

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF HACKENSACK,

Respondent,

Docket No. CO-78-44-31

-and-

HACKENSACK FIREFIGHTERS LOCAL
2081, IAFF, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Murray, Meagher & Granello, Esqs.
(James P. Granello, Esq.)

For the Charging Party, Schneider, Cohen & Somomon, Esqs.
(David Solomon, Esq. and Bruce Brafman, Esq.)

DECISION AND ORDER

On September 1, 1977, the Hackensack Firefighters Local 2081, IAFF, AFL-CIO (the "Union") filed an Unfair Practice Charge, Docket No. CO-78-44-31, with the Public Employment Relations Commission alleging that the City of Hackensack (the "City") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq., (the "Act"). Specifically, the Union contended that the City violated N.J.S.A. 34:13A-5.4a(1), (3) and (5).^{1/} The Union

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

alleged that the City unlawfully instituted disciplinary action against Firefighter Nicholas Sarapuchiello for his failure to respond to a "recall general alarm fire".

It appearing that the allegations, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 29, 1977. Pursuant thereto, Alan R. Howe was designated by the Commission to serve as Hearing Examiner.

On November 10, 1977, the Union filed a supplemental charge alleging that the City unlawfully disciplined Firefighter Richard Winner, in violation of N.J.S.A. 34:13A-5.4a(1), (3) and (5).^{2/} On November 14, 1977, the Union filed a second amended unfair practice charge alleging that the City unlawfully instituted disciplinary proceedings against Firefighter Nicholas Sarapuchiello in violation of N.J.S.A. 34:13A-5.4a(1), (3) and (5).^{3/} The City had instituted these disciplinary actions against Winner and Sarapuchiello for violating a regulation of the Fire Department which prohibits members of the Fire Department from calling or visiting the Auditing Department.^{4/}

The City objected to the aforesaid amendments to the original unfair practice charge. Overruling the objections of the

^{2/} See note 1.

^{3/} See note 1.

^{4/} Special Order No. 25 provides as follows: "Effective immediately, no member of the Fire Department will call or visit the Auditing Department. All matters will be handled through the Fire Department front office. Since a previous memo to this effect has been ignored, a breach of this Special Order will be considered a punishable offense."

City, the Hearing Examiner granted the two amendments to the unfair practice charge by Order dated December 16, 1977.

Hearings were held on November 14, 1977 and January 9, 1978 in Newark, New Jersey, at which time the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by the parties on March 8, 1978. On March 16, 1978, the Hearing Examiner issued his Recommended Report and Decision, which report included findings of fact, conclusions of law and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and is made a part hereof.^{5/}

The Union elected not to file exceptions to the Hearing Examiner's Recommended Report and Decision. The City filed exceptions on March 31, 1978. Additionally, the City requested oral argument before the Commission in this case. That request is hereby denied. Not only have the parties had full opportunity to present their cases and make their arguments but we are satisfied that this case can be decided on the basis of the record without additional amplification.

The Hearing Examiner found that the City's records showed that Sarapuchiello was the only firefighter who was contacted by phone and who did not respond. Therefore, the Hearing Examiner recommended that the Commission dismiss that part of the complaint that alleges that the City violated the Act by disciplining

^{5/} H.E. No. 78-29, 4 NJPER 140 (Para 4066 1978).

Sarapuchiello for his failure to respond to the alarm.

As to the charges with respect to visiting and calling the Auditing Department, the Hearing Examiner found that Sarapuchiello and Winner were engaged in the protected activity of representing employees concerning grievances or problems with respect to terms and conditions of employment for which they were disciplined in violation of the Act. To remedy the finding of the violations of N.J.S.A. 34:13A-5.4a(1) and (3), the Hearing Examiner recommended that the Commission issue a cease and desist order, order the City to make Sarapuchiello and Winner whole for loss of wages, and require a posting of a notice detailing the above findings and orders. The Hearing Examiner also rejected the City's affirmative defense of deferral to arbitration. Citing Hudson County Board of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (Para. 4041 1978), the Hearing Examiner reiterated this Commission's policy of refusing to defer to arbitration where deferral would be a futile act.

