P.E.R.C. NO. 84-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE, NEW JERSEY,

Respondent,

-and- Docket No. CO-83-44-45

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that the Communications Workers of America, AFL-CIO filed against the City of East Orange. The charge had alleged that the City discriminatorily suspended two employees for five days because they had engaged in activity protected by the New Jersey Employer-Employee Relations Act, but the Commission holds that Communications Workers of America did not prove its allegations by a preponderance of the evidence.

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Green and Dzwilewski, Esqs. (Roger Jacobs, of Counsel)

For the Charging Party, Ann F. Hoffman, Esq., Counsel, District 1, CWA

DECISION AND ORDER

On August 25, 1982, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the City of East Orange ("City") with the Public Employment Relations Commission. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4 (a)(1) and (3),[1/] when it suspended Laverne Chambers, a principal clerk-typist, and Saundra Heath, a clerk-typist, for five days without pay. The charge specifically alleged that the City discriminatorily suspended Chambers in retaliation for her refusal to monitor the

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; [and] (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

time CWA's local president and other officials spent on union business leave. The charge also alleges that the City discriminatorily suspended Heath for objecting to the manner in which her supervisor addressed her and her co-workers during an office staff meeting.

On November 19, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On December 1, 1982, the City filed an Answer. The City admitted the suspensions, but denied that they were illegally motivated or otherwise improper. It also asserted that the charge was untimely.

On February 17 and 18, 1983, Commission Hearing Examiner Edmund G. Gerber conducted hearings. The parties examined witnesses, presented exhibits, and argued orally. Both parties filed post-hearing briefs.

On August 16, 1983, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-11, 9 NJPER 546 (¶14227 1983) (copy attached). With respect to Chamber's suspension, he found that the City had not committed an unfair practice because CWA had not established that there was any causal connection between this suspension and the purported refusal to gather information on union officials or that the City had not properly acted to ensure that leave time is not abused. With respect to Heath's suspension, however, he found that the City violated subsection 5.4(a)(1) because it punished her for the allegedly protected activity of speaking out in response to her

supervisor's accusations, thus, in effect, presenting a "grievance." 2/

On August 22, 1983, the City filed exceptions. Specifically, the City argues that the charge was untimely; that it suspended Heath for her insolence, disruption, and insuborindination at the meeting; and that her conduct was not a grievance and was not protected by the Act. It also contends that in the event the recommended decision is adopted, the posting of a notice should specify that Chamber's suspension was not an unfair practice.

On September 12, 1983, CWA filed cross-exceptions. It specifically disagrees with the Hearing Examiner's finding that there was no causal connection between the suspension of Chambers and her supervisor's alleged anti-union animus.

We have reviewed the record. The essential facts follow.

Mary Ann Whitt was appointed East Orange Municipal Court Administrator in July, 1981. Whitt offered Chambers, then a principal clerk-typist at the municipal court, the position of administrative secretary; Chambers accepted. Her duties included checking the attendance records to determine who should be paid. Chambers would complete the payroll forms which would then be reviewed by Whitt and forwarded to the payroll department.

In October, 1981, Whitt asked Chambers to monitor the time union officials spent on union business during the work day

2/ The Hearing Examiner did not explicitly rule on CWA's allegation that Heath's suspension violated subsection 5.4(a)(3) of the Act.

According to Chambers, Whitt told her to do this to build a record for the purpose of terminating these individuals. Chambers kept track of the time spent on leave for union business.

In December, 1981 Chambers advised Whitt of her desire to return to her position as principal clerk-typist. Another employee, Louise West, replaced her as administrative assistant.

In February, 1982, a paycheck was erroneously issued to Renee Norwood, an employee who was on an unpaid maternity leave. Whitt was absent on the day in question. When she learned of the mistake, she became outraged. In her view, Chambers was primarily responsibile for the error because West had asked Chambers whether Norwood was entitled to the check and Chambers had advised West to ask another employee, instead of telling West directly that Norwood was not entitled. Whitt believed Chambers knew Norwood was on an unpaid maternity leave since Chambers had prepared the form approving Norwood's request for an unpaid leave. Therefore, according to Whitt, Chambers was suspended on February 22, 1983, effective March 1-5, 1983, for "insubordination, failure to notify me of an important thing which I felt was in her control." According to Chambers, she did not know Norwood was not entitled to the check because she was no longer responsible for the payroll transmittals.

