P.E.R.C. No. 91-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CLIFTON,

Respondent,

-and-

Docket No. CO-H-90-210

CLIFTON POLICE PBA LOCAL NO. 36,

Charging Party.

-and-

NEW JERSEY POLICEMEN'S BENEVOLENT ASSOCIATION,

Intervenor.

CITY OF CLIFTON,

Respondent,

-and-

Docket No. CO-H-90-211

CLIFTON CITY EMPLOYEES ASSOCIATION,

Charging Party.

CITY OF CLIFTON,

Respondent,

-and-

CLIFTON FIREMENS MUTUAL BENEVOLENT ASSOCIATION,

Docket No. CO-H-90-216

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses as moot unfair practice charges filed by Clifton Police PBA Local No. 36, the Clifton City's Employees Association, and the Clifton Firemens Mutual Benevolent Association. The charges challenged the City of Clifton's adoption of an ethics code ordinance. N.J.S.A. 48:9-22.1 et seq. now preempts negotiations over ethics codes for employees of municipalities without municipal ethics boards.

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CLIFTON FIREMENS MUTUAL BENEVOLENT ASSOCIATION, Docket No. CO-H-90-216

Charging Party.

Appearances:

For the Respondent, Sam Monchak, City Counsel

For the Charging Parties, Loccke & Correia, attorneys (Michael J. Rappa, of counsel)

For the Intervenor, Zazzali, Zazzali, Fagella & Nowak, attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On January 25, 1990, Clifton Police PBA Local No. 36 filed an unfair practice charge against the City of Clifton (CO-H-90-210). The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by unilaterally adopting an ethics code ordinance during interest arbitration proceedings.

On January 25, 1990, the Clifton City Employees Association filed an unfair practice charge alleging that the City violated subsections 5.4(a)(1) and (5) by unilaterally adopting the ethics code ordinance during negotiations for a successor collective negotiations agreement (CO-H-90-211).

On January 31, 1990, the Clifton Firemens Mutual Benevolent Association filed an unfair practice charge alleging that the City violated subsections 5.4(a)(1) and (5) by unilaterally adopting the ordinance during interest arbitration proceedings (CO-H-90-216).

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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On January 31, 1990, the charging parties filed suit in the Superior Court, Law Division, Docket No. PASL-1158-9D, seeking an order temporarily restraining the implementation of the ethics code ordinance. A restraint was granted on March 5, 1990.

On March 20, 1990, a Consolidated Complaint and Notice of Hearing issued. On May 17, Hearing Examiner Alan R. Howe conducted a hearing at which the parties stipulated a complete record. On May 17, the New Jersey State Policemen's Benevolent Association was granted permission to file an amicus curiae brief.

On December 6, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. 91-14, 17 NJPER 39 (¶22014 1990). He found that the provisions were either non-negotiable exercises of managerial prerogatives or preempted by statutes or regulations. On December 28, the New Jersey State PBA filed exceptions to the Hearing Examiner's findings on sections 3F, 7 and 9 of the ordinance. On January 2, 1991, the charging parties filed exceptions to the Hearing Examiner's findings on sections 2A, 3F, 6, 7 and 9. On January 7 and 10, the City replied to the exceptions.

On January 20, 1991, Governor Florio signed into law, effective May 21, 1991, "The Local Government Ethics Law", N.J.S.A. 40A:9-22.1 et seq. The purpose of the statute is to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees are clear, consistent, uniform in their application and enforceable on a statewide basis and to provide local officers or employees with

advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties. N.J.S.A. 40A:9-22.2.

The statute sets forth minimum ethical standards for local government officers and employees and provides for the filing of annual financial disclosure statements by local government officers. N.J.S.A. 40A:9-22.6. It further provides that a municipality may establish a municipal ethics board and that if such a board is created, it must promulgate a municipal code of ethics within 90 days. If a municipality does not establish a municipal ethics board, the only ethical restrictions it can place on its employees are those contained within the statute. N.J.S.A. 40A:9-22.4; -22.19; -22.21.

On February 13, 1991, Judge Mandak issued his final opinion in the Superior Court suit. He upheld the ordinance. He found that it was not overbroad, did not unreasonably invade the employees' right of privacy, and did not violate any constitutional safeguards.

We have permitted the parties to supplement their submissions in light of the new statute and Judge Mandak's ruling. The City notes that N.J.S.A. 40A:9-22.1 et seq. contemplates financial disclosure requirements for local government employees and authorizes a municipal ethics board to promulgate a municipal code of ethics which is identical to or more restrictive than the statutory mandates. Therefore, according to the City, the subject of a municipal ethics code is not mandatorily negotiable. The City

concedes that it will have to revamp its present code to comply with the new statute. The charging parties contend that N.J.S.A. 40A:9-22.1 et seq. preempts Clifton's ordinance in its entirety. In the alternative, they claim that portions of Judge Mandak's opinion and the new statute support its position that the employer was required to negotiate before enacting its ordinance.

This is an unfair practice case where the union alleges a unilateral change in a mandatorily negotiable term and condition of employment. We therefore begin by determining whether the subject of the dispute is mandatorily negotiable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standard for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982), articulates the standard for finding a subject preempted:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiation. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." [Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 1982] The legislative provision must "speak in the imperative and leave nothing to the

> discretion of the public employer." In re IFPTE Local 195 v. State, 88 N.J. 393, 403-04 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80.[2/]

We believe that an ethics code covering employees of the City of Clifton is now preempted by N.J.S.A. 40A:9-22.1 et seq. That statute sets forth the only enforceable ethical restrictions on municipal employees in municipalities without a municipal ethics board. It expressly, specifically and comprehensively sets this term and condition of employment. It speaks in the imperative and leaves nothing to the discretion of employers that have no municipal ethics boards. Bethlehem Tp., 91 N.J. at 44. The City of Clifton is such an employer.[3/]

Since we find that N.J.S.A. 40A:9-22.1 et seq. now preempts negotiations over ethics codes for employees of municipalities without municipal ethics boards, this dispute is moot.

2/ The Court also noted that a preempting regulation limits the employer's authority as much as it does the employees. Id. at 48, quoting Bethlehem Tp. Bd. of Ed., 5 NJPER 290, 292 (¶10159 1979).

