P.E.R.C. NO. 78-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2081, AFL-CIO,

Respondent,

Docket No. CE-76-45-19

-and-

CITY OF HACKENSACK,

Charging Party.

CITY OF HACKENSACK,

Respondent,

Docket Nos. CO-76-272-20 and CO-77-3-21

-and-

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2081, AFL-CIO,

Charging Party.

SYNOPSIS

The City and Local 2081 had each filed unfair practice charges against the other. One of the Local's charges alleged that the City committed an unfair practice denying a fire fighter the right to have more than one representative from the Local at a disciplinary hearing. The Local's other charge alleged that the City violated various sections of the Act by compelling attendance of Fire Fighter Richard Winner, the Local's Secretary, at a meeting with the Fire Chief relating to Association business which resulted in verbal abuse and later written threats. The City had charged that Winner's conduct at the meeting with the Fire Chief, taken together with letters sent earlier to the Chief regarding the exclusive use of bulletin boards, constituted coercion and a refusal to negotiate in good faith on the Association's part.

The Hearing Examiner found that the City had violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(3) regarding the "Winner incident" but not any other Subsections of the Act. The Hearing Examiner further found that no unfair practice had been committed by the Local and further determined that the City had not committed an unfair practice by denying fire fighters more than one representative from the Local at a disciplinary hearing.

The Commission, substantially for the reasons cited by the Hearing Examiner, adopted his findings of fact and conclusions of law. The Commission dismissed the various exceptions that had

been filed by the City to the Hearing Examiner's Recommended Report and Decision. More specifically, the Commission sustains the Hearing Examiner's credibility judgments and his reading and weighting of the testimony. The Commission notes that in this regard the City had demonstrated only that certain testimony on its face could sustain a reading different from the Hearing Examiner's, but not that the City's reading of testimony was the only possible one.

The Commission also rejects the City's exception that Fire Fighter Winner had not engaged in protected activities within the meaning of the Act. The Commission further finds that the record does not support the City's contention that the Hearing Examiner was biased and acted improperly by his actions relating to the amendment of one of the Local's charges to include the allegation that the placing of a letter in Winner's file warning of possible discipline was an unfair practice in violation of N.J.S.A. 34:13A-5.4 (a)(1) and (a)(3). There was nothing in the record of this case to indicate the Hearing Examiner added anything to the record or assisted the Local in the presentation of its case. The City was ordered to cease and desist from interfering with, restraining or coercing employees or discriminating in regard to hire or tenure of employment by disciplining employees for actions taken in their capacity as representatives of an employee organization that constituted protected activities under the Act. The City was further ordered to remove from Fire Fighter Winner's file the letter of March 24, 1976 which warned Winner that if he used offensive language again, he would be brought up on charges; post appropriate notices and notify the Chairman of the Commission as to what steps the City has taken to comply with the Commission's order.

P.E.R.C. No. 78-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 2081, AFL-CIO,

Respondent,

Docket No. CE-76-45-19

- and -

CITY OF HACKENSACK,

Charging Party.

CITY OF HACKENSACK,

Respondent,

- and -

Docket Nos. CO-76-272-20
CO-77-3-21

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 2081, AFL-CIO,

Charging Party.

Appearances:
For International Association of Fire Fighters, Local 2081, AFL-CIO, Nicholas Sarapuchiello, President of Local 2081
For City of Hackensack, Murray, Meagher & Granello, Esqs. (James P. Granello, of Counsel, Robert H. Goodwin, on the Exceptions)

DECISION AND ORDER

Two Unfair Practice Charges were filed with the Public Employment Relations Commission by the International Association of Fire Fighters, Local 2081, AFL-CIO (the "Association") alleging violations of the New Jersey Employer-Employee Relations Act (the "Act") by the City of Hackensack (the "City"). One of the charges alleged that the City committed an unfair practice by denying Fire

Fighter J. Warcholowski the right to have more than one representative from the Association at a disciplinary hearing (Docket No. CO-77-3-21). The other alleged violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7) from the compelled attendance of Fire Fighter Richard Winner, the Association Secretary, at a meeting with the Fire Chief relating to Association business, and alleged verbal abuse and later written threats (Docket No. CO-76-272-20). These charges were filed on July 9 and April 15, 1976, respectively.

