H.E. NO. 2018-4

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

In the Matter of

CAMDEN COUNTY LIBRARY COMMISSION,

Respondent,

-and- Docket No. CO-2016-098

CWA LOCAL 1014,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Camden County Library Commission (Library) violated section 5.4a(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it ordered a Local 1014 member to remove his T-shirt that stated, "Highest Rated County Service, Lowest Paid County Workers," or be subject to discipline, and further prohibited other Local 1014 members from wearing the T-shirt while working. The Library's business justification, namely its appearance policy, did not outweigh the employees right of free speech.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2018-4

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

In the Matter of

CAMDEN COUNTY LIBRARY COMMISSION,

Respondent,

-and- Docket No. CO-2016-098

CWA LOCAL 1014,

Charging Party.

Appearances:

For the Respondent
Brown & Connery, LLC
(Michael J. DiPiero, on the brief)

For the Charging Party
Spear Wilderman, P.C.
(James Katz, on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 9, 2015, CWA Local 1014 (Local 1014) filed an unfair practice charge with an order to show cause and request for interim relief against the Camden County Library Commission (Library). The charge alleges that the Library violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] when it ordered a Local

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in
(continued...)

1014 member to remove his CWA T-shirt because of its message, or be subject to discipline; and also prohibited all Local 1014 members from wearing the T-shirt during work.

On January 6, 2016, Charging Party's request for interim relief was denied by decision of Commission Designee David Gambert.

On April 25, 2016, a Complaint and Notice of Hearing was issued (C-1).[2/] The Director of Unfair Practices declined to issue a complaint on the 5.4a(3) allegation, concluding that there were insufficient facts presented to support same. On May 4, 2016, the Library filed an answer denying it violated the Act by prohibiting Local 1014 members from wearing the CWA T-shirt while working. A hearing was held in this matter on January 31, 2017.[3/] The parties submitted post-hearing briefs by March 31, 2017.

Based upon the record, I find the following facts:

1/ (...continued)
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/ Exhibits received in evidence are marked "C", "J", "CP" and "R", representing respectively Commission, Joint, Charging Party and Respondent.

3/ The transcript references to hearing date is "T".

FINDINGS OF FACT

1. CWA Local 1014, successor to Camden County Council No. 10, is a public employee organization within the meaning of N.J.S.A. 34:13A-1 et seq. It is the duly authorized representative for various bargaining units of civilian employees employed by the Camden County Board of Chosen Freeholders and its various entities, including the Camden County Prosecutor, the Camden County Sheriff, the Camden County Library Commission, and the Camden County Superintendent of Schools (C-3, ¶1).[4/]

2. The Camden County Library Commission (Library) is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq., and the rules and regulations of the Public Employment Relations Commission promulgated in accordance therewith. It is the responsibility of the Library Commission to operate the Camden County Library System (C-3, ¶2).

3. The Library System consists of eight (8) branches located throughout Camden County and is funded, in part, by a tax paid by residents from member Camden County communities, whose residents are entitled to borrow books and other library materials free of charge (C-3, ¶3).

4. County member communities of the Library consist of Audubon Park, Barrington, Bellmawr, Berlin Township, Brooklawn,

---

4/ Commission exhibit C-3 consists of stipulated facts from the parties. The paragraph number cited refers to the enumerated paragraphs in the document.

Camden, Chiselhurst, Clementon, Gibbsboro, Gloucester Township, Haddon Township, Hi Nella, Lawnside, Laurel Springs, Lindenwold, Magnolia, Merchantville, Mt. Ephraim, Oaklyn, Pine Hill, Pine Valley, Somerdale, Tavistock, Voorhees, Winslow Township, and Woodlynne (C-3, ¶4). Currently, library branches are located in Bellmawr, Camden, Gloucester, Haddon Township, Merchantville, Voorhees, and Winslow, New Jersey (C-3, ¶5).

5. In 2014, the Library had almost 800,000 users visit its branch locations. In addition to providing access to thousands of books, periodicals, audio recordings and video materials, the Library provides public meeting space, educational programs, computer services and free internet access to all County citizens that reside in participating municipalities (C-3, ¶9).

6. The Library's mission statement provides as follows:

> We meet the learning, recreational and informational needs of our customers, providing an open environment to our community. (C-3, ¶7)

7. Local 1014 and the Library are parties to separate collective negotiation agreements (CNA) covering the support staff and supervisory unit employees employed by the Library. There are approximately 112 members of the support staff, consisting of a variety of titles, including but not limited to, library page, library assistant, building maintenance worker, clerks, receptionist/telephone operator, and numerous other positions. The most recent CNAs between the parties covering the

separate units effective from January 1, 2009 through December 31, 2015. A list of the current job titles for the two units is set forth in the Recognition Article of each of the contracts (C-3, ¶8; J-1 and J-2).

8. The parties began to prepare for contract negotiations in the Fall of 2015, and negotiations are on-going at this time (C-3, ¶9-10).

9. Karl Walko has been employed as the President of CWA Local 1014 for over fifteen (15) years (1T9-T10, T12). Walko is the lead negotiator for Local 1014, and he has negotiated prior agreements (T12).

