

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,

Respondent,

-and-

Docket No. CO-77-320-20

HACKENSACK FIRE FIGHTERS LOCAL
2081, IAFF, AFL-CIO,

Charging Party.

HACKENSACK FIRE FIGHTERS LOCAL
2081, IAFF, AFL-CIO,

Respondent,

-and-

Docket No. CE-78-10-37

CITY OF HACKENSACK,

Charging Party.

SYNOPSIS

Hackensack Fire Fighters Local 2081 and the City of Hackensack each have filed unfair practice charges against the other. With regard to the charge filed by the Union, the Hearing Examiner found that a letter regarding the safety of fire patrol cars which the President wrote to the Mayor constituted a protected activity and that the City manifested a discriminatory motive in threatening the Union President with future discipline if he again wrote such a letter. This action, he concluded, violated N.J.S.A. 34:13A-5.4 (a) (1) and (3).

The Hearing Examiner also recommended that the unfair practice charge filed by the City be dismissed on the ground that the City had failed to meet its burden of proof of a statutory violation by the Union in writing directly to the Mayor, allegedly by-passing designated City representatives during the course of negotiations for a successor agreement.

The Commission accepts the Hearing Examiner's findings of fact, conclusions of law, and recommended order, with certain modifications and amplification, necessitated by the additional arguments raised in the City's exceptions. The City argued that the rights granted to employees under the Act do not abridge the right of a managerial body to promulgate and enforce reasonable rules, such as Section 63 relied upon in this case, which regulate the conduct of its employees. The Commission, as did the Hearing

Examiner, questions the applicability of the rule in this situation. Assuming that the rule does apply, the Commission nevertheless concludes that the President's action in sending the letter was protected activity within the meaning of the Act. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination. In drawing the line between these sometimes conflicting rights, the Commission finds that the injury to the City is minimal at best, while the Union would be severely limited in exercising its fundamental right to represent employees concerning terms and conditions of employment. Further, Section 63 constitutes a limitation and restraint on the free speech right of the Union President to express the concerns of his fellow union members.

Accordingly, the Commission orders the City to cease and desist from interfering with employee rights by threatening to discipline employees for actions taken in their capacity as representatives of the employee organization and to remove from the file of the Union President the letter from the City Attorney which threatened future discipline.

P.E.R.C. NO. 78-71

STATE OF NEW JERSEY
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Docket No. CE-78-10-37

CITY OF HACKENSACK,

Charging Party.

Appearances:

For the City of Hackensack, Murray, Meagher & Granello,
Esqs. (Mr. James P. Granello, of Counsel)

For the Hackensack Fire Fighters Local 2081, IAFF,
AFL-CIO (Mr. Thomas P. Flynn, Vice President, IAFF)

DECISION AND ORDER

On May 9, 1977, an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by Hackensack Fire Fighters Local 2081, IAFF, AFL-CIO (the "Union") which, as amended on August 19, 1977, alleges that the City of Hackensack (the "City") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1, et seq. (the "Act"). Specifically, the Union alleged that, in response to a letter from the Union President

to the Mayor with respect to the safety conditions of certain fire patrol cars, the City sent a letter to the Union President threatening him with discipline if there were further violations of Section 63 of the Rules and Regulations of the Hackensack Fire Department. This action by the City allegedly interfered with and discriminated against the Union President's conducting of protected activities, in violation of N.J.S.A. 34:13A-5.4(a) (1), (2), (3) and (5).^{1/}

The City subsequently filed an Unfair Practice Charge on September 19, 1977 which alleges that, in writing directly to the Mayor, the Union President bypassed authorized City negotiators during a period of negotiations for a successor agreement. This action by the Union President allegedly constituted a refusal to negotiate in good faith in violations of N.J.S.A. 34:13A-5.4(b) (2), (3) and (5).^{2/}

^{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. (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. (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/} These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

The charges were processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, Complaints and Notices of Hearing on the Union's and City's charges were issued on September 13, 1977 and October 21, 1977, respectively. In accordance with the Complaints and Notices of Hearing, a hearing was held on October 11 and November 14, 1977 before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. On December 16, 1977, the City submitted a memoranda of law. On February 2, 1978, the Hearing Examiner issued his Recommended Report and Decision,^{3/} which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Pursuant to an approved request for an extension of time, timely exceptions and a brief in support thereof were filed by the City on February 27, 1978. The City belatedly requested oral argument before the Commission. That request is denied. The matter was fully litigated before the Hearing Examiner and we do not believe that oral argument would add appreciably to the record or in any other way contribute to the Commission's ability to render a just determination.

