P.E.R.C. NO. 82-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and-

Docket Nos. CO-81-57-28
CO-81-39-57
CO-81-76-58

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, BRANCH NO. 9 and ROBERT GARRY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the City of Elizabeth violated the New Jersey Employer-Employee Relations Act when its Fire Director unilaterally terminated all holidays or accumulated time off until further notice, but did not violate the Act when it suspended the president of F.M.B.A. Branch No. 9 for posting a misleading notice concerning the closing of an engine company and the reporting of fires and when its Mayor sent City Council a letter recommending a grand jury investigation and a consulting firm study of the Fire Department.

P.E.R.C. NO. 82-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and-

Docket Nos. CO-81-57-28
CO-81-39-57
CO-81-76-58

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, BRANCH NO. 9 and ROBERT GARRY,

Charging Party.

Appearances:
For the Respondent, Marvin Lehman, Esq.

For the Charging Party, Goldberger, Siegel & Finn, Esqs. (Howard A. Goldberger, of Counsel)

DECISION AND ORDER

On August 13, 1980, the Firemen's Mutual Benevolent Association, Branch No. 9 ("FMBA") filed an unfair practice charge against the City of Elizabeth ("City") with the Public Employment Relations Commission. The charge alleged, inter alia, that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1),(3),(4) and (5),[1/] when its Fire Director

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

unilaterally issued General Order JBS #11 terminating all holidays or accumulated time off until further notice and its Mayor sent the City Council a letter recommending a grand jury investigation and a consulting firm study of the Fire Department.[2/]

On September 9, 1981, the FMBA and its president, Robert Garry ("Garry"), filed a second charge against the City. This charge alleged that the City violated subsections 5.4(a)(1), (2) and (3) of the Act when it suspended Garry for posting a notice, on a private building next to the firehouse, concerning the closing of an engine company in the firehouse and instructing citizens to report fires at the nearest firebox.[3/]

On September 24, and December 3, 1980, the Director of Unfair Practices issued Complaints, Notice of Hearings, and an Order Consolidating Cases. The City filed Answers in which it averred that General Order JBS #11 was proper because an emergency manpower shortage existed, that the Mayor's letter to City Council was a proper discharge of his duties and not an attempt to coerce the FMBA or its employees, that the notice Garry posted was inaccurate and that his suspension, later vacated with no loss in pay, was a proper exercise of disciplinary authority.

2/ The charge also alleged that the City violated the Act during the summer of 1980 by reducing the number of firefighters from 275 to 236 and closing certain fire companies, all in an attempt to undermine the FMBA. This portion of the charge was later withdrawn.

3/ On September 19, 1980, the FMBA filed a third charge against the City. This charge, later withdrawn, alleged that the City violated subsections (a)(1),(2) and (3) of the Act when its Mayor sent a firefighter a note accusing him of ingratitude because he had posted a sign on his property protesting the reduction in the number of firefighters.

On September 24 and 25, 1981, Commission Hearing Examiner Alan R. Howe conducted hearings. Both parties examined witnesses, presented evidence, and argued orally. The City also filed a post-hearing brief on December 2, 1981.

On December 11, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-22, 8 NJPER 19 (¶13008 1981) (copy attached). He concluded that the City violated subsections 5.4(a)(1) and (5) when it issued General Order JBS #11 and recommended an order requiring it to negotiate with the FMBA concerning changes in the taking of paid holidays or accumulated time off and to post an appropriate notice. He also concluded that the City did not violate subsections 5.4(a) (1) and (3) by suspending Garry or by the Mayor's letter to the City Council; he thus recommended the dismissal of the remaining portions of the Complaint.

On January 18, 1982, the City filed Exceptions to the Hearing Examiner's findings with respect to General Order JBS #11. The City specifically asserted that the Hearing Examiner failed to make findings concerning a manpower emergency which resulted from a federal court order in an anti-discrimination suit barring hiring from the existing Civil Service list and which necessitated General Order JBS #11.