On April 26, 1976, the City filed a charge alleging that the Association committed unfair practices in violation of N.J.S.A. 34:13A-5.4(b)(1), (2), (3) and (5) (Docket No. CE-76-45-19). More specifically, it is alleged that Winner's conduct at the meeting with Chief Jones taken together with letters sent earlier to the Chief regarding exclusive use of bulletin boards constitutes coercion and a refusal to negotiate in good faith.

Three Complaints and Notices of Hearing were issued on August 26, 1976 along with an Order Consolidating Cases, and a hearing was held before Commission Hearing Examiner Edmund G. Gerber on October 4 and 5, 1976. Both parties had the opportunity to examine and cross-examine witnesses, present evidence, and argue orally. Only the City chose to submit a brief, which it did on December 27, 1976.

On September 13, 1977 the Hearing Examiner issued his Report and Recommended Decision.[1/] He found that the City had

1/ H.E. No. 78-5, 3 NJPER 280 (1977). A copy is appended hereto and made a part hereof.

violated N.J.S.A. 34:13A-5.4(a)(1) and (3)but not any other subsection in regard to Docket No. CO-76-272-20; he further found that no unfair practice had been committed in either of the other two matters and he recommended their dismissal.

Execptions and a brief were filed with the Commission by the City on October 20, 1977. Additionally, in accordance with its request, the City argued orally before the Commission on November 15, 1977. No exceptions or papers in opposition to the City's exceptions have been filed by the Association nor did the Association appear at the oral argument. The City excepts to the findings that the City violated the Act and that the Association did not. There have been no exceptions filed in regard to the Warcholowski matter, and after reviewing the record, we adopt the findings of fact and conclusions of law of the Hearing Examiner and dismiss the complaint in Docket No. CO-77-3-21.

The controversy in the remaining charge filed by the Association centers around a meeting which took place between the Chief and Winner, with Deputy Chief Aiellos also present. It is not disputed that the Chief and the Association had been trying to arrange a meeting to deal with access to bulletin boards, and when that was not successful the Chief called Winner into his office and gave his opinion on the matter even though Winner protested that he was not authorized to conduct union activity on his own. Where there is a conflict is in the directly conflicting testimony of the Chief and Deputy Chief on the one side, and Winner on the other as

to whether it was the Chief or Winner who introduced the word "ass" into the conversation at that meeting in the Chief's office. The Hearing Examiner found Winner to be more credible and as a result found that the Chief had verbally abused Winner, who then merely repeated to state what the Chief had said. Consequently, a letter later placed in Winner's file warning of discipline if Winner ever used profanity again in the office was held to be an attempt to discourage Association activity.

Several exceptions go to the Hearing Examiner's credibility determinations and his reading and weighting of the testimony. We have most carefully reviewed the transcript, and as we noted above, the testimony on its face is diametrically opposed. However the Hearing Examiner had the benefit of observing the demeanor of the witnesses and it was his conclusion that Winner was more credible. Therefore, as the transcript does not show the Hearing Examiner to be clearly erroneous, we can find no justification for reversing his findings. In its citation to particular portions of the transcript the City demonstrates no more than that the testimony on its face could sustain a reading different from the Hearing Examiner's, but not that the City's reading is the only possible one.[2/] What remains of the City's exceptions on this point is an assertion that the Hearing Examiner was not impartial, an accusation that will be considered later in this decision.

2/ The Hearing Examiner does note that the Chief and Deputy Chief testified they could not hear what Winner said except for the word "ass", which they heard twice. We agree with the Hearing Examiner that this does detract from their credibility.

The City has also objected to the Hearing Examiner's conclusion that Winner was engaged in activity protected under the Act, and therefore could not be disciplined without violation of the Act unless his conduct was so offensive as to be beyond the pale. Here, he found that at most Winner had used the word "ass", and in light of his being forced to attend the meeting despite his protest, his rights under §5.3 of the Act remained intact.

