

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Canandaigua in the unit represented by the Canandaigua Firefighters Association, Local 2098, IAFF that the City of Canandaigua will:

1. Stop unilaterally transferring the exclusive bargaining unit work of driving and operating City owned fire trucks, pumpers, ladder trucks and other vehicles operated by the fire department, the regular day-to-day duties involved in the maintenance of fire stations and grounds, testing and cleaning fire apparatus and equipment in the fire houses, testing fire hydrants, fire inspections and firefighting services involving the work at-issue herein in the Town of Canandaigua;
2. Forthwith reinstate unit employees to their former positions;
3. Make Association unit employees whole for wages and benefits, if any, lost as a result of the unilateral transfer of unit work defined in paragraph one, above, with interest at the currently prevailing maximum legal rate until such time as it offers to reinstate those unit members whose employment with the City was terminated; and
4. Forthwith restore such work to the Association's bargaining unit.

Dated

By
on behalf of the City of Canandaigua

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CANANDAIGUA FIREFIGHTERS ASSOCIATION,
LOCAL 2098, IAFF,**

Charging Party,

CASE NO. U-29660

- and -

CITY OF CANANDAIGUA,

Respondent.

**CHAMBERLAIN D'AMANDA (MATTHEW J. FUSCO of counsel), for Charging
Party**

**MICHELLE O. SMITH, CORPORATION COUNSEL and BOND, SCHOENECK
& KING, PLLC (TERRY O'NEIL and HOWARD M. WEXLER of counsel), for
Respondent**

DECISION OF ADMINISTRATIVE LAW JUDGE

On December 4, 2009, the Canandaigua Firefighters Association, Local 2098, IAFF (Association) filed an improper practice charge alleging, as amended, that the City of Canandaigua (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred exclusive bargaining unit work outside the bargaining unit, eliminated the line captain position and reassigned the duties to remaining firefighters, and eliminated the fire inspector position and assigned those duties outside the unit. The City filed an answer denying that its conduct violated the Act and raising affirmative defenses.

A hearing was held on April 27, 2010, at which both parties were present and represented. Both parties filed briefs.

FACTS

The City's fire department is composed of paid firefighters and volunteer firefighters. In 2008, there were fifteen paid firefighters and in 2009, with the retirement of one firefighter, the paid contingent was reduced to fourteen.

Gerald F. Boock, III, a paid firefighter with the City and president of the Association, testified that Kay James, the city manager, met with the paid firefighters and told them of impending layoffs in 2010. On December 4, 2009, in response to James' news, Boock wrote Matthew Snyder, chief of the fire department, indicating that

[a]s President of the Canandaigua Firefighters Local 2098 I write to formally request that you not take the steps called for by the City Council Budget Resolution passed on December 3, 2009 with regard to permanent layoffs of members of this bargaining unit.¹

As Boock explained in his letter to the chief, it was his understanding that the budget resolution called for the elimination of five permanent paid positions, one of which was then vacant, as of January 1, 2010, and the elimination of four additional paid positions as of July 1, 2010.

Firefighters Rockford Collett, Jason Harris, and George Smith were notified by letters dated December 7, 2009 sent by James that as a result of the passage of the City Council's 2010 budget on December 3, 2009, their positions were no longer funded and they would be terminated effective December 31, 2009.

Boock testified that in addition to the elimination of paid firefighter positions, a captain position and all fire inspector positions were eliminated. In addition, paid firefighters were no longer assigned to fire station 1.

¹Joint Exhibit 3.

Prior to January 1, 2010, station 1 was staffed by two paid firefighters per shift and station 2 was staffed by one paid firefighter per shift. Station 1 is now manned by volunteers only.

Station 1, located at 335 South Main Street in the City, has an upstairs area consisting of a volunteer meeting room, two bathrooms, a coat closet, a fire prevention office and offices for two volunteer fire companies. The upstairs portion of station 1 can be used by the public. Arrangements to rent the space are handled by a volunteer fire captain.

The downstairs portion of station 1 consists of four vehicle bays, living quarters, a locker room, laundry room, workout room, the chief's office, secretary's office, fire inspectors' office, Association office and a cascade room where the self-contained breathing apparatus (SCBA) are filled. Paid firefighters have, according to Boock, exclusively maintained the downstairs area of station 1 and the grounds of station 1. Paid firefighters have never had responsibility for the upstairs area. Boock also testified that paid firefighters had exclusively performed the work of maintaining the City's fire department vehicles and equipment, driving the fire vehicles, operating the equipment at fire scenes, and testing fire hydrants.

