

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

In the Matter of

CITY OF JERSEY CITY,

Respondent,

- and -

Docket No. CO-78-229-68

JERSEY CITY P.O.B.A.,

Charging Party.

CITY OF JERSEY CITY,

Respondent,

- and -

Docket No. CO-78-230-69

JERSEY CITY FIRE FIGHTERS,
LOCAL 1066, IAFF, AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed against the City of Jersey City by the P.O.B.A. and the Fire Fighters, which alleged that a letter sent by the City on March 27, 1978 to all police and firemen and a second letter sent by the City to the unions' attorney on April 1, 1978 constituted interference in the administration of the unions and, further, constituted an attempt to bypass and undermine the unions in collective negotiations, thus manifesting bad faith on the part of the City.

The Hearing Examiner concluded that the expressions set forth in the two letters were privileged and protected by the "free speech" provisions of the United States and New Jersey Constitutions and, further, were proper under pertinent decisions of the National Labor Relations Board. The Hearing Examiner noted that the letters were devoid of any restraint or coercion and did not contain threats or promise of benefit.

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.

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Appearances:

For the City of Jersey City
Louis P. Caroselli, Esq., Corporation Counsel
(Francis X. Hayes, Esq.)

For the Jersey City P.O.B.A. and the Jersey City Fire Fighters,
Local 1066, IAFF, AFL-CIO
Schneider, Cohen and Solomon, Esqs.
(David Solomon, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission, (hereinafter the "Commission") on April 3, 1978 by the Jersey City P.O.B.A. (hereinafter the "P.O.B.A.") alleging at great length that the City of Jersey City (hereinafter the "Respondent" or the "City") had 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,

through its Business Administrator, Joseph A. Giorgio, had on March 27, 1978 sent a letter to all P.O.B.A. members setting forth, inter alia, the City's financial situation vis-a-vis the pending labor negotiations, which the P.O.B.A. alleged was an attempt to bypass its negotiating committee and to turn the membership against the P.O.B.A. and "chill" negotiations, and that the letter further showed a lack of good faith in negotiations on the part of the City and constituted an attempt to interfere with the existence and administration of the P.O.B.A.; the charge of unfair practices also alleged that the City's Labor Counsel, Francis X. Hayes, on April 1, 1978 sent a letter to David Solomon, Esq., as attorney for the P.O.B.A., charging him with a conflict of interest in that he also represents the Fire Fighters, copies of which letter were given directly to the Jersey Journal as well as to the two arbitrators involved in the pending interest arbitrations between the P.O.B.A., the Fire Fighters and the City; all of the foregoing of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) of the Act. ^{1/}

An identical Unfair Practice Charge was also filed with the Commission on April 3, 1978 by the Jersey City Fire Fighters, Local 1066, IAFF, AFL-CIO (hereinafter the "Fire Fighters"), which contained identical allegations of unfair practices by the City, and cited the same provisions of the Act as having been violated, supra. ^{2/}

It appearing that the allegations of the above charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing and an Order consolidating the two cases was issued on April 5, 1978. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 19, 1978 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The City filed

^{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.

"(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.

"(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.

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

^{2/} Both charges of unfair practices were grammatically amended and filed on the date of the hearing, April 19, 1978 (C-2, C-3). The City did not file a written answer to the unfair practice charges. Although not formally designated as an answer, Mr. Hayes read a statement into the record at the conclusion of the hearing, (cont'd. next page)

a post-hearing brief on May 19 and a post-hearing brief, filed jointly on behalf of the P.O.B.A. and the Fire Fighters, was received on May 25, 1978.

Unfair practice charges, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exist and, after hearing, and after the consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The City of Jersey City is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Jersey City P.O.B.A. is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The Jersey City Fire Fighters, Local 1066, IAFF, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
4. Francis X. Hayes, Esq., Counsel for the City, is also the Chief Labor Negotiator for the City and has served in this position since March 1, 1978.
5. With the prior approval of Mr. Hayes, the Business Administrator of the City, Joseph A. Giorgio, under date of March 27, 1978, sent out a letter (CP-1) to all policemen and firemen of the City which stated, in pertinent part:

"As you are well aware, Jersey City is experiencing severe fiscal problems. This year alone our tax rate will soar to \$100.64 per \$1000. valuation or an increase of \$5.67 on the tax rate. In addition, our ratables have decreased by some \$12 million and the percentage of collected taxes fell short of what we had anticipated. And, because of these factors, and rising inflationary costs together with the obligation to provide "normal" service to the public, the 1978 budget will increase by approximately \$4 million.