We are not convinced by the City's characterization of the meeting as an informal one which was removed from the realm of protected activity. Even if the Chief felt the matter was not an "immediate grievance or dispute", the Association clearly did and Winner was in no way acting in an individual capacity. Therefore, even accepting, arguendo, that the City is correct when it urges that a balancing test is the proper one, given that we believe the Chief's action in requiring Winner to meet on a matter broached by the Association was improper, the scales herein must be weighted in favor of protected activities under the Act.[3/]

As noted earlier, part of the exceptions to the Hearing Examiner's findings of fact and conclusions of law is a challenge of his impartiality. This has also been a general exception on its own. Specifically, it centers around the Hearing Examiner's allowance

3/ In any event, since we are sustaining the Hearing Examiner's findings of fact as to what was said at the meeting in the Chief's office, no insubordinate conduct has been shown. Therefore the result herein is not affected by the legal standard.

of an amendment to the charge in this matter to include the allegation that the placing of the letter in Winner's file warning of possible discipline was an unfair practice in violation of §5.4(a)(1) and (3).

The initial charge filed by the Association dealt with the meeting itself, and during the hearing Fire Fighter Sarapuchiello, the Association President, presenting the case, moved to amend the Complaint to include the letter. The Hearing Examiner overruled the City's objection to this amendment, but offered the City additional time to prepare if desired,[4/] an offer which was declined. Later, the City's counsel stated that the amendment had been made at the Hearing Examiner's suggestion. In response the Hearing Examiner noted that the letter in question had been raised by the Association in pre-hearing discussions between the parties as part of the basis of the charge.[5/] Additionally the same letter was already part of the record as the City itself had included it as part of its charge against the Association, attaching it as an exhibit.

Given these facts, not challenged by the City, there is no indication that the Hearing Examiner added anything to the record or assisted the Association in the presentation of its case.

4/ Transcript, October 4, pp. 28-30.
5/ Transcript, October 4, pp. 57-60. In fact a review of this portion of the transcript indicates that following this discussion the attorney for the City asked that his earlier remarks be stricken and appears to have apologized for certain of his remarks.

The amendment of the charge appears to have been warranted by the evidence already in the record and discussed at pre-trial and may be analogized to portions of Rule 4:9-2 of the New Jersey Court Rules, Civil Practice which encourage the amendment of pleadings to permit a full trial of the merits.[6/] The Hearing Examiner appears to have done no more than permit the pleadings to be amended to facilitate the introduction into evidence by the Association of a letter which the Association had previously advised both the City and the Hearing Examiner it intended to use, and which, in fact, had already been made part of the record by virtue of its inclusion in the City's own charge against the Association.

As to the exception to the recommended dismissal of the City's §5.4(b) charge, having reviewed the record we find no evidence to support the City's allegation that the Association's conduct in sending a letter regarding bulletin boards was coercive or in derogation of the statutory duty to negotiate in good faith. We adopt the Hearing Examiner's findings of fact and conclusions of law on Docket No. CE-76-45-19.

6/ Court Rule 4:9-2 states in relevant part: "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence."

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the City of Hackensack

(1) Cease and desist from interfering with, restraining or coercing employees or discriminating in regard to hire or tenure of employment by disciplining employees for actions taken in their capacity as representatives of an employee organization.

(2) Take the following affirmative action

(a) Remove from Fire Fighter Winner's file the letter of March 24, 1976 which warned Winner that if he used offensive language again he would be brought up on charges.

(b) Post at Fire Headquarters in a conspicuous place the copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted by the City immediately upon receipt thereof, after being duly signed by the City's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the City to ensure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman of the Commission within twenty (20) days of receipt of this Order what steps the City has taken to comply herewith.

(d) It is further ORDERED that those portions of the Complaint in CO-76-272-20 which charge the City with violations

of §5.4(a)(2), (4), (5) and (7) be dismissed as well as all of Docket No. CO-77-3-21.

(e) It is further ORDERED that the Complaint in CE-76-45-19 be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioner Forst, Hipp, Hurwitz, Hartnett and Parcells voted for this decision. None opposed.

DATED: Trenton, New Jersey
December 20, 1977
ISSUED: December 21, 1977

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE SHALL NOT interfere with, restrain or coerce employees or discriminate in regard to hire or tenure of employment by disciplining employees for actions taken in their capacity as representatives of an employee organization, provided that such actions fall within the protections of the New Jersey Employer-Employee Relations Act.