Prior to January 1, 2010, the City's fire vehicles and equipment kept at station 1 consisted of engine 211, tower ladder 281, reserve ladder 282, and rescue 261. On a daily basis, according to Boock, paid firefighters at station 1 inspected all the vehicles and equipment and made certain that all the SCBA bottles were full. On a weekly basis, paid firefighters checked fluids, belts, drained the air tanks to make sure no water was in them, ran the pump, exercised the gates and valves, operated the primer and the generator and drained the pump so it would not freeze in the winter.

While department of public works (DPW) employees and contractors perform major equipment repairs and maintenance, such as changing oil or replacing tires, Boock testified that only paid firefighters worked on the fire apparatus, using daily and weekly check sheets.

The Canandaigua Fire Department Career Personnel Rules and Regulations,² applicable to paid firefighters and not volunteer firefighters, provide clear and very explicit direction as to the responsibility of paid firefighters at both stations 1 and 2 "for the custody, care and maintenance of all buildings, equipment and supplies."³

The daily work schedule set forth in the rules and regulations instructs firefighters to inspect all fire department property, to sweep and dust floors, wipe counter tops and sinks, empty waste baskets, wash dishes, vacuum the day room and study, and wash and fold laundry. Firefighters, on a daily basis, also read and record fire alarm voltages and currents, wipe off fire apparatus, change batteries on radios and cell phones as necessary, and perform radio tests. The rules and regulations set forth specific duties for each day of the week from Monday through Friday. The duties assigned to specific days of the week reiterate the daily duties described in the rules and regulations, but are even more specific; for example, on Monday, firefighters perform a weekly apparatus check, Tuesday, cut the lawn, Wednesday, portable radios are to be checked, Thursday firefighters are to check the oil and radiator on the emergency diesel tank as well as test

²Joint Exhibit 9.

³*Id.* at 105.10.

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the building ~~sprinkler system and extinguishers~~, and on Friday, firefighters check the SCBA apparatus and record their findings. These are but a few examples of the responsibilities of paid firefighters for maintaining the fire department's vehicles, buildings and property. Boock testified that the duties set forth in the Career Personnel Rules and Regulations were duties performed only by paid firefighters. No other City employees and no outside contractors, according to Boock, ever maintained the interior and exterior of station 1 and/or maintained and operated the fire department's vehicles and equipment. Prior to 2010, volunteer firefighters never performed those tasks. On cross-examination, Boock admitted that DPW employees performed repair work at station 1, adding that "sometimes fixing things go out of the scope of our expertise. I mean ... we are not all plumbers. We are not masons."⁴

With regard to hydrant testing, paid firefighters, according to Boock, have been doing that work for at least the last ten years. Boock explained that the paid firefighters are responsible for removing the hydrant caps, lubricating the threads and allowing the water to run until it runs clear. Article 12 of the parties' collectively negotiated agreement provides that effective January 1, 1995, the fire department rules and regulations "shall include the annual testing of fire hydrants as a firefighter work responsibility."⁵ Boock testified that DPW is responsible for maintaining the hydrants, not testing them. Since January 1, 2010, however, the DPW has been responsible for testing the hydrants. Paid firefighters no longer perform that task.

⁴Transcript, pp. 68-69.

⁵Joint Exhibit 1.

On cross-examination, Boock explained that if a firefighter, while testing, discovered a broken hydrant, DPW employees would be notified to fix it. When asked if DPW employees tested hydrants, Boock explained that they would only run water from the hydrants to rid the system of bacteria.

With regard to emergency medical services (EMS) calls, Boock testified that prior to January 1, 2010, paid firefighters responded only to Advanced Life Support (ALS) emergency calls in the City. Boock explained that "[o]riginally we responded to all emergency calls, but it got to be too much work, so the City cut us back to just the ALS level of calls."⁶ According to Boock, since January 1, 2010, "we have been further cut back...to practically nothing."⁷ Boock testified that prior to January 1, 2010, volunteer firefighters never responded to ALS calls. One volunteer firefighter is now responding to those calls.