3/ H.E. No. 78-23, 4 NJPER 101 (Para. 4046 1978).

With regard to the charge filed by the Union, the Hearing Examiner found that the Union President's letter to the Mayor was a protected activity and that the City violated the Act in threatening the Union President with future discipline. Accordingly the Hearing Examiner concluded that the City violated N.J.S.A. 34:13A-5.4(a) (1) and (3). The Hearing Examiner also recommended that the unfair practice charges filed by the City should be dismissed on the ground that the City had failed to meet its burden of proof of a violation by the Union.

The Commission accepts the Hearing Examiner's findings of fact, conclusions of law, and recommended order with certain modifications and amplification, precipitated in part by the additional arguments raised in the City's exceptions.

In its major exception the City contends that Union President Sarapuchiello's submission of a demand, outside of ongoing negotiations, to the Mayor, who was not a member of the City's negotiating team, concerning a change in terms and conditions of employment, i.e., safety of patrol cars, is not a protected activity under the Act. Further, the City argues that the rights granted to employees under the Act do not abridge the right of a managerial body to promulgate and enforce reasonable rules regulating the conduct of its employees. Section 63 of the Rules and Regulations of the Hackensack Fire Department^{4/} is, the City

^{4/} Section 63 of the Rules and Regulations of the Hackensack Fire Department provides that "An officer or member wishing to transact Department business with the City Manager shall do so through the Chief."

contends, a proper procedural rule which does not prevent communications between the Union and the City but merely establishes the method by which such communications must be made. The City argues that this rule preserves the established organization and efficient operation of the City's municipal government by insuring the orderly flow and processing of such communications through the appropriate chain of command in this para-military municipal agency. Accordingly, the City believes that it had a right to advise Union President Sarapuchiello that he would be disciplined for further violations of the rule. Finally, since this rule does not limit or control the contents of communications, has a legitimate public purpose, and constitutes only a minimal and incidental limitation, the City contends that it does not constitute an impermissible infringement on the free speech right of Union President Sarapuchiello to express the concerns of his fellow union members.

Initially, we wish to comment on the applicability of Section 63 to this situation. The section provides that official business which members of the department wish to conduct with the City Manager must pass through the Fire Chief. But in the instant case Mr. Sarapuchiello did not wish to conduct business with the City Manager. Therefore, the relevance of the provision is doubtful. What Mr. Sarapuchiello did do was to communicate with the Mayor in response to a suggestion from the Mayor. The City can hardly turn around, after requesting that a matter be put in writing, and then threaten discipline if that same activity is repeated.

The activity presumably occurred because the Mayor suggested it. Additionally, there is a real question, which may not be resolved here, as to whether the provision was intended to apply to this situation where Mr. Sarapuchiello was acting in his capacity as a union representative in matters of fire fighting as provided in the rule.

However, regardless of whether the cited provision was intended to apply to letters such as Mr. Sarapuchiello's and whether it can reasonably be construed, as contended by the City, to prohibit the conduct of business by a fire fighter directly with the Mayor, we find that communications between Mr. Sarapuchiello, in his capacity as the collective representative of the Union, and the Mayor regarding the Union's concern for safe working conditions do not fall within the restrictions of this rule.