After a careful consideration of the record here and the exceptions, the Commission adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order in part and rejects the same in part. Noting the absence of exceptions with respect to the disciplining of Sarapuchiello for his failure to respond to the recall general alarm, the Commission is in agreement with the Hearing Examiner and dismisses the complaint in its entirety with respect to that alleged violation of N.J.S.A. 34:13A-5.4a(1), (3) and (5). Concerning the disciplining of Winner and

Sarapuchiello for visiting and telephoning the office of the Auditing Department, however, the Commission disagrees with the Hearing Examiner's conclusion for the reasons set forth below.

The Hearing Examiner found that Sarapuchiello and Winner were engaged in the protected activity of representing themselves and other employees on complaints with respect to terms and conditions of employment by visiting and telephoning the office of the Auditing Department to check on various insurance and pay discrepancies. But an employee may not act with impunity even though he may be engaged in what might constitute protected activity in certain circumstances. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination.^{6/} The City presented testimony that Special Order No. 25 was promulgated to ensure that the operation of the Auditing Department would not be unnecessarily disrupted. If an employee needed to telephone or visit the Auditing Department, permission could be received from an employee's department head. The department head could then contact the Auditing Department to schedule an appointment for the employee. In the absence of any evidence that the Special Order was promulgated for improper reasons, the Commission cannot conclude that its existence constituted an unreasonable restriction on rights protected by the Act.

^{6/} Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965) and Boag Spinning Co. v. NLRB, 395 F.2d 512, 68 LRRM 2393 (5th Cir. 1968).

The claimed shield of protected activity is not a license to flagrantly disregard an employer's work rules. Here, Sarapuchiello and Winner had questions concerning insurance coverage for an employee and a complaint concerning salary. Instead of following the established procedure of obtaining permission from Chief Jones, Sarapuchiello and Winner directly telephoned and visited the Auditing Department. No reason was given for their failure to obtain prior permission. It was not alleged that they failed to request permission because they believed it would be unreasonably denied. In addition, immediate emergency action was not necessary to remedy the problems concerning insurance and salary.^{7/}

At this juncture, we think it is appropriate to point out where we differ with the Hearing Examiner's analysis of the behavior of Winner and Sarapuchiello. On page 7 of his report, he states that there can be no dispute that a union officer is engaged in protected activity when representing an employee concerning terms and conditions of employment and grievances.

While we have no quarrel with that statement in the abstract, it ignores the context of the instant dispute. The fact is that the City has promulgated a rule, Special Order No. 25, which we do not find to be an unreasonable rule. All employees including union officers and activists are expected to adhere to

^{7/} Certain safety hazards might rise to the level where time is an important factor but that is not the case before us. Due to the lack of an emergency situation, necessity is not a defense to disregarding a regulation.

such rules. Where, as here, a rule places reasonable limits on the actions of union representatives (and all other employees), those representatives cannot violate the rule under the guise of serving in their representative capacities.

Having determined that the existence of Special Order No. 25 does not violate the rights of employees protected by this Act, it remains to be determined if the City enforced that rule in a discriminatory manner to encourage or discourage employees in the exercise of those rights. The Hearing Examiner found that there was disparate treatment of fire department employees who violated Special Order No. 25. He cited eight instances in which employees went directly to the Auditing Department without obtain-^{8/}ing prior approval and in which no disciplinary action was taken. Yet when Winner and Sarapuchiello went to the Auditing Department, these two union activists, the Secretary and President of the union, respectively, were given a total of eight days off without pay. It was this disparate treatment which led the Hearing Examiner to conclude that Sarapuchiello and Winner had been unlawfully discriminated against in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3).

As the Hearing Examiner found, in addition to Sarapuchiello and Winner, three other members of the Fire Department visited the Auditing Department. The City maintains that it had no knowledge of these other visits which were also violations of Special Order No. 25 although the Assistant Comptroller testified that employees

^{8/} By their own testimony, Robert Berkonish made one visit, William Krejsa six visits and Richard Borys one visit.

in the Auditing Department had been instructed to report any employee who called or visited the department without permission.