The same day, following the suspension of Chambers, Whitt called a staff meeting to discuss the Norwood check incident. In Whitt's view, the staff knew Norwood was not entitled to the check but no one brought it to her attention. Therefore, she believed the entire staff was responsible for the wrongful

issuance of the check and requested that the entire staff make restitution in lieu of buying a shower gift for Norwood as previously planned.

Whitt was quite upset at the meeting. Her voice was raised. She called the employees "lying dogs" [3/] and accused the employees collectively of a conspiracy of silence for the purpose of permitting an employee to receive unearned money. Saundra Heath, an employee of the City but not a CWA official, stood up while Whitt was speaking, interrupted her, and said:

> Miss Whitt, you have a lot of stuff with you. You issued this check in error. You made the error and you want the office to pay for it.

Despite the efforts of CWA's president to calm them down, Whitt and Heath then got into a heated argument. After the president finally persuaded Heath to sit down so Whitt could continue her presentation, Heath got back up and resumed the argument. The argument disrupted the meeting and, in Whitt's judgment, made it impossible to continue. After the meeting ended, CWA's president and a shop steward met with Whitt in private and they ultimately arranged for Norwood to pay back the check.

On February 23, 1983, the City suspended Heath for five days without pay, effective March 1-5, 1983. According to

3/ Although Whitt denied making this statement, the Hearing Examiner credited the testimony of the other witnesses that she did. We will not disturb this credibility judgment. See, e.g., In re City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982).

Whitt, the suspension was imposed because "Ms. Heath threatened my position in front of the staff of 38 people...by disrupting the meeting." She further testified that "any time I speak with people, I usually ask them if there are any questions or discussions after the meeting, and there certainly would have been time for that after I had finished, if I were allowed to finish."

We first consider whether this charge was timely. Under all the circumstances of this case, we conclude it was.

CWA originally processed this matter through the parties' grievance procedure, alleging that the two suspensions were without just cause. It sought binding arbitration within two months of the suspensions. The City then filed a scope of negotiations petition seeking to restrain arbitration.[4/] Promptly thereafter and within six months of the effective date of the suspensions, CWA filed this charge. These circumstances establish that this charge is timely. Kaczmarek v. New Jersey Turn-

4/ In a case of first impression, applying Assembly Bill No. 706 which amended N.J.S.A. 34:13A-5.3, the Commission determined that disciplinary suspensions of five days or less in a Civil Service municipality may not be submitted to binding arbitration. In re City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14070 1983), appeal pending App. Div. Docket No. A-3688-82T3. Based on a subsequent Appellate Division decision, Bergen County Law Enforcement Group, Superior Officers, PBA Local No. 134 v. Bergen County Bd. of Chosen Freeholders, ___ N.J. Super. ___ (App. Div. 1/7/83), 9 NJPER 489 (¶14203 1983), the Commission has since overruled its scope of negotiations determination in East Orange. In re Atlantic County, P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983).

pike Authority, 77 N.J. 329, 341-343 (1978).[5/]

We now consider whether the City committed an unfair practice when it suspended Laverne Chambers. To establish such a violation, CWA must first show that the decision to suspend was motivated by the employee's protected activity. East Orange Public Library v. Taliaferro, 180 N.J. Super. 155, 162 (App. Div. 1981). The record in this case simply does not permit such a finding. In fact, it is quite clear from Whitt's actions that the suspension resulted from her perception that Chambers acted improperly in the Renee Norwood incident.[6/] Moreover, we agree with the Hearing Examiner, under the circumstances of this case, that the City acted within its right to ensure against abuse of union leave time and that an employee's unwillingness to discharge her normal duties with respect to keeping payroll and attendance records would not constitute activity worthy of protection under the Act. See In re Jefferson Twp. Bd. of Ed., P.E.R.C. No. 81-135, 7 NJPER 337 (¶12151 1981) (surveillance of driver to verify request for overtime compensation does not constitute an unfair practice). Accordingly, we dismiss those portions of the Complaint which allege that the suspension of Chambers violated subsections 5.4(a)(1) and (3).

5/ Given the apparent uncertainty over the availability of binding arbitration to review these disciplinary suspensions and CWA's prompt response to the City's filing of a scope petition, we do not strictly apply the general rule that grievance proceedings do not toll the statute of limitations. In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (App. Div. 1977), pet. for certif. den. 78 N.J. 326 (1978). Further, given these considerations, we need not decide in the abstract whether the notice or the effective date of a suspension triggers the statute of limitations.

