H.E. NO. 2016-15

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

In the Matter of

CITY OF HOBOKEN,
Respondent,

-and- Docket No. CO-2015-064

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS LOCAL 1076
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss the Complaint finding that the City Of Hoboken did not violate 5.4a(1) and (2) of the Act when it demanded written reports about threats made against a fire captain by other fire captains at a union meeting. She determined that the City's interest in maintaining order and discipline in the work place as well as its duty under its own rules and the LAD to investigate hostile work environment complaints outweighs the union's and employees' interests in maintaining complete privacy regarding activities at union meetings.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Weiner Lesniak, attorneys
(Steven Nevolis, of counsel)

For the Charging Party
Cohen, Leder, Montalbano & Grossman, LLC, attorneys
(Bruce D. Leder, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 22, 2014, the International Association of Fire Fighters Local 1076 (IAFF or Union) filed an unfair practice charge, Docket No. CO-2015-064, against the City of Hoboken (City). In September 2014, a fire captain filed a complaint with the chief alleging two co-workers had harassed him and subjected him to a hostile work environment. The charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A.34:13A-1, et seq. (Act) when in September and October

2014, the City investigated the captain's complaint by ordering Local 1076 members who were present at two union meetings to submit written reports about the alleged threats. The City's conduct allegedly violates section 5.4a(1) and (2) of the Act.[1/]

On March 31, 2015, a Complaint and Notice of Hearing issued on allegations the City violated the Act. On April 13, 2015, the City filed an Answer, denying having violated the Act and raising several affirmative defenses. The City asserts that its legitimate and substantial interests in investigating the alleged incidents and addressing any harassment outweighs the interests of the employees.

On or about August 21, 2015, the parties advised me they wished to waive an evidentiary hearing and would rely on a stipulation of facts, documents and their briefs. On August 24, 2015, I wrote to the parties outlining the conditions for proceeding in this manner:

> Accordingly, by choosing to waive the hearing through the presentation of witnesses and exhibits, the parties agree that the facts as stipulated will constitute the complete record upon which I will rely in rendering my decision. Specifically, the Charging Party agrees that if the stipulated facts are insufficient to sustain its burden of proof by a preponderance of the evidence, the complaint

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act, and (2) Dominating or interfering with the formation, existence or administration of any employee organization."

> will be dismissed. Similarly, the Respondent agrees to rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted or to rebut or disprove the existence of a prima facie case established by the Charging Party.

The parties were given the opportunity to respond or object to the above terms and I notified them that in the absence of their responses, I would assume they understood and agreed to the terms. Neither party responded within the time afforded them. Accordingly, the parties have agreed to the above conditions and are bound by them. Thereafter, on September 18, 2015, the parties' attorneys submitted an executed "Joint Stipulation of Facts and Exhibits." On September 16, 2015, the City filed a brief and on September 30, 2015, the IAFF filed a brief. On October 9, 2015, the City filed a reply brief and the record closed.

FINDINGS OF FACT

The parties stipulated:

1. At all times relevant to the underlying matter, the International Association of Fire Fighters, Local 1076 ("Charging Party") is the duly-selected bargaining unit for fire officers employed by the City of Hoboken, Hoboken Fire Department ("Respondent").
2. At all times relevant to the underlying matter, Jon Tooke ("Tooke") was the Director of the Department of Public Safety for Respondent.

3. At all times relevant to the underlying matter, Chief Richard Blohm (“Chief Blohm”) was the Fire Chief for Respondent.

4. At all times relevant to the underlying matter, Vincent DePinto (“DePinto”) was a fire captain employed by Respondent and president of the charging Party.

5. At all times relevant to the underlying matter, Ronald Miltner (“Miltner”) was a fire captain employed by Respondent and vice-president of the Charging Party.

6. At all times relevant to the underlying matter, Andrew Markey (“Markey”) was a fire captain employed by Respondent and a member of the Charging Party.

7. On or about April 28, 2014 and September 15, 2014 Charging Party conducted union meetings at Exempt Hall in Hoboken, New Jersey.