10. The primary issue in current negotiations is wages. According to Walko, Local 1014 Library employees receive significantly lower pay rates than any other Local 1014 employees in the County (T13).

> . . . a lot of these workers make less than $10 an hour. I think two-thirds of them make less than $15 and around 40 percent of them make less than $12 an hour (T13).

The lowest starting hourly rate paid to employees of the County, outside the Library, is $16.92 (T14-T15, T33, T53).

11. In 2015, Local 1014 began a public campaign entitled, "Fight for 15" which is a push to raise the minimum wage to $15 per hour (T15). This is a national campaign as well as a local campaign for Local 1014 and, as such, was directed to the Library Commissioners, the taxpayers, the Library patrons and Local 1014

members (T15-T16). Basically, Local 1014's campaign goal was to bring Library employees hourly rate up to $15 in the next negotiations agreement (T17).

12. In April of 2015, Local 1014 representatives and members attended the Library Commission meeting to advise the commissioners of the union’s efforts in its campaign to raise wages paid to its members (T16, T41). The union also sent an email to its members entitled "Fight for $15 - Camden County Library System" to educate them on the national campaign as well as their local campaign for an increase in hourly wages in the upcoming negotiations (T16-T17; CP-3).

13. On November 17, 2015, Local 1014 held a meeting with unit members regarding upcoming negotiations (T17). Along with draft contract proposals, Local 1014 handed out red T-shirts with a white CWA Local 1014 insignia (T17-T18; J-3). Local 1014 asked members to wear the T-shirts at work (T18). The following statements were also printed on the front and back of the T-shirts in white letters (C-3, ¶19; J-3);

> Camden County Library System
> Highest Rated County Service
> Lowest Paid County Workers
> [J-3].

14. The T-shirts were part of Local 1014's campaign and were meant to help educate the public, specifically Library patrons (T19, T44). The T-shirts were also meant to build enthusiasm and solidarity amongst members (T20). The language on

the T-shirts was specifically chosen by the negotiations committee to reflect "how members felt, that the members understood that the County took credit for the excellent services from the library but wasn't willing to pay the workers a fair wage" (T18-T19).

15. Laura Callahan has been the Library's Human Resources Manager for approximately fifteen years (T54-T55). As the Human Resources Manager Callahan handles personnel matters (T55). She also sits at the negotiations table as a member of management's negotiations team (T59).

16. On November 17, Callahan and a building maintenance worker, Lou Pavone, were setting up for a training session in one of the Library's meeting rooms (T55). As a maintenance worker, Pavone works everywhere in the Library; he cleans, performs snow removal and sets up meeting rooms (T56). It was during this time that Callahan saw and read the CWA T-shirt. (T55)

17. Callahan felt the T-shirt was "inappropriate," "inflammatory" and that the message "would be intimidating for someone to approach." However, Callahan admitted that she was not personally offended by the T-shirt, and she does not know if the message on the T-shirt is true (T60-T61). She also acknowledged that Library workers are permitted to wear T-shirts, and that the statement "CWA Local 1014, Camden County Library System, Highest Rated Service" would not be offensive to anyone

(T62). Callahan makes a distinction between what is appropriate by both the content on a T-shirt and its appearance (T63).

18. Nevertheless, despite not being personally offended by the T-shirt or its message, Callahan went to Linda Devlin's office after finishing the room set up and advised her about the T-shirt (T57, T75). Devlin is the Director of the Camden County Library System (C-3, ¶2 and ¶6, T66).

19. After speaking with Callahan, Devlin first sought guidance from the County human resources office, but she does not recall what she was told (T67, T81). Devlin thereafter spoke to Pavone and advised him that the T-shirt "was not professional for use while at work on the clock and asked that he refrain from wearing it in the future" (T68). Devlin also warned that if he disobeyed the directive, he would be subject to discipline (T68).

Devlin then advised the Union that members would not be permitted to wear the T-shirt at work during working hours and warned that anyone who did would be disciplined (C-3, ¶13, T23, T47, T81). Devlin’s intention was not to prevent Union members from wearing this T-shirt at the Library facilities, or at Library Commission meetings when they are off-the-clock, or to wear the T-shirt in public outside of the Library (C-3, ¶18, T23).

20. CWA President, Walko, wrote to Devlin on November 17, 2015 questioning her decision to insist that Local 1014 members

remove these shirts (C-3, ¶14; J-4). However, he instructed Local 1014 members to refrain from wearing these T-shirts at work until the issue concerning their legality was resolved (C-3, ¶15; J-5; T24, T28, T30). As a result Local 1014 members have worn the T-shirts when not working, including at a Library Commission meeting in December 2015 and at freeholder meetings (T25, T45).

21. In the spring of 2016, one member of the Local 1014 negotiating committee did wear the T-shirt during a negotiations session at a library branch (T26, T28). Director Devlin objected because the member was "on the clock" during negotiations, and the member removed the T-shirt (T26). The negotiations were in a third floor conference room of the Voorhees branch (T26). However, some members put the T-shirts on their windshield, while they were working (T45). No member of the public and/or patron of the Library made a complaint about the T-shirts (T26-T27, T75).