The Commission concludes, in accordance with the Hearing Examiner, that Mr. Sarapuchiello's activity in sending the letter to the Mayor, was protected within the meaning of the Act. Although the letter does use the word "demand" in discussing the need for safer vehicles, considering the tenor of the letter as a whole, and the circumstances which prompted its writing,^{5/} the Commission finds that this communication was simply intended to convey to the Mayor the Union's displeasure over the unsafe conditions of fire patrol vehicles. The presentation of a position to an elected official

^{5/} See paragraphs six, seven and eight of the Findings of Fact, and pages five and six of the Discussion and Analysis in the Hearing Examiner's Recommended Report and Decision.

concerning a term and conditions of employment, employee safety, is indisputably a protected activity.^{6/}

As clearly pointed out by the City in its exceptions, an employee may not act with impunity even though he is engaged in protected activity. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination.^{7/} In drawing the line between these conflicting rights, each case must be determined on its particular facts.

On the City's side of the scale lies the claimed injury done to the efficient operation of the fire department by the failure of Mr. Sarapuchiello to present the Union's position through the chain of command. But this injury is minimal at best, in that the Mayor could simply turn the letter over to the appropriate authorities in the fire department.

The application of Section 63 to the filing of this letter would limit the fundamental right of the Union to register its complaint over the need for safety, an especially important concern for fire fighters, with a city official who, because of his position, the Union believes can help rectify the situation. This is even more clearly true in the present situation where the

^{6/} NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 71 LRRM 2827 (3rd Cir. 1969); NLRB v. Bowman Transportation, Inc., 314 F.2d 497, 52 LRRM 2543 (5th Cir. 1963).

^{7/} Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965); Boag Spinning Co. v. NLRB, 395 F.2d 512, 68 LRRM 2393 (5th Cir. 1968).

letter was sent in response to the Mayor's request. The Union, in this situation, must be free to present its problem directly to those public officials who, the Union believes, have the authority, ability, and responsibility to deal with them.

Further, by declaring it a violation of regulations for an employee of the fire department to communicate with any public official other than the Fire Chief, this rule constitutes, in effect, a prior restraint on free speech. It goes beyond what is necessary to insure the orderly flow of communications in the City government - i.e., it is not an overriding public need -- and is substantially more than merely a minimal or incidental limitation. ^{8/}

In its next exception the City contends that in interpreting Section 63 of the Hearing Examiner acted ultra vires and usurped the exclusive authority of the judiciary to construe and apply municipal ordinances. This Commission has exclusive jurisdiction, subject to appellate review, to determine whether violations of the Act have occurred as alleged. Clearly, in rendering such determinations, the Commission must consider the various defenses raised by the respondent. It was the City which cited the section as justification for its action. Furthermore, our doubts notwithstanding, we have assumed that the designated section does cover this situation as urged by the City.

The City further contends that, since the rule was a proper exercise of the City's managerial prerogatives to organize

^{8/} Anderson v. Sills, 56 N.J. 210 (1970).

and control its operations and employees, the Hearing Examiner erred in finding a violation of N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, a violation of N.J.S.A. 34:13A-5.4(a)(1) without the additional finding that the City was motivated by union animus. In the first instance, the Hearing Examiner found an independent, not a derivative, (a)(1) violation. Secondly, having concluded that the threat of future disciplinary action for subsequent violations of Section 63 interfered with, restrained, and coerced Mr. Sarapuchiello in the exercise of rights guaranteed by the Act, the Hearing Examiner, citing Crown Central Petroleum Corp. v. NLRB, supra, correctly held that good faith is no defense. It is the tendency of an employer's conduct to interfere with those employee rights protected by (a)(1), rather than his motives, that is controlling.^{9/} Further, under the two pronged test for finding an (a)(3) violation,^{10/} once the Hearing Examiner determined that the threat of future discipline would, by its very nature, have a chilling effect on and was inherently destructive of the exercise of Mr. Sarapuchiello's protected rights, it was not necessary to also determine that the City was motivated by anti union sentiment.^{11/}

^{9/} Welch Scientific Co. v. NLRB, 340 F.2d 199, 58 LRRM 7237 (7th Cir. 1965).