On January 19, 1982, the FMBA filed its exceptions. The FMBA asserted that under In re Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1978), the City violated

subsections (a)(1) and (3) when it suspended Garry for posting a notice on August 25, 1980. On February 1, 1982, the City filed a response.[4/]

As explained in the Hearing Examiner's Recommended Report and Decision, the events in the unfair practice proceeding are part of a larger dispute between the City and the Association relating to a reduction in the manpower level of the Fire Department during the summer of 1980. The evidence in the record indicates that during this period the City, as a result of a federal court order issued as part of an anti-discrimination suit, was unable to hire new firefighters from the existing Civil Service lists. The record indicates that from June, 1980 to September, 1980 the number of firefighters in the Elizabeth Fire Department dropped - through attrition - from 275 to approximately 235. The City closed certain firehouses and eliminated some Engine Companies and rescue squads. In response to these events, the FMBA organized several demonstrations and took certain other action to publicize its opposition to these reductions in manpower and the elimination of fire companies. These activities were directed at both the City officials and the general public. The specific actions at issue in this proceeding arose in the context of these events.

4/ Neither party filed exceptions to the Hearing Examiner's recommendation that we dismiss the allegations in the Complaint pertaining to the Mayor's letter to City Council. Based on our own review of the record, and in the absence of exceptions, we adopt this recommendation.

We first review the Hearing Examiner's conclusion that the City violated the Act when its Fire Director, without prior notice to or negotiation with the FMBA, promulgated General Order JBS #11 denying holidays or accumulated time off until further notice. We agree.

Article IX, paragraph 1 of the parties' January 1, 1980 - December 31, 1981 collective agreement confers holiday pay in the form of 112 hours compensatory time off per calendar year for each employee working a 42 hour schedule. Paragraph 3 provides that "[t]he allocation of compensatory time off shall be by mutual agreement between the Director and the employee." Paragraph 4 lists 13 holidays and provides that employees working a 40 hour schedule shall receive wages for each holiday, even if not required to work. Paragraph 5 of Article IX provides that "[a]ll compensatory time earned for holidays authorized during a given calendar year, except in cases of emergency, employee illness, or for the convenience of the City with the approval of the Director of Chief, must be used by April 1st of the year following that in which it was earned or it shall be forfeited."

Prior to the summer of 1980, an employee wishing to use compensatory time off[5/] would put in a holiday slip requesting a day off. The Chief or Deputy Chief would then approve or disapprove the request. Decisions were made case-by-case. Requests were granted unless manpower needs dictated

5/ Off-duty employees recalled to fight fires also received accumulated compensatory time off.

to the contrary. If a request was turned down, the employee did not lose the right to holiday time, but would have to reapply on another day.

On June 20, 1980, the Fire Director issued a memorandum observing that the City had already exceeded its overtime budget for the year and that overtime would be held down to an absolute minimum. On July 15, the Fire Director issued the General Order in dispute. It states: "Because of the critical manpower shortage no holidays or accumulated time off will be granted until further notice." The City did not seek to notify or to negotiate with the FMBA before the issuance of this order. While Garry acknowledged the existence of a manpower emergency during the summer of 1980, he ascribed the emergency to the City's refusal to assign firefighters to overtime work.

During the summer of 1980, Garry and other employees requested, but, as a result of the General Order, did not receive compensatory time off for two holidays. In September 1980, the City hired twenty more firefighters. While General Order JBS #11 has apparently not been formally rescinded or changed, Garry testified that "holidays are in effect now only pertaining to manpower" and that some firefighters have been able to use compensatory time off.

The above facts establish a unilateral change in the terms and conditions of employment established by the contract. From a case-by-case review of requests for compensatory time,

the City shifted to a system of a blanket denial covering an indefinite period, with no means of review. Employees lost their right to even ask for compensatory time during the summer, a time when employees traditionally avail themselves of accumulated time off. Also, because the order was open-ended and because the FMBA had no opportunity to discuss its effect on employees' rights, it was not known if the holiday time would be lost or if they could carry over accumulated time off into the next year. Indeed, since the order has not been formally rescinded despite the easing of the manpower crisis, some employees -- although obviously not all -- may still be unaware or discouraged from requesting compensatory time.

We appreciate that the contract and past practice enabled the City to turn down individual requests for compensatory time off because of manpower needs on particular days. We also appreciate that the reduction in work force during the summer of 1980 imposed constraints upon the City's ability to meet its manpower needs. Nevertheless, we do not believe that either past practice or the decline in manpower justified the City's unilateral adoption of General Order JBS #11, which imposed a blanket recision of the negotiated provisions on compensatory time off and holidays.