"We have made every effort possible to cut costs and limit the impact of a tax increase. And, yet, despite these constraints, this Administration continues to pursue a good faith effort at negotiating new contracts that are fair and equitable both to you and the good people of our City.

"Commensurate with what our City can afford, we have set aside in our budget a reasonable appropriation that will

2/ (cont'd.)

which the Hearing Examiner has considered as the City's answer (Tr. 68-70).

provide you with a fair wage increase. Please be mindful of that fact. Despite enormous financial problems we still provided monies in the budget for salary increases. We mention this because there are those who may wish to misrepresent our position and attempt to distort this fact. Realistically if we want to stabilize and rejuvenate our community, we must operate within the fiscal and budgetary limitations that we are experiencing. In addition, we are mandated through the 1976 "CAP" Law not to exceed last year's City's expenditures by more than 5%.

"I ask that your good judgment and affection for Jersey City will bring you to realize that the problems we face are common and can only be resolved if we work together. We are mindful of that common bond and have provided a reasonable wage offer..." (Emphasis supplied).

6. Mr. Hayes testified that the purpose of the Giorgio letter (CP-1) was to explain the economic climate of the City and to urge the policemen and firemen to exercise "a little common sense and restraint" (Tr. 44, 45). In response to a question as to whether or not the purpose of the letter was to get the membership of the police and fire fighters to put pressure on their own negotiating committees to reduce the demands proposed to the City, Mr. Hayes acknowledged "That might have been a result" (Tr. 45). Mr. Hayes, in response to a similar question, testified "...we felt that their leaders might be leading them down the primrose path..." (Tr. 46). When asked to whom the City was referring in the letter ^{3/} Mr. Hayes replied: "We don't know in particular. They might be--they could be the labor leaders or friends of the labor leaders, having a large negotiating committee, it could be anyone...I'm not saying these particular leaders. Could be anyone, could be these two gentlemen ^{4/}, could be anyone of the twenty men on the two bargaining committees..." (Tr. 47, 48).

7. Mr. Buonocore, the President of the P.O.B.A., acknowledged on cross-examination, that Mr. Giorgio's letter of March 27 (CP-1) did not contain any direct threat to the employees to whom it was addressed (Tr. 54).

8. Under date of April 1, 1978, Mr. Hayes sent a letter (CP-2) to David Solomon, Counsel for the P.O.B.A. and the Fire Fighters, which stated, in pertinent part:

^{3/} See emphasized sentence in CP-1, Finding of Fact No. 5, supra.

^{4/} Referring to Ronald Buonocore, the President of the P.O.B.A., and Joseph W. Krajnik, the President of the Fire Fighters, both of whom were present when Mr. Hayes testified at the hearing.

"It has become increasingly apparent to the City of Jersey City that your acting as attorney for both the policemen and firemen is placing you more and more in a conflict of interest on labor relations negotiations.

"The police and firemen are bargaining on an individual basis and are not engaged in coalition bargaining.

"As just one example, the invidious comparisons between the policemen and firemen made by the firemen in their arbitration brief place you in an untenable position.

"In our bargaining sessions, you tell the City that the police are more important than the firemen and deserve more money than the firemen. When you represent the firemen, you tell the City the exact opposite.

"May I suggest that you immediately seek an opinion from the Advisory Committee on Ethics of the New Jersey Supreme Court as to your role in this matter..."

9. Copies of the April 1 letter (CP-2) were hand-delivered by the City to Mr. Buonocore and Mr. Krajnik on April 1. Copies of the letter were mailed, inter alia, to Mr. Sobol and Dr. Halevy, the interest arbitrators for the P.O.B.A. and Fire Fighters, respectively, and to Mr. Tener, the Chairman of the Commission. On the following day, Sunday, April 2, Mr. Hayes, in a conversation with a reporter from the Jersey Journal, read the contents of the April 1 letter to the reporter. ^{5/}

10. Mr. Hayes was unable to recall a specific bargaining session where Mr. Solomon stated that in negotiations he tells the City that the police are more important than the firemen and deserve more money, and then states the exact opposite when he represents the firemen (Tr. 26). Mr. Buonocore and Mr. Krajnik testified credibly that they had attended all of their respective negotiating sessions, and that Mr. Solomon had never at any time told the City that either the police or firemen are more important than the other and deserve more money (Tr. 50, 57).