22. The Library has no rule which prevents members of the public and/or a unit member on his or her day off, from wearing the CWA T-shirt in the Library's facilities and/or when patronizing the Library. Nor does it have a rule which bars patrons from wearing T-shirts in the Library which may offend staff or that other patrons may find offensive (C-3, ¶16). Basically, the Library does not have a dress code for library patrons (C-3, ¶17).

23. Local 1014 members are not required to wear uniforms and are permitted to wear T-shirts at work (T20, T62). However, the Library has an appearance policy, which became effective on January 21, 2013 (R-1; T48-T49).[5/] The policy states that employees should report to work "properly attired appropriate to their function" (R-1; T57). The policy also has expansive guidelines that state:

> It is important that Library employees project a professional image to the public and internal customers. To help present this professional image and foster public confidence while maintaining a comfortable work environment, the Library has adopted business casual dress as our year-round standard.
>
> Traditional business dress may be required or appropriate when employees are conducting or attending meetings with clients, vendors, employees, or representatives from other public and private agencies, or are representing the Library at an external event.
>
> This policy applies to all employees of the Camden County Library System with the exception of positions which may need to take safety considerations into account due to the nature of work performed. These positions include maintenance workers and Library Clerk Drivers.
>
> To facilitate a common understanding between supervisors and employees, the following guidelines are provided.

5/ The appearance policy and guidelines was not negotiated with Local 1014 (T76-T77).

> These guidelines are for illustrative purposes only and are not to be considered all-inclusive.
>
> Traditional business dress. Examples include suits, dresses, skirts, jackets, dress pants, dress shoes or sandals and ties.
>
> Business casual dress. Business casual attire means clothing that is neat, clean, in good repair, and which allows the employee to feel comfortable at work, yet is appropriate for a workplace that serves the public. The following are examples of appropriate business casual dress:
>
> a. Khakis, corduroys, dress pants, jeans and other casual pants.
>
> b. Long or short-sleeved shirts with or without collars.
>
> c. Casual skirts, culottes, or capri pants.
>
> d. Sweaters, turtlenecks, knit tops, or blouses, including sleeveless blouses.
>
> e. Athletic shoes, such as sneakers, which are laced and clean, casual shoes, or sandals.
>
> Clothing which is never appropriate
>
> a. Clothing which is wrinkled, torn, dirty or frayed.
>
> b. Clothing with sayings, messages, or slogans that may be offensive to others.
>
> c. Flip flops and slippers.
> (emphasis supplied).

24. Devlin did not feel that the Local 1014 T-shirt was professional. Indeed, she felt that it was "offensive in a sense--in the way that it was presented" (T69). Devlin also

concluded that patrons would feel intimidated by the T-shirts and would be hesitant to approach staff members wearing the T-shirt. Specifically, Devlin testified that the Library serves "two locations in the City of Camden . . . one of the poorest cities in the United States. The unemployment rate is much higher than the national or state averages." As the Library is a place for people to seek assistance in finding information, she conjectured that the T-shirts would impede the Library's ability to provide services (T70-T71, T80). However, Devlin admits that she considered any T-shirt that criticized the Library or which stated that Library employees were the lowest paid county workers on average to be unprofessional (T79, T86).

25. Since the commencement of the appearance policy in 2013, Devlin has corrected employees for their attire under the policy (T87). Typically, she has needed to remind employees "not to wear flip-flops to work or a halter top or, you know, something that's strappy at the top, too revealing. Those are the types of things that we're usually dealing with" (T88).

ANALYSIS

Section 5.4a(1)

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146

1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The mere tendency to interfere is sufficient to prove a violation. Mine Hill Tp., Id. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights. If proven, the inquiry then becomes whether the employer had a legitimate and substantial business justification for its actions which outweighs any interference. The two prong test is based upon consideration of the totality of facts in each case and a balancing of the parties' interests. N. Warren Reg. Bd. of Ed. and Bridge, P.E.R.C. No. 2016-85, 43 NJPER 31 (¶9 2016).

N.J.S.A. 34:13A-5.3 provides “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 . . ." Essential to these rights is the ability for unions and employees to effectively communicate regarding terms and conditions of employment. New Jersey Dept. of Corrections., H.E. 97-26, 23 NJPER 221, 223 (¶28106 1997), aff'd P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997).

The Commission and the Courts have long held that the Act also guarantees an Association's right to publicly express its views about labor relations. Id.; Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div 1996), certif. den. 149 N.J. 35 (1977). This includes the protection of activities of public employees in support of their majority representative such as to ". . . inform the public of their view of a particular dispute or issue as well as their activities at the negotiating table." Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228, 229 (1977); Jackson Tp. P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988). The Act's protection of public expression by public employees in matters of labor relations encompasses the protection of public employees' constitutional right of free speech. Middletown, supra. However, the Commission has long held that employees engaged in protected activity do not act with complete impunity. City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 214 (¶4107 1978). The employee rights must be weighed against the employer's right to maintain order and to establish work rules. Id. at 215-216; Irvington Bd. of Ed. and Irvington Ed. Assoc., H.E. No. 2001-11, 27 NJPER 105 (¶32041 2001), aff'd. 28 NJPER 157 (¶33055 App. Div. 2001); North Warren Reg. and Bridge, supra.

The issue here is whether the Library violated the Act by prohibiting Local 1014 members from wearing the CWA message T-shirts during work and threatening discipline if they did.