^{10/} In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) and In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), Appeal pending, App. Div. Docket No. A-2546-76.

^{11/} The Commission, in agreement with the Hearing Examiner, concludes that the facts in this case do not warrant a finding that the City violated N.J.S.A. 35:13A-5.4(a)(2) and (5).

In its final exceptions the City objects to the Hearing Examiner's conclusions that its unfair practice charge was filed as a defense tactic and that it failed to prove this charge by a preponderance of the evidence.

First, we do not adopt the Hearing Examiner's opinion, set forth in dicta on page 8 of the Slip Opinion, that the City's charge was filed as "an after thought and a tactic." But we do agree that the City has failed to prove its charge that Mr. Sarapuchiello's letter to the Mayor constituted an illegal attempt to bypass authorized City negotiators and a refusal to negotiate in good faith. Again, the context of this dispute must be recalled. The matter of the safety of the patrol vehicles was brought up by a private citizen at a City Council meeting. After the meeting, Mr. Sarapuchiello discussed the subject with the Mayor who told him to "put it in writing". At this time, the City and the Union were engaged in negotiations for a successor agreement but the Union, which opposed fire safety patrol, had proposed that the new agreement not provide for such patrol. The parties had not negotiated regarding the matter. Mr. Sarapuchiello's letter calls for safer automobiles "if Fire Patrol is to be continued. This sequence does not suggest an effort to skirt designated City representatives nor a refusal to negotiate regarding the matter nor anything else either complicated or devious. Rather, it is simply a direct expression of concern about a matter -- employee safety -- of interest to the Union which was provoked by a development at a public meeting.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the City of Hackensack:

1. Cease and desist from interfering with, restraining or coercing employees or discriminating in regard to hire or tenure of employment by disciplining or threatening to discipline employees for actions taken in their capacity as representatives of an employee organization.

2. Take the following affirmative action:

a. Remove from Nicholas Sarapuchiello's personnel file the City Attorney's letter of April 26, 1977, which threatened Sarapuchiello with discipline if he again communicated with the Mayor.


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

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

3. It is further ORDERED that those portions of the Complaint in CO-77-320-20 which charge the City with violations of N.J.S.A. 34:13A-5.4(a)(2) and (5) be dismissed.

4. It is further ORDERED that the Complaint in CE-78-10-37 be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp, Graves, Parcels and Schwartz voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 20, 1978
ISSUED: April 25, 1978

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 SHALL NOT interfere with, restrain or coerce employees or discriminate in regard to hire or tenure of employment by disciplining or threatening to discipline employees for actions taken in their capacity as representatives of an employee organization, provided that such actions fall within the protections of the New Jersey Employer-Employee Relations Act.

WE WILL remove from the personnel file of Nicholas Sarapuchiello the City Attorney's letter of April 26, 1977 which threatened Sarapuchiello with discipline if he again communicated with the Mayor.

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

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Docket No. CE-78-10-37

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission that charges of unfair practices filed by the Union against the City be sustained. Specifically, the Hearing Examiner concluded that the City interfered with and discriminated against the Union President by threatening him with discipline if, in the future, he communicated directly with the Mayor of the City. The Hearing Examiner concluded that such communication with the Mayor was a protected activity and that the City manifested a discriminatory motive in threatening Sarapuchiello with future discipline.

The Hearing Examiner also recommended that charges of unfair practices filed by the City against the Union be dismissed on the ground that the City had failed to meet its burden of proof of a violation by the Union. The City had alleged that in writing directly to the Mayor the Union President had by-passed authorized City negotiators during a period of negotiations for a successor agreement. The Mayor was not part of the City's negotiating team.

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

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Charging Party.

Appearances:

For the City of Hackensack
Murray, Meagher and Granello, Esqs.
(James P. Granello, Esq.)

