

P.E.R.C. NO. 80-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF ASBURY PARK,

Respondent,

-and-

Docket No. CO-79-178-53

LOCAL 196, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO,

Charging Party.

SYNOPSIS

In an unfair practice proceeding the Commission concludes, in agreement with the Hearing Examiner, that the City interfered with employee rights by suspending for three days an employee who was engaging in protected activities when he approached the City Manager outside of working hours and away from the workplace in an attempt to set up a meeting regarding the processing of employee grievances. The City was ordered to cease and desist from this activity, to rescind the suspension and to make the employee whole for the three days' wages lost by reason of his unlawful suspension. Neither party had filed exceptions to the Hearing Examiner's Recommended Report and Decision.

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LOCAL 196, INTERNATIONAL
FEDERATION OF PROFESSIONAL AND
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Charging Party.

Appearances:

For the Respondent, Kaplan & Steinberg, Esqs.
(Mr. Mark A. Steinberg, Of Counsel)

For the Charging Party
Mr. Joseph C. Spicuzzo, Business Agent

DECISION AND ORDER

On January 12, 1979, Local 196, International Federation of Professional and Technical Engineers, AFL-CIO ("Local 196") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the City of Asbury Park ("City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), N.J.S.A. 34:13A-1 et seq. Specifically, Local 196 claims the City violated subsections 5.4(a) (1), (2) and (3) by engaging in a course of conduct, characterized as "union busting", when it suspended for three days without pay Sal Caliendo ("Caliendo"), President of the Asbury Park Chapter of Local 196.

A hearing was held before Commission Hearing Examiner Robert T. Snyder on May 3, 1979 at which time all parties were given an opportunity to present evidence, to examine and cross-examine witnesses and argue orally. The Hearing Examiner issued

his Recommended Report and Decision on June 29, 1979, H.E. No. 79-43, 5 NJPER _____ (¶ _____ 1979), a copy of which is attached to this Decision and Order and made a part hereof. The Report was served upon the parties and the case was transferred to the Commission, N.J.A.C. 19:14-7.1. Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision, N.J.A.C. 19:14-7.3.

The incident which precipitated the suspension began with a chance meeting between Caliendo and City Manager John Collins, on the evening of September 29, 1978 at Asbury Park Convention Hall, a city owned facility. Unfortunately what began as an informal attempt by Mr. Caliendo, as the Local's president, to request a meeting with Mr. Collins to discuss certain employee complaints, deteriorated into a shouting match between the two men in which both lost their composure.^{1/} The evidence established that both men became loud and argumentative and that Caliendo's language and conduct was similar to that of Collins.^{2/} Based upon this evidence the Hearing Examiner dismissed the allegations that the City was motivated by anti-union animus, in violation of

^{1/} The Hearing Examiner found that Mr. Caliendo and Mr. Collins had in the past developed an informal but effective method of resolving employee grievances and other concerns by meeting quickly to discuss the situation which prompted the complaints. He further found that Mr. Caliendo's attempt to request such a meeting upon their chance meeting was consistent with this practice.

^{2/} The Charging Party alleged that Mr. Collins' initial response to Caliendo was abusive and utilized profanity. However, the Hearing Examiner credited Collins that he did not resort to such language initially, though he did conclude that Collins utilized such language later. The Hearing Examiner further found that Collins' initial response to Caliendo was curt and somewhat hostile as Collins was annoyed at being confronted with work problems in an after hours' setting.

N.J.S.A. 34:13A-5.4(a)(3), when it suspended Caliendo as a result of the argument. Similarly he recommended the dismissal of the alleged violation of N.J.S.A. 34:13A-5.4(a)(2) because he found no evidence of an intention by the City to dominate or interfere with the administration of Local 196.

