P.E.R.C. NO. 97-145

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-96-77

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO, Local 1040 against the State of New Jersey (Department of Corrections). The charge alleges that the State violated the New Jersey Employer-Employee Relations Commission when it prohibited employees represented by CWA from wearing T-shirts stating "Don't Privatize, Manage Wise" within the inner perimeter of correctional facilities. The Commission concludes that special circumstances justified this prohibition.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 97-145

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-96-77

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Peter Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judiann Chartier, of counsel)

DECISION AND ORDER

On September 19, 1995, the Communications Workers of America, AFL-CIO, Local 1040 filed an unfair practice charge against the State of New Jersey (Department of Corrections). The charge alleges that the Department of Corrections violated subsections 5.4(a)(1), (2), (3) and (7)[1/] of the New Jersey

---

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

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it prohibited employees represented by CWA from wearing T-shirts stating "Don't Privatize, Manage Wise" within the inner perimeter of correctional facilities on September 15, 1995. Inmates are secured within the inner perimeter behind a series of locked doors and gates.

On January 8, 1996, a Complaint and Notice of Hearing issued. The employer's Answer admitted the prohibition, but asserted that the prohibition was not motivated by anti-union animus and was necessary to maintain discipline among inmates and safety within prisons.

On March 21 and 22, 1996, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties entered stipulations, examined witnesses, and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On March 13, 1997, the Hearing Examiner issued a report recommending that the Complaint be dismissed. H.E. No. 97-26, 23 NJPER 221 (¶28106 1997). She found that the ban was not motivated by hostility towards union activity and she concluded that the employer had a legitimate and substantial basis for the ban because it was reasonably related to the need to maintain order and discipline within prisons.

CWA filed exceptions asserting that the Hearing Examiner erred in not finding that the prohibition violated subsections

5.4(a)(1) and (3).[2/] It specifically asserts that the Hearing Examiner erred in: finding that the T-shirt ban was justified by "special circumstances"; applying a First Amendment analysis of prisoners' rights; and finding that the employer did not have to prove the T-shirt ban would have compromised employee safety or security concerns.

The employer filed a response asserting that the Complaint should be dismissed. It also filed its own exceptions objecting to the Hearing Examiner's focus on whether the employer had shown "a legitimate and substantial basis" for the ban and to her statements that the employer "should not assume that the result would be the same outside the perimeter" (H.E. at 17) and that the employer "was attempting to censor an unpopular message, to quash debate about a matter of public concern" (H.E. at 17-18).

We have reviewed the record. The Hearing Examiner's findings of fact are undisputed and accurate. We incorporate them.

We first consider whether the employer violated subsections 5.4(a)(3) and, derivatively, 5.4(a)(1) when it prohibited wearing the T-shirt within the inner perimeter of prisons on September 15, 1995. To establish this violation, the charging party must prove that the employer's hostility towards union activity was a substantial and motivating factor in adopting

---

2/ CWA did not except to the recommended dismissal of the subsection 5.4(a)(2) and (7) allegations. We dismiss those allegations.

the prohibition. In re Bridgewater Tp., 95 N.J. 235 (1984). The Hearing Examiner found no evidence of such hostility in either her findings of fact or her analysis of the subsection 5.4(a)(3) allegation. We agree. As shown by findings of fact nos. 18-26 (H.E. at 8-10), the record demonstrates that the prohibition stemmed from the good faith concerns of prison officials about maintaining discipline among inmates and security within the inner perimeter rather than from an anti-union desire to censor CWA's message. Accordingly, we dismiss the allegations that the prohibition violated subsection 5.4(a)(3) and, derivatively, 5.4(a)(1).

We next consider whether the prohibition independently violated subsection 5.4(a)(1). To establish such a violation, the charging party need not prove an illegal motive. Instead, an independent violation of subsection 5.4(a)(1) will be found if the prohibition tends to interfere with the statutory rights of employees and lacks a legitimate and substantial operational justification outweighing any interference. UMDNJ-Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). See also Gorman, Basic Text on Labor Law at 132-34 (1976).

