

P.E.R.C. NO. 98-158

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF FIRE COMMISSIONERS,
MONROE TOWNSHIP FIRE DISTRICT NO. 2,

Respondent,

-and-

Docket No. CO-H-96-290

MONROE TOWNSHIP FIREFIGHTERS
ASSOCIATION, IAFF LOCAL NO. 3170,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Board of Fire Commissioners, Monroe Township Fire District No. 2. The Complaint was based on an unfair practice charge filed by the Monroe Township Firefighters Association, IAFF Local No. 3170. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by abolishing the negotiations unit position of fire lieutenant/fire official and creating the non-unit position of executive director/captain to "avoid entanglement" with the Association. The Association alleges that the Board's actions were motivated by anti-union animus. The Commission finds that an employer has a managerial right to reorganize the way it delivers government services and, it may, by necessity, be able to transfer job duties to non-unit employees without incurring a negotiations obligation. The Board restructured the department and created the executive director/captain position because it determined that the supervisor in charge of the firefighters should also be responsible for formulating policies and advising the Board on negotiations and grievances. The Commission, therefore, finds that the Board did not violate the Act.

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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ASSOCIATION, IAFF LOCAL NO. 3170,

Charging Party.

Appearances:

For the Respondent, McLaughlin, Bennett, Gelson & Cramer,
attorneys (Richard J. Shaklee, of counsel)

For the Charging Party, John F. Pilles, Jr., attorney

DECISION

On March 29, 1996, the Monroe Township Firefighters Association, IAFF Local No. 3170 filed an unfair practice charge against the Board of Fire Commissioners, Monroe Township Fire District No. 2. The Association alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(1), (2), (3), and (5),^{1/} by abolishing

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of

the negotiations unit position of fire lieutenant/fire official and creating the non-unit position of executive director/captain to "avoid entanglement" with the Association. The Association alleges that the Board's actions were motivated by anti-union animus.^{2/}

On October 21, 1996, a Complaint and Notice of Hearing issued. On November 6, the Board filed an Answer denying that it had violated the Act when it created the executive director/captain position.

On March 19, 1997, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses, submitted exhibits, and filed post-hearing briefs.

On October 29, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-12, 24 NJPER 45 (¶29030 1997). He found that the Board was not hostile toward the Association's exercise of protected rights and that the Board created the executive director/captain position to have a non-unit

1/ Footnote Continued From Previous Page

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."

2/ The charge also alleges that the Board retaliated against firefighter James Krajcsovics, Jr., by auditing his payroll records over a six-year period. This portion of the charge was settled. H.E. No. 98-12, 24 NJPER 45 (¶29030 1997).

supervisor and manager whose loyalty ran solely to the Board. He concluded that the lieutenant position, which the Board has not filled, was different from the executive director/captain position.

On December 15, 1997, the Association filed exceptions. The Association objects to the conclusions in factual findings nos. 5 and 13. The Association also maintains that the Hearing Examiner erred in finding no evidence of anti-union animus. Further, it asserts that the executive director/captain performs essentially the same duties that had been performed by the lieutenant. Therefore, it contends that the Hearing Examiner erred in rejecting its contention that the Board violated the Act by transferring unit work without negotiations.

On January 15, 1998, the Board filed an answering brief supporting the Hearing Examiner's findings of fact and conclusions of law.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-13). We reject the Association's exceptions for the reasons set forth in this decision.

We begin with a factual summary and chronology.

From at least 1990 through January 14, 1996, the fire district was composed of three firefighters and one lieutenant or acting lieutenant, all of whom were included in the negotiations unit. During the period leading up to the 1994-1996 negotiated

agreement, the Board felt at a disadvantage because there was no non-unit fire department employee who could give it negotiations input.

In April 1994, after Lt. James Hoffman resigned, the Board appointed James Krajcsovics, Jr. lieutenant and fire official.^{3/} The parties' agreement provides that all employees promoted during its term shall serve a one-year probationary period, during which time the Board may demote the employee to his previous rank. The appointing resolution included such a probationary period and added that a condition of Krajcsovics' probation was passing a written lieutenant's examination.^{4/}

On January 30, 1995, the Board met with Krajcsovics during the closed session portion of its regular meeting. The Board designated its attorney as its spokesperson. The attorney told Krajcsovics that, in the Board's view, he was not properly supervising or disciplining the firefighters. As examples, the

^{3/} The fire official is the person, designated by the local enforcing agency, in charge of enforcing the Uniform Fire Code. N.J.A.C. 5:18-1.5.

