicated that only captains could apply. Initially, we note that the CNAs between FMBA 235 and the Township were not admitted into evidence by either party and therefore were not referenced by the Hearing Examiner. Oppositely, the CNAs between the FMBA and the Township were admitted into evidence and the Hearing Examiner referenced them, as well as the stipulated succession of training officers, in order to establish the historical context of the training officer position. (H.E. at 6-8) While we acknowledge that Deputy Chief DeLane testified that he was removed from the training officer position when he was promoted to deputy chief (3T28:25 thru 3T29:16) and that there is at least one memorandum from the chief of the Department indicating that only captains were eligible to apply for the training officer position (CP-10), these facts do not conflict with the Hearing Examiner's findings of fact or legal conclusion. Indeed, the Hearing Examiner clearly determined that "[c]aptains have exclusively been assigned as training officers when that position is filled . . . [but] have not exclusively performed training officer duties . . . in particular during periods when no one held the position of training officer." (H.E. at 18)

With respect to finding of fact number 10, the FMBA contends that the Hearing Examiner incorrectly found that the Township Council sets the salary for the training officer position. We note the Hearing Examiner's finding that the "Township Council . . . [must] approve a formal resolution approving the [appointment of a training officer] as well as setting the salary for the position." (H.E. at 7) The Hearing Examiner's finding was based upon Chief Naples' testimony that in order to appoint a training officer, he must obtain approval from the Mayor and the Township Council "to formalize the position and [the] salary." (3T58:18 thru 3T59:4) Chief Naples went on to clarify that Township Council approval is necessary to ensure the "allocation of resource money [for the training officer position] if it's available," not to set the amount of the training officer's stipend. (3T59:5-7) Accordingly, we agree with the FMBA's exception to the extent that it clarifies that the amount of the training officer's stipend is established in the parties' CNA. (J-1 at Article VI, Section 7)

With respect to finding of fact number 13, the FMBA maintains that the Hearing Examiner erroneously equated departmental training with tour training and inaccurately described the procedure for submission of Department training

report forms.^{11/} Consistent with testimony adduced at the hearing, the Hearing Examiner found that there are two types of training - departmental training, which is also known as tour training, and company training. (H.E. at 9) Captain Albrecht testified that the training officer was responsible for performing tour training, which "is the training that . . . would be conduct[ed] by the training officer[;] . . . it's departmental training or the whole department is training on the same evolution for different . . . types of exercises." He also testified that the captains of each company were responsible for performing company training, which is "training that would be given to . . . a company officer to just do with [an] individual company." (2T69:9 thru 2T70:3; 2T107:24 thru 2T108:14) Deputy Chief DeLane testified that "[t]our training would be that [the training officer is] letting you know on this specific date that [he/she] is going to train your tour, your shift on this subject matter." He also testified that departmental training "would just be a substitute word for . . . tour training . . . [and] would be all four tours" completing the same training exercise. Deputy Chief DeLane went on to testify that "company training would be . . . the company officers indicating . . . that they

^{11/} As conceded by the Township, neither the training report form nor the procedure for its submission are contested in this matter. Accordingly, we acknowledge this aspect of the FMBA's exception to the extent it clarifies the Township's training documentation protocol.

were to go over some different subject matter with their company[,] meaning their unit or truck or an engine, supervisor of each unit would go over these particular . . . subjects and then indicate them on a training form." (3T34:19 thru 3T36:13; 3T42:12 thru 3T45:16) Deputy Chief Ferrigno testified that company training is performed by a company captain and "is done by any given tour at any given day, we take up a topic and train them." He also testified that "[d]epartmental training usually encompasses mandated or state mandated training events that need to be accomplished in any given year." (3T22:14 thru 3T26:1) Finally, Chief Naples testified that "tour training could be all members on duty that day training on a subject, specific subject, or subject matter." He also testified that "[c]ompany training is individual training for each company that [the Department has]" and could be conducted by "any member of the department." (3T69:6 thru 3T70:10) Notwithstanding this testimony, the FMBA has failed to cite anything in the record to support its contention that the Hearing Examiner erroneously equated departmental training with tour training. We find that the Hearing Examiner's findings are supported by sufficient, competent, credible evidence and we will not substitute our reading of the transcripts for her first-hand observations and judgments. Accordingly, we reject this aspect of the exception.