We do not dispute the accuracy of the City's assertion of a manpower emergency,[6/] nor of its non-negotiable right to

6/ However, we note that the record does not establish that no requests for time off could have been granted during the summer of 1980, nor did the City introduce evidence indicating how the attrition in the work force affected the operations on a firehouse or company level.

decide manpower levels and the number of fire companies or rescue squads required to deliver firefighting protection. In re City of East Orange and Local 23, East Orange FMBA, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd App. Div. Docket No. A-4851-79 (7/15/81), pet. for certif. den. __ N.J. __ (1981); In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976). We have in the past held that a proposal that an employee would have to consent before his/her vacation could be rescheduled to meet a specific emergent situation was non-negotiable. In re Newark Board of Education, P.E.R.C. No. 80-93, 6 NJPER 53 (¶11028 1980). However, our case law is also consistent that the granting and scheduling of time off is a clearly negotiable subject to the extent that the agreed-upon system does not cause manpower levels to fall below an employer's manning requirements. In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978); In re Hudson County, P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980); In re New Jersey State Troopers, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981); In re Town of Kearny, 7 NJPER 14 (¶12006 1982).

Under the circumstances as they exist in this record, we believe that the City's action here exceeded the needs of the emergency situation and unreasonably abrogated the terms and conditions of employment negotiated in the contract. Even assuming that the City had to suspend time off and holidays during the emergency, it was, at least, obligated to offer to

negotiate with the FMBA on how these accrued contractual rights might be protected and/or reinstated when the emergency ended. Instead, it unilaterally imposed an open-ended, blanket denial of all accrued time off and holidays, and the order actually remains on the books notwithstanding the end of the manpower emergency. We find that the City's actions were overly intrusive on the employees' negotiated rights, even if they had their genesis in a real manpower shortage. We therefore affirm the Hearing Examiner's recommendations that the City violated subsections 5.4(a)(1) and (5) when it unilaterally adopted and enforced General Order JBS #11.[7/]

We next review the Hearing Examiner's conclusion that the City did not violate the Act when its Fire Director suspended Garry on August 25, 1980 for posting a sign and then issued an order prohibiting the posting of any signs concerning firehouse closings. We agree with his result, but not with all of his analysis.

The Hearing Examiner's Fingings of Fact (nos. 6-12) describing the background and the events of August 25, 1980 are essentially accurate.[8/] We incorporate them here.

7/ Neither party excepted to the Hearing Examiner's recommended order. In the absence of exceptions, we adopt it.

8/ We note two inaccuracies. On August 25, 1980, the firemen of Truck Company No. 1, not Engine Company No. 1, posted a sign at the firehouse stating that Engine Company No. 1 and Rescue Squad No. 1 were closed. Also, Garry testified that the sign he hung on the South Broad Street Bridge stated that the firehouse, not merely the engine company, was closed.

The record establishes that the sign Garry posted across from the firehouse, as well as the one on the bridge, had the potential for misleading people into thinking the entire firehouse was closed, when, in fact, the truck company was still operating in that location. The sign stated that the engine company was closed and that persons wishing to report a fire should go to the nearest fire box. The nearest box was 200-300 yards away. Garry himself acknowledged that the average person would not know the difference between an engine and a truck company. Hence, a person wishing to report a fire and reading Garry's sign (or the signs previously posted by personnel of Truck Company No. 1) might well have believed that the entire firehouse was closed and have gone elsewhere to report the fire or seek assistance for some other emergency. The sign Garry hung from the bridge would have only confirmed this misinformation.

The Hearing Examiner concluded that Garry's sign-posting was not protected activity. He distinguished In re Laurel Springs Board of Education, supra, because he did not believe that posting a sign was analagous to the protected activity in that case -- addressing a Board of Education at a public meeting regarding an involuntary transfer. We agree that the sign-posting was not protected activity under all the circumstances of this case. We do not, however, agree that under different circumstances, communicating a position on a labor dispute through sign-posting rather than at a public meeting would be a

significant distinguishing factor in terms of deciding if the activity is protected by this Act.[9/]

Thus, we do not base our finding that Garry's actions were not protected on the fact that he was communicating through the posting of signs. Instead, we focus on the misleading nature of the particular signs in question.[10/] The signs gave the erroneous impression that the entire firehouse was closed, when in fact it was open, though on a more limited scale. This misleading message could have interfered with the efficient delivery of fire protection services by directing citizens to