Boock identified the Canandaigua Ambulance Service as the responding ambulance service for the City, but denied that firefighters provided backup service only. Boock testified that firefighters were first responders, that they arrived at the scene before the ambulance service eighty percent of the time, and that they provided life saving services such as oxygen and glucose, performed CPR and recorded vital signs. Boock admitted that the ambulance service provides the same type of emergency medical service (EMS) as the paid firefighters. Boock also admitted that there were times when an EMS call would be received through dispatch and that paid

⁶Transcript, p. 48.

⁷Transcript, p. 48.

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firefighters could not respond because of a lack of available trained personnel and that on those occasions the ambulance service responded.

Boock, when asked if during his tenure as fire inspector he ever issued a building permit or performed a minimum housing inspection, answered "No. That was done by City Hall."⁸ Boock testified that he was asked to do a planning review with respect to new construction but only as it concerned fire safety.

Robert Case also testified on behalf of the Association. Case was hired by the City as a paid firefighter in 1972. In 1976 he was appointed as a fire inspector and in 1989 he became a captain. In 1992 Case retired, but in January 2002 returned to the City as fire chief. Case served as fire chief until January 3, 2009, when he again retired.

Case testified that when he was hired in 1972 and throughout his employment, volunteers did not drive City-owned vehicles or operate equipment. According to Case, when he was chief, some volunteer firefighters were trained on a new ladder truck to operate the controls of the bucket on the end of the ladder, so that in the event a paid firefighter became incapacitated someone would be able to lower the ladder. Volunteers, however, never operated the ladder outside of training, according to Case.

When asked about the responsibilities of paid firefighters at station 1, Case testified that they checked and maintained the apparatus, made certain the apparatus was functional, cleaned the station, and mowed the lawn, all in accordance with a set schedule of tasks. Plumbing and electrical work, according to Case, were generally performed by DPW employees or contractors. Major repairs to station 1 were contracted out.

⁸Transcript, p. 79.

Case testified that there was a time when DPW employees tested hydrants, although not on an annual basis. Prior to his becoming chief, the fire department assumed responsibility for testing. Paid firefighters began testing hydrants because the department needed to show, for insurance purposes, that hydrants were being tested annually.

Case was asked if, as a fire inspector, he ever did any minimum housing inspections. He explained that in "later years that became part of the fire inspector's duties, to look at buildings that you were inspecting for those types of complaints; however, the fire inspector's primary job was to do actual fire inspections."⁹

Lee DeRuyter, a former fire captain and now a paid firefighter, also testified on behalf of the Association. DeRuyter was a captain from 1989 to 2009, and during that time earned approximately \$6,000.00 more annually than a firefighter. He was also a fire inspector and served on two occasions as acting fire chief.

As a fire inspector, DeRuyter inspected places of public assembly and, in 2008 or 2009, began inspecting businesses. Fire inspectors also issued permits for tents at events or festivals. DeRuyter was paid straight time when he was off duty performing fire inspections. When asked if he had any responsibilities for building code enforcement, DeRuyter responded "I don't think we had any enforcement powers but we did look at buildings with respect to building codes...the whole idea of the fire inspection is to determine if they meet the building code."¹⁰ The building codes and fire

⁹Transcript, p. 108.

¹⁰Transcript, p. 119.

inspection codes, according to DeRuyter "cross over".¹¹ DeRuyter explained that "fire inspection may require certain exits and if they don't have the proper exit then it's a violation of the building code."¹² DeRuyter admitted that he did not issue building permits or inspect rental housing units for minimum housing standards.

DeRuyter testified as to his duties as a captain, explaining that each captain had a specific area. DeRuyter's area was communications. Other duties included making sure daily tasks were completed and filing reports. Captains were in command at fires until the fire chief or assistant fire chief arrived. Since January 1, 2010, and the elimination of the captain position, the senior firefighter on a shift is now responsible for incident command until that command is transferred to the chief or assistant chief. The senior firefighter is also responsible now for fire reports, daily maintenance activities, shift training, contact with the chief, and acting as chief as required,¹³ all duties formerly performed by the fire captain.

Jeffrey Harloff, director of emergency management and County fire coordinator, City manager James, and fire chief Matthew Snyder testified on behalf of the City. Harloff coordinates the services of 28 fire departments and 19 ambulance corps in Ontario County. He is responsible for the Fire Service Mutual Aid Plan and the County's Comprehensive Emergency Management Plan. The City's fire department has participated in the mutual aid plan since February 2009. The City has not restricted the service of other fire companies providing mutual aid when necessary. Volunteer

¹¹ *Id.*

¹² *Id.*

¹³ Joint Exhibit 11.

companies provide mutual aid to the City, providing both manpower and their own equipment.