^{4/} The Association excepts to the Hearing Examiner's finding that Krajcsovics had to serve for one year and pass a written examination to "obtain permanency" in the position. While the resolution does not indicate that the appointment was temporary, the parties' agreement and Krajcsovics' testimony support the Hearing Examiner's findings that Krajcsovics' continued service as a lieutenant was contingent upon his satisfying the above-noted requirements. The Hearing Examiner's statement about the need to "obtain permanency" was a reference to these undisputed conditions.

attorney noted that Krajcsovics had not provided training schedules, was unaware of the whereabouts of on-duty personnel, and had certified that an employee was working overtime when, in fact, the employee had not worked at all that day. The Board also stated that it believed that his being a union member might be a conflict of interest. Krajcsovics responded that he saw no conflict. Finally, the Board stated that it wanted Krajcsovics to take a more active role as a Board spokesperson.^{5/}

Sometime before April 12, 1995, the end of Krajcsovics' one-year probationary period, the vendor responsible for preparing the lieutenant's examination told the Board that it could not administer the test before that date. The Board asked the Association to agree to an extension of Krajcsovics' probationary period. The Board told Krajcsovics it planned to make such a request and advised him that the other option was to demote him, have him take the examination, and possibly re-promote him later. The Association denied the request to extend the probationary period and, by letter dated April 27, 1995, Krajcsovics was demoted, retroactive to April 12. On May 10, the Association

^{5/} The Association excepts to the Hearing Examiner's finding that the Board had been dissatisfied with Krajcsovics' performance prior to May 1995, when the Association filed a grievance challenging Krajcsovics' April 1995 demotion. We reject that exception. While Krajcsovics was never disciplined for poor performance, the above-noted concerns are noted in the closed-session minutes of the January 30, 1995 Board meeting and Krajcsovics acknowledged that the concerns were communicated to him at that time.

filed a grievance contesting the demotion, which was denied on May 15. The Association then filed for arbitration.^{6/}

On May 22 and August 1, 1995, the Board filed a unit clarification petition and amended petition, seeking to have the lieutenant position removed from the unit on the grounds that the lieutenant was a confidential employee and, further, was a supervisor who should not be included in a unit with non-supervisory employees. The Association opposed the petition, maintaining that none of the District's lieutenants had been involved in negotiations, negotiations strategy, or processing grievances. In July 1995, the Board appointed William Jackson as acting lieutenant.

Sometime prior to November 1995, the Board passed a resolution establishing the position of executive director/captain. The resolution stated that the executive director/captain was intended to be a managerial executive and confidential employee, as those terms are defined in the Act. It also specified that the executive director/captain would have disciplinary and supervisory powers over paid employees. The Board intended that the executive director/captain would provide advice on negotiations and grievance matters and, in addition, would be a full-time manager who could formulate and implement policies. In a November 29 letter to the Commission, the Board

^{6/} Krajcsovics also filed a lawsuit challenging the demotion.

stated that it was withdrawing its unit clarification petition because the executive director/captain would "fulfill the supervisor responsibilities as well as the confidential functions in regard to collective bargaining which the Board had intended the lieutenant to perform."

In January 1996, the Board appointed George Cier to the position. Cier was also appointed fire official. Cier had been a volunteer member of the department and had scored first on the lieutenant's examination.^{7/} At about the same time, the Board passed a resolution demoting Jackson to firefighter, noting that it appeared that the lieutenant's duties "may be subsumed" within the duties of the executive director/captain. The lieutenant position is vacant but the Board has not abolished it.

Cier performs the duties set forth in the lieutenant's job description. In addition, he has advised the Board concerning negotiations proposals, attended all of the Board's negotiations strategy sessions, and advised the Board concerning grievance responses. In non-negotiations matters, he wrote and implemented a policy concerning fire station visitors, proposed a policy concerning firefighter uniforms, and issued oral and written reprimands to firefighters concerning lateness and attendance at training sessions.

^{7/} Krajcsovics did not sit for the examination.

We turn to the Association's exceptions to the Hearing Examiner's legal analysis. We consider first its contention that, contrary to the Hearing Examiner's finding, the Board created the executive director/captain position in retaliation for the Association's engaging in protected activity -- specifically, its refusal to extend Krajcsovics' probationary period and its grievance concerning his demotion.

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for having engaged in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. 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, however, need not be considered 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 us to resolve.

The Hearing Examiner found that there was no evidence that the Board was hostile toward the exercise of protected rights. We find no basis to disturb that conclusion. We reject the Association's contention that Cier was promoted because, as a volunteer firefighter, he had not been a union member. The Association offers no particularized arguments why another individual would have been a more logical candidate for the position. Cier scored highest on the lieutenant's test and, because the executive director/captain position includes the duties previously performed by the lieutenant, his selection by the Board is not unusual or indicative of anti-union animus.

The Association also relies on N.J.S.A. 40A:14-29, which requires that promotions be made from among paid members of the municipal fire departments. However, the Association acknowledges that there is a question whether the statute applies to fire districts as well as municipalities. In this posture, we cannot say that the Board's appointment of an unpaid member of the department evidences anti-union animus. Cf. In re Bridgewater

Ip., 95 N.J. at 247 (departure from established practice can be considered as evidence of hostility to exercise of protected rights).