8. On or about September 16, 2015, Markey forwarded an email to Chief Blohm requesting that “departmental charges of harassment be filed against Vincent DePinto and Ronald Miltner on my behalf.” Markey went on to state that “[t]hese two individuals have threatened me with physical harm and created a hostile work environment for myself, my family and my friends.” Specifically, Markey alleged that at a union meeting held on April 28, 2014, Miltner threatened him with

bodily harm and stated "How about I come over there and slap the shit out of you." Markey further alleged that at a union meeting on September 15, 2014, Miltner threatened him by saying "I should beat the shit out of you." Markey further alleged that DePinto threatened him on September 15, 2014 by stating "Don't give me that smirk. I'll come over there and slap it off your face. Don't think anyone in this room will stop me either." A true and correct copy of Markey's September 16, 2014 email to Chief Blohm is attached here to as **Exhibit A**.[2/]

9. That same day, Chief Blohm forwarded the email to Tooke requesting guidance on how to handle the matter. A true and correct copy of Chief Blohm's September 16, 2014 email to Tooke is attached hereto as **Exhibit B**.

10. Respondent then began an investigation of the alleged conduct.

11. Tooke advised Chief Blohm that, in his opinion, the conduct described by Markey appeared to be "prohibited under the established Rules and regulations of the fire Division. Specifically, Chapter 18 General Rules, Sections, 31 point f. and g., 32 and 66." Tooke then directed Chief Blohm to "interview and collect

2/ The parties' joint exhibits will be referred to herein as J-A through J-H.

subjects[3/] from all who can be determined to have been present at the instances described by Captain Markey." A true and correct copy of Tooke's email to Chief Blohm is attached hereto as **Exhibit C**. A true and correct copy of the Rules and Regulation of the Department of Administration, Division of Fire for the City of Hoboken is attached hereto as **Exhibit D**.

12. After receiving Tooke's directive, Chief Blohm called Battalion Chief David Buoncuore and Battalion Chief Joseph Turner to his office and directed them to order any members that witnessed Markey's allegations to write a subject to the Chief regarding same. Chief Blohm then memorialized his actions in an email to Respondent's corporation counsel on September 17, 2014, a true and correct copy of which is attached here to as **Exhibit E**.

13. In response to Chief Blohm's directive, approximately sixteen (16) written subjects were submitted. True and correct copies of those subjects are attached hereto as **Exhibit F**.

14. On October 1, 2014, Chief Blohm issued a second directive for written subjects. Chief Blohm did so

3/ In the parties' vernacular, a "subject" is a written, signed and dated report of an event or incident. (J-G and J-H)

because the subjects received were “vague and unresponsive.” Chief Blohm ordered employees to submit a second subject advising “[n]arrowly, directly and specifically whether or not you heard any other person say, ‘How about I come over there and slap the shit out of you? Or ‘I should beat the shit out of you”, or “don’t give me that smirk I’ll come over there and slap it off your face. Don’t think anybody here will stop me either’.” A true and correct copy of Chief Blohm’s October 1, 2014 directive is attached hereto as **Exhibit G**.

15. In response to the October 1, 2014 directive, approximately thirteen (13) written subjects were submitted. True and correct copies of those subjects are attached hereto as **Exhibit H**.

* * * *

I add the following facts from the parties’ joint exhibits.

In his September 16, 2014 email, Director Tooke also directed Chief Blohm to “. . .have Captain Markey respond to the Office of the Corporation Counsel to be interviewed by Police to determine if an offense was committed” (J-C).

Section 18[4/] of Chapter 6, "General Rules" of the Division's Rules and Regulations (J-D) states:

> Members, on or off duty, relieved from duty, under suspension, or on leave of absence, shall be held accountable for any disorderly conduct or violations of any law, whether such members are in uniform or civilian attire. Members shall be held responsible at all times, whether on or off duty, for conduct unbecoming a member of the Division, or tending to lower their service in the estimation of the public. (J-D, pg. 24)

Chapter 6, Section 31 of the Rules, provides:

The following behaviors are forbidden:

> f. Conduct prejudicial to good order and discipline.
>
> g. Abusive or threatening language. (J-D, pg. 25)

Chapter 6, Section 32 provides:

> Section 32. Members shall not engage in altercations nor be guilty of improper, indecent or immoral conduct. They shall at all times be civil and orderly in their conduct and refrain from doing those things which may bring discredit to them or the Division. (J-D, page 26)

Chapter 6, Section 66 provides:

> Section 66. Members are cautioned against entering into quarrels in or about company quarters or while working at fires/emergencies. Should there not be a clear understanding of a duty requirement; the matter shall be amicably decided by the company commander. (J-D, pg. 29)

Chapter 7, Charges and Suspensions, Section 6. Provides:

4/ Joint Exhibit D does not appear to have a Chapter 18, as stated in Director Tooke's September 16th email to Chief Blohm, however, I do not need to resolve this discrepancy.

