P.E.R.C. NO. 77-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,
Respondent,

-and-

RICHARD WINNER, an individual,
Charging Party,

Docket Nos. CI-1, 2 and 3

-and-

NICHOLAS SARAPUCHIELLO, an individual,
Charging Party,

-and-

WILLIAM KREJSA, an individual,
Charging Party.

## SYNOPSIS

In a decision in an unfair practice proceeding, the Commission finds the exceptions filed by the City relating to the findings of fact and conclusions of law of the Hearing Examiner to be without merit. The Commission, in agreement with the Hearing Examiner, finds that the City committed an unfair practice by discriminatorily skipping over Nicholas Sarapuchiello and William Krejsa in making promotions to the rank of Lieutenant within the Fire Department because of these individuals' membership in and activities on behalf of Local 2081, I.A.F.F., the certified majority representative of all firefighters employed by the City below the rank of Lieutenant. The Commission finds that the City's discriminatory actions, affecting the terms and conditions of employment of these individuals, were motivated at least in part, if not exclusively, by the desire to discourage these employees in the exercise of the fundamental rights guaranteed to them by the Act to "freely and without fear of penalty or reprisal,...form, join and assist [an] employee organization." The Commission further concludes that the record is also sufficient to sustain a finding that the City's acts were inherently destructive of employee rights and interests and could only have had a chilling effect on other employees desirous of engaging in union activities. The Commission orders the City to cease and desist from engaging in similar conduct in the future; and affirmatively orders the City to offer Krejsa and Sarapuchiello the promotion to the rank of Fire Lieutenant that was unlawfully denied to them on or about February 12, 1975, without prejudice to any rights and privileges enjoyed by them; to make them whole for any

loss of pay they may have suffered as a result of the City's improper conduct; to preserve and, upon request, make available to the Commission for its examination all relevant records and reports necessary to analyze the amount of back pay due under the terms of the Commission's order; to post appropriate notices and to notify the Commission, in writing, of the steps taken to comply with the order.

The Commission further concludes, in agreement with the Hearing Examiner, that no unfair practice had been committed in regard to Richard Winner, a finding that had not been excepted to by any of the parties. The Commission therefore dismisses those sections of the Complaint alleging that the City had committed unfair practices relating to Winner.

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WILLIAM KREJSA, an individual,
Charging Party.

Appearances:

For the Charging Parties, Schneider, Cohen & Solomon, Esqs.
(Mr. David Solomon, of Counsel and on the Brief)

For the Respondent, Murray, Meagher and Granello, Esqs.
(Mr. James P. Granello, of Counsel and on the Brief)

DECISION AND ORDER

Richard Winner, Nicholas Sarapuchiello, and William Krejsa (collectively the "Charging Parties") filed Unfair Practice Charges on February 18, 1975, which were amended on May 16, 1975. They alleged that the City of Hackensack (the "City") had discriminatorily skipped the Charging Parties when making promotions in the Fire Department due to the Charging Parties' activities on behalf of Local 2081 of the International Association of Fire Fighters, AFL-CIO ("Local 2081"), thereby violating N.J.S.A.

34:13A-5.4(a)(1), (3), (4), (5) and (7).[1/]

An interlocutory ruling was issued by Hearing Examiner Stephen B. Hunter on August 25, 1975 denying a motion to dismiss the Complaint filed by the City and the Commission denied the City's request for special permission to appeal on September 11, 1975. The Hearing Examiner filed his Recommended Report and Decision on July 12, 1976.[2/] Although N.J.A.C. 19:14-7.3a provides for the filing of exceptions within 10 days of service of the Hearing Examiner's Report, exceptions to that Report were filed by the City on October 8, 1976, after requests for extensions of time to file exceptions were granted. No cross-exceptions were filed. Some months later, on February 18, 1977 the Commission received from counsel for the City a request for special leave to file an additional exception to the Report. In light of the

1/ These subsections provide that employers, their representatives or agents are prohibited from "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act; (3) Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Dischcarging or otherwise discriminating against any employee because he had signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

2/ H.E. No. 77-1, 2 NJPER 232. All briefs, letters and post-hearing motions were received by the Hearing Examiner by June 1, 1976.

considerable time which has elapsed since this matter was filed and that the City requested and received extensions of almost three months within which to file exceptions, that request is hereby denied.[3/] The case has been transferred to the Commission,[4/] which, pursuant to a request in accordance with N.J.A.C. 19:14-8.2, heard oral argument on March 16, 1977.

The Hearing Examiner's Recommended Report and Decision, a copy of which is annexed hereto and made a part hereof, sets forth the factual background and the positions of the parties in exhaustive detail and they need not be restated herein.

3/ In this exception, the City, citing Board of Education of Township of N. Bergen v. N. Bergen Fed. of Teachers, 141 N.J. Super 97 (App. Div. 1976) argues that the Act prohibits discrimination as to terms and conditions of employment and that a promotion to a position is not a term and condition of employment. While it is true that the court in North Bergen, supra, held that establishment of criteria for promotions is a managerial prerogative, we note that the court in that case also stated, "Arbitrary action on the part of the /employer/ which bear a reasonable relationship to educational goals /or the manner and means by which the employer provides its services/ ...cannot and will not be tolerated." If it is determined that the employer was motivated, at least in part, by reasons proscribed by our Act, we shall find that the Act has been violated. We also observe that promotions result in higher pay and fringe benefits and changes in other terms and conditions of employment.

4/ N.J.A.C. 19:14-7.1 et seq.

The Hearing Examiner's Recommended Report and Decision found that no unfair practices had been committed in regard to Richard Winner, and there being no exceptions to that finding,[4/] it is adopted by the Commission for the reasons stated therein. Similarly, as to William Krejsa & Nicholas Sarapuchiello he found no violations of N.J.S.A. 34:13A-5.4(a)(4), (5) and (7) and we adopt those findings as well, again noting the absence of exceptions thereto. However, as to both William Krejsa and Nicholas Sarapuchiello, the Hearing Examiner found that the City had violated N.J.S.A. 34:13A-5.4(a)(1) and (3), and it is these findings to which the City now excepts.

Initially, the City excepts to the Hearing Examiner's refusal to consider the determination of the Civil Service Commission as being res judicata on the issue of whether the City's act was motivated by anti-union animus. While using the term res judicata, the City is actually advancing the theory of collateral estoppel, i.e., issue preclusion as opposed to preclusion of the whole cause of action under res judicata. In his rejection of that argument, the Hearing Examiner noted that the only evidence adduced to show that the Civil Service hearing included litigation of this issue was a quotation from the opening remarks therein by Counsel for the Charging Parties. In those remarks it was specifically stated that the grounds for the complaint were that the City was retaliating for the Charging Parties' activity in pressing Complaints under the Civil Service statutes. The Hearing Examiner concluded that the same issue had not been fully litigated and so collateral estoppel did not apply. He further ruled that

4/ N.J.A.C. 19:14-7.3.

because the Commission has exclusive unfair practice jurisdiction, collateral estoppel should not apply. See N.J.S.A. 34:13A-5.4(c).

After a review of the authorities presented in the brief in support of exceptions, the Commission adopts the Hearing Examiner's conclusions of law.[5/] Nothing additional is presented as evidence that the question of anti-union animus was fully litigated in the Civil Service Commission hearing. Moreover, res judicata and collateral estoppel have been held by the United States Supreme Court not to apply to issues not within the jurisdiction of the administrative agency.[6/] Discrimination by an employer in retaliation for union activities is an unfair labor practice, jurisdiction over which has been exclusively granted to the Commission.[7/]

While the City's brief cites Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 583 (1970), for the proposition that the Civil Service Commission could rule on anti-union animus, that case is inapposite as it predates the legislative grant of unfair practice jurisdiction to the Commission. The specific grant of exclusive jurisdiction contained in N.J.S.A. 34:13A-5.4(c) nullifies the holding of Burlington Cty, supra,

5/ In his report the Hearing Examiner noted that as the Civil Service Commission decision was not then final, it could not be res judicata. As it is the unchallenged assertion of the City that the time to appeal that decision has run and no appeal has been filed, that portion of the Hearing Examiner's decision is not adopted.

6/ United States v. Radio Corp. of America, 358 U.S. 334 (1959).

7/ N.J.S.A. 34:13A-5.4(c).

which specifically called for the legislature to act in this regard. The other cases cited by the City were analyzed fully in the Hearing Examiner's Report and need not be dealt with further.[8/]

The second exception presented by the City goes to the Hearing Examiner's alleged failure to have defined the standard to be applied by the Commission in determining whether there has been a violation of N.J.S.A. 34:13A-5.4(a)(3). No authority is cited, nor can there be any, for the proposition that in a case admittedly "of first impression",[9/] there must be a ruling on one of the legal issues raised prior to the hearing. Both sides herein were aware of the existence of this issue and fully briefed it. Moreover, no request was made of the Hearing Examiner to have this issue argued and decided before proceeding with the evidentiary hearing. Consequently, this exception is rejected as being without merit.

Also excepted to is the standard which the Hearing Examiner recommended and applied in his report. In the interim subsequent to his report, the Commission has considered this issue in In the Matter of Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-36, 2 NJPER ___ (1977). The decision in Haddonfield sets forth the Commission's analysis of this problem,

8/ The recent decision of the New Jersey Supreme Court in Patrolmen's Benevolent Association of Montclair, Local No. 53 v. Town of Montclair, 70 N.J. 130 (1976), discusses the Commission's unfair practice jurisdiction and the Hearing Examiner's decision is consistent therewith.

9/ City's brief in support of exceptions at p.7.

and the Commission's determination that a two-fold test best effectuates the policy of the New Jersey Employer-Employee Relations Act (the "Act").

Under the Haddonfield decision, a §5.4(a)(3) violation may be found if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that the effect of the employer's actions was "inherently destructive" of rights guaranteed to employees by the Act. Preliminarily, the Charging Party must prove that the employee was engaging in protected activities and the employer knew or thought he knew of such activities.

The City objects to the "one of the motivating factors" test on the grounds that there must be not only discrimination but a resultant discouragement or encouragement of union membership in order to find a violation of §5.4(a)(3). The Commission believes that there must be intent to discourage but believes that in a situation where it has been found that the employer was improperly motivated by anti-union animus, then intent to discourage as to the employee directly affected may be presumed.[10/] To adopt the City's contention that there must be a showing of actual discouragement would be in effect to say that there is no unfair practice unless the employer is successful in his attempt to reduce union activity, and if he fails the motivation will be ignored thereby giving the employer a free shot at achieving an

10/ See Buckner Corp. v. NLRB, 69 LRRM 2421 (CA 9 1967).

unlawful result. As to the second part of the Commission's §5.4(a)(3) standard (the effect test), it merely obviates the necessity of proving the motivation when the effect of the action is so substantial as to allow a presumption of impropriety. This has been approved by the United States Supreme Court.[11/] Once an inherently destructive act has been established, then an improper motive on the part of the employer may be presumed; however, this presumption may be rebutted by evidence that the employer was not motivated by anti-union animus, and did have legitimate reasons for his acts.[12/] In making this exception to the standard adopted by the Commission, the City has indulged itself in "bootstrap" logic which the Commission emphatically rejects.

The next exception alleges a failure to make a finding of any discriminatory conduct. This conclusion is reached on the basis that the Civil Service Commission found no violation of its rules, and so there can be no finding of discrimination. Clearly, the City is doing no more than repeating its res judicata argument in another form. During the hearing the City raised the so-called "one in three" Civil Service rule.[13/] It is this very rule that allows an employer the latitude to skip employees on a promotion list without violating the Civil Service rules. This

11/ NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).
12/ Some acts may be so destructive as to create an irrebuttable presumption of anti-union animus. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). The Commission does not reach that issue in this case.
13/ Transcript, page 234, N.J.A.C. 4:1-12.15.

does not mean that if such skipping is motivated by anti-union animus, it cannot be an unfair labor practice. The Hearing Examiner found such animus to have existed, and therefore the discriminatory conduct necessary for a violation of §5.4(a)(3) was found.[14/]

Exception number five - that there was no finding of discouragement - is disposed of by the analysis, supra, of the City's exception to the two-fold standard. The finding of an anti-union motivation allows presumption of resultant discouragement. As it happens the Hearing Examiner credited testimony that Mr. Sarapuchiello resigned as President of the Local after being told that he might not get promoted, and Mr. Krejsa resigned as State Delegate to avoid jeopardizing a promotion.[15/]

The Hearing Examiner found that the record indicated an anti-union animus on the part of the City, and this finding is excepted to on the basis that the record does not support the conclusion. After a careful independent review of the record, the Commission adopts the findings of the Hearing Examiner, including the following points.

The City argues that the skipping of Mr. Sarapuchiello and Mr. Krejsa is not evidence of anti-union animus. While it might not, standing alone, establish the motivation of the City, it is certainly evidence tending to show animus. We reiterate

14/ Contrary to the City's assertion at page 14 of its brief, the charge herein does not assert a violation of Article V of the contract with the Fire Fighters.

15/ Transcript, page 47, pages 136-138.

that the Civil Service ruling finding no violation in no way precludes a finding that this action was aimed at the union. Those affected by this skipping - the first in 30 years by the Hackensack Fire Department - had been among the most active union members shortly beforehand and simply because the City was technically within its rights under N.J.A.C. 4:1-12.15 does not insulate it from the clear inference created.

The second item of evidence cited by the Hearing Examiner was a meeting held in December 1973 at which the City Manager was alleged to have stated that he "was going to take care of the guys on his side and the guys against he would take care of." The City first objected that as this statement came from Lieutenant Kearney, who was at the meeting, and not by the City Manager, this evidence was inadmissible hearsay. In response it may be pointed out that most of the testimony by Lieutenant Kearney as to that meeting was elicited by Counsel for the City on cross-examination, and no objection was raised to the initial broaching of the subject on direct examination.[16/] The further argument that none of the men who would be up for promotion was at that meeting is irrelevant on the subject of animus.

Item number three considered by the Hearing Examiner was a meeting on January 2, 1975 at which it was announced that union officers would no longer be utilized as Acting Fire Officers. The City refers to the deposition of City Manager Joseph Squillace - Joint Exhibit 1 - in which he stated that he wished to keep management and rank and file separate and to have officers be aligned

16/ Transcript, pages 230-232, 234-237.

with management. This is evidence as to the City's motive but certainly does not preclude contrary evidence from being considered. The fact that the deposition was entered in evidence by stipulation binds the parties only so far as agreeing that its contents are Mr. Squillace's testimony, and not that it must be believed or that such testimony is dispositive of the issue. In any event, the statement referred to by the City was not made in response to a question about the specific action taken but rather was related to a different time period and set of circumstances.

The final portion of the exception on this point is addressed to the fact that the Hearing Examiner considered certain documents contained in Joint Exhibit 1 which were not part of the pages stipulated to by the parties, but were the subject of the testimony that appeared in the designated pages. At this time, the Commission finds it unnecessary to come to a determination as to whether the Hearing Examiner should have examined those other documents.[17/] The other evidence adduced to which the Hearing Examiner referred is sufficient to sustain a finding of anti-union

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17/ It must be pointed out that the Squillace testimony in this deposition revolves around certain documents, and to limit a trier of fact by restraining him from scrutinizing those documents would seem tc render the testimony itself of little value.

animus, and the Commission adopts the finding that such animus existed.[18/] Therefore, the Commission has not examined the documents in the Joint Exhibit apart from the deposition itself, and part four of the Hearing Examiner's analysis on this topic is not adopted.

The Commission also cannot agree that the record is insufficient to sustain a finding that the City's acts were inherently destructive of employee rights. In this case, the two men denied promotion were the President of the Local and its chief negotiator, and another member of the negotiating team who had been a Shop Steward and a State Delegate. They were clearly the leaders of the union activities within the Hackensack Fire Department, being highly visible and vocal in terms of the picketing referred to in the Hearing Examiner's Recommended Report and Decision and negotiating with management and superior officers. Against this backdrop, the fact of their having been singled out to be skipped cannot help but have a chilling effect on other employees desirous of engaging in union activity.

In finding no unfair practice as to Mr. Winner, the Hearing Examiner was in no way inconsistent as contended by the

18/ The fact that two union members were promoted is thoroughly dealt with by the Hearing Examiner, and the Commission agrees that this could not be avoided by the City under the Civil Service "one in three" rule. The record also reveals that the Hearing Examiner considered many other factors, including the apparent pretextuality of all the City's reasons for not promoting Messrs. Krejsa and Sarapuchiello in making his determination as to animus.

City. It must be emphasized that the test for a §5.4(a)(3) violation as set forth in Haddonfield, supra, includes a showing of protected activity and employer knowledge. The Hearing Examiner found that Mr. Winner's protected activities were minimal and that there was no credible evidence that the City had knowledge of them.[19/] In light of these findings, and the additional facts that the City had been granted permission to bypass Mr. Winner to allow for psychological testing, and the resultant psychologist's report recommending no promotion, dismissal of the charges as to Mr. Winner is warranted without affecting the findings regarding Messrs. Krejsa and Sarapuchiello.

Next on the list of the exceptions is the City's complaint that the Hearing Examiner's presentation was improper. The Commission finds that this amounts to no more than an objection to style and to the fact that the Hearing Examiner did not, on consideration, choose to find the City's evidence more believable than that of the Charging Parties. When the City objects to the use of the word "extraordinary" to describe the skipping on the Civil Service list, admittedly the first in thirty years, it does nothing more than engage in semantics. An accepted dictionary definition of extraordinary is "out of the usual course or order, often opposite to ordinary."[20/] If a deviation from a regular occurrence takes place only once in thirty years, it is surely not the ordinary course of events.

19/ Hearing Examiner Report, pages 47-49.
20/ Shorter Oxford English Dictionary, 3rd Ed.

While the Hearing Examiner noted that the City had failed to offer proof on a particular point, it came in the context of a discussion of a specific legal argument presented by the City, and is meant to show that in the Hearing Examiner's mind, the argument in question was not supported by the facts.[21/] It in no way acts as a substitute for consideration of the "facts" that were presented.