For the Hackensack Fire Fighters Local 2081, IAFF, AFL-CIO
(Thomas P. Flynn, Vice President, IAFF)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 9, 1977 by Hackensack Fire Fighters Local 2081, IAFF, AFL-CIO (hereinafter the "Union"), which was amended August 19, 1977, alleging 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, in response to a letter from the Union President to the Mayor with respect to the condition of certain fire patrol cars, sent a letter back to the Union President threatening him with discipline if he ever again submits a letter to anyone but the City's Chief of the Fire Department, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), and (5) of the Act. ^{1/}

The City, by way of response to the charge of the Union, filed an unfair practice charge on September 19, 1977, alleging that the Union had refused to negotiate in good faith with the City by the Union President's aforesaid letter to the Mayor, which allegedly bypassed the authorized City negotiators during a period of negotiations for a successor agreement, all of which is alleged to violate N.J.S.A. 34:13A-5.4(b)(2), (3) and (5) of the Act. ^{2/}

It appearing that the allegations of the above charges, if true, may constitute unfair practices within the meaning of the Act, Complaints and Notices of Hearing were issued, respectively, on September 13, 1977 and October 21, 1977.

Pursuant to the Complaints and Notices of Hearing, hearings were held on October 11 and November 14, 1977 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue

^{1/} These subsections prohibit employers, representatives or their 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.

"(5) Refusing to negotiate in good faith with a majority representative of employees in that unit, or refusing to process grievances presented by the majority representative."

In its amended charge, the Union included as a paragraph seven the disciplinary suspension of one Richard Winner, Secretary of the Union. A motion to strike this paragraph from the amended charge was granted, in part, because of another pending case in Docket No. CO-78-44-31 involving the same parties and other (a)(3) charges.

^{2/} These subsections prohibit employee organizations, their representatives of agents from:

"(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the Commission."

orally. A post-hearing brief was submitted by the City only on December 16, 1977.

Unfair practice charges, as amended in the case of the Union, having been field with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing and after consideration of the brief filed by 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 Hackensack is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Hackensack Fire Fighters Local 2081, IAFF, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The Union has for many years been the sole and exclusive collective negotiations representative for all firemen employed by the City. The most recent collective negotiations agreement was effective during the term January 1, 1974 to December 31, 1976, with provision that the agreement remains in full force and effect until superceded by a successor agreement. Negotiations for a successor agreement commenced November 3, 1976 and, as of the date of hearing in the instant matter, no successor agreement has been consummated.
4. The City is represented in collective negotiations, inter alia, by its special labor counsel, Murray, Meagher and Granello, and by an administrative analyst, Gordon Sieck, who reports directly to the City Manager. The City Manager does not attend negotiations sessions nor does the Mayor or members of City Council. Instructions to negotiators for the City originate with the City Manager. It is noted that the City Manager, Joseph J. Squillace, was one of the parties who executed the collective negotiations agreement effective January 1, 1974 (R-2).
5. The Union negotiators submitted proposals for a succesor agreement at the first negotiations meeting on November 3, 1976. Unlike the provisions of Article XXVI, Section 26.2A of the current agreement, the Union's contract proposals in Article 26 omitted reference to assignment of firemen to "public safety fire and safety patrol". Further, in subsequent negotiations meetings, at least through the third meeting on March 22, 1977, the Union did not raise or discuss the fire safety patrol.
6. Gordon Sieck testified that at a February 1977 meeting of the City Council a private citizen raised a question about the condition of the fire safety patrol cars. This question was addressed to the Mayor, to which the City Manager

responded, at the direction of the Mayor, that the matter was not a proper subject for public discussion in view of current contract negotiations (Tr.116).

7. The then Mayor, Kazmier Wysocki, testified that at a City Council meeting a private citizen brought up the question of the condition of fire safety patrol vehicles, and he further testified that after the public meeting Nicholas Sarapuchiello, the Union President, spoke to him about the fire safety patrol vehicles. The Mayor told Mr. Sarapuchiello to "put it in writing" (Tr. 32-34).

8. Mr. Sarapuchiello, under date of February 19, 1977, addressed a letter to then Mayor Wysocki on the letterhead of the Union, which stated, in pertinent part, as follows:

"The Local finds it most important to demand safer automobiles if Fire Patrol is to be continued.

