

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-99-156

POLICE SUPERIOR OFFICERS' ASSOCIATION
OF NEWARK, NEW JERSEY, INC.,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the City of Newark violated N.J.S.A. 34:13A-5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act when the City, through its Police Director, removed informational material posted on the Police Superior Officers' Association of Newark, New Jersey, Inc.'s (SOA's) office doors, verbally advised SOA officers that all material must be removed from the doors or he would file an unfair practice charge, issued Director's Memorandum No. 1401 requiring an authorized agent's written pre-approval to post informational material, and issued a letter requiring written pre-approval to post in the department or be subject to disciplinary action. The Hearing Examiner finds that the SOA has maintained a past practice of posting informational materials for its members on its office doors since 1971.

The Hearing Examiner recommends the Commission issue a cease and desist Order, and specifically direct the City to rescind Director's Memorandum No. 1401 and the letter, allow the SOA to post informational material on its office doors, meet with SOA representatives and negotiate over posting requirements before attempting to change the posting practice, and post a notice regarding the Commission's Order in places where notices to employees are customarily posted, including the SOA's office doors.

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. 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.

H.E. NO. 2001-3

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Appearances:

For the Respondent, Michelle Hollar-Gregory, Corporation
Counsel (Lenora E. Marshall, Assistant Corporation
Counsel)

For the Charging Party, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 16, 1998, the Police Superior Officers'
Association of Newark, New Jersey, Inc. (SOA or Charging Party)
filed an unfair practice charge (C-1)^{1/} with the New Jersey
Public Employment Relations Commission (PERC or Commission)
alleging that the City of Newark (City or Respondent) violated the

^{1/} Exhibit designations are as follows: C - Commission; CP -
Charging Party; and, R - Respondent. The parties also
submitted a joint stipulation comprised of twenty-six (26)
numbered paragraphs with exhibits. The stipulations shall
be referred to as Stip. ¶. Exhibits attached to the
stipulations and/or jointly entered at the hearing shall be
referred to as JT__.

New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1) and (5).^{2/}

The SOA contends that the City violated the Act on or about October 8, 1998, and at other times, by removing SOA informational material posted on the SOA's office doors. The SOA contends that it has an established past practice of posting newsletters and various other notices to its members on its office doors and the City violated the Act by issuing a November 2, 1998 letter advising that posting literature, signs, memoranda or handbills in the department, without the prior written consent of the Director of Police, would be subject to disciplinary action.

PROCEDURAL HISTORY

The unfair practice charge was filed together with an application for interim relief. The SOA sought to enjoin the City from (1) unilaterally removing SOA-posted materials on its office doors; (2) prohibiting the SOA from posting materials on its office doors; and, (3) threatening to discipline SOA officers for posting materials.

^{2/} 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. (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."

The City opposed interim relief by letter dated December 9, 1998 contending inter alia, that it has a longstanding policy of prohibiting the posting of notices, posters, placards, signs and solicitations in public places without prior approval from an appropriate City authority. The City relied upon Special Order from the Chief of Police No. 75-35, Police Director Memorandum No. 90-51, various City ordinances, and provisions of the parties' collective negotiations agreement in support of its position.^{3/} Moreover, the City contended, and the SOA acknowledged, that office door postings are not the only means the SOA has to communicate with its members.

Interim relief was denied on December 22, 1998. City of Newark, I.R. No. 99-7, 25 NJPER 31 (¶30033 1998).^{4/}

A Complaint and Notice of Hearing issued on June 11, 1999 (C-1). A pre-hearing conference was conducted on August 18, 1999 and attended by counsel for the SOA, two SOA members and counsel for the City. I reviewed the procedural history of the case with the parties and noted that the City had not filed an Answer pursuant to N.J.A.C. 19:14-3.1 and 3.2. The City did not seek leave to file a late Answer and Charging Party made no motion regarding the City's failure to file an Answer.

^{3/} These documents shall be discussed more fully infra.

^{4/} Although denying interim relief, the Commission Designee noted that if the SOA established violations of the Act and incurred additional expenses in communicating with its members as a result of the violations, the Commission would be able to fashion an appropriate remedial order.

At the conference, the Charging Party was requested, pursuant to N.J.A.C. 19:14-6.3(a)(10), to state the precise issue it requested the Commission to decide; it responded as follows:

Whether the City's removal of Notices from the SOA's office doors and threat of discipline if re-posted constitutes a violation of the Act? If so, what shall the remedy be?

The parties acknowledged there was no dispute that City representatives removed material from the SOA's doors and that SOA officers were threatened with discipline if the material was re-posted. The parties also acknowledged that the only factual issue in dispute was whether there was a past-SOA practice of using the doors to post informational material.

A hearing was held December 3, 1999.^{5/} The parties submitted joint stipulations with exhibits (T7-T9). One additional joint exhibit was submitted during the course of the hearing (T95).

Following the submission of stipulations, exhibits and opening statements, the SOA moved, pursuant to N.J.A.C., 19:14-3.1, to have the allegations of the Complaint deemed admitted as the "City never really filed an answer..." (T13).

In the interest of administrative efficiency, I denied the motion, (T15-T16) finding the following:

1. the City previously responded to, and defended against, the SOA's interim relief application;

^{5/} The transcript of the hearing shall be referred to as "T".

2. during the interim relief proceeding, the City opposed the factual allegations of the charge;

3. in preparation for this hearing, the parties entered into a lengthy stipulation of facts which resulted in a dispute over only two issues raised in the charge;

(a) whether "For many years the SOA has maintained a practice of utilizing the doors of its office for posting its newsletter and other notices to bargaining unit employees."; and,

(b) whether "the City's action in this matter was taken without any consultation or negotiation with the SOA. As such, said action is in violation of N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-5.4a(1) and (5)." (T15-T16;; C-1, 5 and 8).