However the Hearing Examiner did find that Caliendo's activities were "protected" by this Act and therefore the suspension for engaging in such activities violated N.J.S.A. 34:13A-5.4(a)(1) in that retaliating against him constituted "interference", "restraint" or "coercion" of an employee for "the exercise of rights guaranteed by this Act". Mr. Caliendo's attempt to talk to Mr. Collins to set up a meeting was consistent with the parties' past accepted practice. His conduct was specifically related to the processing of employee grievances and concerns and was in furtherance of his responsibilities as union president. While Mr. Collins may have been free to not speak to Mr. Caliendo or to tell him to contact him during normal working hours, he was not free to utilize his position as City Manager to punish Mr. Caliendo for what was initially protected activity. The Hearing Examiner applied the standard developed in In re Hamilton Twp Board of Education, P.E.R.C. No. 79-39, 5 NJPER 188 (¶10105 1979) relying on Crown Central Petroleum Corp., 74 LRRM 2855 (1970) to hold that the suspension was violative of Mr. Caliendo's right to be free from "penalty or reprisal" for assisting employee organization. N.J.S.A. 34:13A-5.3.

The Commission having reviewed the entire record, and noting the absence of exceptions, ^{3/} hereby adopts the finding of

3/ N.J.A.C. 19:14-7.3(b) provides, in part, that "Any exception which is not specifically urged shall be deemed to have been waived".

facts and conclusions of law contained within the Hearing Examiner's Report and Decision. The Commission reiterates and emphasizes the rationale stated in In re Hamilton Twp. Bd of Ed, supra, that in the processing and resolution of grievances the parties must be on an equal footing and not in a master and servant relationship. Caliendo's conduct, while loud, was apparently not violent or physically threatening and the suspension notice itself cites "insubordination and conduct unbecoming a public servant". An employee may not utilize his or her employee organization position to attempt to undermine an employer's supervisory and management status, or to engage in offensive behavior. But neither may an employer utilize its power to punish an employee for engaging in protected activity which happens to annoy the employer's representative because it comes at an inconvenient or undesirable time. This is particularly true where the conduct punished is of the same nature as that engaged in by the employer toward the employee.

ORDER

For the foregoing reasons and upon the entire record herein, it is hereby ORDERED that the complaint as to the alleged violations of N.J.S.A. 34:13A-5.4(2) and (3) be dismissed.

Furthermore, it is hereby ORDERED that the City of Asbury Park:

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 for conduct while engaging in grievance processing.

B. Take the following affirmative action:

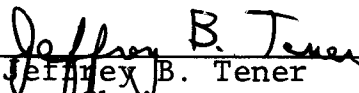
1. Expunge and rescind the Notice of Suspension dated October 2, 1978, suspending employee Sal Caliendo three work days on the charges of insubordination and conduct unbecoming an employee in the public service.

2. Make Sal Caliendo whole by paying to him one hundred and thirty-six (\$136.00) dollars representing the three days' wages he lost by reason of his unlawful suspension, less any monies actually earned by him during those three days.

3. Post at the Asbury Park City Hall in conspicuous places, 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 thereafter.

4. Notify the Chairman, in writing, within twenty (20) days of the receipt of this order, what steps have been taken to comply herewith.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hipp, Parcels and Hartnett voted for this decision. None opposed. Commissioners Graves and Newbaker were not present.

DATED: Trenton, New Jersey
August 28, 1979
ISSUED: August 29, 1979

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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act by refraining from disciplining employees for conduct while engaging in grievance processing.

WE WILL expunge and rescind the Notice of Suspension dated October 2, 1978, suspending employee Sal Caliendo three work days on the charges of insubordination and conduct unbecoming an employee in the public service.

WE WILL make Sal Caliendo whole by paying to him one hundred and thirty-six (\$136.00) dollars representing the three days' wages he lost by reason of his unlawful suspension, less any monies actually earned by him during those three days.

City of Asbury Park

(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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Docket No. CO-79-178-53

LOCAL 196, INTERNATIONAL
FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the City of Asbury Park committed an unfair practice when it suspended Local 196 President Sal Caliendo for insubordinate conduct engaged in during the processing of union grievances. The Examiner also recommends that two other allegations of unfair practices related to the same incident be dismissed.