In evaluating testimony, the Hearing Examiner found various witnesses credible on some points and not on others. This was true not only with respect to Chief Jones, as to whom the City raises this point, but also as to Mr. Sarapuchiello. The Hearing Examiner noted at page 48 of his Report that he did not credit Mr. Sarapuchiello's testimony as to a conversation on Memorial Day with Chief Jones, testimony which, if believed, would have been damaging to the City. It is a basic principle of law that it is for the trier of fact to judge the credibility of witnesses, and that he need not find a witness to be either totally truthful or totally engaged in falsehoods, but may accept part and reject other parts of the testimony.

Simply because the City is unhappy over the Hearing

21/ More specifically, with regard to one point the Hearing Examiner stated that the City's brief argued that the City wished to insulate itself from charges of dominating or interferring with a union and therefore refused to permit union officers to be Acting Fire Officers. His statement of what was not proved merely indicates the City's failure to show that it had reason to anticipate such a charge. If the City presents an alleged motive for an act, it is surely legitimate to examine the record to see if it has supported its claim, and to note the absence of such support.

Examiner's choice of words in outlining his findings is no reason to find the Hearing Examiner's Report unworthy of acceptance. The Commission has independently reviewed the entire record and finds no basis for a claim of bias on the part of the Hearing Examiner.

The last two exceptions go to the Order recommended by the Hearing Examiner. It is objected to on the grounds that the Commission does not have the jurisdiction to order promotion and back pay, and that it is too broad in its cease and desist portions.

In its brief, the City acknowledges that N.J.S.A. 34:13A-5.4(c) gives the Commission the authority "to take such reasonable affirmative action as will effectuate the policies of this Act." It cannot be gainsaid that it is part of the policy of the Act to discourage unfair labor practices. The City chooses to seize on the word "prevent" in the grant of unfair practice jurisdiction to assert that no remedial action may be taken after an unfair practice has been committed. This ignores the placement of the aforesaid authority to take action which is given in the context of the Commission having determined that a party "has engaged or is engaging in any such unfair practice."[22/] Clearly it is intended that the Commission take the steps it deems necessary to remedy whatever damage has been wrought by the unfair practice it has found to exist or have existed.

22/ N.J.S.A. 34:13A-5.4(c).

Prevention cannot be taken to be limited to ensuring that there will be no repetition. If that were so, then the City herein would be getting the one time "free ride" decried earlier in this decision.[23/] Only by ordering an offer of promotion and back pay can the Commission ensure that the City has not benefited from an unfair practice, and can that violation be remedied. As the finding of an unfair practice includes the finding that the failure to promote was due at least in part to anti-union animus and not because the men were not competent, the City's argument that the public safety is in jeopardy if those individuals are promoted does not hold water.[24/]

As to the breadth of the cease and desist order the City appears to argue a position completely inconsistent with that urged with regard to the affirmative aspects of the order. The City excepts to the cease and desist order because it attempts to prevent future conduct while the facts in this case relate to past events. The recommended order is framed in the language of the sections of the statute which have been violated and is an attempt to prevent similar future conduct by the respondent City. The Commission is only attempting to preclude the City from further engaging in conduct which would violate N.J.S.A. 34:13A-5.4(a)(1) and (3). The Commission fully recognizes that in the event of a totally unrelated unfair practice, contempt proceedings would not be appropriate.

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23/ See page 6.

24/ We know that Krejsa and Sarapuchiello scored higher than several of the individuals who were actually promoted.

However, in an effort to make this clear, the Commission has deleted from the recommended cease and desist order that paragraph which referred in broad language to a future violation of N.J.S.A. 34:13A-5.4(a)(1).

ORDER

Accordingly, for the reasons set forth above, the Public Employment Relations Commission hereby determines that the Respondent City of Hackensack has violated N.J.S.A. 34:13A-5.4 (a)(1) and (3) with regard to William Krejsa and Nicholas Sarapuchiello and IT IS HEREBY ORDERED that the Respondent, City of Hackensack, shall

1. Cease and desist from:

(a) Discriminating in regard to hire or tenure of employment or any term and conditions of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer William Krejsa and Nicholas Sarapuchiello the promotion to the rank of Fire Lieutenant that was unlawfully denied to them on or about February 12, 1975, without prejudice to any rights or privileges enjoyed by them, and make then whole for any loss of pay they may have suffered as a result of the City of Hackensack's discriminatory refusal to promote them by

paying them a sum of money equal to the amount that they would have earned as wages as Fire Lieutenants from the date that they were unlawfully refused promotions to the date of the City of Hackensack's offer of promotion, less the actual earnings of these individuals during that period.

(b) The back pay owed to William Krejsa and Nicholas Sarapuchiello shall be computed on the basis of each separate calendar quarter or portion thereof, during the period from the refusal to promote these individuals on or about February 12, 1975 to the date of the City of Hackensack's offer of promotion. The first quarterly period shall begin with the first day of January 1975.

(c) Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(d) Post at its central administrative building in Hackensack, New Jersey, copies of the attached notice marked Appendix "A". Copies of said notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and 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 Respondent to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Commission, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the particular sections of the Complaint that allege that the City of Hackensack engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(4), (5) and (7) with regard to the William Krejsa and Nicholas Sarapuchiello matters be dismissed.

IT IS FURTHER ORDERED that the section of the Complaint alleging that the City of Hackensack was engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5) and (7) with regard to the Richard Winner matter be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett, Hurwitz and Parcells voted for this decision.
Commissioner Hipp was not present.

DATED: Trenton, New Jersey
March 16, 1977

ISSUED: March 17, 1977

H.E. NO. 77-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,

Respondent,

-and-

RICHARD WINNER, an individual,

Charging Party,

NICHOLAS SARAPUCHIELLO, an individual,

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WILLIAM KREJSA, an individual,

Charging Party.

Docket No. CI-1
Docket No. CI-2
Docket No. CI-3

ERRATA

The Hearing Examiner's Recommended Report and Decision in the above-entitled matter that issued on July 12, 1976 is hereby corrected as follows:

| PAGE | LINE | DELETE | SUBSTITUTE |
|---|---|---|---|
| 32 | 28 | Krejsa entirely | Krejsa was entirely |
| 49 | 29 | Winnter | Winner |

Stephen B. Hunter
Hearing Examiner

DATED: July 22, 1976
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,

-and-

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Docket No. CI-1
Docket No. CI-2
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Appearances:

For the Charging Parties
Schneider, Cohen & Solomon, Esqs.
(Mr. David Solomon, of Counsel and on the brief)

For the Respondent
Murray, Meagher and Granello, Esqs.
(Mr. James P. Granello, of Counsel and on the brief)

## HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

Unfair Practice Charges were filed by Richard Winner, Nicholas Sarapuchiello, and William Krejsa (hereinafter the Charging Parties whenever referred to collectively) on February 18, 1975 and said charges were amended by the filing of an amended charge on May 16, 1975. The Charging Parties alleged that the City of Hackensack (hereinafter the City) had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the Act) in that the City discriminatorily skipped over the Charging Parties in making promotions to the rank of Lieutenant within the Fire Department because of the Charging Parties' membership in and activities on behalf of Local 2081, International Association of Firefighters, (hereinafter Local 2081), the

certified majority representative of all firefighters employed by the City of Hackensack below the rank of Lieutenant.[1/]

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 June 18, 1975 along with an Order Consolidating Cases.

An interlocutory ruling denying a Motion to Dismiss Complaint filed by the City was issued by the undersigned Hearing Examiner on August 25, 1975. A copy of this ruling is attached hereto as Appendix "A" and made a part hereof. By letter dated August 26, 1975 the City filed with the Commission a request for special permission to appeal from the Hearing Examiner's ruling, pursuant to N.J.A.C. 19:14-4.5. The Attorney for the Charging Parties filed a letter opposing the request. The Commission on September 11, 1975 issued an Order that denied the City's request for special permission to appeal. A copy of this Order is attached hereto as Appendix "B" and made a part hereof.

Pursuant to the Complaint and Notice of Hearing, hearings were held on October 21, 1975, November 21, 1975 and January 8, 1976 in Newark, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs, letter memoranda and post-hearing motions were subsequently submitted on behalf of all the parties to this instant proceeding, all of which were filed by June 1, 1976. Upon the entire record in this proceeding, the Hearing Examiner finds:

1. The City of Hackensack is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

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1/ More specifically, the Charging Parties asserted that the actions of the City violated N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5), and (7).

These subsections prohibit employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act...(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act...(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this act...(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative...(7) Violating any of the rules and regulations established by the Commission.

2. Richard Winner, Nicholas Sarapuchiello and William Krejsa are public employees within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and are subject to its provisions.

3. Local 2081, Hackensack Fire Fighters, International Association of Fire Fighters, AFL-CIO (hereinafter Local 2081) is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

4. An Unfair Practice Charge having been filed with the Commission alleging that the City of Hackensack has engaged or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

PROCEDURAL BACKGROUND[2/]

The Charging Parties are all firefighters employed by the City of Hackensack. Each of the Charging Parties was certified on a promotional examination for the rank of Lieutenant in the Hackensack Fire Department. This certification was dated December 13, 1974. The Charging Parties' order of certification was as follows: Richard Winner - No. 3; William Krejsa - No. 4; and Nicholas Sarapuchiello - No. 6 on the list. The men promoted to the rank of Fire Lieutenant by the City of Hackensack were Nos. 1, 2, 5, 7 and 8 on the certification list. None of the Charging Parties were promoted to the rank of Fire Lieutenant.

On January 28, 1975, Sarapuchiello and Winner filed complaints with the Civil Service Commission of the State of New Jersey alleging that the City of Hackensack had unlawfully and discriminatorily appointed certain firefighters Acting Lieutenants, entirely ignoring their certification rank. On January 21, 1975 Krejsa had filed a similar complaint with the Civil Service Commission.

The Charging Parties assert that on February 6, 1975 the Civil Service Commission determined that the City of Hackensack had acted unlawfully in skipping over Winner and Sarapuchiello in its appointments to Acting Lieutenants and refused to certify the pay for those individuals who were appointed Acting Lieutenant over Winner and Sarapuchiello. The

2/ Certain portions of this section are reproduced almost verbatim from the "Background" section of the undersigned's interlocutory decision referred to hereinbefore and designated as Appendix "A". The chronology of events as set forth in this section is essentially uncontroverted.

Charging Parties added that this Civil Service Commission decision also applied to Krejsa. The Respondent admits that on February 6, 1975 the Civil Service Commission determined that "the City of Hackensack had not employed eligible members of the Fire Department to Acting Lieutenant positions." However, the Respondent declared that the Civil Service Commission later accepted a clarification by the City of Hackensack that because of the number of Acting Lieutenant positions which were available, certain non-eligible members had to be employed.

On or about February 12, 1975 the promotions to the rank of Fire Lieutenant [as opposed to Acting Lieutenant] were announced. As stated previously individuals designated as Nos. 1, 2, 5, 7 and 8 on the certification list were promoted to the rank of Fire Lieutenant while Richard Winner (No. 3), William Krejsa (No. 4), and Nicholas Sarapuchiello (No. 6) were passed over for these promotions.

On or about February 13, 1975 a letter was written on behalf of Sarapuchiello and Krejsa to the Acting Director of Local Government Services requesting a review of the decision of the City to bypass these two individuals in making its appointments to the rank of Fire Lieutenant. Violations of the New Jersey Civil Service Laws were alleged. As set forth hereinbefore Unfair Practice Charges were filed with the Public Employment Relations Commission on February 18, 1975 by the Charging Parties that charged the Respondent with violations of the New Jersey Employer-Employee Relations Act, as amended.

On April 30, 1975 the Acting Director of Local Governmental Services issued a preliminary determination "that the Hackensack appointing authorities are not in violation of Civil Service Law and Rules in by-passing the names of Messrs. Sarapuchiello and Krejsa for appointment to the position of Fire Lieutenant from the certification dated December 13, 1974." The Acting Director stated that this determination was based on the provisions of N.J.S.A. 11:27-4 and N.J.A.C. 4:1-12.15(a)3 which permit an appointing authority to make a selection from among three names certified. The City of Hackensack had also requested and was granted permission to conditionally bypass Richard Winner pending completion of a psychological review.

In a letter dated May 5, 1975 the Attorney for Sarapuchiello and Krejsa appealed the April 30, 1975 determination of the Acting Director of Local Government Services and requested an administrative review of this

decision. Subsequent thereto an administrative review was conducted and the earlier decision of the Acting Director was sustained. On June 12, 1975 the Attorney for Sarapuchiello and Krejsa appealed this matter further to the Civil Service Commission. A Hearing Officer of the Civil Service Commission, Abe Weitzman, thereafter issued his report and recommendation on February 19, 1976. Weitzman did not find that the actions of the City in bypassing Sarapuchiello and Krejsa were contrary to the spirit and intent of the Civil Service Laws and recommended that the actions of the City be upheld and that the appeal of Sarapuchiello and Krejsa be dismissed. Weitzman also concluded that the "Fire Chief promoted two active union officers which indicates to this Hearing Officer that he did not discriminate against the Appellants because of their union activities."

In a letter dated March 2, 1976 the attorney for the City requested in part, that the complaint in the instant unfair practice charge matter be dismissed with prejudice in light of the fact that the Civil Service Commision Hearing Officer had "reviewed and considered allegations pertaining to discrimination based on union activity and has found an absence of same..."

In a letter dated March 9, 1976 the attorney for the Charging Parties responded by asserting that the statement of Hearing Officer Weitzman was entirely gratuitous and unfortunate inasmuch as "he had no authority either by law or by the rules of Civil Service, to rule upon unfair practice allegations, especially when those allegations were not alleged and should not have been part of the hearing." The Attorney for the Charging Parties additionally contended that he had never alleged before the Civil Service Commission any violation of the "Public Employment Relations Act" and had reserved this argument for the Public Employment Relations Commission, "the sole agency with authority to hear and determine alleged violations of the Act." In this March 9, 1976 letter it was stated that the decision of the Hearing Officer in the Civil Service Commission matter would certainly be appealed and that the appeal would, in part, question the Civil Service Commission's jurisdiction to rule on any aspects of the "Public Employment Relations Act" in light of the Public Employment Relations Commission's exclusive jurisdiction.

In letters dated March 10, 1976 and March 16, 1976 the undersigned informed the parties that the City's letter of March 2, 1976 would be treated

as a motion to dismiss complaint filed subsequent to the hearing but prior to the transfer of the case to the Commission, pursuant to N.J.A.C. 19:14-4.1. The parties were further informed that the undersigned intended to defer ruling on the City's most recent motion to dismiss until this recommended report and decision was issued.

On May 20, 1976 the Civil Service Commission issued its decision on the appeals of Sarapuchiello and Krejsa and accepted and adopted the Findings of Fact and Conclusions as contained in Hearing Officer Weitzman's report and recommendation. In a letter dated May 27, 1976 the attorney for the City again renewed his Motion to Dismiss Complaint in light of the Civil Service Commission's decision. In a letter dated June 1, 1976 the attorney for the Charging Parties opposed the City's motion.

The parties were later apprised, in a letter dated June 3, 1976, that the undersigned still intended to defer ruling on the City's motion to dismiss until this recommended report and decision was issued.

MAIN ISSUES

1. A preliminary issue concerns whether the Public Employment Relations Commission is now precluded from rendering a decision in this consolidated unfair practice matter by virtue of the operation of the doctrine of res judicata in light of a finding of a Hearing Officer of the Civil Service Commission, adopted by the Civil Service Commission, that the City did not discriminate against William Krejsa and Nicholas Sarapuchiello because of their union activities?

2. Whether the City's actions in skipping over Richard Winner, Nicholas Sarapuchiello, and William Krejsa in making promotions to the rank of Fire Lieutenant were violative of N.J.S.A. 34:13A-5.4(a)(1) and (3)? More specifically, was the City's decision not to promote the Charging Parties motivated by anti-union animus or based upon sound management judgment that these individuals were not the most qualified individuals available?

POSITION OF THE CHARGING PARTIES ON CITY'S POST-HEARING MOTION TO DISMISS COMPLAINT (RES JUDICATA ARGUMENT)

The Charging Parties contend that the City's motion to dismiss complaint should be denied. They maintain that no violations of the New Jersey Employer-Employee Relations Act were alleged before the Civil

Service Commission and that they had reserved these arguments for the Public Employment Relations Commission, the only administrative agency with the authority to hear and determine alleged violations of the Act.

The Charging Parties argue that the statement of the Hearing Officer of the Civil Service Commission [apparently adopted by the Civil Service Commission], concerning his conclusion that the City's designated representative did not discriminate against William Krejsa and Nicholas Sarapuchiello because of their union activities, was entirely gratuitous since allegations of this type were not litigated before him and therefore should not have been part of his report.

POSITION OF THE CITY ON ITS POST-HEARING MOTION TO DISMISS COMPLAINT

The City maintains that the hearing conducted before a Hearing Officer of the Civil Service Commission with regard to Nicholas Sarapuchiello and William Krejsa "arose out of the identical facts and circumstances as was presented to [the undersigned Hearing Examiner] regarding the unfair practice charges filed [on behalf of Sarapuchiello and Krejsa as well as Richard Winner]." The City concludes that certain conclusions reached by the Hearing Officer of the Civil Service Commission and adopted by the Civil Service Commission are dispositive of the matter before the undersigned i.e., "[t]he Fire Chief promoted two active union officers which indicates... that he did not discriminate against [Krejsa and Sarapuchiello] because of their union activities...[and]...there was no prejudice proven by preponderance of evidence..."

The City asserts that the doctrine of res judicata if properly applied in this instant matter would prevent the Charging Parties from litigating the same facts before two separate forums and getting the proverbial "two bites at the same apple." The City advances alternative arguments that, based on the Civil Service Commission proceeding, the instant unfair practice charge should either be summarily dismissed with prejudice or that the Commission should adopt the findings of fact and conclusions of law rendered by the Civil Service Commission's Hearing Officer and adopted by the Civil Service Commission and then "formulate a determination as to whether or not an unfair practice has been committed on those facts."

The City cites one judicial decision and one decision of a Hearing Officer of the New York Public Employment Relations Board in support of its Motion to Dismiss Complaint.

HEARING EXAMINER'S RULING ON CITY'S MOTION TO DISMISS COMPLAINT - DISCUSSION AND ANALYSIS

After careful consideration of the positional statements of the parties and the record as a whole, the undersigned is constrained to deny the City's motion in all respects.