The National Labor Relations Board allows an employer to promulgate and enforce a rule prohibiting the wearing of union

emblems only where the prohibition is necessary because of "special circumstances". Such circumstances include the need to maintain production and discipline and to ensure safety. Floridan Hotel of Tampa, 137 NLRB 1484, 50 LRRM 1433 (1962), enf'd as mod., 318 F.2d 545 (5th Cir. 1963). Accord Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 455 (¶14196 1983). See generally Hardin, The Developing Labor Law at 96 (3d ed. 1992). The parties agree that the "special circumstances" approach should be applied in this case and we will do so. We do not believe, however, that the "special circumstances" approach is materially different from asking whether a ban has a legitimate and substantial operational justification since both approaches focus on the operational need for a ban.

We conclude that special circumstances justified this prohibition. The prison officials charged with ensuring inmate discipline and prison safety made a good faith and reasonable judgment that the prohibition was necessary to prevent possible disturbances among the inmates within the inner perimeter.3/ We agree with the Hearing Examiner (H.E. at 18-19) that the employer was not required to show past disturbances or await future disturbances. Nor was it required to prove that permitting

---

3/ In reaching this conclusion, we do not consider the Hearing Examiner's analysis of First Amendment cases (H.E. at 15-16). We also express no opinion about hypothetical situations outside the perimeter. We will consider any ban on employee communications on a case-by-case basis.

employees to wear the T-shirt would necessarily have upset the inmates and caused disturbances. It suffices to demonstrate, as the employer has, that prison officials reasonably feared that such disturbances could occur and required a prohibition.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn, Klagholz and Wenzler voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners Boose and Ricci were not present.

DATED: June 19, 1997
Trenton, New Jersey
ISSUED: June 20, 1997

H.E. NO. 97-26

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and-

Docket No. CO-H-96-77

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the State of New Jersey, Department of Corrections did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (7), by issuing a directive on September 14, 1995, prohibiting employees from wearing T-shirts with the slogan, "Don't Privatize, Just Manage Wise," within the secured inner-perimeter of any correctional facility. The Hearing Examiner found that the Communications Workers of America, AFL-CIO, failed to establish, by a preponderance of the evidence, that under the circumstances, the right to wear the T-shirt within the secured inner-perimeter was protected activity.

The Hearing Examiner also found that there was insufficient evidence to prove that the State dominated or interfered with the administration of the union; discriminated against employees in order to discourage protected activity; or breached any other Commission rule. Accordingly, she recommends the Complaint be dismissed.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 97-26

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and-

Docket No. CO-H-96-77

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

Appearances:

For the Respondent,
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judiann Chartier, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 19, 1995, Local 1040, Communications Workers of America, AFL-CIO, filed an unfair practice charge against the State of New Jersey, Department of Corrections ("State" or "DOC"). The charge alleges that the State violated subsections 5.4(a)(1), (2), (3) and (7) of the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"),[1/] when, just prior to a CWA-sponsored "T-shirt day," the DOC issued a directive prohibiting employees from wearing T-shirts with the slogan "Don't Privatize, Just Manage Wise," within the secured inner-perimeter of any correctional facility. The State denies that the prohibition interferes with protected activity or connotes anti-union animus and asserts that its purpose was to avoid a breakdown in prison discipline.

A Complaint and Notice of Hearing was issued on January 8, 1996. The State filed an Answer on January 29, 1996, denying it violated the Act. On March 21 and 22, 1996, I conducted a Hearing at which the parties examined witnesses and introduced exhibits.[2/] Post-hearing briefs were received by July 8, 1996. Based upon the entire record I make the following:

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; (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; and (7) Violating any of the rules and regulations established by the commission.

2/ The transcript citations "1T-" refers to the transcript developed on March 21, 1996; "2T" refers to the transcript developed on March 22, 1996. Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" and "R" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits.

FINDINGS OF FACT

1. CWA represents DOC employees in four (4) negotiations units: administrative/clerical, professional, primary level supervisory and higher level supervisory units. The State and CWA have had a series of collective negotiations agreements dating back to the 1970s. When this dispute arose, the parties' most recent agreement had expired and negotiations were in progress.[3/]

2. The mission of the DOC is to implement criminal sentences imposed by the Courts and insure the safety of persons in its jurisdiction (2T8). The DOC operates eight adult prisons, three juvenile reformatories and one diagnostic/treatment facility for sex offenders, totaling approximately 26,000 incarcerated persons (1T97-1T98). Safety, order and security are the Department's fundamental missions (2T13). The parties stipulated:

> Each State correctional facility is designed with an inner-perimeter to secure the inmate population behind a series of locked doors and gates to protect the general public which has access to other parts of the facility.
>
> CWA employees work both within and without the inner-perimeter of correctional facilities.
>
> Within the inner-perimeter of a state correctional facility a CWA employee would only encounter inmates, other CWA staff and uniformed corrections officers who are members of the PBA (1T7-1T8).