Based on the foregoing, I found that the SOA was on notice of the City's pre-hearing position that it denied the existence of any SOA posting past practice. Moreover, the SOA did not assert or establish, and I did not find, that it would be prejudiced by going forward with the hearing (T15-T16).

The parties filed post-hearing briefs by April 10, 2000. On June 5, 2000 the City expressed an interest in negotiating a resolution of this matter and requested that further processing be stayed. Charging Party consented to a limited stay to allow the parties to negotiate. As of June 27, 2000, I was advised that the parties had not met to discuss resolution and was requested to issue a decision.

Based upon the entire record, I make the following:

FINDINGS OF FACT

The parties entered the following stipulations (T7-T9):

1. The Superior Officers Association (hereinafter "SOA") is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act ("Act") and is the exclusive representative of all superior officers employed in the police department of the City of Newark (hereinafter "City"), in the position of sergeant, lieutenant, and captain. The collective negotiations unit is comprised of approximately two-hundred and thirty (230) superior officers.

2. The City is a public employer within the meaning of the Act and is subject to its provisions.

3. The City and the SOA have been parties to a series of collective negotiations agreements. The most current collective negotiations agreement is effective January 1, 1996 through December 31, 1999. A copy of the current collective negotiations agreement is marked as joint exhibit #1.

4. For many years the SOA has maintained an office at a building owned by the City located at 1 Lincoln Avenue, Newark, NJ 07102.

5. On November 16, 1998, the SOA filed an unfair practice charge with the Public Employment Relations Commission (hereinafter "Commission") alleging that the City committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act. The unfair practice charge was accompanied by an application for interim relief.

6. On November 18, 1998, an order to show cause was executed and a return date was scheduled for December 15, 1998. The parties submitted briefs, affidavits, and exhibits in accordance with Commission rules. The parties argued orally on the established return date. On December 22, 1998, the Commission designee, Stuart Reichman, issued an interlocutory decision denying the SOA's application for interim relief.

7. The SOA alleges that it has maintained the practice of utilizing the doors of its office for posting of its newsletter and other notices to the bargaining unit employees. Marked as joint exhibits #2A, 2B, 2C, and 2D are copies of various notices that would have been posted by the SOA on its doors but for the City's actions herein. The SOA also alleges that its officers utilize the office doors to leave messages for their members advising of their location and where they may contact them when they are not at the office.

8. On or about October 8, 1998, between the hours of 11 am and 12 pm, the material posted on the SOA doors was removed by unknown persons at the direction of police director Joseph Santiago who was present in the building at that time.

9. Subject to the removal of the material that was posted on October 8, 1998, the material was reposted by representatives of the SOA.

10. On or about October 22, 1998, at about 2 pm, police director Joseph Santiago appeared in the office of the SOA and

stated that he wanted all material removed from the SOA doors or that he would file an unfair practice charge. He advised that it was "his doors" and that the SOA could not post anything on it. He then left the SOA office. Present at that time were SOA President Richard Luongo, SOA Vice-President John Huegel, and SOA Secretary Joseph Reilly along with SOA member Lieutenant Kurt Ebler.

11. On or about October 22, 1998, at about 4 pm, the SOA office was visited by a representative of the police department's professional standards unit who photographed the doors. The material on the doors included the open enrollment notice for the changing of health insurance carriers, a recent grievance that was filed by the SOA and an announcement of a dinner dance by the Bronze Shields, an organization of African-American police officers. Copies of these announcements are marked as joint exhibits #3A, 3B, and 3C.

12. When the SOA representatives reported to the office on the morning of October 23, 1998, they observed that the notices had been removed again from the doors. The notices were removed at the direction of the police director. A letter of the same date, October 23, 1998, was also provided to the SOA by police director Santiago protesting the SOA's failure to remove the materials from the doors. A copy of the letter from director Santiago dated October 23, 1998, has been marked as joint exhibit #4.

13. On or about October 26, 1998, Director's Memorandum No. 1401 was issued by police director Santiago prohibiting the

placement of any materials on doors, windows, walls, or any place other than an authorized bulletin board without express permission of the department's designated representatives. Director's Memorandum No. 98-1401 has been marked as joint exhibit #5.

14. On October 26, 1998, the SOA reposted the notices. The notices were removed from the doors at the direction of the police director on or about November 2, 1998. On that date, police director Santiago wrote to SOA President Luongo advising that the SOA was not permitted to post any literature "...on or in any City property of (SIC) facility except in designated areas and only with authorization from the appropriate parties." The police director directed SOA President Luongo to "...refrain from posting or permitting anyone to post, any literature, signs, memoranda, or handles on or in any City of Newark property without my prior written consent in the form of my original signature on the document to be posted. Failure to adhere to this directive shall subject you and/or your officers to disciplinary action." A copy of the police director's letter has been marked as joint exhibit #6. A copy of the material removed from the doors on November 2, 1998 has been marked as joint exhibits #7A, 7B, and 7C.

15. By letter dated October 27, 1998, SOA President Luongo responded to the police director's "grievance" of October 23, 1998, by denying his request and noting the past practice of using the doors for posting and his disparate treatment of the SOA. No appeal was taken of the denial of the grievance. A copy of SOA President Luongo's letter of October 27, 1998 is marked as joint exhibit #8.