Local 196 had charged that City Manager John Collins cursed the union and refused to discuss grievances relating to working conditions and contractual clothing allowances for certain employees in the negotiating unit represented by Local 196 when he unexpectedly met Caliendo who was off duty the evening of September 29, 1978, at the Asbury Park Convention Hall. A heated exchange between the two led Collins to order Caliendo suspended for three days without pay. The Examiner concluded that in view of a long standing informal working relationship between them on handling of work disputes, and the circumstances surrounding the spontaneous interchange at the Convention Hall, Local 196 had failed to sustain its burden of proof that the Manager's conduct toward Caliendo had been motivated by anti-union considerations. Accordingly, he recommended dismissal of the allegation of discrimination in regard to Caliendo's employment. However, the Examiner followed the Commission's recent decision in Matter of Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (para. 10068 1969) in concluding that the Manager's decision to suspend Caliendo represented a subversion of the principle of equality which must exist between the parties to the grievance process if the efficacy of an essential key to the system of public sector labor relations in the State is to be insured. The Examiner therefore found the City interfered with, restrained and coerced its employees in the rights guaranteed by the Act in violation of N.J.S.A. 34:13 A-5.4(a)(1) and ordered the City to rescind its suspension of Caliendo and pay him the three day's salary he had forfeited.

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 Respondent
Kaplan and Steinberg, Esqs.
(Mark A. Steinberg, Esq., Of Counsel)

For the Charging Party
Joseph C. Spicuzzo, Business Agent

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 12, 1979, Local 196, International Federation of Professional and Technical Engineers, AFL-CIO ("Local 196") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the City of Asbury Park ("City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, Local 196 claims the City violated Section 5.4 (a)(1)(2) and (3) ^{1/} by engaging in a course of conduct, characterized as "union busting" directed in particular against Sal Caliendo ("Caliendo"), President of the Asbury Park Chapter of Local 196. This conduct is alleged to have commenced

1/ Section 5.4(a)(1) prohibits employers from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act."; 5.4(a)(2) prohibits employers from "Dominating or interfering with the formation or administration of any employee organization."; and 5.4(a)(3) prohibits employers from "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."

the evening of September 29, 1978, ^{2/} during a chance meeting at the Asbury Park Convention Hall, when City Manager John Collins ("Collins") coupled a refusal to discuss with Caliendo certain union problems, with invective against the union, and culminated in a summary three day suspension without pay of Caliendo, allegedly for insubordination and conduct unbecoming a City employee during the course of the September 29 contact with Collins.

It appearing that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 6, 1979. By Answer filed February 16, 1979, the Respondent City denied the material allegations of the Charge, denied that it had committed the unfair practices alleged and interposed an affirmative defense that Caliendo's suspension was carried out in strict conformance with Civil Service rules and regulations and was levied for an act of insubordination as a disciplinary action. The original hearing date of April 11, 1979 was postponed while the parties explored the possibility of resolving the underlying dispute without the necessity for litigation before the Commission. When this proved unsuccessful, hearing was scheduled and held on May 3, 1979. Both parties were given the opportunity to examine witnesses, to present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on May 17, 1979 and the Respondent on May 24, 1979.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

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

2. Local 196, International Federation of Professional and Technical Engineers, AFL-CIO, is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. At all times material to this proceeding, Local 196 has been the exclusive representative for collective negotiations concerning the terms and conditions of employment for all white collar and blue collar workers employed by the City.

4. The most recent collective negotiation agreement between the parties covers the period January 1, 1978 to June 30, 1979. Among its provisions is one

^{2/} All dates hereinafter are in 1978 unless otherwise indicated.

providing a clothing allowance of \$375.00 per year, to be increased to \$500.00 as of January 1, 1979, to be paid quarterly to each member of the bargaining unit. The agreement also contains a grievance procedure, the stated purpose of which "...is to secure at the lowest possible level, an adequate solution to the problems which may arise affecting the terms and conditions of this Agreement" and with the added note that "The parties agree that this procedure will be kept as informal as may be appropriate." A grievance is defined as "any controversy arising over the interpretation, application or alleged violation of the terms and conditions of this Agreement and may be raised by an individual, the Union or the City." With respect to individual or Union grievances, step one of the process is a presentation by the grievant to his or her immediate supervisor. Unsettled grievances at step two are presented to the department head. Grievances still not resolved to satisfaction of any of the parties at step three are presented in writing to the City Manager and at step four may be referred to final and binding arbitration.