Finally, we recognize that the executive director/captain position was created after the Association's refusal to extend Krajcsovics' probationary period and after the Association grieved his demotion. But that chronology does not give rise to an inference of anti-union animus. The record also supports the Hearing Examiner's conclusions that, prior to these events, the Board believed that the department's management would be improved if its organizational structure included a non-unit employee who could advise the Board on negotiations and operational matters. It also believed, prior to these events, that a supervisor would be more effective if he or she were not in the same negotiations unit as his or her subordinates. The record supports the Hearing Examiner's conclusion that the executive director/captain position was created to address these concerns. An employer's decision to employ a managerial executive or confidential employee does not establish hostility toward the exercise of protected rights by organized employees.

We also reject the Association's argument that the Board violated the Act by establishing a new position that subsumed the duties of the lieutenant title. The Association argues that the Board could not have prevailed in a unit clarification petition by prospectively assigning confidential duties to a lieutenant and,

therefore, it should not be able to "evade this restriction" by creating a position that is identical to the lieutenant position, except for new confidential duties.

We make no finding as to whether the Board would have prevailed in a unit clarification petition concerning the lieutenant position. The salient point is that the Board created a position which the Hearing Examiner properly found met the statutory definitions for confidential employee and managerial executive. The Association does not dispute that the executive director/captain functions as a managerial executive and acknowledges that the position includes new confidential duties. The Board was not obligated to file a unit clarification petition to establish that the executive director/captain position was not properly included in the unit. See Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) (person hired for new welfare coordinator position was a managerial executive; employer did not commit unfair practice by refusing to negotiate over terms and conditions of employment for the position); cf. State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246 (¶22112 1991) (employer risks committing unfair practice by unilaterally removing employee from unit). We therefore agree with the Hearing Examiner that the Board had a managerial prerogative to create the title. See Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 29 (1973); Ramapo-Indian Hills Bd. of Ed. v. Ramapo-Indian Hills Ed. Ass'n, 176 N.J. Super. 35, 47

(1980); Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985).^{8/}

Finally, the Association's reliance on Gloucester Tp. Fire Dist. No. 4, H.E. No. 92-19, 18 NJPER 109 (¶23053 1992), adopted P.E.R.C. No. 94-36, 19 NJPER 534 (¶24250 1993), is misplaced. In that case, the Hearing Examiner found that an employer violated 5.4a(3) when it refused to fill a full-time firefighter/mechanic position and hired a part-time non-unit mechanic.^{9/} As evidence of anti-union animus, the Hearing Examiner cited the need for the firefighter position, the employer's hostile response to grievances, and the timing of the decision: it was made during difficult negotiations and within two months after the Commission denied a clarification petition that would have eliminated the unit. The unit clarification petition had in turn been filed within three months of the employer's agreeing to a consent election.

Here, unlike Gloucester, there is no evidence that the Board and the Association were engaged in difficult negotiations or that the Board responded with hostility toward grievances

^{8/} The Association also argues that the Hearing Examiner erred in emphasizing that the lieutenant position had not been formally eliminated. We agree that this fact is not analytically significant. The Board had the right to create the executive director/captain position in addition to, or in lieu of, the lieutenant position.

^{9/} In view of our determination that the employer violated 5.4a(1) and (5), we did not decide whether 5.4a(3) was violated. 19 NJPER 536 n.2.

filed. That the withdrawal of the unit clarification petition was a consequence of establishing the executive director/captain position does not establish such hostility. Both actions reflect the Board's belief that it needed an employee to advise it on managerial policies and negotiations confidences and supervise the firefighters. As discussed above, that decision does not constitute hostility toward the exercise of protected rights by organized employees.

Finally, we turn to the Association's argument that the creation of the position without negotiations with the Association resulted in the unilateral transfer of unit work and therefore violated the Act. Preliminarily, while the Association maintains that the Hearing Examiner did not consider this argument, he did rule on, and reject, the Association's unit work claim. H.E. No. 98-12, 24 NJPER at 49. In concluding that the Board did not violate 5.4a(5), the Hearing Examiner noted that the lieutenant position was not abolished and that, consistent with the practice in para-military organizations, the executive director/captain is performing the lieutenant's duties as the next ranking officer.

In its answering brief, the Board states that there is no need for both the lieutenant and executive director positions. Instead, it has determined that the functions previously performed by the lieutenant, together with new duties, shall be performed by the executive director. Therefore, while we agree with the Hearing Examiner that the Board did not violate 5.4a(5), we do not

rely on the fact that the lieutenant's position has not been abolished.

