P.E.R.C. NO. 2016-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Respondent,

-and- Docket No. CO-2011-225

POLICE BENEVOLENT ASSOCIATION LOCAL 47,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision and order in an unfair practice case filed by the Police Benevolent Association Local 47 against the Borough of Carteret. That decision recommended that the Commission find that the Borough violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3), by disciplining a unit member after he made comments at a public meeting concerning union-related issues. The Commission rejects the Borough's exceptions, finding that the Hearing Examiner acknowledged all of the unit member's comments at the public meeting, even disrespectful comments, but found that it was protected conduct given the totality of the exchange which concerned union-related issues discussed off-duty in a public meeting in his capacity as a union representative.

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.

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Appearances:

For the Respondent, McManimon, Scotland & Baumann, L.L.C., attorneys (Leslie G. London, on the brief)

For the Charging Party, Mets, Schiro and McGovern LLP, attorneys (Leonard C. Schiro, of counsel and on the brief; Matthew T. Clark, on the brief)

DECISION

This matter comes to us on the Borough's exceptions to a Hearing Examiner's Report and Recommended Decision. On December 8, 2010, the Police Benevolent Association (PBA) Local 47 (Local 47) filed an unfair practice charge against the Borough of Carteret (Borough), alleging that the Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by disciplining

1/ These provisions 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."

Salvatore Renda (Renda), a Borough police officer and PBA State Delegate, after he made comments at a public meeting concerning union-related issues. We adopt the Hearing Examiner's Report and Recommended Decision finding that the Borough violated the Act.

A Complaint and Notice of Hearing issued on November 14, 2011. On November 29, the Borough filed an Answer to the Complaint. Hearing Examiner Wendy L. Young conducted an evidentiary hearing on December 12, 2013. On May 12, 2014, the Hearing Examiner issued a Report and Recommended Decision. H.E. No. 2014-12, 40 NJPER 569 (¶184 2014). The Hearing Examiner found that the Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act and recommended that the Commission issue an order directing that the Borough cease and desist from bringing and/or sustaining disciplinary charges against Renda, and post a Notice to Employees. On June 11, 2014, the Borough filed exceptions and a supporting brief. On July 2, Local 47 filed a brief in opposition to the exceptions with exhibits.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact. H.E. at 2-11. We offer a brief summary of the essential facts.

FACTS

The Borough and Local 47 signed a collective negotiations agreement (CNA) in effect from January 1, 2007 through December 31, 2011. The Borough's governing body consists of a six-member Council in addition to a Mayor. Daniel Reiman was, and remains,

the Mayor of the Borough. Salvatore Renda is employed by the Borough as a police officer and also serves as a PBA State Delegate.

On October 21, 2010, there was a public meeting of the Borough Council. Individuals intending to speak at the meeting were asked to list their names on a sign-up sheet. They were reminded by the Mayor that they would have three minutes to speak and that if they chose to ask questions, responses to those questions would count toward their three minute allotment. Renda and several other State PBA and Local 47 union representatives attended the public portion of the meeting in order to address ongoing union matters. Renda was not on duty and was not in uniform during the public meeting.

After four other union-affiliated individuals spoke during the public portion of the meeting,[2/] Renda's name was reached on the sign-up sheet. Renda began by making a statement about the Attorney General guidelines concerning disciplinary hearings and internal investigations. When the Mayor interrupted Renda's statement by commenting, "I--I can't dispute that, --", a heated exchange ensued during which Renda specifically told the Mayor

2/ Five other individuals spoke at the public meeting after Renda.

that he did not want him to answer any question(s).[3/] However, the Mayor proceeded to interrupt Renda again twice before Renda asked, "...do I get extra time to talk?" When the Mayor indicated that additional time would not be allotted, Renda told the Mayor to ". . . please shut up."

Throughout the balance of Renda's alloted time, a relatively heated exchange continued with the Mayor and Renda interrupting each other repeatedly. Renda advised the Mayor not to interrupt him at least twice. Later, when the Mayor clarified that Renda could either ask a question and receive an answer or simply make a statement, Renda specified, "I'll make a statement." Immediately thereafter, the Mayor proceeded to interrupt Renda approximately eight times[4/] to which Renda ultimately responded by saying, "You're a joke."