It is evident to the undersigned that Krejsa and Sarapuchiello have set forth distinct and independent grounds for their appeals filed with the Civil Service Commission and the Public Employment Relations Commission concerning the alleged improper actions taken by representatives of the City of Hackensack concerning the bypassing of the Charging Parties in making promotions to the rank of Fire Lieutenant.3/ The City cites certain opening remarks of the Attorney for Sarapuchiello and Krejsa in the aforementioned Civil Service proceeding in support of its Motion to Dismiss Complaint and in support of its contention that the existing judgment or conclusion of Hearing Officer Weitzman concerning the motivation of the City in bypassing these two individuals was conclusive of the rights of these parties (and apparently Richard Winner as well) in any other proceeding involving the litigation of that claim. These opening remarks of Counsel however only establish that the appeal before the Civil Service Commission dealt with the contention that Krejsa and Sarapuchiello had been denied promotions because they had been too active in the past in filing complaints and appeals with the Civil Service Commission against the City predicated upon the City's alleged violations of particular Civil Service statutes.4/ In addition the Civil Service Commission's Hearing Officer's Report addresses itself to the Appellants' contention that the actions of the City in bypassing their names for promotion was contrary to "the spirit and intent of the Civil Service rule."

3/ At this juncture it is important to emphasize that the City does not attempt to differentiate Richard Winner from Krejsa and Sarapuchiello in its Motion to Dismiss Complaint even though Winner was not a party to the Civil Service Commission matter referred to by the City in its Motion to Dismiss.

4/ In contrast, the opening statement of the Attorney for the Charging Parties in the matter before the undersigned never refers to the activities of these individuals in pursuing their Civil Service rights but in fact emphasizes that they were denied promotions because of the anti-union animus of the City that was directed at them as union officers and/or active participants in Local 2081 activities. (Transcript, pages 11-12 and 18-19)

In light of the evidence before the undersigned it therefore cannot be concluded that the related doctrines of res judicata and collateral estoppel mandate that the undersigned defer to the conclusions of Hearing Officer Weitzman concerning the anti-union animus issue. The doctrine of res judicata refers to "claim preclusion" and holds that an existing valid and binding judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. Collateral estoppel refers to "issue preclusion" and holds that a final decision of a court or administrative agency on an issue actually litigated and determined is conclusive of that same issue in any subsequent suit. Neither of these two concepts apply however to matters not within the particular jurisdiction of an administrative agency as authorized by statute.5/

An examination of the entire record fails to substantiate the contentions of the City that both the PERC and Civil Service Commission proceedings instituted by Krejsa and Sarapuchiello were predicated on either the claim or concerned the same issue.

In addition it is the undersigned's determination, as set forth more fully in the aforementioned Ruling on Motion to Dismiss Complaint (Appendix "A"), that the Civil Service Commission clearly does not have any jurisdiction to investigate or to rule upon the substance of the unfair practice charges filed with PERC in this instant matter. PERC has been granted the exclusive power to prevent a public employer or a public employee organization from engaging in unfair practices as defined in the Act, as amended. [See N.J.S.A. 34:13A-5.4(a) and (b)] Therefore it is concluded that in any event the doctrines of res judicata and collateral estoppel are not applicable in this instant matter.6/

The cases cited by the City in support of its most recent Motion to Dismiss are inapposite. The City first referred to a March 1, 1976 decision of the United States Supreme Court to decline to review a

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5/ See Am Jur 2d Sections 496 - 504 (pages 305-316) - The undersigned recognizes that while thedoctrines of res judicata and collateral estoppel were developed in the context of judicial proceedings, it is accepted that in a proper case they may be applied to administrative proceedings as well.

6/ It may also be noted that as stated before only a valid and final judgment can be res judicata. The proceeding before the Civil Service Commission may still be deemed to be in fieri inasmuch as the Civil Service Commission's decision was only issued on May 20, 1976 and that decision may still be appealed.

decision of the Colorado Court of Appeals in a matter entitled Colorado Springs Coach Co. v. State Civil Rights Commission, 536 P. 2d 837 (1975).[1] The Colorado Court in this matter held that the decision of the State Industrial Commission which affirmed a referee's finding that the discharge of a bus driver was based on his failure to make scheduled runs or to inform his employer of his reasons barred [by operation of res judicata] a subsequent proceeding before the State Civil Rights Commission by that bus driver who alleged before the Civil Rights Commission, as he had before the Industrial Commission, that his termination had been because of race and color. This Colorado decision is easily distinguishable from the matter before the undersigned. It was uncontroverted in this case that the racial discrimination claim was specifically litigated in two forums and it was apparent that the state Industrial Commission had sufficient statutory authorization to have concurrent jurisdiction over allegations of racial discrimination within its "sphere of influence." In addition, inasmuch as the bus driver in the Colorado matter declined to appeal the decision of the Industrial Commission that decision could be deemed to be final and enforceable and could therefore be res judicata.

The City also cites a decision of a Hearing Officer of the New York Public Employment Relations Board in a case entitled Board of Education of the City of Buffalo, 6 PERB 4534, in partial support of its Motion to Dismiss. In this decision the Hearing Officer determined that since issues raised in the improper practice charge before him had been fully litigated in a court proceeding to compel arbitration the charge should therefore be dismissed. This Buffalo decision can be distinguished from the matter sub judice on several grounds. A final judicial decision had been rendered with regard to the identical issue that was before the PERB Hearing Officer. It was also clearly uncontroverted that the Supreme Court, Erie County, in ruling on the City of Buffalo matter had properly exercised its jurisdiction concerning a request to compel arbitration pursuant to Article 75 of the New York Civil Practice Law and Rules.

In conclusion it is the undersigned's determination that the matter sub judice is appropriately before the Public Employment Relations Commission which has exclusive nondelegable jurisdiction with regard to the instant charge. It has not been established by the City that the doctrines of res judicata and collateral estoppel have any applicability in this case.

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[1] Colorado Civil Rights Commission v. Colorado Springs Coach Co. 96 S. Ct. 1420 (1976).

POSITION OF THE CHARGING PARTIES ON THE N.J.S.A. 34:13A-5.4(a)(3) "DISCRIMINATION" ISSUE

The Charging Parties contend that the City violated the Act, as amended, when the City discriminatorily skipped over them in making promotions to the rank of Fire Lieutenant because of the Charging Parties' membership in and active participation on behalf of Local 2081. The Charging Parties emphasized that it was stipulated that in every year since 1947, when the City became subject to the Civil Service Laws, all promotions in the Department were made in accordance with the rank order of the candidates on the appropriate Civil Service Certification list without any instances of skipping. The Charging Parties maintain that the reason why the City deviated from the standard operating procedures previously applied in making promotions within the Fire Department was that three union activists, two of whom were former Local 2081 officers and members of Local 2081 negotiating teams in the past, had scored well on the Civil Service examination.

The Charging Parties referred to the following arguments, among others, in further support of their allegations that the City was motivated primarily if not exclusively by anti-union animus in skipping over them:

1. The City, through its agents and representatives, had established a policy as of the beginning of 1975 that Local 2081 officers would no longer be utilized as Acting Superior Officers within the Department. The rationale enunciated for this decision referred to the inherent conflict of interest between Union responsibilities and Fire Officer responsibilities.

2. The City Manager, Joseph Squillace, in a deposition that was introduced as a joint exhibit (Exhibit JT-1), referred to the existence of Special Order #9 issued on July 26, 1972 that, in apposite part, directed all Fire Officers who were members of Local 2081 to submit their resignations from that organization by August 4, 1972.

3. Certain City agents and representatives were supporters of the F.M.B.A. (Firemen's Mutual Benevolent Association), a former majority representative of the City's firefighters, and therefore intended to intimidate

supporters of Local 2081 by discriminating against Local 2081 officers and activists concerning promotional opportunities in an effort to aid the F.M.B.A.

4. The testimony of Lt. Richard Kearney established that the City's announced reasons for bypassing the Charging Parties were pretextual only.

5. The testimony of Michael Volpe proved that City representatives and agents had determined that the main Union troublemakers - the leaders of the picketing of City facilities during prior contract negotiations - included the three Charging Parties. Lt. Richard Kearney also confirmed that the City Manager had announced that he would skip individuals on Civil Service Certification lists who were not on his side.

The Charging Parties asserted that their work records were more than satisfactory and that they had never been directly informed that their attitudes or performances on duty (including fire safety patrol) were considered to be deficient in any way by the City administration. The Charging Parties maintained that they had never received any warnings that unless their alleged "deficiencies" were corrected they would not be considered for promotions.

The Charging Parties contended that, in accordance with precedent established by the National Labor Relations Board, the City's conduct in discouraging its employees from becoming involved in any Local 2081 affairs by effectively denying union activists their promotional rights was so "inherently destructive of employee interests" that specific proof of intent (to encourage or discourage employees in the exercise of the rights guaranteed to them by [the Act]) was unnecessary. The Charging Parties did argue that specific proof of intent had in fact been established by the record.

The Charging Parties as a remedy sought an order requiring the City to promote them to the rank of Fire Lieutenant, effective as of the date they were denied promotion. They contended that they should then be entitled to full back pay and other benefits.

POSITION OF THE CITY ON THE N.J.S.A. 34:13A-5.4(a)(3) DISCRIMINATION ISSUE

The City denied that it had committed any unfair practices within the meaning of the New Jersey Employer-Employee Relations Act. The City contended that the Charging Parties had failed to prove by a preponderance of the reliable and probative evidence that (1) the City, as represented by the Mayor and Council, had any knowledge that the Charging

Parties were members and active supporters of Local 2081; (2) that the City through its representatives or agents, were motivated by anti-union animus in bypassing the Charging Parties in making promotions to the rank of Lieutenant in February of 1975; and (3) that the negative recommendations with regard to their promotions would not have made "but for" the Charging Parties' exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

More specifically, the City submitted that the credibility of the witnesses called on behalf of the Charging Parties and the reliability of their testimony was highly suspect given the inconsistency and self serving nature of their testimony and their obvious bias.

The City contended that the policy adopted by the Fire Department which directed that no Superior Officer within the Department could hold a position as an officer within Local 2081 was well within the power of the City, as the appointing authority, to make. The City argued that the promulgation of this policy completely comported with the clear language of the Act dealing with employer unfair practices as well as that language proscribing the commingling of supervisors with non-supervisory personnel and did not reflect any anti-union animus on the City's part. The City also maintained that Special Order #9 referred to by the Charging Parties did not preclude membership in Local 2081, but only directed that Superior Officers could not hold an official position with the Union.

The City emphasized that its decision to bypass the Charging Parties in making its promotions to the rank of Fire Lieutenant was motivated by "legitimate business reasons based upon an evaluation of the performance of all the men who were considered for the position of Fire Lieutenants." The City submitted that the record amply demonstrated that Krejsa and Sarapuchiello were not promoted as a result of considering (1) negative factors found in their personnel files; (2) personal observations of these individuals while on duty; (3) reliable information given to the Chief by Deputy Chief Aiellos that casted doubt on Krejsa's and Sarapuchiello's abilities to function in a supervisory capacity and (4) their poor performance while on Fire Safety Patrol. The City contended that it bypassed Winner because of certain psychological problems that were found by an examining physician at Stevens' Institute in Hoboken, New Jersey.

In conclusion, the City requested that the complaint in this matter be dismissed with prejudice.

DISCUSSION AND ANALYSIS OF THE N.J.S.A. 34:13A-5.4(a)(3) DISCRIMINATION ISSUE

A. The Applicable Law

In the absence of any Commission decisions that have defined the standards by which to analyze allegations of an employer's discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3), the undersigned has analyzed apposite federal private sector 8/ and public sector judicial and administrative decisions that have dealt with similar issues, with particular emphasis on the decisions of other state administrative agencies that are responsible for the development and administration of public sector labor relations policy within their respective jurisdictions. An examination of the different kinds of standards that have been applied in other jurisdictions in "§ 5.4(a)(3)" type cases is in order and will be discussed seriatim.

"BUT FOR" MOTIVATION TEST

The New York Public Employment Relations Board (PERB) has recently applied a "but for" test in "§ 5.4 a(3) type" discrimination cases. PERB defined this test by stating that, "In order for [a union] to prove its allegations [of a § 5.4 (a)(3) type violation], it is incumbent upon it to establish by a preponderance of the evidence that the [Public Employer] knew [that the aggrieved individual] was engaged in union activities, had animus toward [the union], and that [the Public Employer's] actions [against the aggrieved] would not have been taken 'but for' such activity (footnote omitted)." 9/ Under this "but for" standard a public employer such as the City in the instant matter would be found to have violated N.J.S.A. 34:13A-5.4(a)(3) if it could not justify the decisions complained of as decisions that would have been made absent its employees' exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

8/ The Courts of our State have specifically recognized that the New Jersey Employer-Employee Relations Act was patterned after the National Labor Relations Act, as amended, and that the latter may be utilized as a guide in resolving disputes arising under our Act [See Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970)]

9/ In the Matter of Mexico Academy and Central School District, 8 PERB 4550 at 4552 (1975); See also In the Matter of Sag Harbor Union Free School District, 8 PERB 4565, affirmed 8 PERB 3137 (1975)

Pursuant to this "but for" test, if a public employer could establish a valid economic reason or "business" reason for its decision to discharge, suspend or not to promote an employee in and of itself, the public employer's action would be upheld even if the employer's anti-union animus played some part in its decision.[10/]

"PRIMARY MOTIVATION" TEST

Under this standard the decision of the City not to promote the Charging Parties to the rank of Fire Lieutenant when said promotions were announced on or about February 12, 1975 would be upheld unless the primary motivation for the City's decision was found to be the Charging Parties' exercise of the rights guaranteed to them by the Act. A public employer under this test could fire an employee for good cause, for bad reasons or no reasons at all, as long as the decision was not primarily motivated by anti-union animus.[11/]

Under this "primary motivation test" generally it would first have to be established that (1) the Respondent knew that the aggrieved employees were involved in protected union activities and (2) that the Respondent through its agents and representatives revealed its anti-union animus.

"ONE OF THE MOTIVATING FACTORS" TEST

This test has been applied by the Wisconsin Employment Relations Commission,[12/] the Massachusetts Employment Relations Board,[13/] the Pennsylvania

10/ As set forth before, the City in its brief refers to a "but for" test in disputing that its actions in not promoting Krejsa, Sarapuchiello and Winner to the rank of Fire Lieutenant violated N.J.S.A. 34:13A-5.4(a)(3).

11/ See e.g., the decision of the Michigan Employment Relations Commission in the decision entitled In the Matter of Summerfield School District and Summerfield Education Association, Case No. C68-D-37, 314 GERR, F-1 (1969). It is also arguable that MERC in this decision adopted the more commonly accepted "one of the motivating factors" test, to be discussed hereinafter, rather than a primary motivation test.
Also see the United States Court of Appeals decision, NLRB v. Ogle Protection Service, Inc., 64 LRRM 2792 (6th Cir. 1967) for reference to the "primary motivation" test.

12/ See e.g., Koeller and Muskego - Norway Consolidated Joint School District No. 9, 60 LRRM 1246 (WERC 1965), affirmed Muskego - Norway C.J.S.D. No. 9 v. WERB, 151 N.W. 2d 617 (1966) and Kenosha Teachers Union v. WERC, 67 LRRM 2237 (Wisc. Cir. Ct. 1967), affirmed 158 N.W. 2d 914 (1968).

13/ See e.g., Town of Halifax, Mass., L.R.C. Dec. No. MUP - 2059, 1 MLC 1486 (1975).

Labor Relations Board,[14] and the Iowa Employment Relations Board.[15] This standard would mandate a finding that a particular Respondent had committed an unfair practice if it was determined that the Respondent was aware of an individual's union activities, had animus toward that the union, and that the actions taken by the Respondent that adversely affected that individual were motivated in part by that person's union activities. Pursuant to this test an employee could not be discriminated against concerning promotional appointments, for example, when one of the motivating factors for his employer's decision was the employee's union activities, no matter how many other valid reasons existed for the employer's decision. Although it is arguable that there is not one clear "federal standard" relating to a violation of Section (a)(3) of the National Labor Relations Act [ which is substantially similar in material part to N.J.S.A. 34:13A-5.4(a)(3) ] [16], substantial support can be found in relevant judicial and administrative decisions for this "one of the motivating factors" standard.[17]

THE THEORY THAT CERTAIN ACTIONS OF EMPLOYERS ARE SO "INHERENTLY DESTRUCTIVE OF EMPLOYEE RIGHTS AND INTERESTS" THAT THEY MAY BE DEEMED PROSCRIBED WITHOUT NEED FOR PROOF OF AN UNDERLYING IMPROPER MOTIVE

There is a significant line of decisions concerning "§ 5.4(a)(3) type" discrimination cases that have adopted the theory that some actions of an employer, whether in the public or the private sector, are so "inherently destructive of employee interests" that those actions may be considered to be proscribed without need for proof of an underlying improper motive. The conduct itself is deemed sufficient to make a case concerning the commission of an unfair practice. There is recognition of the fact that some conduct carries with it attendant consequences, e.g. the discouraging of present or future activities with regard to the participation in and the assisting of any employee organization, which an employer not only anticipated but which he must

14/ See e.g., Little Neighborhood Centers, 7 PPER 27 (1976) and Upper St. Clair School District, 5 PPER 96 (1974).

15/ See e.g., In the Matter of Phyllis Cate, PERB Case No. 354 (1975).

16/ Section 8 (a)(3) of the National Labor Relations Act, in part, declares that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage membership in any labor organization."