3/ The City concedes that it will have to revise its ordinance to comply with the new statute.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: May 21, 1991
Trenton, New Jersey
ISSUED: May 21, 1991

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

H.E. NO. 91-14

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

In the Matter of

CITY OF CLIFTON,
Respondent,

-and-

Docket No. CO-H-90-210

CLIFTON POLICE PBA LOCAL NO. 36,
Charging Party.

-and-

NEW JERSEY POLICEMEN'S BENEVOLENT ASSOCIATION,
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CITY OF CLIFTON,
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Docket No. CO-H-90-211

CLIFTON CITY EMPLOYEES ASSOCIATION,
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CITY OF CLIFTON,
Respondent,

-and-

CLIFTON FIREMENS MUTUAL BENEVOLENT ASSOCIATION,
Charging Party.

Docket No. CO-H-90-216

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent City did not violate Section 5.4(a)(1) or (5) of the Act when it unilaterally and without negotiations with the Charging Parties adopted an Ethics Code Ordinance on December 28, 1989. The Ordinance sought to require financial disclosure of certain transactions and to eliminate conflicts of interest under pain of sanctions. The City contended that the entire subject matter of the Ordinance was preempted from negotiations under Paterson, IFPTE Local 195 and like cases.

The Charging Parties and the Intervenor attacked two of nine major sections on the theory that under State Supervisory and Bethlehem Tp. the subject matter was preempted by State statutes and regulations and that since the unions were barred from negotiating on the subject matter the City was likewise barred from adopting and implementing an Ordinance dealing with the same preempted subject matter. The unions acknowledged that their approach was a novel one since arguing preemption as a bar has been an employer stratagem rather than a union stratagem.

The Hearing Examiner could find no authority for the union's theory either under State Supervisory or Bethlehem Tp. The Charging Parties were able to cite only the original Commission decision in Bethlehem Tp. where a single sentence stated that a regulation limited the employer's authority as much as the employees and that neither may deviate from the mandate of the regulation (5 NJPER at 293).

This was too slim a reed upon which to base a remedial order that the City be barred from adopting and implementing an Ordinance pertaining to conflicts of interest and sanctions. The Hearing Examiner also questioned whether he even had the authority to grant the relief requested and speculated on whether the Charging Parties had selected the proper forum for the obtaining of the requested relief.

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. 91-14

STATE OF NEW JERSEY
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In the Matter of

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CLIFTON CITY EMPLOYEES ASSOCIATION,
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CITY OF CLIFTON,
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CLIFTON FIREMENS MUTUAL BENEVOLENT ASSOCIATION, Docket No. CO-H-90-216
Charging Party.

Appearances:

For the Respondent, Sam Monchak, City Counsel

For the Charging Parties, Loccke & Correia, Attorneys (Michael J. Rappa, of counsel)

For the Intervenor, Zazzali, Zazzali, Fagella & Nowak, Attorneys (Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge [Docket No. CO-H-90-210] was filed with the Public Employment Relations Commission ("Commission") on January 25, 1990, by the Clifton Police PBA Local No. 36 ("PBA") alleging that the City of Clifton ("Respondent" or "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that during the course of interest arbitration proceedings, the Respondent unilaterally adopted an Ethics Code Ordinance (No. 5387-89), which is alleged to affect terms and conditions of employment and which is also alleged to be preempted by various statutes; all of which is alleged to have had a "chilling effect" on the above Interest Arbitration Proceedings, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

A second Unfair Practice Charge [Docket No. CO-H-90-211] was filed with the Commission on January 25, 1990, by the Clifton City Employees Association ("Association") alleging that the City has engaged in unfair practices within the meaning of the Act, in that the last collective negotiations agreement between the parties

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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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

expired on December 31, 1989, and they are currently engaged in negotiations for a successor agreement; that during the course of these negotiations the City unilaterally adopted an Ethics Code Ordinance (No. 5387-89), which affects terms and conditions of employment and, as to which, the City has threatened dismissal for failure to comply; and that this Ordinance is preempted by various statutes; all of which is alleged to have had a "chilling effect" on the above negotiations, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[2/]

A third and final Unfair Practice Charge [Docket No. CO-H-90-216] was filed with the Commission on January 31, 1990, by the Clifton Firemens Mutual Benevolent Association ("FMBA") alleging that the City has engaged in unfair practices within the meaning of the Act, in that during the course of interest arbitration proceedings, the Respondent unilaterally adopted an Ethics Code Ordinance (No. 5387-89), which is alleged to affect terms and conditions of employment and which is also alleged to be preempted by various statutes; all of which is alleged to have had a "chilling effect" on the above Interest Arbitration Proceedings, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[3/]

It appearing that the allegations of the three Unfair Practice Charges, if true, may constitute unfair practices within

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2/ These subsections of the Act have been previously quoted.

3/ These subsections of the Act have been previously quoted.

the meaning of the Act, a Consolidated Complaint and Notice of Hearing was issued on March 20, 1990. Arnold H. Zudick, the initial Hearing Examiner in this proceeding, scheduled a hearing for April 26, 1990 in Newark, New Jersey. This hearing date was cancelled and on May 9, 1990, the case was reassigned to this Hearing Examiner for hearing and determination. The matter was then rescheduled to May 17, 1990, at which time a hearing was held in Newark, New Jersey where the parties stipulated a complete record.[4/] Oral argument was waived and all parties filed post-hearing briefs by June 25, 1990. However, on August 27, 1990, the Hearing Examiner found it necessary to request Supplemental Briefs from the Charging Parties and the Intervenor (see pp. 12-14 infra). These Briefs and the City's Response, as supplemented by it on September 26, 1990, were filed by October 1, 1990.[5/]

Three Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately

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4/ On April 19, 1990, the New Jersey State Policemen's Benevolent Association moved to intervene for the sole purpose of participating by brief as amicus curiae (C-5). Also, this motion was limited to participation in Docket No. CO-H-90-210. The motion was tentatively granted by Hearing Examiner Zudick on April 26, 1990. At the hearing on May 17th, the intervention was formally granted without objection (Tr 6, 7).

5/ The City's additional supplement, received November 9th, will not be considered.

before the Commission by its designated Hearing Examiner for determination.

Upon the entire stipulated record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Clifton is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Clifton Police PBA Local No. 36, the Clifton City Employees Association and the Clifton Firemens Mutual Benevolent Association are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

3. The Intervenor, New Jersey State Policemen's Benevolent Association, is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

4. Each of the Charging Parties entered into separate collective negotiations agreements with the City, which were effective during the term January 1, 1987 through December 31, 1989 (Tr 8).