With respect to finding of fact number 15, the FMBA asserts that Deputy Chief DeLane has been the de facto training officer since Captain Mateer's retirement based upon Captain Albrecht's testimony, Department journals memorializing training exercises, and the Township's answer to the FMBA's unfair practice charge. Contrary to the FMBA's position, however, Captain Albrecht conceded that his review of Department journals indicated that after Captain Mateer retired, there were "training exercises performed by other individuals than Deputy Chief DeLane" including both "department training and company training." (2T124:7 thru 2T125:16) He also testified that he "couldn't approximate the gaps that . . . existed between captains serving as training officers and vacancies in that spot until the next training officer was appointed" and that it was fair to say that during those vacancies "training continued." (2T149:16 thru 2T150:6) Moreover, Deputy Chief DeLane specifically disagreed with the Township's answer^{12/} and testified that since Captain Mateer retired, he is only performing "a fraction of the training that [he] did as a training officer" because training duties "are disseminated among all members" and "[d]eputy chiefs, . . . plural, . . . have been assigned to do training." (3T46:20 thru

^{12/} The FMBA's exception to finding of fact 18, footnote 8 specifically pertains to the same section of the Township's answer. Accordingly, we address this aspect of the exception more fully below.

3T54:10; 3T52:5-21) Chief Naples testified that he has been in charge of training since Captain Mateer retired. At the beginning of every year, he puts out a schedule covering all required training to be completed by year end and he relies on "officers within the Department," specifically deputy chiefs and captains, to ensure that the training gets done. He also testified that there was no training officer "because the township [had not] afforded [him] the fiscal ability," that "[t]he township [had not] hired firefighters or . . . officially promoted in . . . about two years," that the Township received a federal grant to finance the employment of "12 . . . firefighters," and that the Department "wasn't fully staffed." (3T59:14 thru 3T60:23; 3T61:19 thru 3T62:5; 3T62:24 thru 3T65:4) Ultimately, the Hearing Examiner "[did] not give a great deal of weight to [Captain Albrecht's notes pertaining to the Department journals] to the extent that there were entries which were unclear as to who provided training on a particular date" and she found that training "was . . . provided by others holding different ranks" after Captain Mateer's retirement and during periods when there was no training officer. (H.E. at 16) We find that the Hearing Examiner's findings are supported by sufficient, competent, credible evidence and we will not substitute our reading of the transcripts for her first-hand observations and judgments. We reject this exception.

With respect to finding of fact number 17, the FMBA contends that the Hearing Examiner erroneously addressed the Department's manpower at the time of the hearing despite the fact that the Township unilaterally assigned training officer unit work to non-bargaining unit members on or around March 12, 2013. The Hearing Examiner's findings of fact pertaining to manpower were based upon the only evidence offered by the parties about the issue. Specifically, at the hearing on September 29, 2015, Chief Naples testified that there was no training officer "because the township [had not] afforded [him] the fiscal ability," that "[t]he township [had not] hired firefighters or . . . officially promoted in . . . about two years," that the Township received a federal grant to finance the employment of "12 . . . firefighters," and that the Department "wasn't fully staffed." He also testified that he inquired about hiring people and getting money for the training officer position "prior to . . . [Captain Mateer's] retirement . . . in the fall of 2012" (3T59:14 thru 3T60:23; 3T61:19 thru 3T62:5) Notwithstanding this testimony, the FMBA has failed to cite anything in the record to support its contention that the Department's manpower was at a higher level prior to the hearing in this matter. We find that the Hearing Examiner's findings are supported by sufficient, competent, credible evidence and we will not substitute our

reading of the transcripts for her first-hand observations and judgments. Accordingly, we reject this exception.

With respect to finding of fact number 18, footnote 8, the FMBA argues that the Township admitted in its answer that it assigned training officer duties to a deputy chief but the Hearing Examiner erroneously broadened/equated training officer duties to all training duties. In its answer, the Township admitted "that a Deputy Chief has been assigned the training officers' duties due to the fact that there is no qualified person from the bargaining unit to assume these duties." (C-2 at ¶8) However, consistent with the Hearing Examiner's footnote, testimony adduced at the hearing indicates that only some of the training officer duties were assigned to Deputy Chief DeLane. (H.E. at 12) Deputy Chief DeLane specifically disagreed with the section of the Township's answer noted above and testified that since Captain Mateer retired, he is only performing "a fraction of the training that [he] did as a training officer" because training duties "are disseminated among all members" and "[d]eputy chiefs, . . . plural, . . . have been assigned to do training." (3T46:20 thru 3T54:10; 3T52:5-21) Deputy Chief Ferrigno testified that when the training officer's spot was vacant both past and present, training continued and was performed by deputy chiefs, captains, and firefighters. (3T20:24 thru 3T22:22) Chief Naples testified that he has been in charge

of training since Captain Mateer retired. At the beginning of every year, he puts out a schedule covering all required training to be completed by year end and he relies on "officers within the Department," specifically deputy chiefs and captains, to ensure that the training gets done. (3T62:24 thru 3T65:4) We find that the Hearing Examiner's findings are supported by sufficient, competent, credible evidence and we will not substitute our reading of the transcripts for her first-hand observations and judgments. Accordingly, we reject this exception.