11. The P.O.B.A. and the Fire Fighters have been at impasse with the City in contract negotiations since November 1, 1977, the date on which impasse was declared and interest arbitration was instituted under Chapter 85. The interest arbitration proceedings were pending on the date of the hearing, April 19, 1978.

^{5/} The portion of CP-2, quoted in Finding of Fact No. 8, appeared in the April 3, 1978 edition of the Jersey Journal together with Mr. Solomon's response (CP-3).

12. Although no formal press releases were adduced by either party, a series of newspapers articles, reporting on the contract negotiations dispute between the parties, were introduced in evidence (CP-3 through CP-12 and R-1 through R-5 ^{6/}).

THE ISSUES

1. Did the City violate the Act when its Business Administrator, Joseph A. Giorgio, sent a letter to all police and firemen under date of March 27, 1978?

2. Did the City violate the Act when its Chief Labor Negotiator, Francis M. Hayes, Esq., sent a letter to David Solomon, Counsel for the P.O.B.A. and the Fire Fighters, under date of April 1, 1978?

DISCUSSION AND ANALYSIS

Positions of the Parties

The P.O.B.A. and the Fire Fighters concentrate on Subsections (a)(2) and (5) of the Act, in urging that the City has committed unfair practices. They urge that Subsection (a)(2) was violated, in that there was an interference by the City with the "administration" of the employee organizations by the City's letters of March 27 and April 1, 1978 which, they contend, was an attempt to discredit the integrity of the leadership of the P.O.B.A. and the Fire Fighters and to undermine their effectiveness in negotiations. They also contend that Subsection (a)(5) was violated by the March 27 letter in that it attempted to put pressure on the leadership, via appeals to the membership, to alter the contract proposals of the P.O.B.A. and the Fire Fighters, the latter being urged as evidence of bad faith. ^{1/}

The City in its memorandum of law contends that it did no more than exercise the right of "free speech", and that it is protected in such exercise by the First Amendment of the United States Constitution and Section 8(c) of the National

^{6/} The five Respondent exhibits were submitted post-hearing in accordance with an understanding reached at the hearing (Tr. 17).

^{7/} The P.O.B.A./Fire Fighters' brief also argued at p. 2 that testimony was adduced, which demonstrated that the City intended to "stall negotiations as long as they can, (and) that they (hope that Buonocore would) lose the election...", referring to an internal election of officers in the P.O.B.A. (Tr. 52, 53). The Hearing Examiner will not consider this argument since it is not within the scope of the original charge, as amended, and there was no motion made by counsel at the hearing to amend the charge further to include such additional allegations.

Labor Relations Act, as amended. ^{8/} The City does not deal with the fact that there is no section in our Act analagous to Section 8(c) of the N.L.R.A. The City cites a spate of decisions of the courts and the NLRB, which it contends support its asserted exercise of "free speech" in the instant case.

The City Did Not Violate The Act When
Its Representatives Sent The Letters
of March 27 and April 1, 1978

The Hearing Examiner finds and concludes that the City's letters of March 27 and April 1, 1978 constituted protected expression under the "free speech" provision of the First Amendment of the United States Constitution and Article I, para. 6, of the New Jersey Constitution. The Hearing Examiner also decides that such a conclusion is supported by applicable precedent from decisions of the National Labor Relations Board. ^{9/}

Although the Hearing Examiner does not expressly read into our Act the provisions of Section 8(c) of the National Labor Relations Act, as amended, supra, ^{10/} the Hearing Examiner is persuaded, at least by analogy to Section 8(c), that the instant letters contained no threats of reprisal or force or promise of benefit, which might constitute violations of Subsections (a)(1), (2) and/or (5) of the Act.

It is first noted that "free speech" exercised by employers in labor relations matters is not absolute under the First amendment, i.e., it must be devoid of restraint or coercion. In this connection, reference is made to a case cited by the City, which was decided after Section 8(c) was incorporated into the N.L.R.A., N.L.R.B. v. Corning Glass Works, 204 F. 2d 422 (1st Cir. 1953), 32 LRRM

^{8/} Section 8(c) of the N.L.R.A. provides that:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." (29 U.S.C.A. Sec. 158(c))

^{9/} Reference to NLRB decisions is supported by Lullo v. International Ass'n. of Fire Fighters, Local 1066, 55 N.J. 409(1970).