An employer is generally obligated to negotiate with the majority representative before shifting work historically performed by one group of employees within a negotiations unit to other employees outside the unit. Burlington Cty., P.E.R.C. No. 98-122, 24 NJPER 215 (¶29102 1998), recon. den. P.E.R.C. No. 98-139, 24 NJPER 276 (¶29131 1998); North Arlington Bd. of Ed., P.E.R.C. No. 98-10, 23 NJPER 469 (¶28219 1997); Jersey City; Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991); City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988); Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1980); Rutgers, the State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980). However, where an employer has exercised its managerial right to reorganize the way it delivers government services it may, by necessity, be able to transfer job duties to non-unit employees without incurring a negotiations obligation. See, e.g., Maplewood Tp.; Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984).

The Board restructured the department and created the executive director/captain position because it determined that the supervisor in charge of the firefighters should also be

responsible for formulating policies and advising the Board on negotiations and grievances. In connection with that restructuring, it transferred duties previously performed by the lieutenant to the executive director/captain. Its action fits within the ambit of Maplewood, Freehold and related cases. Toms River Bd. of Ed., P.E.R.C. No. 92-71, 18 NJPER 62 (123027 1991), is distinguishable. In that case, the board eliminated a department chairperson position and, as here, transferred supervisory duties to non-unit supervisors. However, the board's action was not taken to change the way instruction was provided but to save money in the wake of a budget defeat. The elimination of the department chairperson position allowed the board to eliminate the stipend attached to that position and to assign more teaching periods to the former chairpersons -- with the result that further savings could be effected by eliminating several teaching positions. In contrast, the restructuring here was effected to improve the supervision and management of the department.^{10/}

For these reasons, we agree with the Hearing Examiner's conclusions that the Board did not violate 5.4(a)(1), (3), or (5). In the absence of exceptions, we also adopt his recommendation to dismiss the 5.4a(2) and independent a(1) allegations.

^{10/} After the creation of the executive director/captain position, there are five rather than four paid members of the fire department: the executive director/captain and four firefighters.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: June 25, 1998
Trenton, New Jersey
ISSUED: June 26, 1998

H.E. NO. 98-12

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

In the Matter of

BOARD OF FIRE COMMISSIONERS,
MONROE TOWNSHIP FIRE DISTRICT NO. 2,

Respondent,

-and-

Docket No. CO-H-96-290

MONROE TOWNSHIP FIREFIGHTERS
ASSOCIATION, IAFF LOCAL 3170,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Board of Fire Commissioners, Monroe Township Fire District No. 2, did not violate the Act by establishing an executive director/captain position. The creation of the new position did not result in the assignment of unit work outside the unit. The position was not created to avoid "entanglements" with the Monroe Township Firefighters Association, IAFF Local 3170, nor was it created as the result of union animus.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall 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.

H.E. NO. 98-12

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

In the Matter of

BOARD OF FIRE COMMISSIONERS,
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Appearances:

For the Respondent, McLaughlin, Bennett, Gelson & Cramer,
attorneys (Richard J. Shaklee, of counsel)

For the Charging Party, John F. Pilles, Jr., attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 29, 1996, the Monroe Township Firefighters Association, IAFF Local No. 3170 ("Association" or "Charging Party") filed an unfair practice charge (C2)^{1/} with the Public Employment Relations Commission ("Commission") against the Board of Fire Commissioners, Monroe Township Fire District No. 2 ("Board" or "Respondent"). The Association alleges that the Board

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to the Charging Party's exhibits, and those marked "D" refer to the Respondent's exhibits. Transcript citation 1T1 refers to the transcript developed on March 19, 1997, at page 1.

abolished the negotiations unit position of fire lieutenant/fire official and created the non-unit position of executive director/captain to "avoid entanglement" with the Association. The Association alleges that the Board's actions were motivated by anti-union animus.

The Association also alleges that the Board retaliated against Firefighter James Krajcsovics, Jr., by auditing his payroll records over a six year period rather than merely reviewing such records over a two year period. The Association alleges that the Board's actions violated sections 5.4(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").^{2/}

On October 21, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C1). On November 6, 1996, the Board filed its answer (C3) generally denying that its actions violated the Act. A hearing was conducted on March 19, 1997 at the Commission's offices in Trenton, New Jersey. The

^{2/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by June 18, 1997.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Board was a public employer and the Association was a public employee representative within the meaning of the Act (1T10).

2. In July 1990, James Krajcsovics, Jr., began his employment with the Board as a firefighter/fire inspector (1T27-1T28). He joined the Association at that time (1T28). When Krajcsovics started, the District was comprised of three firefighters and one lieutenant (1T29). Subsequently, the Board grew to four firefighters and one executive director/captain (1T29). At least since 1990, the lieutenant's position was included in the unit and so recognized by the Board (1T29). Before the Board formally established the lieutenant title, the compliment of paid firefighters consisted of three firefighters and one senior firefighter. Those four employees were included in the same negotiations unit. The senior firefighter began calling himself a lieutenant and the Board subsequently, formally created the lieutenant title (1T113).