3/ Successor agreements were signed on March 29, 1996 covering the period from July 1, 1995 through June 30, 1999.

3. Gary Hilton, Chief of Staff, is second in command at the Department, reporting directly to the Commissioner (2T5). Hilton has worked 39 years at the DOC, and has been a consultant to the National Institute of Corrections and the United States Justice Department (2T5-2T7). Reporting directly to Hilton is Howard Beyer, Assistant Commissioner of Operations, who has worked 21 years at the DOC (1T96-1T97).

4. On September 14, 1995, Beyer issued an Inter-Office Communication (J-1) to all administrators and superintendents prohibiting the wearing of a T-shirt with the slogan, "Don't Privatize..Just Manage Wise" within the inner-perimeter of any State correctional facility.

J-1 states, in part:

> The CWA has requested that Friday, September 15, 1995, be designated as T-Shirt Day for their members. We are advised that T-Shirts will read "Don't Privatize..Just Manage Wise" and CWA Local 1040 on the back. The T-Shirt is navy blue with gold lettering.
>
> After deliberating with the Governor's Office of Employee Relations it has been determined that the T-Shirt may not by [sic] worn in the inner-perimeter of any state correctional facility, inclusive of minimum housing units/satellite units.
>
> Should there be any questions you may contact my office immediately.

5. Employees were permitted to wear the disputed T-shirts outside the locked inner-perimeter (1T115-1T116). The parties stipulated that the T-shirt was navy in color with gold lettering, with the slogan on the front and the CWA, Local 1040 logo on the back, and that the slogan was neither profane nor vulgar (1T7-1T8).

6. CWA officials at Riverfront Prison asked members to wear the "Don't Privatize..." T-shirt on September 15, 1995, to show solidarity with the negotiations efforts and to express their opposition to the State's privatization of services performed by State employees (1T22-1T23).

7. Richard Hancock, substance abuse counselor II, has been employed by the DOC for six and one-half years (1T13). Hancock coordinates inmate orientation at the Riverfront State Prison (1T14). Hancock is in direct contact with inmates in a classroom setting within the locked inner-perimeter (1T14-1T15). Prior to September 15, 1995, Hancock wore T-shirts to work which contained CWA slogans and logos (1T18-1T19). Hancock admitted that anything could excite or enrage an inmate; however, no article of clothing Hancock has worn has provoked an inmate (1T39, 1T43).

8. Elizabeth Monaghan has been employed as a teacher at Riverfront Prison for ten and one-half years (1T44-1T45). Monaghan teaches literacy skills and is in direct contact with inmates five or six hours per day (1T46). Monaghan is a shop steward and vice president of the Riverfront professional unit (1T54). She received T-shirts with the "Don't Privatize..." message to distribute to members at Riverfront prior to September 15, 1995, in preparation for T-shirt day (1T54-1T55).

9. Before September 14, 1995, employees were never prevented from wearing CWA T-shirts (1T73). Although Superintendent Hundley issued an order (in 1991) prohibiting employees from wearing

T-shirts at Riverfront prison, he did not enforce the rule. Hancock and Monaghan have worn T-shirts while on duty (1T18-1T19, 1T24, 1T48, 1T67-1T70). Neither Monaghan nor Hancock were aware of any formal dress code except the prohibition against shorts and halter tops (1T48, 1T68-1T70). Employees had been disciplined for wearing shorts (1T68-1T69).

10. During the 1989 and 1992 CWA campaigns for successor agreements, Monaghan and others wore message T-shirts which read "Take a Stand," "Privatization means Profit," and "To Close is To Hurt CWA Local 1040." These slogans attacked the lack of a contract and the layoffs under the Florio administration (1T48-1T50).

11. A red "No Justice No Peace" T-shirt was never prohibited (1T51). Buttons which read "To close is to Hurt CWA Local 1040" have been worn within the secured inner-perimeter (1T51-1T52). This button has not provoked inmates (1T52). Monaghan wore a button and ribbon which read, "Strike Captain CWA, Fighting for Jobs with Justice," daily within the inner-perimeter from June 1995 until December 1995 (1T52-1T53). Monaghan also wore a button which read, "Standing United for Fairness June 30, We'll Be There At the Top, CWA," within the inner-perimeter in 1989 or 1992 (1T53-1T54).