It might seem suspicious on its face that of the numerous visits by several firefighters, only the Union President and the Union Secretary were disciplined for violation of Special Order No. 25. However, the record also reveals a Captain Richard Johnson was also disciplined for violating Special Order No. 25 in December 1974, which fact does not appear in the Hearing Examiner's Report. There is no evidence that this incident was in any way related to union activity or that it was the employer's intent in disciplining Captain Johnson to discourage him in the exercise of rights protected under the Act. Additionally, William Krejsa testified that he visited the Auditing Department six times without being disciplined. As noted in the City's exceptions to the Hearing Examiner's Recommended Report and Decision, Krejsa has been an active union participant.^{9/} Yet, his six visits in violation of Special Order No. 25 escaped discipline. If the employer was attempting to discourage the exercise of rights under the Act, Krejsa would seem to have been as likely a target as Sarapuchiello and Winner. Due to the disciplining of Johnson and the failure to discipline Krejsa, it is not possible for this Commission to conclude that disciplining of Sarapuchiello and Winner was to discourage employees from the exercise of rights guaranteed under the Act.

^{9/} See In re City of Hackensack, P.E.R.C. No. 77-49 at 13, 3 NJPER 143 at 145 (1977), of which we take administrative notice.

Our decision is really a conclusion that the Union has failed to meet its burden of proof. The standard developed by this Commission in an alleged a(3) violation necessitates that the charging party establish that the employer's conduct was motivated in whole or in part by a desire to encourage or discourage the exercise of rights under the Act.^{10/} The Union has not established the employer's motivation. In some limited circumstances, the natural consequence of the employer's action may be sufficient to infer the unlawful intent of the employer.^{11/} However, here we cannot conclude that the evidence establishes that the City has been selective in its application of Special Order No. 25. Therefore, this Commission does not find that the City violated N.J.S.A. 34:13A-5.4(a)(3) by disciplining Sarapuchiello and Winner for violating Special Order No. 25.

The Union also has failed to prove an independent violation of (a)(1). Since there was no finding of a violation of (a)(3), no derivative violation of (a)(1) can be found.

No further consideration of the City's exceptions to the Hearing Examiner's Recommended Report and Decision is deemed necessary due to the above findings of fact and conclusions of law.

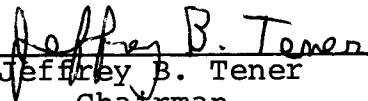
^{10/} In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

^{11/} Radio Officers' Union, AFL v. NLRB, 347 U.S. 17, 74 S. Ct. 323, 33 LRRM 2417 (1954).

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp, Schwartz, Graves and Parcels voted for this decision. None opposed.

DATED: Trenton, New Jersey
May 25, 1978
ISSUED: May 26, 1978

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

In the Matter of
CITY OF HACKENSACK

Respondent,

- and -

Docket No. CO-78-44-31

HACKENSACK FIREFIGHTERS
LOCAL 2081, IAFF, AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission sustain charges of unfair practices filed by the Union against the City alleging that the City illegally disciplined the Union President and the Union Secretary for representing employees on grievances in connection with terms and conditions of employment. The Hearing Examiner recommends that the President and Secretary of the Union be made whole for the loss of wages suffered by them as a result of disciplinary suspensions for engaging in protected activity.

The Hearing Examiner also recommends that the Commission dismiss a charge of unfair practices, which had alleged that the Union President was suspended illegally for failure to respond to a recall general alarm fire. The Union President was not engaged in any protected activity nor was he disciplined because he was the Union President.

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.

STATE OF NEW JERSEY
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Charging Party.

Appearances:

For the City of Hackensack
Murray, Meagher and Granello, Esqs.
(James P. Granello, Esq.)

