NYS PUBLIC EMPLOYMENT RELATIONS BOARD
Public Sector Voluntary Grievance Arbitration

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In the Matter of the Grievance Arbitration between:

ALBANY PERMANENT PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCALS 2007, 2007-A,
("Union" or "APPFA"),

-and-

CITY OF ALBANY, NEW YORK,
("City", "Employer", or "Management"),

Grievance: Alleged Subcontracting of Station Instructor Work

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ARBITRATOR'S

OPINION and AWARD

PERB Case No. A2019-089

BEFORE: Robert A. Grey, Esq., Arbitrator

HEARING: November 7 and 8, 2019, Albany, NY

APPEARANCES:

FOR THE UNION:

Law Offices of Thomas J. Jordan, LLC
By: Thomas J. Jordan, Esq.

FOR THE EMPLOYER:

Department of Law, City of Albany
By: Peachie L. Jones, Esq., Assistant Corporation Counsel

OPINION

INTRODUCTION

The Union grieves that in February 2019 the City began violating the following alleged long-standing past practice regarding the City of Albany Fire Department ["AFD"] Recruit Firefighter Training Program ("RFFT"):[1]

> AFD Union members have been used exclusively as MTB[2] facility station instructors for recruit training classes unless: (1) a special certification was needed to instruct the skill, i.e. pumper operations, (2) no qualified AFD members were available to act as a station instructor for that particular skill, or (3) another FD department with recruits at the training facility was asked by the AFD class administrator to bring their apparatus to the facility for training.

Union Brief 37.

The Union claims this work as exclusive, with a discernable boundary that is not interrupted by the alleged narrow and sporadic exceptions thereto. For remedy, the Union seeks cease-and-desist, compliance with the past practice, and financial compensation.

The City responds that the grievance is not arbitrable and should be dismissed with prejudice. If found to be arbitrable, the City argues that the Union did not prove an exclusive past practice with a discernible boundary. Therefore, the City argues that the grievance must be denied in all respects.

Consistent with the parties' CBA, the hearing of this grievance took place on November 7 and 8, 2019, upon mutual agreement. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence, examine and cross-examine witnesses, and argue their positions. Both parties did so. All testimony was given under oath or affirmation and direct observation of this arbitrator. The

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[1] The parties use the terms "Academy", "Fire Academy", "School", "Recruit School", "Recruit Training School", and "Recruit Firefighter Training Program ('RFFT')" interchangeably.

[2] "MTB" is the Colonie Municipal Training Building and Facility, which is located outside of the City of Albany. It is rented for use as the recruit school.

proceedings were transcribed by a court reporter and an official transcript was produced.[3] Neither party questioned the fairness of the proceedings, but from the outset the City challenged, and continues to challenge, the arbitrability of the grievance. This is discussed in the Arbitrability section below.

The record was closed upon receipt of the parties' post-hearing submissions. The Union submitted a 46-page post-hearing Brief, with four (4) supporting documents: one (1) court decision, two (2) PERB ALJ decisions, and one (1) arbitration award. Additionally, the Union submitted a four (4)-page post-hearing Reply Brief. The City submitted a 23-page post-hearing Brief, with nine (9) supporting documents: one (1) court decision, four (4) PERB Board decisions, three (3) PERB ALJ decisions, and a partial chapter from Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. (2003). Additionally, the City submitted a 10-page post-hearing Reply Brief, with three (3) supporting documents: two (2) PERB Board decisions and one (1) PERB ALJ decision.

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record, including the arbitrator's assessment of witness credibility, conflicting testimony, and the relative probative value of all evidence in the record. All testimony, exhibits, party positions and post-hearing submissions have been thoroughly considered in rendering this Opinion and Award, whether or not specifically addressed herein.

STIPULATED ISSUES

The parties submitted the following stipulated issues for final and binding determination:

1. **Is this matter arbitrable?**

2. **Under PERB decisions and other case law, does APPFA have exclusivity over the Station Instructor role?**

3. **If APPFA has exclusivity, did the City subcontract the Station Instructor role to others?**

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[3] Transcript page number citations are prefixed with "T". Transcript and Exhibit citations are intended to be illustrative, and not necessarily all-inclusive, of the record evidence pertaining to the arbitrator's statements herein.

3. **If the City subcontracted the Station Instructor Role, what shall be the remedy?**

Arbitrator Exhibit 1.

BACKGROUND and RELEVANT FACTS

The following pertinent facts are set forth in chronological order where practicable. Most are not materially in dispute, unless noted otherwise.

"The City and Union are parties to a collective bargaining agreement with a term of January 1, 2010 through December 31, 2011; that agreement was modified by a compulsory interest arbitration award which covered the period January 1, 2012 to and through December 31, 2013 (collectively referred to as the 'Agreement')." Joint Exhibit 1. Pursuant to a Memorandum of Agreement covering January 1, 2014 to December 31, 2017, and a Memorandum of Agreement ("MOA") covering January 1, 2018 to December 31, 2022, the terms of the CBA continue in full force and effect except as modified by either MOA. Joint Exhibit 1. Neither party points to any such modification relevant to this arbitration.

The City maintains a Department of Fire & Emergency Services, referred to by the parties as the Albany Fire Department ("AFD") in the context of this proceeding.

The bargaining unit consists of approximately 255 members employed by AFD, comprised of the ranks of Firefighter, Fire Lieutenant, Fire Captain and Fire Battalion Chief.[4]

For its AFD new-hires ("recruits") the City conducts recruit schools to provide training in compliance with New York State requirements. Subject to changing state requirements, each recruit school lasts approximately 14 to 17 consecutive weeks, Monday through Friday.

Within the last decade there have been 11 recruit schools. They began on or about

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[4] Many witnesses and pertinent individuals were promoted subsequent to the facts they testified about, or events they were involved in. For brevity, clarity, and consistency with documentary evidence, ranks in effect at the time of the facts/events will be used in this Opinion, without indicating "then-[rank] [name]".

December 4, 2009, August 5, 2011, May 22, 2012, December 21, 2012, April 17, 2013, February 28, 2014, May 7, 2015, January 8 2016, September 16, 2016, April 10, 2017, and February 1, 2019, respectively. City Exhibit 24. At all relevant times, the recruit schools have been held at the Colonie Municipal Training Building and Facility ("MTB"), which is located outside of the City of Albany.

There are typically 10 to 20 recruits in a recruit school. Most recruits are AFD new-hires. Each recruit school usually includes a few recruits who are new-hires from other fire departments, particularly nearby Troy ("Troy FD" or "TFD") and Rensselear ("Rensselear FD" or "RFD"). Less frequently, other fire departments such as Albany Airport, Gloversville or Watervliet send a very small number of recruits.

Other than a few days of subjects with a full-day classroom component, the recruit school daily routine typically consists of classroom instruction in the morning, followed by hands-on instruction in the afternoon. The classroom instruction is typically taught to the entire recruit class together as one group. The hands-on instruction is typically conducted in groups with a ratio of four (4) to six (6) recruits with one (1) Station Instructor. For relatively dangerous skills (such as lowering a firefighter from a roof by rope, especially in icy conditions), there will usually be more than one Station Instructor. *Who* can perform the *Station Instructor work* is what this grievance is about. Who can perform *classroom* instruction is not part of the grievance.

Each recruit school has an AFD supervisory officer assigned for the duration as the Class Administrator. At all relevant times, each Class Administrator was either a Lieutenant or Captain, and all were bargaining unit members. The Class Administrator is under the supervision of an AFD Deputy Chief, but runs the recruit class day-to-day. The Class Administrator is present full-time at the school; the Deputy Chief is not. "The class administrator basically runs the entire recruit class." T33.

One of the primary duties of the Class Administrator is the selection and scheduling of instructors for all classroom instruction and for all station instruction, as well as the scheduling of apparatus/equipment for station instruction.

To fill these slots, an Internal Department Correspondence ("IDC", essentially a one-page memo) was posted at all AFD firehouses. Union Exhibit 1 is an IDC dated October 31,

2108, "Subject: Instructors", informing those interested to submit an IDC to Deputy Chief Walker by December 7, 2018 for the "upcoming recruit class."

Members who responded were given an information sheet to indicate their subject preferences. These members were sent a weekly email by the Class Administrator indicating what slots were open for the following week. Those interested in working were listed in seniority order. If they had the expertise for the slot, they were scheduled for it. If they did not, the Class Administrator scheduled the next most senior member with that expertise. This was the process until the second week of February 2019, discussed below, which led to this grievance.

Prior to the deviation from alleged practice in February 2019, the only other alleged deviation of record occurred in 2012.

In 2012, the Union alleged that a first-time Class Administrator violated the alleged practice. Union President Robert Powers, and Union Secretary Robert Mengel promptly met with AFD Chief Robert Forezzi, and Deputy Chief Warren Abriel to discuss this deviation from alleged practice. No attorneys were present. The parties did not memorialize the meeting in writing. The parties materially differ regarding what transpired at the meeting. This 2012 meeting will be discussed separately below.

The Union did not file a grievance for the 2012 alleged violation. The parties did not sign a written agreement about the 2012 alleged violation. From the 2012 meeting until 2019 there were no grievances, nor written agreements, between the parties regarding recruit school Station Instructors.

For the February 1, 2019 recruit school class, Capt. Kim Ciprioni was the assigned Class Administrator. The class consisted of 14 AFD recruits, 3 Troy FD recruits, and one (1) Rensselear FD recruit. Ciprioni previously served as an assistant Class Administrator for approximately three (3) months in 2014, while recovering from an injury.