12. On September 15, 1995, Hancock wore a T-shirt which read, "No Justice..No Peace" and was prohibited from working in the inner-perimeter (1T24). Instead, he worked in the administration building (1T24-1T25). Hancock was given the option of working in

the inner perimeter if he turned the T-shirt inside out, but he declined. Hancock had worn the "No Justice.." T-shirt to work inside the inner-perimeter sometime before September 15, 1995, and observed no negative reaction from inmates when he wore the shirt (1T25-1T26).

13. Monaghan wore the "Don't Privatize..." T-shirt to work on September 15, 1995 (1T56). When she arrived at work, the lobby officer informed Monaghan she could not proceed to the inner-perimeter wearing the T-shirt (1T57-1T58). Monaghan was permitted to return home to change the T-shirt (1T58). She did so, returned to work, did not lose pay, and was not disciplined (1T58, 1T65).

14. Most of the CWA members in the administration building at Riverfront wore the disputed T-shirt, as did at least one maintenance employee (1T59-1T60, 1T65-1T67). Nurses were not permitted to wear the T-shirt (1T59).

15. Monaghan did not receive any complaints that employees at Riverfront prison were docked pay or forced to use leave for having worn the disputed T-shirt to work on September 15, 1995 (1T64).

16. Inmates usually do not express any interest in the CWA buttons worn by employees; they have only occasionally asked Monaghan about the meaning of the messages (1T80). Some of the inmates in Monaghan's classes would have difficulty understanding the term "privatization" (1T80-1T81).

17. Thomas Pitteo is a teacher at the Avenel Diagnostic Treatment Center (2T26). Pitteo wore the "Don't Privatize..." T-shirt to work on September 15, 1995, but was not permitted to stay in his classroom and went instead to the administration area outside the security perimeter (2T28, 2T31-2T32). Pitteo did not change his shirt and did not teach that day (2T32). He was forced to take administrative leave that day, though he did not leave the center; he performed whatever business he could, but was not given any alternative assignment for that day, and did not perform his official teaching duties (2T32, 2T36, 2T46).

18. Inmates are a unique population, confined against their will, twenty-four hours a day, for years, in some cases serving life sentences (1T99). Inmate populations generally include psychopathic individuals, who seek their needs and desires through violence (2T23). Inmates are volatile and have brawled over relatively minor incidents (1T104-1T105). Inmate violence can be extreme: Beyer has been present for three hostage situations, and other incidents include murders, attempted murders, escapes, attempted escapes and riots (1T104).

19. According to Beyer and Hilton, no one can predict what will cause an inmate disturbance to escalate to hostage-taking, beatings and death (1T104, 1T118). There have been brawls over the quantity of food and use of paper plates at meals, and disputes over television programs (1T104, 1T125-1T126). Targets of inmate violence have included teachers, medical personnel and corrections officers (1T117-1T118).

20. The State viewed "T-shirt day" as a demonstration, whose purpose was to direct attention to the proposed privatization of medical services at State prisons (1T110, 2T18, 2T24). Hilton and Beyer were concerned that the prospect of a large group of employees wearing identical T-shirts would undermine the order and discipline in prisons. The words on the shirt were not the only issue; the demonstration, and spotlight on an issue which separated employees from the control of prison managers also concerned Hilton (2T25).

21. Beyer did not want inmates drawn into the privatization debate because it was a management issue in which inmates do not have a voice, and, the issue is inherently one which could provoke their concern and insecurity (1T127-1T128). At the time, most of the staff did not know exactly what privatized medical care would mean to inmates and "we had to be very careful not to send out bad information" (1T128). The potential message conveyed to inmates was that they could become the victims of this conflict; that they would receive diminished medical services (2T17).

22. Another management concern arose from a rule which prohibits inmates from any collective action: any gathering of inmates larger than six, without authorization, is prohibited and considered a serious breach of discipline (2T14). Inmates are not permitted to wear uniform colors or patterns or alter the tailoring of their clothing in a uniform manner. Doing so suggests a gang mentality and is contrary to policy and the maintenance of order

(2T15). Beyer recalled an incident wherein a group of seven inmates at Trenton prison wore red arm bands and were placed in disciplinary detention. In retaliation, this same group instigated a violent attack on four corrections officers: a captain was stabbed, others were beaten (1T106).