5. Each of the Charging Parties separately gave notice to the City of their intention to negotiate a successor agreement to their respective agreements, expiring December 31, 1989, as follows: On July 26, 1989, the PBA gave its notice (CP-3); on August 11, 1989, the FMBA gave its notice (CP-2); and on October 13, 1989, the Association gave its notice (CP-1). [See, also, Tr 9, 10].

6. Approximately one week prior to November 14, 1989, counsel for the PBA met with the City Manager, Roger L. Kemp, where the discussion centered on an Ethics Code Ordinance, which was being proposed by the City. At the conclusion of the meeting counsel for the PBA suggested that the Ordinance be sent by the City Counsel to the Attorney General for an opinion. [Tr 10-12].

7. On November 14, 1989, the City Counsel sent a letter to the Attorney General in Trenton together with a copy of the proposed Ethics Code Ordinance (R-1, R-2; Tr 12, 13). In this letter, the City Counsel noted that the PBA claimed that the Ordinance would conflict with the "Police Chiefs Act" and that it was in conflict with a statute governing the soliciting of funds for law enforcement organizations (R-1).

8. On December 22, 1989, the Attorney General's office responded with a Letter Opinion, in which it was assumed that the City was adopting an ordinance that conformed with N.J.S.A. 40A:14-118, governing the operation of municipal police departments (CP-4; Tr 13)[6/]. The Opinion then stated the belief that "...in order to be consistent with N.J.S.A. 40A:14-118, it is more appropriate for a code of ethics for members of the police department to be contained in the department's rules and regulations, rather than in an ordinance applicable to all municipal

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6/ This communication from the Attorney General's office was not actually received by the City until December 26, 1989, as indicated by a date stamp on CP-4.

employees..." (CP-4, p. 1). The Opinion stated further "...that N.J.S.A. 2A:170-20 preempts the regulation of solicitation of funds by law enforcement organizations...," vesting that responsibility in the Attorney General and the County Prosecutors. "...This office has previously advised that police officers or police departments, as such, may not solicit contributions as this kind of activity is only lawful within the provisions of this statute i.e., by members of an organization of law enforcement officers..." Continuing, the Attorney General "would recommend" that the proposed ordinance exclude members of the Clifton Police Department from its application, adding that if the City has not already done so, it should "...enact an ordinance for the adoption of the police department's rules and regulations. They could incorporate those parts of the proposed code of ethics ordinance which are not inconsistent or at variance with the above-mentioned statutes..." [CP-4, pp. 1, 2].

9. Prior to the receipt of the Attorney General's response, supra, on December 26, 1989, the City had concluded the legislative process of adopting the Ethics Code Ordinance. The first reading had taken place on December 4, 1989, which was followed by the second reading on December 18, 1989. The Ordinance became effective ten days later on December 28, 1989, as Ordinance No. 5387-89. [J-1; Tr 14].7/

7/ The Ordinance is too lengthy to quote in full in these Findings of Fact. The relevant portions at issue between the parties will be quoted as needed under Analysis, infra.

10. Although objected to as irrelevant, it is undisputed that the background to the City's adoption of the Ethics Code Ordinance was a request to do so by a citizen at a City Council meeting on December 6, 1988 (R-3, R-4; Tr 19-21).

11. The Charging Parties, as plaintiffs, instituted suit on January 31, 1990, in the Superior Court, Law Division, of Passaic County (Docket No. PASL-1158-90), seeking an order temporarily restraining the implementation of the above Ethics Code Ordinance. The requested order was entered by the Court on January 31, 1990, and has been continued in effect. [Tr 16-18].

ANALYSIS

Positions Of The Parties

1. The Charging Parties address the issues presented by the City's Ethics Code Ordinance as essentially being mandatorily negotiable either under the test enunciated in Paterson PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), which governs police and fire employees, or under the test in IFPTE, Local 195 v. State, 88 N.J. 393 (1982), which governs all other employees. Although the Ethics Code Ordinance contains nine separate substantive sections, the Charging Parties have in their brief limited their attack to the definition of "Interest" (§2A); the provision regarding "Incompatible Service" (§3F);[8/] the "Disclosure of Financial

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8/ The Charging Parties and the Intervenor perceive Section 3F as restricting "outside employment" (Charging Parties' Brief, pp. 7, 8; Intervenor's Brief, p. 2). However, the City disclaims any such purpose or intent in having adopted the Ethics Code Ordinance (City's Reply Brief, pp. 7-11, infra).

Interests" provision (§6); the "Penalties" provision, which mandates censure, suspension, demotion or removal from office of any employee who willfully violates the Ordinance (§9A); and the related provision which permits the city attorney to exempt conduct found to constitute a violation of the Ordinance (§9B). The Charging Parties contend that these sections of the Ordinance, in particular, impinge directly on such terms and conditions of employment as discipline or discharge for violation of the Ordinance, restrictions on "outside employment" and the disclosure of financial interests which, by definition, includes the spouse or unemancipated children.[9/] Further, the Charging Parties cite as applicable precedent the case of Somerset County, P.E.R.C. No. 84-92, 10 NJPER 130 (¶15066 1984), where the Commission found a duty to negotiate a code of ethics that prohibited social workers and psychologists from maintaining a private practice within the County. The Charging Parties also advance a preemption argument, the significance of which is considered under "Threshold Question," infra.

2. The Intervenor agrees with the Charging Parties that Section 3F of the Ordinance, which bars "incompatible" private employment, is mandatorily negotiable under Somerset County, supra. The Intervenor's main thrust is its argument that Sections 3B, 7 and

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9/ However, the City in its Answers filed on February 15, 1990, specifically stated that the Ordinance "...does not apply to spouses or the employees' children..." (C-2 & C-3; Tr 7). Although this admission is omitted in the Answer filed April 8, 1990 (C-4), it is assumed to be an oversight.

9 of the Ordinance are preempted by a series of statutes. See, also, "Threshold Question, infra.