James testified that the budget planning for 2009 began in the fall of 2008. At that time, the City Council indicated that it was looking for some significant structural changes to reduce costs in 2010. James does three-year financial projections and at some point in the 2009 budget process it became apparent that there would be a budget shortfall in 2010. In response, James proposed a number of personnel reductions, two new revenue sources and a tax increase.

James was shown a copy of City Council Resolution 2009-176, titled "A Resolution Authorizing the City Manager to Enter Into A Subcontract With The Cheshire Volunteer Fire Department,"¹⁴ along with the subcontract itself, and asked to explain its significance. James testified that

We were reducing the number of firefighters and it was necessary then to reduce the size of the fire district to make sure that we could adequately provide fire protection. This subcontract took a portion of the Town fire district, which is approximately half of the total area and assigned it to the Cheshire Volunteer Fire Department to cover on behalf of the City so that we could fulfill our contract with the Town.¹⁵

James explained further that the City had entered into a contract with the Town of Canandaigua to provide fire protection services within certain areas of the Town. The agreement between the City and the Town was for five years. The contract between the City and the Cheshire Volunteer Fire Company was to cover the remaining two years of the City's obligation to the Town.

¹⁴Joint Exhibit 7.

¹⁵Transcript, pp. 146-147.

The City's "Fire Services Sub-Contract Agreement"¹⁶ with the Cheshire Volunteer Fire Company calls for the City to pay the volunteer company as follows: March 1, 2010, \$214,176.00; March 1, 2011, \$204,88.00.¹⁷ The money paid to Cheshire under its subcontract with the City is, according to James, a portion of the amount of money the Town paid the City for fire protection services.

James testified that the code enforcement officer is responsible for the enforcement of the New York State Uniform Fire Prevention and Building Code which includes "issuance of plan review, issuance of building permits, construction inspections and also enforcement of the City's municipal code, which include rental housing inspections, minimum housing standards, the grass and weed ordinance, junk vehicles, enforcement of the garbage regulations and similar codes."¹⁸ The City currently employs two full-time and one part-time code enforcement officers. They, according to James, have more training than fire inspectors. Their duties encompass the work previously done by fire inspectors.

On cross examination, James testified that some volunteer firefighters have received training in driving the City's fire vehicles and that, in anticipation of further layoffs among paid firefighters, the City is increasing the number of volunteers who will be able to drive the vehicles and operate the equipment.

Snyder testified with regard to mutual aid. As a participating member of the County Mutual Aid Plan, the City is obligated to provide whatever resources are

¹⁶*Id.*

¹⁷*Id.*

¹⁸Transcript, pp 159-160.

requested. When volunteer companies respond to requests from the City for mutual aid they drive and operate their own equipment.

Prior to September 2009, according to Snyder, the City began discussing ways to reduce its response to EMS calls. Snyder described five levels of EMS calls, lettered A through E. Prior to September 1, 2009, the City fire department automatically responded to all ALS criteria calls, i.e. C, D and E. It was later determined, however, that the fire department would respond to C level ALS calls only if specifically requested to do so by the Canandaigua Emergency Squad. Eliminating automatic response to C level calls has reduced the department's EMS calls by 66 percent.

Snyder testified that the primary responder with respect to EMS calls in the City is the Canandaigua Emergency Squad. As a first responder agency, the fire department compliments the Squad in providing medical service. Prior to January 1, 2010, eight of fourteen paid firefighters were trained to provide EMS services.

Snyder testified that there are currently ten paid firefighters and thirty active volunteer firefighters. Snyder estimated that ten to twelve volunteers can operate rescue 261, and six or seven can operate engine 212. He did not know how many volunteers were trained to operate ladder 282.

On February 11, 2010, Snyder issued a memorandum to all firefighters informing them that effective immediately "any time the Canandaigua Fire Department is dispatched for a structure fire or possible structure fire, the senior on duty career firefighter shall immediately contact dispatch via radio to request assistance from the Veterans Administration (VA) Fire Department."¹⁹ The VA hospital has its own fire

¹⁹Charging Party Exhibit 4.

department. The memorandum, according to Snyder, represents a change in that it mandates an immediate request of the VA for resources instead of leaving the request to the discretion of the senior firefighter in charge. This change, Snyder testified, is attributed to the manpower reductions in the fire department.