Police Captain McFadden, who was also in attendance at the public meeting but not in uniform, subsequently called Police Chief Pieczyski to inform him that Renda had been disrespectful to the Mayor. On November 18, 2010, Renda was advised that an internal affairs investigation had been initiated. Based upon his review of the transcript and audio recording of the October

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3/ As noted by the Hearing Examiner, the transcript of the public meeting is inaccurate – Renda's testimony and the audio recording confirm that he told the Mayor that he did not want him to answer any question(s).

4/ Within these interruptions, the Mayor included a reminder that Renda was allotted three minutes to speak before the governing body.

21 public meeting, the investigator drafted a memorandum dated November 23 recommending that Renda be charged with insubordination under the Police Department's Rules & Regulations, section 12:39(B) which prohibits "[u]sing profane or insulting language to a superior officer or to higher elected or appointed authority." Thereafter, Renda was served with a preliminary notice of disciplinary action dated November 24 charging him with insubordination and conduct unbecoming a public employee. The notice also indicated that a suspension or removal were the penalties being sought.[5/]

Police Chief Pieczyski testified that the reason for the disciplinary action against Renda was the manner and demeanor he used when speaking to the Mayor, which he characterized as inappropriate and insulting, and not the contents or substance of his speech. He went on to testify that other individuals who spoke at the public meeting were not disciplined because they were not disrespectful. Police Chief Pieczyski agreed that the matters Renda discussed were union-related and not issues of personal interest to Renda as an individual officer.

STANDARD OF REVIEW

With respect to the Hearing Examiner's findings of fact, we cannot review same de novo. Instead, our review is guided and

5/ Although a final notice of disciplinary action dated December 7, 2011 was issued and indicated that Renda's penalty would be a four-day suspension, it appears that no discipline has been imposed to date.

constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c).[6/] Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility

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6/ N.J.S.A. 52:14B-10(c) provides, in pertinent part:

> The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

unless we first determine from our review of the record[7/] that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due factfinder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006).

7/ N.J.A.C. 19:14-7.2 provides:

> The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees all public employees the right to engage in union activity including organizing, making their concerns known to their employer, and negotiating collectively. It further provides that a majority representative of public employees shall be entitled to act for and represent the interest of public employees.

N.J.S.A. 34:13A-5.4(a)(3) specifically prohibits an employer from retaliating against an employee for exercising his or her rights as guaranteed under N.J.S.A. 34:13A-5.3. Under Bridgewater Tp., 95 N.J. 235, 241-45 (1984), no violation will be found unless the charging party has proved by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse action. See also Wright Line, 251 N.L.R.B. 1083, 1984-85 (1980). 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 that the employer was hostile toward the exercise of the protected rights. Id. at 246.

Once an employee has established a prima facie case, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the action occurred for legitimate business reasons and not in retaliation for protected activity. Id. at 242-44. In short, the employer must show that the same action

would have taken place even in the absence of the protected activity. Id. Notably, this affirmative defense need not be considered unless the charging party has established that anti-union animus was a motiving force or substantial reason for the employer's action. Id. Ultimately, conflicting proofs will be for the fact finder to resolve. Id. at 244.

In finding that the Borough's disciplinary charges and any discipline penalties against Renda violated section 5.4(a)(3) and, derivatively, 5.4(a)(1) of the Act, the Hearing Examiner determined that Renda did not lose the protections of the Act given the totality of the circumstances. H.E. at 20. Noting that there was no dispute that Renda was engaged in collective activity when he addressed the Mayor and Council on October 21, 2010 and that at least part of his remarks were protected by the Act, the Hearing Examiner discussed Renda's purpose in appearing at the public meeting and concluded that the substantive parts of Renda's speech were a legitimate exercise of his rights protected under the Act. H.E. at 12-13. The Hearing Examiner also concluded that there was no question that the Borough was aware of Renda's protected activity, noting that the Borough acknowledged that his remarks centered on union concerns and emphasized that same was not the basis of discipline. H.E. at 13-14.