3. The City's briefing is extensive and is contained in its Main Brief and in its Reply Brief. Numerous authorities are cited in support of its right to enact an Ethics Code and that, once enacted, the subject matters constitute the exercise of non-negotiable managerial prerogatives by the City. The City emphasizes that any requirement that it negotiate with respect to the provisions in the Ethics Code "...would substantially limit governmental policy-making powers with respect to the deterrence and prevention of conflict-of-interest situations, a...goal intended to benefit the public interest and welfare..." (City's Main Brief, pp. 15-21). The City argues further that a section by section examination of the Ordinance demonstrates clearly that its provisions "...do not affect, much less intimately, directly, significantly or substantially, the terms and conditions of employment of the union employees..." (City's Main Brief, pp. 22-27). The City suggests that the basic thrust of the Charging Parties is directed at Section 6 of the Ethics Code Ordinance, which pertains to the disclosure of financial interests.[10/] The City's Reply Brief is devoted essentially to defending the disciplinary provisions in Section 9 of the Ordinance and its contention that the

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10/ The Hearing Examiner's reading of the Briefs of the Charging Parties and the Intervenor indicates that their attack upon the Ethics Code Ordinance is considerably broader.

Ordinance does not prohibit or restrict an employee's "ability to secure valid compatible off-duty employment" (City's Reply Brief, pp. 1-11).

Threshold Question

For reasons that baffle this Hearing Examiner, the Charging Parties and the Intervenor have each argued in their Briefs that specific statutes have preempted certain sections of the Ordinance from collective negotiations as more particularly set forth hereinafter. Usually, preemption is an argument which is advanced by a public employer who seeks to avoid negotiating a particular subject or issue. Thus, the New Jersey Supreme Court has issued such decisions as State v. State Supervisory Employees Assn., 78 N.J. 54, 80 (1978) and Bethlehem Tp. Bd. of Ed. v. Ed. Assn., 91 N.J. 38, 44 (1982).

The Charging Parties' Brief cites a series of criminal statutes, which, it states, already protect the public in such areas as official bribery, threats and improper influence, retaliation for past official action, gifts to public servants, etc. (see N.J.S.A. 2C:27-2 through 27-7 & 30-2) [Brief, pp. 10, 11]. However, while the Charging Parties suggest that these statutes preempt unspecified provisions in the City's Ethics Code Ordinance on the one hand, they contend, in the alternative, that "...The statutes...do not specifically and comprehensively set terms and conditions of employment. Negotiation of the ethics code has therefore not been pre-empted by statutes..." (Brief, p. 9).

The Intervenor's Brief specifically cites Sections 3B, 7 and 9 of the Ordinance as being preempted by statutes governing solicitations, departmental charges, hearings and discipline involving police officers, and the powers invested by statute in the Chief of Police (see N.J.S.A. 2A:170-20 et seq.; 11A; and 40A:14-118 & 147) [Brief, pp. 3, 4]. Unlike the Charging Parties, the Intervenor appears to argue that these statutes completely preempt the above-cited provisions of the Ordinance under "...the guidelines established in..." State Supervisory and Bethlehem Tp., supra (Brief, pp. 3, 4).

Because the Hearing Examiner timely concluded in mid-course that he was unable to adjudicate the preemption versus negotiability of those sections of the Ordinance referred to specifically by the Intervenor and tangentially by the Charging Parties in their respective Briefs, he requested Supplemental Briefs on August 27, 1990.[11/]

* * * *

Having now received the supplemental submissions of the parties, it is noted that the Charging Parties and the Intervenor

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11/ In his letter so requesting, the Hearing Examiner asked that the Charging Parties and the Intervenor demonstrate precisely how the cited statutes either preempted or fail to preempt negotiations as to specific sections of the Ordinance. Also, each of the said parties was directed to provide the requisite analysis under State Supervisory and Bethlehem Tp., supra. In any instance where a section of the Ordinance was either not preempted from negotiations or was only preempted in part, then this distinction was to be made. The Supplemental Briefs and the City's Response were filed by October 1, 1990, supra.

have each clearly addressed the applicability of the doctrine of preemption to the City's Ethics Code Ordinance as requested:

1. The Charging Parties interpret State Supervisory and Bethlehem Tp. to mean that "preemption," when applied, not only precludes that negotiation of a term and condition that has been set or fixed "expressly, specifically and comprehensively..." by statute or regulation [91 N.J. at 44] but equally precludes "...an employer from unilaterally implementing a change in terms and conditions of employment which are specifically set by statute..." [Supp. Brief, p. 1]. Charging Parties' authority for this latter proposition is the Commission's original decision in Bethlehem Tp. Bd. of Ed.[12/] wherein it stated only that "...The regulation (at issue) limits the employer's authority as much as it does the employees. Neither may deviate from the regulation's mandate..." (5 NJPER at 293). The Charging Parties then argued that the following sections of the Ordinance were preempted: Sections 3, 6, 7 and 9.

2. The Intervenor confesses that it is in "an unusual position" in arguing preemption since this is typically the strategy pursued by an employer in seeking to limit negotiations, restrain arbitration or defend an unfair practice charge. But, if the instant Ordinance is preempted, as the Intervenor argues, then the provisions of the Ordinance cannot be imposed unilaterally and the union can seek "offensively" to restrain unilateral action by the

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12/ P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), aff'd 91 N.J. 38 (1982), supra.

City. Thus, if Sections 3B, 7 and 9 of the Ordinance are not mandatorily negotiable, as the City argues, then they are preempted by the several statutes and regulations cited by the Intervenor. [Supp. Brief, pp. 2-4].

The City's response is that the provisions of the City Manager statutes [N.J.S.A. 40:79-1 et seq.] together with various other statutes and regulations, with which the Ordinance is not in conflict, provide it with the requisite authority to adopt, implement and administer its ethic code. The City has not directly responded to the above preemption arguments of the Charging Parties and the Intervenor, but it has again briefly referred to State Supervisory and Bethlehem Tp. as supporting its position.

* * * *

The provisions of the Ordinance, which the parties have placed in issue are:

(1) Section 2A [Definition of "Interest"];[13/] (2) Section 3A [Establishment of Code of Ethics];[14/] (3) Section 3B [Interest in Contract or Transaction, which includes "solicitation"];[15/] (4) Section 3F [Incompatible Service ("outside employment")];[16/] (5) Section 6A-D [Disclosure of Financial

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13/ Charging Parties' Brief, p. 11.

14/ City's Main Brief, pp. 12, 14, 24.

15/ Intervenor's Brief, p. 3; and City's Reply Brief, p. 12.

16/ Charging Parties' Brief, pp. 7-9; Intervenor's Brief, p. 2; and City's Main Brief, pp. 9-12 and Reply Brief, p. 7-11.