In January and February 2019 several meetings of AFD chief officers and members of the training staff took place regarding the recruit school. A common thread of these meetings was the high cost of recruit school, cutting costs and budgeting. T64-65. Capt. Ciprioni testified that during this time period Deputy Chief Wickham ordered her, as Class Administrator, "to start using Troy firefighters a couple times a week" as Station

Instructors. T43-44, T50; Union Exhibit 2.

The record is unclear whether Chief Wickham's order pertained solely to using *Troy* FD as Station Instructors, or using Troy *and other* outside fire department personnel as Station Instructors. T218-219, T244, *cf.* T245; T89. It is clear from the record that what precipitated Chief Wickham's order was Troy not paying the $5,000 MTB rental fee it usually paid for the AFD recruit school when TFD had recruit(s) in the school. T222. Chief Wickham's testimony in this regard corroborates the testimony of Capt. Ciprioni (T44) and Lt. Mengel (T89-91). What is also clear from the record is that when Chief Wickham followed up with Class Administrator Capt. Ciprioni regarding his order, Chief Wickham's inquiry was solely whether she was using *Troy* FD. T219.

Union President Lt. Mengel served as a Station Instructor in previous recruit schools, and was eligible to do so for the February 2019 school. As such, he was on the email list for Station Instructor scheduling. In February 2019 he received such an email and observed that the schedule had Tuesday and Thursday Station Instructor slots marked "Troy Fire Department", with no names associated with them. T89. He testified, "I felt this was odd. I called Kim [Ciprioni] and asked her what that was about. She told me she had been ordered to start hiring Troy firefighters to do station work two days a week." T89.

Based upon this information, Union President Lt. Mengel met with AFD Chief Gregory. Also present were Union Vice President Ed Verhoff and Chief Wickham. Mengel gave unrebutted testimony about the sum and substance of his conversation with Chief Gregory,[5] as follows:

> I told the chief that this was our exclusive work; he shouldn't be doing this. He told me that they were under a tight fiscal watch from City Hall and they had to save money and that the Troy Fire Department hadn't paid the rental fee for the recruit academy, which was approximately $5,000 in years past, and that they had to save money. . . . I told him if they didn't stop and continue the practice, I was going to file a grievance. . . .

T90-92.

The use of non-bargaining unit Station Instructors at the February 2019 recruit

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[5] Chief Gregory did not testify in this proceeding.

school continued. The Union grieves that this constituted a continuing violation of the alleged practice.

On or about March 6, 2019, the Union filed this grievance. It states in pertinent as follows, *verbatim*:

> THE FACTS PERTAINING TO THIS GRIEVANCE ARE AS FOLLOWS: (The Union first learned about this grievance on 2/25/19.) On the above-identified dates [2/19/19, 2/21/19] and continuing the Albany Fire Department subcontracted the exclusive work of bargaining unit members at the Colonie MTB training facility. Specifically, on those dates, Troy firefighters were used to supplement the complement of station instructors which has historically and exclusively been the work of Albany Firelighters. (The Union reserves the right to amend this grievance up until the time of trial as additional facts and/or violations occur.)
>
> SUGGESTED CORRECTION: Four (4) hours overtime as back pay for the most senior Firefighter for each violation; i.e. each time the senior Firefighter should have been given have the assignment. To permanently cease and desist subcontracting the exclusive work of bargaining unit members as described above without prior negotiation with the Union.

Joint Exhibit 6.

On or about March 7, 2019, the Union filed a charge at PERB, citing § 209-a.1(d) of the NYS Public Employees' Fair Employment Act. PERB assigned Case No. U-36826. "The City filed an answer denying the material allegations of the charge." Union Reply Brief Exhibit 1.

On or about June 13, 2019, the Union filed a Demand for Arbitration with PERB. Joint Exhibit 7.

On or about June 24, 2019, a PERB ALJ issued a Decision deferring the charge to arbitration, citing the parties' agreement to do so. Union Reply Brief Exhibit 1.

On July 22, 2019 the undersigned was selected and designated as arbitrator of this grievance through the procedures of PERB.

PERTINENT CBA PROVISIONS

RECITALS: WHEREAS, it is the desire of both parties to this Agreement to

negotiate collectively with regard to terms and conditions of employment in order to avert disputes and secure harmonious cooperation within the limits of the laws of the State of New York.

ARTICLE 19: GRIEVANCE PROCEDURE: 19.4 Definition of grievance - a grievance shall mean a claimed violation, misinterpretation, or inequitable application of any existing rule, procedure, law or regulation covering any items mentioned in this contract or covering any other item which affects the "terms and conditions" of employment of members of the bargaining unit. "Terms and conditions" of employment shall be defined as those terms are defined in the Taylor Law. . . .

ARTICLE 20: ARBITRATION: 20.1. Either party may submit to binding arbitration pursuant to the then obtaining Voluntary Arbitration Rules and Procedures of the New York State Public Employment Relations Board, an unresolved grievance. A grievance shall be defined as in Article 19, Section 19.4.

Joint Exhibit 1; Joint Exhibit 7 (Sections 19.4 and 20.1).

STIPULATED ISSUE 1:
IS THIS MATTER ARBITRABLE?

The City has maintained from the outset that the grievance is not arbitrable. The City renews its motion for a ruling of non-arbitrability. The Union opposes the motion and continues to maintain that the grievance is arbitrable.

POSITIONS OF THE PARTIES – ARBITRABILITY

The positions of the parties on arbitrability follow, summarized or excerpted from their respective post-hearing submissions. The positions are set forth single-spaced, in a different font, to denote they are not the words of the arbitrator. Citations and footnotes are generally omitted. As stated above, all party positions have been thoroughly considered, even if not specifically addressed herein.

City Position – Arbitrability

After considering all the evidence, APPFA's grievance should be denied, because recruit school instruction is not a part of AFD-employee duties, and thus not subject to arbitration under the City-APPFA collective bargaining agreement. Station instruction is not a part of APPFA unit-work or employment, thus APPFA may not claim

exclusivity over it and it is not subject to grievance or arbitration. This matter should be dismissed.

The City-APPFA CBA's definition of grievance includes claimed violations of anything in the contract or "any other item which affects the 'terms and conditions' of employment of members of the bargaining unit." (Joint Exh. 1, section 19.4) The recruit school, however, is not addressed in the City-APPFA CBA (i.e., the contract). While instruction compensation may have been discussed in past contract negotiations, the parties did not agree to place the item in the City-APPFA CBA. Furthermore, several additional factors demonstrate that recruit school instruction is not as aspect of AFD "employment" and thus not subject to arbitration as affecting terms and conditions of employment.

Employees are not required to participate in the recruit school. Employees *opt* to instruct at the recruit school. Employees assist at the recruit school on their days off from work at AFD.

Yes, "subcontracting of unit work is a mandatory subject of negotiations" and yes, the City permits individuals to "work" at the recruit school. But, functioning as a Station Instructor is not "unit work." It is not part of their AFD duties and their AFD employment. Station Instructors opt to participate; they are not mandated or required to attend or instruct at the recruit school. The City compensates non-APPFA Station Instructors. The City compensates all Station Instructors the same amount, regardless of affiliation, rank or contractual rate-of-pay, and employees do not receive out-of-grade pay. This shows the CBA does not apply to or control the recruit school. Employees assist at the recruit school on their days off from work at AFD-with only ten exceptions in the last two recruit classes.

The recruit school is not mentioned in the City-APPFA CBA. APPFA President Mengel testified that the recruit school is not in the City-APPFA CBA, where it would be if it were an aspect of their employment.

Given that instruction at the recruit school is optional and occurs on employee's days off from work; and that the City-APPFA CBA neither mentions the recruit school nor dictates the compensation for Station Instruction work, there is no basis to assert that recruit instruction is part of the APPFA employees' work or employment. It is not part of the employees' duties-and therefore, this grievance must be dismissed as not subject to arbitration.

Union Position – Arbitrability

Under the Taylor Law, public sector parties are empowered to arbitrate labor relation disputes arising from a collective bargaining agreement. (NYS Civil Service Law Section 204) Not all disputes are arbitrable Watertown. The courts have set forth a two prong test to determine whether a dispute is arbitrable: (1) Is there any statutory, constitutional or public policy against arbitration of

the grievance and (2) if there is no such prohibition, did the parties agree to arbitrate the dispute at issue. Matter of City of Johnstown [Johnstown PBA].

It is submitted that the City cannot seriously argue that the instant grievance is prohibited from arbitration due to any statutory, constitutional, or public policy prohibition. With regard to whether the parties agreed to arbitrate the dispute, the Union calls the Arbitrator's attention to collective bargaining agreement Section 20.1: "Either party may submit to binding arbitration, . . . an unresolved grievance. A grievance shall be defined as in Article 19, Section 19.4". Section 19.4 of Article 19 contains the following relevant language:

> Definition of Grievance - a grievance shall mean a claimed violation, misinterpretation, or inequitable application of any existing rule, procedure, law or regulation covering any items mentioned in this contract or covering any other item which affects the "terms and conditions" of employment of members of the bargaining unit. "Terms and conditions" of employment shall be defined as those terms are defined in the Taylor Law… (underlining added)

Subcontracting of unit work is a mandatory subject of negotiations (i.e., by definition a term and condition of employment) where there is no curtailment in the level of services. Niagara Frontier Trans. Auth., Somers Faculty Assn., and Northport Frontier Trans. Auth. Further, station instructors are compensated by the City, told their hours to work in that capacity, may be disciplined by the AFD for misconduct, and are covered for injury by General Municipal Law Section 207-a (full salary for firefighters injured while performing their regular duties) during work as a station instructor. (See testimony of Robert Mengel in this regard.) It is black letter Taylor Law that compensation, hours of work, discipline, and compensation for injuries are mandatory subjects of negotiations. (i.e. terms and conditions of employment). Thus, the Union and City agreed to arbitrate the subject matter of this grievance.