More specifically, given that the Borough brought disciplinary charges against Renda for his remarks, the Hearing Examiner determined that hostility could be inferred without further analysis. H.E. at 14. The Hearing Examiner also determined that the ultimate issue in this matter focused on whether Renda had a right protected under the Act to tell the Mayor to "shut up" and to call him a "joke." H.E. at 14. Noting that Renda was acting as a PBA delegate when addressing the Borough's elected officials concerning issues of concern to the PBA rather than in his capacity as a police officer, and further that the Mayor was not acting in the capacity of Renda's commanding officer at the public meeting, the Hearing Examiner found that Renda and the Mayor were on equal footing and discussed the contentious nature of labor relations. H.E. at 14-17.

While acknowledging the Borough's concerns about, and departmental policy prohibiting, disrespectful and insulting conduct toward superior or elected officials, the Hearing Examiner ultimately concluded that although Renda's comments could be viewed as disrespectful and insulting to the Mayor, they were insufficient to cause him to lose the protections of the Act given the context in which they were made. H.E. at 17-19. In particular, the Hearing Examiner found that the Mayor's actions provoked Renda's response and the Borough's policy was overbroad

given that it provided no latitude for situations in which an employee was acting in a union advocacy role and engaging in protected activity. H.E. at 17-20.

The Borough has filed eight exceptions. We find that the exceptions can be grouped into two general categories. In exceptions 1, 5, 6, and 8, the Borough disputes factual and legal findings made by the Hearing Examiner with regard to whether Renda's comments fall within the purview of protected activity. Specifically, the Borough maintains as follows:

> 1. The Hearing Examiner erred by limiting her factual characterization of Renda's comments to the use of special police for security in schools and conducting disciplinary proceedings in public, failing to indicate that Renda insulted the Mayor by telling him to "shut up" and referring to him as "a joke."
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> 5. The Hearing Examiner erred in her legal conclusion that Renda's comments, although disrespectful and insulting, were insufficient to cause him to lose the protections of the Act in the context in which they were made. The Borough maintains that Renda's comments do not constitute protected activity as same cannot be used as both a shield and a sword to insult the Mayor.
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> 6. The Hearing Examiner erred in her legal conclusion that City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967) is inapposite based upon her findings that Renda was not the Mayor's subordinate at the time of the public meeting and his comments were not made while on duty or directed toward his commanding officer. The Borough maintains that the Hearing Examiner failed to take into account that Renda being off duty is of no

> moment as a matter of law or that the Mayor is the highest civilian authority overseeing the Police Department who was, in a sense, Renda's superior and therefore entitled to commensurate respect.
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> 8. The Hearing Examiner erred in her legal conclusion that Renda did not lose the protections of the Act given that she also concluded that Renda was disciplined "for his disrespectful and insulting behavior" rather than any protected activity.

We reject exceptions 1, 5 ,6 and 8. Contrary to the Borough's characterization, the Hearing Examiner acknowledged all of Renda's comments at the public meeting in her findings of fact. H.E. at 5-8. She specifically recognized Renda's request that the Mayor ". . . please shut up" in addition to Renda's remark that the Mayor was ". . . a joke." H.E. at 7-8. Likewise, the Hearing Examiner's discussion of Renda's purpose for appearing at the public meeting was followed by an analysis of Renda's "disrespectful and insulting" comments to the Mayor. H.E. at 12-20. The Hearing Examiner noted that labor relations is sometimes a contentious and emotional business and cited several NLRB decisions standing for the proposition that criticism or epithets directed at management representatives, strong or foul language, or even profanity which occurs during the course of protected activity does not justify disciplining an employee acting in a representative capacity. H.E. at 17. Moreover, the record supports that Renda's purpose in attending

the public meeting was to address union-related issues. (T16:22 thru T26:10)[8/]

Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), defined what is protected speech and conduct under the Act. Therein, we stated:

> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the others actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment.
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> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.
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> [Black Horse Pike Reg. Bd. of Ed., 7 NJPER at 502]

8/ Transcript references for the December 12, 2013 hearing are denoted by "T". Transcript references for the October 21, 2010 public meeting are denoted by "J-1" followed by the page number.