6/ We, of course, intimate no opinion on whether there was contractual "just cause" for a five day suspension. As long as an employer does not illegally discriminate under our Act, we have no jurisdiction to consider whether there was good cause, bad cause, or no cause for a personnel action. In re College of Medicine & Dentistry, P.E.R.C. No. 76-46, 2 NJPER 219, 220 (1976).

We next consider whether the suspension of Saundra Heath constituted an independent 5.4(a)(1) violation. In In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979), the Commission set forth the standard to apply in determining whether an independent 5.4(a)(1) violation has been committed:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id at 551, n. 1]

An application of this standard to the facts of this case requires us to balance two equally important, but conflicting rights. On the one hand is the employer's right to maintain discipline in his establishment. It is beyond cavil that insubordination and disruption of staff meetings are actions which an employer need not tolerate. On the other hand is the employee's right to engage in activities protected by this Act, assuredly including the right to present grievances to her employer.

This Commission has faced these conflicts before and certain teachings of prior cases are applicable here. Thus, in In re Hamilton Twp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979 ("Hamilton"), we found that the Board committed an unfair practice in reprimanding an employee for his conduct at a grievance hearing which included striking a table with his fist,

standing up, shouting and walking around the room. Applying relevant private sector precedent, Crown Central Petroleum Corp., 430 F.2d 724, 74 LRRM 2844 (5th Cir. 1970), we recognized that:

> wide latitude in terms of offensive speech and conduct must be allowed in the context of grievance proceedings to insure the efficacy of this process. [Id at 116]

We also adopted the Crown Central Petroleum Corp. doctrine that:

> ...As long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected under §7 of the Act" (emphasis in the original decision).

The principles articulated in Hamilton were subsequently applied in In re City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979) ("Asbury Park"). There, the president of the local union was suspended for three days as a result of a shouting match with the City Manager during a discussion regarding various employee complaints. In finding that the City committed an unfair practice, we stated:

> ...in the processing and resolution of grievances the parties must be on an equal footing and not in a master and servant relationship. Caliendo's conduct while loud, was apparently not violent or physically threatening and the suspension notice itself cites "insubordination and conduct unbecoming a public servant." An employee may not utilize his or her employee organization position to attempt to undermine an employer's supervisory and management status, or to engage in offensive behavior. But neither may an employer utilize its power to punish an employee for engaging in protected activity which happens to annoy the employer's representative because it comes at an inconvenient or undesirable time. This is particularly true where the conduct punished is of the same nature as that engaged in by the employer toward the employee. [Id. at 390]

In In re City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 215 (¶4107 1978), by contrast, we held that the public employer did not commit an unfair practice when it discharged two employees for visiting and telephoning the City's auditing department to check on insurance and pay discrepancies. The employees were disciplined for failing to obtain prior permission in violation of a work rule which required the officers to make an appointment prior to visiting the department. We found that the work rule was enacted to ensure that the operation of the department would not be unduly disrupted. Thus, in dismissing the charge, we stated:

> ...an employee may not act with impunity even though he may be engaged in what might constitute protected activity in certain circumstances. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination. [Id. at 215]

Applying these principles to all the circumstances of this particular case, we do not believe that CWA has established by a preponderance of the evidence that Heath's actions were protected by the Act.[7/] Heath disrupted a staff meeting called by her employer for the purpose of admonishing employees for what their supervisor believed was improper conduct committed by them. There can be no question but that an employer has the right to call such a meeting to discuss what the employer has determined

7/ Given the conclusion that Heath's actions were unprotected, we cannot find an unfair practice and we have no further jurisdiction to consider whether there was contractual "just cause" for a five day suspension. See footnote 6.

to be a serious problem in the workplace. Under all the circumstances of this case, we do not believe Heath's conduct at this meeting was entitled to the Act's protection.

In reaching this decision, we recognize that the Hearing Examiner found that this action was protected under the Act because he believed Heath was presenting a "grievance." It is true, as already stated, that in the "resolution of grievances the parties must be on an equal footing and not in a master and servant relationship." Asbury Park, supra at 390. In this case, however, Heath's outburst did not occur during a grievance meeting; Heath was not acting as a spokesperson for the majority representative seeking to represent or defend employees during an investigation of suspected employee misconduct;[8/] and her behavior went beyond the bounds of propriety and, indeed, defeated the efforts of CWA's president to defuse the situation. We do not believe that, under these circumstances, an individual employee has a protected right to unilaterally convert a meeting called by the employer for the purpose of commenting upon its impressions of faulty work performance into a grievance conference where the parties are on an equal footing.[9/] See NLRB v. Prescott Indus-

8/ This meeting was not called for the purpose of investigating suspicions of employee misconduct. Contrast NLRB v. Weingarten, __ U.S. __, 88 LRRM 2689 (1975).