DISCUSSION

In *Town of Riverhead*,²⁰ the Board stated:

Under the framework established in *Niagara Frontier Transportation Authority*...[citation omitted], there are two essential questions that must be determined when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the work at-issue exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications. When there is a significant change in job qualifications, however, we must balance the respective interests of the public employer and the unit employees to determine whether §209-a.1(d) of the Act has been violated.²¹

In *Manhasset Union Free School District*,²² the Board reviewed prior decisions discussing discernible boundaries and concluded that

[t]he criteria articulated in earlier Board decisions provide clear guidance for determining the discernible boundary, if any, of a past practice in transfer of unit work cases: the nature and frequency of the work performed, the geographic location where the work is performed, the employer's explicit or implicit rationale for the practice, and other facts establishing that the at-issue work has been treated as distinct from work performed by nonunit personnel.²³

²⁰42 PERB ¶3032 (2009).

²¹*Id.* at 3119.

²²41 PERB ¶3005 (2008) *affirmed sub nom. Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 123, 42 PERB ¶7004 (3d Dept 2009), *on remitter*, 42 PERB ¶3016 (2009).

²³*Id.* at 3025.

The Board further endorsed the ongoing application of the "reasonable relationship requirement, wherein the Board will examine the relationship between the proposed discernible boundary and the duties of unit employees."²⁴ The reasonable relationship test, the Board explained, is relevant to a determination of whether unit employees had an expectation that the past practice would continue.

The City argues that the work at issue is firefighting and that the Association has never exclusively performed that work. The Association has never claimed exclusivity over the work of fighting fires. Instead, it defines the at-issue work as driving and operating the fire trucks, pumpers, ladder trucks and other vehicles owned and operated by the City's fire department, the regular day-to-day duties involved in the maintenance of the fire stations and grounds, and testing and cleaning fire apparatus and equipment in the houses, as well as the testing of fire hydrants.²⁵

The City argues that the Association's description of unit work consists of tasks incidental to the primary work of firefighters, citing to the Board's decision in *Village of Rye Brook*.²⁶ The Administrative Law Judge in *Village of Rye Brook*²⁷ applied a core component analysis in determining that a firefighter's job is being ready "to respond to fire and fire-related emergencies and questions"²⁸ and that "the function of 'staffing' the

²⁴*Id.*

²⁵The Association's allegations with regard to EMS calls, the elimination of the captain's position, the fire inspection work and transfer of duties to the Cheshire Volunteer Company are addressed separately.

²⁶39 PERB ¶3028 (2006).

²⁷39 PERB ¶4575, at 4651 (2006).

²⁸*Id.*

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fire house...is incidental to that core job duty."²⁹ It was the core component analysis that the Board adopted in *Rye Brook* in affirming the decision below. In *Manhasset Union Free School District, supra*, however, the Board soundly rejected the core component analysis, finding that it constituted an abandonment of the Board's past practice analysis as the essential test for determining whether a discernible boundary exists. The decision in *Village of Rye Brook* therefore does not control.

The record in this case demonstrates that only paid firefighters drove and operated City fire department vehicles and were trained to do so. The Association's exclusivity over this work is not destroyed by DPW employees changing the oil in the vehicles and driving the vehicles to and from the firehouse. Neither is the Association's exclusivity destroyed by the maintenance and repair work performed by contractors. The at-issue unit work is driving and operating City fire department vehicles in the course of the performance of unit employees' work as firefighters.

The City argues that volunteer fire companies responding to calls for mutual aid drive fire equipment and operate that equipment at a fire scene, thus destroying the Association's exclusivity. At issue is not driving or operating any fire fighting equipment, but driving and operating City-owned fire fighting equipment. The facts demonstrate that only paid firefighters were trained to drive and operate the City's equipment but for a single instance where, according to Case, volunteers were trained to lower the ladder on the ladder truck in the event that a paid firefighter became incapacitated. Case testified that volunteers never operated the ladder outside of the discrete training he

²⁹*Id.*

described earlier. His testimony in this regard is uncontradicted. There is no evidence in this record that volunteer firefighters received training in the operation of departmental vehicles prior to the layoff of paid firefighters.