See also, Central Reg. Bd. of Ed., P.E.R.C. No. 2015-77, 42 NJPER 36 (¶10 2015)(employer violated Act when it used criticism and adverse evaluations to retaliate against union president for engaging in protected activities which were not insubordinate); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. 149 N.J. 35 (1977)(employer violated Act when it disciplined a teacher who called the superintendent a "lying scuzzball" at a public board meeting); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (1979)(employee may not be disciplined for engaging in protected activity, namely a shouting match between union president and city manager about employee complaints).

The Commission has also explored the line between what is protected conduct of an employee serving as a union representative and what is conduct amounting to insubordination and, thus, not protected. In State of New Jersey, Dept. of Treasury (Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001) and State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C. No. 2001-52, 27 NJPER 167 (¶132057 2001), we noted that consideration must be given to whether the employee is acting in the role of a shop steward or union representative, as well as the time and place of the speech. The latter includes whether the speech or conduct is on work time and on the shop floor or a closed-door meeting, whether other employees are

present, whether the actions were threatening, and whether the employee's actions were provoked by the employer's actions. In Glover, we stated:

> In negotiations and grievance discussions, management officials and union representatives meet as equals and exchange views freely and frankly. Passions may run high and epithets and accusations may ensue so courts have refused to impose a 'rigid standard of proper and civilized behavior' on participants and have allowed leeway for adversarial and impulsive behavior. An employer may criticize a representative's conduct at such meetings, but it may not discipline the representative as an employee when that conduct is unrelated to job performance.
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> Despite the equality of participants in negotiations and grievance settings and despite the leeway allowed for impulsive and adversarial behavior, representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect. To determine whether conduct is indefensible in the context of the dispute involved, it is necessary to balance the employees' heavily protected right to representation in negotiations and grievance discussions against the employer's right to maintain workplace discipline.
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> [Glover, 27 NJPER at 167 (citations omitted)]

Here, Renda was off-duty and acting as a union representative during the public meeting in which his comments were made. The substance of his commentary was union-related and directed at an elected official who was not within his direct

chain of command.[9/] Although Renda uttered two inappropriate and disrespectful remarks during the course of his commentary, his comments must be considered in the totality of his exchange with the Mayor. Moreover, the Mayor contributed to the exchange by repeatedly interrupting Renda after he specified that he did not want answers to his questions and simply wanted to make a statement.[10/]

We agree with the Hearing Examiner that City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967) is inapposite to this matter. In that case, which did not involve any protected activity, a police officer (Massey) refused a superior officer's order during working hours and slammed his loaded weapon down on a superior officer's desk. Massey was charged with insubordination and tossing a firearm and ultimately removed from his position as a police officer. Originally, Massey's penalty was reduced from removal to a six-month suspension by the Civil Service Commission. In reinstating the penalty of removal, the

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9/ N.J.S.A. 40A:14-118 states that in municipalities where a chief of police position is established, same "shall be the head of the police force and . . . shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof . . . ." The statute goes on to define "appropriate authority" as "the mayor . . . or the governing body . . . ."

10/ In fact, during the public meeting one of the speakers who preceded Renda cited N.J.S.A. 40A:14-118 to the Mayor and accused him of usurping the powers of the Police Chief. H.E. at 4-5; J-1 at 10-12.

Appellate Division noted that "[t]he disrespect Massey manifested toward his superiors was subversive of discipline and was conduct unbecoming a police officer" because "a police force and its responsible officers in many respects constitute a military-type organization and discipline must be enforced." City of Newark, 93 N.J. Super. at 323.

Renda's comments did not indefensibly threaten workplace discipline, order and/or respect and therefore he did not forfeit the statutory protection afforded under the Act. See generally, State of New Jersey, Dept. of Treasury (Glover); Middletown Tp. Bd. of Ed.; Black Horse Pike Reg. Bd. of Ed.; City of Garfield and PBA Local 46, P.E.R.C. No. 2013-88, 40 NJPER 54 (¶20 2013), aff'd 41 NJPER 177 (¶63 2014). "Even where a representative's public comments criticizing the employer are false, the representative may still be protected from retaliation as an employee." Jackson Tp., P.E.R.C. 2006-12, 31 NJPER 281 (¶110 2005).