For the Hackensack Firefighters Local 2081, IAFF, AFL-CIO
Schneider, Cohen and Solomon, Esqs.
(David Solomon, Esq. and Bruce Brafman, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 1, 1977, by the Hackensack Firefighters Local 2081, IAFF, AFL-CIO (hereinafter the "Union") alleging that the City of Hackensack (hereinafter the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the City on August 19, 1977 gave notice of disciplinary action to Firefighter Nicholas Sarapuchiello for his alleged failure to respond to a "recall general alarm fire"; other firefighters who failed to respond were not disciplined, which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3), and (5). ^{1/}

1/ The subsections prohibit employers, their representatives or agents from:

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

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

(continued page 2)

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 29, 1977. ^{2/}

Under date of November 10, 1977 the Union filed a supplemental charge of unfair practices alleging that the City disciplined Firefighter Richard Winner on July 15, and August 25, 1977 for allegedly telephoning and appearing at the City's Auditing Department in violation of a regulation of the Fire Department, which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. Under date of November 14, 1977 the Union filed a second amended charge of unfair practices alleging that the City on October 5, 1977 instituted disciplinary proceedings against Firefighter Nicholas Sarapuchiello for visiting the Auditing Department of the City in alleged violation of a regulation of the Fire Department, which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.

The City objected to the granting of the aforesaid two amendments to the original charge of unfair practices. The Hearing Examiner overruled the City's objection and permitted the amendments by Order dated December 16, 1977.

Pursuant to the Complaint and Notice of Hearing, hearings were held on November 14, 1977 and January 9, 1978 in Newark, New Jersey, at which the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by the parties on March 8, 1978.

An unfair practice charge, as twice amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, and, hearing and after the consideration of briefs by the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for a determination.

1/ (continued from page 1)

"(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."

2/ Immediately prior to the issuance of the Complaint and Notice of Hearing, Counsel for the Union withdrew paragraphs 1, 2, 3, 4 and 6 of the charge of unfair practices filed September 1, 1977. This left only paragraph 5 operative.

Upon the entire record, the Hearing Examiner makes the following.

FINDINGS OF FACT

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

2. The Hackensack Firefighters Local 2081, IAFF, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Article III, Section 19-18 A(50) of the rules and regulations of the City's Fire Department provides as follows:

"All members of the Department, either when on call or when off duty and available, are subject to recall for emergency duty. During such recall periods, members may be excused from active duty only by permission of the officer in command and shall report for duty promptly upon notification of an emergency."
(Emphasis supplied).

4. On August 15, 1977 at 2:08 A.M. there was a recall general alarm fire in the City.

5. Firefighter James B. Gleason was assigned the task of telephoning off-duty firefighters to report for duty for the general alarm fire. Gleason placed program cards for each firefighter into a special telephone, which automatically dialed the number. Gleason made 30 to 40 such calls, one of these being the telephone number of Nicholas Sarapuchiello. Gleason testified that a woman answered the phone and said "Okay" when asked to have "Nick" report. Sarapuchiello did not report and was the only firefighter who was reached by telephone who did not report.

6. Sarapuchiello testified that August 15, 1977 he was living alone, that there was no woman in the home, and that he was home and was not on recall.

7. Under date of August 19, 1977 a preliminary notice of disciplinary action was served upon Sarapuchiello for having failed to respond to the recall general alarm fire of August 15, 1977, which was alleged to be a violation, inter alia, of subsection 50, supra, of the rules and regulations of the Fire Department. After a departmental hearing Sarapuchiello was suspended for two days without pay.

8. Firefighters Anthony Martino, Martin Corsano and Paul Ianuale were called as witnesses for the Union.

Martino testified that on August 15, 1977 he was home in bed and

received no telephone call. The recall roster (R-5) indicates "NA" for Martino, meaning "no answer".

Corsano testified that he was out of town on August 15, 1977. The recall roster shows "out of town" for Corsano.

Ianuale testified that he was off duty at home on August 15, 1977 and was never called. The recall roster shows "NA" for Ianuale.

9. Martino, Corsano and Ianuale were not disciplined for failure to respond to the recall general alarm fire on August 15, 1977.

10. Under date of July 12, 1974, the Chief of the Fire Department, Charles H. Jones, issued Special Order No. 25, which provides as follows:

"Effective immediately, no member of the Fire Department will call or visit the Auditing Department.