Interests by Annual Certified Statement];[17] (6) Section 7A-C [Enforcement];[18] (7) Section 8 [Advisory Opinions];[19] and (8) Section 9A-D [Penalties, Including Dismissal, Exemptions and Preemption if Ordinance in Conflict with Federal or State Law, etc.].[20]

Finally, precedent for assuming that the City was empowered to enact an Ethics Code Ordinance is found in Lehrhaupt v. Flynn, 140 N.J. Super. 250 (App. Div. 1976), which sanctioned the adoption of a financial disclosure ordinance by the Township of Madison. The Court stated:

> Preliminarily, it should be observed that although there is no specific statutory authorization for municipal enactment of official financial disclosure ordinances, general power to adopt such local legislation is inherent in the broad delegation of police power contained in N.J.S.A. 40:48-2. [Inganamort v. Bor. of Fort Lee, 62 N.J. 521 (1973)...(other citations omitted)...
>
> Municipalities thus may enact regulatory ordinances on any subject matter, provided that (1) they do not conflict with state enactments, (2) the subject matter has not been preempted by state legislation and (3) the subject matter does not necessarily require uniform state regulation. Summer v. Teaneck, 53 N.J. 548, 554-555 (1969); Inganamort v. Fort Lee, (supra)...

17/ Charging Parties' Brief, p. 14; and City's Main Brief, pp. 6, 7, 13, 23, 27.

18/ Intervenor's Brief, pp. 2-4; and City's Main Brief, p. 12 and Reply Brief, pp. 4, 5, 9.

19/ City's Main Brief, pp. 12, 14, 24 and Reply Brief, p. 8.

20/ Charging Parties' Brief, pp. 7, 12; Intervenor's Brief, pp. 2-4; and City's Main Brief, pp. 12, 24 and Reply Brief, pp. 1-6, 12.

[140 N.J. Super. at 259]

* * * *

Section 2A Of The Ordinance

Only the Charging Parties have cited Section 2A of the Ordinance, which appears under the general heading "Definitions." Section 2A defines "Interest" as "...direct or indirect pecuniary or material benefit accruing to any...employee subject to this ordinance as a result of a contract or transaction which is or may be the subject of an official act or action by or with the City..." Section 2A then proceeds to state, inter alia, that "For the purposes of this ordinance, a public...employee will be deemed to have an interest in the affairs of: (1) His or her spouse and unemancipated children..."

In its brief, the Charging Parties attack Section 2A as being "overbroad" and "arbitrary" with emphasis upon the fact that under this Section "...a public employee is deemed to have an interest in the affairs of his or her spouse and unemancipated children for the purposes of compliance with this ordinance..." (Brief, p. 11). Two things are immediately apparent to the Hearing Examiner: (1) The Charging Parties' concern appears to be focused on matters other than negotiability since the terms "overbroad" and "arbitrary" are generally used in attacking the validity of a legislative enactment; and (2) the Charging Parties appear to be registering a strenuous objection to the definition of "Interest" because it directly links the employee to his or her spouse and

unemancipated children. But, as previously noted, the City in its Answers has specifically stated that the Ordinance does not apply to spouses or the children of employees and the City is bound to that position.

Accordingly, the Hearing Examiner cannot conclude other than that there is nothing in Section 2A and its definition of "Interest" which mandates negotiations since its provisions in no way trench upon the terms and conditions of employment of employees represented by the Charging Parties.

* * * *

[Section 3A of the Ordinance is referred to by the City only. This subsection appears within Section 3, entitled "Code of Ethics," and merely recites that the requirements contained in the Ordinance shall constitute a "code of ethics" establishing standards and guidelines, etc. Thus, there is nothing substantive in Section 3A, which requires further consideration.]

* * * *

Section 3B Of The Ordinance

This section is entitled "Interest in Contract or Transaction" and refers in two subsections [(3) and (4)] to types of solicitations, which are proscribed by the Ordinance. The relevant parts of Section 3B provide:

> B. Interest In Contract Or Transaction. No public official or employee having the power or duty to perform an official act or action, related to a contract or transaction which is or may be the subject of an official act or action of the city, shall:

* * * * *

(3) have solicited or accepted present or future employment with a person or business entity involved in such contract or transaction, or

(4) have solicited, accepted or granted a present or future gift, favor, service or thing of value from or to a person involved in such contract or transaction...

The Intervenor, but not the Charging Parties, has addressed Section 3B. It claims that Section 3B is preempted by N.J.S.A. 2A:170-20 et seq. to the extent that it involves solicitations by police officers (Brief, p. 3). The Intervenor cites State Supervisory and Bethlehem Tp. The City responds that, even if the Intervenor is correct as to police officers, Section 3B could still be applied to its firemen and other employees (Reply Brief, p. 12).

While it might initially appear that the Intervenor's preemption argument removes Section 3B of the Ordinance from further consideration, at least as to police officers represented by the PBA, a non-negotiable managerial prerogative is, in fact, involved. This managerial prerogative likewise governs the City's firemen and other employees. The plain language of Section 3B(3) & (4) deals with ethical criteria related to a contract or transaction where an employee has acquired an "interest," inter alia, through a solicitation of future employment or a thing of value. Such criteria fall within the area of "...government's policy-making powers..." which "...must always remain within managerial prerogatives...": Paterson, 87 N.J. at 92. To the same effect: see Local 195, 88 N.J. at 404, 405. Thus, Hearing Examiner cannot

discern anything within Section 3B or subsections (3) and (4), which even remotely touch upon negotiable terms and conditions of employment, i.e., remuneration, fringe benefits, hours, working conditions, etc. Having concluded that Section 3B pertains solely to conflicts of interest arising from certain contracts or transactions, it does not constitute a subject upon which the City must negotiate.

Section 3F Of The Ordinance

The Charging Parties and the Intervenor each view this Section as a unilateral restriction on "outside employment" without collective negotiations. Section 3F, entitled "Incompatible Service," provides as follows:

> No public official or employee shall engage in or accept private employment or render service, for private interest, when such employment or service is incompatible with the proper discharge of his official duties or would tend to impair his independence of judgment or action in performance of his official duties unless otherwise permitted by law and unless disclosure is made as provided in this code. (Emphasis supplied).