16. The City contends that it is the policy of the police department to prohibit the posting of notices, etc..., on or in police facilities and department general bulletin boards without prior approval of an appropriate authority. On or about October 28, 1975, the chief of police issued special order No. 75-35, providing that representative organizations are entitled by contract to exclusive bulletin boards and that others wishing to post notices must obtain permission prior to posting. Special Order No. 75-35 is marked as joint exhibit #9.

17. On March 26, 1990, police director memorandum No. 90-51 providing that department general bulletin boards not be used for posting labor organizational information or solicitations except as required by law or administrative code, or as authorized by the police director. Police director's memorandum No. 90-51 is marked as joint exhibit #10.

18. The revised ordinances of the City of Newark (1966) provides that it is unlawful inter alia, to post any handbill, poster, notice, sign or advertisement on any curb, gutter, flagstone, pavement, sidewalk, tree, lamppost, awning post, telegraph or telephone box or handset, or other article, in any street or public place without the approval of the municipal council or authorized city agency or city officer. The ordinance has been subject to subsequent amendment without changing its basic premise. R.O. 22:21-3. R.O. 22:21-3 as amended in 1981, R.O. 22:21A et seq., and R.O. 22:21B et seq., are marked as joint exhibit #11.

19. The current SOA contract with the City in Article XXVI, Section 3 permits the SOA reasonable use of the department mail or message routing system and department mailboxes. Postage and stationery shall be paid by the SOA. The SOA has utilized the department's mail system and mailboxes to communicate with its members.

20. Unlike the Fraternal Order of Police, Newark Lodge No. 12 ("FOP"), the bargaining agent for the police officers below the rank of sergeant, the SOA does not have a labor contract provision which permits them reasonable use of department bulletin boards on which to post information of concern and for the welfare of its members. A copy of Article 3 of the FOP contract is marked as joint exhibit #12.

21. The SOA has not posted any material on the SOA doors in order to avoid the imposition of discipline as threatened by the police director since the material was removed on November 2, 1998.

22. The material posted on the doors has always been posted by the utilization of scotch tape without any damage to the doors.

23. The SOA does not maintain any bulletin boards or posting locations, per se, in any other departmental facility. Notices of SOA meetings and newsletters are, however, usually posted on various departmental bulletin boards.

24. The doors of the SOA office was the only location throughout the police department that the organization actually posted notices of interest to its members.

25. Prior to the events described above, the SOA maintained the door postings without objection by the City.

26. The City's action concerning these postings were taken without any consultation or negotiation with the SOA.

In addition to the parties' stipulations, I find the following facts:

27. The SOA's first office was located in the basement of the police department's 2nd precinct building at the corner of Orange and North 6th Streets in the City of Newark. The SOA moved its office to the current location at 1 Lincoln Avenue, 3rd Floor, Room 300 in 1981 or 1982 (T25, T36, T49).

The SOA's current office is located on a floor which includes the City Police Academy, Department of Community Affairs and Credit Union all of which may be accessed by the public (T75-T78; JT-13). The Fraternal Order of Police (FOP) maintains a bulletin board on the 3rd floor in the vicinity of the Police Academy on the opposite side of a hallway and dividing doors from the SOA's office location (Id.).

The doors to the SOA's current office are in the interior of the building and are comprised of double-hung dark stained wood, what appears to be brass knob and lock fixtures and yellow painted metal trim (CP-1). A sign above the double doors states "Superior Officer's Ass'n. Police Department Newark, N.J. Est. 1914" (CP-1). The doors generally remain closed and are only opened momentarily when people are entering or exiting the office (T102).

The informational materials typically posted on the SOA doors are typically 8 1/2" x 11" sheets of paper taped to the center of each door (Stip. ¶7; JT 2A-2D). The informational materials consist of the SOA's periodic newsletter, meeting notices, promotional advertisements and notes of interest (Id.).

The SOA's first contract with the City was negotiated in 1973 and that agreement and each contract since has not addressed postings on the doors or bulletin board access (T86).

28. On October 8, 1998, the information posted on the SOA doors consisted of a grievance the SOA filed against the City regarding disciplinary procedures and the SOA's September newsletter (Stip. ¶8; T51, T52, T100).^{6/}

The full newsletter was mailed to the SOA membership and consisted of seven pages (T100); the first five pages were information concerning the SOA's September membership meeting (T98; R-2), page six was a Director of Police memorandum regarding changes to the department disciplinary system together with a portion of an order issued by Commission Designee Stuart Reichman granting the SOA interim relief, restraining the City from modifying its disciplinary procedure (Id.). The final page consisted of two images; (1) a picture of Police Director Joseph Santiago with the head removed, a

^{6/} While many of the events that occurred in October 1998 are detailed in the parties' Stipulations, for purposes of clarity, I restate certain critical events here in the context of testimony and other exhibits introduced during the hearing.

hood placed on with whiteout for the eyes with the words "Police Trials" beneath, blaming Santiago for the results of certain recent disciplinary actions, and (2) five hangman photos obtained from a criminal investigation book with the numbers "93-2" beneath, referring to Santiago's memorandum regarding changes to the department disciplinary system (T98-T100; R-1).

The newsletter was the center of controversy in October 1998 for several reasons. The "Police Trials" picture (R-1) was of Santiago and the hangman sequence (R-1) was similar to a document previously mailed to his home depicting Mussolini hanging upside down, other people hanging, and the last rites of the Catholic Church (T56).

The document mailed to Santiago's home was received shortly before the October 1998 SOA posting issues arose (Stip ¶¶ 8-12, T56, T61-T63). The document mailed to his home was the subject of a criminal investigation (T56) including a State Police fingerprint check (T62-T63). No charges were ever brought and Santiago acknowledged that the mailed document was not the same document attached as the last page of the SOA's September newsletter (T63).