"All matters will be handled through the Fire Department front office.

"Since a previous memo to this effect has been ignored, a breach of this Special Order will be considered a punishable offense."

The above Special Order No. 25 was directed to be posted on all bulletin boards and was so posted for some period of time on and after the date of issuance.

11. The following members of the Fire Department testified uniformly that they visited the Auditing Department without the requisite permission required by Special Order No. 25 on and after July 12, 1974 and were never disciplined for this infraction: Robert Berkanish (one visit), William Krejsa (six visits), and Richard Borys (one visit). In each instance these individuals made inquiries at the Auditing Department regarding pension loans for themselves.

12. Under date of July 15, 1977, Firefighter Richard Winner, who is also Secretary of the Union, was served with preliminary notice of disciplinary action for having made a telephone call to the Auditing Department on July 7, 1977 in alleged violation of Special Order No. 25. Winner testified that he made the telephone call to the Controller, James LaCava, on behalf of Firefighter Ronald Freeman in connection with an alleged insurance problem which Freeman had discussed with Winner prior to the telephone call. ^{3/}

13. After a departmental hearing, Winner was suspended for three days without pay by the City for this infraction.

^{3/} Winner never filed a formal written grievance on behalf of Freeman and the Hearing Examiner finds that Winner was under no contractual obligation to do so before telephoning the Auditing Department.

14. Under date of August 25, 1977, a preliminary notice of disciplinary action was issued against Winner for violating Special Order No. 25 on August 19, 1977 when he allegedly visited the Auditing Department without permission.

15. Winner testified that he did not visit the Auditing Department on that date, but merely accompanied Sarapuchiello, who did visit the Auditing Department. The Hearing Examiner credits the testimony of Winner that he did not visit the Auditing Department as alleged. Winner was suspended a second time for four days for this alleged violation of Special Order No. 25 without pay.

16. Under date of August 26, 1977, a preliminary notice of disciplinary action was issued against Sarapuchiello for visiting the Auditing Department on behalf of Winner on August 19, 1977 in alleged violation of Special Order No. 25.

17. After a departmental hearing, Sarapuchiello was suspended for one day without pay by the City for this infraction.

18. Sarapuchiello testified that he again visited the Auditing Department on September 30, 1977 without permission on behalf of himself. After a departmental hearing, Sarapuchiello was suspended without pay. 4/

19. On each occasion that Sarapuchiello appeared at the Auditing Department on behalf of Winner or himself, Sarapuchiello was President of the Union.

20. The Assistant Controller, Robert P. Bogle, testified that employees in the Auditing Department had been instructed to "report" any employees who telephoned or appeared at the Auditing Department without permission. He knew of no firefighter who had ever been so "reported" except Sarapuchiello and Winner.

21. One of the City's defenses to the charges of unfair practices is the provision in the contract for arbitration, which has specific preliminary time limits, all of which had lapsed by the dates of hearing. At the hearing on January 9, 1978, the Hearing Examiner asked Counsel for the City whether it would waive its time limits defense to arbitrability of the instant subject matter. Counsel for the City replied that the City would not waive any defenses regarding arbitrability.

THE ISSUES

1. Was Nicholas Sarapuchiello the subject of disparate and discriminatory treatment when he was disciplined by the City for having allegedly failed to respond to a recall general alarm fire? If so, was this a violation of the Act?

2. Was Richard Winner, as Secretary of the Union, engaging in a protected

4/ The record does not indicate the length of the suspension.

activity when he telephoned the Auditing Department on behalf of Ronald Freeman, and was his subsequent discipline a violation of the Act?

3. Was Nicholas Sarapuchiello, as President of the Union, engaging in a protected activity when he visited the office of the Auditing Department separately on behalf of Winner and himself, and was his subsequent discipline a violation of the Act?

4. Were Sarapuchiello and Winner the subject of disparate and discriminatory treatment by the City in having been disciplined for telephoning and/or appearing at the Auditing Department? If so, was this a violation of the Act?