17/ See e.g., Brickner Corp. v. NLRB, 69 LRRM 2421 (CA 9) (1968), J.P. Stevens & Co. v. NLRB, 65 LRRM 2829 (CA 2) (1967), Riverside Lumber Company and Local Union No. 3-22, International Woodworkers of America, AFL-CIO (Before the National Labor Relations Board - Division of Judges) - Case No. 36-CA-2736 - (1976).

be presumed to have intended. The employer's conduct thus bears its own indicia of intent.[18]

The United States Supreme Court set forth "[s]everal principles of controlling importance" concerning the above-delineated theory with regard to motivation, legitimacy of purpose, and burden of proof in the following fashion:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.[19]

The undersigned concludes that a two fold standard should be applied to cases alleging violations of N.J.S.A. 34:13A-5.4(a)(3) in order to best effectuate the purposes of the Act. A violation of § 5.4(a)(3) should be found if it is determined that a public employer's discrimination "in regard to hire or tenure of employment or any term and condition of employment" (1) was motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of the rights guaranteed to him by the Act that includes "the right, freely and without fear of penalty or reprisal, to form join and assist any employee organization or to refrain from any such activity"[20] ["one of the motivating factors" test] or (2) had the attendant effect of so encouraging or discouraging employees in the exercise of those protected rights [the "inherently destructive of employee rights" theory].

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18/ See e.g., NLRB v. Great Dane Trailers, Inc., 388 U.S.26 (1967), NLRB v. Erie Resistor 373 U.S. 221 (1963), Meyer v. Lane County Board of Commissioners, 68 LRRM 2685 (Ore. Cir. Ct. 1968), In the Matter of Phyllis Cate, Iowa PERB Case No. 354 (1975).

19/ NLRB v. Great Dane Trailers, Inc., supra at p. 34.

20/ See N.J.S.A. 34:13A-5.3

The "Declaration of Policy" section of the Act, incorporated within N.J.S.A. 34:13A-2, in part states that "It is hereby declared as the public policy of this State that the best interests of the people of this State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors; that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless where the merits of the controversy lie are forces productive ultimately of economic and public waste..." In addition, one of the basic tenets incorporated within the Act [in N.J.S.A. 34:13A-5.3] referred to hereinbefore, refers to the right of public employees to form, join or assist any employee organization or to refrain from any such activity without fear of penalty or reprisals. It is axiomatic that, contrary to the "Declaration of Policy" within the Act, labor disputes would not normally be prevented or promptly settled nor would employer and employee strife be lessened if employers were permitted to discriminate against an individual for reason of that employee's exercise of a fundamental right protected under the Act. Even if an employer's discriminatory act was motivated only in part by an employee's union activities, the fact that the employer relied upon this rationale to any extent, or that the attendant effect of the employer's actions would be to encourage or discourage the exercise of protected rights, would be violative of the clear mandate of the Act.

This two fold "motivation" and "effect" test also accommodates the prerogative of a public employer to discharge, suspend or to refuse to promote its employees, for example, for any cause or no cause at all, so long as these actions were not in retaliation for union activities or support, subject, of course, to compliance with any relevant contractual provisions negotiated between the parties. The Commission cannot substitute its judgment for that of an employer as to what constitutes reasonable grounds for discharge or other degrees of discipline. In addition, under this "motivation" and "effect" test membership in a union or other employee organization does not immunize employees against disciplinary action taken by an employer for reasons other than union hostility. Lastly, the Commission in its Rules and Regulations determined that the Charging Party "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." (emphasis supplied) [21/]

The undersigned thus concludes that the two fold "motivation" and "effect" test referred to hereinbefore effectuates the purposes of the Act

21/ See N.J.A.C. 19:14-6.8

while preserving public employers' legitimate prerogatives of management. Similar standards are applied in the federal private sector and by other state administrative agencies whose responsibilities parallel those of the Commission.

An examination of the merits of the specific charges filed by William Krejsa, Nicholas Sarapuchiello, and Richard Winner, in light of the standards enunciated by which to analyze the allegations of the City's discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3), is in order and will be discussed seriatim.

B. THE CHARGE FILED BY WILLIAM KREJSA

1. Krejsa's Protected Union Activities

William Krejsa has been employed as a firefighter by the City since July 1, 1964. Local 2081 was certified by the Commission on January 18, 1972 as the exclusive representative of all firefighters employed by the City below the rank of Lieutenant for the purposes of collective negotiations. Krejsa held the position of a Shop Steward with Local 2081 in 1972 and 1973. He was a member of Local 2081's negotiating team during the period between the early part of 1972 and August of 1974. Krejsa was elected to the office of State Delegate for Local 2081 in December of 1974 and later resigned that position on January 7, 1975 for the reasons to be set forth in a later section of this decision. Krejsa also testified that he participated in the picketing that took place within the vicinity of City Hall in February of 1974 aimed at protesting the status then of negotiations between the City and Local 2081.[22/]

2. The City's Knowledge of Krejsa's Activities

The City in its brief admitted that Chief Charles Jones was aware of the Union activities of Krejsa. However the City contended that Krejsa failed to prove knowledge on the part of the Mayor and members of the City Council of Krejsa's union activities at the time that promotions were made to the rank of Lieutenant on or about February 12, 1975. The City argued that Jones' knowledge of Krejsa's activities could not be imputed to either

22/ The City did not allege that the peaceful picketing that took place in February of 1974 was in furtherance of an illegal prupose and did not assert that the picketing was thus not permissible and outside the ambit of rights guaranteed to public employees by the New Jersey Employer-Employee Relations Act as well as the United State Constitution. See Kulish v. Hillside Policemen's Benevolent Assoc., 124 N.J. Super. 263 (1973).

the Mayor or the Councilmen.

The Commission has recognized, however, that a public employer may be bound by the actions or decisions of that employer's designated agents or representatives in accordance with the principles of the law of agency and certain applicable sections of the New Jersey Employer-Employee Relations Act.[23] Implicit in the Commission's Bergenfield decision [supra, see footnote 23] is the recognition that the knowledge of an employer's representative or agent concerning certain labor relations matters, e.g., the union activities of its employees, may be imputed to that representative's principals, such as a Mayor and the members of the Council.[24] The undersigned thus concludes that the City's Mayor and Council had, at least, constructive knowledge of Krejsa's union activities as a result of Jones' actual knowledge of said activities. It is moreover uncontroverted that the City Manager, the chief executive officer of the City, had actual knowledge of the role that Krejsa played as a member of Local 2081's negotiating committee.[25]

3. THE CITY"S ANTI-UNION ANIMUS

An examination of the entire record in this matter reveals the following evidence that establishes the anti-union animus of the City and its representatives and agents:

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23/ See, e.g. In re Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975). The Commission in Bergenfield stated the following:

> In spelling out the obligations to negotiate and to reduce a negotiated agreement to a signed writing, N.J.S.A. 34:13A-5.3 refers to the parties' "representatives", "designated representatives", and "authorized representatives". In defining the term "representative", N.J.S.A. 34:13A-3(e) specifically provides that the term "shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them." The definition of "employer" set forth in N.J.S.A. 34:13A-3(c) includes "public employers" and includes "any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification". The newly enacted unfair practice amendment is fully consistent with the above-cited definitions, specifically imposing its prohibitions not only upon "employers" and "employee organizations", but also "their representatives or agents". N.J.S.A. 34:13A-5.4(a) and (b) (emphasis supplied) (In Re Bergenfield, supra, 1 NJPER 44 at 45)

24/ On the basis of the entire record it is the undersigned's finding that Chief Charles Jones may be considered to be an agent or designated representative of the City within the intendment of the Act.

25/ See Transcript, page 120.

1. The City and the Charging Parties stipulated that at least since 1947, when the City first became subject to the Civil Service Laws, all promotions within the Fire Department had been made in rank order of the candidates on the certification list without any instances of skipping prior to February 12, 1975 when the announcement was made by the City that Krejsa along with Sarapuchiello and Winner would be skipped over for promotions to the rank of Fire Lieutenant.[26/]

It is uncontroverted that the promotions to the rank of Fire Lieutenant were the first set of promotions announced concerning this particular position after a contract had finally been concluded between the City and Local 2081 in August of 1974, after approximately a year and one-half of difficult, often acrimonious, negotiations punctuated by the picketing of the City Hall complex and other areas by members of Local 2081. It is furthermore uncontroverted that, as set forth before, William Krejsa was a member of Local 2081's negotiating team during the period between the early part of 1972 and August of 1974, held several official positions within Local 2081, and participated in the picketing of City facilities. Nicholas Sarapuchiello was the President of Local 2081 from January, 1974 until July or August of 1974 when he resigned his position as President of Local 2081. Sarapuchiello also served as the Chief negotiator of Local 2081 during his tenure as President of Local 2081. Sarapuchiello as President of Local 2081 was also involved in the picketing of City facilities that took place in February of 1974.[27/]

2. Lieutenant Richard A. Kearney testified that he had attended a meeting called by Joseph J. Squillace, the City Manager and a member of the

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26/ Transcript, pages 159-160.

27/ Sarapuchiello stated that the Mayor of the City had definitely observed him while he was involved in the picketing that took place and further testified that the Mayor had waved at him at that time. Sarapuchiello also stated that he had also personally observed Chief Jones and the Deputy City Manager while he was picketing. The City did not attempt to refute Sarapuchiello's testimony in this regard although on cross-examination Sarapuchiello did testify that he had no conversations with any of the City officials that he had identified (Transcript, pages 25-26, 53).

Krejsa testified that City Manager Squillace along with the Mayor and several other councilmen had observed the picketing of City Hall while he was one of the individuals picketing. The City did not attempt to refute Krejsa' testimony in this regard. (Transcript, page 121)

City's negotiating team, that took place in December of 1973. Kearney stated that chief officers of the Fire Department were present [including Jones who was then a Deputy Chief] along with officers of the Fire Officers Association [including Kearney]. Kearney testified that Squillace referred to the fact that a Civil Service test had been called for [concerning promotions to the rank of Fire Lieutenant] and that the Civil Service Certification list [from which individuals were appointed to the rank of Fire Lieutenant on or about February 12, 1975] was going to be his (Squillace's) list. Kearney testified further that Squillace had stated that he intended to do "jumping on this certification list" and that "[h]e was going to take care of the guys on his side and the guys against he would take care of".[28/]

The City did not specifically contest that these statements attributed to Squillace had in fact been made.[29/] The City during cross-examination of Kearney submitted that Squillace was simply referring to his right, pursuant to N.J.S.A. 11:27-4 and N.J.A.C. 4:1-12.16, to select one of each "set" of three certified individuals to fill a particular position.[30/] Kearney denied however that Squillace made any reference to the Civil Service "one in three" rule during this December, 1973 meeting.[31/]

3. At a Chiefs' meeting held on January 2, 1975 attended by Chief Jones, Deputy Chiefs Aiellos and Chomiak and Battalion Chiefs DiMartino, Pinto and Morosco, Chief Jones announced that the City would no longer utilize Union (Local 2081) officers as Acting Fire Officers including Acting Lieutenants. Jones announced that the utilization of Union officers as Acting Fire Officers within the department represented a conflict between an individual's union responsibilities and his Fire Officer responsibilities. A list of newly elected Local 2081 officers was then read by Jones. Jones testified that he had announced

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28/ Transcript, pages 231-237.

29/ On the basis of the entire record it is the undersigned's finding that Joseph Squillace as the City Manager may be considered to be an agent or designated representative of the City within the intendment of the Act.

30/ The City contended that in making the promotions to the rank of Fire Lieutenant on or about February 12, 1975 it had fully complied with the applicable Civil Service "one in three" rule.

31/ Transcript, pages 234-237.

this new policy concerning "out of title" work after determining that a number of Union Officers (including Krejsa) either were then presently functioning as Acting Lieutenants or had occupied that position recently.[32]

As a result of Jones' announcement, all of the "chiefs" present at that meeting were thereafter instructed not to utilize union officers in acting rank capacities. Krejsa testified that he was approached by Battalion Chief Morosco on January 5, 1975 and was asked whether he held any office within Local 2081. When Krejsa answered that he had been elected as State Delegate, Morosco informed him that he had to remove him from his position as Acting Lieutenant as per Chief Jones' orders. Krejsa did not work again as an Acting Lieutenant and was thus not entitled to receive the higher rate of pay for days worked as an Acting Lieutenant until after he had resigned his position as State Delegate for Local 2081 on January 7, 1975 and until after his notice of resignation from the position of State Delegate had been communicated to Chief Jones.[33]

During the course of the hearing in this matter the City never attempted to define or demonstrate the conflict of interest between an individual's union responsibilities as an officer within Local 2081 and his responsibilities as an Acting Fire Lieutenant. Chief Jones was asked on one occasion whether he had found, based upon his long experience within the Fire Department, that superior officers within the Department who were also officers in the labor organization that represented the firefighters in the City prior to 1972, the F.M.B.A., had not performed their jobs properly as fire officers. Jones cryptic answer was that he "never was able to make that distinction."

In its brief the City referred to N.J.S.A. 34:13A-5.4(a)(2) that defines one prohibited employer unfair practice as "[d]ominating or interfering with the formation, existence or administration of any employee organization." The City further cited the portion of N.J.S.A. 34:13A-5.3 concerning

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32/ Transcript, pages 116, 121-123, 136-138.

33/ Krejsa had served as an Acting Lieutenant for approximately seven consecutive months before he was removed from the position pursuant to Jones' directive. The record also reflects that apparently Krejsa was not immediately reinstated to the rank of Acting Lieutenant after his resignation on January 7, 1975 because Local 2081 had not sent Jones a copy of Krejsa's "notice of resignation." Krejsa was later transferred on January 16, 1975 to another company that did not require the services of an Acting Lieutenant. (Transcript, pages 136-138.)

proscriptions against the commingling of supervisory personnel and non-supervisory employees.[34] The City maintained that by reading these sections in pari materia it was clear that "the legislature permitted supervisors to have the ability to become members within the rank and file local but that their membership must be limited to a passive role." The City, after referring to several cases decided under the National Labor Relations Act in the private sector, submitted that Chief Jones' directive of January 2, 1975 on "out of title work" was aimed at insulating the City from possible violations of the New Jersey Employer-Employee Relations Act (concerning N.J.S.A. 34:13A-5.4(a)(2) referred to hereinbefore) that could have been found if the City permitted Local 2081 officers to serve as Acting Lieutenants.

The undersigned finds that this particular argument of the City, contained in its brief, is completely pretextual and is without any foundation whatsoever. The City never attempted during the course of the hearing or in its brief to establish that either Acting Lieutenants or permanent Fire Lieutenants were supervisors within the meaning of the New Jersey Employer-Employee Relations Act. There was also no proof proffered by the City on the record that established that any firefighter, labor organization or representative of the City in reality feared that the appointment of firefighters who were Union officers to the rank of Acting Fire Lieutenant, on an ad hoc basis, in order to fill temporary vacancies caused by illnesses, vacation schedules or temporary shortages in permanent officers, constituted domination or interference with the formation, existence or administration of Local 2081. The cases cited by the City are totally inapposite and were substantially based on the fact that all supervisors, as broadly defined in Section 2(11) of the National Labor Relations Act, are excluded from coverage under that private sector Act and have no statutorily protected right to participate actively in a union - factors that are clearly not relevant to determinations under the New Jersey Employer-Employee Relations Act, a statute that does not exclude supervisors within the meaning of that Act from coverage thereunder.

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[34] The apposite sections of N.J.S.A. 34:13A-5.3 reads as follows:

> "...nor, except where established practice, prior agreement, or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations..."

4. A joint exhibit (JT-1) was introduced into the record by the parties that consisted of a deposition taken of Joseph J. Squillace, the City Manager and Chief executive officer of the City, concerning another matter that was pending before the Appellate Division of the Superior Court of New Jersey at the time of the hearing in the instant matter before the undersigned. Although Squillace's deposition was only one of the many documents contained within a Joint Appendix prepared by the parties with regard to that appeal, the parties asked that no documentation contained within that Appendix that was not directly related to the Squillace deposition be considered by the undersigned or the Commission.35/

The three exhibits referred to in the Squillace deposition consisted of (1) an interoffice communication, dated May 15, 1972, from the then Fire Chief John Bishop to Lieutenant Richard Kearney demanding that he resign as an officer of Local 2081 in 48 hours or be subject to disciplinary action; (2) an interoffice communication from Bishop to Kearney denying Kearney's request for an extension of time in which to resign his position; and (3) a memo from Bishop, entitled Special Order #9; to all officers of the Fire Department, dated July 26, 1972, which directed all officers of the Department who were members of Local 2081 to submit their resignations to Local 2081 on or before 8:00 A.M., Friday, August 4, 1972. The order further stated that any officers failing to comply with that order would be subject to departmental Charges. (emphasis supplied)

In his deposition Squillace affirmed that a statement contained within Special Order #9, referred to above, that stated that he concurred with Bishop that all Fire Officers, from Lieutenant to Deputy Chiefs, could not belong to a Union was absolutely correct. Squillace further confirmed that he would take disciplinary action as the Chief executive officer of the City against any officers of the department that did not submit their resignations to Local 2081.

In its brief the City through its attorney submitted that Special Order #9 did not preclude membership in Local 2081, and only directed that superior officers could not hold an official position with that union. The City further argued that this order was not germane to the matter before the undersigned inasmuch as Krejsa, Sarapuchiello and Winner would not be directly affected by that Order.

35/ The undersigned did of course examine the exhibits that were specifically referred to in Squillace's deposition.

The undersigned finds after careful consideration of Special Order #9 and the Squillace deposition that the City's attorney has clearly misread Special Order #9. This order clearly directed that all Superior Officers submit their resignations to Local 2081 or face disciplinary charges. Contrary to the position taken by the City's attorney this order does preclude membership in Local 2081 and by no means "only" directs that Superior Officers cannot hold an official position with that employee organization.[36/]

The undersigned also rejects the City's argument that Special Order #9 was not germane to the issues involved in this instant matter since none of the Charging Parties were presently superior officers and could not be "directly" affected by that order. The undersigned finds that the promulgation of Special Order #9 - an order that apparently was still in effect at the close of the hearing in this instant case [37/] - could only have had an attendant "chilling effect" on the fundamental rights of public employees within the City's Fire Department to "form, join and assist any employee organization..." [38/] and is indeed indicative of the anti-union animus of the City's representatives and agents. There is substantial judicial precedent in New Jersey that supervisory personnel can retain membership in an employee organization that represents non-supervisory employees of that department for purposes of collective negotiations.[39/] The judiciary in this respect has interpreted the relevant language of the New Jersey Employer-Employee Relations Act as permitting a supervisor to maintain membership in an employee organization that is the

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36/ It appears that the City's attorney has read Special Order #9 as a codification of the import of the two Bishop "memos" to Kearney that requested that Kearney resign his position as State Delegate inasmuch as he was a Superior Officer within the Department. It is clear from Squillace's deposition and the language of Special Order #9 that the scope and impact of this order was far more extensive than Bishop's earlier memos.