Even though a specific provision of the collective bargaining agreement is not alleged to be violated by the Union, it is submitted that because the grievance involves a claim of subcontracting of bargaining unit work, the Arbitrator has jurisdiction over and authority to decide that matter. Accompanying this Brief as Exhibit 1, is the PERB Administrative Law Judge's decision deferring this matter to the grievance-arbitration procedure. Secondly, accompanying this Brief as Exhibit 2, is the Opinion and Award of Arbitrator Paul Doyle regarding a building codes' subcontracting issue not specifically addressed in the collective bargaining agreement between the Union and the City in which he decided that grievance. His award was confirmed by the Albany County Supreme Court. (Exhibit 3, attached) Thus, it is submitted there is no question the Arbitrator has the authority to decide this illegal subcontracting case.

Further, the City should not be heard to argue that the Union members working as station instructors are not engaged in employment for the City because they are not required to sign up; it is voluntary. NYS Labor Law Section 2(7) defines employment as one who is "permitted or suffered to work" (borrowing from the federal law definition) and thus, the Union members' station work clearly is employment. Based on the broad definition of grievance in the parties' agreement, which is what they both agreed to arbitrate, this grievance is arbitrable.

DISCUSSION and RULING – ARBITRABILITY

As the moving party against arbitrability of this grievance, the burden is on the City. Under the facts and circumstances of this record, the City's arguments against arbitrability are not persuasive.

The City did not cite any statutory, constitutional or public policy prohibition against arbitration of this grievance. The parties' CBA clearly and unambiguously demonstrates their intent and agreement to arbitrate grievances "covering any other item which affects the 'terms and conditions' of employment of members of the bargaining unit. 'Terms and conditions' of employment shall be defined as those terms are defined in the Taylor Law. . . ." Joint Exhibit 1.

It is undisputed that in performing Station Instructor work, Station Instructors are paid an hourly rate by the City (pensionable for AFD employees), have their hours and assignments scheduled and directed by the City, are subject to discipline, and are covered by GML 207-a if injured. These constitute "terms and conditions of employment", notwithstanding the CBA's silence regarding recruit school work. The City cites no authority that performing Station Instructor work on a voluntary basis, and/or in addition to one's regular work schedule, removes it from the realm of "terms and conditions of employment". "Terms and conditions of employment" are mandatory subject of bargaining.

The City asserts that for recruit school instructor hourly pay it "unilaterally applied the amounts for EMS to the recruit school training", and that the CBA contains no "specific reference to, or compensation amount for, the recruit school". City Brief 2. The silence of the CBA regarding recruit school was discussed above. The City did *not* unilaterally set the

hourly pay rate for recruit school instructors. Rather, it is set pursuant to an unwritten negotiated agreement between the parties. T78, T98, T101, T362. The fact that the parties did so is further proof of "terms and conditions of employment", and thus a mandatory subject of bargaining.

Furthermore, in upholding Arbitrator Doyle's 2013 award between these parties—in what the City accurately characterizes as a "very similar matter" [subcontracting of inspections] (City Brief 9), Supreme Court, Albany County, noted that "a past practice independent of a contract term, may be relied upon by an arbitrator in resolving disputes which have been submitted under the grievance machinery of a collective bargaining agreement" (*Matter of Aeneas McDonald Police Benevolent Ass'n, Inc. v. City of Geneva*, 92 N.Y. 2d 326, 332-333 [1998])". O'Connor, K., A/JSC; Index No. 3305-13; January 23, 2014. Union Brief Exhibit 3, at 14.

Notably, during the pendency of the City's appeal to the Appellate Division, Third Department, the parties reached a settlement. The settlement included withdrawal of the City's appeal of Arbitrator Doyle's 2013 award, and the Union's withdrawal of its PERB charges. City Exhibit 10. Thus, Arbitrator Doyle's 2013 award finding subcontracting of inspections arbitrable remains in effect between the parties. There is nothing persuasive in the instant record which would render alleged subcontracting of Station Instructor work non-arbitrable.

Bargaining unit members are compensated for Station Instructor work, over and above their normal work schedule. Other than the Union-acknowledged exceptions to the alleged practice (discussed below), when Station Instructor work is performed by non-bargaining unit members, there is loss of work to the bargaining unit. Whether the Union meets its burden to prove an enforceable past practice remains to be seen, below. However, for the foregoing reasons, the Union's grievance is arbitrable. Therefore, the answer to Stipulated Issue 1 is Yes.

In conclusion, based upon the facts and circumstances of this particular record, the arbitrator finds that the City did not meet its burden to prove that the grievance is not

arbitrable. The City's renewed motion to dismiss for lack of arbitrability is denied. We turn now to the merits.

SUBSTANTIVE MERITS

POSITIONS OF THE PARTIES – MERITS

The positions of the parties on the merits follow, summarized or excerpted from their respective post-hearing submissions. The positions are set forth single-spaced, in a different font, to denote they are not the words of the arbitrator. Citations and footnotes are generally omitted. Again, as stated above, all party positions have been thoroughly considered, even if not specifically addressed herein.

Union Position – Merits

The APPFA has exclusivity over the station instructors' duties. Regarding the legal analysis of the Union's illegal subcontracting claim, it is submitted that the NYS PERB analysis for the transfer of unit work and whether it constitutes illegal subcontracting is proper to consider for this case. Arbitrator Doyle used this analysis in the Union grievance concerning the subcontracting of building code inspections.

In Town of Riverhead, 42 PERB 3032 (2009), the PERB 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… Id. at 3119. (underlining added)

The Union has argued that it exclusively performed the work of station instructors at the recruit facility for a sufficient period of time to be binding. However, even the Union admitted there were narrow, well-defined exceptions to this exclusivity. Thus, an analysis of the discernable boundary of the past practice of exclusivity is also in order.

There is a past practice with a discernable boundary. The past practice of exclusivity with a discernable boundary of exceptions of the station instructor work was articulated collectively by several Union witnesses as:

> AFD Union members have been used exclusively as MTB facility station instructors for recruit training classes unless: (1) a special certification was needed to instruct the skill, i.e. pumper operations, (2) no qualified AFD members were available to act as a station instructor for that particular skill, or (3) another FD department with recruits at the training facility was asked by the AFD class administrator to bring their apparatus to the facility for training.

First, it is submitted the Union has established a binding past practice and that no change in the level of service or job duties occurred when station work was subcontracted to Troy firefighters. The past practice articulated above by the Union witnesses has existed for at least twenty (20) years even though there was not first hand knowledge testimony that covered that entire period. However, at least the last nine (9) years of a consistent exclusivity practice were articulated by Union witnesses with first hand knowledge. Lieutenant Santulli was a class instructor since 2011; he covered up to 2016; President Mengel was a station instructor from 2016-19; former Union President Powers stated that the above-identified exclusivity practice existed the entire time he was President from 2011-2016 and Captain Ciprioni believed this to be the practice when she was assistant class administrator in 2015 and later, when she was class administrator in 2019. Thus, the Record includes clear first hand knowledge and other evidence of this exclusivity past practice for at least nine (9) years (2011-19). Thus, at issue work was done by the AFD union members for a sufficient period of time for it to be binding. Town of Riverhead 42 PERB 3032 (2009)

All the City's proof to the contrary of the past practice of exclusivity with the narrow exceptions was 'smoke and mirrors', and none of the sporadic instances, if any, that the practice was not followed, ex. Captain Peters temporarily using retirees before that was stopped by the Union, broke the discernable boundary. Any testimonies from Eric McMahon, the Troy Fire Chief, AFD Deputy Chief Wickham, and former Chief Abriel regarding how the recruit class station instructors were selected, it is submitted was 'second hand' hearsay evidence or fit within one of the limited exceptions articulated by the Union witnesses. Fire Chief Dott did more to corroborate the Union's case than dispute it. There was no testimony whatsoever that there was a change in job qualifications which would require further legal analysis.

After the second week in February, 2019, because DC Wickham ordered her to do so, Captain Ciprioni, the class administrator used Troy firefighters as station instructors, thus, violating past practice. Thus, it is submitted that prima facially, the Union has established a violation of the Taylor Law and a meritorious

grievance; however, this only remains true if there is a discernable boundary to the past practice, i.e. the exceptions where non-unit personnel did station work did not break the perimeter of a discernable boundary. The Union argues that the exceptions to the past practice had a clear discernable boundary and only occurred sporadically.

In Manhasset Union Free School District, 41 PERB 3065 (2008), aff. 61 A.D.3d 123, on remitter, 42 PERB 3016 (2009), the Board . . . found that past practice is relevant in determining the "discernable boundary" and the inquiry focuses on whether the employer has broken the perimeter of the past practice.

It is submitted there was clearly discernable boundary based on the Union evidence. Looking at the nature and frequency of the station instructor work, when recruit school was in session, station work took place every day (M-F) for 17 weeks. According to Lieutenant Santulli, sometimes there was as many as three (3) recruit classes a year. Again, the AFD department Union firefighters did the station instructor work exclusivity except for narrow exceptions. (Even the narrow exceptions occurred maybe 1 out of 20 times station work was performed.)

The location of the work was the Colonie MTB facility but all the first hand testimony stated that AFD historically controlled the facility during the relevant recruit training periods. Even the 'colloborative effort' was brought about because AFD's initiative to want to share costs. The exclusivity with the discernable exceptions perimeter was not broken by the AFD (Employer) until February, 2019 class.