The Borough's exceptions 2, 3, 4, and 7 relate to the Hearing Examiner's findings of fact and conclusions of law with regard to this matter arising in a law enforcement context. The substance of this group of exceptions is that the Borough asserts that even if Renda's comments were protected under the Act, there was an independent basis for the discipline based upon departmental policy since Renda's comments were not

constitutionally protected speech. Specifically, the Borough maintains:

> 2. The Hearing Examiner failed to consider or emphasize the applicable law enforcement context of this matter, and the Borough's legitimate, governmental interests in maintaining order, harmony and discipline within its ranks, by limiting her characterization of the state of the law to an employee and employer being on equal footing when an employee acts in the capacity of a union representative and interacts with a management representative while pursuing protected activity.
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> 3. The Hearing Examiner erred in her legal conclusion that this matter does not dictate a different result than Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. 149 N.J. 35 (1977) based upon her findings that at the time of the public meeting, Renda was acting as a PBA delegate addressing issues of concern to the PBA and the Mayor was an elected official, such that the two were on equal footing - management to labor. The Borough maintains that, given the unique interest of the Borough in the oversight of its Police Department, Renda was not acting as a PBA delegate while hurling insults at the Mayor that had nothing to do with protected union activity.
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> 4. The Hearing Examiner erred when justifying Renda's speech as within the framework of "reasonable latitude to labor and management advocates to express their opinions" by failing to acknowledge that the Act does not abrogate a police officer's responsibility to his department and related civilian authority to maintain harmony and discipline.
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> 7. The Hearing Examiner erred in her legal conclusion that the departmental policy

> prohibiting disrespectful and insulting conduct towards superiors or elected officials is overbroad because it allows no latitude for situations where the employee is acting in a union advocacy role and engaging in protected activity given that such protected speech is implicitly excluded from the limitations on conduct pursuant to Karins v. City of Atlantic City, 152 N.J. 532 (1998). The Borough maintains that the Hearing Examiner has confused Renda's protected union activity, which is undisputed and for which no one else at the public meeting was disciplined, with Renda's independent insults directed at the Mayor, for which only he was disciplined.

We reject exceptions 2, 3, 4 and 7. Contrary to the Borough's characterizations, the Hearing Examiner acknowledged the law enforcement context of this matter in her findings of fact, including the testimony of Police Chief Pieczyski. H.E. at 8-11. Further, she specifically incorporated the Borough's legal arguments in her analysis, referencing the alleged violation of departmental policy (H.E. at 16, 19-20), the claimed standing of Mayor as chief civilian authority (H.E. at 16), the contention that the Police Department is a para-military organization where disrespect towards superiors is subversive to maintaining proper discipline (H.E. at 18), and the concern regarding police officers engaging in public displays of disrespect (H.E. at 18).

We may consider the Borough's constitutional claims as part of exercising our exclusive unfair practice jurisdiction in this case. The Commission is "competent to pass upon constitutional issues germane to proceedings before [it] . . ." and its

"delegated authority is broad enough to enable it to apply laws other than that which it administers, and should be construed 'so as to permit the fullest accomplishment of the legislative intent.'" Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teach. Ass'n, P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super. 468, 475 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981)(citing Plainfield Bd. of Ed. v. Plainfield Ed. Ass'n, 144 N.J. Super. 521, 524 (App. Div. 1976)).

In Pickering v. Bd. of Ed., 391 U.S. 563 (1968), the Supreme Court of the United States analyzed the degree to which the speech of public employees may be constitutionally regulated within the bounds of the First and Fourteenth Amendments. The Supreme Court held that a school teacher could not be dismissed for making erroneous public statements upon issues which were current subjects of public attention "absent proof of false statements knowingly or recklessly made by him . . . ." Id. at 574. The Supreme Court of this State found that Pickering and its progeny remain the "standard . . . for determining when conduct-related speech in public-sector employment is constitutionally protected." Karins v. City of Atlantic City, 152 N.J. 532, 548 (1998).