5. At the time of the incident which gave rise to the instant charge, Sal Caliendo, a City employee within the unit who had been employed by the City for more than six years, was the Local 196 President and John Collins had then been employed as the City Manager for 15 months. Over the period of time from Collins' initial employment and up to September, 1978, Caliendo had pursued Local 196 grievances with Collins directly in an informal manner, by-passing the formal grievance steps, and their relationship had generally been cordial, with only one instance which Collins could recollect during which an exchange had become heated. Thus, for example, Caliendo periodically telephoned Collins' office to arrange to meet with him to discuss problems which arose on the job and could not be resolved at the work place. Upon being advised of the problem, Collins would contact the supervisor or manager directly involved and seek to resolve the matter to the parties' mutual satisfaction. Caliendo's policy on behalf of Local 196 was to avoid arbitration because of its costs and disruption of the relationship; his efforts rather were directed to working out problems on an informal basis. ^{3/} To date no grievances had remained unresolved after third step level meeting and none had proceeded to arbitration.

3/ Both Collins and Caliendo agreed that with respect to certain problems that had arisen, Collins' initial, unsuccessful attempts to resolve them had to be reinforced by "knocking heads" of supervision to achieve management compliance with contract provisions.

6. Collins saw Caliendo on a fairly regular basis at least once a week during the summer of 1978 with respect to problems of a continuing nature that had developed on the job. Among them was an allegation by Caliendo that a foreman at the City yard, one Juliano, had been treating workers unfairly, harassing and threatening them. One incident involved a threat by Juliano to some of the employees that they would be sent home if they refused to pick up extra heavy 55 gallon drums, beyond required weight limits, which contained putrid and smelly remains of fish disposed of by a fish market on Main Street. Collins had taken this problem up with the foreman's immediate supervisor, apparently without a successful resolution of it. Another lingering problem involved a claim by Caliendo that the City Beach Director, Mr. Del Pessio, had been issuing policy memoranda to employees violative of the terms and spirit of the collective negotiations agreement in that they adversely affected employee benefits and conditions. Here, too, Collins had made an effort to resolve the matter by speaking to Del Pessio to change his interpretations of the agreement and to bring them into accord with his own and Caliendo's views regarding the spirit and meaning of the contract.

7. Commencing sometime in September work problems involving Foreman Juliano's mistreatment of workers and Beach Director Del Pessio's improper interpretation of the agreement had resurfaced. During the one to two weeks prior to September 29, Caliendo sought to contact Collins to arrange a meeting to discuss these matters, but was unsuccessful. Caliendo left messages with Collins' secretary which Collins received. In contrast to the pattern of their relationship until this time, Collins did not respond to the messages, even to arrange a meeting for a future time, explaining [on the stand] that it had been a particularly busy period for him.

8. By September 29, the last Friday in the month, Caliendo had learned during the day that out of 200 odd employees in the collective negotiations unit of blue and white collar workers, approximately a dozen Local 196 members, including himself, had failed to receive their quarterly clothing allowance. After learning these facts, on September 29, Caliendo contacted Del Pessio. The Beach Director knew nothing about it. Caliendo then spoke to Siciliano, the City Treasurer, who said he would check into it. By the end of the day the men had not been paid.

9. Caliendo's work day was from 7:00 a.m. to 3:30 p.m. On the evening of September 29 Caliendo accompanied another employee to the City Convention Hall,

a City owned facility, to pick up some keys at the Convention Hall office. While at the Hall, by chance, Caliendo happened to run into Collins, who had spent the day on business in Trenton but had come to the beach front and Hall that evening to speak with James McLaughlin, the producer of a home trade show then under way at the Hall and "to basically relax" (Tr. 50). When Caliendo saw Collins it was 9:00 p.m. and Collins was then having a conversation at the ticket gate with an off-duty City Detective, Edward Burke, who was working at the time as a ticket collector for McLaughlin. Also nearby was Beach Director Del Pessio and a Dennis Gallagher, employed by McLaughlin, and known to Collins, along with Gallagher's wife, a close friend of Collins' wife, and his son. During their interchange, McLaughlin came nearby and patrons of the Hall passed by.