It appears to the Hearing Examiner that the Briefs of the Charging Parties and the Intervenor have set up a "straw man" in arguing that Section 3F of the Ordinance constitutes a unilaterally imposed restriction upon "outside employment" by employees in the three collective negotiations units herein involved. The City, beginning with POINT 1 of its Main Brief, repeatedly represents and acknowledges that its Ethics Code Ordinance "...does not require any

prior or subsequent approval of (or impose any prior restraint or restriction on) and does not regulate outside employment..." [p. 9]. [Emphasis supplied]. Further, the City states elsewhere in its Main Brief that "...Neither prior written approval nor any limitation on the compensation of any Clifton employee can obtain or receive from outside employment and/or business activity is present here..." [p. 11]. [Emphasis Supplied].[21/] The City reiterates this position in its Reply Brief where it notes that the "formal contracts" (collective negotiations agreements) between the instant parties do not contain any reference to outside employment and "...the provisions of the ordinance at issue do not...affect the terms and conditions of the employees' employment or restrict outside employment (other than those outside employments which are incompatible with the...employees' duties and functions)..." [p. 10]. [Emphasis supplied].[22/]

The Charging Parties and the Intervenor each cite Somerset County, supra, and the case upon which the Commission there relied, Assn. of N.J. State College Faculties v. N.J. Bd. of Higher Ed., 66

21/ The City also states later in its Main Brief that the Ordinance does not "...prohibit, require approval, continuing or otherwise, or restrict an employee from valid outside employment..." [p. 13]. [Emphasis supplied].

22/ Presumably these outside or off-duty employment opportunities have been at all times permitted by the City and, thus, antedate the adoption of the Ethics Code Ordinance on December 28, 1989. This assumption has been made by the Hearing Examiner since the City has nowhere in its Main Brief or Reply Brief indicated the contrary.

N.J. 72 (1974). Each then argues that Section 3F of the Ordinance is in conflict with these decisions. Leaving aside for the moment the role of the modifier, "incompatible," in Section 3F, infra, the Hearing Examiner notes that the City has also cited these same two decisions as validating Section 3F.

In addition, the Charging Parties and the City have each cited and drawn upon Tp. of Montclair, P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989), a case which required police officers to report all outside employment and to obtain approval for such employment. Although the Charging Parties do not amplify upon this holding, the City observes that its Ordinance "...does not require any prior or subsequent approval..." of outside employment (City's Main Brief, p. 9).[23/] Further, the Charging Parties, the Intervenor and the City all agree that the unilateral, additional restrictions on outside employment imposed by Somerset County and the Board of Higher Education were mandatorily negotiable [under Englewood Bd. of Ed. v. Englewood Teachers Assn., 64 N.J. 1 (1973) in the case of the Supreme Court in State College Faculties, supra, and under the three-pronged analysis of Local 195, supra, in the case of the Commission in Somerset County, supra].

23/ The Charging Parties also cite Tp. of Pennsauken, 709 F.Supp. 1329 (D.N.J. 1989), 15 NJPER 392 (¶20165 1989), a constitutional decision, holding that restrictions on the off-duty employment of police officers as security guards violated their equal protection and due process rights under the 14th Amendment to the United States Constitution.

In both Somerset County and State College Faculties, the public employer had acted unilaterally to restrict outside employment opportunities which "...intimately and directly..." affected the work and welfare of public employees, and had not been preempted by statute or regulation. In State College Faculties, the Court concluded that a negotiated agreement would not "...affect any major educational policy..." 66 N.J. at 77 and the Commission concluded in Somerset County that negotiation over the additional restrictions imposed by the County "...would (not) significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy..." (10 NJPER at 132).[24/] Thus, these two cases hold that a public employer may not unilaterally impose additional restrictions on outside employment that exceed those that were pre-existent in the absence of collective negotiations.

Turning now to the concerns of the Charging Parties and the Intervenor that the term "incompatible service"[25/] is lacking in definition and "...may be read to restrict off-duty employment..."

24/ The Commission in Somerset County also cited Local 195 for the proposition that "...'most decisions of the public employer affect the work and welfare of public employees to some extent and that negotiations will always impinge to some extent on the determination of governmental policy...(88 N.J. at 404)'..."[Id.].

25/ The Intervenor has also raised a concern regarding the phrase "...would tend to impair his independence of judgment or action in performance of his official duties..." in Section 3F.

(Intervenor's Brief, p. 2). The City freely acknowledges that the Ethics Code Ordinance "...may be said to restrict outside employment which is in conflict with an employee's duties..." [Main Brief, p. 11]. [Emphasis supplied]. It then argues that "incompatible employments" are necessarily illegal under either the common law or statute and that the purpose of the instant Ordinance "...is to deter, if not prevent, conflicts of interest and to provide guidance...to municipal employees..." (Main Brief, p. 12). Further, the City argues persuasively[26/] that preventing conflicts of interest among its employees is in the public interest and constitutes the exercise of a "management prerogative" which may not be the subject of negotiations: Paterson, supra, 87 N.J. at 93. [Main Brief, p. 14].[27/] Recognizing that it is impossible to devise an all-embracing test to determine what is and what is not "incompatible" employment or a "conflict of interest," the City points to Section 8 of the Ordinance, infra, which provides for an advisory opinion by the City Attorney in cases where an employee "...has a doubt as to the applicability of any provision of this code to a particular situation..." (Main Brief, pp. 12, 14, 24 and Reply Brief, p. 8).

26/ See State College Faculties and Somerset County, infra.

27/ The City has provided pertinent examples of "incompatible" employment by a police officer and by a fireman, i.e., a "conflict of interest" (Reply Brief, p. 7).

The Hearing Examiner, in evaluating the City's argument as to the need for the qualifying terms "incompatible service" and "impair his independence of judgment...(etc.)...," supra, in relationship to its otherwise permitting outside employment, refers again to State College Faculties. In finding a violation of the employer's obligation to negotiate, the Supreme Court there approved more limited pre-existent restrictions on outside employment under guidelines previously issued in November 1971. These had mandated:

> ...inter alia, that college employees shall not engage in any business or transactions or professional activities which are in "substantial conflict" with the proper discharge of their public duties, that they shall not use their official positions to secure "unwarranted privileges" for themselves, that they shall not act in their official capacities on matters in which they have such direct or indirect financial interests as might reasonably be expected to impair their "objectivity or independence of judgment," and they shall not accept gifts or other things of value under circumstances where it might reasonably be inferred that the things of value were being given "for the purpose of influencing" them in the discharge of their official duties.
>
> [66 N.J. at 73, 74]. [Emphasis supplied].

Significantly, the Court also observed that the Union had not objected to certain changes in the February 1973 guidelines at issue that barred outside employment if it constituted "a conflict of interest"; or occurred during working hours; or diminished the employee's efficiency in performing his or her primary work obligation (see 66 N.J. at 74).