DISCUSSION AND ANALYSIS

The City Did Not Violate the Act When It Disciplined Sarapuchiello For failing to Respond to a Recall General Alarm Fire on August 15, 1977

Even if the Hearing Examiner should find that Sarapuchiello was home alone and was never telephoned to report to duty on August 15, 1977, it does not follow that because Sarapuchiello was disciplined for alleged failure not to report there was a violation of the Act. The Hearing Examiner is not persuaded by the record that Sarapuchiello was disciplined because he was President of the Union. The Union's witnesses on disparate treatment ^{5/} on this issue may well have persuaded an arbitrator that Sarapuchiello was disciplined without just cause. This, does not, in and of itself, permit the Hearing Examiner to draw the inference that Sarapuchiello was disciplined because he was President of the Union. ^{6/}

There was competent evidence introduced by the City that Sarapuchiello was telephoned to report for duty on August 15, 1977. The evidence also indicated that three firefighters were not disciplined, namely Martino, Corsano and Ianuale. However, they were not disciplined because the recall roster (R-5) showed that there was "no answer" in the cases of Martino and Ianuale, and Corsano was noted as "out of town". Notwithstanding that Martino and Ianuale testified that they were home on August 15, 1977, the objective facts before the Chief of the Fire Department at the time of his evaluation were that the recall roster showed that there was "no answer" when they telephoned. The recall roster also showed that Corsano was "out of town". Thus, the Chief had before him objective evidence, uncontradicted at that point, that two firefighters did "not answer"

^{5/} Martino, Corsano and Ianuale.

^{6/} It is also noted that there has been no showing that Sarapuchiello was disciplined for engaging in any activity protected by the Act.

and that the third was "out of town". Accordingly, these three firefighters were not disciplined for failure to report. The same recall roster also indicated to the Chief of the Fire Department that Sarapuchiello had been contacted by telephone but did not report.

Sarapuchiello, and the Union on his behalf, have failed to prove by a preponderance of the evidence that Sarapuchiello was disciplined wholly or in part because he was the President of the Union on August 15, 1977. Further, Sarapuchiello has failed to show that he was engaged in any protected activity on August 15, 1977, which would have insulated him from discipline for failure to respond to a recall general alarm fire.

Thus, the City did not violate the Act when it disciplined Sarapuchiello for his failure to have responded to a recall general alarm fire where the City's records showed that Sarapuchiello was the only firefighter, who was reached by telephone, who did not respond.

Sarapuchiello and Winner were engaged in Protected Activity When They Visited and/or Telephoned the Office of the Auditing Department of the City in Their Capacity as Union Officers For Which They Were Disciplined in Violation of the Act

The Hearing Examiner concludes that Sarapuchiello and Winner were acting in a representative capacity when they respectively visited and telephoned the office of the Auditing Department of the City on the dates in question. Sarapuchiello testified credibly that he visited the Auditing Department on behalf of Winner, who had a complaint regarding the pay he received in connection with his earlier three-day suspension. Sarapuchiello also made a visit to the Auditing Department in connection with his own pay. Winner likewise testified credibly that he telephoned the office of the Auditing Department on behalf of Ronald Freeman in connection with an insurance problem which Freeman had. There can be no dispute but that a union officer, or shop steward, as the case may be, is engaging in protected activity when he represents an employee on a grievance or problem involving wages, hours or conditions of employment. ^{7/}

^{7/} In accordance with Lullo v. International Ass'n. of Firefighters, 55 N.J. 409 (1970), see, for example, the following decisions of the National Labor Relations Board and the courts: Chatham Mfg. Co., Inc., 221 NLRB No. 114, 90 LRRM 1577 (1975); May Dept. Stores Co., 220 NLRB No. 168, 90 LRRM 1444 (1975); Morris-Knudsen Co., Inc., 213 NLRB No. 48, 87 LRRM 1655 (1974); Quality Mfg. Co., 195 NLRB No. 197, 79 LRRM 1269 (1972); NLRB v. R.W. Little, Inc., ___ F.2d ___, 85 LRRM 2921 (9th Cir. 1974); NLRB v. Quality Mfg. Co. 481 F.2d 1018, 83 LRRM 2817 (4th Cir. 1973).