Only the first five pages of the September newsletter were posted on the SOA doors in October; excluded were the memorandum regarding the disciplinary system with the interim relief order, the "Police Trial" picture, and hangman sequence (T100, T101).

29. On October 8, 1998, between the hours of 11:00 am and 12:00 pm, the material posted on the SOA doors were removed at

Santiago's direction (Stip ¶8). Informational material was subsequently re-posted by representatives of the SOA (Id.).

30. On October 22, 1998, Santiago entered the SOA office with four SOA officers/members present, President Richard Luongo, Vice-President John Huegel, Secretary Joseph Reilly and member Lieutenant Kurt Ebler. Santiago stated that he wanted all material removed from the SOA doors or he would file an unfair practice charge against the SOA. He advised them that they were "his doors" and that the SOA could not post anything on them (Stip. ¶¶9-10, T51-T52).

Later that day, at 4:00 p.m., a representative of the police department's professional standards unit photographed the doors. The material then posted included an open enrollment notice for changing health insurance carriers, a recent grievance filed by the SOA and a dinner dance announcement (Stip. ¶11, JT 3A-3C). Between October 22, 1998 and October 23, 1998, the notices were again removed from the doors at Santiago's direction (Stip. ¶12).

31. On October 23, 1998, Santiago sent the SOA a letter grieving its posting practice (JT 4, Stip. ¶12). Santiago contended that it violated the parties' collective negotiations agreement (Stip. ¶12, JT 4).

32. On October 26, 1998, Santiago issued Director's Memorandum No. 1401 prohibiting the posting of any materials on doors, windows, walls, or any place other than an authorized bulletin board without express permission of the department's

designated representatives. It directed that permission would be granted in the form of an original signature on the posting and name stamps were not to be used (Stip. ¶13, JT 5).

33. On October 26, 1998, the SOA re-posted the notices (Stip. ¶14).

34. On October 27, 1998, the SOA sent a response letter to Santiago denying his grievance stating that "As you are aware, the Association has long used its doors to post copies of notices and literature important to our members. This practice is not new, it has been done for years without objection. It is also consistent with other postings throughout the Department." (Stip. ¶15, JT 8).

35. On November 2, 1998, Santiago replied (Stip. ¶14, JT 6) acknowledging that "[d]espite your prior practices, the Department nor [sic] the City permit the posting of any literature on or in any City property of [sic] facility except in designated areas and only with authorization from the appropriate parties." [Emphasis added]. Santiago directed the SOA to

...refrain from posting or permitting anyone to post, [sic] any literature, signs, memoranda, or handbills on or in any City of Newark property without my prior written consent in the form of my original signature on the document to be posted. Failure to adhere to this directive shall subject you and/or your officers to disciplinary action.

No further action was taken by either party regarding Santiago's grievance (Stip. ¶15). On November 2, 1998, however, the notices were again removed from the doors (Stip. ¶14, JT 7A-7C).

36. In addition to the documents posted on the SOA doors, informational postings, consisting of various sized colored paper are taped to the walls and doorways in numerous locations throughout the police complex at 1 Lincoln Avenue and police headquarters at 22 Franklin Street (CP-1, CP-12). These postings include credit union advertisements, candlelight vigils, soda machines, promotional tributes, dinner dance advertisements, car wash advertisements, "Keep Area Clean" signs and various other social literature (Id.; T25-T30). None are affixed to any bulletin boards (CP-4 shows a "Blue Mass" notice and credit union advertisement taped to the exterior of a sealed directory board) and none appear to have any markings, initials, stamps or signatures indicating approval by anyone for posting (CP-1, CP-12; T69-T70, T96). Photographs of the foregoing postings were taken on October 22 and 23, 1998 (Id.).

37. Lieutenant John Huegel was hired by the City as a policeman in 1981 and promoted to sergeant in 1989, at that time becoming a member of the SOA's bargaining unit (T18, T21). Huegel was promoted to lieutenant in 1995 and also became first vice president of the SOA. In that capacity he is responsible for SOA labor relations (T19).

Huegel has seen the SOA office doors utilized to post informational materials on a regular basis since the early to mid 1980's (T20-T22, T97). Huegel and other SOA officers use the doors to post messages advising of their location and/or how they may be contacted (T20-T21; see also Stip. ¶7). Huegel has personally been

posting informational material on the doors since 1995.

Specifically between April 1997 and October 1998, he worked on a daily basis from the SOA office and routinely posted informational materials, including a monthly SOA newsletter, on the doors during that period (T97, T101). He personally posted newsletters following meetings each month with the exception of July and August during which no meetings were scheduled (T100, T102).

Prior to 1995, Huegel was assigned to the Police Academy, down the hall from the SOA office location. Huegel passed the SOA office on a daily basis and he states that he saw materials posted on the SOA doors at that time (T103). Huegel never requested permission from any City official to post notices on the SOA doors (T98) and was unaware of any directive or order forbidding postings on the doors without prior approval before October 1998 (T22).

According to Huegel, who prepared the September newsletter, pages six and seven containing the disciplinary memorandum, PERC interim relief order, Santiago's image and hangman sequence, were intended to inform SOA members of the leadership's view of Santiago's treatment of the disciplinary system (T99). Huegel explained that he did not post the pages depicting Santiago or the hangman sequence, however, because he did not believe they were appropriate to be posted and viewed in a public location (T100, T101).