The Employer's rationale for the practice was simple—it was their class administrator selected and scheduled the station instructors in order for AFD kept control of the training, especially the costs. The only time this changed radically is in 2019 because AFD administration wanted to save money. It is black letter PERB case law that saving money does not justify an illegal subcontract. (City of Canadaigua, accompanying the Brief as Exhibit 4).

Finally, was the at issue work treated as distinct? The answer to that question is a resounding "yes". Historically, station instructor workers had been exclusively selected from the AFD ranks. All Union witnesses who had first hand knowledge of the practice testified as much.

Clearly, with the narrow exceptions which have discernable boundary, the Union has established exclusivity over the station instructor work at the MTB facility for local professional firefighter recruit classes.

The city subcontracted the APPFA's exclusive work. As stated previously, whether the at issue work was assigned to nonunit employees is relevant to determining whether the subject work was subcontracted. Town of Riverhead 42 PERB 3032 In making such a determination, the PERB Board has endorsed the application of the

"reasonable relationship" between the proposed discernable boundaries and the duties of the employees. Riverhead, supra. and City of Canadaigua Case No. U-29660 (2010) (Accompanying the Brief as Exhibit 4) The reasonable relationship test is relevant to whether the unit employees had a reasonable expectation that the past practice would continue. City of Canadaigua.

It is submitted that the Union did have a reasonable expectation that the longstanding practice of exclusively using AFD members as station instructors would continue. Otherwise, Union officials, Robert Mengel and Robert Powers, would not have questioned the attempted changes in 2012-13 and Robert Mengel would not have objected to the February, 2019 change by AFD Deputy Chief Wickham.

It is also submitted that the unrebutted testimony of all witnesses is that in February, 2019, there was a change due to an order by Deputy Chief Wickham given to Class Administrator AFD Captain Ciprioini that Troy firefighters were to be used routinely as station instructors. This was different than in the past when AFD personnel exclusively performed station instructor work with narrow, discernable exceptions that were well-defined and sporadically occurred. (See testimony of Union witnesses, Ciprioni, Mengel, Powers and Santulli which supported the longstanding past practice that the City unilaterally changed in February, 2019). The reason for the transfer of the unit work was a quid pro quo -- Troy FD could not pay the $5000 rental fee in 2019 so the AFD paid it and got the benefit of using Troy firefighters paid by the Troy FD and not using and paying their own AFD firefighters. (See testimony of Troy firefighter Eric Wisher on this subject) Clearly, this was a subcontract that violated the Taylor Law unless the work done by the Troy firefighter was substantially different than what the AFD firefighters had been doing as station instructors. The testimony of Eric Wisher, a Troy firefighter who did station instructor work after February, 2019, shows the Troy people were doing the same type of station instructor work that was formerly done exclusively by the AFD members. Thus, the overwhelming proof shows that the City, through the AFD administration, engaged in an illegal subcontracting of the bargaining unit work of AFD Union members.

The city's witnesses and exhibits sought (un-sucessfully) to blur the historical discernable boundary between station instructors work done exclusively by APPFA members and non-unit members work. It is submitted that there was a sharp difference in the parties' witnesses' perception of what was actually going on at the Colonie Municipal Training Facility ("CMTF").

In support of its' counter-argument, the City witnesses sought to blur the boundary articulated by the APPFA witnesses. Collectively, they asserted the recruit training was a "collaborative effort", a phrase that was apparently coined for this grievance arbitration. No APPFA witnesses used this phrase and no document introduced by the City mentions this phrase. In fact, only a few City witnesses referred to the recruit school as a 'collaborative effort'.

Secondly, again, in support of its counter-argument, City witnesses, documents and photos attempted to blur the distinction between lecturers and station instructors and boundary of whom historically performed station instructor work. Yet, when these distinctions were clarified later in the hearing by APPFA's witnesses, especially the rebutlal witnesses, it became clear that 'blurring the lines' was part of the City's tactics to confuse the trier of fact and obfiscate the truth. In this regard, it is important to note that none of the City witnesses had first-hand knowledge of the day to day activities at the recruit school.

The arbitrator has to make a credibility determination with regard to the afd administration's recognition of the APPFA's exclusive work right with regard to station instructors. APPFA witnesses, Robert Mengel and Robert Powers, both of whom are APPFA officials, recalled an instance approximately seven (7) years ago, where there was some confusion by AFD Lieutenant Fred Peters about the APPFA's exclusive right to work as station instructors. Both testified, it is submitted, very credibly that they along with Lieutenant Peters met with then AFD Chief Robert Forezzi and then Assistant Chief Warren Abriel. According to the APPFA witnesses' testimony, all agreed that the APPFA's position was correct. Both testified that there were no further instances or problems of exclusivity until the 2019 recruit class. It is submitted that their testimony is consistent with what happened afterwards. In 2019, and only then, Deputy Chief Wicknam ordered Captain Ciprioni to start using Firefighters outside the AFD, (eg. From Troy) a couple of times a week. It is submitted this order would not have been necessary except to change the practice of exclusivity testified by all the APPFA witnesses.

In contrast, former Deputy Chief Abriel denies that there was a meeting of the minds on exclusively of the station instructor work in 2013. The accuracy of his recollection of the meeting is somewhat suspect. First, he was not Chief at the time so the decision as to whether the AFD administration agreed with the APPFA regarding exclusivity was not his to make. Secondly, and more importantly, The APPFA never filed a grievance or took any action against the AFD administration regarding this issue after that meeting until 2019 even though the history shows there were a number of recruit schools conducted after the 2013 meeting.

The union remedy is reimbursement and enjoining the city from future violation. It is submitted the Union has shown a longstanding practice that its members have exclusively performed station instructor work at the MTB facility, with certain well-defined and discernable exceptions that were only occasionally used. Further, it is submitted that in February, 2019, the City violated this practice when AFD Deputy Chief Wickham ordered AFD Captain Ciprioni, the MTB facility Class Administrator, to start routinely using Troy firefighters instead of AFD Union members as station instructors for the 2019 recruit class. This was done without the consent of or negotiation with the Union.

Thus, as a remedy, the Union is requesting (104 hr. x $25/hr.) $2600 reimbursement which are the hours that Troy firefighters were station instructors in violation of the practice. In addition, the Union requests an Award that prohibits such subcontracting in the future unless the City and Union negotiate and agree to such subcontracting at some future date.

City Position – Merits

The grievance should be dismissed with prejudice, because APPFA failed to satisfy its burden of proof regarding exclusivity by the close of its case-in-chief. After the three witnesses and thirteen exhibits during APPFA's case-in-chief, there is insufficient evidence to establish an unequivocal practice regarding APPFA exclusivity for any period of time.

Pursuant to the stipulated issues, APPFA had to-but failed to-provide proof of its claimed exclusivity under Public Employment Relations Board ("PERB") precedent. PERB utilizes a "past practice" analysis as to whether work has been performed exclusively by a union and has outlined criteria by which a discernible boundary can be established. While both *Niagara Frontier Transportation Authority*, and *Manhasset Educational Support Personnel Association*, are frequently cited as the authoritative cases regarding transfer of work claims, portions of the *Manhasset* decision regarding past practice and discernible boundary are produced here:

> When determining the scope of unit work and whether that work has been performed exclusively by the bargaining unit, we will examine whether an enforceable past practice exists by applying the test recently stated in *Chenango*. It asks whether the 'practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue.' This *prima facie* showing is subject to a defense raised by the employer demonstrating its lack of actual or constructive knowledge and therefore, a lack of bilateral acceptance of or acquiescence in the practice. As in *Chenango*, however, constructive knowledge exists when the past practice is reasonably subject to the employer's managerial and/or supervisory responsibilities and obligations.
>
> The 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 of implicit rationale for this practice, and other facts establishing that the at-issue work has been treated as distinct from work performed by nonunit personnel.

APPFA failed, as the proponent of the grievance, to prove their exclusivity, i.e., that an unequivocal practice for a sufficient duration of time existed, so that members could reasonably consider

exclusivity would control the Station Instructor role. Although APPFA also failed to establish a discernible boundary and a reasonable relationship (of the alleged boundary to AFD duties), a discernible boundary is immaterial if APPFA cannot establish exclusivity.

Even assuming, arguendo, that station instruction is part of AFD duties, [i]t is clear-both from APPFA's silence and the record-that the evidence was insufficient to prove a past practice. APPFA ignored PERB precedent cited in Manhasset.

APPFA witnesses lack the personal knowledge needed to establish a past practice. The arbitrator should conclude that the testimony of APPFA witnesses Cpt. Kim Ciprioni and Lt. Robert Mengel lack the personal knowledge and detail necessary to establish an "unequivocal" and uninterrupted practice for a sufficient period of time. APPFA admits that it did not offer testimony covering the entire period of its alleged past practice: "The past practice articulated above by the Union witnesses has existed for at least twenty years even though there was not first-hand knowledge testimony that covered that entire period." Lt. Mengel did not personally participate in the recruit school for enough time or frequency for anyone to rely on his personal experience. Cpt. Ciprioni and Fred Peters did not alert Lt. Mengel about using non-unit individuals to teach at the recruit school; Lt. Mengel initiated the conversation with them. Thus the record does not suggest how Lt. Mengel would have known about examples of non-APPFA individuals functioning as Station Instructors.

It is also puzzling why Lt. Mengel, the union secretary from 2007-2016 would approach Fred Peters about the alleged past practice in 2012 or 2013. Was Lt. Mengel the only AFD employee or member of the APPFA Executive Board who knew about this alleged past practice?

Cpt. Ciprioni was not described as a member of the APPFA Executive Board or privy to any sort of information that would entitle her to speak with authority on the question of exclusivity. Again, her testimony principally concerned the 2019 recruit class and did not establish any basis for her statement regarding historical practice.