> Chief Officers receiving written charges preferred against members of the Division shall examine them carefully, see that they are properly prepared, make a thorough investigation of their own, and endorse it with their opinion as to whether or not the charges can be sustained by competent testimony and evidence. The Chief of Division may designate an officer to conduct fact finding as circumstances dictate. (J-D, pg. 35)

ANALYSIS

The issue presented here is whether the City's investigation of Markey's harassment complaint namely when the City demanded written reports of anyone attending two union meetings interfered with Local 1076 members' exercise of protected activity and lacked a legitimate and substantial business justification. Having carefully considered the stipulated facts, exhibits and legal arguments and having weighed the parties' competing interests, as the Commission's case law requires, I find the City's investigation did not violate either 5.4a(1) or 5.4a(2).

The Union contends the City's demand for written statements about the union meetings interfered with the members' exercise of protected activity and violated the Act. It argues the union meeting is a forum where members are entitled to freely express their views, and they have a right to expect their statements will not be divulged to the

City. The Union also argues the alleged incidents occurred while the captains were off-duty, the incidents had no relation to on-duty conduct and no facts suggest the alleged conduct would persist into the workplace. Consequently, the Union asserts the City's investigation had no relation to any public interest. Finally, the City had a more appropriate alternative to handling Markey's particular complaints of threats of physical harm - by referring him to law enforcement. The Union concludes the City had no legitimate business justification to interfere with members' rights to participate in union meetings by forcing them to divulge in written reports what they heard at the meetings. The City contends[5/] it was compelled to investigate the complaint under the Division's Rules and Regulations and New Jersey's Law Against Discrimination, N.J.S.A. 10:5-12, et seq. ("LAD"). It asserts it had to investigate the incidents despite the fact that they occurred during union

5/ Initially, the City argued that since there are no genuine issues of material fact it is entitled to summary judgment in its favor, citing Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Here, a motion for summary judgment is inappropriate. As I stated in the procedural history, the parties have stipulated the record, have agreed to be bound to the stipulations and exhibits and agreed the issues will be decided on the stipulated record. Their signatures on the statement of facts indicate to me they agree to be bound by them. Neither the City nor Local 1076 objected to the conditions I outlined for this case. Thus, this case is ripe for a decision on the merits, not for a decision on a motion for summary judgment.

meetings. The City also explains that it's investigation was narrowly tailored to questioning the alleged threats and did not intrude into traditional union business. Next, the City contends its legitimate and substantial interest in preventing harassment outweighs the members' interests in this circumstance. Finally, the City argues its investigation did not interfere with the administration of the Local and thus, the alleged violation of section 5.4a(2) should be dismissed.

N.J.S.A. 34:13A-5.4a(1) prohibits employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." The standards for evaluating 5.4a(1) charges were initially set forth in New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, (¶4189 1978), and revised and restated in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73 5 NJPER 550 (¶10285 1979):

> 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, tends to interfere with, restrain or to 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

The first inquiry is whether the employer's actions tend to interfere with protected rights and the second is

whether the employer had a legitimate and substantial business justification for its actions. The totality of evidence and particular facts of each case are to be examined and a balancing of the parties' interests made.

The Union's Interest

The ability of union members to hold meetings is essential to their rights under the Act to form, join or assist an employee organization. N.J.S.A. 34:13A-5.3. Their ability to freely discuss issues like negotiations or grievance strategies, and keep these confidential, is crucial to achieving consensus, developing goals and planning. Meetings also function as the forum for conducting union business. Denying the protection of free expression in union meetings diminishes the rights guaranteed by section 5.3, and chills employees' participation in their organizations.

Generally, under 5.4a(1) employers may not trespass into internal union affairs and deliberations by questioning employees about interactions in union meetings. Moreover, having to report on co-workers generally intensifies interpersonal conflicts, inhibits communication and creates mistrust. For these reasons it is likely the City's investigative method of requiring written reports of what was heard at the union meetings would have the tendency to

chill employees' willingness to express themselves freely in future union meetings. The City's investigation therefore interfered with unit members' rights to be fully active in the Local by openly expressing views at union meetings. As the above cases indicate that is not the end of the inquiry.

City's Business Justification

The second consideration is whether the City's business justification for its action was legitimate and substantial and outweighed the employees' interests. Relevant here are the City's responsibilities to maintain order and morale, ensure proper supervision and minimize conflict within the Fire Division.