3. During the negotiations leading to the collective agreement covering the period of January 1, 1994 through December 31, 1996, the Board felt that it was at a disadvantage because it had no full-time non-unit employees which it could rely upon for advice on the operational impact of the Association's negotiations demands (1T115; 1T160). The Board wanted a non-unit employee to rely on for advice (1T115).

4. The fire lieutenant's responsibilities include, in relevant part, the following:

Under the general supervision of the Chairman of Board of Fire Commissioners has responsibility for supervising the Fire Department for the control and extinguishing of fires, the rescue and evacuation of individuals from hazardous areas, the performance of emergency treatment, and the answering of ambulance calls. Has complete charge of the company equipment and personnel during a fire call, an ambulance call, and at headquarters. Takes the lead in fighting fires and exercises considerable independent judgment in deciding the best way to extinguish a fire. Work requires physical effort. Performs related work as required. [CP-3]

Krajcsovics performed the duties reflected in the job description while serving as lieutenant (1T33). No job description for the executive director/captain position was submitted into the record.

5. On April 13, 1994, after the position became vacant, Krajcsovics was promoted to lieutenant (1T34; 1T39; 1T95; CP-4; CP-5A; CP-5B). To obtain permanency in the lieutenant position, Krajcsovics had to serve a one year probationary period from his date of promotion, and successfully pass a written examination which

the Board was in the process of having prepared by an outside vendor (1T39; 1T119; CP-5A). The requirement to serve a one year probationary period was set forth in Article 16 of the collective agreement (1T46; CP-7; D-1).

6. Krajcsovics thought, based upon what he was told during the April 13, 1994 Board meeting, that he would be able to achieve permanent status as a lieutenant if he passed his one year probationary period and passed the written lieutenant's examination that would be given during the term of the probationary period (1T41). Other candidates were allowed to take the examination (1T39). Krajcsovics also thought that he would remain in the lieutenant's position if he just passed the examination and was not required to achieve the highest score (1T40). The examination was not given within Krajcsovics one year probationary period^{3/} (1T41-1T42; 1T121-1T122). While Krajcsovics never took the examination, he always understood that passing it was a condition of being made a permanent lieutenant (1T98).

7. Prior to its January 30, 1995 meeting, the Board contracted with Edcon, a private company, to develop and deliver the lieutenant's examination (1T159; D2). Prior to April 12, 1995, Edcon advised the Board that it would not be ready to administer the lieutenant's examination by April 12, 1995, the conclusion of Krajcsovics probationary period (1T119-1T120), and it scheduled the

^{3/} Krajcsovics one year probationary period ran from April 13, 1994 until April 12, 1995 (CP-4).

examination for April 29, 1995. Krajcsovics was aware of the scheduled date (1T51; 1T96; 1T110). In light of the delay in the administration of the examination, the Board asked Krajcsovics to agree to an extension of his probationary period so that the examination could be given within the term of the probationary period (1T120).

8. On April 12, 1995, the date on which Krajcsovics probationary period concluded, the Board held a regular meeting (CP-9A). During the closed session portion of the meeting, the Board discussed that Krajcsovics' probationary period would conclude before the administration of the examination (CP-9B). Since the collective agreement contained no provision allowing for the extension of the probationary period, the Board recognized that it needed the Association's agreement to effect an extension (CP-9B).^{4/} The Board also told Krajcsovics that it would seek permission from the union to extend the probationary period (1T45; 1T46; CP-9B). The Board told Krajcsovics that an extension of his probationary period would allow him to take the examination during the term of the probationary period (1T122; CP-9B). The Board told Krajcsovics that another option was for it to demote him immediately during the meeting, have him take the examination on April 29,

^{4/} The Board has asserted the position that the collective agreement contains a provision which permits the Board to extend the probationary period for 45 days, at the Board's discretion. The Board contends that that language was inadvertently omitted from the agreement due to a clerical error (CP-14).

evaluate the results and possibly re-promote him thereafter (1T120; CP-9B). While Krajcsovics indicated that he was not in favor of his immediate demotion, he made no other comment to the Board other than that he would discuss the matter with the Association (CP-9B). On or about April 12, 1995, the Board prepared a resolution seeking the Association's agreement to extend Krajcsovics probationary period until after the results of the examination were known (1T111; CP-8).

9. At all times relevant to the issues in this matter, Leonard LeBrun served as the on-site shop steward and Frank Turak was Association president (1T53; 1T158). Krajcsovics replaced LeBrun as shop steward in May 1995 (1T158). Prior to April 12, 1995, the Board had approached neither LeBrun nor Turak to request an extension of Krajcsovics probationary period (1T53). Turak works as a firefighter for another employer (1T121).