37/ The City never attempted to establish that Special Order #9 had ever been rescinded and the language of the City's brief [...it (Special Order #9) only directs that Superior Officers cannot hold an official position with the Union] would appear to support an inference that Special Order #9 is still in effect. It is also apparent from an examination of the Squillace deposition only that the litigation for which the deposition was taken at least in part concerned an attack on the legality of the effects of Special Order #9 by Local 2081 or any members thereof.

38/ N.J.S.A. 34:13A-5.3

39/ See, e.g. Union Council No. 8 v. Housing Authority of Elizabeth, 124 N.J. Super. 584 (Law Div. 1973) and Bowman v. Hackensack Hosp. Association, 116 N.J. Super. 260 (Ch. Div. 1971).

It is interesting to note that the City itself concedes this point in its brief. (See City's Brief - Page 19)

majority representative (for purposes of collective negotiations) of non-supervisory employees while not permitting supervisors to be represented by that organization unless the statutory exceptions in N.J.S.A. 34:13A-5.3 referred to earlier ("established practice, prior agreement or special circumstances") are applicable. Special Order #9 ignores the clear import of relevant judicial decisions in the state and is inimical to the interests of the Act.40/

The witnesses called by the City, Jones and Deputy Chief Anthony Aiellos, testified that the Union activities of the Charging Parties did not play a role in Jones' determination that these individuals should be denied promotions to the rank of Fire Lieutenant. For the reasons already referred to hereinbefore and for the additional reasons to be delineated hereinafter the undersigned does not credit this testimony of Jones or Aiellos. The undersigned is also not persuaded that Jones' active participation on behalf of the F.M.B.A. (the organization that represented the City's firefighters prior to the certification of Local 2081 in 1972), primarily in the late 1940's and early 1950's, substantiates Jones' statements that he was not motivated by anti-union animus in skipping over any of the Charging Parties.

The City also proffered evidence that it had in fact promoted several firefighters who were union activists when it announced the promotions to the rank of Fire Lieutenant in February of 1975. The City submitted that this fact

40/ The undersigned's findings concerning the issue of the anti-union animus of the City have been made on the basis of essentially undisputed testimony. The City has questioned the relevancy and legal import of the facts referred in the four subsections under the topic entitled "The City's Anti-Union Animus" but has not disputed the facts themselves. Other matters referred to by the Charging Parties concerning the issue of anti-union animus, including Sarapuchiello's Memorial Day (1974) conversation with Jones and Michael Volpe's recounting of a meeting he had with Squillace and Jones in February of 1974 - events referred to earlier in this decision - were in dispute. I have not resolved the conflicts in the testimony concerning these two incidents at this time because of my reservations about the credibility of the opposing witnesses with regard to these particular incidents. The witnesses appeared to be candid at times but at other times, in my opinion, they were not so candid. In addition the passage of time between the dates of these incidents and the actual hearing dates appeared to have affected the opposing witnesses' recollections of these incidents.

In any event, the undersigned concludes that there is substantial evidence that there existed an "anti-union animus" on the part of the City without having to resolve the conflicts in the testimony concerning the "Memorial Day" and "Volpe" incidents.

illustrated that no City agent or representative was motivated by anti-union animus in skipping over the Charging Parties.

The record reveals that a Lieutenant Willaims who was promoted in February of 1975 had been a Shop Steward for Local 2081 in 1972 and had been on Local 2081's negotiation team for a time although not apparently during the period that Sarapuchiello was President or during the time that the picketing of City Hall took place in February of 1974, A Lieutenant Yanello who was also promoted in February of 1975 to that rank had been a trustee of Local 2081 in 1974.[41] There was no evidence proffered that established that Yanello had ever been on Local 2081's negotiating team nor was it established that either Yanello or Williams had played any active role in the picketing incident that took place in February of 1974. Moreover the undersigned is not at all persuaded that the promotions of two individuals who had at one time held offices within Local 2081 substantiated the City's position that it was motivated solely by sound "business reasons" in skipping over the Charging Parties for promotions. As the City pointed out on several occasions it had to adhere to the Civil Service statute that mandates that one of three certified individuals be selected a particular position. The promotions of Yanelli and Williams would appear to be more reflective of the language of Civil Service's "one in three" rule rather than being indicative of a lack of anti-union animus on the City's part.[42-A]

4. THE REASONS GIVEN BY THE CITY AS TO WHY KREJSA WAS NOT PROMOTED

Chief Jones testified generally that he had not promoted Krejsa because of information contained in his personnel file; because of Jones' personal observations of him; because of information given to Jones by Deputy Chief Aiellos; and because of Krejsa's performance on Fire Safety Patrol.

More specifically, the record revealed that Krejsa had twice been brought up on disciplinary charges since he was appointed as a firefighter on July 1, 1964. Krejsa was brought up on charges for being eleven minutes late for duty in November of 1964. Jones specifically testified, however, that he was sure that he had not considered this charge in his determinations concerning the promotions to the rank of Fire Lieutenant because the incident had taken place so many years before.[42-B] Krejsa was then suspended on October 22, 1974 for apparently refusing an order to park his car at a certain location. Krejsa

41/ Transcript, pages 127, 206-208, and 226.

42-A/ The NLRB and the courts have found that "a discriminatory motive otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents...(footnote omitted)...Discouragement of organizational activities may be effected by making 'an example' of only one employee." /Aeronca Mfg. Co. 62 LRRM 1645 (1966), aff. 66 LRRM 2574 (CA 9) (1967) and Nachman Corp. v. NLRB, 57 LRRM 2217 (CA 7) (1964)/

42-B/ Transcript, pages 124-125 and 187.

thereafter filed an appeal with the Civil Service Commission concerning this suspension. The Civil Service Commission completely overturned his suspension and dismissed the charges against him.[43]

Concerning Jones' personal observations of Krejsa, Jones testified that Krejsa performed his duties satisfactorily when Krejsa was directly under his command. Jones was not able to refer to any specific instances wherein he had observed that Krejsa had not performed his firefighting duties properly. Jones mentioned only one incident [apart from Krejsa's Fire Patrol activities] that he felt reflected adversely upon Krejsa's ability to perform the duties of a Lieutenant. Jones referred to a statement attributed to Krejsa that was apparently quoted in a local newspaper sometime in 1974. Krejsa allegedly referred to officers in the department as being from the old school who "wanted you to get down on your knee and say 'yowsuh, yowsuh'." Jones admitted that he had not specifically verified whether Krejsa had made these particular comments. Jones further testified that he believed that these comments were contained within an article that referred to Krejsa's suspension concerning apparently his refusal to park his car at a designated location that was later overturned by the Civil Service Commission. Jones also stated that Krejsa probably held an office within Local 2081 at the time that this article was published. It is thus arguable that assuming that Krejsa did make the statements attributed to him he had made them as a representative of Local 2081 and had engaged in activities protected by the Act as well as by the "freedom of speech" provision of the First Amendment of the United States Constitution.[44]

Jones testified that he had found Krejsa's "attitude" to be "always on the border line of an insubordinate act, comments that were always close but never violations in themselves." Jones however did not refer to any instances that illustrated Krejsa's "bad attitude".[45]

Jones emphasized that he was quite critical about Krejsa's performance on Fire Safety Patrol - a program that had been established in the early part of 1974 in which firefighters would serve occasional four hour tours of duty during which time they would patrol sectors of the City in search of violations of various fire safety laws. Jones testified that he <u>believed</u> that

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[43] Transcript, pages 125, 185-186.

[44] Transcript, pages 184-186.

[45] Transcript, pages 204-205.

Krejsa had gone out on Fire Safety Patrol eight or nine times prior to the date (February 12, 1975) when the promotions to Fire Lieutenant were announced. Jones stated that Krejsa had not shown any initiated activities on patrol and that he simply went out on patrol and came back in again four hours later without making an effort to search out and to rectify violations of the fire safety laws. Jones mentioned that he was aware of Krejsa's deficiencies on Fire Patrol since he had received a formal written compilation of the activities of individuals on Fire Safety Patrol (for the first time) in January of 1975 shortly before the promotions were announced and had also received information from Deputy Chief Aiellos concerning Krejsa's lack of initiated activities. Three exhibits (R-3, R-4 and R-5) were introduced by the City that showed that Krejsa had not shown any initiated activities on January 13, 1975, January 18, 1975 and February 6, 1975 respectively.[46/]

The record however reveals that apparently none of the individuals that were promoted to Fire Lieutenant showed any initiated activities on their Fire Safety Patrol reports when they went on patrol. Jones referred to four individuals [Donaldson, Ingallinera, Williams and Yanelli] who had been promoted and yet had not reported violations of fire safety laws when they had been on patrol.[47/] Jones testified that these four men had participated on Fire Safety Patrol only during the early days of the program when "most of [the men] had a 100% attitude that they would just go out and put their time in" without reporting violations.[48/] Jones said that a "good part" of the men began to take their responsibilities on Fire Patrol seriously around August of 1974 and a pattern developed at that time that reflected that only certain firefighters (including Krejsa and Sarapuchiello) were not properly performing their duties on patrol. Jones stated that he was sure that he had had a discussion with "someone" concerning the lack of initiated activities on Krejsa's and Sarapuchiello's reports as early as August of 1974. Aiellos, the Deputy Chief and Training Officer responsible for the Fire Safety Patrol on a day to day basis, testified that he had had an opportunity to review the Fire Safety Patrol reports of Krejsa and had clearly related to Jones both orally and in the first written survey submitted to Jones in January of 1975 that Krejsa was

46/ Transcript, pages 128-132, 187-188, 200-202.

47/ Donaldson had been on Fire Safety Patrol once or twice. Ingallinera had been on patrol approximately four times. Williams had been on patrol perhaps three times. Jones also guessed that Yanell had been on patrol three or four times.

48/ Transcript, pages 181-182, 199.

not performing his duties on Fire Patrol and was not conforming to the "pattern" that the majority of the firefighters had established as of August of 1974.[49]

The undersigned concludes that the record fails to effectively distinguish Krejsa's performance on Fire Patrol from the performances of the firefighters who were promoted to Lieutenant in February of 1975. It is uncontroverted that Krejsa functioned as an Acting Lieutenant under the direct command of Battalion Chief John Morosco for a period of approximately seven months, from April of 1974 to January 7, 1975. As an Acting Lieutenant Krejsa did not go out on Fire Safety Patrol. If Krejsa failed to show any initiated activities on his Fire Safety Patrol reports after that program was instituted in January of 1974 up until the time that he was designated as an Acting Lieutenant in April of 1974 the testimony reveals (as referred to earlier) that he was simply doing what apparently every other firefighter, including those men who were promoted, was doing during the early part of the Fire Patrol program.

Furthermore, the only patrol reports of Krejsa's that were introduced into the record concerned his tours of duties on January 13, 1975, January 18, 1975 and February 6, 1975, three dates that, according to testimony, may not have even been referred to in the first formal written survey that Jones testified had been considered in determining that Krejsa was not performing his Fire Patrol duties properly.[50]

Moreover, Aiellos testified that he did not personally know of any occasion, before the promotions to Fire Lieutenant were announced, when other firefighters had patrolled areas either directly before or directly after Krejsa had patrolled them and had found violations of the fire laws. Krejsa also testified that he had discovered violations of the fire safety laws in the past and had reported them although he was unsure of whether he had shown initiated activities on the reports that he had submitted prior to the February 12, 1975 date of promotions. Krejsa also stated that to his knowledge no standards had been established by the Fire Department as to how many violations had to be found while on Fire Patrol.[51]

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49/ Transcript, pages 199-202, 321-322.

50/ Aiellos testified that he had first submitted a written survey of the firefighters' Fire Patrol activities to Jones "around the 15th, thereabouts, January". (Transcript, pages 147-152, 201, 317-318)

51/ Transcript, pages 139-140, 142, 344-345.

In addition, although Aiellos denied that he had told Lieutenant Kearney on February 18, 1975 that Jones had asked him (Aiellos) to check the files of Krejsa and Sarapucheillo "to see if there was anything in the files or reasons in the files why these men should not be promoted," Aiellos did admit that he had told Kearney that he was reviewing the fire patrol files and would advise Kearney "if any of his men were not performing up to any standards." Aiellos then testified that Kearney "kind of grinned and said something to the effect that they are looking for justification and that's when I [Aiellos] left. I didn't answer. I went out." 52/ (emphasis added) Aiellos reference to Kearney's latter remarks casts doubt on Aiellos' version of his February 18, 1975 conversation with Kearney. In any event the undersigned credits Kearney's testimony with regard to this conversation and does not credit Aiellos' testimony.

Moreover, with regard to the question of Krejsa's Fire Patrol activities, Jones admitted that he had no direct knowledge that firefighters had been warned that their performance on Fire Patrol would be evaluated when decisions were made concerning promotions. He could only state that he thought they should have been so warned. Although it is clear that all the firefighters were informed at their monthly platoon meetings that some men were not performing their duties properly on Fire Patrol no individuals were specifically singled out. The undersigned fully credits Krejsa's testimony that he had never been advised by Jones or anyone else, before promotions were made, that his performance on Fire Patrol was not adequate.53/

In light of the above-delineated reasons the undersigned concludes that the City's assertions that Krejsa's deficiencies on Fire Safety Patrol was one important factor that led to the City's decision not to promote him cannot be believed. The evidence referred to hereinbefore established that this reason given for the City's decision not to promote Krejsa entirely pretextual.

The last reason given by Jones to support the decision not to promote Krejsa was that he had received certain negative comments from Aiellos that reflected or Krejsa's supervisory abilities. Aiellos referred to three incidents that he had related to Jones. Aiellos testified that he had reprimanded

52/ Transcript, pages 230, 327.

53/ Transcript, pages 141-144, 204, 340-342.

Krejsa during the latter part of 1974 for visiting various firehouses while he was on suspension [54] to express his opinions as to the conditions under which he had been suspended, in violation of departmental rules. Aiellos stated that Krejsa continued to visit firehouses after he had warned him not to do so. Aiellos further related that he had informed Jones of this incident. Aiellos testified that he had criticized Krejsa, while Krejsa was an Acting Lieutenant, on two other occasions for following "bad practices" by complaining about two departmental orders (Special Orders #30 and #36) in front of the men under his command without following standard "informal" grievance procedures which would have first entailed expressing his dissatisfaction to his immediate superior. Special Order #30 authorized firefighters in the performance of their Fire Patrol duties to issue summonses where necessary. Krejsa allegedly complained that this was one of the changes that would result in having firefighters perform police-related duties. Special Order #36 apparently referred to temporary changes instituted by the Chief concerning interplatoon "shifting" while the legality of existing procedures was investigated. Krejsa allegedly stated that the Chief was taking something else away from the men. Aiellos stated that these two incidents concerning the special orders occurred within a span of ten days in September of 1974. Aiellos stated that although Krejsa had criticized these orders he had not refused to obey them to his knowledge. Furthermore, although Aiellos had related these incidents to Jones he had never brought Krejsa up on charges for either commenting on his suspension or for criticizing the two departmental orders. [55]

Aiellos confirmed that the three incidents referred to above led him to the conclusion that in January of 1975 Krejsa did not possess the supervisory abilities to be a lieutenant within the Department inasmuch as he improperly made his criticisms in front of subordinates. Juxtaposed against this one statement of Aiellos however are his comments that Krejsa possessed outstanding skills and knowledge as a firefighter and his statement that Krejsa possessed the supervisory abilities to be a lieutenant in the department as of the date that Aiellos testified (January 8, 1976). Battalion Chief John Morosco had earlier testified that Krejsa had performed his duties as Acting Lieutenant under him satisfactorily. As stated before Jones had affirmed that Krejsa had performed his duties satisfactorily under his command. [56]

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54/ As referred to earlier, Krejsa's suspension was later overturned by the Civil Service Commission.

55/ Transcript, pages 310-314, 350-351, 353.

56/ Transcript, pages 147, 183, 334 and 350.

In conclusion, based on the foregoing, the undersigned finds that the City's decision not to promote Krejsa was not motivated by unsatisfactory work performance on Fire Safety Patrol; nor by comments that he had made to subordinates criticizing special orders that were issued; nor by his conduct while on suspension. I am convinced that the reasons advanced by the City for its decision not to promote Krejsa are pretextual and that the primary and crucial element which resulted in the decision not to promote Krejsa was the City's desire to put a Local 2081 activist "in his place" and thus discourage other firefighters in the future from holding an official position within Local 2081 or otherwise actively assisting that organization in its frequent "confrontations" with City representatives concerning labor relations matters. The City has not proffered any evidence to support its announced reasons for not promoting Krejsa that would warrant the extraordinary action of skipping over an individual on a Civil Service Certification list for the first time in nearly thirty (30) years - especially an individual whose firefighting abilities and skills appeared to have been appreciated and praised. The record is devoid of any evidence that Krejsa had ever been warned that unless certain problems were corrected he would be denied a promotion. In the circumstances of this case, the above-stated conclusions of the undersinged seem appropriate under the rationale enunciated by the Ninth Circuit Court of Appeals in Shattuck Denn Mining Corp. v. N.L.R.B., 62 LRRM 2401, 2404 (CA 9, 1966):

> [T]he trier of fact may infer motive from the total circumstances proved. ...Nor is the trier of fact... required to be any more naif than is the judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another nature. More than that, he can infer that the motive is one that the employer desires to conceal - an unlawful motive - at least where...the surrounding facts tend to reinforce that inference...

Here, the "surrounding facts" preponderate in favor of a finding that the City, in failing to promote Krejsa pursuant to clearly defined established practices [i.e. promoting in accordance with the rank order on the Certification list], was motivated by a desire to effect a form of punishment on Krejsa for his exercise of the rights guaranteed to him by the Act including the right to assist the employee organization of his choosing.