23. Permitting a large group of employees to wear an identical T-shirt in front of inmates could create an atmosphere of resentment and hostility toward management. Such a display causes inmates to see a rift between employees and management, and that employees are permitted to openly confront management on an issue, a privilege inmates do not have (2T24-2T25). Hilton noted that for inmates fact is often less significant than perception: if inmates perceive something they will react to the perception despite the fact the perception may not be consistent with fact. Hilton explained that the safest and most efficient prisons are those where inmates and staff perceive that management has control (2T6, 2T10-2T11). A perceived loss of control predictably leads to heightened gang activity, weaker inmates giving into stronger inmates for protection, gang warfare and disturbances (2T14). And, at the first suggestion that prison management cannot control, inmates begin to question their safety and will seek their own means of protection, which usually includes a violent agenda (2T11). Typically, when inmates feel that management cannot control or protect them, they begin to "strap down," to arm themselves with shanks (homemade knives) and other instruments of violence (2T22).

24. The fact that there have been no previous incidents where employees' clothing provoked inmates to become violent did not mean that these circumstances would not provoke them (1T117-1T118).

25. Inmates are permitted to read uncensored newspapers, magazines and books, and view and listen to anything on television and radio (1T27, 1T119-1T120, 2T21-2T22). The impact of viewing a television program on the privatization debate is less dramatic and provocative than being a captive witness to a demonstration: i.e., the collective action of wearing T-shirts as an expression of solidarity against a policy (1T121-1T122). That inmates may have seen the issue of privatization reported on t.v. or in the newspapers but did not riot, did not persuade DOC management that a group of employees could safely wear the T-shirts at issue within the inner-perimeter (1T120-1T121).

26. T-shirt day was a publicized, focused demonstration of unity about an unpopular subject (2T24). To have permitted it could have led to a discussion: the inmates may have chosen to support these non-custodial employees who are among inmates' favorite people - those who provide medical care, counsel them, teach and feed them (2T24-2T25). Hilton did not want to give inmates the opportunity to line up together to support the employees because if they had, they would have been dispersed with force, if necessary (2T25).

ANALYSIS

The State did not violate the Act by issuing a directive on September 14, 1995, prohibiting employees from wearing T-shirts with the slogan "Don't Privatize, Just Manage Wise," within the secured inner-perimeter of any correctional facility. CWA failed to establish, by a preponderance of the evidence, that under these circumstances, the right to wear the T-shirt within the secured inner-perimeter was protected; that the State dominated or interfered with the administration of the union, or that the State discriminated against employees in order to discourage protected activity.

The Independent (a)(1) allegation

N.J.S.A. 34:13A-5.4(a)(1) prohibits employers from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act." The standards for evaluating claims of subsection (a)(1) violations are well established:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.[4/]

4/ New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 11979).

The ability of unions and employees to communicate about terms and conditions of employment is essential to the right to form, join or assist any employee organization, N.J.S.A. 34:13A-5.3. In Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988) the Commission found the Township's restriction on PBA members' rights to express opinions to the public and the media to be a violation of 5.4(a)(1). The Commission acknowledged that this form of speech is often an essential means of achieving group goals and to deny its protection would seriously interfere with the rights guaranteed by § 5.3. H.E. 88-49, 14 NJPER at 304 (¶19109 1988). In NJ State (DOT)., P.E.R.C. No. 90-114, 16 NJPER 387, (¶21158 1990) the Commission found a violation of 5.4(a)(1) where the State denied requests that employee shop stewards be permitted to solicit other employees during non-work time in non-work areas about employment conditions.

The Commission may use federal sector precedent in unfair practice litigation. Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970). Wearing message T-shirts while at work is a protected activity, provided that "special circumstances" do not exist which disrupt productivity or discipline.[5/] The National Labor Relations Board has found a proscription on wearing union insignia justified when it may jeopardize employee safety, damage

---

5/ See, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-803 (1945).; See generally Hardin, The Developing Labor Law at 96-97 (4th ed. 1992); The Developing Labor Law, Third Edition, First Supplement 1990-1992 at 16.