The City also argues that the Association does not have exclusivity over the operation of the vehicles at a fire scene. It bases this assertion on Boock's testimony regarding the role of the second truck on the scene of a fire, where in response to the question, "Hooking up to a hydrant isn't something volunteers would do?",³⁰ he responded "Oh, if they were there, yeah".³¹ Hooking a hose to a hydrant does not destroy the Association's exclusivity to the operation of the City's pumper and ladder trucks.

The record also demonstrates that only paid firefighters maintained the fire houses and grounds and tested and cleaned fire apparatus and equipment in the fire houses. Plumbing repairs or masonry work on the houses, or other repairs requiring the expertise of a DPW employee or a contractor does not destroy the Association's exclusive right to perform the work described herein. The exclusive work is the routine maintenance of the fire houses, grounds, and equipment in the houses, in accordance with duties set forth in and required by the City's fire department Career Personnel Rules and Regulations.

The Association has also demonstrated that it has exclusivity over the testing of fire hydrants. Case testified without contradiction that there was a time when DPW employees tested hydrants, however, some time prior to his becoming chief in 2002, the

³⁰Transcript, p. 89.

³¹*Id.*

fire department assumed responsibility for testing, as there was a need to demonstrate to insurers that hydrants were tested annually. The DPW did not test fire hydrants annually. That the paid firefighters have been testing hydrants since 2002 is a sufficient period to find that they have exclusivity over that work regardless of what DPW employees may have done prior to the need for certified annual testing.³²

As all of the above exclusive bargaining unit work has been unilaterally transferred to volunteer firefighters and, in the case of hydrant testing, to DPW employees, the City will be found to have violated §209-a.1(d) of the Act unless its defenses have merit.

The City argues that it acted consistent with rights granted to it by the management rights clause contained in the parties' collectively negotiated agreement (agreement) and that it has, therefore, satisfied its duty to bargain. Article 2 of the agreement covering the term 2009 through 2010³³ provides as follows:

Management Rights

The City retains the sole right to manage the Fire Department and to direct the working force, including the methods to be used in training, fire prevention, firefighting, and the operation and maintenance of equipment and to maintain order and efficiency in the Fire Department including the right to evaluate and discipline employees subject only to such regulations or procedures as may be provided in this Agreement. Any and all rights, powers and authority the City had prior to entering into this agreement are

³² See, *County of Nassau*, 24 PERB ¶¶3029 (1991) (17 months was sufficient time to establish a past practice of 40 minute breaks, although the breaks were shorter during prior years); *City of Rochester*, 21 PERB ¶¶3040 (1988), confirmed sub nom. *City of Rochester v New York State Pub Empl Rel Bd*, 155 AD2d 1003, 22 PERB ¶¶7035 (4th Dept 1989) (13 months sufficient to establish exclusivity; *County of Onondaga and Sheriff of the County of Onondaga*, 28 PERB ¶¶4541, affd, 29 PERB ¶¶3046 (1996) (Director held that performance of work for 12 months established exclusivity).

³³ Joint Exhibit 1.

retained by the City, except as expressly and specifically abridged, delegated, granted or modified by this agreement.

The transfer of exclusive bargaining unit work constitutes a mandatory subject of bargaining.³⁴ A waiver of the right to bargaining the loss of unit work must be clear and unmistakable and contract language purporting to establish a waiver must demonstrate "the intentional relinquishment of a known right with both knowledge of its existence and or intention to relinquish it [citation omitted]"³⁵

In *Garden City Union Free School District*,³⁶ the Board found that the parties' negotiated management rights clause constituted a waiver of the union's right to negotiate the transfer of unit work, where it contained language granting the District the right to "contract for the performance of any of its services." In its decision, the Board cited to an earlier decision in *County of Livingston*,³⁷ where it similarly held that the union waived its right to bargain the transfer of unit work based upon the parties' agreement granting the County the right to determine "whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this Agreement."³⁸ In *County of Allegany*,³⁹ the Board found a waiver of the union's right to negotiate the assignment of unit work to nonunit

³⁴*Niagara Frontier Transit Auth*, 18 PERB ¶3083 (1985).

³⁵*Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO, et al v Newman*, 88 AD2d 685, 15 PERB ¶7011, at 7021 (3d Dept 1982), *appeal denied*, 57 NY2d 775, 15 PERB ¶7020 (1982) (subsequent history omitted).