WE WILL remove from the file of Fire Fighter Richard Winner the letter of March 24, 1976, which warned Winner that if he used offensive language again he would be brought up on charges.

CITY OF HACKENSACK
(Public Employer)

Dated _____ By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 78-5

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

In the Matter of

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL 2081, AFL-CIO,

Respondent,

-and-

Docket No. CE-76-45-19

CITY OF HACKENSACK,

Charging Party.

CITY OF HACKENSACK,

Respondent,

-and-

Docket Nos. CO-76-272-20
CO-77-3-21

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL 2081, AFL-CIO,

Charging Party.

SYNOPSIS

In a Report and Recommended Decision, the Hearing Examiner recommends to the Commission that it find the City of Hackensack guilty of an unfair practice.

The Hearing Examiner found that the City improperly disciplined Fire Fighter Richard Winner, Secretary of Local 2081 of the International Association of Fire Fighters, for using abusive language at a grievance meeting. It was held that Winner did not use the language in question in the manner claimed by Fire Chief Jones. In any event, the New Jersey Employer-Employee Relations Act grants limited protection to employees from discipline for conduct during activities protected under the Act and Winner's conduct, even as alleged by Chief Jones, falls within these protections and accordingly, the discipline was improper. Similarly, a cross-complaint filed by the City, which alleged Winner's conduct constituted an unfair practice was recommended for dismissal since said conduct occurred during protected activity.

In a complaint, the Association alleged it was an unfair practice for the City to limit the local to one representative at the disciplinary hearing of Fire Fighter Warcholowski. The Hearing Examiner held the City has a right to limit the number of representatives at a hearing so long as such limitation does not interfere with an employees' right to adequate representation to their own choosing. Since no evidence was introduced demonstrating such interference, the complaint was recommended for dismissal.

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. 78-5

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

In the Matter of

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
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CITY OF HACKENSACK,

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Docket Nos. CO-76-272-20
CO-77-3-21

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL 2081, AFL-CIO,

Charging Party.

Appearances:

For International Association of Fire Fighters Local 2081, AFL-CIO,
Nicholas Sarapuchiello
(President of Local 2081)

For City of Hackensack,
Murray, Meagher & Granello
(James P. Granello Of Counsel
Robert M. Tosti, Esq. On the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The International Association of Fire Fighters Local 2081, AFL-CIO (the "Association") filed two Unfair Practice Charges with the Public Employment Relations Commission (the "Commission") alleging that the City of Hackensack (the "City") had committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"). 1/ The first alleges that the City

1/ It is specifically alleged that the City violated N.J.S.A. 34:13A-5.4 (a)(1), (2), (3), (4), (5) and (7). These sections provide that employers, their representatives or agents are prohibited from:

(cont'd)

denied Association Secretary, Richard Winner, attendance in a representative capacity at a disciplinary hearing for Fire Fighter J. Warcholowski and this conduct constituted an attempt to interfere with the proper representation of all fire fighters the Association represents. 2/ The other charge alleges that the City compelled Winner's attendance at a meeting on March 26, 1976, in his capacity as representative of the Association, and while at this meeting, which concerned the disposition of a grievance, the City did verbally abuse Winner and, later, threatened him in writing. 3/ It is claimed that this conduct violated §5.4(a)(1), (2), (3), (4), (5) and (7) of the Act.

The City filed an Unfair Practice Charge with the Commission 4/ alleging that the conduct of Winner at the above-mentioned March 26 meeting, as well as the Association's conduct prior to the meeting, constituted coercion, interference and a refusal to bargain in good faith. 5/ 6/

1/ (cont'd)

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

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

"(7) Violating any of the rules and regulations established by the commission."

2/ Said charge was filed on July 9, 1976 and was assigned Docket No. CO-77-3.

3/ Said charge was filed on April 15, 1976 and was assigned Docket No. CO-76-272.

4/ Said charge was filed on April 26, 1976 and was assigned Docket No. CE-76-45.