10. On April 21, 1995, the Association denied the Board's request to extend Krajcsovics probationary period (CP-10). The Association stated the following reasons for denying the Board's request: (1) the collective agreement does not provide for probationary period extensions; (2) the resolution appointing Krajcsovics to the lieutenant's position did not indicate that the promotion was temporary; (3) the April 13, 1994 minutes indicates that the Board chairman stated that Krajcsovics appointment was permanent; (4) since the examination could not be given within the one year probationary period, the Association felt that Krajcsovics no longer needed to take the test; and (5) since no evaluations were

performed during Krajcsovics probationary period, the Association assumed that he performed his duties as required (CP-10).

11. On April 27, 1995, the Board's attorney sent Krajcsovics a letter reading, in relevant part, the following:

As you know, on April 12, 1995, the Commissioners passed a Resolution agreeing to extend your probationary period as lieutenant in lieu of your demotion, contingent upon consent by IAFF, Local 3170. We are in receipt of a letter dated April 21, 1995 from your union indicating that they will not consent to the extension of your probationary period. Accordingly, on behalf of Monroe Fire District, you are hereby advised that you are being demoted to the position of firefighter under the terms of the Resolution and discussion at the meeting of April 12, 1995. This is effective April 12, 1995. [CP-11]

Notwithstanding the fact that CP-11 indicated an effective date of the demotion of April 12, 1995, Krajcsovics served in the lieutenant position until his receipt of CP-11 on April 27, 1995 (1T56).

12. During its May 10, 1995 Board meeting, the Association filed a formal grievance contesting Krajcsovics demotion to firefighter (CP-13). On May 15, 1995, the Board denied the Association's grievance (CP-14). On May 30, 1995, the Association moved the grievance to the arbitration level set forth in the contractual grievance procedure by applying to the Commission for a panel of arbitrators (CP-15).

13. During Krajcsovics probation period the Board became concerned with his performance as lieutenant. On January 30, 1995, Krajcsovics was asked to meet with the Board during the closed session portion of its regular meeting (D-2). The Board discussed

with Krajcsovics a number of problems it had with his performance (1T115-1T116; D-2). The Board was concerned with a lack of control over the whereabouts of on-duty personnel. No log was available for on-duty employees to sign in or sign out, consequently, it was difficult to know which firefighters were on duty. The Board asked Krajcsovics to keep a log (1T116). Board member Haftel had asked Krajcsovics to supply training schedules and other reports a number of times over several months (1T117; D-2). As of January 30, 1995, Krajcsovics had not submitted the information requested (D-2). Krajcsovics indicated he would comply with Haftel's request in the future (D-2). The Board told Krajcsovics that training was not being followed as listed in the Board's rules and regulations (D-2). The Board told Krajcsovics that it was his responsibility to try to minimize costs and overtime assignments (1T118; D-2). Krajcsovics had certified that an employee earned overtime on a particular day, however, the employee was actually not at work that day (1T118). The Commissioners believed that the inclusion of the lieutenants position in the collective negotiations unit caused a conflict of interest and impaired Krajcsovics ability to properly carry out his supervisory responsibilities (1T116; D-2). One of the District 3 board members telephoned Haftel and told him that all of his District 2 firefighters met at District 3 to conduct a union meeting during regular work hours (1T131). The Board believed that Krajcsovics was not acting as a spokesperson on behalf of the Board with the firefighters and that the Board's concerns were not being

addressed. The Board felt that Krajcsovics was not properly supervising the firefighters or establishing a rigid discipline (1T118; D-2). Although the Board had been advised by its attorney that if it were dissatisfied with Krajcsovics' performance, they could demote him within the probationary period or discipline him, it took no such action (1T44; 1T145-1T146; 1T149). By its April 12, 1995 meeting, the Board continued to be dissatisfied with Krajcsovics performance, specifically regarding his failure to submit reports and schedules and his ability to supervise (CP-9B).

14. On May 22, 1995, the Board filed a unit clarification petition with the Commission (CU-95-63) seeking the removal of the lieutenant position from the collective negotiations unit on the grounds that the lieutenant is a confidential employee within the meaning of the Act (CP-16). Since the Board had recently removed Krajcsovics from the lieutenant position and would soon name a new person to serve in that position, the Board thought it would be a good time to seek the exclusion of the position from the unit (1T123-1T124). On August 1, 1995, the Board amended the petition seeking the exclusion of the position from the unit on the grounds that the lieutenant is a supervisor within the meaning of the Act and should not be included within a unit comprised of non-supervisory employees (CP-17B). The Association opposed the petition arguing that the lieutenant has never sat on the employer's negotiating team, been provided regular access to or knowledge of confidential labor relations documents, been provided with advanced

knowledge of bargaining proposals, attended executive sessions regarding negotiations, or processed grievances on behalf of the employer (1T98; CP-17). Krajcsovics never viewed himself as a confidential employee while serving as lieutenant (1T68).