Cpt. Ciprioni's testimony similarly fails to explain the extent of her personal knowledge, and thus, why a neutral third party would give weight to her testimony that a uniform practice existed. We know only this about her experience prior to 2019. We do not know what her duties were or if she scheduled the Station Instructors. Was she in a room doing paperwork or observing the recruit school? Based on her testimony, we do not know why she "believed" a practice existed. Importantly, her "assistant" role occurred prior to the transition from Lab Instructor to Station Instructor. Her experience is thus irrelevant as it occurred prior to the discontinuation of the Lab Instructor role and the alleged establishment of exclusivity of the new Station Instructor role.

APPFA also overlooks that the recruit school only occurs for part of the year, which distinguishes this situations from other

cases involving the daily ongoing functions. APPFA cannot argue that APPFA members have performed this function continuously, because the recruit school does not operate continuously. It only lasts four to five months and resumes only after another group of employees is hired. APPFA also failed to establish that exclusivity over the Station Instructor role has "continued uninterrupted" for a sufficient "period of time." In their case-in-chief, APPFA explained that the role of Station Instructor is a new one. Per Lt. Mengel, Lab Instructors historically functioned under Lead Instructors. Then, three to four years ago, Lab Instructors-now called Station Instructors-began to function akin to Lead Instructors, which have more to do than Lab Instructors. Station Instructors' pay also increased twenty-five percent, and were now viewed as equal to Lead Instructors, who had previously exercised supervision over Station Instructors. Any prior exclusivity was thus extinguished when, as explained by APPFA, the Lab Instructor role ended and was replaced by the Station Instructor role.

Even if APPFA had sought to establish exclusivity through the last three to four years, that period of time is insufficient given the facts of this case. PERB has stated:

> "Case law sets no definitive standard for a requisite number of years necessary to establish a reasonable expectation of continued exclusivity. Rather, the subcontracting analysis becomes quite fact specific and operates in a context unique to each case. For example, 13 months of unequivocal and uninterrupted service has been found to be sufficient. In *Manhasset Union Free School District*, three years sufficed."

Lawrence Teachers Association.

The recruit school occurs once annually for seventeen weeks. The recruit school is not an ongoing element of AFD and is not "continuous" as required by case law. Because of the short duration of each recruit school, APPFA must demonstrate this practice through many recruit schools-not three or four. The recruit schools, moreover, occur at irregular intervals. While September 2016 and April 2017 recruit schools were only six months apart, the subsequent recruit school occurred twenty months later in February 2019. (City Exh. 24) APPFA thus must provide clear evidence of continuity from one recruit school to another, over many years to establish a sufficient period of time, which APPFA did not do.

APPFA failed to produce any written documents regarding an alleged "unequivocal" practice. Instead, Lt. Mengel stated that the alleged exclusivity was verbally "acknowledged" by AFD management. This stands in stark-and unexplained-contrast to when the City and APPFA reduced a different agreement regarding exclusivity to writing. (City Exh. 10) The discrepancy begs the question: Why didn't the City and APPFA memorialize the agreement or acknowledgement in writing, when they did so in a very similar matter? Because there wasn't an agreement regarding exclusivity of the Station or Lab Instructor role.

It is clear that without its rebuttal witnesses, APPFA failed to prove in its case-in-chief that it had exclusivity that was retained within a discernible boundary. Lt. Mengel and Cpt. Ciprioni lacked the personal knowledge to make their statements reliable. Because APPFA failed to establish exclusivity by the close of its case-in-chief, this grievance should be dismissed.

The City has a long-standing practice of accepting recruits, lecturers, and station instructors from other agencies (which further its efforts of collaboration), and thus owes no remedy for APPFA's legally-inconsistent and unsubstantiated claims of exclusivity and subcontracting. For more than twenty years, non-APPFA individuals have functioned as Station Instructors at the recruit school, and the City never intended or agreed to grant exclusivity to Albany employees. Considerable evidence supports that AFD has consistently, over several years, invited and utilized individuals external to AFD and APPFA to work as (Lecturers and) Station Instructors at the recruit school. AFD Deputy Chief Craig Wickham testified that non-APPFA individuals have taught at the recruit school since at least 2001, when he began functioning as a Station Instructor.

APPFA cannot and did not establish a "discernible boundary" of exclusivity based on availability, qualifications, and/or intermittent equipment usage, and in an area outside of the City's services. To be consistent with PERB precedent, APPFA must establish a discernible boundary with limited circumstances, and that defines exclusivity by the work's characteristics, not the people performing the work. APPFA failed to provide specific evidence of the discernible boundary it alleges.

Cpt. Ciprioni explained, after being prompted, that one exception to APPFA exclusivity was when another agency brought its own equipment. Troy Union President Eric Wischer agreed with Cpt. Ciprioni, but then directly contradicted that sentiment when he testified that he instructed as a Station Instructor on a piece of Albany apparatus while at the recruit school. Troy Fire Chief McMahon "imagined" that Troy employees sometimes brought Troy apparatus to the recruit school, but also testified that Troy at times sent them in a Suburban, because they only needed transportation there (and not apparatus).

But, one might ask, why were other agencies and municipalities permitted to bring their apparatus in the first place? Because the City has a long history of inviting individuals from other municipalities to instruct as Lecturers and Station Instructors in its recruit school. This wasn't a caveat, this was part of the known manner of doing things.

APPFA also alleged that non-APPFA individuals functioned as Station Instructors when APPFA members were not certified to teach a specific subject matter. This is illogical, because the State only requires Lecturers to be certified. The City does not need to find Station Instructors who were certified, because Station Instructors, distinct form Lecturers, are not required to be certified.

Multiple witnesses explained that only Lecturers (and not Station Instructors) must be certified. Chief Abriel distinguished between the Lectures who were "experienced or certified," and the Lab Assistant. When the City didn't have "anybody "certified to teach" (i.e., Lecturers), individuals from other departments were used.. Former Class Administrator, Lt. Santulli testified that when he "did not have anybody that was certified to teach a certain course," that they would invite instructors from other agencies. He is referring to Lecturers though: a person-with *certifications*-was present to "oversee" the Station Instructors and ensure the recruits are performing satisfactorily. The employees from Troy, Rensselaer or other municipalities who served as Station Instructors did so because the City has long invited non-APPFA individuals to function as (Lecturers and) Station Instructors at its recruit academy.

Even if Station Instructors needed to be certified, non-APPFA individuals still instructed when APPFA possessed those certifications. Saratoga Springs Chief Shaw taught pump operations even though APPFA member Jeremy Clawson is certified *and willing* to teach that skill and Fred Peters was believed to be certified to teach it.

Even if they were consistent with case law, these exceptions (creating the "discernible boundary") lack support in the record by individuals with knowledge or credibility. APPFA simply did not prove them.

The recruit school is not a part of the City's services, so subcontracting case law is inapplicable to it. In *Canandaigua*, PERB articulated the backdrop to subcontracting when distinguishing between abolition of services and subcontracting claims:

> "[a] curtailment or abolition of services is not mandatorily negotiable and an employer is privileged to reach a decision to do so unilaterally. Subcontracting, by contract, occurs when an employer, contemplating no change in the services it provides, replaces its employees with a contractor. […] 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." 43 PERB 4585.

Subcontracting cases pertain to changes in how an entity provides its services. The recruit school-the manner in which the City trains its new firefighters-is not a part of the services provided by AFD to City residents. As such, a subcontracting analysis is not applicable here. The City has not changed which individuals provide its *services*, because the recruit school is not a part of the services provided by AFD or the City to the general public. The City simply has not subcontracted the services-or stated differently, the *work*-of AFD and its employees.

The City has not subcontracted the Station Instructor role to anyone or any agency. While there is an understanding amongst municipalities to provide instruction in lieu of payment, no written

agreement or contract exists. APPFA, who has the burden to prove the case, did not provide one to support its claims.

In conclusion, the Arbitrator should deny the grievance because (i) the evidence overwhelmingly supports a longstanding practice of non-APPFA individuals functioning as (Lecturers and) Station Instructors at the Albany recruit school and (ii) APPFA alleged a "discernible boundary" that is legally inconsistent with PERB decisions and then failed to prove it with evidence. In all three approaches to this matter, APPFA should not prevail and no remedy should be awarded.

DISCUSSION AND OPINION – MERITS

At the conclusion of the Union's case-in-chief, the City moved to dismiss with prejudice for failure to submit sufficient evidence to meet the Union's burden of proof on any of the stipulated merits issues. Decision on the motion was reserved, and in its post-hearing submissions the City renewed its motion to dismiss. The arbitrator has throughly reviewed the record to the extent it existed when the Union rested its case-in-chief. Lt. Mengel and Capt. Ciprioni gave credible testimony based upon personal knowledge, which withstood the City's rigorous cross-examination. The arbitrator finds that by the conclusion of its case-in-chief, the Union presented more than sufficient credible evidence, exclusive of its rebuttal-case evidence, to establish a *prima facie* case on the stipulated issues. Therefore, the City's motion is denied.

As noted above, the burden is on the Union as the moving party in this past practice grievance. For the following reasons, under the facts and circumstances of this record, the Union met its burden. Therefore, the grievance must be sustained.

STIPULATED ISSUE 2:
UNDER PERB DECISIONS AND OTHER CASE LAW, DOES APPFA HAVE EXCLUSIVITY OVER THE STATION INSTRUCTOR ROLE?