9/ The Hearing Examiner suggested that it was not appropriate to consider the relevance of Federal Constitutional questions, such as First Amendment freedom of speech considerations, in determining whether the City's actions against Garry were appropriate. He believed his authority was limited to deciding if an unfair practice under this Act was committed. While he is correct that the authority of this Commission, or any administrative agency, does not normally extend to adjudicating constitutional questions, we do believe that case law interpreting public employees' free speech rights may provide appropriate analogies and guidance in deciding these types of unfair practice cases. As was discussed by our Supreme Court in Twp. of West Windsor v. PERC, 78 N.J. 98, 108-114 (1978), public employees do not give up their rights as citizens and given the very nature of public employment it can be expected that they will exercise those rights in matters affecting their employment.

10/ We note our disapproval of the Fire Director's order prohibiting the posting of any signs anywhere concerning firehouse closings. This order sweeps too broadly: signs containing accurate information could be an acceptable means of communicating with the public on a labor relations dispute. Nevertheless, because the FMBA's charge does not allege that this order violated the Act and because the FMBA never amended its charge to so allege, we will not find an unfair practice based on the order itself.

a fire box rather than to Truck Company No. 1, which was still operating from the firehouse. It could have also created a potentially injurious situation for citizens confronted with an emergency by directing them away from a place where they might have received assistance.[11/] Thus, we find that the Fire Director had a legitimate right to demand the removal of these signs.

ORDER

For the foregoing reasons, the Public Employment Relations Commission orders:

A. That the Respondent City cease and desist from:

1. Interfering with, restraining or coercing its employees in the rights guaranteed to them by this Act, particularly by refusing to negotiate in good faith with Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of paid holidays or accumulated time off.

2. Refusing to negotiate in good faith with the Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of holidays or accumulated time off due to manpower or manning requirements.

B. That the Respondent City take the following affirmative action:

1. Upon demand negotiate in good faith with the Firemen's Mutual Benevolent Assocication, Branch No. 9 concerning

11/ Oliver Wendell Holmes' famous statement on the limits of the First Amendment's protection is particularly appropriate:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. Schenck v. United States, 249 U.S. 47 (1919).

any changes to be made in the collectively negotiated agreement regarding paid holidays or accumulated time off.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notices on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent City to insure that such notices are not altered, defaced, or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent City has taken to comply herewith.

C. That the allegations in the Complaint that the Respondent City violated N.J.S.A. 34:13A-5.4(a)(2) and (4) be dismissed in their entirety.

D. That the allegations of the Complaint that the City violated the Act when it suspended Robert Garry be dismissed in their entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Hipp and Suskin voted in favor of this decision. None opposed. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey
May 4, 1982
ISSUED: May 5, 1982

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the rights guaranteed to them by this Act, particularly by refusing to negotiate in good faith with Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of paid holidays or accumulated time off.

WE WILL NOT refuse to negotiate in good faith with the Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of holidays or accumulated time off due to manpower or manning requirements.

WE WILL upon demand negotiate in good faith with the Firemen's Mutual Benevolent Association, Branch No. 9, concerning any changes to be made in the collectively negotiated agreement regarding paid holidays or accumulated time off.

CITY OF ELIZABETH
(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 Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 82-22

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

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and-

Docket Nos. CO-81-57-28
CO-81-39-57
CO-81-76-58

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION,
BRANCH NO. 9 AND ROBERT GARRY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when its Fire Director unilaterally issued a General Order on July 15, 1980, which stated that "Because of the critical manpower shortage no holidays or accumulated time off will be granted until further notice," notwithstanding that the collective negotiations agreement between the parties provided for eleven enumerated paid holidays. However, the Hearing Examiner recommended that no violation be found as to the Fire Director's order of August 25, 1980 stating that any member of the Fire Department who posted a sign "in relation to Fire House closing anywhere shall be suspended" and on the same day suspended Robert Garry, the President of the Charging Party, for two-days as a result of having posted such a sign. Additionally, the Hearing Examiner found no violation of the Act when the Mayor on August 5, 1980 sent a letter to the members of Council requesting the convening of a Grand Jury to investigate, inter alia, job actions by employees of the Fire Department and the "overtime problem."

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 82-22

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

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and-

Docket Nos. CO-81-57-28
CO-81-39-57
CO-81-76-58

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, BRANCH NO. 9 AND ROBERT GARRY,

Charging Party.