"...We DO respond to emergencies, in these unsafe vehicles. The very fact that the vehicles in question have lasted so long, is a testimony to the perserverance of the Firefighters who, with little regard to their own personal safety, have endured numerous (sic) mechanical and safety deficiencies, in purusing their public purpose.

"The safety of the Firefighters should be of paramount importance to management. We insist on it.

For the Local

Nick Sarapuchiello, Pres."

9. The then Mayor Wysocki received Mr. Sarapuchiello's letter of February 19, 1977 and brought it to the next meeting of the City Council where it was the consensus of the City Council to turn the letter over to the City Attorney for response (Tr. 23, 24, 116, 117).

10. Under date of April 26, 1977, the City Attorney, Seymour Chase, responded by letter as follows:

"This office has reviewed a letter dated February 19, 1977 which you sent to Mayor Kazmier Wysocki concerning the safety of Fire Patrol Automobiles.

"This letter was a clear violation of the rules and regulations of the Fire Department. Specifically, Article III, Section 63, provides that official business which members of the Department wish to conduct with the City Manager must pass through the office of the Fire Chief. Fire Fighters are not authorized to conduct official business directly with the Mayor.

"Further, violations of this rule will give rise to disciplinary action."

Very truly yours,

SEYMOUR CHASE
City Attorney" (Emphasis supplied).

The City stipulated that Mr. Chase was authorized to write the above letter on behalf of the City.

11. Fire Chief Charles H. Jones testified that the April 26, 1977 letter from Mr. Chase to Mr. Sarapuchiello is either in Mr. Sarapuchiello's personnel file or is on its way to his personnel file (Tr. 162).

THE ISSUES

1. Did the City Attorney's letter of April 26, 1977 to Nicholas Sarapuchiello, and its placement in Mr. Sarapuchiello's personnel file, constitute a violation of the Act?
2. Did Nicholas Sarapuchiello's letter of February 19, 1977, addressed to the Mayor, constitute an attempt by the Union to bypass authorized City negotiators during the pendency of negotiations for a successor agreement in violation of the Act?

DISCUSSION AND ANALYSIS

The City Violated the Act When
It Threatened Sarapuchiello
With Discipline in the Future
if He Again Communicated Directly
With The Mayor

The Hearing Examiner is of the opinion, and concludes, that the City violated Subsections (a)(1) and (3) of the Act when the City Attorney, by letter dated April 26, 1977, threatened Nicholas Sarapuchiello, the President of the Union, with discipline if he again communicated official business directly with the Mayor.

The first thing to be noted is that Article III, Section 63 of the Rules and Regulations of the Fire Department, by which Mr. Sarapuchiello as a fire fighter is governed, and which was cited by the City Attorney, pertains to the conduct of official business with the City Manager. It makes no reference to the Mayor or any other City official.

It is clear to the Hearing Examiner that communication with a public official, such as the Mayor in the instant case, particularly where the communi-

cation originated at the request of the Mayor, is a protected activity within the meaning of the Act where the communication pertains to terms and conditions of employment. The Hearing Examiner notes that Mr. Sarapuchiello's letter of February 19, 1977 addressed to the Mayor was on the letterhead of the Union and signed by Mr. Sarapuchiello in his capacity as President of the Union. The thrust of the letter was to protest the condition of fire safety patrol vehicles, clearly a term and condition of employment for the fire fighters covered by the collective negotiations agreement.

It is interesting to note that the matter of communication with the Mayor by Mr. Sarapuchiello originated with a question raised by a private citizen about the condition of the fire safety patrol vehicles. The Hearing Examiner concludes that Mr. Sarapuchiello had a clear right to communicate with the Mayor with respect to the condition of the fire safety patrol vehicles, either in his capacity as an employee of the City, or in his capacity as President of the Union or, for that matter, in his capacity as a private citizen and taxpayer of the City. ^{3/}

Support for the right of an officer of a public employer representative to communicate with a representative of the public employer with respect to terms and conditions of employment has been recognized and affirmed by the Commission in the case of Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977). It is clearly applicable in the instant case where communication was made by the President of the Union to the Mayor of the City. Thus, Laurel Springs is precedent for finding that Mr. Sarapuchiello was engaged in protected activity when he wrote to the Mayor on February 19, 1977 with respect to the condition of the fire safety patrol vehicles.