The Commission, after summarizing the above guidelines from State College Faculties, stated that, as in its case "...valid

pre-existing regulations protected the employer's interests without trenching upon the employees' interests..." [Somerset County, 10 NJPER at 131]. Thus, the Hearing Examiner may infer that the Commission has recognized that when "conflicts of interest" in outside employment are involved, then the subject matter is beyond the scope of collective negotiations.

Or, cast differently, under Paterson, supra, in the case of police and fire employees, to permit negotiations with respect to the terms "incompatible service" and/or "independence of judgment" in Section 3F of the Ordinance would place "...substantial limitations on government's policy-making powers...," which "...must always remain within managerial prerogatives and cannot be bargained away..." (87 N.J. at 92). To the same effect, under Local 195, supra, which pertains to the other City employees."

> ...To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> [Id. at pp. 404-405].

The Hearing Examiner concludes that, based upon the authorities cited and discussed above, all of the qualifying and modifying terms and phrases in the City's Ethics Code Ordinance that are directed at and intended to bar "conflicts of interest" are non-negotiable and constitute the exercise by the City of a

managerial prerogative, the purpose of which is to serve the public interest. Simultaneously, the Hearing Examiner finds and concludes that there is no disagreement among the parties as to the negotiability of the Ordinance with respect to the right of the employees of the City to engage in compatible outside or off-duty employment.

Section 6 Of The Ordinance

Section 6, entitled "Disclosure of Financial Interests," provides, in part, as follows:

> A. Every public official and employee shall file with the City Clerk on or before January 31st of each year that he or she holds such position or employment, a certified disclosure statement covering the previous calendar year containing a list of the name, address and nature only of any entity from which such public official or employee derives income, including:
>
> (1) Ownership of 5% or more or employment by a corporation, sole proprietorship, partnership or other business venture;
>
> (2) Any association with any business organization, excluding the ownership of mutual funds and bonds;
>
> (3) All real property in the City other than place of residence, including the names of any joint tenants.

The remaining subsections (B through D) provide variously that any disclosure statement is a public record, that in the case of appointment to a new position then a new disclosure statement must be filed within 30 days and that all initial disclosure statements shall be filed within 30 days of the adoption of the Ordinance.

While the Intervenor did not address Section 6, the Charging Parties have attacked its disclosure requirements as "...an unwarranted intrusion into the private affairs of the employees..." and an invasion of the "...right of privacy..." (Brief, p. 14 & Supp. Brief, p. 3).[28/] In other words, the Charging Party views this as a constitutional issue and it cites two decisions of the United States Supreme Court: Griswold v. Connecticut, 381 U.S. 479 (1965) and NAACP v. Button, 371 U.S. 415 (1963) and, additionally, Article I of the New Jersey Constitution and Application of Tiene, 19 N.J. 149, 163, 164 (1955). Significantly, there is Commission precedent for adjudicating a case before it on constitutional grounds: see Hunterdon Central H.S. Teachers Assn. v. Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 80-4, 5 NJPER 289, 290 (¶10158 1979), aff'd 174 N.J. Super. 468 (App. Div. 1980), aff'd 86 N.J. 43 (1981).

The case of Lehrhaupt v. Flynn, has been cited previously as sanctioning the adoption of a financial disclosure ordinance in the Township of Madison. This decision is also relevant to the argument of the Charging Parties herein since the plaintiffs in Lehrhaupt contended that their constitutional right to privacy had

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28/ The applicability of the Ethics Code Ordinance is defined in Section 1, which provides that it "...shall be applicable to all elected and appointed officials, employees and members of boards and committees of the City of Clifton."

been infringed. Those covered under the Madison ordinance were top-level elected and appointed officials of the Township.[29/]

The Madison ordinance was exceedingly broad and detailed as to the nature and type of financial disclosure required, which afforded the plaintiffs[30/] their basic argument that their constitutional right of privacy had been invaded. Unlike Section 6A of the City's Ethics Code Ordinance, which contains a limited obligation to disclose financial interests, the Madison ordinance required the "full disclosure" of specific dollar amounts of cash on hand, bank accounts, receivables, stocks, bonds, etc. and total net worth by each elected or appointed official (see 140 N.J. Super. 256-258).

After noting that the plaintiffs did not question the legality of the disclosure requirements relating to conflicts of interest, the Court rejected their right of privacy argument, which was based upon the scope and breadth of the ordinance. The Court stated first that "...there can be little question that there exists a significant interest of the public to demand financial disclosure from its officials in the quest for more responsible clean government..." (140 N.J. Super. at 261). It then continued:

29/ Employees such as those involved herein were not covered by the Madison ordinance. However, the analysis of the Appellate Division on the privacy issue appears to be germane to the instant case.

30/ The members of the Board of Adjustment and Planning Board and their attorney.

> ...By accepting public employment an individual steps from the category of a purely private citizen to that of a public citizen. And in that transition he must of necessity subordinate his private rights to the extent that they may compete or conflict with the superior right of the public to achieve honest and efficient government.
>
> [140 N.J. Super. at 262].

It would appear that Lehrhaupt v. Flynn affords the basis for concluding that the narrower financial disclosure provisions of Section 6 of the instant Ordinance are devoid of constitutional infirmity. The Hearing Examiner finds inapposite the argument of the Charging Parties that Section 6 places any unconstitutional restrictions or restraints upon the associational rights of the employees herein involved within the meaning of NAACP v. Button, supra, or FOP v. City of Philadelphia, 812 F.2d 105, 119, 120 (3rd Cir. 1987). [Charging Parties' Brief, p. 14].

Further, the provisions of Section 6 are beyond the pale of negotiability, following the rationale employed previously in analyzing the negotiability of Section 3F, which restricts City employees from engaging in "incompatible" outside employment. Thus, given the fact that the rationale and analysis applied to Section 3F and Section 6 are identical in each instance, the Hearing Examiner concludes that the City exercised a non-negotiable managerial

prerogative in enacting Section 6 of the Ordinance.[31/] Accordingly, the City was not obligated to negotiate with the Charging Parties prior to enacting Section 6.

Section 7 Of The Ordinance

Section 7, entitled "Enforcement," contains four subsections (A through D) and need not be quoted in full here. Suffice it to say, the City Attorney is given the "primary responsibility" for the enforcement of the Ethics Code and is invested with the power to investigate complaints and to prosecute them before the City Council or its Manager (§7A). Further, the City Council may direct the City Attorney to investigate or prosecute apparent violations of the Ethics Code (§7B) and, additionally, any person who believes that a violation of the Ethics Code has occurred may file a complaint with the City or with the Courts (§7C). Finally, any person named in a complaint shall be afforded due process (§7D).