The T-shirts distributed to unit employees and worn by Pavone are red with a white CWA Local 1014 insignia and white writing on the front and back which states:

> Camden County Library System,
> Highest Rated County Service,
> Lowest Paid County Workers

This statement explicitly addresses member wages. The T-shirts were distributed by CWA to be worn as part of a concerted campaign in anticipation of the commencement of collective negotiations. The right of employees to wear union T-shirts to communicate about terms and conditions of employment constitutes protected activity under the Act. New Jersey Dept. of Corrections, supra.

The parties here were preparing for the commencement of negotiations. Wages are a mandatory subject of bargaining, with few issues of greater concern. Robbinsville Twp. Bd. of Ed. and Washington Tp. Educ. Ass'n., 227 N.J. 192 (2016). The T-shirts were inclusive of a greater effort to petition the County and the public for support in Local 1014's efforts toward higher compensation for its workers, nationally and locally. The uncontroverted testimony of Local 1014 President Walko is that the Library employees are the lowest paid workers in the

County.[6/] The Library is funded, in part, by a tax paid by residents of the County. The T-shirts were to publicize to the tax paying consumers of the worker's services a message regarding the status of these workers' wages.

Local 1014's right to engage in protected activity by wearing CWA T-shirts, however, is not an unfettered right; it must be balanced against an employer's legitimate business needs. N.J. Dept. of Corrections, supra; City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 215 (¶4107 1978); N. Warren Reg. Bd. of Ed. and Bridge, supra. Here, the Library asserts that it has a legitimate business need to project a professional image. Additionally, the Library argues that the T-shirts were intended to be offensive, were directed to the Library patrons and were in contravention of the established dress code policy.

However, the Library's dress code policy expressly permits T-shirts to be worn by staff. Therefore, T-shirts are not inherently unprofessional attire. Nevertheless, Devlin argues that any T-shirt critical of the Library is unacceptable under the dress code.

The policy does prohibit clothing with messages that "may be offensive to others." Offensive language is defined as comments that are "hurtful, derogatory or obscene." Black's Law

---

6/ Walko elaborated that two-thirds of the employees make less than $15.00, around 40 percent make less than $12.00 per hour, and that many workers make less than $10.00 per hour.

Dictionary, 2nd Ed., on-line. The message on the T-shirts are none of those. Moreover, the Library offered no evidence that the message on the T-shirt was offensive, only that it is critical of the Library's low wages paid to its staff. No patron complained to management about the T-shirts. Devlin's conjecture that patrons of the Library might be intimidated by the staff wearing them was pure speculation. I can not reasonably find or hold that a patron would be any more intimidated or inflamed by the T-shirt because they feel the employee is disgruntled than I can reasonably find a patron would be inflamed by learning an employee is upset with being under-compensated.

An employer may not stifle Local 1014's message or an employee's right to voice its message just because it is undesirable to the employer. See, Morris Tp. and PBA, P.E.R.C. No. 2017-21, 43 NJPER 140 (¶43 2016). The Commission in Black Horse Pike, P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981), explained:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an

> employee of that employer (citations omitted).
>
> When an employee is engaged in protected activity, the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. [7 NJPER at 503]

The Commission further expanded on the employer's limitation:

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. [7 NJPER at 504]

The Commission has repeatedly recognized that public employees have a protected right to publicly address terms and conditions of employment. Borough of Carteret, P.E.R.C. No. 2016-28, 42 NJPER 231 (¶66 2015). (criticisms including disrespectful comments to mayor at public meeting is protected conduct); State (Stockton State College), P.E.R.C. No. 2011-78, 37 NJPER 200 (¶63 2011) (local president who engaged in a profanity laced shouting match with his supervisor over hiring is protected conduct); Florham Park Bd. of Ed., P.E.R.C. No. 2004-83, 30 NJPER 230 (¶86 2004) (highly critical telephone message from Association president to Superintendent about "lack-luster" workshops is protected activity); Middletown Tp. Bd. of

Ed., P.E.R.C. No. 96-45, 22 NJPER 31, 33 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. 149 N.J. 35 (1997) (association representatives comment at public referring to unnamed Board representative as a "lying scuzzball" is protected activity); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (1979) (shouting match between union president and city manager about employee complaints is protected activity). These cases demonstrate that public expression by public employees about terms and conditions of employment whether in a letter, at a public meeting or on a T-shirt are protected under the Act.

Moreover, the Library has put forth no legitimate or substantial justification to restrict the employees from wearing the CWA T-shirts. The Library correctly cites County of Sussex, P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994), for the proposition that an employer has the right to place "reasonable time and place restrictions . . . [on] the freedom of employees to discuss their employment conditions" when there is a legitimate business need. Sussex is inapposite in this instance.

In Sussex, the County issued a disciplinary warning to a nurse for violating County policy which prohibits conversations, such as her two day suspension, with other employees in or near areas frequented by patients. Although recognizing an employer's legitimate interest in limiting personal conversations around patients, the Commission held that it did not appear the brief

conversations at a nurses station compromised patient care and therefore the employer did not meet "its burden of demonstrating a legitimate operational need[ ]" justifying disciplinary action. Id. at 434.