^{10/} See Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 346 N.J. Super 346 (App. Div. 1977), cert. granted, 75 N.J. 29 (1977), appeal pending. The Court said at p. 352:

"According to Lullo v. Intern. Ass'n. of Fire Fighters, 55 N.J. 409 (1970), the Federal Labor Management Relations Act, 29 U.S.C.A. Sec. 141 et seq., was the model for N.J.S.A. 34:13A-1 et seq. Omission of a specific term of the federal act is therefore significant in construing the New Jersey act..."

(Emphasis supplied).

2136, where the Court said:

"...But the First Amendment of the Constitution of the United States protects an employer with respect to the oral expression of his views on labor matters provided his expressions fall short of restraint or coercion (NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941)), and Sec. 8(c) of the Act, supra, protects an employer with respect to like expressions in written...form, provided his expressions contain 'no threat of reprisal or force or promise of benefit.'..." (32 LRRM at 2139) (Emphasis supplied).

It is contended by the P.O.B.A. and the Fire Fighters that the instant letters constitute violations of Subsections (a)(2) and (5) of the Act.

The Hearing finds no pertinent precedent of the NLRB insofar as the alleged (a)(2) violation. ^{11/}

In connection with an alleged (a)(5) violation, there is ample NLRB precedent for resolution of the instant matter. The Hearing Examiner now refers to several cases, involving employer communication with its employees during the period of contract negotiations. ^{12/}

In Proctor & Gamble Mfg. Co., 160 NLRB 334, 62 LRRM 1617 (1966) the Board found no violation of Section 8(a)(5) under the circumstances of a non-coercive letter campaign by the employer directed at its employees during contract negotiations. This finding was predicated upon the following facts: the employer negotiated with the union with a sincere desire to reach agreement; copies of all communications were sent to the union; although some of the communications were critical of the union's bargaining strategy, they were not designed

^{11/} The brief of the P.O.B.A./Fire Fighters cites Hydro-Dredge Accessory Co., 215 NLRB No. 5, 87 LRRM 1557 (1974) and Kent Corp., 212 NLRB No. 88, 87 LRRM 1730 (1974) in support of its contention that the City herein sought to influence the make-up of the union negotiating committee. The two cases are readily distinguishable and have no application to the instant case. In Hydro-Dredge the employer recognized an employee association after a question concerning representation was raised by another union's request for recognition and, further, the employer drafted and signed a contract with the employee association under these circumstances. In Kent the employer interfered with the administration of an employee association by: (1) seeking to influence or control the selection of officers and the admission of employees to membership; (2) soliciting employees' support for the association; and (3) threatening employees because of their activities on behalf of a rival union.

^{12/} It is noted that at the time of the March 27 and April 1 letters the parties were involved in interest arbitration under C. 85, by virtue of an impasse having been declared on or about November 1, 1977. Query: Is not an employer on sounder legal ground in communicating with its employees after negotiations have reached impasse rather than prior to impasse? As will be apparent herein-after, the NLRB makes no such distinction.

to subvert the employees' choice of bargaining representative and were motivated solely by the desire of the employer to relate its version of the breakdown of negotiations. There was also involved in the communications, the expression by the employer of preference for agreement with the incumbent union in opposition to the efforts of the union leadership to affiliate with another union. The Board, in distinguishing that case from General Electric Co., 150 NLRB 192, 57 LRRM 1491 (1964), said at one point in its decision:

"As a matter of settled law, Section 8(a)(5) does not, on a per se basis, preclude an employer from communicating, in noncoercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith..." (62 LRRM at 1620)

Compare General Electric, supra, where the employer engaged in an extensive campaign of communication to employees both before and during formal negotiations, while its conduct at the bargaining table marked a clear refusal to engage in meaningful give and take bargaining. As the Board stated in Proctor & Gamble, supra:

"...Thus, we were there confronted (in General Electric) with a communication campaign, which, coupled with the employer's fixed position at the bargaining table, effectively excluded the Union from meaningful bargaining, and represented a patent attempt to bypass and undermine the union as bargaining agent..." (62 LRRM at 1620)

In Safeway Trails, Inc., 216 NLRB No. 171, 89 LRRM 1017 (1975), the employer sent a letter urging employees to oust the chief union negotiator and deal directly with the employer. The Board concluded that the letter, read as a whole, was no more than an attempt to get the union to accept the employer's latest offer and was, therefore, not a violation of Section 8(a)(5).