PERB's "Past Practice" Approach

> PERB generally determines whether the reassigned work was exclusive to the unit by asking whether a discernable boundary can be drawn around the work performed by the unit employees. . . . Beginning with *Matter of Chenango Forks Teachers Assn., NYSUT, AFT, AFL-CIO, Local 2561 (Chenango Forks Cent. School Dist.*) (40 PERB 3012 [2007], supra), PERB found [the "core

> components"] concept too limiting and expressly returned to its earlier "past practice" approach, which focuses on whether the employer's 'practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue'" (*id.*, [interior citations omitted]. Such a practice establishes the exclusivity of the unit's work . . .

Matter of Manhasset Union Free Sch. Dist. v. N.Y. State Pub. Empl. Relations Bd., A.D.3d (3rd Dept. 2009). City Brief Exhibit C-2.

Thus, under *Manhasset*, the initial inquiry pursuant to PERB's "'past practice' approach" is "whether the employer's 'practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue'"?

The Union avers that the practice is:

> AFD Union members have been used exclusively as MTB facility station instructors for recruit training classes unless: (1) a special certification was needed to instruct the skill, i.e. pumper operations, (2) no qualified AFD members were available to act as a station instructor for that particular skill, or (3) another FD department with recruits at the training facility was asked by the AFD class administrator to bring their apparatus to the facility for training.

Union Brief 37.

The arbitrator finds this practice, with the above-quoted acknowledged exceptions, amply proven in the record. The arbitrator finds Lt. Mengel's and former Class Administrator Capt. Ciprioni's testimony regarding the practice credible, based on first-hand knowledge, and supported by and corroborated by the record. The proven existence of the practice was corroborated by the weight of the credible record evidence, and particularly by the credible testimony of former Class Administrators AFD Lt. Ken Dott (now Rensselear FD Chief) and AFD Lt. Anthony Santulli. Notably, AFD Class Administrators at all relevant times were always of supervisory rank, either Lieutenant or Captain, and all were bargaining unit members.

The record does not support the City's attempts to rebut the Union's proven practice. The record evidence of Station Instructor work being performed by non-bargaining unit members is not inconsistent with the acknowledged exceptions to the practice. The City's arguments and evidence to the contrary are not persuasive.

For example, Ken Dott was the Class Administrator for two (2) classes that took place in 1998 and 2000. T320-329. He testified that "equipment wasn't always plentiful". T329. He also testified that OFPC and DEC did both lecture and station instruction because AFD did not have qualified station instructors for their subjects of instruction. T334-335.

Lt. Santulli was Class Administrator for five (5) recruit schools, during 2013, 2014, 2015, and 2016. T405-406; City Exhibit 24. He testified that in 2016, when Troy FD firefighters came to the school to do Station Instructor work they came with their Troy truck/equipment. T400. This clarified previous testimony. T297, T304-306. As Class Administrator, Lt. Santulli abided by the practice. T394. His emails to fill Station Instructor slots were sent only to bargaining unit members. If he had to reach further, next in line were AFD retirees. Only if he had to reach even further did he contact members of other departments who had recruits in the class. T394-395.

The February 2019 Class Administrator Capt. Ciprioni testified that she "never ran out of [qualified AFD] people" to fill Station Instructor slots. T43. However, she was ordered by Chief Wickham to use non-AFD personnel. T43-44. Chief Wickham testified that Capt. Ciprioni would have more personal knowledge than he would of who was being used as Station Instructor in both 2015 and 2019. T219-221. He testified that he was not aware that AFD were being used exclusively for Station Instructors prior to 2019 (T219), but had no personal knowledge that it was not the practice in 2015. T221.

The 2012 Meeting

It is undisputed that the 2012 meeting was held because the Union complained that first-time Class Administrator Lt. Fred Peters violated the alleged practice regarding a 2012

recruit school.[6] It is also undisputed that there were four (4) participants at the meeting: AFD Chief Robert Forezzi, with Deputy Chief Warren Abriel; and Union President Robert Powers, with Union Secretary Robert Mengel. Abriel, Powers and Mengel testified at this hearing. Unfortunately, former Chief Forezzi is deceased.

As is frequently the case, substantial and significant variations exist between testimonial versions of an event. In this case, witnesses were testifying about a meeting that took place some *seven (7) years* earlier, and, which was not reduced to writing.

Both Union meeting participants testified in sum and substance that the practice was acknowledged, and AFD administrations abided by it from 2012 until 2019. T83; T389-390.

Retired Chief Abriel, who was Deputy Chief under Chief Forezzi in the chain of command in 2012 (Abriel served as the AFD Chief from 2014 to 2018), testified that he recalled there were many meetings between the Union and AFD Chiefs. He remembered there were discussions about exclusivity of recruit training (T358), but he did not specifically remember this meeting. He testified, ". . . we never agreed to anything . . . The whole process was to share in the expenses of the training recruit class. So we – we never agreed to anything permanent or formally". T343. He testified if there were such an agreement, it "probably" would have been put in writing. T344.

When confronted by the Union attorney with Union President Mengel's testimony that at the 2012 meeting he [Abriel] agreed the work was exclusive, Abriel testified, "No, I don't recall that. I don't think I would ever agree to that." T359. When confronted by the Union attorney with Capt. Ciprioni's testimony of how she used outside departments in accordance with the practice, but without the question referring to it as a practice, Abriel answered: "Like I say, I'm not that familiar with the inner workings of how they did it."

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[6] The parties agree that Lt. Peters was the Class Administrator for two or three recruit schools in 2012/2013 (City Brief 3; Union Brief 11, 43), but the record is unclear as to which particular school dates. Based upon analysis of the entire record, and particularly of the 2011, 2012, 2013 and 2014 recruit school dates contained in City Exhibit 24, compared with conflicting testimony, it is persuasive from the record that this meeting likely took place in 2012, not 2013.

T360.

Such variation between testimonial versions in 2019 of what transpired at the meeting in 2012 is not necessarily indicative of lying or lack of candor. Rather, otherwise credible perceptions and memories can vary from their very formation, are subjective by nature, and are subject to fade and change over time. One can truthfully testify about one's recollections and still be factually incorrect.

In resolving such testimonial variations, comparison to objective facts in the record is often helpful. In this case, there are several.

First, regarding the context of the meeting itself, the Union promptly raised the issue, and the highest Union official met with the highest AFD official. There were no attorneys present or involved. The record is clear this was common practice. It was also common practice to resolve labor/management issues informally, without attorneys and without written agreement. However, the City maintains this would have been an important enough issue to put an agreement in writing.

The Union did not file a grievance on the issue in 2012. Indeed, Union did not file a grievance on the issue in the following 6 or 7 years, when it alleges the practice was first deviated from since the 2012 meeting. It is persuasive from the record that Lt. Peters abided by the practice for the remainder of his Class Administrator service. As discussed above, Lt. Santulli abided by the practice when he was Class Administrator for five (5) recruit schools, during 2013, 2014, 2015, and 2016.

Notably, the Union defended its Station Instructor work in 2012, even to the exclusion of retired members of the Union. Additionally, the record reflects that this Union is not shy about filing grievances. On October 26, 2012—the same year as this meeting—the Union filed a grievance alleging violation on October 19, 2012 of its exclusive right to the work of placing "unsafe/unfit" placards on buildings. On December 4, 2012 the Union filed a Demand for Arbitration with PERB regarding same. On January 11, 2013 the Union filed a grievance relating to a December 1, 2012 Notice issued by Chief Forezzi regarding 911 dispatch of bargaining unit work to non-bargaining unit members.

By approximately March 14, 2014, the Union had filed *243* such grievances.

It is persuasive from the record that if the City did not acknowledge and abide by the Station Instructor practice at or shortly after the 2012 meeting, the Union would likely have filed at least one (1) grievance about it in 2012.

Furthermore, as also discussed in the Arbitrability section above, during the pendency of the City's appeal to the Appellate Division, Third Department, of the Supreme Court, Albany County, Decision/Order/Judgment regarding the Doyle Award, the parties reached a settlement. The settlement is what can fairly be called a "global" settlement. It included settlement of the 243 grievances, withdrawal of the court appeal, withdrawal of PERB charges, withdrawal of proposals from Interest Arbitration, introduction of a new Standard Operating Procedure, and amendment of the CBA, *inter alia.* City Exhibit 10.

It is persuasive from the record that if the City did not acknowledge and abide by the Station Instructor practice at or shortly after the 2012 meeting, the issue would likely have been addressed in the "global" settlement.

Lastly, it is was not coincidence that the deviation from the practice happened when Troy did not pay the $5,000 MTB fee it had customarily paid in the past, in exchange for having its recruits in the AFD recruit school.

Thus, the record reflects that the practice was unequivocally followed from 2012 until February 2019. Under the facts and circumstances of this record, the unequivocal practice continued uninterrupted for a period of time under the circumstances that was more than sufficient to create a reasonable expectation among the affected bargaining unit employees that the practice would continue.

> Case law sets no definitive standard for a requisite number of years necessary to establish a reasonable expectation of continued exclusivity. Rather, the subcontracting analysis becomes quite fact specific and operates in a context unique to each case. For example, 13 months of unequivocal and uninterrupted service has been found to be sufficient. In Manhasset Union Free School District, three years sufficed.

Lawrence Teachers Association, NYSUT, AFT, NEA, AFL-CIO, 48 PERB 4547 (2015).

City Brief 13.

The record demonstrates that the practice continued during every recruit school from at least 2012 until February 2019. Not counting the May 2012 school, there were seven (7) recruit schools from December 2012 to April 2017, inclusive, until this issue arose with the February 2019 school. There was no school in 2018. City Exhibit 24. Thus, the practice was continuously in effect during the *six (6) consecutive year* period from 2012 to 2017, during which there *seven (7) consecutive* recruit schools.