Appearances:

For the City of Elizabeth
Marvin Lehman, Esq.

For the Charging Party
Goldberger, Siegle & Finn, Esqs.
(Howard A. Goldberger, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Three Unfair Practice Charges were filed with Public Employment Relations Commission (hereinafter the "Commission") on the following dates: August 13, 1980 (No. CO-81-39-57); September 9, 1980 (No. CO-81-57-28); and September 19, 1980 (No. CO-81-76-58) by the Firemen's Mutual Benevolent Association, Branch No. 9 (hereinafter the "Charging Party" or the "FMBA") alleging that the City of Elizabeth (hereinafter the "Respondent" or the "City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that: (No. CO-81-39-57) the Respondent reduced the normal complement of firemen from 275 to 236 for alleged reasons of economy without notice to or negotiations with the Charging Party and that the Respondent issued a General Order, which terminated all "holidays or accumulated time off ...until further notice" without notice to or negotiations with the Charging

Party and that the Respondent's Mayor attempted to threaten and coerce firemen represented by the Charging Party by sending a letter to City Council under the date of August 5, 1980; (No. CO-81-57-28) the Respondent on August 25, 1980 suspended the President of the Charging Party, Robert Garry, for having posted a factually accurate notice of the closing of a particular Fire Department facility on private property adjacent to the said Fire Department facility, notwithstanding that the suspension was immediately vacated and Garry suffered no loss of pay; (No. CO-81-76-58) the Respondent "castigated" Anthony Valvano, a fireman, for having posted a sign on his residential property on September 7, 1980 protesting the action of the Fire Department in reducing fire fighting services to the City of Elizabeth; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, Complaints and Notices of Hearing were issued on September 24, 1980 and December 3, 1980. Pursuant to the Complaints and Notices of Hearing, hearings were held on September 24 & 25, 1981[2/]

1/ These Subsections prohibit public employers, their representative or agents from:

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

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

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

"(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."

2/ The delay in bringing these matters to hearing was occasioned by intensive settlement efforts of the parties after the issuance of the Complaints and Notices of Hearing. Additionally, at the hearing the Charging Party withdrew Docket No. CO-81-76-58 regarding Valvano and also that portion of Docket No. CO-81-39-57 pertaining to the reduction in the number of firemen without notice to or negotiations with the Charging Party.

in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and the Respondent only filed a post-hearing brief by December 2, 1981.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument and post-hearing brief of the City, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

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

2. The Firemen's Mutual Benevolent Association, Branch No. 9 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Robert Garry is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. Garry has been employed in the City's Fire Department for eighteen years. Prior to becoming President of the FMBA on June 19, 1980 he had been Vice-President of the FMBA for four years.

5. Approximately one week after Garry became President of the FMBA he sought a meeting with the City's Mayor, Thomas G. Dunn, and when they subsequently met Mayor Dunn said something to the effect that Garry should "cut" his "crying," adding that he was "acting like the last guy," referring to the previous President of the FMBA, Donald Silvey. In a similar vein Mayor Dunn in September, 1980 declared that Garry was "persona non grata" at a time when there were demonstrations outside of City Hall in response to the closing of certain fire houses. At or about that time the Mayor's secretary said to William Neafsy, a Battalion Chief, that the

Mayor would see anyone but Garry.

6. The foregoing indications of strain in the relationship between the Mayor and Garry occurred in the context of reductions in the number of firemen from 275 in June, 1980 to 235 in September, 1980 and the closing of certain fire houses with the resulting elimination of some Engine Companies and Rescue Squads. For example, the Fire Director, Joseph B. Sullivan, issued General Order No. JBS-9 on June 20, 1980, which stated that as of July 1, 1980 Engine Company No. 7 and Rescue Squad No. 1 would be out of service (CP-1, CP-4).

7. In response thereto, the FMBA organized several demonstrations and ran newspaper advertisements appealing to the public to put pressure upon City officials to restore manpower levels (see, for example, CP-2). Firemen posted signs where fire houses had been closed.