15. On November 29, 1995, believing that the Board could not show that the lieutenant had been performing confidential duties prior to the filing of the petition, the Board withdrew the unit clarification petition (1T132; CP-18). Additionally, the Board had decided to create the position of executive director/captain, which would perform both supervisory and confidential duties (CP-18).

16. The Board established the position of executive director/captain (CP-21). In or about July 1995, the Board appointed William Jackson as acting lieutenant (1T67; CP-22). On or about January 14, 1996, the Board hired George Cier to serve as executive director/captain and demoted Jackson to firefighter (1T133; D-14; CP-22). The Board retained the position of lieutenant, however, it kept the position vacant since those duties were subsumed within the executive director/captain position (1T76; 1T33-1T34; CP-22). The Board also appointed Cier to serve as the Board's fire official (CP-20B).

17. While Cier had not been included in the collective negotiations unit prior to his appointment as executive director/captain, he has been a member of the volunteer fire company in the District since 1987 (1T140). Along with two other unit employees and one other non-unit employee, Cier took the

lieutenant's examination and achieved the top score (1T79-1T80; 1T124).

18. Cier performed the lieutenant's duties as set forth in CP-3 and was assigned additional responsibilities. He wrote and implemented a policy concerning fire station visitors (1T135; D-11). Cier initiated a proposal to the Board calling for the adoption of a detailed uniform code (1T137-1T138; D-13). He has issued oral and written warnings to firefighters concerning tardiness and attendance at training sessions (1T139-1T141; D-15; D-16; D-17). Cier has participated on behalf of the Board in collective negotiations. He has attended all of the Board's negotiations strategy sessions and has advised the Board concerning its negotiations proposals. He provided the Board with technical information regarding Association demands (1T142). Cier has advised the Board regarding appropriate grievance responses (1T142-1T143).

19. During 1995, Commissioner Helfer was responsible for issuing paychecks to employees. Helfer died in December 1995 (1T99). In or about February 1996, a concern arose regarding whether Krajcsovics had been overpaid (1T87-1T88; 1T100). The Board undertook a review of Krajcsovics pay records. Subsequently, Krajcsovics reviewed the Board's analysis of his salary. On March 4, 1996, Krajcsovics sent a letter raising certain discrepancies he found with the Board's salary analysis (D-18). A dispute arose regarding whether the Board should go back as far as six years in analyzing Krajcsovics salary. Ultimately, the parties amicably

resolved all issues pertaining to the analysis of Krajcsovics salary (1T88; 1T102).

ANALYSIS

In the unfair practice charge (C-2), the Charging Party states, in part, that:

...the creation of Executive Director/Captain by the Fire District is merely a subterfuge to avoid the statutory and contractual obligation imposed upon the public employer to negotiate with the union.

In its opening statement during the hearing, the Charging Party states, in part, the following:

Suffice it to say that the basis of this case is the abolition of job classification, which prior to the filing of a grievance pursuant to arbitration and the filing of litigation within the Superior Court of New Jersey has prompted the public employer to abolish the position.

Ordinarily...that decision is managerial and therefore non-arbitrable because it is not negotiable.

In this matter, the Charging Party alleges that the decision to abolish the position and create in its stead a new position with similar duties known as Executive Director/Captain and couching it as a confidential employee position was intended to avoid the entanglement with the union and, therefore, was anti-union animus.
[1T11-1T12].

Preliminarily, certain clarifications must be set forth. The Board never eliminated the lieutenant's position. After removing Jackson from the lieutenant's position in or about January

1996, the Board chose to retain the position on its organizational chart and keep it vacant. Thus, there is no remedial issue regarding the reestablishment of the lieutenant's position; it still exists.

The Association argues that by creating the Executive Director/Captain position, the Board has violated subsections (a) (3) and, derivatively, (a) (1). I disagree. Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. 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, however, need not be

considered 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 us to resolve.

The record in this case contains no direct evidence that protected conduct was a substantial or motivating factor in the Board's action. While the Association was engaged in protected activity which was known to the Board, I find that the Board was not hostile toward the exercise of such protected rights. There is no evidence that the Board has reduced its "entanglements" with the Association. The Board has processed the Association's May 10, 1995 grievance contesting Krajcsovics demotion up to, and including, the arbitration level.^{5/} The Board has engaged in successor collective negotiations with the Association.

The Board was dissatisfied with the quality of the supervisory/managerial work performed by Krajcsovics. It believed that Krajcsovics' poor performance as a supervisor or manager was due to the conflict of interest Krajcsovics experienced as the result of his title being included within the collective negotiations unit. With the lieutenant position included in the unit, the Board felt it could not rely upon the incumbent employee

^{5/} Of course, any claim that the Board violated the Act by the manner in which it demoted Krajcsovics on April 27, 1995 or processed the resulting grievance is time barred and, consequently, outside the scope of this unfair practice charge. N.J.S.A. 34:13A-5.4c.

to advise it concerning daily operational matters and issues arising during the course of collective negotiations with the Association. What the Board sought and obtained through the creation of the executive director/captain position was a non-unit supervisor and manager; someone whose loyalty ran solely to the Board. Accordingly, I find that the Board was not hostile toward the exercise of employees' protected rights or the Association's existence.