38. Former Chief of Police and Acting Director John Golba entered the SOA bargaining unit in 1971 when he was promoted to

sergeant. He made lieutenant in 1979, captain in 1983, chief in 1986, deputy chief^{7/} in 1990 (T34-T35). In 1978, he was elected SOA treasurer and from 1979-1986 was SOA president (T35-T36).

Golba saw SOA office door postings when the office was located in the Orange Street facility (T37, T87). He also saw notices to SOA members as early as 1971 being posted in squad rooms and on police facility walls (T85-T86).

Golba witnessed first hand that the posting practice continued, without objection by the City, when the office was moved to the current location in 1981 or 1982 (T37, T87). While he worked in the 1 Lincoln Street building on a daily basis during the 1980's, he saw the SOA office doors were constantly utilized for posting documents (T86-T87).

Golba personally posted documents on the doors while he was an officer in the SOA and never sought permission from any City official (T87-T89). Additionally, he was not aware of anyone else ever seeking permission to post documents in the department and did not see any posted materials bearing any official's signature or initials (T87, T88).

On direct examination Golba was shown and reviewed Special Order No. 75-35 dated October 28, 1975 (JT 9), which states as follows:

^{7/} Golba was demoted from chief to deputy chief in 1990 and as a result, he sued the City contending it was an illegal demotion (T39-T40).

1. The representative organizations are entitled by contract to exclusive bulletin boards. This Order does not in any way abrogate that right.
2. Others wishing to post notices, etc., must use the general bulletin board of their commands, after permission is granted by the Commanding Officers of Bureaus.
3. Affixing posters or placards on any police facility wall is prohibited, unless permission is first sought from the Chief of Police. When such permission is granted, each Divisional Commander has the option to permit or reject posting on walls, in the facilities of his command.
[Emphasis in original.]

I credit Golba's testimony that Special Order 75-35 was never applied to the SOA's use of the office doors, rather, it related to a representation campaign between the PBA and FOP (T38).

On direct examination Golba was shown and reviewed Police Director Memorandum No. 90-51, dated March 26, 1990 (JT 10), which states as follows:

1. Department general bulletin boards shall not be used for the posting of labor organizational information or solicitations unless such information is required by law or administrative code, or the posting of such information is authorized by this office.
2. Commanding Officers shall ensure that all general bulletin boards within their respective commands are in compliance with this directive.

That Memorandum was issued while Golba was chief. I credit his testimony that it was never applied to the SOA's use of the office doors, rather, it related to PBA use of general bulletin boards at a time when the PBA was not a majority representative of police employees (T38-T39).

Golba knew that the Revised Ordinances of the City generally prohibited unauthorized postings in public places (JT 11), but he was not aware whether the ordinances were ever applied to police employees or police facility postings (T42).

While Golba was chief, he never had occasion to enforce either the Special Order or the Memorandum (T90, T92, T93). While he acknowledged that he was not aware of Special Order 75-35 until the day of the hearing in this matter (T90, T92, T93), I credit his explanation that the Special Order, the Memorandum and the Revised Ordinances did not apply to the SOA use of its doors because that use "had been a maintenance and standard practice prior to the first contract" and pertained to situations involving public elections and/or rival labor organizations (T91, T92).

39. Santiago entered the SOA bargaining unit when he was promoted to sergeant in 1974. He was promoted to lieutenant in 1978 and captain in 1983. He left the department as a captain in 1987 to become the director of public safety in Essex County. He returned to the department in 1991 as a deputy chief and in 1996 was named police director (T47).

In 1978, Santiago was elected SOA recording secretary and held that office until 1983 but he did not work out of the SOA office (T47-T49). As recording secretary, he attended SOA meetings and prepared and distributed the SOA newsletter and reports of the meetings (T48). Santiago did not post any notices on the SOA doors while he was recording secretary, but he did not state whether anyone else ever posted notices on the SOA doors (T49-T50).

Santiago did not recall seeing notices posted on the SOA doors while he was the Commanding Officer for the North District and therefore working in the same building as the SOA office, from 1984 to 1986 (T49-T59).

In April, 1997, Santiago began attending COMSTAT (command status) meetings at the Police Academy every Thursday morning at 9:00 a.m. and he passed the SOA office doors on a weekly basis. He contends that the first time he remembers seeing notices posted on the doors was in October, 1998 (T50-T52).

Santiago's testimony did not specifically contradict Huegel's or Golba's. They both personally posted documents on the SOA doors without Santiago's, or anyone else's permission and they both saw documents so posted-Golba as early as 1971 at the old SOA office and both Golba and Huegel throughout the 1980's in the current SOA office (T85-T86, T20-T22, T97). Santiago noted that he, personally, did not post any notices on the SOA office doors while he was an officer of the union from 1978-1983 (T48-49) but, that testimony is not inconsistent with Golba's who stated that he personally did post, and saw information that was posted by others, during the same time frame.

Santiago conceded that general informational material posted throughout the department (see finding no. 36) were legitimate ways to communicate social and command information (T68, T70, T71; CP 2-12), but he thought that it was inappropriate to allow politically inflammatory or libelous material to be posted in

public places in department buildings (T64, T68). Santiago and Huegel agree that the SOA doors are located in a public place where citizens can view documents posted thereon (T54, T100-T101).

Santiago compared the FOP and SOA agreements regarding postings. The FOP contract contains a bulletin board clause in which the parties negotiated the location of boards and certain restrictions on the nature of the material which may be posted. The SOA contract does not have a similar clause, rather, it contains provisions regarding the use of the City's mail system (T57).