10. Caliendo approached Collins with the intent of seeking an early meeting to discuss the two lingering problems and the new one involving the clothing allowances. According to Caliendo, he told Collins the Union was having some problems that were just being dragged out and it wanted to get them settled. Caliendo said that he wanted to get together and talk about them and that he had tried to reach Collins through his secretary. Caliendo explained the items included the failure to pay clothing allowance to himself and certain other Union members. A conflict arose as to what was said next. According to Caliendo, Collins in reply said, "I don't give a fuck about you and your union" and this response angered Caliendo and led suddenly to a heated exchange of words. Collins denied using profanity in his initial reply and asserted Caliendo became increasingly antagonistic and profane upon learning that Collins did not want to go into the problems at that time but would investigate the non payment of the clothing allowance and arrange an early meeting with Caliendo the following week. ^{4/} The fact remains that Collins refused to discuss the matters at all then and there with Caliendo (Tr. 52) and manifested an unwillingness to engage in any further exchange about the problems, even in a preliminary way. ^{5/} Collins reiterated

^{4/} I credit Collins' version of his own initial response but I also conclude that at some later point in the argument Collins did utter the profanity attributed to him at a time when the exchange had deteriorated into a shouting match and each of the participants had become emotional and antagonistic to the other.

^{5/} While Caliendo denied that he asked for any resolution to the problems at the time but sought only to arrange a meeting to discuss them, it appears that, at least, Caliendo took the opportunity presented by Collins' unexpected presence after the frustrations of his day, to acquaint Collins with their nature. I also conclude that Collins, who admitted he sought to avoid any discussion of the matters, was somewhat short and curt when Caliendo approached him.

that the Convention Hall at that evening hour was neither the time nor the place to discuss the problems. Collins also refrained from setting a time and place to meet Caliendo, even after he asserted Caliendo accused him of avoiding him over the past week. (Tr. 52). The most Collins offered was the expectation, at least as to the clothing allowance, that it would be straightened out Monday morning when Siciliano returned to his office.

11. After the initial exchange between the two, the discussion very quickly became a heated argument with Caliendo pressing Collins for an early meeting and decisive action and seeking to continue the exchange, and Collins seeking to terminate it. ^{6/}

12. At some point toward the end of their dispute, Del Pessio came over, took Caliendo's arm and sought to persuade him to leave the area. Caliendo did not immediately do so. At around this point Collins told Caliendo that he was creating a scene and that if he did not stop he would be suspended for a day. When Caliendo indicated that he was not afraid of the suspension, Collins repeated his warning. Caliendo replied he could make it three days and Collins concurred by indicating that he would suspend Caliendo for three days.

13. Collins testified that at some point during the argument he noticed McLaughlin standing about 15 ft. away observing the incident. ^{7/}

14. A few days later Caliendo received a written notice that he had been suspended without pay for three days because of "insubordination and conduct not

^{6/} There was unrebutted testimony by a bystander, Gallagher, that Collins walked away from Caliendo, up a ramp leading out of the Hall a number of times but that each time Caliendo shouted after him, he returned to continue the confrontation.

^{7/} Gallagher, his wife and son also remained nearby during most of the argument. Gallagher was a personal acquaintance of Collins' and had been a colleague of Collins' in prior employment and his wife and Collins' wife were close friends. He was called as a witness by Respondent. At one point in his testimony, Gallagher volunteered that Caliendo had gotten "extremely abusive with my wife" and used some language which "I am sure she's heard before" (Tr. 76). Collins himself had not testified that Caliendo had been abusive to anyone but himself. Neither did the City's suspension notice nor any representative of Respondent ever inform Caliendo that the action against him was related to his abuse of third persons. Further, the affirmative defense in Respondent's answer relies solely upon an act of insubordination as grounds for the suspension. While Gallagher's statement remains unrebutted in the record it appears to be somewhat ambiguous and inconclusive, and, in any event, in the absence of any specific reliance by the Respondent upon such alleged conduct, this Report will deal solely with the interaction between Caliendo and Collins which resulted in the suspension.

becoming an employee in the public service". Caliendo was suspended without pay on October 10, 17 and 24 in accordance with the penalty imposed. According to Collins, Caliendo was suspended because he acted out of order in front of not only other City employees but the man who had rented the Convention Hall and patrons of the Hall, thereby impugning the office of the City Manager, and because Caliendo was testing him to see how far he, Collins, could be pushed, whether it was personal or union related (Tr. 60).