machinery, exacerbate employee discord, or unreasonably interfere with a public image which the employer has established.[6/] In areas of hospitals where patient care could be adversely affected, rules banning the wearing of union insignia are valid. Beth Israel Hospital v. NLRB, 437 U.S. 483, 98 LRRM 2727 (1978); Association Hospital Del Maestro v. N.L.R.B., 842 F.2d 575 (1st Cir. 1988) In National Vendors v. NLRB, 630 F.2d 1265, 105 LRRM 2281 (CA 8, 1980), an employer did not violate section 8(a)(1) of the National Labor Relations Act ("NLRA"), when it prohibited a employees' meeting in the cafeteria during brief (10-minute) break periods, where holding a large structured meeting would be disruptive to nonunit employees who used the cafeteria, where the employer did not prohibit employee discussions or the distribution of literature on nonwork time in the cafeteria, and where the employers' prohibition was not an attempt to keep the contract negotiations information from affected unit members. In One Way, Inc., 268 NLRB, 115 LRRM (1983) the Board held that rules prohibiting employee solicitation during working time are presumed valid, absent evidence that the rules are adopted for discriminatory purposes. There, the Board relied on the long accepted maxim that "working time is for work." Peyton Packing Co., 49 LRRM 828 at 843-844, 12 LRRM 183 (1943) enforced, 142 F.2d 1009 (CA 5), cert. denied, 323 U.S. 730, 15 LRRM 973 (1944). In Sussex Cty. P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994), the Commission

---

6/ United Parcel Service, 312 NLRB 776, 144 LRRM 1153 (1993); Nordstrom, Inc., 264 NLRB 698, 111 LRRM 1344 (1982).

held that reasonable time and place restrictions may be imposed on the freedom of employees to discuss their employment conditions when an employer can demonstrate legitimate business needs justifying such restrictions. That case involved the reprimand of a nurse for discussing her suspension with co-workers. The Commission found that the hospital employer had not demonstrated that the disputed conversation threatened patient care.

The issue here is one of first impression: whether, under all the circumstances, the State had a legitimate and substantial basis for banning the "Don't Privatize...Just Manage Wise" T-shirt within the secured inner-perimeter of any correctional facility. While I agree with CWA's assertion that the right to wear union insignia and T-shirts at work to communicate about terms and conditions of employment is a protected right, I find that there are special circumstances within the secured area of a State prison which justify limitations on the right.

This case does not neatly fit into private sector cases concerning restrictions on the wearing of union insignia. Principles from those cases are appropriate for production, retail, service businesses and hospitals. Prisons are distinguishable: security is paramount. Employees who work within secured areas of prisons have narrower first amendment and collective activity rights than they do outside these areas. See, Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 134 (1977) (no First Amendment right

to hold meetings or mail union material to prisoners in correctional facility; fact of confinement and needs of penal institution impose limitations on constitutional rights of prisoners, including First Amendment rights). In Israel v. Abate ___ F. Supp. ___, 154 LRRM 2097 (S.D.N.Y. 1996), the Court held that the public employer corrections department did not violate the free speech rights of union leafletters, finding that the message which the union sought to communicate was not one "of public concern" and the guard house where the union sought to distribute fliers was not "a public forum." Therefore, regulations on speech could be more restrictive. Here, the message is one of public concern, but within the inner-perimeter there a few, if any, members of the public. The secured inner-perimeter of a State prison is not a public forum, and, the State has an inherently greater ability to limit speech within this area. Connick v. Myers, 461 U.S. 138 (1983); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 112 LRRM 2766 (1983).7/

The DOC prohibition was narrowly drawn, i.e., the restriction was limited in scope; CWA members were free to wear the

---

7/ Courts have upheld limits on speech in a wide variety of public spaces not designated public fora: Krishna Consciousness, 505 U.S. at 678 (interior of airport terminal); U.S. v. Kokinda, 497 U.S. 720 (1990)(post office sidewalk); Greer, 424 U.S. at 838-839) (military base); Adderly, 385 U.S. at 46-47(jail entrance); Young v. New York City Transit Auth., 903 F.2d 146, 161-62 (2d Cir. 1990)(in subways); Knolls Action, 771 F.2d at 49(government nuclear research facility and its parking lot).