8. The fire house on Broad Street contained Engine Company No. 1, Rescue Squad No. 1, and Truck Company No. 1. As of August 25, 1980 Engine Company No. 1 and Rescue Squad No. 1 were closed while Truck Company No. 1 remained open. On August 25, 1980 the firemen of Engine Company No. 1 posted a sign at the fire house stating that Engine Company No. 1 and Rescue Squad No. 1 were closed. When Mayor Dunn learned of this he told Fire Director Sullivan that he wanted the sign out of the window immediately. Fire Director Sullivan telephoned Truck Company No. 1 and ordered that the sign be removed.

9. Shortly thereafter on the same day, August 25, 1980, Garry personally went to Engine Company No. 1 on Broad Street and made up a sign, the legend of which was that Engine Company No. 1 was closed and that any fires should be reported by going to the nearest fire box. Garry posted the sign on a privately owned building adjacent to the fire house and also on a bridge on the opposite side of the fire house, the purpose of which was to inform the public that no Engine Company was available at this location.

10. After Garry had posted the sign he immediately called City Hall and spoke to the City's Business Administrator, Harry Frank, telling him that Engine Company

No. 1 on Broad Street was closed.

11. Garry next went to that portion of the building occupied by Truck Company No. 1. In the meantime Fire Director Sullivan had appeared on the scene and removed the sign which Garry had posted on the adjoining private property. Sullivan said that he could not tolerate the posting of the sign and when Garry said that he would take the sign and re-post it Sullivan said: "If you do you're suspended." When Garry re-posted the sign Sullivan suspended Garry for two days. The suspension was later vacated and Garry suffered no loss in pay (CP-3).

12. On the same day, August 25, 1980, Fire Director Sullivan issued an order, which was entered in a log at the fire house on Broad Street, and which stated that any member of the Fire Department who put up a sign "... in relation to fire house closings anywhere shall be suspended." (CP-7).

13. Article IX of the current collective negotiations agreement between the parties, effective January 1, 1980 through December 31, 1981, provides for 11 paid holidays (J-1, p.12).

14. Under date of July 15, 1980 Fire Director Sullivan issued General Order-JBS No. 11 which stated: "Because of the critical manpower shortage no holidays or accumulated time off will be granted until further notice." (CP-5). This action by the Fire Director was taken without notice to or negotiations with the Charging Party.

15. Garry acknowledged during cross-examination that while he was denied the opportunity to take off on two scheduled holidays provided for in the collective negotiations agreement he did not lose the days and was still eligible to take time off on other days when permitted to do so. There have been days off granted to other firemen in 1980 and 1981 since the issuance of Sullivan's General Order of July 15, 1980 (CP-5, supra).

16. Under date of August 5, 1980 Mayor Dunn sent a letter to the members of City Council on the subject of the Fire Department, in which he defended the

City against attacks made by firemen in connection with the reduction of manpower, and further indicating, inter alia, that he had requested the convening of a Grand Jury, which might investigate: (1) the respective roles of the City and the Fire Department; (2) job actions by employees of the Fire Department; and (3) the "overtime problem." Finally, the Mayor recommended the hiring of a consulting firm to study the operation of the Fire Department. See CP-6.

THE ISSUES

1. Did the Respondent violate Subsections(a)(1) and (3) of the Act when the Fire Director issued an Order on August 25, 1980 stating that any member of the Fire Department who put up a sign "in relation to Fire House closings anywhere shall be suspended" and on the same day suspended Robert Garry, the President of the Charging Party, for two days as a result of his having posted two signs on private property adjacent to a firehouse, which stated that Engine Company No. 1 was closed and that any fires should be reported by going to the nearest fire box?

2. Did the Respondent violate Subsections(a)(1) and (5) of the Act when the Fire Director on July 15, 1980 issued a General Order which stated "Because of the critical manpower shortage no holidays or accumulated time off will be granted until further notice," notwithstanding that the collective negotiations agreement between parties provided for eleven enumerated paid holidays?

3. Did the Respondent violate Subsections(a)(1) and (3) of the Act when the Mayor on August 5, 1980 sent a letter to the members of City Council in which, inter alia, the Mayor requested the convening of a Grand Jury, which might investigate, (1) the respective roles of the City and Fire Department, (2) job actions by employees in the Fire Department and (3) the "overtime problem"?