Here, the Director and Chief did not begin the investigation sua sponte; it was brought about because of Captian Markey's harassment/hostile work environment complaint against Captains DePinto and Miltner. Once Director Tooke and Chief Blohm were aware of Markey's complaint they were obligated to investigate it. A set of rules and regulations (J-D) codifies the City's standards of conduct and procedures for complaints like Captain Markey's.

Chapter 7, Section 6 required Chief Blohm, who received the charges against DePinto and Miltner, to examine them carefully, conduct a thorough investigation and give an opinion as to whether the charges could be sustained by

competent testimony and evidence (J-D, pg. 35). Markey alleged he had been threatened with physical abuse. Such threats would violate the City's rules, especially the prohibition on conduct prejudicial to good order and discipline and abusive or threatening language (J-D, Chapter 6, Section 31. f and g) and the provision that members, on or off-duty are held accountable for disorderly conduct (J-D, Ch. 6, Section 18).

Local 1076 argues the captains' altercation have nothing to do with their on-duty conduct and thus, the City had no legitimate justification for investigating. I find this argument is without merit. Initially, I note the above prohibitions in Ch. 6, Section 31, do not appear to be restricted to on-duty conduct. The division's rules and regulations apply to the fire captains' off-duty conduct as well. Section 18 of Chapter 6, holds members accountable ". . .on or <u>off-duty</u> . . .for any disorderly conduct or violations of any law, whether such members are in uniform or civilian attire." Further, in the same section: "Members shall be held responsible at all times, <u>whether on or off-duty</u> for conduct unbecoming a member of the Division, . . ." (J-D, pg. 22).

Additionally, in Chapter 6, Section 32, the rules state, "Members shall <u>not engage in altercations</u> nor be

guilty of improper, indecent or immoral conduct. They shall at all times be civil and orderly in their conduct and refrain from doing those things which may bring discredit to them or the Division" (J-D, page 26). If the investigation substantiated Markey's allegations, DePinto and Miltner would likely have violated these provisions.

The City asserts it narrowly confined the investigation into the alleged threats. The Union argues this misses the point that whenever any information about any union meeting is sought, employee rights are violated. The first step the City took was to verify or confirm what Markey alleged. The City ordered those unit members who attended and may have seen or heard the threats Markey alleged to submit written reports. When those responses were vague, it more narrowly defined the inquiry to whether any officers overheard anyone asking three specific statements of anyone at the meetings. None of these questions touched on internal union business or substantive discussions. The investigation targeted the statements to discover whether any department rules were broken. The Union's argument is unpersuasive and counter to the cases the Commission had previously decided.

In Hillsborough Twp., P.E.R.C. No. 2000-82, 26 NJPER 207 (¶31085 2000) ("Hillsborough") the Commission considered a township's investigation of a police union's president's

letter to a neighboring police union. The union membership had directed the president to draft and send the letter and never intended it to be public. However, the letter became public. The chief ordered an investigation because the letter implied that officers were giving family members preferential treatment in carrying out their duties. The investigation consisted of internal affairs interviews and compelled written statements delving into the membership's processes and decision to send the letter.

There, as here, the Police Chief did not institute the investigation on his own but in response to information provided by the president. The Hearing Examiner and Commission found the investigation interfered with the officers' 5.4a(1) rights but concluded the Township had a legitimate business justification and legal duty to investigate which outweighed the interference into the employees' protected activity. The facts that the letter was from one union to another, the idea evolved at a union meeting and the president's conduct was off-duty did not prevent the township from investigating the letter or the president's role in the matter. The Commission weighed heavily the township's legitimate concerns that the police were in fact improperly showing favoritism in performing

their duties and that the public would perceive the department was not enforcing the laws impartially.