³⁶27 PERB ¶3029, at 3071 (1994).

³⁷26 PERB ¶3074 (1993).

³⁸*Garden City Union Free Sch Dist*, *supra*, at 3070.

³⁹33 PERB ¶3019 (2000).

employees based upon the wording of a management rights clause identical to that in *Livingston*.⁴⁰

In comparison to the above cited cases, the broad management rights clause in this case cannot be said to establish a clear and unmistakable waiver of the right to negotiate the unilateral transfer of bargaining unit work.

The City next argues that by reducing its paid workforce and relying to an increasing extent on volunteer firefighters it has drastically altered the provision of firefighting service. Its decision to do so, the City argues, represents a significant change in qualifications for the job of a firefighter within the City and represents a change in the level of service provided, thus triggering the balancing test of *Niagara Frontier Transportation Authority, supra*.

While arguing a change in qualifications and level of service in its brief, the City neither pled these defenses nor offered evidence in support thereof. In addition, there is no basis for such a defense apparent on the record and I decline to infer one based upon the shift from paid to volunteer firefighters. Having not been pled in the answer or a timely amendment thereto, and in the absence of any evidence, the allegation that there is a change in qualifications or level of service may not be considered.⁴¹

The City's defenses being without merit or not properly before me, I find that the City violated §209-a.1(d) of the Act when it unilaterally transferred the exclusive

⁴⁰See also *Mattituck-Cutchogue Union Free Sch Dist*, 40 PERB ¶14577 (2007) (management rights clause granted the District the right to contract with independent contractors for any work which the District was not properly equipped for or had inadequate labor to perform).

⁴¹*Service Employees Intl Union, Local 222*, 16 PERB ¶13063 (1983).

bargaining unit work of driving and operating City owned fire trucks, pumpers, ladder trucks and other vehicles operated by the fire department, the regular day-to-day duties involved in the maintenance of fire stations and grounds, testing and cleaning fire apparatus and equipment in the fire house, and the testing of fire hydrants.

So much of the Association's charge as complains of the unilateral abolition of the captain position and the transfer of that work to other unit members is dismissed. The City was privileged to abolish the position⁴² and assign the captain's duties to other unit employees, here, the most senior paid firefighter. As there was no transfer of work outside the unit, there is no basis for finding a violation of the Act.⁴³

The Association also complained of the City's unilateral assignment of exclusive fire inspection duties to civilian code enforcement officers. In *State of New York (Department of Correctional Services)*,⁴⁴ the Board, in reviewing earlier decisions regarding civilianization, found that a reassignment of work from uniformed personnel to civilians was "a de facto change in the qualifications deemed necessary by the employer to perform the duties, as well as a concomitant change in the level of service to be offered by the employer."⁴⁵ This decision was reaffirmed in *Fairview Fire District*,⁴⁶ where the Board held that

⁴²*Burnt-Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶3066 (1992).

⁴³*Id.*

⁴⁴27 PERB ¶3055 (1994), *confirmed sub nom. State of New York (DOCS) v Kinsella*, 220 AD2d 19, 29 PERB ¶7008 (3d Dept 1996).

⁴⁵At 3125.

⁴⁶29 PERB ¶3042 (1996).

[t]he substitution of civilians for police officers or firefighters to deliver services previously performed by those uniformed personnel necessarily reflects an employer's determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks.⁴⁷

Finding the work of fire inspector to be exclusive to the unit, and that the City has determined to transfer that work to civilian code enforcement officers, pursuant to *Niagara Frontier, supra*, the parties' interest must be balanced. The Association, in its brief, argues only that the qualifications of the code enforcement officer are similar to those of a fire inspector. It does not argue a detriment to its members, although the proof at hearing reveals that paid firefighters who also hold the position of fire inspector will lose that position and an \$800.00 annual stipend. The City does not assert, in its brief, any operational need, only that the code enforcement officers are more qualified than fire inspectors. The fire inspectors have not been relieved of those duties in order to redeploy them to fight fires since they always performed both fire inspector duties and fire fighting duties without any apparent loss of productivity in either job category. While there was testimony as to a City-wide budget shortfall, there was no evidence presented by the City as to the economic impact of transferring the work to code enforcement officers.