Santiago believed the Revised Ordinances prohibited the unauthorized posting of documents in public places, including within police department facilities (T53-T54). He was not aware, however, of anyone ever being charged with violating the posting ordinances (T64-T65), Special Order 75-35 or Memorandum 90-51, (T66). He also agreed with Golba that posting issues typically occurred during public political (primary or general election) or union representational campaigns and compliance occurred, if at all, after a warning or the material was simply removed (T63-T65).

40. I find, based on the foregoing testimony, stipulations and exhibits, that since 1971, the SOA has maintained a practice of utilizing the exterior face of its office doors to post informational materials for its members. Specifically, since 1981, when the SOA first occupied its offices on the third floor of 1 Lincoln Avenue it has continuously utilized its office doors to post newsletters and/or other informational material.

41. I find, based on the foregoing testimony, stipulations and exhibits, that the City did not have a long standing policy of prohibiting the posting of notices, posters, placards, signs and solicitations in public places and the Revised Ordinances, Special Order 75-35 and Memorandum 90-51 were never applied by the City to regulate the location or content of informational postings by the SOA to its membership.

42. Although I find the parties agree that certain types of information, which may be appropriate for the SOA to communicate to its membership, may not be appropriate to post on the SOA doors or other locations where the general public may view it, the parties have no mutual agreement regarding the regulation of appropriate content.

ANALYSIS

Charging Party requests the Commission decide whether the City's removal of notices from the SOA's office doors and threat of discipline if re-posted constitutes a violation of the Act. The parties acknowledge there is no dispute that City representatives removed material from the SOA's doors and that SOA officers were threatened with discipline if the material was re-posted. The parties also acknowledge that the only factual issue in dispute is whether there is a past SOA practice of using the doors to post informational material.

Charging Party requests that the Commission "enjoin" "the City of Newark from unilaterally removing materials posted by the SOA; [sic] prohibiting the SOA from posting said materials; and threatening to discipline officials of the SOA for the posting of materials" (C-1). The City, in its post-hearing brief, requests the Commission find that: the SOA does not have a past practice of using its office doors to post informational materials; even there is such a practice, the SOA may not continue posting as it violates the City's Revised Ordinances; and, neither the doctrine of laches nor estoppel bar the City's application of the Revised Ordinances. The City requests, therefore, that the Complaint be dismissed.

THE CITY'S UNILATERAL CHANGE OF THE SOA'S POSTING PRACTICE

N.J.S.A. 34:13A-5.3 sets forth the negotiations obligations of public employers and their employees' majority representatives. The parties must "meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." [Emphasis added]. When the parties reach an agreement, they must write it down and sign it. The agreement must contain grievance procedures for resolving contractual disputes and an employer must negotiate with a majority representative over "proposed new rules or modifications of existing rules governing working conditions." This requirement applies at all times, not just during negotiations for a new or successor contract. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48-49 n.9 (1978).

N.J.S.A. 34:13A-5.4 prohibits specified unfair practices by public employers and majority representatives. Consistent with the negotiations obligation set forth in the Act, 5.4a(5) prohibits a public employer from refusing to negotiate in good faith over terms and conditions of employment.

It is axiomatic that public employees have the right to communicate with each other about employment conditions. State of N.J. (Dept. of Transp.), P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990) citing Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); and Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983), .

In Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50, 52 (1976), the Commission held that the use of bulletin boards was a term and condition of employment, stating: "School Boards [] have an obligation to negotiate over access to school facilities by its employees in furtherance of their legal collective activities." Similarly, in West Deptford Bd. of Ed., P.E.R.C. No. 79-41, 5 NJPER 44 (¶10029 1979), the Commission found violations of 5.4a(1) and (5) of the Act where an employer sought to terminate an Association's longstanding use of school facilities for meetings during the school year.

Read together, the foregoing cases and the respective progeny, stand for the general proposition that the Act confers a statutory right of communication between majority representatives and unit members. Communication between majority representative and

unit member, therefore, is a term and condition of employment.

Eastex, Inc. v NLRB; Republic Aviation Corp. v. NLRB; State of N.J. (Dept. of Transp.); Passaic Cty. Park Comm., P.E.R.C. No. 85-56 11 NJPER 16 (¶16007 1984); Bergen Cty.; West Deptford Bd. of Ed.; Union Cty. Reg. Bd. of Ed.

Terms and conditions of employment may arise from a past practice not contained in parties' collective negotiations agreement. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977) mot. for recon. den., 4 NJPER 56 (¶4073 1978). A past practice demonstrates "a pattern of conduct and some kind of mutual understanding, either express or implied." United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970). The Commission has defined past practice as a course of events "...which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Somerville Boro., P.E.R.C. No. 84-90, 10 NJPER 125, 126 (¶15064 1984), quoting from Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973).

Where a collective negotiations agreement is silent or unclear concerning a particular term, then the parties' past practice may control. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). An employer fulfills its 5.3 obligation to negotiate when it makes changes in terms and conditions of employment that are permitted under the contract's terms. Sussex-Wantage Reg. Bd. of

Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). A past practice that is determined to be contrary to the clear, express terms of a collective negotiations agreement, must yield to the clear meaning of the contractual agreement. See N.J. Sports & Expo. Auth. and Laborers Int'l Union Local 734, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Commission and judicial precedent in cases dealing with the removal of posted information are of somewhat limited application in this matter because they all seem to involve employer removal of documents from contractually negotiated bulletin boards. Disputes over the removal or censorship of postings in those cases, were deferred to the parties' contractual grievance resolution procedure. See Middletown Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd __ N.J. Super. __ (App. Div. 1996) certif. den. and notice of app. dismiss., 149 N.J. 35 (1997); New Jersey (Dept. of Human Svce.), I.R. No. 99-13, 25 NJPER 141 (¶30066 1999); New Jersey (Dept. of Human Svce.), P.E.R.C. No. 99-65, 25 NJPER 93 (¶30040 1999). In this case, there are no bulletin boards or similar contract provisions implicated by the parties' conduct, accordingly, this dispute is not deferrable and I must examine the parties' conduct.