In City of Bridgeton, P.E.R.C. No. 2011-4, 36 NJPER 299 (¶113 2010) the Commission also considered a case where a City sought information from the union president whose grievance alleged improprieties in the internal affairs bureau. The president was told about the improprieties in confidence by other unit members. The City disciplined him for his refusal to reveal his sources, and consolidated Merit Systems Board and Commission cases were filed. An Administrative Law Judge recommended the City's investigation ordering the union president to divulge the names of officers who made certain allegations was not an unfair practice. The Commission adopted the finding, holding:

> If a union representative alerts a police chief about problems in the internal affairs bureau, the chief has a right to investigate those allegations. We appreciate the impact a union president's being forced to reveal his sources could have on unit members. However, the paramilitary nature of a police department and the critical concern about possible misconduct in an internal affairs bureau outweigh any potential chilling effect on police officers. [36 NJPER at 300]

Karins v. Atlantic City, 152 N.J. 532 (1998) is a case that concerned off-duty conduct. A firefighter claimed that disciplining him for off-duty private speech infringed on

his freedom of speech. The New Jersey Supreme Court, reversing the Appellate Division and Merit Systems Board, held that the racial epithet Karins uttered was not protected speech, the rules he violated were not unconstitutionally vague or over-broad, and he was properly disciplined. Applying a balancing test[6/] to the firefighter's free speech rights and the employer's actions, the Court held the employer's interest in maintaining order and a professional working relationship between the police and fire departments substantially outweighed Karins' right to make abusive racially motivated comments. Id. at 552. The Court forcefully explained the City's interests:

> Firefighters are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees, especially police officers. . . Any conduct jeopardizing an excellent working relationship places at risk the citizens of the municipality as well as the men and women of those departments who place their lives on the line on a daily basis. . . .There are countless ways that bigotry in a fire department can endanger lives: delayed response time, less than careful assessment of

6/ The test was derived from Pickering v. Board of Educ., 391 U.S. 563 (1968) (discipline voided; Board's interest in barring teacher's criticism of Board's failure to raise revenue did not outweigh teacher's free speech rights) and Connick v. Myers, 461 U.S. 138 (1983) (discharge upheld; employer's interests in disruption-free office and not having authority undermined outweighed assistant district attorney's right to survey co-workers on internal office conditions).

> risk, less than whole-hearted rescue attempts and dissemination of inaccurate or incomplete information about a fire. Thus, a municipality has a compelling interest in avoiding the consequences of strained relationships within and between the departments. Id. at 716-717. (Emphasis added)

Further, in Hall v. Mayor & Director of Public Safety, 176 N.J. Super. 229 (App. Div. 1980) the Appellate Division, in a case where a police officer was disciplined for making statements to a local newspaper critical of a superior, noted that legitimate employer interests may impose limits on an employee's First Amendment rights, including the need to maintain harmony among co-workers, to limit conduct that impedes the employee's performance and the encouragement of professional relationships between employees and their supervisors. Although both Karins and Hall are First Amendment cases, they echo the City's interests here that maintaining discipline, harmony and fostering professional relationships among co-workers are clearly related to the City's ability to effectively and safely deliver public services.

I find Local 1076's contention that fire captains' off-duty remarks had no nexus to the public interest unpersuasive. Moreover, the concern that the alleged threats would spill over into the workplace was a reasonable concern by the Chief and Director. In paramilitary

organizations, like fire departments, there is a special need to maintain order and discipline because the work is inherently dangerous and mutual trust and cooperation are paramount values.

Based on the above, I find the City's concern not unreasonable but legitimate and substantial in having fire captains not threaten or bully other fire captains. Under these circumstances, the fact that the threats occurred during a union meeting does not relieve the City from its duty to investigate. In fact, Director Tooke cited the specific rules he thought were violated: Chapter 18, Sections 31, f. and g. 32, and 66. The City's legitimate concerns outweigh the intrusion into the unit members' protected activity.

Duty to Investigate under Anti-Discrimination Laws

Further, under anti-discrimination laws the City has a duty to investigate the hostile work environment claims, even though the conduct occurred off duty. The City also had an interest in avoiding liability under the LAD. An employer has a legal obligation to conduct an investigation whenever an employee formally alleges he was harassed or subjected to a hostile work environment. The New Jersey Supreme Court in Lehmann v. Toys 'R' Us, 132 N.J. 587, 623 (1993) ("Lehmann"), held that an employer may be vicariously

liable, under principles of agency law, for sexual harassment committed by a supervisor that results in a hostile work environment. In Lehmann, the Court noted when an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined the harasser in making the workplace hostile, and sends the harassed employee the message that the harassment is acceptable.