The loss of the fire inspector position for which firefighters received a stipend and were separately compensated,⁴⁸ tips the balance, on this record, in favor of the

⁴⁷At 3098-3099.

⁴⁸See *City of Canandaigua*, 43 PERB ¶14563 (U-28929, July 9, 2010).

Association.⁴⁹ The transfer of the exclusive bargaining unit work of the fire inspector to the City's code enforcement officers is therefore a violation of §209-a.1(d) of the Act.

The Association's complaint with regard to the firefighters response to EMS calls is twofold, i.e. the number of calls firefighters respond to has been reduced by the elimination of an automatic response to ALS level C calls, and the fact that one volunteer firefighter is now responding to ALS calls where no volunteers responded in the past.

The reduction of the automatic response to ALS calls is a management decision regarding deployment of staff and does not violate the Act.⁵⁰ As to the assignment of a volunteer firefighter to respond to ALS calls, no violation can be found as the Association has failed to establish its exclusive right to the work.

Finally, the Association asserted that the unilateral transfer of work performed by the City in the Town of Canandalgua, to the Cheshire Volunteer Fire Company, violated §209-a.1(d) of the Act. The City argues that the Association failed to establish exclusivity over the work transferred to Cheshire. For the reasons set forth herein for finding that the Association established exclusivity over the at-issue work in the City, I find the Association has established exclusivity over the at-issue work in the Town.

The City next argues that it has curtailed its service to the Town and its actions with respect to the Cheshire Volunteer Fire Company do not, therefore, violate the Act. A curtailment or abolition of services is not mandatorily negotiable and an employer is

⁴⁹*State of New York (DOCS), supra.*

⁵⁰*Lake Mohegan Fire Dist, 41 PERB ¶3001 (2008).*

privileged to reach a decision to do so unilaterally. Subcontracting, by contrast, occurs when an employer, contemplating no change in the services it provides, replaces its employees with a contractor. James testified that the City entered into a subcontract with Cheshire so that it could cover, on behalf of the City, the contractual obligation the City owed to the Town. In consideration thereof, the City agreed to pay the Cheshire Volunteer Fire Company. The agreement itself is called a "Sub-Contract"⁵¹ and while it vests with Cheshire the sole authority to determine the manner in which firefighting services will be delivered to the Town, that reservation of right to Cheshire does not establish a curtailment of the City's services to the Town. The City continues to provide those services and is facilitating the provision of those services through a subcontract with, and payment to, a third party.⁵²

For the reasons set forth above, I find that the City violated §209-a.1(d) of the Act when it unilaterally transferred the exclusive bargaining unit work of driving and operating City owned fire trucks, pumpers, ladder trucks and other vehicles operated by the fire department, the regular day-to-day duties involved in the maintenance of the fire stations and grounds, testing and cleaning fire apparatus and equipment in the fire houses, the testing of fire hydrants, fire inspections, and firefighting services involving the work at-issue herein in the Town of Canandaigua. The remainder of the charge is dismissed.

⁵¹Joint Exhibit 7.

⁵²See *County of Chautauqua*, 21 PERB ¶4559, *affd*, 21 PERB ¶3057 (1988); *County of Montgomery*, 19 PERB ¶4600 (1986); *Buffalo Urban Renewal Agency*, 18 PERB ¶4533 (1985).

THEREFORE, IT IS HEREBY ORDERED that the City

- 1. Cease and desist from unilaterally transferring the exclusive bargaining unit work of driving and operating City owned fire trucks, pumpers, ladder trucks and other vehicles operated by the fire department, the regular day-to-day duties involved in the maintenance of fire stations and grounds, testing and cleaning fire apparatus and equipment in the fire houses, testing fire hydrants, fire inspections and firefighting services involving the work at-issue herein in the Town of Canandalgua;**
- 2. Forthwith reinstate unit employees to their former positions;**
- 3. Make Association unit employees whole for wages and benefits, if any, lost as a result of the unilateral transfer of unit work defined in paragraph one, above, with interest at the currently prevailing maximum legal rate until such time as it offers to reinstate those unit members whose former employment with the City was terminated;**
- 4. Forthwith restore such work to the Association's bargaining unit; and**
- 5. Sign and post the attached notice in all locations normally used to communicate with unit employees.**

**Dated at Buffalo, New York
this 10th day of September, 2010**



**Jean Doerr
Administrative Law Judge**