The City's basic position that the SOA does not have a past practice of posting informational materials on its office doors is inconsistent with its stipulation in this proceeding. The City entered joint stipulations during the conduct of the hearing in this matter (T7-9). Stipulation ¶25 states that "Prior to the events described above, the SOA maintained the door postings without objection by the City." The City, therefore, acknowledges by the stipulation that the SOA has a past practice of posting informational materials on its office doors

Even if the City had not entered Stipulation ¶25, Director Santiago acknowledged the SOA's posting past practice in writing (JT 6). See finding no. 35 supra.

Moreover, even if the City had not entered Stipulation ¶25, and Santiago did not acknowledge, in writing, the SOA's practice, Santiago's general testimony was unpersuasive regarding his recollection of the SOA posting past practice. See finding nos. 39-40.^{8/} Santiago's specific testimony that he did not notice any postings on the SOA's office doors between April 1997 and October

^{8/} The City did not attempt to discredit Huegel's testimony and its effort to discredit Golba, or establish bias (T39-T40) was ineffectual. It appears that he was demoted from chief to deputy chief in 1990 and as result, he sued the City contending it was an illegal demotion (T39-T40). The results of that litigation were not presented nor was any connection made between Golba's personnel issue and the SOA's posting issue. There is no objective reason to believe that Golba's testimony in this matter is anything less than truthful notwithstanding prior, unrelated litigation involving the City.

1998 was also unpersuasive. A more likely explanation is that Santiago had no reason to notice the postings before October 1998. In response to a cross examination question asking whether he ever observed any material posted on the SOA doors during the April 1997 to October 1998 period, he answered in part, "None that came to my attention" (T74). He went on to note that he saw other postings on walls and on one occasion saw a posting on the doors but that he directed it be removed.

Based on the disciplinary procedure litigation that was going on at the time, combined with the offensive mailing he received, it is doubtless but that Santiago had an increased personal sensitivity to critical comment in October 1998 than he did previously. He was aware of the SOA's full September newsletter, that the version mailed to the SOA membership contained an offensive image of him and a hanging sequence similar to that previously mailed to his home. When he saw the newsletter on the SOA door, it is more reasonable to believe that he was offended--not by what was actually posted, recall, the final two pages containing the offensive material were not posted, but the idea that officers in his command were critical of his leadership and the SOA was sanctioning that criticism. Therefore, it is logical to believe that the September newsletter, under those circumstances, would come to Santiago's attention while other, non-controversial material posted during the same period would not necessarily have come to his attention. Accordingly, Huegel's unequivocal testimony that he

posted documents on the SOA office doors during the April 1997 to October 1998 period is inherently more reliable.

The SOA's posting practice, dating back to 1971, and the City's acquiescence thereto, demonstrates a repeated, unequivocal, clearly enunciated and readily ascertainable practice over a reasonable period of time as a fixed and established method of the SOA communicating with its members. The parties' collective negotiations agreement is silent on the issue of posting notices and therefore, the parties' past practice controls. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982).

Based on the foregoing, the City did not fulfill its 5.3 obligation to negotiate with the SOA. The City violated 5.4a(5) and derivatively 5.4a(1) of the Act when, contrary to the parties' past practice, it

1. removed informational material posted on the SOA doors on October 8, 1998;
2. through its agent, Police Director Santiago, verbally advised SOA officers on October 22, 1998, that all material must be removed from the SOA doors or he would file an unfair practice charge;
3. removed informational material posted on the SOA between October 22 and 23, 1998;
4. removed informational material posted on the SOA doors on November 2, 1998
5. issued Director's Memorandum No. 1401 requiring the police director's or other authorized agent's written pre-approval to post literature, signs, memoranda or handbills in the department; and,

6. issued the November 2, 1998 letter requiring the police director's written pre-approval to post literature, signs, memoranda or handbills in the department or be subject to disciplinary action.

THE CITY'S INDEPENDENT VIOLATION OF 5.4a(1)

Even if the City did not violate 5.4a(5) in this case, a 5.4a(1) violation may be found if the City's prohibition on posting tends to interfere with the statutory rights of employees and lacks a legitimate and substantial operational justification outweighing any interference. New Jersey (Dept. of Human Svce.), P.E.R.C. No. 99-65, 25 NJPER 93 (¶30040 1999); UMDNJ-Rutgers Med.School. P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

The SOA apparently contends that four independent 5.4a(1) violations occurred; (1) the removal of informational material posted on the SOA doors on October 8, October 22 and 23, and November 2, 1998; (2) Police Director Santiago' verbally advising SOA officers on October 22, 1998, that all material must be removed from the SOA doors or he would file an unfair practice charge; (3) the issuance of Director's Memorandum No. 1401 requiring the police director's or other authorized agent's written pre-approval to post literature, signs, memoranda or handbills in the department; and, (4) the November 2, 1998 letter requiring the police director's written pre-approval to post literature, signs, memoranda or handbills in the department or be subject to disciplinary action.