5/ It is specifically alleged that the Association violated N.J.S.A. 34:13A-5.4 (b)(1), (2), (3), and (5). The sections provide that employee organizations, their representatives or agents are prohibited from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

(cont'd)

It appearing that the allegations of the charges if true might constitute unfair practices within the meaning of the Act, three Complaints and Notices of Hearing were issued on August 26, 1976 along with an Order Consolidating Cases, and a hearing was held before the undersigned on October 4 and 5, 1976. 7/ The two complaints growing out of the March 26 meeting involve the same incident and will be dealt with as a unit.

Richard Winner is the secretary of Local 2081. On March 1, he, in conjunction with the Local President Nicholas Sarapuchiello, wrote a letter to Fire Chief Charles H. Jones stating,

> "The Local has and is becoming increasingly aware of literature being posted on bulliten [sic] boards by the F.M.B.A.
>
> This Local would like to be advised as to the nature of this material and given the opportunity to review same before posting.
>
> We consider this to be an unfair labor practice by the Fire Dept. and the F.M.B.A.
>
> This Local was only given the use of the bulliten [sic] board after a contractual agreement was reached."

5/ (cont'd)

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the commission."

6/ The City in its brief argues that the Association also charged that it was an unfair practice for the City to deny the Association exclusive use of the bulletin board. I do not so read the Association's charge. In any event, as the City points out, the Commission has discussed the whole area of access to bulletin boards in Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 25 (1976) and it is clear that the denial of the exclusive use of the bulletin board is not an unfair practice, absent specific contractual provisions.

7/ Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Both parties were given an opportunity to file post-hearing memoranda but only the City did so. Their memorandum was received on December 27, 1976.

(cont'd)

The letter was signed by both Winner and Sarapuchiello. The Chief's secretary called the Association officers to arrange for a meeting between the parties to discuss this letter. 8/ Although the dates for a meeting were discussed, no meeting was held.

On March 23, Winner's company was on duty at fire headquarters. Chief Jones happened to see Winner and had him paged in order to speak to him about the bulletin board. When Winner arrived at the Chief's office, Deputy Chief Aiellos was also present. The testimony of the parties is conflicting as to what happened at the meeting.

Winner testified that upon his entrance into the office, the Chief stated he was going to conduct the meeting requested in the letter of March 1. Winner replied that he was not authorized to conduct a union meeting and the local president Sarapuchiello would have to be in attendance. Chief Jones responded that "He was going to have a meeting, that it [apparently the bulletin board matter] had gone far enough and he had waited long enough and it was his decision, he was going to have the meeting right now and he was not going to wait on it." The Chief thereupon related to Winner he had gone over the letter and reached a decision that the bulletin boards on City property were public property and anybody could post anything they wanted.

Thereupon, according to Winner, the Chief seemed to lose complete control of himself and said "If I didn't like it I could stick it up my ass," and continued a "tirade of statements" whereupon Winner opened the office door and called upon a clerk and a secretary in the outer office to witness the Chief's conduct but, Winner stated, they "both buried their heads and

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7/ (cont'd)

Upon the entire record of this proceeding, the undersigned finds that the City is a public employer within the meaing of the Act and is subject to its provisions and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. Unfair Practice Charges having been filed with the Commission alleging that the respective parties have engaged or are engaging in unfair practices within the meaning of the Act, as amended, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

8/ Several other letters were sent to the Chief on May 1 and they were to be discussed as well.

refused to even recognize the fact I was in the room" Winner then walked back into the office and the Chief was screaming, "Get the hell out of here," at which point Winner left.

Jones testified that Winner stated something to the effect that he [Winner] couldn't conduct the meeting on his own. The Chief responded, "Well it's not going to be really a meeting. I just want to give you my answer to the letter specifically, that the bulletin boards can be used by anybody." Jones acknowledged that Winner asked him to put his decision in writing but he refused. Jones claims that at this point Winner jumped up and he mumbled something about "ass," and went out of the room, Jones heard him repeat the phrase outside, but doesn't know what else he said; he couldn't hear it. Winner came back into the office and said something about wanting to bring in the shop steward to hear this. At this point, Jones had Winner leave his office. Aiellos' testimony was substantially in accord with Jones'. Both Jones and Aiellos denied that the Chief used abusive language.

On March 24, 1976, Jones had the following letter placed in Winner's file:

> "You are hereby put on notice that as a result of your conduct in my office in the presence of Deputy Chief A. Aiellos on March 23, 1976, if you ever use profanity again, either to me or in front of my office personnel, you will be brought up on charges."