Similarly, the Library has not met its burden in demonstrating that the Director's prohibition of the T-shirts during working hours was a reasonable time and place restriction based upon a legitimate business need. The enforcement of a dress code may be a legitimate business need; however, banning T-shirts that are expressly permissible based upon a message that is not objectively offensive is not a reasonable restriction. It is censorship based upon a dislike of the message. It is a prohibition on concerted activity. There is no evidence presented by the employer that wearing the T-shirts will interfere with the productivity or performance of unit members, only mere speculation that it may intimidate or inflame a patron. The existence of an appearance policy and guidelines, while reasonable, cannot be unreasonably applied.

Accordingly, I find that the Library's absolute prohibition on the CWA T-shirts violates 5.4a(1) of the Act.

Special Circumstances Test

The Act's unfair practice provisions parallel their counterparts in the National Labor Relations Act ("NLRA") governing private sector labor relations. 29 U.S.C. ¶158 and

¶160. As such, the Commission may rely upon federal sector precedent in unfair practice litigation as a guide for interpreting our Act. Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970); Morris Cty. and Morris Coun. No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. denied 182 N.J. 427 (2005).

The Commission, the Courts and the National Labor Relations Board (NLRB) have generally recognized the right of employees to wear union T-shirts, insignia and buttons at work. See, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-803 (1945); NLRB v. Starbucks Corp., 679 F.3d 70, 77 (2d Cir. 2012); New Jersey Department of Corrections, supra. In such cases, the right is not absolute but rather the NLRB has adopted a "special circumstances" test. Republic Aviation Corp. v. NLRB, Id. If the employer demonstrates "special circumstances" which warrants a restriction on the employee's right then there is no violation. Id. The NLRB has found special circumstances exist which permit a proscription on wearing union insignia when it may jeopardize employee safety, damage machinery, exacerbate employee discord, or unreasonably interfere with a public image which the employer has established. United Parcel Service, 312 NLRB 776, 144 LRRM 1953 (1993); Nordstrom, Inc., 264 NLRB 698, 700, 111 LRRM 1344 (1982).

New Jersey Department of Corrections, supra, a case of first impression, examined whether, under all the circumstances, the State had a legitimate and substantial basis for proscribing T-shirts that stated "Don't Privatize...Just Manage Wise" within a secured inner-perimeter of a correctional facility. In applying NLRB precedent, the Hearing Examiner determined that wearing message T-shirts while at work to communicate about terms and conditions of employment is a protected activity. Id. However, because the employer was a State prison where "security is paramount,"[7/] she found that was a "special circumstance" warranting a restriction on the employees right to wear the T-shirts within the secured inner-perimeter of the correctional facility. The Hearing Examiner wrote in pertinent part:

> Employees who work within secured areas of prisons have narrower first amendment and collective activity rights than they do outside these areas.
>
> * * *
>
> [R]egulations on speech could be more restrictive. Here, the message is one of public concern, but within the inner-perimeter there are few, if any, members of the public. The secured inner-perimeter of a

---

7/ The Commission affirmed in New Jersey Dept. of Corrections, supra. In doing so, the Commission noted, "The parties agree that the 'special circumstances' approach should be applied in this case and we will do so. We do not believe, however, that the "special circumstances" approach is materially different from asking whether a ban has a legitimate and substantial operational justification since both approaches focus on the operational need for a ban."

> state prison is not a public forum, and, the State has an inherent greater ability to limit speech within this area.
>
> Id. at 224, citations omitted.

The Hearing Examiner went on to acknowledge that the prohibition was narrowly drawn, limited only to the inner-perimeter of a secured facility but permissible "at work, on working time" in any other area of the prison. Id.

Here, the employer has issued an absolute prohibition on unit members wearing the message T-shirts. Accordingly, the employer must demonstrate the existence of "special circumstances" which permits its broad prohibition. To do so, the Library relies upon its dress code policy and an assertion that it desires to maintain a professional image.

The NLRB has held that special circumstances exist when the wearing of union insignia may "unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." United Parcel Service, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). In doing so, the Board requires an employer to show that the message interferes with that image. Eckerd's Market, Inc., 183 NLRB 337, 338 (1970). The Board has rejected the employer's special circumstances argument, where the employer's history of allowing employees to wear a variety of apparel frustrated the argument that the ban was necessary to

maintain a professional public image with customers. AT&T and CWA, 362 NLRB No. 105 (2015).

The Library relies on Davison-Paxon Company, Division of R.H. Macy & Co. v. NLRB, 462 F.2d 364 (5th Cir. 1972) in support of its argument that enforcement of an employer's dress code policy may include a prohibition of union messaging at work. Davison-Paxon Company was a retail department store chain in several states, where union organizers distributed large yellow buttons with black letters that stated, "Vote Yes Retail Clerks International Association, AFL-CIO." Management asked employees to remove the buttons in customer areas.

In reversing the NLRB, the 5th Circuit found the prohibition was reasonable in light of the unique circumstances presented in the case. The Court noted:

> Here the employer instituted the anti-button rule as an interpretation of the general dress code, which was reasonable in light of the peculiar characteristics of the button involved here, and limited the rule's application to employees on the selling floor. Undisputed evidence was here presented to employee factions and the union's method of distributing the buttons had caused labor unrest, which created at least the possibility that Davison's labor problems would erupt on the selling floor. We hold only that under these particular facts the Board, in prohibiting enforcement of Davison's anti-button rule, did not take proper cognizance of the employer's interest in protecting his business and thus incorrectly struck the balance of interests involved.