Seven (7) consecutive recruit schools over a *six (6) consecutive year* period from 2012 to 2017 is a sufficient period of time in the unique context of this case. The City argues however, that because recruit schools do not run continuously, the Union cannot establish that the practice continued uninterrupted for a sufficient period of time. This is not a persuasive argument. The test is a sufficient period of time *under the circumstances*. By its nature, the recruit school only operates when there are new recruits. Each time it operated during the above time period, the practice was maintained. Thus, *under the circumstances*, the practice continued uninterrupted for a sufficient period of time to create a reasonable expectation among the affected bargaining unit employees that the practice would continue.

In conclusion, pursuant to PERB's "'past practice' approach", upheld by the Appellate Division in *Manhasset*, the arbitrator finds that the practice was unequivocal and continued uninterrupted for a period of time under the circumstances that was more than sufficient to create a reasonable expectation among the affected bargaining unit employees that the practice would continue.

PERB's Discernible Boundary of Exclusivity

It is undisputed that Station Instructor work has in the past been performed by non-bargaining unit members. The Union argues such work was performed within the acknowledged exceptions to the practice, and thus does not extinguish its exclusivity over the work. The City argues exclusivity is extinguished.

"Exclusivity over unit work may still be found even though non-unit personnel have also performed the work in certain circumscribed contexts when a 'discernible boundary' is found to exist. [Footnote 56, citing Manhasset, 41 PERB 3005, at 3022 (subsequent history omitted)]." *Civil Service Employees Association v. Pine Valley Central School District*, 51 PERB 4512 (2018), City Reply Brief Exhibit L.

The Union makes no claim that all station instructor work has always been performed solely by AFD bargaining unit members. The Union readily acknowledges the distinct exceptions to the practice. Upon review of the record, these constitute discernible boundaries of exclusivity. Arguments by the City against the existence of discernible boundaries of exclusivity are discussed below.

The City argues that "APPFA's last witness even contradicted APPFA's theory of exclusivity in his testimony. (Tr. 124:18-20)." City Brief 7, 21. This is not persuasive. Beside the fact that it occurred during the challenged February 2019 recruit school, Troy FD Firefighter-Paramedic Eric Wisher testified that he was instructing on an Albany pumper because: "I was sent up there originally as a driver instructor, and then they changed it. I was going to be a maze instructor, and so I went up there without a [Troy] pumper. And when I got up there, they changed me to do a driver instruction station." T124. Other credible testimony is similarly not inconsistent with the established boundaries of exclusivity. For example, RFD Chief Dott: T321-324, 334-335.

Wisher is the Troy FD Union President, and was so during the February 2019 recruit school. The City argues that the lack of a grievance being filed by the Troy FD Union about performing AFD Station Instructor work at the recruit school is proof that APPFA "likely . . . did not have exclusivity." City Brief 11. This is not persuasive, because Wisher credibly testified that the Troy FD Union "would have no reason to [file such a grievance]." T133.

City Exhibit 9 does not support the City's assertion that AFD "Fred Peters is believed to be certified to teach pump operations." However, City Exhibit 9 is consistent with the record evidence that state certification is required to teach pump operations and that state-

certified pump operators were in relatively short supply. T395-398; T412. This is consistent with why Saratoga Springs FD Asst. Chief Peter Shaw would be in a photograph at a hands-on AFD recruit school training station with an AFD pumper. It is also consistent with why his son Troy FD Patrick Shaw[7] would be in a photograph at a hands-on AFD recruit school training station with a Troy FD pumper. City Exhibit 17 undated photographs 6 and 7; T287-288, T294-295; T403-404.

The City argues that "Saratoga Springs Chief Shaw taught pump operations even though APPFA member Jeremy Clawson is certified *and willing* to teach that skill . . . (City Exh. 9; Tr. 38:10-23; 229:1-15)" City Brief 3 and 22 [emphasis in original]. This assertion is unsupported by the record. Capt. Clawson did not testify. There is nothing in the record about his *willingness* to teach pump operations, or any other skill, whether or not SSFD Chief Shaw was teaching.

Be that as it may, the City proved that from 2013 to 2019, inclusive, —a seven (7) *year* period of time covering seven (7) AFD recruit schools—SSFD Chief Shaw taught at the AFD recruit school on six (6) *days*: February 16, 17, and 18, 2016, and, March 5, 6, and 11, 2019. City Exhibit 13 (and 14, partially). Moreover, the comprehensive AFD training and payroll records provided by the City show that Clawson did *not* teach at the recruit school on February 16 and 18, 2016, nor on March 5, 6, and 11, 2019. City Exhibits 7 and 16.

In summary, of the *six (6) days* in total that SSFD Chief Shaw taught at the AFD recruit school over *seven (7) years*, Clawson taught on only *one (1)* such day: February 17, 2016. This is according to City Exhibits 7 and 16, as illustrated in the following table:

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[7] Troy FD Patrick Shaw is apparently an officer, but his specific rank is not in the record. City Exhibit 12.

Saratoga Springs FD Asst. Chief Shaw Teaching Days at Seven (7) AFD Recruit Schools 2013-2019, Inclusive	AFD Capt. Clawson Teaching Days at AFD Recruit School on Days Chief Shaw Teaching 2016	AFD Capt. Clawson Teaching Days at AFD Recruit School on Days Chief Shaw Teaching 2019
Six (6) Days over Six (6) Years	One (1) Day	Zero (0) Days
City Exhibit 13	City Exhibit 7	City Exhibit 16
2/16/16	-	-
2/17/16	8.0 hours	-
2/18/16	-	-
3/5/19	-	-
3/6/19	-	-
3/11/19	-	-

One (1) day out of six (6) days is 0.167 percent. The City's evidence does not support the City's assertion that Capt. Clawson was *willing* to teach pump operations on days that Chief Shaw was teaching pump operations. The City's proof is not inconsistent with the boundaries of exclusivity.

Furthermore, City Exhibit 9 is a *2019* list of instructor certifications. It does not shed light on whether Clawson was pump operations certified in any other year, including 2016. Nor does City Exhibit 9 indicate the year of certification for pump operations, unlike at least three (3) other categories which do list year of certification.

Additionally, City Exhibit 9 does not show Fred Peters to be certified in pump operations, thus clarifying testimony of a witness who thought that Peters might be so certified. T229. Again, the City's proof is not inconsistent with the boundaries of exclusivity. Nor is the testimony that Troy FD Captain McIntyre functioned as a Station Instructor in ladders inconsistent with the boundaries. T175, T240, T244, T245-248.

The City avers that Troy FD "Chief McMahon produced a list of seven Troy employees that functioned as Station Instructors in 2019 (City Exh. 23; Tr. 301:10-25)."

City Brief 4. However, the list does not indicate "Station Instructors", and does not differentiate "Instructors". Indeed, McMahon testified that he did *not* know what type of instructors they were. T279-280. In light of this, the testimony that in 2016 the "'great majority' of the [Troy FD] individuals listed in [City Exhibit 22] were sent to the recruit school as Station Instructors (Tr. 278:2-15) . . ." (City Brief 4) is not persuasive. McMahon testified that he would *not* know if the reason Troy FD were used for Station Instructors was because AFD personnel were not available/certified/qualified. T292-293, 311. Chief McMahon was not present at the recruit school on a daily basis. T298.

The City of Troy (or Troy FD) cut a check on February 17, 2017, to the Town of Colonie Building and Fire Services Department in the amount of $7,375. City Exhibit 25. The check was for a September 26, 2016 voucher for "USE OF CLASSROOM" during the recruit school commencing September 16, 2016. City Exhibit 24; T281-282. There is no such document in evidence for the grieved 2019 recruit school. This tends to support the record evidence that in 2019 AFD ordered the use of Troy FD personnel as Station Instructors to offset Troy's non-payment of the 2019 $5,000 MTB fee that Troy/Troy FD customarily paid. T44-45; T90-91; T106; T222.

However, "An economic benefit to the employer resulting from a unilateral change in past practice is insufficient to justify the employer's failure to negotiate prior to making a change. State of New York (Dept of Correctional Svcs), 20 PERB P3003 (1987)." [Footnote 14], *Johnson City Police Association v. Village of Johnson City*, 46 PERB 4561 (2013), City Brief Exhibit D.

Documents from the AFD HQ files of AFD Deputy Chief Maria Walker, who retired in October 2019, are in evidence. They include unsigned computer-printed letters containing material alterations in her handwriting. She did not testify. Testimony about these alterations was largely speculative. Assuming, *arguendo,* that the documents should be given weight, they are not inconsistent with the defined boundaries of the Union's claim. Indeed, Chief Wickham testified that the majority of names on the "Class of 2006 Instructor list" (City Exhibit 18) were AFD, without the document indicating thereon who were

Station Instructors. T231.

Also, almost all of the names on the "March 13, 2015" letter purportedly pertaining to the 2015 recruit school (City Exhibit 19) were AFD, with all but one (1) of the 32 listed as "Skills Instructor" being AFD. T236-237. That one (1) non-AFD name was retired AFD Lt. Ken Dott–before he became Chief of Rensselear FD. Chief Wickham testified that "Skills Instructor" is synonymous with "Station Instructor". T235-236.

That retired AFD Lieutenants Mineau and Vondollen taught at the recruit school November 22, 2016 and June 30, 2017 (City Exhibit 6) is not inconsistent with the boundaries of exclusivity. This is particularly so in light of the unrebutted testimony that they were used "because the City did not have enough bailout instructors to work those days; so they had to go to retired members to get the instruction done." T94-95. Both retirees are bailout certified. Again, the City's evidence is not inconsistent with the boundaries of exclusivity.