5. APPLICATION OF THE "MOTIVATION" AND "EFFECT" TESTS TO THE KREJSA MATTER - CONCLUSIONS OF LAW

The undersigned, on the basis of the foregoing and the record as a whole, concludes that the City's discrimination affecting the terms and conditions of employment of Krejsa was motivated at least in part, if not exclusively, by a desire to discourage this employee in the exercise of the fundamental rights guaranteed to him by the Act to "freely and without fear of penalty or reprisal, to form, join and assist [an] employee organization."

The undersigned further concludes that the illegal actions of the City were "inherently destructive of employee rights and interests" and had the attendant effect of discouraging employees in the exercise of the rights guaranteed to them by the Act. It is not an unreasonable inference from the failure to promote Krejsa (as well as Sarapuchiello) [57] to hold that other firefighters would have every good reason to fear the same treatment meted out to Krejsa if they were aggressive in their activities on behalf of Local 2081. The effect of Jones' January 2, 1975 directive on "out of title" work and the apparent continuing effect of Special Order #9 reinforces that inference. The City has made it very clear that active participation in Local 2081's activities that impact on labor relations policy matters within the City is not the way to get ahead in the Fire Department.

For the reasons set forth hereinbefore, the undersigned finds that the City's conduct in failing to promote Krejsa was violative of N.J.S.A. 34:13A-5.4(a)(3). The undersigned further concludes that the City's improper actions, motivated in this case by a specific anti-union animus, necessarily had a restraining influence and attendant coercive effect upon the free exercise of Krejsa's rights guaranteed to him by the Act and was violative of N.J.S.A. 34:13A-5.4(a)(1).

C. THE CHARGE FILED BY NICHOLAS SARAPUCHIELLO

1. SARAPUCHIELLO'S PROTECTED UNION ACTIVITIES

Nicholas Sarapuchiello has been employed as a firefighter by the City for approximately eight years. As set forth earlier in this decision Sarapuchiello was the President of Local 2081 as well as its chief negotiator during the first seven or eight months of 1974 during which time he had been an active participant in the picketing of City facilities protesting the status of negotiations between the City and Local 2081. [58]

57/ The evidence concerning the failure to promote Sarapuchiello will be discussed in the next section.

58/ See page 21 of this recommended report and decision (lines 17-22).

2. THE CITY'S KNOWLEDGE OF SARAPUCHIELLO'S ACTIVITIES

The City in its brief admitted that Jones was aware of the Union activities of Sarapuchiello. For the reasons stated hereinbefore, the undersigned finds that the City's Mayor and Council had, at least, constructive knowledge of Sarapuchiello's union activities as a result of Jones' actual knowledge of said activities.[59] As referred to earlier the City did not attempt to refute Sarapuchiello's assertions that the Mayor of the City had waved at Sarapuchiello while he was picketing nor his statement that Jones and the Deputy City Manager were present during the time that he engaged in picketing.[60] Furthermore it is uncontroverted that the City Manager had actual knowledge of the role that Sarapuchiello played as a former Chief negotiator of Local 2081's team.

3. THE REASONS GIVEN BY THE CITY AS TO WHY SARAPUCHIELLO WAS NOT PROMOTED [61]

Chief Jones testified generally that he had not promoted Sarapuchiello because of information contained in his personnel file; because of Jones' personal observations of him and Jones' assessment of his "attitude"; because of information given to Jones by Deputy Chief Aiellos; and because of Sarapuchiello's performance on Fire Safety Patrol.[62]

More specifically, the record revealed that Sarapuchiello had been brought up on charges for talking to a newspaper reporter about the status of negotiations on the question of Fire Patrol during his term as President of Local 2081 in violation of a rule of the Fire Department that prohibited members of the department from speaking out on issues of that nature. The record reveals however that the State Superior Court fully sustained the essential allegations of a complaint filed on behalf of Sarapuchiello that challenged this particular rule as being violative of the section of the First Amendment relating to freedom of speech. This rule was also deemed not to have been validly enacted by the City.[63]

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59/ See page 209 of this decision (lines 2-15 and footnotes 23 and 24).

60/ See also footnote 27 on page 21 of this decision.

61/ The evidence that established the City's anti-union animus is referred to on pages 20-28 of this decision.

62/ At one point in the record Jones stated that "everything was considered by me" [Transcript, page 174].

63/ Transcript, pages 24-25, 52-53, 171, 173-174. Jones testified that Sarapuchiello had still disobeyed a departmental rule and that this was one matter that he considered in making promotions.

During his eight year tenure as a firefighter Sarapucheillo had only been disciplined twice by the City. On December 1, 1974 Sarapuchiello was four minutes late for duty as an Acting Lieutenant and was suspended for two days by the City.[64] On June 2, 1974 Sarapuchiello had failed to report for recall and was suspended with the loss of one day's pay. The testimony revealed that Sarapuchiello had been in church that day and had not found out about recall until he returned to work. Sarapuchiello further stated that he did not believe that he had been obligated pursuant to either departmental rules or the contract then in existence to notify headquarters of his whereabouts at all times while on recall. No evidence was introduced by the City that established what a firefighter's recall responsibilities were.[65]

Concerning his personal observations of Sarapuchiello, Jones testified that he did not remember observing Sarapuchiello at the scene of a fire nor could he recall any of the dates that he had the occasion to observe Sarapuchiello personally.[66] Jones moreover never referred to any specific incidents that could possibly substantiate his contentions that Sarapuchiello had "attitudinal" problems. The following interchange between the Attorney for the Charging Parties and Jones is illustrative of Jones' testimony in this regard:

> Q What was it about the way Mr. Sarapuchiello performed his duties that indicated to you that he might not have been -- should not have been promoted?
>
> A When you say "Performing of duties", that has to include many things.
>
> Q All right.
>
> A Performing of the duties could be an attitude related to your position.
>
> Q What -- Chief, in your own words, tell us you know what you observed about him?
>
> A Once again, it's hard to define, put it in specifics, it was a general attitude.

64/ Sarapuchiello had not been disciplined for reporting twenty (20) minutes late for a shift in June of 1971, because of alarm clock difficulties, since this was considered to be a first offense. At that time Local 2081 had not been certified as the exclusive majority representative for purposes of collective negotiations.

65/ Transcript, pages 31, 34, 55-59, 171.

It is interesting to note at this juncture that Jones testified that one of the men that had been promoted had a disciplinary record. (Transcript, page 175).

66/ Transcript, page 165.

Part of it was once again — was input from the Deputy Chief. It's difficult to define that in exact language.

Q You cannot pinpoint to any specific instance where Mr. Sarapuchiello did not perform his duties properly?

A Which duties?

Q Any fire duties whatsoever.

A I really can't give you a for instance that he did not perform his duties. 67/

At another point in the record this exchange took place between Jones and the Attorney for the Charging Parties concerning Jones' personal perceptions of Sarapuchiello's supervisory abilities:

Q For the moment, Chief - and I will get to the Fire Patrol - forgetting the Fire Patrol if you could in your testimony, what was it about Mr. Sarapuchiello's attitude that led you to believe that he was not — should not have been promoted?

A It appeared he had an attitude contrary to supervisory ability.

Q And is it possible for you to pinpoint exactly what it was about his attitude that would not be — that would be contrary to a supervisory ability?

A It would not be possible to pinpoint it. 68/

In later testimony Jones admitted that he was sure that he did not tell Sarapuchiello that his attitude as an Acting Lieutenant was not acceptable nor did he believe that he had ever related to Sarapuchiello that his attitude as a firefighter was not proper. Jones stated that he did not recall that he had ever instructed other superior officers to so inform Sarapuchiello. Jones also testified that he did not remember whether he had heard any comments made by Sarapuchiello that he felt indicated that Sarapuchiello would not make a proper candidate for promotion. Furthermore, Jones had not issued an order that Sarapuchiello should not be appointed as an Acting Lieutenant because of any "attitudinal" or other problems. 69/ In this regard Jones stated the following:

67/ Transcript, pages 165-166.

68/ Transcript, pages 166-167.

69/ Transcript, pages 168-169, 172-173.

"I made a decision that he should not be an Acting Lieutenant, I believe, if he was a Union Officer. That was only a period of time when I determined that we had a number of Union Officers as Acting Lieutenants." 70/

Jones affirmed that information that had been given to him by Deputy Chief Aiellos who was also the chief training officer within the department constituted another reason why Sarapuchiello was not promoted. Jones again did not refer to any particular incidents involving Sarapuchiello that had been brought to his attention by Aiellos. With regard to this consideration the following dialogue took place between Jones and the Attorney for the Charging Parties:

Q Did you ever receive any reports or observe personally that he was not performing his duties properly in the supervisory capacity of Acting Lieutenant?

A Yes, to the extent it was brought to my attention by the Deputy Chief.

Q Which Deputy Chief?

A Deputy Chief Aiello. (sic)

Q What did Deputy Chief Aiello (sic) tell you about the way Mr. Sarapuchiello performed his duties?

A Once again, based on attitude, possibly comments made, I can't give you it exactly. Possibly also some could be tied in with his duties as fire fighter but it was many things that was in-putted. 71/

The City relied heavily upon Sarapuchiello's performance on Fire Patrol in support of its contention that Sarapuchiello had been denied a promotion solely because of sound "business reasons." Jones testified that Sarapuchiello had gone on Fire Patrol perhaps eight or nine times before promotions had been announced on or about February 12, 1975. Both Jones and Aiellos emphasized that Sarapuchiello had never shown any initiated activities on his Fire Safety Patrol reports and that he did not conform to the pattern of reporting violations of fire safety laws apparently established by a majority of the firefighters after August of 1974. 72/

70/ Transcript, pages 172-173.

71/ Transcript, pages 167-168.

72/ Transcript, pages 65-67, 96, 182, 199-200, 317-318, 320.

The undersigned does not credit the testimony of the City's witnesses concerning the weight given to Sarapuchiello's performance on Fire Patrol in making the promotions to Lieutenant for substantially the same reasons cited before in the section concerning William Krejsa. More specifically it is uncontroverted that almost 100% of all the firefighters on Fire Patrol had not actively attempted to report violations during the first months of patrol. The institution of Fire Patrol had been bitterly contested by Local 2081 during the course of negotiations with the City under Sarapuchiello's leadership as President of Local 2081 and it appears that few if any firefighters took their responsibilities on the patrol seriously until after a contract was signed by the City and Local 2081 in August of 1974. Sarapuchiello's testimony also establishes that he was an Acting Lieutenant, with no Fire Patrol responsibilities, during much of July, August and September of 1974 and part of February of 1975.[73] The City introduced only two of Sarapuchiello's Fire Patrol reports [Exhibits R-1 and R-2], dated January 4, 1975 and February 18, 1975 [approximately one week after promotions were announced], in partial support of its contentions that Sarapuchiello's poor performance on Fire Patrol in large part justified its decision to skip over him for promotion. On the basis of the above-delineated considerations one must wonder exactly how many of Sarapuchiello's reports could possibly have been examined by Jones and Aiellos [after the time that certain firefighters had begun showing some initiated activities] before the promotional decisions were made.

The pretextuality and hollowness of the City's arguments concerning the weight given to Fire Patrol performances are further substantiated by the testimony referred to hereinbefore concerning the "Aiellos - Kearney" conversation of February 18, 1975, the Fire Patrol performances of those individuals promoted to Lieutenant, the lack of standards that had been developed concerning the number of violations to be reported, and the superficiality of the "warning" given to the firefighters concerning their performance on Fire Patrol.[74]

Jones testified at one point in the record that it was possible that he might have been influenced by an opinion of a physician that Sarapuchiello appeared "mentally dull" and "complained vaguely of problems which he could not really locate." The record revealed however that this physician was examining Sarapuchiello after he had been involved in an automobile accident while on

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73/ Transcript, pages 29-30, 162.

74/ See pages 31 and 32 of this decision. Battalion Chief John Pinto testified that Jones had ordered him not to use Sarapuchiello as an Acting Lieutenant because of his poor performance on Fire Patrol. The record however supports the conclusion that Pinto was so ordered after the promotions had been announced in February 1975. The undersigned concludes that Jones issued this order only to help buttress the manufactured case against Sarapuchiello.

Fire Patrol in late February of 1974. Sarapuchiello had apparently been knocked unconscious. At a subsequent medical examination on March 19, 1974 the doctor indicated that Sarapuchiello's attitude had changed greatly, that he anticipated no permanent disability, and that he was agreeable that Sarapuchiello could go back to work on March 21, 1974.[75/]

Deputy Chief Aiellos referred to three incidents involving Sarapuchiello that he had related to Jones prior to February of 1975. Aiellos believed that these incidents indicated that Sarapuchiello did not possess the attitude necessary to be an officer in the City's Fire Department. Aiellos testified that in February of 1974 Sarapuchiello was assigned to Number 2 Company and on one occasion during that time frame had gotten into a conversation with Aiellos, Kearney and one other firefighter. The discussion concerned the growing dissatisfaction at that time concerning the institution of Fire Safety Patrol.[76/] Aiellos stated that at that time Sarapuchiello had emphasized that he would refuse to sign a contract with the City with a Fire Patrol Clause in it. Aiellos recalled that Sarapuchiello had referred to officers within the Department as "scum bags" since they had not gone to the Mayor and Council on the firefighters' behalf to protest the institution of this patrol. Aiellos further testified that Sarapuchiello responded to Aiellos' question asking him whether he ever expected to become an officer himself by stating "He didn't give a damn and he didn't expect to be on the Department for twenty five years, and that as guys were interested in promotion, that was not his interest. He could go back to driving a truck." [77/] Aiellos later testified however that he had not brought Sarapuchiello up on charges for violating departmental rules and regulations in making the remarks attributed to him. Aiellos added that he was only critical of Sarapuchiello's comments concerning the officers in the department. The undersigned does not credit Aiellos' testimony that Sarapuchiello called officers in the Department "scum bags" in that February, 1974 incident. I do credit the testimony of Lieutenant Kearney who was present at that time that Sarapuchiello had not called officers in the department "scum bags".

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75/ Transcript, pages 176-178.

76/ As referred to earlier the picketing of City facilities to protest the status of negotiations and the institution of Fire Patrol took place also in February of 1974.

77/ Transcript, pages 303-307, 357-358.

Aiellos testified that he had criticized Sarapuchiello on another occasion on or about September 19, 1974, as he had reprimanded Krejsa under similar circumstances, for criticizing Special Order #30 (on Fire Safety Patrol procedures) while he was an Acting Lieutenant without going through proper channels within the Fire Department. Aiellos stated that he believed that Sarapuchiello's improper handling of Special Order #30 reflected adversely on his supervisory ability. The record reveals however that Aiellos testified that this was the only incident that he recalled that indicated that Sarapuchiello did not have the requisite supervisory abilities to be a Lieutenant. Aiellos affirmed that to his knowledge there was no recurrence of this incident while Sarapuchiello was an Acting Lieutenant and added that Sarapuchiello had not refused to obey the mandate of Special Order #30 to his knowledge. There was also no evidence in the record that Sarapuchiello was brought up on charges because of this incident.78/

The third incident related by Aiellos concerned a conversation he had with Sarapuchiello in Aiellos' office during the latter part of January of 1975, shortly before promotions were announced. Aiellos testified that Sarapuchiello had apparently heard rumors that he would be skipped over for promotion and in his conversation with Aiellos he had become irate and "worked up" and in general had "threatened bodily harm to the City Manager." 79/ Aiellos related that he had told Sarapuchiello to "remain cool" and that he was not doing himself any good by acting in that manner. Aiellos remembered that Sarapucheillo was relatively calm when he left his office. Aiellos testified that he had informed Jones about this particular event when he assumed his duties as a Training Officer. Aiellos stated that he had neither informed the City Manager about this incident nor did he feel that Sarapuchiello's comments warranted bringing him up on charges.80/

78/ Transcript, pages 307-309, 346, 347, 350 - Although the record is somewhat unclear in this regard, Aiellos did not specifically state that there were firefighters present who overheard the remarks attributed to Sarapuchiello.

79/ At another point in the record Aiellos was asked on direct examination what Sarapuchiello had said with respect to threatening the City Manager. Aiellos testified as follows:

> It's hard to put in direct words, other than the fact that he would like to work him over, something to that effect. (Transcript, page 331)

80/ Transcript, pages 330-332, 335-336, 356.

The undersigned does not credit Aiellos' version of this incident. Aiellos' testimony that he had informed Jones about this incident [that occurred in late January of 1975] when he assumed his duties as Training Officer, apparently in September of 1974, illustrated Aiellos' apparent "confusion" over some of the more important aspects of this meeting with Sarapuchiello. I do credit Sarapuchiello's account of this meeting with Aiellos during the latter part of January, 1975. Sarapuchiello stated that he had not threatened to do bodily harm to the City Manager, Joseph Squillace. Sarapuchiello admitted that the conversation that took place concerned the matter of promotions but testified that he had merely questioned Aiellos concerning why the City was not obeying Civil Service rules concerning promotions and had later informed Aiellos that he (Sarapuchiello) intended to do something about this problem by filing a complaint with Civil Service. Sarapuchiello recalled that Aiellos had told him to be calm and not cause problems and everything would be all right.[81]

Aiellos confirmed that Sarapuchiello's criticism of Special Order #30 and his insulting of officers of the Fire Department led him to his conclusion that Sarapuchiello did not possess the supervisory abilities or attitude to be a Lieutenant within the Fire Department. Juxtaposed against this statement of Aiellos is Aiellos' testimony that Sarapuchiello possessed the skills and the knowledge necessary to be a lieutenant in the Fire Department. Battalion Chief John Pinto testified that Sarapuchiello had performed his duties as an Acting Fire Lieutenant in a satisfactory manner.[82] Pinto stated that he had based his conclusion on his personal observations of Sarapuchiello and the reports that he had received from Captain Kinsley under whose direct command Sarapuchiello had worked. Lieutenant Richard Kearney testified that Sarapuchiello had worked under his command for the better part of 1974 and had performed his duties as a firefighter in an excellent manner.[83]

In conclusion, based on the foregoing, the undersigned finds that the City's decision not to promote Sarapuchiello was not motivated by the reasons that the City advanced. I am convinced, for substantially the same reasons set forth in

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81/ Transcript, pages 364-366, 368-369.

82/ The record reveals that an Acting Fire Lieutenant while on duty had the same responsibilities as a permanent Fire Lieutenant [Transcript, page 167].