The Association claims that placing this letter in Winner's file was disciplinary in nature and was both coercive and discriminatory with the intent to discourage protected activity.

The undersigned finds the letter is clearly disciplinary; it contains a warning that Winner faces a hearing if he uses profanity again.

After evaluating all the testimony, observing the witnesses and evaluating whether they testified in a candid, forthright and consistent manner, the undersigned finds that Winner's testimony was more credible than that of Jones' and Aiellos;. This finding is based on a number of factors. Jones consistently avoided admitting anything which might be considered adverse to his position by repeatedly stating that he couldn't

recall the facts. Obviously just because a witness has a bad memory doesn't mean he is not credible. Here, however, a very convenient pattern emerged that leads the undersigned to the conclusion that the witness was less than candid. The undersigned also finds it less than credible that neither Jones nor Aiellos could understand anything that Winner stated other than the word "ass" but they both heard it twice. Also, Aiellos initially testified that Winner was shouting. Then later, on redirect testimony, Aiellos changed his testimony and stated that Winner could not have been shouting because the only thing he could pick out in what Winner was saying was the word "ass." 9/ This change in testimony raises a doubt as to the veracity of Aiellos' testimony.

Accordingly, I find that Jones did use the abusive language and Winner merely repeated what Jones had said. Jones took advantage of this repetition and used it as an excuse to discipline Winner. 10/ Winner was in Jones' office in his capacity as a representative of the employee association, and disciplining Winner in such a less than honest way is violative of §(a)(3) of the Act. The true purpose of Jones' action was to discriminate against Winner for the purpose of discouraging his Association activity. 11/

Moreover, it is not necessary to find that Jones wrongfully accused Winner of the use of derogatory language in order to find that the City was guilty of an unfair practice.

Winner was called into the Chief's office not as an employee but, rather, as secretary of the Local. He was in effect processing a grievance. Accordingly, Winner was engaged in protected activity when the offensive

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9/ It is also interesting that according to their testimony Jones and Aiellos could not understand anything that Winner stated in the outer office [except for the word "ass"] but they did not deny that he stepped out. This admission bolsters Winner's testimony. Since there were other people in the outer office who apparently saw and heard Winner, Jones and Aiellos could not deny that he stepped out, but Winner's conduct only makes sense if the events were as Winner testified.

10/ See Thor Power Tool Co., 351 F.2d 584, 68 LRRM 2237 (7th Cir. 1965) where an employee muttered "horses' ass" as he left a grievance session. See also B.D. Labs Inc. v. NLRB, 397 F.2d 965, 68 LRRM 2514 (9th Cir. 1968); Hugh M. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355-56, 71 LRRM 2827 (3rd Cir. 1968).

11/ See In re Haddonfield Board of Education, P.E.R.C. No. 77-31, 3 NJPER ___ (1977) and In re City of Hackensack, P.E.R.C. No. 77-46, 3 NJPER ___ (1977), currently pending appeal.

language was used. Under §5.3 of the Act,

> "public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal to form, join and assist any employee organization. Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them..."

An employee may not act with impunity even though he is engaged in protected activity. An employee's rights under §5.3 must be balanced by an employer's right to maintain order and offensive conduct which is gratuitous or patently opporbrious may remove the protection of §5.3. Here, however, Winner, according to Jones only mumbled the word "ass". The relationship between the parties was not good. As a matter of administrative notice Winner has been involved in a number of administrative and judicial actions with the City and Chief Jones. Winner was compelled to attend this meeting against his will and in view of the nature of the meeting, the use of such language, while certainly inappropriate, was not entirely unprovoked and, under the circumstances, the §5.3 rights of Winner should be preserved. In Crown Central Petroleum, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965), [12] a Circuit Court of of Appeals held, disciplinary action taken by an employer against employees for their insubordinant statements directed at supervisors was unlawful. The court stated that although management does have the right to discipline employees, "that right is not immune from challenge as a primary violation of §8(a)(1). When then considered, the motive behind an employer's conduct is not an element of the unfair labor practice charge" and, even if the employer acted in good faith, if the employer's conduct tends to interfere with the rights of employees it is violative of §8(a)(1) of the National Labor Relations Act.