9/ We are not condoning Whitt's conduct and language at the meeting. Instead, we are simply holding that Whitt's behavior did not give an individual employee (and, by extension, all 38 individual staff employees at the meeting) the right, under our Act, to directly challenge and defy her authority. We also need not consider whether a more limited and dispassionate response to Whitt's accusations by an official of the majority representative would have been protected or whether, in light of Whitt's behavior, there was contractual "just cause" to suspend Heath for five days.

trial Products Co., 500 F.2d 6, 86 LRRM 2963 (8th Cir. 1974) (employee's persistent attempts to ask question at employer's pre-election campaign meeting constituted insubordination, not protected activity). Therefore, we dismiss those portions of the Complaint alleging that the suspension of Heath violated subsections 5.4(a)(1) and (3).[10/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hipp voted against the decision.

DATED: Trenton, New Jersey
December 9, 1983
ISSUED: December 12, 1983

10/ Our finding that Heath's insubordination was unprotected necessarily requires dismissal of the 5.4(a)(3) allegation since the City cannot be said to have acted to discourage Heath's exercise of any rights guaranteed by the Act.

H. E. No. 84-11

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

In the Matter of

CITY OF EAST ORANGE, NEW JERSEY,

Respondent,

-and- Docket No. CO-83-44-45

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the City of East Orange did not commit an unfair practice when it suspended Laverne Chambers for five days. The union failed to demonstrate that this suspension was in any way connected with the exercise of protected rights under the Act.

It was recommended that a five-day suspension imposed against Saundra Heath be found to be an unfair practice for this suspension was for the exercise of protected rights when Heath spoke out at a meeting called by the city and an unjust suspension penalty was threatened against all employees.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 84-11

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Appearances:

For the Respondent, Green and Dzwilewski, Esqs.
(Roger Jacobs, Esq.)

For the Charging Party
Ann F. Hoffman, Counsel, District 1, CWA

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 25, 1982, the Communications Workers of America, AFL-CIO ("CWA") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the City of East Orange ("City") engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.1 et seq. ("Act") when it caused Laverne Chambers to be suspended for five days when Chambers refused to participate in gathering information concerning the job performance of a president of CWA Local 1077 in an effort to build a case to terminate her employment. It was further alleged that the City also suspended Saundra Heath for her engaging in protected activity when she spoke out in defense of herself and her co-workers when they were accused of "knowing of and consenting to" the disbursement of a check to an employee who was on maternity leave and

therefore not entitled to same.

It was specifically alleged that these actions violated subsections 5.4(a)(1) and (3) of the Act. 1/

It appearing that the allegations of the charge if true may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on November 19, 1982.

Hearings were held on February 18 and 19, 1983, in the Commission offices in Newark, New Jersey, at which time both parties were given an opportunity to examine and cross-examine witness, present evidence and argue orally. Both parties submitted briefs which were received by April 18, 1983.

Maryann Whitt is the Court Administrator in the East Orange Municipal Court. In October of 1982 Whitt approached Laverne Chambers, a clerk in the court, and asked her to become Administrative Assistant. Chambers agreed and assumed the responsibilities of this position. As part of her duties Chambers was requested to check up on leave time of the president of CWA Local 1077, Toni Westry. Whitt told Chambers that she believed that Westry was taking excessive leave and falsely claiming it was for union business. Chambers also testified that Westry expressed a dissatisfaction with the union on several occasions.

Chambers complied with Whitt's request and compiled a record of all leave time including union business time taken by Westry. Sometime in November of 1981 Chambers resigned from her position as Administrative Assistant telling Whitt that the position was not working

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

out and she wanted to return to her old duties. Accordingly, Whitt transferred Chambers from Administrative Assistant back to Clerk Typist. There was no evidence regarding any union or Association activity on the part of Chambers during this period of time.