Finally, the FMBA takes exception with the Hearing Examiner's findings of fact number 19, 23, and 23, footnote 11. The FMBA contends that certain training officer duties (i.e., the development and distribution of an annual training schedule and departmental training) were exclusively performed by bargaining unit members until Captain Mateer retired and are presently being performed by non-bargaining unit members. The FMBA also claims that despite Deputy Chief DeLane's testimony that the training officer exclusively provided all departmental training, the Hearing Examiner erroneously blended the terms training and training officer when finding that Deputy Chief DeLane's conflicted with the testimony of other witnesses.

In addition to other evidence admitted during the hearing, Deputy Chief DeLane testified that since Captain Mateer retired, he is only performing "a fraction of the training that [he] did

as a training officer" because training duties "are disseminated among all members" including "[d]eputy chiefs, . . . plural," and "all ranks and inclusive of all." (3T46:20 thru 3T54:10; 3T52:5 thru 3T54:6) Captain Albrecht conceded that since Captain Mateer's retirement, Department journals indicate that individuals other than Deputy Chief DeLane may have performed departmental training. (2T124:7 thru 2T138:1; CP-23; CP-24) He also testified that despite the fact that there were vacancies between prior training officers, "training continued although there was no captain designated at the time" (2T149:16 thru 2T152:7) Deputy Chief Ferrigno testified that when the training officer's spot was vacant both past and present, training continued and was performed by deputy chiefs, captains, and firefighters. (3T20:24 thru 3T22:22) Chief Naples testified that he has been in charge of training since Captain Mateer retired and that he relies on "officers within the Department," specifically deputy chiefs and captains, to ensure that the training gets done. (3T62:24 thru 3T65:4)

The Hearing Examiner found that ordinarily, departmental/tour training is scheduled by the training officer in conjunction with the chief and is conducted by the training officer. (H.E. at 9-10; 2T68:5 thru 2T71:23; 3T22:14 thru 3T26:1; 3T33:15 thru 3T37:17; CP-8; CP-11 thru CP-13) She also found that "there have been gaps in time between training officer

assignments when no one filled that role" and "during the gaps between training officer as well as presently, training continued but was carried out by others, including deputy chiefs, captains and firefighters" and "the chief disseminated [the] annual training schedule" ^{13/} (H.E. at 8; 2T61:4 thru 2T63:10; 2T65:23 thru 2T67:6; 3T20:24 thru 3T26:1; 3T28:25 thru 3T30:25; 3T57:2-13; 3T63:7 thru 3T65:4; 3T68:25 thru 3T70:10) The Hearing Examiner also found that "training has continued and is being handled by Deputy Chief DeLane as well as other deputy chiefs, captains and firefighters" and "[Chief] Naples issues an annual training schedule and distributes it to the shifts." (H.E. at 10-12)

We find that the Hearing Examiner's findings are supported by sufficient, competent, credible evidence and we will not substitute our reading of the transcripts for her first-hand observations and judgments. Accordingly, we reject these exceptions.

FMBA'S EXCEPTION TO THE HEARING EXAMINER'S LEGAL CONCLUSION

The FMBA takes exception with the Hearing Examiner's legal conclusion, contending that the Township violated the Act when it unilaterally made a de facto appointment to the training officer

^{13/} In the footnote at issue, the Hearing Examiner found that the record was consistent and demonstrated that officers of all ranks performed both departmental/tour training and company training during periods when there was no training officer. (H.E. at 16)

position by assigning training officer duties exclusively to Deputy Chief DeLane. Based upon the findings of fact set forth above, we reject this exception and adopt the Hearing Examiner's analysis and legal conclusion.

ORDER

The Hearing Examiner's report and recommended decision is adopted. The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. None opposed. Commissioners Jones, Voos and Wall were not present.

ISSUED: November 17, 2016

Trenton, New Jersey