Reference is also made to case of T. M. Cobb Co., 224 NLRB No. 104, 93 LRRM 1047 (1976), where the Board found no violation in the posting of a letter on the bulletin board, which blamed the union for failing to sign a contract and for demanding contract changes. The Board noted that there had been no prior unlawful conduct.

See, also, PPG Industries, Inc., 172 NLRB No. 61, 69 LRRM 1271 (1968), where no violation was found in the employer having sent a letter to employees outlining its proposals, which were rejected by the union, and indicating a

readiness to "discuss problems" directly with its employees.

The Hearing Examiner now considers the letters of March 27 and April 1 in the light of the legal precedent hereinbefore set forth. Turning first to Mr. Giorgio's letter of March 27 (CP-1), it is noted that it deals almost entirely with a recital of the City's financial situation. It is true that the letter was sent to all police and firemen, thus by passing the P.O.B.A. and the Fire Fighters, but the phrasing of the letter is in no way threatening or coercive. ^{13/} Mr. Hayes freely acknowledged that the purpose of the letter was to explain the economic climate of the City and, further, to urge the police and firemen to exercise "a little common sense and restraint" (Finding of Fact No. 6, supra.)

With respect to the single sentence in the letter of March 27, emphasized in Finding of Fact No. 5, supra, Mr. Hayes likewise acknowledged that the reference to "those" might be the labor leaders, including Mr. Buonocore and Mr. Krajnik, the respective presidents of the P.O.B.A. and the Fire Fighters, or it might be anyone of the members of the two bargaining committees (Finding of Fact No. 6, supra.) The Hearing Examiner notes that the emphasized sentence is the only possible objectionable sentence in the letter of March 27. It is very carefully phrased, stating only that there are "those" who "may wish to misrepresent our position and attempt to distort this fact," referring to the prior sentence, that being a statement that despite enormous financial problems the City has still provided moneies in the budget for salary increases. The Hearing Examiner sees nothing improper or illegal in this sentence and is of the view that the sentence represents privileged expression, either under the United States or New Jersey Constitutions, or under the NLRB precedent hereinbefore set forth. ^{14/}

Next, considering Mr. Hayes' letter of April 1 to Mr. Solomon (CP-2), it is first noted that this was directed to the attorney for the P.O.B.A. and the Fire Fighters, and not to the members represented by those two organizations. In this letter Mr. Hayes, although unable to recall a specific instance, stated that in the bargaining sessions Mr. Solomon tells the City that the police are more important than the firemen and deserve more money, and then in representing the firemen says the exact opposite (Finding of Fact No. 8, supra).

^{13/} The President of the P.O.B.A. acknowledged that the letter of March 27 did not contain any direct threat to the employees to whom it was addressed (Finding of Fact No. 7, supra).

^{14/} It is noted that the City is not charged with any independent prior misconduct in collective negotiations before the sending of the letter of March 27, which was the situation in T. M. Cobb Co., supra, where no violation was found.

Based on the testimony, the Hearing Examiner is persuaded that Mr. Solomon never made any such statement (Finding of Fact No. 10, supra). This, however, is totally irrelevant to the right of Mr. Hayes to express himself, thusly, in a letter to Mr. Solomon. Further, the Hearing Examiner is not persuaded that any illegality attached to an otherwise proper exercise of "free speech" by Mr. Hayes by the fact that the letter of April 1 was distributed on that date by hand to the presidents of the P.O.B.A. and Fire Fighters, and by mail to the interest arbitrators and Mr. Tener, and that it was ultimately reprinted in the Jersey Journal (Finding of Fact No. 9, supra). If the communication was privileged and proper in the first instance, the mere fact that it was distributed to persons other than Mr. Solomon does not render it improper.

As noted previously, the brief of the P.O.B.A. and Fire Fighters concentrated on alleged violations by the City of Subsections (a)(2) and (5) of the Act which, if found, would constitute a derivative violation of Subsection (a)(1). ^{15/} No such violations, as contended, are found by the Hearing Examiner for the reasons hereinbefore set forth. It is further noted that no evidence was adduced, which could possibly constitute independent violations of Subsections (a)(3) or (7) of the Act.


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

CONCLUSIONS OF LAW

The City did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) when its representatives sent the letters of March 27 and April 1, 1978.

RECOMMENDED ORDER

The City not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: July 13, 1978
Trenton, New Jersey