15. A grievance was initiated by Caliendo but because of Collins' direct involvement in the matter Caliendo asked Collins by letter to remove himself from any involvement in its processing and suggested that the Mayor could act as a mediator to resolve the matter. In a responsive letter dated the same day, October 4, 1978, Collins did agree to withdraw himself from any further involvement but referred the entire matter to the City Attorney. Neither Caliendo nor Local 196 pursued the matter or the grievance any further.

16. A few weeks prior to the incident, in early September, Caliendo had been informed by Collins that he was being promoted to a newly created job as Labor Foreworker to bring his salary up to that of plumbers helper - a position for which Caliendo had received a high mark on a Civil Service examination but to which he could not be appointed because a veteran had received preference ahead of him. Because the new position involved supervisory authority of certain unit employees Caliendo resigned his position as Local 196 President effective at the end of 1978 and assumed the new position with a salary increase in January, 1979.

ISSUES

1. Whether the City's disciplinary suspension of Local 196's President for conduct during an off-hours encounter between the City Manager and Local 196's President the evening of September 29, 1978 was motivated in whole or in part by anti-union animus.

2. Whether the Local 196 President's conduct during his interchange with the City Manager the evening of September 29, 1978, is protected activity under the Act, as amended.

ANALYSIS

Local 196 has charged the City, through the actions of its City Manager in responding to the Local's President at a chance meeting and then in suspending him for three days without pay, with "union busting" and acting against Caliendo

in a discriminatory manner in violation of N.J.S.A. 34:13A-5.4(a)(3). In support of such an allegation, the Charging Party has the burden of proving by a preponderance of the evidence that the City Manager was motivated by anti-union animus in its conduct toward Caliendo. In re City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 215 (para. 4107 1978); In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 188 (para. 10105 1979). The record evidence fails to support such a conclusion and I will recommend its dismissal.

Neither the history of the nature of the relationship of the parties, and the principals to the incident, nor Manager Collins' actions on or after September 29, support a finding of hostility either toward Local 196 or its President. Both Collins and Caliendo agreed that Collins in the past had evidenced a readiness and willingness to meet with Caliendo and to attempt to resolve work problems brought to his attention, even exerting some pressure over subordinates when a problem had a tendency to linger. Collins and Caliendo each had a good informal work relationship with the other as chief representative for his respective organization in administering the contract, and only occasionally in the past had discussions of grievances become heated. Furthermore, just weeks before the incident, Collins arranged a promotion for Caliendo to a newly created position, to a level of pay which Caliendo had earned but which, because of veterans' preference under Civil Service regulations, was going to be denied him. ^{8/} Finally, the facts regarding the altercation between the two men on the evening of September 29 fail to support a conclusion that Collins' reaction was dictated by vindictiveness toward Caliendo's union role or Local 196's representative status. From all that can be gathered from the testimony, sketchy as it is, Collins was annoyed, even piqued, that Caliendo was taking the occasion of an off hour time of relaxation, to vent his frustration at the City Manager's inability to resolve certain long standing grievances and, in particular, the apparent failure of the City to make a timely payment of a quarterly economic benefit, to certain union members, including the Local's President. Collins' putting off of Caliendo, in appearance an abrupt dismissal of a work subordinate's entreaties made in front of personal friends and a City business figure of some stature, only served to raise Caliendo's frustration and resentment close to the breaking

^{8/} While Caliendo personally felt compelled to resign his Union office upon accepting the new position because of a felt conflict of interest with union members he would be supervising, the record is devoid of any evidence that Collins had thereby schemed to remove Caliendo as a Union adversary.

point. Yet, nothing in Collins' demeanor during the incident, even his use of obscene invective after both men had lost their "cool", supports the charge made by Local 196 that the City Manager's conduct of the interchange or his decision to suspend Caliendo were discriminatorily motivated.

The question, however, remains, whether Caliendo's conduct during the argument exceeded the limits of protected conduct under the Act. If it did not, the absence of a discriminatory motive, does not shield the Respondent from a finding that its suspension of the Local's President interfered, as a matter of law, with the Act's specific protection afforded public employees.