In another case involving sexual harassment and hostile work environment charges, Blakey v. Continental Airlines, Inc., 164 N.J. 38 (2000) ("Blakey"), the Court held an employer who has notice that its employees are engaged in a pattern of retaliatory harassment directed at a co-employee occurring on a work-related online forum has a duty to remedy that harassment even though the harassing activity originates online and outside a particular jurisdiction. There, a number of the airline's male pilots had posted derogatory and insulting remarks about Blakey on an online forum, accessible to all pilots and crew. The Court wrote:

> An electronic bulletin board may not have a physical location . . . it may nonetheless have been so closely related to the workplace environment and beneficial to the employer that a continuation of harassment on the forum should be regarded as part of the workplace," and "conduct that takes place

> outside the workplace has a tendency to permeate the workplace." Id. at 46, 57.

In New Jersey State (Dept. of Corrections), I.R. No. 2011-34, 37 NJPER 117 (¶33 2011) a Commission Designee denied interim relief in a case where the PBA alleged the State's sexual harassment investigation did not permit it to intrude into the PBA's internal operations. The State had a zero tolerance policy requiring prompt investigations of harassment complaints and the investigation narrowly focused on facts that prompted the harassment charges. See also, New Jersey State (Juvenile Justice Comm'n., D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014) (Director dismisses charge alleging unlawful transfer of shop steward; status as union representative does not insulate employees from investigation of rape allegation; State is required to take steps under federal Prison Rape Elimination Act).

In Rockaway Twp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013), the Director dismissed in part an Association's charge that the Board targeted a union vice president for investigation of gender discrimination because of his union activity. The Director reiterated that employers have a legitimate and substantial business justification for administering and enforcing affirmative action plans to avoid complaints under anti-discrimination

laws, citing Jersey City Ed. Ass'n. v Jersey City Bd. of Ed., 218 N.J. Super. 177, 187-188 (App. Div. 1987) (employer's implementation of an affirmative action plan is a proper exercise of its managerial prerogative). Finally, in Montclair Bd. of Ed., H.E. No. 2007-9, 33 NJPER 171 (¶59 2007) in a contested transfer case, a Hearing Examiner found a teacher was transferred not for disciplinary reasons but pursuant to Board's obligation, once on notice of a hostile work environment charge, to take steps to address alleged harassment.

Less Intrusive Option

The Union here argues that the Director had a less intrusive option in its response to Markey's complaint and could have avoided investigating the union meeting. It argues the City could have simply referred Markey to the police. In fact, it appears that the Director did order Markey to meet with corporation counsel and the police in addition to ordering a departmental investigation (J-C). Both actions appear to be prudent and not excessive responses to the complaint.

Local 1076 also cited a New York case - New York Public Employees Federation and State of New York, 26 PERB (¶4525 1993) which held that in New York, a privilege attached to communications between an employee and his union

representative to facilitate the grievance process. However, in Rutgers, The State Univ., P.E.R.C. No. 96-88, 22 NJPER 247 (¶27130 1996), a discovery dispute, the Commission declined to find that our Act provides a broad privilege between employees and their union representatives, analogous to the attorney-client or doctor-patient privilege, noting it will review privilege defenses on a case-by-case basis and balance the parties' interests in privilege and relevance. See also, City of Bridgeton.

On balance, the City's interests in enforcing its rules and regulations, maintaining order and discipline among fire captains, fostering harmonious work relationships and its duty to investigate harassment and hostile work environment complaints outweigh the union members' interests in not having to report instances of threats of harm and abusive language occurring at their union meetings.

The 5.4a(2) Allegation

In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), the Commission discussed the standards for a violation of section 5.4a(2) of the Act:

> Domination exists when the organization is directed by the employer, rather than the employees. . .Interference involves less severe misconduct than domination so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely

> interfering with an employee's . . . rights; it must be aimed instead at the employee organization as an entity. 12 NJPER at 765.

The type of activity prohibited by 5.4a(2) is "pervasive employer control or manipulation of the employee organization itself. . ." North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). None of the stipulated facts here demonstrate pervasive manipulation or control of the administration of Local 1076. The City's investigation was limited, narrowly tailored and grounded in legitimate and substantial managerial concerns. I recommend this allegation be dismissed.

CONCLUSIONS OF LAW

Based on the above, the City of Hoboken did not violate section 5.4a(1) or (2) of the Act when it demanded written reports about any threats made to Captain Markey at two Local 1076 meetings. The City's managerial interests in maintaining order and discipline and its duty under its own rules and the LAD to investigate such complaints are legitimate and substantial business justifications for the investigation. In these circumstances, these outweigh the union's and employees' interests in maintaining the complete confidentiality of union meetings.

Therefore, I recommend the Commission dismiss the Complaint.

/s/Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: January 22, 2016
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 1, 2016.