All four instances constitute independent 5.4a(1) violations by the City. Each has a tendency to interfere with, restrain, and coerce SOA members, and the SOA itself in the exercise of statutory rights--the right to communicate--specifically, the right to post SOA informational material on the SOA office doors in accordance with a long established past practice. See New Jersey (Dept. of Human Svce.), 25 NJPER 93. These four events led to the SOA refraining from posting such material during the pendency of this action.

The City, however, apparently contends that Director Santiago had a legitimate and substantial business justification for his actions, as he believed the material posted on the office doors violated the City's Revised Ordinances, Special Order 75-35 and Memorandum 90-51. Additionally, the City contends that it has the zoning authority to regulate signs, that acquiescence to past zoning violations and/or failure to enforce zoning regulations does not prevent current enforcement of ordinances. It cites the following cases to support its positions: Universal Holding Co. v. N. Bergen Tp., 55 N.J.Super. 103 (App. Div. 1959); Adler v. Dept. of Parks & Public Prop., 20 N.J.Super. 240 (App. Div. 1952); and, Ianieri v. E. Brunswick Zoning Bd. of Adj., 192 N.J.Super. 15 (Law Div. 1983).

The equitable considerations and/or merits of the City's arguments regarding the applicability of its Revised Ordinances (JT 11) need not be reached since "[t]he City could not, by passage of a local ordinance, unilaterally preempt the area of negotiable terms

and conditions of employment; only a specific state statute or regulation could do so." City of Paterson v. AFSCME Coun. 52, Local 2272, NJPER Supp. 2d 93, 94 (1976 App. Div. 1981).

Even if the Revised Ordinances were considered, it is unclear which sections of the ordinances the City relies upon. It is unclear from the sections submitted (JT 11), which ordinances are currently operative as the document suggests that several posting provisions have been amended over time. Additionally, there was no conclusive legal authority presented which supports the City's position that any of the Revised Ordinances apply to the SOA posting practice.

As to Special Order 75-35 and Memorandum 90-51, neither were ever applied by the City to regulate the location or content of SOA informational postings. See finding no. 41, supra.

The City offered no legitimate and substantial operational justification outweighing its interference with the SOA's right to communicate with its members. Accordingly, I recommend the following conclusions of law:

CONCLUSIONS OF LAW

The City violated 5.4a(1) and (5) of the Act when, contrary to the parties' past practice, it:

1. removed informational material posted on the SOA doors on October 8, 1998;
2. through its agent, Police Director Santiago, verbally advised SOA officers on October 22, 1998, that all material must be

removed from the SOA doors or he would file an unfair practice charge;

3. removed informational material posted on the SOA doors between October 22 and 23, 1998;

4. removed informational material posted on the SOA doors on November 2, 1998

5. issued Director's Memorandum No. 1401 requiring the police director's or other authorized agent's written pre-approval to post literature, signs, memoranda or handbills in the department; and,

6. issued November 2, 1998 letter requiring the police director's written pre-approval to post literature, signs, memoranda or handbills in the department or be subject to disciplinary action.

Based on the foregoing, I recommend the following Order:

RECOMMENDED ORDER^{9/}

I recommend the Commission ORDER:

A. That the City of Newark cease and desist from:

^{9/} While the Commission Designee noted in denying the SOA application for interim relief, that if the SOA established violations of the Act and incurred additional expenses, the Commission would be able to fashion an appropriate remedial order, City of Newark, I.R. No. 99-7, 25 NJPER 31 (¶30033 1998), the SOA presented no facts that it incurred additional expenses.

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by implementing the provisions of Director's Memorandum No 1401, implementing the provisions of the Director's Letter dated November 2, 1998, removing SOA informational material from the SOA office doors, and, threatening discipline if informational material is posted.

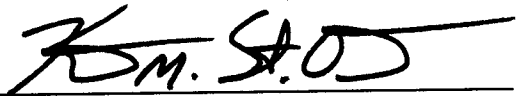
2. Refusing to negotiate in good faith with the SOA before unilaterally changing a term and condition of employment particularly by implementing the provisions of Director's Memorandum No. 1401, implementing the provisions of the Director's Letter dated November 2, 1998, removing SOA informational material from the SOA office doors, and threatening discipline if informational material is posted.

B. That the City take the following affirmative action:

1. Rescind Director's Memorandum No. 1401 and Director's Letter dated November 2, 1998;
2. Allow the SOA to post informational material on its office doors;
3. Meet with SOA representatives and negotiate over posting requirements before attempting to change the posting practice;
4. Post in all places where notices to employees are customarily posted, including the SOA's office doors, copies of the attached notice marked as Appendix "A." Copies of such notice, on

forms to be provided by the Commission, shall be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials; and,

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



Kevin M. St. Onge
Hearing Examiner

Dated: July 20, 2000
Trenton, New Jersey



RECOMMENDED



**NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from Interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by implementing the provisions of Director's Memorandum No 1401, implementing the provisions of the Director's Letter dated November 2, 1998, removing SOA informational material from the SOA office doors, and, threatening discipline if informational material is posted.

WE WILL cease and desist from refusing to negotiate in good faith with the SOA before unilaterally changing a term and condition of employment particularly by implementing the provisions of Director's Memorandum No. 1401, implementing the provisions of the Director's Letter dated November 2, 1998, removing SOA informational material from the SOA office doors, and threatening discipline if informational material is posted.

WE WILL take the following affirmative action:

WE WILL rescind Director's Memorandum No. 1401 and Director's Letter dated November 2, 1998;

WE WILL allow the SOA to post informational material on its office doors.

WE WILL meet with SOA representatives and negotiate over posting requirements before attempting to change the posting practice.

CI-H-99-156
Docket No. _____

City of Newark

(Public Employer)

Date: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"