On February 12, 1982, a payday, Whitt was absent and Chambers' successor to the Administrative Assistant position asked Chambers whether a check was to go out to Renee Norwood who was then on maternity leave. Chambers testified that although she knew Norwood was on leave she did not know whether her sick leave or other accrued benefits had been exhausted and suggested that the assistant contact someone else to determine whether or not Norwood should receive a check. The check ultimately was given to Norwood. On February 19th Whitt discovered that the check was given to Norwood when in fact she was not entitled to it. Whitt testified that Chambers knew that Norwood was not supposed to receive the check in question because Chambers had filled out the employee form signifying that Norwood was to go on leave. Chambers testified, however, that she asked Whitt for assistance in completing this form since she had never done one before and accordingly did not know whether or for how long Norwood would receive a check after going on leave. Whitt further testified that the master payroll list for the pay period was prepared by Chambers and Chambers had neglected to put down on that form that Norwood was not to receive a check. This sheet went to the payroll department wherein the check for Norwood was generated. Chambers denies that she prepared the form. She testified that Whitt prepared said list and it was Whitt who failed to make the notation.

After Whitt discovered what happened on February 22nd she

accused Chambers of knowingly letting the check go out when she knew that Norwood was not entitled to it. Whitt gave Chambers a five-day suspension.

Shortly after Whitt's discussion with Chambers, some of the other employees were talking about raising money for Norwood to buy her a shower present. Whitt thereupon called a general meeting of all the employees of the municipal court. She accused all the employees of engaging in a conspiracy to allow Norwood to improperly receive a check and called them all "lying dogs." Although this last accusation was denied by Whitt, this was credibly testified to by three witnesses: Saundra Heath, Chambers and Toni Westry.

It is noted that Whitt's testimony was evasive and inconsistent and cannot be fully credited. I find that Whitt did call the employees lying dogs.

At this point Whitt appeared agitated and was speaking in a loud tone of voice. She stated that all the employees should chip in and reimburse the city for the check which improperly went out to Norwood rather than buy Norwood a present. At this point Saundra Heath interrupted Whitt, stating, "Miss Whitt you have a lot of stuff with you. You issued this check in error. You made the error and you want the office to pay for it." Whitt then responded that Heath "could be laid off for her attitude if she didn't like what was going on." Heath "could not tell her [Whitt] what her job was" and that Heath could be let go. Heath replied that trying to get the office to pay for Whitt's mistake would be improper. The interchange continued for a short time. No threats or abusive language was used by Heath nor was profanity used in this interchange. As a result of

her statements Heath received a five-day suspension for insubordination.

Analysis

The purpose of the instant proceeding is not to determine whether or not the discipline meted out by Whitt was just or proper; rather, it is to determine whether the imposed discipline violated the protections afforded under the Act. Regardless of the underlying merits of the suspension of Chambers, the Charging Party has failed to establish any causal connection between Chambers' suspension and any anti-union animus on the part of Whitt. Chambers did keep records of Westry's use of union leave but an employer has a right to investigate to see that leave time is not abused and Chambers never indicated to Whitt that she opposed keeping these records. See Piscataway Twp. Bd/Ed, P.E.R.C. No. 82-64, 8 NJPER 95 (¶12029 1982). There is simply no causal connection between Chambers' recordkeeping and her later resignation from the Administrative Assistant job and the five-day suspension for her alleged mishandling of Norwood's check.

There is, however, a relationship between Saundra Heath's suspension and the exercise of protected rights. Unlike the National Labor Relations Act, the word "concerted" does not appear in the Public Employer-Employee Relations Act, i.e. N.J.S.A. 34:13A-5.1 et seq. Activity does not have to be concerted activity before an employee is protected. N.J.S.A. 34:13A-5.4 expressly permits employees to present grievances personally. See Red Bank Reg. Ed/Assn and Red Bank Reg. High School Bd/Ed, 78 N.J. 122 (1978). Heath individually, and the other employees of the municipal court collectively, were being accused of wrongdoing and were threatened that they might be required to pay back Norwood's check. 2/ Heath had a real grievance against this

2/ It is noted that an agreement was ultimately entered into where Norwood would pay back this money when she resumes her work at the municipal court.

accusation by Whitt, and pursuant to the Act had a right to make it known that neither she nor the other employees had anything to do with Norwood's receipt of the check. Heath's actions were, in fact, concerted. She testified that although she spoke out primarily on her own behalf, Heath knew that a number of her co-workers were unaware of the check incident and did not even understand Whitt's accusation and accordingly spoke out on their behalf as well. There is no gainsaying an employer has the right to expect loyalty and discipline from an employee in an open meeting but Whitt was acting in an immature, if not irrational manner, making improper and arbitrary threats against the employees.