Unlike Davison's, the Library is not a retailer of textiles, with a dress code prohibiting "unfashionable" clothing,[8/] the prohibition of the T-shirts was not limited to employees who have contact with "customers," there was no evidence of employee factions or disruption, and there was no evidence that the T-shirts were distributed in a manner which caused disruption or that they were to be worn for the purpose of union campaigning. Thus, the unique facts of Davison are inapposite to the facts here.

Specifically, the Library is not a retailer but rather a government service provider. The Library's dress code is not directly linked to the services provided as textiles are linked to the salable goods in Davison. The Library's dress code generally permits T-shirts to be worn by employees, and there is no union campaign which created animosity amongst the workers. There are no special circumstances present here which would balance conflicting interest in favor of the Library. To the contrary, the limited testimony presented reveals that the Library's blanket ban on the CWA's T-shirts was not a reasonable

---

8/ The testimony of all witnesses clearly established that Davison's is, and always has been, concerned about the appearance of its employees before its customers and has always insisted that its sales personnel appear in businesslike attire and without items which are unfashionable or in bad taste. The Trial Examiner found in fact that "obviously, [Davison's] liked the idea of its employees doubling both as customers and fashion models of [its] merchandise.

enforcement of its dress code policy, rather at best was an arbitrary application of it that is tantamount to suppression of the employees protected right.

The Library also cites NLRB v. Harrah's Club, 337 F.2d 177 (9th Cir. 1964) in further support of its position that it can ban the CWA T-shirts to protect and maintain a professional image. Harrah's Club involved uniformed employees and a company prohibition on "any jewelry or other personal adornment on the uniform." Id. at 179. (Emphasis added). The employees in Harrah's were subject to daily inspections and the rule was "strictly enforced." In reversing the NLRB decision to permit employees to wear a union pin on their uniform, the Court determined:

> The record shows that the wearing of union buttons was not part of any concerted campaign to organize the employees, or to promote collective bargaining, or to gain better hours, wages, or working conditions.
>
> * * *
>
> We think there must be evidence of a purpose protected by the act -- i.e., collective bargaining or other mutual aid or protection. This record is totally devoid of any evidence of such a purpose. On the contrary, the only evidence on the question of purpose -- the testimony of the employees themselves -- shows that they had no express purpose in mind in wearing the buttons. There was no attempt to organize the employees: they were already organized. There was no attempt to wring from management better wages, hours, or working conditions.
> Id. at 178-179.

Harrah's Club is readily distinguishable, not just because it involved uniformed employees, who had direct contact with the public, but because the record is clear that the Local 1014 T-shirts were in support of concerted activity, very specifically designed to address employee compensation.

In United Parcel Service Inc. v. NLRB, 195 NLRB 441 (1972), the NLRB adopted a trial examiner's decision, restricting uniformed drivers from wearing an "intra-union" election button on their route. The Board found that maintaining its public image constitutes a special circumstance. Id. at 44. In doing so, the Board determined that:

> The public image developed by UPS appears to be an integral part of its business and a substantial business asset. If it were harmed or destroyed by the actions of the drivers, there is no way of determining what the damage to UPS might be. Id. at 46.

However, the Board further noted,

> As a practical matter, the driver on the route is giving up very little in not wearing the Ryan button. His union affiliation and union activities are made known to the public by wearing his union dues button. The public, at large, is little, or not at all, interested in the competition for the post of business agent that recurs internally to Local 294. The purpose of the button is to induce other members of Local 294 to vote for Ryan. This purpose may be achieved at the plant or in places where other members of Local 294 are present. The probabilities are very small that this purpose will be achieved were the button worn by the driver on his route. The record contains no evidence on this subject. Nevertheless, it is not

> unreasonable to find that the number of Local 294 members that UPS driver meets on the delivery route is negligible. Thus, in balancing conflicting rights as stated above, the restriction posted here deprives the employee of something of small value in relation to the potential damage to UPS. Id. at 50-51.

Unlike the prohibited buttons in United Parcel Service which communicated to only co-workers, the T-shirt message at issue here was meant to communicate with the Library Commission and patrons who provide funding to support Library services, namely that employees were dissatisfied with being under-compensated. Prohibiting the ability to communicate this message had a much larger consequence than the prohibition in United Parcel Service which the Court found to be inconsequential.

The following cases were accurately cited by Local 1014 in support of its position that the Library has failed to establish special circumstance to warrant a blanket prohibition of the employees right to wear the CWA T-shirts. For instance, Inland Counties Legal Services, 317 NLRB 941 (1995), involved a public service law office which required a secretarial employee to remove her union button or risk being written up. Id.

The NLRB rejected the judge's finding that the employer had demonstrated the existence of "special circumstances" because of the public nature of its work and funding, and . . . had

established a need to avoid open displays of partisanship." Id.