83/ Transcript, pages 78-80, 82-82, 229-230, 333-334, 347, 357-358.

an earlier section of this recommended report and decision concerning William Krejsa,[84] that the reasons proffered by the City for its decision not to promote Sarapuchiello are pretextual and that the primary and crucial element which led to the City's decision was the City's desire to discipline Sarapuchiello [by not promoting Sarapuchiello in accordance with the rank order on the Civil Service certification list pursuant to the established practice of the City] [85] for Sarapuchiello's exercise of the rights guaranteed to him by the Act including the right to assist the employee organization of his choosing.

5. APPLICATION OF THE "MOTIVATION" AND "EFFECT" TESTS TO THE SARAPUCHIELLO MATTER - CONCLUSIONS OF LAW

The undersigned, on the basis of the foregoing and the record as a whole, concludes that the City's discrimination affecting the terms and conditions of employment of Sarapuchiello was motivated at least in part, if not exclusively, by a desire to discourage this employee in the exercise of the fundamental rights guaranteed to him by the Act to "freely and without fear of penalty or reprisal, to form, join and assist [an] employee organization"

The undersigned further concludes for the reasons set forth in the section of this decision dealing with William Krejsa that the illegal actions of the City were "inherently destructive of employee rights and interests" and had the attendant effect of discouraging employees in the exercise of the rights guaranteed to them by the Act. [86]

For the reasons set forth hereinbefore the undersigned finds that the City's conduct in failing to promote Sarapuchiello was violative of N.J.S.A. 34:13A-5.4(a)(3). The undersigned further concludes that the City's improper actions, motivated in this case by a specific anti-union animus, necessarily had a restraining influence and attendant coercive effect upon the free exercise of Sarapuchiello's rights guaranteed to him by the Act and was violative of N.J.S.A. 34:13A-5.4(a)(1).

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84/ See page 34 of this decision.

85/ Although Sarapuchiello was ranked No. 6 on the original list and only five (5) firefighters were promoted to the rank of Fire Lieutenant, Sarapuchiello would have been one of the firefighters so appointed if the City had not illegally discriminated against him. The City had requested and was granted permission to conditionally bypass Richard Winner (No. 3 on the Certification list), and the removal or withholding of his name from that Certification list had the effect of advancing all the individuals below Winner, including Sarapuchiello, on the eligible list. (See N.J.A.C. 4:1-12:14)

86/ See page 35 (lines 10-18) of this recommended report and decision.

D. THE CHARGE FILED BY RICHARD WINNER

1. WINNER'S PROTECTED ACTIVITIES

Richard Winner has been employed by the City as a firefighter for approximately eleven and one half years. Although Winner testified that he was a member of Local 2081 he stated that he had never held office within that organization. In addition there was no evidence in the record that Winner had ever been a member of Local 2081's negotiating team.

The record does reflect that Winner had been assigned the task of coordinating and assigning pickets when certain City facilities had been picketed in February, 1974. Winner stated that he personally had been involved in the picketing of the City Hall area and other locations.

Winner also testified with regard to two conversations that he had with Chief Jones in late December, 1974 and in the second week of January, 1975 concerning the promotions to Lieutenant that were to be announced. Winner stated that in his first telephone call to Jones he had informed Jones that Civil Service laws required that the City, as the appointing authority, notify the Department of Civil Service of the disposition of the certification list [with regard to the promotions to Lieutenant] within fifteen (15) days of receipt of that certification.[87] Winner recalled that he had been curious as to when the promotions would be made since he had "bad premonitions" about these promotions. Winner thereafter testified that in his second conversation with Jones on this matter he had raised the question as to why the aforementioned fifteen (15) day time was not being complied with by the City. Winner recalled that when he asked Jones whether it would be a good thing to make an official complaint concerning this delay to Civil Service Jones replied, "You know, if you rock the boat, I'll rock your boat harder."[88] It is clear to the undersigned that Winner considered that his right to file a complaint with Civil Service [about the failure of the City to notify Civil Service within fifteen days of receipt of a promotional certification list of the disposition of that certification] was a right clearly protected by the New Jersey Employer-Employee Relations Act. It is apparently Winner's argument that Jones' "rock

87/ It is uncontroverted that the certification in this matter concerning promotions to Lieutenant was dated December 13, 1974.

88/ Jones admitted that he had had one conversation with Winner concerning promotions in December, 1974 or in January, 1975. Jones denied that he had made the "boat rocking" statement attributed to him by Winner (Transcript, pages 214-215).

your boat" statement substantiated Winner's alternate contention that he was not promoted because of the City's intention to discourage him (as well as other firefighters) from filing official complaints with Civil Service protesting the actions or inaction of the City with regard to any matters affecting labor relations.[89/]

The undersigned after careful consideration of the applicable sections of the Act [90/] concludes that Winner's right to file the complaint referred to hereinbefore with the Civil Service Commission under the circumstances of this particular case is not a right guaranteed to Winner by the Act. Although Winner does not refer to any specific sections of the Act in support of his theory it would appear that Winner sould rely primarily on the section of N.J.S.A. 34:13A-5.3 that states "Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations." The undersigned concludes that this particular provision was designed to allow public employees the option of continuing to present individual grievances through established Civil Service procedures or through procedures mutually agreed to by public employers and employee organizations.[91/] The undersigned does not interpret this provision as guaranteeing to public employees any substantive rights [ to be added to those guaranteed rights specifically delineated elsewhere within N.J.S.A. 34:13A-5.3 ] but interprets this sentence as instead referring to procedural "choice of forum" considerations.

The undersigned does recognize that under certain circumstance complaints filed with the Civil Service Commission or other administrative agencies may be deemed to be activities protected by the Act. If complaints are filed with these other administrative agencies, pursuant to a grievance

89/ Winner's other contention is that the City's decision not to promote him was motivated at least in part by the City's desire to "discipline" him for taking an active role in the picketing of City facilities protesting the status of negotiations with Local 2081.

Transcript, pages 88-90, 96-99.

90/ See N.J.S.A. 34:13A-2 (Declaration of Policy) and N.J.S.A. 34:13A-5.3 (Employee Organizations; Right to Form or Join; Collective Negotiations)

91/ See Final Report to the Governor and the Legislature from the New Jersey Public and School Employees Grievance Procedure Study Commission (also known as the Bernstein Commission report) (dated January 9, 1968).

procedure established by agreement between a public employer and an employee organization,[92] and it is further established that an individual was "discriminated against" concerning a term or condition of employment because of the utilization of this grievance procedure it may well be determined that under the facts of that case the filing of a complaint with another administrative agency constituted an activity fully protected by the Act.

In the matter before the undersigned Winner proffered no evidence that he intended to file any grievance in accordance with the grievance procedure delineated in the contract between the City and Local 2081 pursuant to which a complaint to the Civil Service Commission may have been specifically authorized. In addition there was no evidence that Winner attempted to act on behalf of Local 2081 or on behalf of anyone other than himself when he conversed with Jones concerning the possibility of filing a complaint directly with Civil Service concerning the City's failure to observe Civil Service time limits. Furthermore there was no attempt to establish that Winner's announced intention to file this complaint was related to Winner's right, pursuant to N.J.S.A. 34:13A-5.3, "to form, join and assist any employee organization." The undersigned thus concludes that Winner's declarations concerning the possibility of filing a complaint with Civil Service on his behalf did not constitute an exercise of rights guaranteed to him by the New Jersey Employer-Employee Relations Act. It is the undersigned's determination that it would not properly effectuate the purposes of the Act to extent even the penumbra of the Act that far.

2. THE CITY'S KNOWLEDGE OF WINNER'S PROTECTED ACTIVITIES

Winner testified that he had come in contact with Jones, the Mayor of the City and a couple of members of the City Council while he was engaged in the picketing of City facilities. Winner also stated that he had said hello to certain of these individuals who in turn had said hello to him.[93] There

92/ N.J.S.A. 34:13A-5.3 states in part the following:

> Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

93/ Winner testified that he did not have a conversation with all of the people that he had mentioned. Winner never referred to the names of the people who had specifically said hello to him.

was no evidence introduced on behalf of Winner that established that any agents or representatives of the City were aware that Winner was responsible for the coordination of picketing activities and the assigning of pickets.[94]

During the hearing in this instant matter there were two specific conversations referred to that if credited would tend to establish that Winner had been singled out as a Local 2081 activist and "troublemaker" by City representatives. Sarapuchiello testified that on Memorial Day of 1974 Jones had informed him that the City was going to skip Richard Winner, the officers of Local 2081 and certain members of its negotiating team in making promotions from the certification list. At one point in the record Sarapuchiello stated that Jones told him that the City was going to skip these individuals "because of the long and lengthy battle [the parties] were having with [their] contract negotiations." Sarapuchiello later testified however that Jones had not given him a reason for the City's decision to skip the aforementioned individuals.

Sarapuchiello also recalled that although he disbanded his negotiating committee and resigned his presidency because of this conversation with Jones he had not indicated to other people to whom he had spoken to shortly after his conversation with Jones that he had even had a conversation with Jones. Sarapuchiello affirmed that he had informed only Richard Winner, on some unspecified date, about the substance of this conversation with Jones. Richard Winner however, never confirmed that he had been informed by Sarapuchiello about Jones' "Memorial Day" remarks concerning skipping on the promotional list.[95]

Jones denied that he had had a conversation with Sarapuchiello on Memorial Day of 1974 regarding promotions in general or more specifically skipping individuals for promotions. Jones stated that on that date he had approached Sarapuchiello and had asked him to try to get Local 2081's membership to sign the contract that had been proposed by the City that made reference to the institution of Fire Safety Patrol inasmuch as Jones believed that this patrol would be instituted in any event.[96]

For the reasons set forth earlier,[97] I do not credit Sarapuchiello's account of this Memorial Day incident. His testimony concerning his conversation

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94/ Transcript, pages 22-23, 41-42, 46-47. Jones denied that he had knowledge of any of Winner's Union Activities. (Transcript, page 208).

95/ Transcript, pages 22-23, 41-42, 46-47.

96/ Transcript, pages 211-213.

97/ See footnote 40 on page 27 of this recommended report and decision.

with Jones was too internally inconsistent and vague to be convincing.

The undersigned also does not credit the testimony of Michael Volpe, a personal friend of Winner, that Jones singled Winner out (along with Sarapuchiello and Krejsa) as one of the main Union troublemakers when Volpe had met with Jones and the City Manager in February of 1974 to discuss a procedural matter concerning the Fire Department that Volpe had first raised at a City Council meeting. Jones concurred with Volpe that the City Manager, Joseph Squillace, remarked that the picketing that was then taking place was distasteful but denied that he had singled out anyone as a main troublemaker within Local 2081.[98/]

3. THE REASONS GIVEN BY THE CITY AS TO WHY WINNER WAS NOT PROMOTED

Chief Jones testified generally that he had not promoted Winner because of information contained within his personnel file; because of Jones' assessment of Winner's poor attitude; and primarily because of Winner's apparent psychological or emotional problems.

More specifically the record revealed that Winner had been on extended sick leave for treatment of an apparent psychological or emotional problem. Winner had been examined by a psychologist with Stevens' Institute in Hoboken for approximately one week during the latter part of January, 1975 and the early part of February , 1975 in compliance with a specific request of Jones (made apparently in early January, 1975) that he submit to a medical examination.[99/] The City thereafter requested and was granted permission to conditionally bypass Winner pending the completion of the psychological review conducted at Stevens' Institute. A report on this psychological review, prepared by Dr. Murray Greenfield, a Licensed Psychologist, was issued on or about February 14, 1975. It was the recommendation of Dr. Greenfield that Winner not be considered for promotion for at least six months. Dr. Greenfield believed that this period of time would give Winner's condition a chance to improve. Jones testified that this report played a "great part" in the decision not to promote Winner temporarily pending an improvement in his condition. Winnter testified that he had received a letter, dated May 16, 1975, from Morris Farinella, Acting Director for

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98/ As referred to earlier in footnote 40 the undersigned questioned the credibility of Jones concerning this incident as well. The only specific finding that I am making at this juncture is that Winner was not singled out as a Union troublemaker by Jones.
Transcript, pages 249-253, 256, 290-291.

99/ Jones testimony is that Winner had a psychological problem by his own definition and that Winner wanted an examination made to determine what his problem was (Transcript, page 189).

Local Government Services that formally informed him of the decision of the City to bypass him temporarily because of the City's decision, based on his psychological review, that he was not capable at that time of assuming the responsibilities of a Fire Lieutenant. This letter from Farinella further informed him of the appeals procedure available to him concerning the City's decision to bypass his name.100/

Winner testified that he had appealed the City's decision to bypass him and that the result of his appeal was a hearing before the Medical Review Board. The Medical Review Board thereafter recommended that Winner be reinstated to the Lieutenant certification list. This Board further found that Winner had no psychological problems then that would prevent him from acting as a Fire Lieutenant. The City filed exceptions to this decision of the Medical Review Board. This Board conducted a second hearing and stated that it would render a decision on the City's appeal. No decision had been rendered on the City's appeal as of the time of the hearings in the instant matter.101/

Jones also referred to Winner's "attitudinal" problems in support of his decision not to promote him. Jones stated that Winner, according to his perceptions, more or less resented authority and would not accept the authority of his superiors. Jones also stated Winner would follow orders "on the borderline" and would have to be ordered to follow certain established rules such as the bringing of sick slips when absent from work.102/

In contrast to the above-mentioned statements of Jones concerning Winner's "poor attitude" Winner testified that he had functioned as an Acting Lieutenant for most of the period between June, 1974 and January, 1975 and had never been advised that his performance was not adequate nor had he been brought up on disciplinary charges during that time period. Deputy Fire Chief Matthew Chomik testified that he "had no complaints" with Winner's performance as an Acting Lieutenant under his command.103/

In conclusion, based on the foregoing and the record as a whole, the undersigned is unable to infer that the stated reasons for the City's decision

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100/ Transcript, pages 105-109, 189-190, 205-206 and Exhibit R-3A.

101/ Transcript, pages 110-111.

102/ Jones admitted that on one occasion Winner may have been unable to bring in a sick slip until a month had passed because Winner's doctor had been on vacation. (Transcript, pages 191-192)

103/ Transcript, pages 91, 94-95, 105, 112-113.

not to promote Winner on or about February 12, 1975 were false. The undersigned cannot substitute his judgment for that of the City as to what constitutes reasonable grounds for the decision not to promote a firefighter such as Winner in the absence of evidence that this decision is at least in part motivated by the desire to discriminate against that individual concerning terms and conditions of employment to discourage the exercise of that person's rights guaranteed to him by the Act. The undersigned concludes that Winner's membership in Local 2081 and his activities as one of the many fire fighters involved in the picketing of City facilities cannot by itself immunize Winner against being passed over for promotion for reasons other than union hostility.104/ Winner, as one of the Charging Parties, has failed to establish by a "preponderance of the evidence" any nexus between the City's decision to temporarily bypass him for promotion, based in large part upon the recommendations of an independent third party, a licensed psychologist, and his exercise of rights guaranteed to him by the New Jersey Employer-Employee Relations Act.

5. APPLICATION OF THE "MOTIVATION" AND "EFFECT" TESTS TO THE WINNER MATTER - CONCLUSIONS OF LAW

The undersigned, on the basis of the foregoing and the record as a whole, does not conclude that the City's decision not to promote Winner was motivated in whole or in part by a desire to discourage this employee in the exercise of any of the rights guaranteed to him by the Act.

The undersigned further concludes that the actions of the City concerning Winner were not "inherently destructive of employee rights and interests" and did not have the attendant effect of discouraging employees in the exercise of the rights guaranteed to them by the Act.

For the reasons set forth hereinbefore the undersigned does not find that the City's conduct in failing to promote Winner was violative of either N.J.S.A. 34:13A-5.4(a)(1) or N.J.S.A. 34:13A-5.4(a)(3).

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended:

104/ See, e.g. NLRB v. Ogle Protection Service, supra, 64 LRRM 2792 at 2799.

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED, that the Respondent, City of Hackensack, shall

1. Cease and desist from:

(a) Discriminating in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer William Krejsa and Nicholas Sarapuchiello the promotion to the rank of Fire Lieutenant that was unlawfully denied to them on or about February 12, 1975,without prejudice to any rights or privileges enjoyed by them,and make them whole for any loss of pay they may have suffered as a result of the City of Hackensack's discriminatory refusal to promote them by paying them a sum of money equal to the amount that they would have earned as wages as Fire Lieutenants from the date that they were unlawfully refused promotions to the date of the City of Hackensack's offer of promotion, less the actual earnings of these individuals during that period.

(b) The back pay owed to William Krejsa and Nicholas Sarapuchiello shall be computed on the basis of each separate calendar quarter or portion thereof, during the period from the refusal to promote these individuals on or about February 12, 1975 to the date of the City of Hackensack's offer of promotion. The first quarterly period shall begin with the first day of January, 1975.

(c) Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(d) Post at its central administrative building in Hackensack New Jersey, copies of the attached notice marked Appendix "C". Copies of said notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and 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 Respondent to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Director of Unfair Practice Proceedings, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.[105/]

IT IS FURTHER ORDERED that the particular sections of the complaint that allege that the City of Hackensack engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(4), (5) and (7) with regard to the William Krejsa and Nicholas Sarapuchiello matters be dismissed.[106/]

IT IS FURTHER ORDERED that the section of the Complaint alleging that the City of Hackensack was engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5) and (7) with regard to the Richard Winner matter be dismissed in its entirety.

Stephen B. Hunter

Stephen B. Hunter
Hearing Examiner

Dated: Trenton, New Jersey
July 12, 1976

105/ Additional copies of the notice marked as Appendix "C" will be supplied to the City upon request.

106/ There has been no evidence introduced in support of the Charges alleging violations of "(a)(4)", "(a)(5)" or "(a)(7)".

APPENDIX "A"

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF HACKENSACK,
Respondent,

-and-

Docket No. CI-1

RICHARD WINNER, an individual,
Charging Party,

Docket No. CI-2

NICHOLAS SARAPUCHIELLO, an individual,
Charging Party,

Docket No. CI-3

WILLIAM KREJSA, an individual,
Charging Party.