The Hearing Examiner also finds that there was disparate treatment, and therefore unlawful discrimination, with respect to Sarapuchiello and Winner, in the matter of visiting and/or telephoning the office of the Auditing Department of the City. Three employees of the Fire Department testified without contradiction that they visited the Auditing Department in connection with pension loans and were never disciplined for infraction of Special Order No. 25.

The Assistant Controller, Robert P. Bogle, testified that employees in the Auditing Department had been instructed to "report" any employee who visited or telephoned the Auditing Department without permission. In the case of the three employees of the Fire Department referred to above, their visits were never reported. Bogle testified that only Sarapuchiello and Winner have been "reported". Thus, the evidence shows clearly that there was disparate treatment in the application of Special Order No. 25 with respect to Sarapuchiello and Winner.

On this record the Hearing Examiner must conclude that the City, in enforcing Special Order No. 25, discriminated against Sarapuchiello and Winner in the exercise by them of rights protected by the Act, namely the representation of employees in connection with grievances over terms and conditions of employment. 8/

The City's Defense of Deferral to Arbitration Is Rejected

The City has advanced as an affirmative defense the fact that the contract provides for arbitration and that the Commission should defer. This defense is rejected in view of the City's refusal at the hearing to waive its defense of arbitrability in view of the fact that the time limits for arbitration have lapsed.

It is well settled that P.E.R.C. will not defer to arbitration where deferral would be a futile act. Hudson County Board of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER (1978).

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The City did not violate subsections (a)(1), (3) and (5) of the Act when it suspended Nicholas Sarapuchiello for failure to respond to a recall general

8/ Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), appeal pending, App. Div. Docket No. A-2546-76.

alarm fire on August 15, 1977.

2. The City violated subsections (a)(1) and (3) of the Act when it suspended Nicholas Sarapuchiello and Richard Winner for engaging in the protected activity of representing employees on grievances with respect to terms and conditions of employment by having respectively visited and telephoned the office of the Auditing Department of the City on behalf of employees.

3. Richard Winner never, in fact, visited the office of the Auditing Department and should not have been suspended for allegedly having done so.

4. The City has violated the provisions of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. However, the City has not violated N.J.S.A. 34:13A-5.4(a)(5) of the Act.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the City of Hackensack:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refraining from disciplining employees, including Nicholas Sarapuchiello and Richard Winner, for engaging in the protected activity of representing employees in connection with grievances with respect to terms and conditions of employment.

2. 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 the Act.

B. Take the following affirmative action:

1. Make whole Nicholas Sarapuchiello for the loss of wages suffered by him as a result of the disciplinary suspensions for visiting the Auditing Department on behalf of Richard Winner and himself.

2. Make whole Richard Winner for the loss of wages suffered by him as a result of the disciplinary suspensions for telephoning the Auditing Department on behalf of Ronald Freeman and also for allegedly visiting the Auditing Department with Nicholas Sarapuchiello.


3. Post at Fire Department Headquarters, in a conspicuous place, 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 signed by the City's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days there-

after in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the City to insure that such notices are not altered, defaced or covered by other material.

4. Notify the Director of Unfair Practices within twenty (20) days of receipt of this order what steps the City has taken to comply herewith.

C. It is further recommended that the Commission order those portions of the Complaint which charge the City with violating section 5.4(a)(5) of the Act be dismissed in their entirety.

D. It is further recommended that the Commission order that portion of the Complaint which charges the City with violating section 5.4(a)(1), (3) and (5) with respect to the discipline of Nicholas Sarapuchiello for failure to respond to the recall general alarm on August 15, 1977 be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

DATED: March 16, 1978
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

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

WE WILL NOT discriminate 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 the Act.

WE WILL make whole Nicholas Sarapuchiello and Richard Winner for the loss of wages suffered by them as a result of their visiting and/or telephoning the office of the Auditing Department of the City in connection with grievances of employees with respect to terms and conditions of employment.

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