The Board wrote:

> Neither the mere possibility that the Respondent's employees may come into contact with a customer or supplier nor an employer's interest in avoiding controversy among its clientele that an expression of union membership or support might engender outweighs the employees' Section 7 right to wear these emblems. Id. Nordstrom, Inc., 264 NLRB 698, 701-702 (1982). Likewise, the pleasure or displeasure of an employer's customers does not determine the lawfulness of banning employee display of insignia. Howard Johnson Motor Lodge, 261 NLRB 866, 868 fn. 6 (1982).
> Id.

The Board further elaborated on the judge's findings on the effect, or potential effect, of the employer's clientele.

> Regarding the judge's finding that the nature of the Respondent's mission requires that it avoid open displays of partisanship, we note that the button's content 'District 65, UAW, AFL-CIO,' is neither political, partisan, or provocative. Cf. Virginia Electric & Power Co., 260 NLRB 408, 409 (1982). Nor does it fall within the limits of the regulations governing the Respondent's operations as discussed above, as it does not align the agency or the wearer with any political party or campaign. Thus, even assuming the Respondent's prospective clients come in contact with an employee wearing such a button, we find that the Respondent has failed to present any evidence of either actual or potential injury. Moreover, as for the speculation of the Respondent and the judge that the button's message might make a negative impression on clients, The Respondent provides no basis for inferring that a union button would prejudice its interests or the interests of its clients. Moreover, the mere possibility of such

> offense does not outweigh the employees' right to wear such items. Escanaba Paper, Co., 314 NLRB 732 (1994). Id. at 942.

Other recent NLRB case law has addressed analogous situations. In Medco Health Solutions of Las Vegas Inc. v. NLRB, 364 NLRB 115, 2016 NLRB Lexis 662 (2016), the Board found an employer failed to establish special circumstances justifying its requirement that an employee remove a T-shirt bearing the slogan "I don't need a WOW to do my job."[9/] An employee was told to remove the T-shirt because it violated the employer's dress code which prohibited clothing with language that was "degrading, confrontational, slanderous, insulting or provocative." Id. The Board explained:

> Even interpreting 'public image' more broadly, however, we would find that the Respondent has failed to show a public image that would justify banning Shore's T-shirt. Employees were not required to wear uniforms and were permitted to wear a variety of nonbranded apparel, including T-shirts. There was no suggestion of vulgarity in the message on Short's T-shirt. In these circumstances, the dress code's general references to maintaining a 'professional workplace,' a 'neat, clean, conservative appearance,' and a perception among customers that the Respondent will be 'effective' are insufficient to establish a public image that would justify its ban on Short's T-shirt. Id. at fn. 5.

9/ "WOW Program" was an employer created employee achievement and recognition program.

See also, Boch Imports Inc. v. NLRB, 362 NLRB 83 (2015), enfd. sub nom Boch Imports, Inc. v. NLRB, 826 F.3d 588 (1st Cir. 2016). (Dress code policy that barred employees with public contact from wearing message-bearing clothing held overly broad and violative of employees protected rights). See also, In-N-Out Burger Inc. v. NLRB, 365 NLRB 39, 2017 Lexis 117 (March 21, 2017). (Board finds fast food chain employer failed to establish special circumstances sufficient to ban employees from wearing "Fight for $15" pin).

The Library has failed to establish any "special circumstance" to warrant its absolute ban of the CWA T-shirts. There is no allegation that there are concerns for security, employee productivity or employee discord. The Library asserts that interference with its public image is a special circumstance to permit its ban on the CWA T-shirts. Without evidence of a narrow ban necessary to uphold a demonstrable image, I cannot find the restriction is warranted. As no evidence was presented, the Library has failed to meet its burden of establishing special circumstances to justify the prohibition.

First Amendment

CWA also asserts that the ban on the T-shirts independently violates the First Amendment right of free speech under the United States Constitution and Article I, ¶6 of the New Jersey Constitution. The First Amendment to the United States

Constitution provides in relevant part, that, "Congress shall make no law . . . abridging the freedom of speech . . . U.S. Const., Amend. I." It is applicable to the political subdivisions of the States through the Fourteenth Amendment. See, Lovell v. Griffin, 303 U.S. 444, 450 (1938).

The New Jersey Constitution guarantees a broad affirmative right to free speech:

> Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. N.J. Const., Art. I, ¶6.

The Commission may consider constitutional claims of free speech rights as part of exercising its exclusive unfair practice jurisdiction. PERC is "competent to pass upon constitutional issues germane to proceedings before [it]. . ." and its "delegated authority is broad enough to enable it to apply laws other than that which it administers, and should be construed 'so as to permit the fullest accomplishment of the legislative intent.'" Hunderton Central H.S. Bd. of Educ. v. Hunterdon Central H.S. Teach. Ass'n, P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super. 468 (App. Div. 1980), aff'd 86 N.J. 43 (1981) (citing Plainfield Bd. of Educ. v. Plainfield Ed. Ass'n, 144 N.J. Super. 521 524 (App. Div. 1976)); Bridge and N. Warren Reg. Bd. of Ed., supra.

In Pickering v. Bd. of Educ., 391 U.S. 563 (1968), the U.S. Supreme Court examined the degree to which speech of public employees can be constitutionally regulated within the meaning of the First and Fourteenth Amendments. While the government may impose limits on job-related speech, public employees do not forfeit "the First Amendment Rights they would otherwise enjoy as citizens to comment on matters of public concern." Id. at 568.