Having found that Mr. Sarapuchiello was engaging in protected activity within the meaning of the Act, the Hearing Examiner now turns to the question of the threat of discipline for future communication with the Mayor as a violation of Subsections (a)(1) and (3) of the Act. It is well settled that such a violation must be based upon discriminatory employer conduct which is motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act, or had the effect or so encouraging or discouraging the exercise of said rights. ^{4/}

^{3/} Mr. Sarapuchiello's status as a resident of the City and, therefore, a taxpayer was established in a related case involving the same parties: Docket No. CO-78-44-31, now pending before the Hearing Examiner.

^{4/} Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), appeal pending, App. Div. Docket No. A-2546-76.

The Commission in City of Hackensack, P.E.R.C. No. 78-30, 3 NJPER (1977) affirmed the findings and conclusions of the Hearing Examiner in that case, who had found that the threat of discipline for future infractions constituted a violation of Subsections (a)(1) and (3) of the Act. The Hearing Examiner had predicated his (a)(1) finding, in part, on the case of Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965). There the court held that disciplinary action taken by an employer against employees for alleged insubordinate statements directed at supervisors was unlawful. The court stated that although management does have the right to discipline employees, "...that right is not immune from challenge as a primary violation of Section 8(a)(1). When then considered, the motive behind an employer's conduct is not an element of the unfair labor practice charge." Thus, even if the employer acted in good faith, its action is violative of Section 8 (a)(1) if the employer's conduct tends to interfere with the protected rights of employees.

The Hearing Examiner in the instant case also relies in his conclusion that there was a violation of the Act upon the following decisions of the NLRB and the courts in like cases: Isaac & Vinson Security Services, Inc. 193 NLRB No. 129, 78 LRRM 1525 (1971); Hayes-Albion Corp. et al., 195 NLRB No. 170, 79 LRRM 1557 (1972); Bob Henry Dodge, Inc., 203 NLRB No. 1, 83 LRRM 1077 (1973); Prince Lithograph Co., Inc., 205 NLRB No. 23, 83 LRRM 1654 (1973); NLRB v. Lenkurt Electric Co., 459 F.2d 635, 80 LRRM 2222, (9th Cir. 1972)

Any question about the disciplinary nature of the City Attorney's letter of April 26, 1977 to Mr. Sarapuchiello is eliminated by the fact that the Fire Chief testified that the said letter is either in Mr. Sarapuchiello's personnel file or on its way to it. By way of remedy, the Hearing Examiner will recommend to the Commission that it order the City to remove the City Attorney's letter from Mr. Sarapuchiello's file.

The City has not Proved by a Preponderance of the Evidence that Mr. Sarapuchiello's Letter of February 19, 1977 Constituted an Attempt by the Union to By-pass Authorized City Negotiators During the Pendency of Negotiations for a Successor Agreement

The Hearing Examiner will recommend dismissal of the City's charges of unfair practices against the Union for allegedly by-passing authorized City negotiators during the pendency of negotiations for a successor agreement. The City, clearly, has not proved its case by a preponderance of the evidence as required by N.J.A.C. 19:14-6.8.

The Hearing Examiner first notes that the City Attorney's letter of April 26, 1977 to Mr. Sarapuchiello threatening discipline made no reference whatsoever to any unfair practice in Mr. Sarapuchiello's having communicated directly to the Mayor concerning the condition of fire safety patrol vehicles. Thus, the Hearing Examiner is of the opinion that the City's filing of charges of unfair practices is an afterthought and a tactic designed to meet the charges by the Union of unfair practices by the City.