So, too, in the instant case, even if the facts were as Jones testified, placing the notice in Winner's file for abusive language used during activity protected by §5.3 constitutes a §5.4(a)(1) violation.

12/ See also, Welch Scientific Co. v. NLRB, 340 F.2d 199, 58 LRRM 2237 (2nd Cir. 1965) and NLRB v. Cement Transport, 85 LRRM 2294.

The Association in its charge also alleged that the City interfered with the right of the Association to be represented by a representative of its own choosing and, further, that the City refused to process a grievance in violation of §(a)(1) and §(a)(5) respectively. 13/

Taking the latter charge first, it is significant that one year prior to the incident in question, in 1975, the Association raised the very same issue with the Chief. Jones had a meeting with officers of the Association (Winner and Sarapuchiello apparently were not officers of the Local at this time). The meeting was followed by a series of letters in which the Chief refused the Local exclusive access to the bulletin board. 14/ This was all Jones was obligated to do under the contract's grievance procedure. 15/ No evidence was adduced as to whether the union appealed Jones' decision via the grievance procedure of the contract. In any event, Winner and Sarapuchiello's letter a year later was addressed to the same issue under the same contract although Jones had already processed the grievance in question. There is nothing in §(a)(5) of the Act which requires an employer to reconsider or reprocess the same grievance, under the same contract, absent some change in circumstances. Accordingly, Jones had no duty to process the grievance.

In the private sector it is well settled that an employee organization has a basic, but not absolute, right to be represented in grievance procedures and negotiations by representatives of their own choosing - see General Electric Co. v. NLRB, 412 F.2d 512, 71 LRRM 2418 (2nd Cir.1969). The language of §5.3 of the Act certainly seems to grant the same right. The question here is whether Jones' conduct in compelling Winner's attendance at the meeting violated this right. Jones testified that he told Winner he merely wanted to give Winner a message to take back to the union. Winner characterizes Jones to be rather more abusive. It is clear though that Jones did not intend to get involved in a give-and-take discussion, but rather was only

13/ The Association also alleged violations of §(a)(2) and §(a)(7). However, no facts were alleged in the charge nor adduced at the hearing with constituting violations of these subsections and, accordingly, these charges will be dismissed.

14/ H-4 through H-7 in evidence.

15/ A copy of the contract was supplied to the Hearing Examiner by the parties after the close of the hearing.

prepared to give Winner his decision. Moreover, Jones was not obligated to conduct a grievance meeting to begin with. Jones' actions therefore in requiring Winner's presence even in his capacity as an employee representative falls short of dictating to the Association who will represent it during the processing of a grievance. Accordingly, I do not find the City violated §5.4(a)(5) of the Act.

In their brief the City alleges the Association committed an unfair practice by demanding a "noncontractual benefit" which would interfere with, restrain or coerce employees who are not Association memebers. The City also claims the Association, in writing the demands for exclusive access to the bulletin board, attempted a unilateral change in the collective negotiations contract and/or an attempt to force the City to accede to its demands under threat of filing of an Unfair Practice Charge. 16/

In Union County Regional Board of Education, supra, the Commission held that an exclusive access clause of a contract is not an illegal subject of negotiations. 17/ For the reasons set forth in that decision, permitting the Association exclusive access to bulletin boards would not be violative of nonmember rights.

It is noted that the bulletin board in question was supplied by the Association on the basis of an understanding with the Chief. After the bulletin board was implaced, Jones would not allow the Association exclusive access. The conduct of Jones in these circumstances, if nothing else, raises an issue which is suitable for resolution by the grievance process. There is no evidence before me that the instant action was instituted with the intent to coerce the City into giving in to the Association grievance. The undersigned can find no action on the part of the Association which constitutes an unfair practice.

16/ In their charge, the City also claimed a §(b)(2) violation that in interfering with a public employer's selection of his representative for the adjustment of grievances. No evidence was adduced at the hearing nor was an argument made in their brief in support of this charge. Accordingly, the undersigned recommends this charge be dismissed.

17/ With certain qualification not relevant here.