DISCUSSION AND ANALYSIS

The Respondent Did Not Violate Subsections (a)(1) and (3) Of The Act By The Fire Director's Order Of August 25, 1980 And His Suspension On The Same Day Of Robert Garry, The President Of The Charging Party, As A Result Of His Having Posted Two Signs On Private Property Adjacent To A Fire House

The Hearing Examiner finds and concludes that the Respondent's conduct through its Fire Director on August 25, 1980 did not constitute an Unfair Practice under Subsections(a)(1) and (3) of the Act, or any other Subsection, notwithstanding that the Respondent's conduct might have given rise to an appropriate civil action for possible violation of the First Amendment rights of Robert Garry. 3/

At the hearing, the Hearing Examiner inquired of counsel for the Charging Party as to what "protected activity" Garry was engaged in when he posted two signs on private property adjacent to a Fire House stating that Engine Company No. 1 was closed and that any fire should be reported by going to the nearest fire box. Garry's insistence on doing so resulted in a two-day suspension, later vacated, for having violated the Fire Director's order of August 25, 1980 that any member of the Fire Department putting up a sign regarding closings anywhere would be suspended.

The Charging Party has cited no Commission or Court precedent for finding that the activity of Garry was protected under the Act. Independant research has disclosed no Commission or Court precedent recognizing Garry's conduct as protected activity, nor has resort to the private sector provided any analagous precedent there.

It is not the function of an administrative agency, such as the Commission herein, to adjudicate Federal or State protected constitutional rights, notwithstanding that in a single case the Commission in Hunterdon Central High School Teachers' Association

3/ See, for example, Gasparinetti v. Kerr, 568 F.2d 311 (3rd Cir. 1977) where a Newark police officer was successful in invalidating certain Police Department regulations as facially unconstitutional under the First Amendment thereby voiding his discipline.

v. Hunterdon Central High School Board of Education, P.E.R.C. No. 80-4, 5 NJPER 289, affirmed 174 N.J. Super. 468 (App. Div. 1980), aff'd 86 N.J. 43 (1981) was required to apply First Amendment decisions of the United States Supreme Court in deciding a scope of negotiations issue involving a teacher's request for a day off with pay for "religious leave." There the Commission held that a contract provision permitting a day off for the specific purpose of religious observance with pay was unconstitutional because it was a benefit that non-religious employees could never enjoy.

Although not cited by the parties, the Hearing Examiner has considered the Commission's decision in Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977) where the Charging Party, a teacher, as part of the protected activity in which she engaged, addressed the Board of Education at a public meeting regarding her views as to a transfer. The Commission made no reference to the exercise by the Charging Party of First Amendments rights in speaking at a public meeting but did decide that she was attempting to inform and convince the public on a labor relations issue, i.e., the involuntary transfer from one grade to another.

Notwithstanding Laurel Springs, supra, the Hearing Examiner is not persuaded that addressing a Board of Education at a public meeting regarding an involuntary transfer is analogous to posting a sign on private property regarding a Fire House closing and directing the public to report fires at the nearest fire box. The instant case would be altogether different if Garry had appeared at a meeting of the City Council and protested the partial closing of a Fire House in order to inform the public of a safety issue, which would tangentially affect firemen who would be laid off as a result of the closing.

Thus, the Hearing Examiner will recommend dismissal of this aspect of the charge involving the alleged violation of Subsections(a)(1) and (3) of the Act.

The Respondent Did Violate Subsections (a)(1) And (5) Of The Act When The Fire Director On July 15, 1980 Issued A General Order Stating That Because Of The Critical Manpower Shortage No Holidays Or Accumulated Time Off Would Be Granted, Notwithstanding That The Agreement Between The Parties Provided For Eleven Enumerated Paid Holidays

Admittedly, this aspect of the Unfair Practice Charge by the FMBA presents a close question. The Hearing Examiner finds and concludes that the Respondent violated Subsections(a)(1) and (5) of the Act when the Fire Director unilaterally issued a General Order on July 15, 1980 stating that because of a critical manpower shortage no holidays or accumulated time off would be granted until further notice. The parties had negotiated a collective agreement that provided for eleven enumerated paid holidays. In so holding, the Hearing Examiner is aware that no firemen, including Garry, have since been denied the opportunity to have been granted a day off in lieu of the enumerated holidays in the agreeement.

As authority for the Hearing Examiner's conclusion, he cites City of Orange, P.E.R.C. 79-10, 4 NJPER 420 (1978), which was a case involving vacation schedules. There the employer was found to have violated the Act by unilaterally determining minimum manpower regarding vacations without negotiations with the public employee representative. The employer was ordered to reinstate the vacation scheduling system "... to the extent that this system does not cause manpower levels to fall below the manning requirements established by the City ..." (4 NJPER at 421).