The Intervenor has addressed Section 7 (Brief, pp. 2-4 and its Supp. Brief, pp. 2, 3), the thrust of which is that Section 7 is preempted by statutes such as N.J.S.A. 40A:14-118 (the powers of the Chief of Police) and 40A:14-147 (departmental charges and hearings,

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31/ Although it does not change the result, one substantive difference between Section 6 and Section 3F does exist. Section 3F contains a term and condition of employment which allows City employees to engage in compatible outside employment, but Section 6 is lacking in any cognizable term and condition of employment. Section 6 is limited solely to the requirement and the procedures for the disclosure of financial interests.

etc.).[32/] The Intervenor has cited the preemption cases above [State Supervisory and Bethlehem Tp.] as supporting its argument. The Charging Parties have cited, additionally, N.J.S.A. 40A:14-19 & 147 plus N.J.A.C. 4A:2-2.5 in contending that Section 7 of the Ordinance has been preempted by statutes and a regulation.

Since the City is also in agreement that the subject matter of Section 7 is preempted by statutes (Reply Brief, pp. 4, 5, 9), there would normally be no need to expound further. However, the Charging Parties and the Intervenor have advanced the novel argument that State Supervisory and Bethlehem Tp. stand for the additional proposition that if the subject matter of Section 7 is preempted by the cited statutes and regulations, then the City is precluded from implementing Section 7, just as the Charging Parties and the Intervenor are precluded from negotiating upon the same subject matter.[33/]

The Hearing Examiner can find no precedent whatsoever for his proposing a remedy under Sections 5.4(a)(1) and (5) in the case at bar. The Commission's hearing examiners are charged with the duty of hearing cases and issuing recommended decisions and orders, based upon Commission and other controlling precedent.[34/] If this

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32/ The Charging Parties addressed the provisions of Section 7 in their Supp. Brief, p. 3.

33/ See Supp. Briefs, discussed at pp. 12-14, supra.

34/ For example, relevant State court decisions and administrative regulations, and private sector decisions where appropriate.

Hearing Examiner were to find a violation of the Act and grant the relief sought herein, namely, recommending that the City be barred from implementing Section 7 of the Ordinance on the ground of preemption, he would be exceeding his authority. Neither State Supervisory nor Bethlehem Tp. per se support the granting of the requested remedy and the quoted language from the Commission's original decision in Bethlehem Tp., supra, is too slim a reed for the Hearing Examiner to rely upon.

The fashioning of such a unique remedy, predicated upon a finding that the City violated Sections 5.4(a)(1) and (5), lies with the Commission and not with the Hearing Examiner. Further, the Hearing Examiner ventures that not only does his authority appear to be circumscribed, but the Commission itself may not provide the proper forum for adjudicating the preemptive effect of the cited statutes and regulations, given the traditional constraints that guide the Commission in deciding violations of Sections 5.4(a)(1) and (5) of the Act.

Section 8 Of The Ordinance

Section 8 of the Ethics Code Ordinance, entitled "Advisory Opinions," contains three subsections (A through C), which provide essentially that where a public official or employee has a "doubt as to the applicability of any provision" of the Ethics Code "to a particular situation" or as to the definition of terms used in the Ordinance, then he or she may apply to the City Attorney for an advisory opinion (§8A).

The Charging Parties and the Intervenor elected not to address Section 8 and its provision for the issuance of advisory opinions by the City Attorney. However, the City has pointed out that Section 8 affords an employee the right to seek an advisory opinion if he or she has any questions concerning the applicability or meaning of any provision in the Ordinance (Main Brief, p. 24). As an example, the City notes that since no definite test exists to determine what is or is not a conflict of interest, Section 8 was incorporated into the Ordinance to assist employees in this respect. This would imply that Section 8 could be relevant to determining whether or not outside employment was "incompatible" under Section 3F, supra. [Reply Brief, pp. 7, 8].

Section 9 Of The Ordinance

Section 9, entitled "Penalties; Forfeited Position; Exemptions," contains a core provision that "Any public official or employee who willfully violates any provision of this ordinance shall be deemed guilty of misconduct in office and shall be subject to censure, suspension, demotion or removal from office..." (§9A). Also, the City Attorney may exempt from the provisions of the Ordinance any conduct found to constitute a violation if he finds that enforcement would not be in the public interest (§9B). The remaining relevant provision is a "savings clause" which provides, essentially, that Federal or state laws or regulations shall prevail in the event of a conflict with the Ordinance (§9D).

The Intervenor again argues, as it did in the case of Section 7, "Enforcement," namely, that since Section 9 pertains to discipline ("censure, suspension, demotion or removal from office") it has been preempted by other statutes (Brief, pp. 2-4 & Supp. Brief, pp. 2, 3). The Charging Parties also object to the substantive provisions of Section 9A on the implied ground of preemption though not as clearly stated as in the case of the Intervenor (Brief, pp. 7, 12 & Supp. Brief, pp. 2, 3). Once again, the City is in agreement that the subject matter is preempted by a series of statutes and argues that, therefore, no negotiable terms and conditions of employment are involved and its exercise of a managerial prerogative prevails (Reply Brief, pp. 1-6).

Again, since there is no disagreement between the Charging Parties, the Intervenor and the City that Section 9 is preempted in its entirety from negotiation under State Supervisory and Bethlehem Tp., supra, the Hearing Examiner need not pursue the matter further for the reasons set forth under the discussion pertaining to Section 7 of the Ordinance.[35/]

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

35/ See pp. 31, 32 supra.

CONCLUSION OF LAW

The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally adopted an Ethics Code Ordinance on December 28, 1989, without having collectively negotiated the subject matter prior to implementation for the reason that the provisions of the Ordinance at issue were either non-negotiable exercises of managerial prerogatives (§§2A, 3B, 3F, 6, 8) or were by de facto agreement of the parties deemed preempted by State statutes or regulations (§§7 & 9); proviso, all parties conceded that Section 3F of the Ordinance does not restrain or restrict "compatible" outside or off-duty private employment and, thus, this subject matter is recognized as mandatorily negotiable.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Consolidated Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

DATED: December 6, 1990
Trenton, New Jersey