The Act contemplates that an employee will generally make her grievance known through the established grievance procedures. But that is not the only time that an employee is protected when she speaks out. It is significant that rights which arise under the National Labor Relations Act [3/] "never have been confined to negotiations conducted during formal grievance, arbitration or labor contract bargaining sessions." NLRB v. Southwestern Bell, F2d (5th Cir. 1982), 112 LRRM 2526, NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 669, 98 LRRM 3144 (5th Cir. 1978); United States v. NLRB, 652 F.2d 409 (5th Cir. 1982):

> The informal resolution of latent grievances is a recognized, and indeed essential, component of the parties' grievance procedure. Without such informal resolutions, there is a risk of destroying the effectiveness of that procedure by weighing it down with formalized grievances. Unless employees are assured that they will be treated as equals when engaged in the informal resolution stage and that they will be free from discipline for freely speaking

3/ As to the applicability of relying on NLRB decisions in interpreting the Act, see Lullo v. Firefighters Local 1066, 55 N.J. 409 (1975).

> their minds, they will be discouraged from seeking informal resolution and encouraged to seek the protections of the more formalized grievance procedure. Ryder Truck Lines, Inc., 239 NLRB 1009, 1011, 100 LRRM 1097 (1978).

It is unrealistic to expect employees to hold their tongues and say nothing when they are falsely accused and threatened by an employer. The NLRB has promulgated a provoked insubordination doctrine -- "an employee may not be provoked into an intemperate outburst by the threatened imposition of illegal punishment." NLRB v. Southwestern Bell, supra.

In determining whether Heath's conduct warranted protection under the law, the timing and nature and deliverance of her response is all important. Heath did not interfere with the productivity of the workplace since it was Whitt who called the meeting. As stated before no profanity was used in Heath's retort nor was there a personal attack against Whitt nor did her statement escalate the emotional level of the meeting beyond that demonstrated by Whitt. But, see Pietrunti v. Bd/Ed of Bricktown, 128 N.J. Super. 149 (App. Div. 1974). It must be emphasized that the protections afforded an individual employee in this type of situation are limited. Here the response of Heath was justified in light of the attack on her and her fellow employees made by Whitt.

The City of East Orange maintains that the instant charge is untimely, that the charge was filed on August 25, 1982, and that the incidents occurred on February 22, 1982 and, accordingly, should be dismissed since the charge was brought more than six months after the alleged unlawful actions of the city.

It is noted however that the five-day suspensions were made effective March 1 through 5, 1982, which are within the six-month period. In Galloway Twp. Bd/Ed v. Galloway Twp. Educational Sec'ys Assn., 78 N.J. 1 (1978), the Supreme Court held in that there are in effect two unfair practices which can occur. The first is the time in which the threat is made and the second is when the threat is carried out. Given that the penalty was imposed within the six-month statutory period this matter is timely and should not be dismissed on that basis.

Accordingly, it is hereby recommended that the Commission find that:

1. the City of East Orange did not violate §5.4(a)(1) and (3) when it suspended Chambers for five days but

2. the City of East Orange did violate §5.4(a)(1) of the Act when it unlawfully interfered with, restrained and coerced Saundra Heath in the exercise of her protected rights by suspending her for a period of five days for speaking out against the intemperate accusations of Maryann Whitt.

It is hereby recommended that the Commission issue the following

ORDER

A. That the City of East Orange cease and desist from

1) Interfering with, restraining or coercing Saundra Heath by suspending her when she responded to wrongful accusations and threats by her supervisor Maryann Whitt.

B. That the City of East Orange take the following affirmative action:

1) Reimburse Saundra Heath the five days of salary which she was denied when she was improperly suspended March 1 through 5, 1982, plus interest of 12% per annum to be computed commencing March 5, 1982.

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

3) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Edmund G. Gerber
Hearing Examiner

Dated: August 16, 1983
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce Saundra Heath by suspending her when she responded to wrongful accusations and threats by her supervisor Maryann Whitt.

WE WILL reimburse Sandra Heath the five days of salary when she was denied when she was improperly suspended March 1 through 5, 1982, plus interest of 12% per annum to be computed commencing March 5, 1982.

CITY OF EAST ORANGE
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.