So, too, in the instant case, the City should be ordered to rescind the July 15, 1980 General Order concerning holidays and accumulated time off to the extent that it does not cause the manpower level to drop below established requirements, pending negotiations with the Charging Party as to essential modifications in the provisions in the collective negotiations agreement regarding paid holidays. It is noted that the Commission was careful in City of Orange, supra, not to intrude upon the proper exercise of mangerial prerogatives by the public employer. The same applies in the

in the instant case.

The Hearing Examiner will, therefore, recommend an appropriate order as to this aspect of the Unfair Practice Charge.

The Respondent Did Not Violate Subsections(a)(1) And (3) Of The Act When The Mayor On August 5, 1980 Sent A Letter To The City Council Requesting The Convening Of A Grand Jury

The Hearing Examiner finds and concludes that the Respondent did not violate Subsections(a)(1) and (3) of the Act when its Mayor on August 5, 1980 sent a letter to the members of City Council requesting the convening of a Grand Jury, which might investigate (1) the respective roles of the City and Fire Department, (2) job actions by employees of the Fire Department and (3) the "overtime problem."

Plainly, the Mayor has wide latitude in communicating with members of City Council. While the mere fact that the Mayor recommended a Grand Jury investigation of the enumerated items above might suggest discrimination regarding terms and conditions of employment of members of the City's Fire Department, the Commission would clearly be intruding upon the mangerial prerogative of communication between the Mayor and City Council if a violation of the Act was held to have occurred by the Mayor's communication of August 5, 1980.

The Courts of this state have been most protective of the exercise by public employers of their managerial prerogatives. In the opinion of the Hearing Examiner, the instant case does not come close to affording a basis for finding a violation of the Act by the Mayor's conduct herein.

Accordingly, the Hearing Examiner will recommend dismissal of this aspect of the charge.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when the Fire Director issued an order on August 25, 1980 stating that any member of the Fire Department who put up a sign "in relation to Fire House closings anywhere shall be suspended" and on the same day suspended Robert Garry for two-days, later vacated, for posting such a sign.

2. The Respondent violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when the Fire Director unilaterally on July 15, 1980 issued a General Order without negotiations with the FMBA stating that because of the critical manpower shortage no holidays or accumulated time off would by granted until further notice, notwithstanding that collective negotiations agreement provided for eleven enumerated paid holidays.

3. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when the Mayor on August 5, 1980 sent a letter to the members of City Council in which he requested the convening of a Grand Jury, which might investigate, inter alia, job actions by the employees of the Fire Department and "overtime problems."

4. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(2) and (4) by its conduct herein.

RECOMMENDED ORDER:

A. That the Respondent City cease and desist from:

1. Interfering with, restraining or coercing its employees in the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of paid holidays or accumulated time off.

2. Refusing to negotiate in good faith with the Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of holidays or accumulated time off due to manpower or manning requirements.

B. That the Respondent City take the following affirmative:

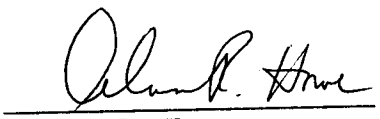
1. Upon demand negotiate in good faith with the Firemen's Mutual Benevolent

Association, Branch No. 9 concerning any changes to be made in the collectively negotiated agreement regarding paid holidays or accumulated time off.

2. Post in all places were notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notices on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent City to insure that such notices are not altered, defaced, or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent City has taken to comply herewith.

C. That the allegations in the Complaint that the Respondent City violated N.J.S.A. 34:13A-5.4(a)(2) and (4) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: December 11, 1981
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with Firemen's Mutual Benevolent Association, Branch No. 9 regarding unilateral changes in the granting of paid holidays or accumulated time off.

WE WILL NOT refuse to negotiate in good gaith with the Firemen's Mutual Benevolent Association, Branch No. 9 regarding changes in the granting of holidays or accumulated time off due to manpower or manning requirements.

WE WILL upon demand negotiate in good faith with the Firemen's Mutual Benevolent Association, Branch No. 9 concerning any changes to be made in the collectively negotiated agreement regarding paid holidays or accumulated time off.

CITY OF ELIZABETH

(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 James Mastriani Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780