Job Descriptions

The City argues that the Union "failed to establish a 'reasonable relationship' between their duties and the alleged discernible boundary [because] only two job descriptions mention instruction. (Joint Exhs. 3 and 4)". City Brief 11. Joint Exhibit 3 is the Fire Lieutenant job description, Joint Exhibit 4 is that of Fire Captain. The City's argument is not persuasive.

It is undisputed that bargaining unit members of ranks other than just Lieutenant and Captain perform Station Instructor work, including the Firefighter rank. The City had knowledge of who performed Station Instructor work, and their ranks when doing so, by virtue of the Class Administrator (always of supervisory rank), and as evidenced by the City's training records (City Exhibits 5, 7 and 16), payroll records (City Exhibit 1), company rosters (City Exhibit 2), and recruit school photographs in evidence (City Exhibit 17). These corroborate the credible testimony that training is part of the duties of a firefighter (T85); and that the ranks of officers, as well as those in the rank of Firefighter,

do station training of recruit classes (T389). Thus, the record establishes a reasonable relationship between the duties of bargaining unit members and the discernible boundary of exclusivity.

Instructor Title Terminology

The arbitrator has thoroughly reviewed the City's arguments (City Brief 9-10; City Reply Brief 8) and the record regarding instructor title terminology, and changes thereto. These titles include: Facilitator, Lab Assistant, Lab Instructor; Lead Instructor, Lecturer, and Station Instructor. In view of the entire record, the arbitrator finds the City's arguments unpersuasive and non-dispositive. For example, T95-101; T117-120; T173-177; T287; T342-344; T355-356; T362; T397; T409-413; City Exhibits 5, 7, 15, 16.

Collaborative Recruit School

Contradicting the City's "collaborative recruit school" arguments are the 2016 and 2017 commencement programs in evidence (City Exhibits 26 and 27, respectively). No other such programs were offered or are in evidence. The cover page of each is prominently entitled at the top: "Albany Fire Department [2016 or 2017] Commencement Exercise". No other fire department's name appears on either cover. The Albany Department of Fire & Emergency Services patch is prominently displayed in the middle of each cover page. No other patch is displayed on either cover. The bottom third of each cover prominently displays the name of the Mayor and Fire Chief of Albany — without indicating the city. No other Mayor, Chief, or locality's name appears on either cover, though the Mayor of Troy is listed on the fourth page of both documents, in the Program of Events, as are the TFD and WFD Chiefs (in addition to the AFD Chief) in the 2016 program (but not the 2017 program). Inside each program there are only two (2) congratulatory letters: one (1) full-page letter from the Albany Mayor, and one (1) full-page letter from the Albany Fire Chief. Furthermore, the word "collaborative" does not appear anywhere in either program. Nor does the word "regional".

City Exhibit 8 is likewise not persuasive evidence in the City's defense. It is a photograph of a picture frame / shadow box hanging on a wall in AFD HQ, near the hearing room. The brass nameplate, centered within the bottom of the frame, is entitled, "*Albany Fire Department* Recruit Class of 2003" [emphasis added], despite there being patches in the frame from the Albany Airport FD, Amsterdam FD, Gloversville FD, and Saratoga Springs FD. Indeed, prominently displayed top center in the frame is the Albany Department of Fire & Emergency Services patch. The words "collaborative" or "regional" do not appear anywhere in or on the physical frame.

Assuming, *arguendo*, that a collaborative/regional recruit school is an objectively reasonable and beneficial idea, especially with mutual aid partners (T178-185), it is well-settled Board law that, "Notably, the asserted merits or demerits of a decision to transfer unit work, including the fiscal and operational wisdom of the decision, are immaterial to whether the subject matter is mandatorily negotiable. [Footnote 54, citing *City of Niagara Falls*, 31 PERB 3085, at 3188; *see also Cayuga Community Coll*, 50 PERB 3003, at 3012.]" *Civil Service Employees Association v. Pine Valley Central School District*, 51 PERB 4512 (2018), City Reply Brief Exhibit L.

Based upon full and detailed consideration of the facts and circumstances of this particular record, the arbitrator finds that the acknowledged exceptions to the practice constitute circumscribed contexts which are a discernible boundary of exclusivity around the work. Thus, under PERB decisions and other case law, APPFA does have exclusivity over the Station Instructor role. Therefore, the answer to Stipulated Issue 2 is Yes.

STIPULATED ISSUE 3:
IF APPFA HAS EXCLUSIVITY, DID THE CITY SUBCONTRACT THE STATION INSTRUCTOR ROLE TO OTHERS?

The Union proved exclusivity over the Station Instructor role. Therefore, PERB's subcontracting analysis applies.

> The seminal case on subcontracting under the Act is *Niagara Frontier Transportation Authority* [18 PERB 3083 (1985)]. That case, along with its progeny, instructs that an employer's unilateral decision to subcontract or otherwise transfer unit work

> to nonunit personnel is unlawful where the work was exclusively performed by unit employees and is substantially the same work before and after the transfer, unless the employer can show that the job qualifications have changed significantly. If there is a significant change in job qualifications, then a balancing test is employed by which the interests of the employees and the employer are weighed against one another. In the instant case, there is no allegation of changed job qualifications.

Johnson City Police Association v. Village of Johnson City, 46 PERB 4561 (2013). City Brief Exhibit D.

As discussed above throughout this Opinion, the record is replete with evidence that the City unilaterally decided to subcontract or otherwise transfer exclusive unit work to nonunit personnel. Union Exhibit 2 corroborates Class Administrator Capt. Ciprioni's testimony that she never ran out of bargaining unit volunteers for station training. It documents that there were more AFD bargaining unit volunteers than available slots. Furthermore, it documents that beginning on February 19, 2019, the third week of the recruit school, some Station Instructor slots began to be filled by non-bargaining unit members, i.e., from other fire departments, even though bargaining unit members had volunteered to perform the work. Thus, because the City did not abide by the practice, work that should have been available to unit members was instead performed by non-unit members, resulting in the loss of work for Union bargaining unit members.

The work was substantially the same work before and after the transfer. There was no significant change of job qualifications. Therefore, the balancing test is inapplicable.

The City's reliance on *Canandaigua* is unpersuasive. In the instant grievance there was no abolishment of any position, nor curtailment in the level of service provided.

Thus, pursuant to PERB's subcontracting analysis, and under PERB decisions and other case law, the City subcontracted the Station Instructor role to others. Therefore, the answer to Stipulated Issue 3 is Yes.

Based on all the foregoing, it is not necessary to address the parties' remaining contentions.

STIPULATED ISSUE 4:
IF THE CITY SUBCONTRACTED THE STATION INSTRUCTOR ROLE, WHAT SHALL BE THE REMEDY?

Having found that the City subcontracted the Station Instructor Role, we turn now to remedy.

The City shall cease and desist from unilaterally subcontracting and/or transferring AFD recruit school Station Instructor work to non-bargaining unit members. The City shall comply with the past practice.

The Union partially amended its remedy request from "Four (4) hours overtime as back pay for the most senior Firefighter for each violation" (Joint Exhibit 6), to 104 hours at the $25 per hour Station Instructor rate of pay. The Union calculates that 104 hours of Station Instructor work was performed at the February 2019 recruit school by non-bargaining unit members that should have been performed by Union bargaining unit members, pursuant to the practice. T50-51; T92, T95.

At the hearing the parties requested that if the grievance is sustained, the arbitrator retain jurisdiction while giving the parties the opportunity to negotiate a mutually agreeable remedy. Accordingly, the arbitrator will retain jurisdiction over the issue of remedy, and temporarily remand to the parties for the opportunity to negotiate a mutually agreeable remedy, as set forth in the accompanying Award.

Despite the City's thorough and vigorous defense, and its detailed post-hearing submissions which left no stone unturned, under the facts and circumstances of this record the Union met its burden of proof.

In conclusion, whether volunteered to AFD as Station Instructors as a *quid pro quo* for admitting a recruit to the 2019 class, as with Rensselear FD, or whether requested by AFD to provide Station Instructors as a *quid pro quo* to offset non-payment of the Troy-FD-customarily-paid-MTB-fee, while having three (3) Troy recruits admitted to the 2019 AFD class, the AFD recruit school Station Instructor work still belonged to the AFD Union in the first place, pursuant to the established past practice with its distinct exceptions. The City

improperly transferred the Union's Station Instructor work without following the practice. Therefore, the grievance must be sustained.

Consequently, and based upon all of the above, the accompanying Award is issued:

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AWARD

For the reasons set forth in the accompanying Opinion, the grievance is sustained.

1. This matter is arbitrable.

2. Under PERB decisions and other case law, APPFA does have exclusivity over the Station Instructor role.

3. The City did subcontract the Station Instructor role to others.

4. Remedy:

4A. The City shall cease and desist from unilaterally subcontracting and/or transferring AFD recruit school Station Instructor work to non-bargaining unit members. The City shall comply with the past practice.

4B. Per joint request of the parties, the Arbitrator retains jurisdiction over the issue of remedy, and temporarily remands same to the parties for the opportunity to negotiate a mutually agreeable remedy.

Accordingly, the parties are hereby directed to promptly engage in good-faith remedy negotiations. On or before sixty (60) days after the date below, the parties will jointly inform the Arbitrator: of their mutually agreed upon remedy, for inclusion in a Memorandum of Agreement by the parties and/or Supplemental Award by the Arbitrator; or, of their joint request for additional time to negotiate a mutually agreeable remedy. In the absence of such mutually agreed upon remedy, or such joint extension request, the Arbitrator will address the issue of remedy upon notice and request of either party.

Dated: May 27, 2020

Robert A. Grey, Arbitrator

AFFIRMATION

I hereby affirm that I executed this instrument as my Opinion and Award.

Dated: May 27, 2020

Robert A. Grey, Arbitrator