N.J.S.A. 34:13A-5.3, in pertinent part, specifically protects public employees, "...in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization..." [Emphasis supplied]. In Matter of Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 188 (para. 10105 1979), the Commission determined that the participants in a grievance setting must be treated as equals if the concept of grievance presentation is to be accorded its key role in the States' system of public sector labor relations and if the efficacy of the grievance process is to be insured. See Id. at pages 6 to 8 of the Commission's Decision and Order. The adoption of that principle led the Commission to conclude that an employer's threat of discipline against a grievant for outbursts against an administrator during the course of a grievance presentation violated N.J.S.A. 34:13A-5.4(a)(1) and were required to be rescinded.

The application of that principle to the instant facts should dictate a similar result. A close review of the evidence of Caliendo's speech and conduct during the September 29 confrontation with the City Manager leads me to conclude that the Local President did not even approach the limits of offensive speech and conduct which would remove the mantle of protection from him. There was nothing in Caliendo's conduct, including his actions and his language, in the context of the grievances he was then pursuing with the City Manager, which were of such an obnoxious character as to render him subject to suspension of even one day's pay. See Crown Central Petroleum Corp., 74 LRRM 2855, 2860.

Respondent, in its brief, contends that the setting in which the dispute arose, however, distinguishes this case from Hamilton Township, supra, in that the incident here did not take place during a grievance proceeding and was not behind closed doors, but rather was between an employee and his employer on

City owned property in front of other City employees. ^{9/} (Page 3 Respondent's brief). City Manager Collins appears to suggest the same thing when he testified that he took no action against Caliendo on the one prior occasion when a heated exchange took place between them as it occurred in the privacy of his office (Tr. 61), and further, when he stated that he did not object to the fact that an argument ensued, which was not an unusual happening in labor-management relations, but did object to the time and place of its occurrence (Tr. 64).

I am not persuaded by Respondent's argument. Nothing in the record supports a conclusion that the principals' informal relationship from time to time precluded their contact outside the Manager's office or normal office hours. The City Manager's easy and regular accessibility to the Local's President outside the formal grievance procedure for airing of accumulated work problems certainly implies that Caliendo's approach to Collins on the evening of September 29 was not an isolated or unusual event. In any event, the record does not show the opposite to have been true.

The language cited from Crown Central, supra, does not appear to have been a significant factor in the Court's decision or, for that matter, in any other decisions in the area. The presence of one moonlighting off-duty City employee (Detective Burke) and of others who were not intimately involved in what was essentially a two-person dialogue did not enlarge the dispute into a public affair. It is also significant that the argument grew out of an initial conversation which was not sought out nor intended by Caliendo but which was spontaneous and purely the result of a chance meeting. ^{10/} It is clear that Caliendo did not intend to embarrass Collins in front of his friends or City businessmen. Once the contact had been initiated Caliendo was no longer functioning as an employee subordinate to the City Manager, but was Collins' equal in the give and take of the grievance process.

^{9/} See Crown Central, supra, at 2860 where the Court cites, among other factors, that the Company supervisor was not assailed on the floor of the plant where he stood as a symbol of the Company's authority and that the abuse directed to the supervisor came while he was appearing as a Company advocate at a closed meeting with Union representatives.

^{10/} See e.g. J.P. Stevens & Co. v. NLRB, 93 LRRM 2262, 2264 (4th Cir. 1976) enforcing J.P. Stevens and Co., 219 NLRB No. 156, supporting decision of the NLRB distinguishing between "spontaneous and thus protected, comments of employee" and "premeditated and intentional" disruption.

Caliendo's argument with Collins did not disrupt any City operations. ^{11/} Collins' personal discomfort that the dispute occurred in the presence of friends and a third party with whom the City had a non-related business relationship did not give the City license to set aside a basic right of public employees - a right which the Commission has recognized is a key to the whole system of public sector labor relations.