Within the relevant time frame of the filing of the charge, no unit employees were harmed as the result of the creation of the executive director/captain position. In or about July 1995, Jackson succeeded Krajcsovics as lieutenant. In January 1996, Jackson was still serving in his probationary period and, pursuant to the collective agreement, could be demoted at will by the Board. The Association has not contested Jackson's demotion nor claimed any impropriety with respect thereto. Consequently, there can be no subsection (a) (3) violation in the absence of adverse action on the part of the Board. Bridgewater. See also Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); City of Newark, H.E. No. 88-3, 13 NJPER 621 (¶18233 1987), adopted P.E.R.C. No. 88-24, 13 NJPER 727 (¶18274 1987).

The Association has alleged that the creation of the executive director/captain position has resulted in the removal of unit work in violation of section 5.4(a) (5). The executive director/captain position is a different job than that of

lieutenant. The executive director/captain develops and implements policy on behalf of the Board. Cier established the policy concerning visitors at the fire station and recommended a uniform standard to be adopted by the Board. The executive director/captain is a supervisor within the meaning of the Act. In fact, he is also a managerial and confidential employee within the meaning of the Act. Cier has written a number of employee reprimands concerning attendance at scheduled training sessions. While the lieutenant was perceived as the supervisor, the evidence indicates that the lieutenant served more as a "lead" employee than a supervisor within the meaning of the Act. There was no evidence that Krajcsovics exercised any authority that had placed him in an actual conflict of interest with the rank and file firefighters.

It is unclear whether the executive director/captain actually sat on Board's negotiations team, however, Cier attended all of the negotiations strategy sessions and advised the Board concerning its negotiations proposals. He provided the Board with technical information regarding Association demands and advised the Board regarding appropriate grievance responses.

The Board did not abolish the lieutenant position, rather, it decided to keep the position vacant. In the normal para-military organizational structure, if an officer is not present, the next higher ranking officer takes charge and performs the subordinate's duties. Such is the case here. Thus, although the executive director/captain position performed the lieutenant's duties, it was

assigned additional responsibilities that make the executive director/captain position different from the lieutenant's position. Consequently, I find that the Board's creation of the executive director/captain position has not resulted in the assignment of negotiations unit work to a non-unit employee and the Board has not violated subsection (a) (5).

In adjudicating an alleged violation of section 5.4(a) (2) of the Act, the Commission has held in order for a violation to be found an employer's actions must constitute pervasive control or manipulation of the employee organization itself. N. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). None of the Board's actions in this case constitute such control or manipulation of the employee organization. Accordingly, I find no subsection (a) (2) violation.

The Association alleges that the Board violated section 5.4(a) (1). An employer violates subsection (a) (1) if its action tends to interfere with an employee's statutory right and lacks a legitimate and substantial operational justification. Matawan-Aberdeen Reg. School District, H.E. No. 89-41, 15 NJPER 356 (¶20159 1989), adopted P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989). The Board has an inherent managerial prerogative to create new positions. Ramapo-Indian Hills Education Assn., 176 N.J. Super. 35 (1980). The creation of new positions does not tend to interfere with employees' statutory rights. The Board also has a managerial prerogative to choose not to fill a vacant position. Piscataway

Op., P.E.R.C. No. 86-10, 11 NJPER 456 (¶16161 1985). Moreover, as discussed above, the Board had a legitimate operational reason for creating the executive director/captain position. Accordingly, I find no independent violation of section 5.4(a)(1).

The Association also alleges in its charge that the Board's audit of Krajcsovics payroll records encompassing a six year rather than a two year time frame, was in retaliation for Krajcsovics filing a grievance contesting his demotion from lieutenant to firefighter. The parties amicably resolved their dispute concerning the audit of Krajcsovics salary. Consequently, I find no violation of the Act arising from this issue.

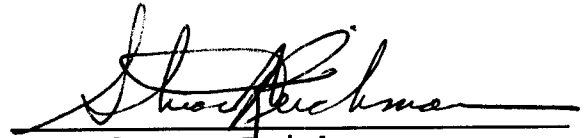
Accordingly, based upon the entire record and analysis, I make the following:

CONCLUSIONS OF LAW

1. The Board of Fire Commissioners Monroe Township Fire District Number 1 did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (5) when it created the position of executive director/captain.

RECOMMENDATIONS

I recommend that the Commission ORDER that the complaint be dismissed.


Stuart Reichman
Hearing Examiner

Dated: October 29, 1997
Trenton, New Jersey