It is true, and the Hearing Examiner has so found, that the parties were in negotiations for a successor agreement on February 19, 1977, the date when Mr. Sarapuchiello communicated by letter with the Mayor. It is also true that the Union in its counter-proposals for a successor agreement sought to eliminate reference to the fire safety patrol. Finally, it is true that the Mayor is not part of the negotiating team for the City and that the City is represented in labor negotiations by its special labor counsel and by an administrative analyst.

However, the foresaid findings by the Hearing Examiner do not in any way constitute an inconsistency with the Hearing Examiner's conclusion that the City has not proved a violation of the Act by the Union in instant case. The Hearing Examiner is of the opinion that Mr. Sarapuchiello on February 19, 1977, although President of the Union and a member of the Union's negotiating team, wrote to the Mayor with respect to a term and condition of employment which, irrespective to the Union's position in negotiations was not an attempt to by-pass City negotiators. Rather, it was an attempt by Mr. Sarapuchiello to reduce to writing the subject matter of a conversation which he had with the Mayor following a public City Council meeting where a private citizen raised a question regarding the condition of fire safety patrol vehicles.

In summary, the Hearing Examiner concludes that the engaging by Mr. Sarapuchiello in a protected activity on February 19, 1977 did not constitute an attempt by him to by-pass authorized City negotiators during the pendency of negotiations for a successor agreement, but was instead the engaging by him in an activity protected by the Act. The Hearing Examiner is of the view that one cannot violate the Act as to the City under Section 5.4(b) while engaging in an activity protected by Section 5.4(a) of the Act.

* * * *

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

CONCLUSIONS OF LAW

1. The letter of February 19, 1977 from Mr. Nicholas Sarapuchiello as Union President to the then Mayor Wysocki with respect to a term and condition of employment was an activity protected by the Act and the threatened discipline by the City Attorney in a letter dated April 26, 1977 was a violation of Subsections (a)(1) and (3) of the Act.

2. Nicholas Sarapuchiello's letter of February 19, 1977 did not constitute an attempt by the Union to by-pass authorized City negotiators during negotiations for a successor agreement and was, therefore, not a violation of Subsections (b)(2), (3) and (5) of the Act.

3. The City has violated the provisions of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. However, the City has not violated N.J.S.A. 34:13A-5.4(a)(2) and (5) of the Act.

4. The Union has not violated the provisions of N.J.S.A. 34:13A-5.4(b)(2), (3) and (5) of the Act.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission issue an ORDER that the City of Hackensack:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refraining from threatening discipline to employees, including Nicholas Sarapuchiello, for engaging in protected activities.

2. Discriminating in regard to hire a 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 the Act.

B. Take the following affirmative action:

1. Remove from Nicholas Sarapuchiello's personnel file the City Attorney's letter of April 26, 1977, which threatened Sarapuchiello with discipline if he again communicated with the Mayor.

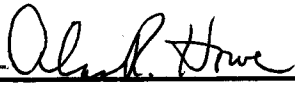
2. Post at Fire Headquarters, in a conspicuous place, copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted by the City immediately upon receipt thereof, after being signed by the City's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its employees are customarily posted.

Reasonable steps shall be taken by the City to insure that such notices are not altered, defaced or covered by any other material.

3. Notify the Director of Unfair Practices within twenty (20) days of receipt of this order what steps the City has taken to comply herewith.

C. It is further recommended that the Commission order those portions of the Complaint which charge the City with violations of Section 5.4(a)(2) and (5) of the Act be dismissed.

D. It is further recommended that the Commission order the Complaint alleging violations of Section 5.4(b)(2), (3) and (5) of the Act by the Union be dismissed in its entirety.


ALAN R. HOWE
Hearing Examiner

DATED: February 2, 1978
Trenton, New Jersey

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 exercise of rights guaranteed to them by the Act.

WE WILL NOT discriminate 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 the Act.

WE WILL remove from the personnel file of Nicholas Sarapuchiello the letter of April 26, 1977, which warns Sarapuchiello that he faces future discipline if he again communicates directly with the Mayor.

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