Neither can Respondent dispute the fact that what occurred the evening of September 29 was Union processing of grievances. Caliendo's efforts to inform Collins of the nature of the three grievances, two accumulated and one new, and to obtain a fixed date for a meeting to resolve them was surely an intimate aspect of their processing under the existing practice between the parties. See Clara Barton Terrace Convalescent Center, 225 NLRB 1028. See also, Will & Baumer Candle Co., 206 NLRB 777 1773. The Act's protection should not be made to turn on whether the niceties of a formal grievance proceeding are being observed, particularly given the informal existing practice between the parties designed to expeditiously resolve outstanding work problems.

The City Manager's continued voluntary participation in the heated exchange, even including the use of obscene language, cannot be overlooked. Caliendo and Collins in the heat of the moment were dealing with each other as equals in the labor-management process. Under such circumstances the Act should not permit one participant to effect the posture of a master when the exigencies of the moment suits the adoption of such a role.

Finally, Caliendo's suggestion, immediately adopted by Collins, that the suspension be enlarged to three days, uttered again in the heat of the moment and under the provocation of Collins' already announced one day suspension for a refusal to cease the interchange, does not constitute a waiver by Local 196 to contest the validity of the suspension.

In the absence of any evidence that the Respondent's action dominated Local 196 or interfered with its formation, existence or administration, I will recommend that the allegation of violation of N.J.S.A. 34:13A-5.4(a)(2) be dismissed.

^{11/} See e.g. AT & T v. NLRB, 89 LRRM 3140, 3141 (2nd Cir. 1975), enforcing AT & T, 211 NLRB No. 115, supporting the NLRB's rejection of the ALJ's finding that a union representative had exceeded the limits of protected activity by haranguing and shouting at a supervisor, thus distracting several employees engaged in exacting tasks requiring their attention. The Board found it significant that the employee's sole concerns in going to see the supervisor were grievance matters that were her responsibility to pursue.

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

CONCLUSIONS OF LAW

1. The Respondent violated N.J.S.A. 34:13A-5.4(a)(1) by suspending employee Sal Caliendo three days without pay for conduct engaged in during an interchange with the City Manager the evening of September 29, 1978.
2. The Respondent did not thereby violate N.J.S.A. 34:13A-5.4(a)(2) or (3).

In order to remedy the violation found, I will recommend, for affirmative relief, that Respondent rescind the discipline and make Caliendo whole ^{12/} and restore the status quo ante by paying to him the one hundred and thirty-six (\$136.00) dollars representing the three days' wages which Caliendo thereby forfeited. Accordingly, I recommend the following:

ORDER

For the foregoing reasons and upon the entire record herein, it is hereby ORDERED that the City of Asbury Park:

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 for conduct while engaging in grievance processing.

B. Take the following affirmative action:

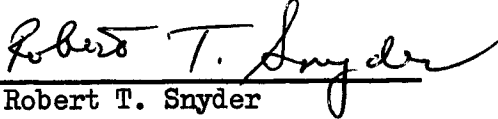
1. Expunge and rescind the Notice of Suspension dated October 2, 1978, suspending employee Sal Caliendo three work days on the charges of insubordination and conduct unbecoming an employee in the public service.
2. Make Sal Caliendo whole by paying to him one hundred and thirty-six (\$136.00) dollars representing the three days' wages he lost by reason of his unlawful suspension, less any monies actually earned by him during those three days.
3. Post at the Asbury Park City Hall in conspicuous places, 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 thereafter

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

4. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of this order what steps the City has taken to comply herewith.

C. It is further ORDERED that the sections of the Complaint which allege a violation of N.J.S.A. 34:13A-5.4(a)(2) and (3) be dismissed.

DATED: Newark, New Jersey
June 29, 1979


Robert T. Snyder
Hearing Examiner

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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by refraining from disciplining employees for conduct while engaging in grievance processing.

WE WILL expunge and rescind the Notice of Suspension dated October 2, 1978, suspending employee Sal Caliendo three work days on the charges of insubordination and conduct unbecoming an employee in the public service.

WE WILL make Sal Caliendo whole for the loss of pay he suffered by paying to him one hundred and thirty-six (\$136.00) dollars representing the pay for the three days he was suspended, less his actual earning on those days.

CITY OF ASBURY PARK

(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, 429 East State Street, Trenton, New Jersey 08608 Telephone (609)-292-6780