RULING ON MOTION TO DISMISS COMPLAINT

Unfair Practice Charges were filed by Richard Winner, Nicholas Sarapuchiello and William Krejsa (hereinafter referred to as the "Charging Parties") on February 18, 1975 and said charges were amended by the filing of an amended charge on May 16, 1975. The Charging Parties alleged that the City of Hackensack (hereinafter referred to as the Respondent) had engaged or were engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5), and (7) [1/] in violation of the New Jersey Employer-Employee Relations Act, as amended (hereinafter referred to as the "Act"). A Complaint and Notice of Hearing was issued on June 18, 1975 along with an Order Consolidating Cases. Prior to the issuance of this Complaint an exploratory conference had been conducted pursuant to N.J.A.C. 19:14-1.6(c) for the purpose of clarifying the issues and of exploring the possibility of voluntary resolution and settlement of this instant matter. In addition, the parties submitted briefs in support of their respective contentions, in part dealing with the jurisdictional issue before this Hearing Examiner at this time, before the decision was made by the Commission's named designee to issue a Complaint in this above-referenced case.

This ruling deals with the Motion to Dismiss Complaint filed by the Respondent along with supportive documentation simultaneously with its answer.

1/ These subsections prohibit employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act...(3) Discriminating in regard to hire or tenure of employment on any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act...(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this act...(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative...(7) Violating any of the rules and regulations established by the Commission.

In accordance with N.J.A.C. 19:14-4.4 the Commission's named designee, Jeffrey B. Tener, referred this Motion to Dismiss Complaint to this Hearing Examiner. The Charging Parties have filed a statement of their position in opposition to the Respondent's motion.

BACKGROUND

The Charging Parties are all firefighters employed by the City of Hackensack. Each of the Charging Parties was certified on a promotional examination for the rank of Lieutenant in the Hackensack Fire Department. This certification was dated December 13, 1974. The Charging Parties' order of certification was as follows: Richard Winner - No. 3; Willian Krejsa - No. 4; and Nicholas Sarapuchiello - No. 6 on the list. The men promoted to the rank of Fire Lieutenant by the City of Hackensack were Nos. 1, 2, 5, 7 and 8 on the certification list. None of the Charging Parties were promoted to the rank of Fire Lieutenant.

On January 28, 1975, Nicholas Sarapuchiello and Richard Winner filed complaints with the Civil Service Commission of the State of New Jersey indicating that the City of Hackensack had unlawfully and discriminatorily appointed certain firefighters Acting Lieutenants, entirely ignoring the certification of Nicholas Sarapuchiello and Richard Winner. On January 21, 1975 William Krejsa had filed a similar complaint with the Civil Service Commission.

The Charging Parties assert that on February 6, 1975 the Civil Service Commission determined that the City of Hackensack had acted unlawfully in skipping over Richard Winner and Nicholas Sarapuchiello in its appointments to Acting Lieutenants and refused to certify the pay for those individuals who were appointed Acting Lieutenant over Richard Winner and Nicholas Sarapuchiello. The Charging Parties added that this Civil Service Commission decision also applied to William Krejsa. The Respondent admits that on February 6, 1975 the Civil Service Commission determined that "the City of Hackensack had not employed eligible members of the Fire Department to Acting Lieutenant positions." However, the Respondent declared that the Civil Service Commission later accepted a clarification by the City of Hackensack that because of the number of Acting Lieutenant positions which were available, certain non-eligible members had to be employed.

On or about February 12, 1975 the promotions to the rank of Fire Lieutenant /as opposed to Acting Lieutenant/ were announced. As stated previously individuals designated as Nos. 1, 2, 5, 7 and 8 on the certification list were promoted to the rank of Fire Lieutenant while Richard Winner (No. 3), William Krejsa (No. 4), and Nicholas Sarapuchiello (No. 6) were passed over for these promotions.

On or about February 13, 1975 a letter was written on behalf of Nicholas Sarapuchiello and William Krejsa to the Acting Director of Local Government Services requesting a review of the decision of the Respondent to bypass these two individuals in making its appointments to the rank of Fire Lieutenant. [2/] Violations of the New Jersey Civil Service Laws were alleged. As set forth hereinbefore Unfair Practice Charges were filed with the Public Employment Relations Commission on February 18, 1975 by the Charging Parties that charged the Respondent with violations of the New Jersey Employer-Employee Relations Act, as amended.

On April 30, 1975 the Acting Director of Local Governmental Services issued a preliminary determination " that the Hackensack appointing authorities are not in violation of Civil Service Law and Rules in by-passing the names of Messrs. Sarapuchiello and Krejsa for appointment to the position of Fire Lieutenant from the certification dated December 13, 1974." The Acting Director stated that this determination was based on the provisions of N.J.S.A. 11:27-4 and N.J.A.C. 4:1-12.15(a)3 which permits the appointing authorities to make a selection from among three names certified. The City of Hackensack had also requested and was granted permission to conditionally bypass Richard Winner pending completion of a psychological review.

In a letter dated May 5, 1975 the Attorney for Nicholas Sarapuchiello and William Krejsa appealed the April 30, 1975 determination of the Acting Director of Local Government Services and requested an administrative review of this decision.

Subsequent thereto an administrative review was conducted and the earlier decision of the Acting Director was sustained.

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2/ There were apparently no specific documents introduced during the processing stage of this instant unfair practice matter that would establish that Richard Winner also filed a similar request for review. However, correspondence from representatives of the Charging Parties and the Respondent permits the inference that Richard Winner, individually, filed a similar request for review.

On June 12, 1975 the attorney for Messrs. Sarapuchiello and Krejsa appealed this matter further to the Civil Service Commission. To date this appeal is still pending.

POSITION OF THE RESPONDENT

The Respondent has contended that the New Jersey Public Employment Relations Commission lacks jurisdiction of this instant matter in that the Charging Parties herein have elected to seek relief before the State of New Jersey Civil Service Commission based upon the same grievances as alleged herein.

The Respondent asserted that the Civil Service Commission had the authority to conduct a hearing concerning "a refusal to grant promotion or permanent status based solely upon Union activity." The Respondent argued that there was every reason to believe that the Civil Service Commission would thoroughly explore the specific issues raised by the Charging Parties in their Unfair Practice Charges filed with the Public Employment Relations Commission when Civil Service considered the appeal taken from the administrative decision of the Acting Director of Local Government Services.

The Respondent relied upon the doctrine of "election of remedies" in support of its position that since the Charging Parties had elected to seek relief from the Department of Civil Service in the first instance, they were now precluded by law [specific reference was made to N.J.S.A. 34:13A-5.3, as amended] and by agreement [specific reference was made to Articles XVII and V of the present collective negotiations agreement between the City of Hackensack and the Hackensack Fire Fighters Association Local No. 2081] from "seeking dual forums in which to seek relief."

The Respondent advanced the argument that the City of Hackensack would suffer serious and irreparable harm if it was required to litigate the same facts and issues before two separate administrative agencies with the possibility of having to deal with inconsistent decisions and remedies.

The Respondent concluded that it should not be placed in a position of having to defend itself before two administrative agencies with the result of additional expense and exposure to public criticism.

In its brief appended to its Motion to Dismiss Complaint, the Respondent also briefly alluded to the allegation that the Motion to Dismiss Complaint should be granted since the charges filed by the Charging Parties failed "to specify any knowledge on the part of the public employer of union activities or affiliation on the part of the complainants..."

POSITION OF THE CHARGING PARTIES

The Charging Parties contended that the Public Employment Relations Commission had the exclusive power to prevent a public employer such as the City of Hackensack from engaging in any unfair practice as listed at N.J.S.A. 34:13A-5.4(a).

The Charging Parties argued that the doctrine of "election of remedies" should not be applied to this instant matter since they had not chosen to pursue inconsistent and contrary forms of relief. The Charging Parties stated that they complained to the Civil Service Commission that the Civil Service Laws of the State of New Jersey had been violated by the City of Hackensack. In a distinct and independent proceeding they filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that sections of the New Jersey Employer-Employee Relations Act were violated by the City of Hackensack. The Charging Parties concluded that they were properly pursuing their legal rights with the appropriate administrative agencies that were statutorily empowered to administer only their respective "Acts".

In response to the Respondent's second contention the Charging Parties stated that their charge, as amended, very clearly specified knowledge on the part of the Respondent of the protected union activities of the three charging parties.

DISCUSSION

This Hearing Examiner finds that the Respondent's reliance on the doctrine of "election of remedies" is clearly misplaced. Certain well recognized conditions must exist before the election becomes operative. These conditions may be referred to as "elements of election" and their presence is essential in every instance in which the doctrine is successfully involved. These essential conditions are (1) the existence of two or more remedies (2) the inconsistency between such remedies and (3) a choice of one of them. If any of these elements

is absent the doctrine will not apply to preclude the remedy not originally exercised. 3/

The essence of this doctrine is the existence of two inconsistent remedies. It is axiomatic that if there is no inconsistency between two "actions", then the pursuit of the one does not prevent the resort to the other. Two modes of redress are deemed to be inconsistent if the assertion of one involves the negation or repudiation of the other, as where one of them admits to a particular set of facts and the other denies the same facts or where the one is founded upon the affirmance and the other upon the disaffirmance of a voidable transaction. 4/

As a general rule a party may have as many remedies as various laws provide as long as they are consistent. The rule of "election of remedies" does not apply where remedies are concurrent or cumulative merely or where these remedies are invoked for the redress of different and distinct wrongs. In summary, distinct and independent grounds of action arising from the same transaction and which may be concurrently pursued to satisfaction are not subject to the doctrine of election of remedies.

In any event the doctrine of"election of remedies"as a rule of "judicial administration" has been categorized by the New Jersey Supreme Court as being a harsh and largely obsolete rule /back in 1938 ever before the development of the Federal Rules of Civil Procedure and liberalized joinder rules 7 and one which should be "strictly confined within its reason and spirit." 5/

In this instant matter this Hearing Examiner finds that the "remedies" exercised by the Charging Parties are fully consistent in kind and purpose and each has as its primary objective the promotion of Messrs. Winner, Sarapuchiello and Krejsa to the rank of Lieutenant in the Hackensack Fire Department.

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3/ 18 Am Jur 652 (Section 8)

4/ 18 Am Jur - Section 12

5/ Adams v. Camden Safe Deposit & Trust Company 121 N.J.L. (Sup. Ct. 1938) 389 at 397 - Also see U.S.v. Oregon Lumber Company 260 U.S. 290 (1922), dissent of Brandeis.

It is equally clear that the Charging Parties have set forth distinct and independent grounds for their appeals filed with the Civil Service Commission and the Public Employment Relations Commission respectively from the alleged improper actions taken by representatives of the City of Hackensack concerning the bypassing of the Charging Parties for the rank of Lieutenant.

The letter of appeal to the Civil Service Commission, dated June 12, 1975, from the administrative decision of the Acting Director of Local Government Services concerning Messrs. Sarapuchiello and Krejsa sets forth various grounds of appeal that differ from the allegations set forth in the Unfair Practice Charges filed by the Charging Parties with the Public Employment Relations Commission.

In any event, contrary to the assertions of the Respondent, and pursuant to the express language of Chapter 123, P.L. 1974 [amending the New Jersey Employer-Employee Relations Act] the Public Employment Relations Commission has the exclusive power to prevent a public employer or a public employee organization from engaging in an "unfair practice" as defined in the newly amended Act. [see N.J.S.A. 34:13A-5.4(a) and (b)] The Commission's designee, Jeffrey B. Tener, determined [in accordance with N.J.A.C. 19:14-2.1] that the allegations set forth in the Unfair Practice Charges filed by the Charging Parties, if true, may constitute unfair practices on the part of the Respondent City of Hackensack and found that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues.

The Hearing Examiner concurs with Executive Director Tener in his decision that the instant matter is properly before PERC. The Civil Service Commission clearly no longer possesses any authorities to investigate and rule upon the kinds of allegations contained within the unfair practice charges filed with PERC in this instant matter. The Public Employment Relations Commission is the only administrative agency statutorily empowered to implement and administer the New Jersey Employer-Employee Relations Act, as amended.

In addition, the Respondent refers to the collective negotiating agreement between the City and Hackensack Fire Fighters Association, Local No. 2081, AFL-CIO in support of its argument that the Charging Parties were precluded from "seeking dual forums in which to seek relief."

The Respondent appears to proceed on the assumption that the grievance procedure as set forth in Article XVIII in some way proscribed the Charging Parties from filing Unfair Practice Charges with PERC once the Civil Service Commission's jurisdiction had been invoked concerning the actions of the City representatives in bypassing Messrs. Winner, Sarapuchiello and Krejsa in making their appointments to the rank of Fire Lieutenant. The Respondent cites a new section of the New Jersey Employer-Employee Relations Act, as amended, concerning the utilization of grievance procedures established by agreement between public employers and employee organizations [6/] in support of its contention that any resort to PERC procedures was impermissible.

The Hearing Examiner concludes, however, that no article or clause contained within the aforementioned collective negotiations agreement in any way restricts the Charging Parties from prosecuting this instant case before the Public Employment Relations Commission. Article XVIII, in apposite part, defines a grievance, for the purposes of that article, as "an alleged violation by an employee, group of employees, or the Union, or by the City of any provision of this Agreement." In the Unfair Practice Charges before PERC the Charging Parties have not alleged any specific unilateral violations of their collective negotiations agreement as providing the basis for a delineated unfair practice charge. Indeed there is no evidence before this Hearing Examiner that a formal grievance, pursuant to Article XVIII, was ever filed by the Charging Parties concerning a violation of Article V (Vacancies and Promotions) or any other article of the agreement between the City and Local No. 2081. The Charging Parties chose instead to

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6/ "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."(N.J.S.A. 34:13A-5.3)

immediately prosecute their claims before the two administrative agencies responsible for the administration of the laws they deemed to have been violated by the City of Hackensack. There has been no evidence proffered to the Hearing Examiner by the Respondent that would support an inference that Local No. 2081 or its membership agreed to waive certain potential remedies it might have with regard to a matter handled apparently entirely outside of the grievance procedure because of the particular nature of the alleged harm suffered by the Charging Parties and the definition of a grievance within the collective negotiations agreement itself.

The Hearing Examiner also finds that the sentence within the "Act" that reads "/n/othing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations /N.J.S.A. 34:13A-5.3/ " does not prevent a person from concurrently pursuing separate matters before the Public Employment Relations Commission and the Civil Service Commission if that individual believes that both the Civil Service Laws and the New Jersey Employer-Employee Relations Act have been violated by particular actions taken by a governmental entity.

Lastly, the undersigned concludes that there is no merit to the additional allegation of the Respondent that its Motion to Dismiss Complaint should be granted because the charges filed by the Charging Parties failed "to specify any knowledge on the part of the public employer of union activities or affiliation on the part of the complainants..."

The Hearing Examiner notes that the amended charge filed by the Charging Parties on May 16, 1975, in accordance with 19:14-1.5 of the Commission's Rules, specifically alleges that the "employer had notice of the union activities of the three charging parties." In any event, this Hearing Examiner finds that there are substantial and material factual issues in dispute that require the holding of an evidentiary hearing in this instant matter. It would thus be inappropriate to grant a Motion to Dismiss Complaint which is tantamount to a summary judgment motion at this time.

For the reasons set forth above, the Hearing Examiner is constrained to deny the Respondent's motion in all respects.

APPENDIX "B"

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,
Respondent,

- and -

RICHARD WINNER, an individual,
Charging Party,
Docket No. CI-1

NICHOLAS SARAPUCHIELLO, an individual,
Charging Party,
Docket No. CI-2

WILLIAM KREJSA, an individual,
Charging Party.
Docket No. CI-3

ORDER ON REQUEST FOR SPECIAL PERMISSION
TO APPEAL HEARING EXAMINER'S RULING

On August 25, 1975 Hearing Examiner Stephen B. Hunter issued a written ruling denying the motion to dismiss complaint filed by the Respondent, City of Hackensack.

By letter dated August 26, 1975 the Respondent filed with the Commission a request for special permission to appeal from the Hearing Examiner's ruling, pursuant to N.J.A.C. 19:14-4.5[1/] The attorney for the Charging Parties filed a letter opposing the request.

1/ N.J.A.C. 19:14-4.5 provides as follows: "All motions, rulings and orders shall become part of the record, except that rulings on motions to quash a subpoena shall become a part of the record only upon the request of the party aggrieved thereby. Unless expressly authorized by these rules, rulings and orders by the Commission's named designee, if any, and by the hearing examiner on motions, and by the hearing examiner on objections, shall not be appealed directly to the Commission except by special permission of the Commission, but shall be considered by the Commission in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Commission (cont.)

Upon due deliberation, it is hereby ordered as follows: the request for special permission to appeal is denied.

BY ORDER OF THE COMMISSION

John F. Lanson

John F. Lanson
Acting Chairman

DATED: Trenton, New Jersey
September 11, 1975

1/ (cont.) pursuant to N.J.A.C. 19:14-7.3 (Exceptions; Cross-Exceptions; Briefs; Answering Briefs). Requests to the Commission for such special permission to appeal shall be filed in writing within five days from the service of written rulings or statement of oral rulings, as the case may be, and shall briefly state the grounds relied on. An origianl and nine copies of such request shall be filed with the Commission, and simultaneously a copy shall be served upon each other party and, if the request involves a ruling by a hearing examiner, upon that hearing examiner. Proof of such service shall be filed with the Commission. In the event the Commission grants an appeal on special permission, the proceedings shall not be stayed thereby unless otherwise ordered by the Commission."

APPENDIX "C"

# 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

we hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer William Krejsa and Nicholas Sarapuchiello the promotion to the rank of Fire Lieutenant / without prejudice to any rights or privileges enjoyed by them / that the Commission has determined was unlawfully denied to them on or about February 12, 1975 because of their exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL make William Krejsa and Nicholas Sarapuchiello whole for any loss of pay they may have suffered by paying them a sum of money equal to the amount that they would have earned as wages as Fire Lieutenants from the date that they were refused promotions to the date of an offer of promotion, less the actual earnings of these individuals during that period of time.

City of Hackensack
(Public Employer)

Dated _____ By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, Labor & Industry Bldg, P. O. Box 2209, Trenton, N. J. (609) 292-6780

PERC-23 (8-69)