> [t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
> Id. at 568.

In Karins v. City of Atlantic City, 152 N.J. 532, 548 (1988), the New Jersey Supreme Court adopted Pickering and its progeny as the standard for deciding whether conduct-related speech in public-sector employment is constitutionally protected." The Court wrote:

> The threshold question in applying the Pickering balancing test is whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern.' . . . '[W]hen employee expressing cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'
>
> Once the public interest prong of the Pickering standard has been satisfied, then a

> court must balance the employee's interest in free speech against the 'government's interest in the effective and efficient fulfillment of its responsibilities to the public.' . . . [A]n employer should not be forced 'to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.'
>
> Thus, a two-part balancing test has evolved from Pickering. . . .First, can the employee's speech be fairly characterized as relating to a matter of public concern? . . . Second, is there a governmental interest, as an employer, in the effective and efficient fulfillment of its responsibilities to the public through its employees? . . .
>
> To summarize, when private expressing is involved, the Pickering . . . balancing test looks not only to the content of the speech, but also the 'manner, time, and place in which it is delivered.'
>
> [Karins, 152 N.J. at 549-51 (citations omitted)]

Recently, the Commission has twice applied the Pickering balancing test. First, in Carteret, supra, the Commission held that a public employee's disrespectful comments to the Borough's Mayor at a public meeting, were protected given the totality of the exchange which concerned union-related issues. Applying the Pickering balancing test, the Commission affirmed the Hearing Examiner's decision that the Borough's departmental policy prohibiting "profane or insulting language" was "over-broad in that it allows no latitude for situations . . . where the employee is acting in a union advocacy role and engaging in

protected conduct." Id., citing H.E. at 19-20. The Commission held that there was no evidence that the exchange interfered with the employer's workplace.

In N. Warren Reg. School District and Bridge, supra, the Commission again applied the Pickering balancing test both to written communications and verbal comments made by a teacher to co-workers. The Commission affirmed the Hearing Examiner's finding that the communications had led to numerous complaints the teacher’s co-workers of intimidation and harassment. The Commission held that the balance rested on the side of the Board as the employee was not engaged in protected activity, there was evidence that his actions "threatened workplace discipline and order," and there was no evidence that his action implicated a matter of public concern. As such, he did not meet the second prong under Pickering.

Applying the Pickering balancing test to the facts here, the balance rests on the side of Local 1014. The CWA T-shirts "speak" to a matter of public concern. The T-shirts expressly address the service and wages of the Library employees. The message was intended for the members, the employer, tax payers and patrons. Local 1014 President Walko confirmed that an increase of wages to $15.00 per hour was a national as well as a local issue. The T-shirts do not address issues relevant only an individual worker, rather they advocate for increased

compensation for public workers with the expenditure of public funds. I find this is not an issue of private expression but one of public concern.

Furthermore, for the reasons already expressed above, the Library has not met its burden in demonstrating that the "speech" of its workers in wearing the CWA T-shirts would hinder effective operation of its services or impinge on the fulfillment of its mission. On balance, I find that the prohibition of the employees' right to wear the CWA T-shirts which address a public concern, without any evidence that it had or would have a detrimental effect on the effective and efficient fulfillment of responsibilities to the public, violates the employees' free speech under the First Amendment to the United States Constitution and Article I, ¶6 of the New Jersey Constitution.

> We do not underestimate the internal unease or unpleasantness that may follow when a government employee decides to break rank and complain either publicly or to supervisors about a situation which s/he believes merits review or reform. That is the price the First Amendment exacts in return for an informed citizenry. Monsanto v. Quinn, 674 F.2d 990, 1001 (3d Cir. 1982).

CONCLUSIONS OF LAW

Based upon the above findings of fact and legal analysis, I make the following:

The Camden County Library Commission violated section 5.4a(1) of the Act when it ordered Lou Pavone to remove his

T-shirt with the CWA insignia and message or be subject to disciplinary action and further prohibited all Local 1014 members from wearing the T-shirt during work. The Library Commission's business justification, namely upholding its appearance policy, did not outweigh the employees' right of free speech under our Act, under the NLRB special circumstance test or under the First Amendment of the United States Constitution and Article I of the New Jersey Constitution.

RECOMMENDED ORDER

I recommend that the Commission order that the Camden County Library Commission:

A. Cease and desist from:

1. Interfering with, restraining or coercing unit personnel in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with CWA members' right to wear T-shirts during work with a CWA insignia that state "Camden County Library System, Highest Rated County Service, Lowest Paid County Workers" and by threatening discipline for wearing the T-shirts.

B. Take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by

the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

/s/Deirdre K. Hartman-Zohlman
Deirdre K. Hartman-Zohlman
Hearing Examiner

DATED: October 2, 2017
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 12, 2017.

RECOMMENDED

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing unit personnel in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with CWA members' right to wear T-shirts during work with a CWA insignia that state "Camden County Library System, Highest Rated County Service, Lowest Paid County Workers" and by threatening discipline for wearing the T-shirts.

Docket No. CO-2016-098

Camden County Library
(Public Employer)

Date: _____ By: _____

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

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