T-shirt at work, on working time in any area of State correctional facilities except the locked inner-perimeter. Other union T-shirts and buttons were permitted within the inner-perimeter in 1989 and 1992, and immediately preceding September 15, 1995. The T-shirt was banned only from one area of the employer's premises: inside the inner-perimeter, where CWA members would only encounter corrections officers, inmates and other CWA employees. Employees could wear the T-shirt in administration buildings and while entering and exiting those outer buildings and areas. The State did not engage in otherwise discriminatory conduct.[8/] Unlike Jackson Tp., members of the public and the media were not the intended audience for the message of "T-shirt day." The only legitimate audience was other CWA unit members. Some CWA employees do not enter the inner-perimeter at all, and they were permitted to wear the T-shirt and could view the T-shirt "demonstration" outside the inner-perimeter.

This conclusion addresses what is appropriate within the inner perimeter only, and the State should not assume that the result would be the same outside the perimeter. Although the State implied that the message about privatization was not as important as the fact that it was carried out as a concerted demonstration of unity, I do not agree. The State was attempting to censor an

---

8/ Compare, United Parcel Service (employer violated LMRA when it permitted drivers to wear variety of other nonunion buttons while enforcing strict dress code against small inconspicuous union button).

unpopular message, to quash debate about a matter of public concern.[9/] The State may not be entitled to the same deference in making this judgment outside the inner-perimeter.

The fact that the State did not produce direct evidence that inmates were upset about privatization does not matter. It is not for this Commission or CWA to determine what might incite inmates to violence. That is for the Department to determine. The requirement of a demonstrable showing that the activity is in fact harmful is inconsistent with the deference which should be given to the informed discretion of prison officials. Accord, Jones 433 U.S. at 134.[10/]

Giving due consideration to the unpredictability of inmates' behavior and the serious consequences of their disposition to violence, it is clear that a high degree of control is necessary to maintain discipline and prevent disturbances. Safety is preeminent. Accordingly, the State should not have to wait until a riot breaks out to prove special circumstances. In NLRB v. Harrah's Club, 337 F.2d 177, 57 LRRM 2198 (9th Cir. 1964), the employer strictly regulated the dress and appearance of employees who came in

---

9/ Compare, Israel (no free speech infringement where message was not one of public concern, but related to an internal union affair).

10/ Compare, St. Luke's Hospital, 314 NLRB 434, 146 LRRM 1291 (1994) (Hospital violated LMRA by prohibiting employees from wearing "united to fight" stickers where there was no evidence that patients complained of or even noticed buttons).

contact with the public. Certain employees began wearing union buttons. Harrah's ordered the buttons removed in order for the employees to remain in conformance with the dress code. The employees complied with Harrah's order and the union filed an unfair labor practice charge with the NLRB. The NLRB found Harrah's in violation of the NLRA. Harrah's appealed and the Circuit Court of Appeals reversed. The Court concluded that the employer has the right to maintain discipline in its establishment and found the existence of "special circumstances" which justified Harrah's decision to require the removal of the union buttons and pins. Id. at 2200. It is of particular significance that in ratifying Harrah's actions, the Court said:

> Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose. Id. at 2201.

On balance, the intrusion on CWA's ability to communicate about the privatization issue was de minimis. I conclude that the State's proffered business justification was reasonably related to the essential need to maintain order and discipline within prisons.

Section 5.4(a)(2), (3) and (7) Allegations

No facts were introduced supporting the contention that the State dominated or interfered with the formation, existence or

administration of CWA's organization. N.J.S.A. 34:13A-5.4(a)(2). As to the subsection 5.4(a)(3) allegation, I find that CWA has not met its burden of proof under the applicable standards. Having found that wearing the T-shirt within the locked inner-perimeter was not protected, together with the lack of any evidence on the record of hostility by the State toward the exercise of the activity, the first two tests under In re Bridgewater Tp., 95 N.J. 235 (1984) have not been satisfied.[11/]

Finally, CWA has failed to cite a specific Commission rule which has been breached. I recommend that the §5.4(a)(7) allegation be dismissed. Accordingly, I recommend that the Commission dismiss all of these allegations.

Accordingly, based upon the above findings and analysis I make the following:

Conclusions of Law

The State Department of Corrections did not violate the Act when it issued a directive on September 14, 1995, prohibiting employees from wearing T-shirts with the slogan "Don't Privatize, Just Manage Wise," within the secured inner-perimeter of any correctional facility.

11/ No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was **hostile** toward the exercise of the protected rights. Bridgewater 95 N.J. at 246.

Recommendation

I recommend the complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: March 13, 1997
Trenton, New Jersey