II

The facts of the second incident are not in dispute. On February 27, 1976, a disciplinary hearing involving Fire Fighter Warchalowski was scheduled before Chief Jones. Dominick Venanzi, the Vice-President of the Local, and Richard Winner were present in their capacity as officers of the Association. Venanzi was prepared to represent Warchalowski and Winner was there to take notes.

Venanzi testified that just prior to the hearing the Chief stated that the Association was entitled to only one representative at the hearing and since Venanzi was representing both the Local and Warchalowki, Winner could not attend the hearing. No evidence was introduced that Winner was denied admittance at the hearing for any other reasons. The contract is silent as to the number of representatives at such a hearing. There was testimony concerning representation at prior hearings, but no pattern emerged as to any clear or consistent past practice.

The employer does not dispute the right of employees to be represented at disciplinary hearings; accordingly, the basic right of representation is not an issue here. Rather, the only thing to be decided is whether it is an unfair practice to refuse to allow more than one representative at the hearing. The Respondent points to NLRB v. Weingarten, Inc., 420 U.S. 251, 43 L.Ed. 2d 171, 95 S.Ct. 959, 88 LRRM 2689 (1975) where the U.S. Supreme Court found §7 of the National Labor Relations Act, [which states that employees have the right to engage in "concerted activities for...mutual protection,"] grants to employees the right to have his own union representative at an employee's investigatory interview when the employee might reasonably believe that such an interview could result; in disciplinary action against him. 18/ A reading

18/ It is noted that although the language of §7 of the NLRA is different from the Act, §5.3 of the Act states in part, "A majority representative of public employees in an appropriate unit shall be entitled to act for ...all employees in the unit and shall be entitled to act for...all employees in the unit and shall be responsible for representing the interests of all such employees..." If one may interpret this language in the broad manner of the Appellate Division in Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, Appellate Division Docket No. A-3632-5 (July 13, 1977), a similar right would seem to exist in the Act. See also In re Dover Twp., P.E.R.C. No. 77-43, 3 NJPER ___ (1977) where the Commission found that, in the processing of a grievance, an individual had the right to be represented by the majority representative.

of the decision makes it clear the court was referring to a single representative and the Respondent urges that it would be over-reaching to find a greater right in the Act.

Significantly, no evidence was introduced by the Association to demonstrate that Warcholowski could not receive adequate representation of his own choosing.

It is not unreasonable for the City to limit the number of representatives at a hearing for the purpose of maintaining order and, as in a typical courtroom situation, one competent representative should, in most cases, be able to adequately represent the interests of the individual in question and the Association. Accordingly, the burden of proof here must be on the Association to prove that they could not receive adequate representation. [19/] Since the Association failed to prove they did not receive adequate representation, the undersigned finds the City did not commit an unfair practice in limiting the representatives at Warcholowski's hearing to one person.

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, the undersigned hereby recommends the Commission issue an ORDER that the City of Hackensack to

(1) Cease and desist from

(a) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act.

(b) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

(2) Take the following affirmative action

(a) Remove from Fire Fighter Winner's file the letter of March 24, 1976 which warned Winner that if he used offensive language again he would be brought up on charges.

(b) Post at Fire Headquarters in a conspicuous place the copies of the attached notice marked as Appendix "A". Copies of such notice, on forms

19/ Assuming there is a right of representation under the Act.

to be provided by the Director of Unfair Practices of the Public Employment Relations Commission, shall be posted by the Board immediately upon receipt thereof, after being duly signed by the Board's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Director of Unfair Practices within twenty (20) days of receipt of this Order what steps the Board has taken to comply herewith.

(d) It is further recommended that the Commission order those portions of the Complaint which charge the City with violations of §5.4(a)(2), (4), (5) and (7) be dismissed.

(e) It is further recommended that the Commission order the Complaint with violations of §5.4(b) (1), (2), (3) and (5) be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: September 13, 1977
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE SHALL NOT interfere with, restrain or coerce employees in the exercise of rights guaranteed to them by the Act.

WE SHALL NOT discriminate in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

WE WILL remove from the file of Fire Fighter Richard Winner the letter of March 24, 1976, which warned Winner that if he used offensive language again he would be brought up on charges.

City of Hackensack
(Public Employer)

Dated _____ By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780