In Karins, the Supreme Court of New Jersey stated:

> The threshold question in applying the Pickering balancing test is whether the employee's speech may be 'fairly characterized as constituting speech on a

> matter of public concern. '. . . .'[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'
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> Once the public interest prong of the Pickering standard has been satisfied, then a court must balance the employee's interest in free speech against the 'government's interest in the effective and efficient fulfillment of its responsibilities to the public . . . . [A]n employer should not be forced 'to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.'
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> * * *
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> Thus, a two-part balancing test has evolved from Pickering . . . . First, can the employee's speech be fairly characterized as relating to a matter of public concern? This is known as the employee's interest prong because it focuses in the interest of the employee, as a citizen, in commenting upon matters of public concern. Second, is there a governmental interest, as an employer, in the effective and efficient fulfillment of its responsibilities to the public through its employees? This is known as the public's interest or the governmental interest prong.
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> To summarize, when private expression is involved, the Pickering . . . balancing test looks not only to the content of the speech, but also the 'manner, time, and place in which it is delivered.'
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> [Karins, 152 N.J. at 549-551 (citations omitted)]

We find that after applying the Pickering balancing test to the facts herein, the balance rests on the side of the employee.

The Borough's departmental policy prohibits "[u]sing profane or insulting language to a superior officer or to a higher elected or appointing authority." The Borough asserts that Renda was disciplined for the "manner and demeanor that he used when speaking to the Mayor", deemed to be "disrespectful" by Police Chief Pieczyski. H.E. at 9-10. The Hearing Examiner concluded that the "[departmental] policy itself is over-broad in that it allows no latitude for situations such as here where the employee is acting in a union advocacy role and engaging in protected conduct." H.E. at 19-20.

It is undisputed that Renda was off-duty and speaking on matters of public concern in his role as PBA delegate at the meeting. While the Borough suggests parsing the exchange between Renda and the Mayor, we find that the totality of the circumstances must be considered. Renda's two inappropriate comments were made as part of an overall heated exchange with the Mayor and cannot be viewed in a vacuum. Additionally, the record supports that the Mayor's treatment and interruption of Renda also contributed to the exchange. Renda stayed within the three minute time limit allowed for his comments, and the exchange did not interfere with the overall conduct or flow of the meeting. Moreover, there is no support in the record that the exchange interfered with the administration of the police department.

The Borough relies upon Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), which is clearly distinguishable from this matter. Pietrunti was a teacher who was terminated after making a prepared speech at a staff orientation meeting to which she was invited to speak in her role as union president. The speech contained lengthy comments with specific insulting and abusive language directed at the superintendent. The court upheld Pietrunti's dismissal from her employment, finding that the content of her prepared speech was a premeditated and calculated attempt to bring scorn and abuse on the school administration in general, and the superintendent in particular - Pietrunti's supervisor. In contrast, the facts of this case involved a brief "in the moment" heated exchange between Renda and the Mayor to which both parties contributed.[11/] Renda's two inappropriate comments are minor in comparison to the verbal attack leveraged by Pietrunti against the superintendent and the administration.

Hall v. Mayor & Director of Public Safety, 176 N.J. Super. 229 (1980) is instructive in this case. In Hall, a police officer (Hall) gave a statement to a newspaper reporter criticizing his superior officer. After the critical comments

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11/ Notably, the Appellate Division also recognized that strongly worded criticisms leveled by a public employee can be protected. See Pietrunti, 128 N.J. Super. at 167-68 (citing Pickering v. Board of Education, 391 U.S. 563, (1968)).

were published, Hall was charged with conduct unbecoming an officer and publicly criticizing the official action of a superior officer, carrying a penalty of a five-day suspension. Originally, Hall's appeal was dismissed by the trial court. In reversing the dismissal and vacating the suspension, the Appellate Division noted that "the right of public employees to speak on matters of public concern must be balanced against the interest of the State, as an employer, to promote efficiency in the public services it performs through its employees."[12/] Hall, 176 N.J. Super. at 232 (citing Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)). Despite finding that Hall's statement "constituted public criticism of a superior officer...[and] served to create disharmony in the department and thereby impeded its function", the Appellate Division held that the township's regulation of speech swept "too broadly in prohibiting all speech which publicly criticizes the actions of a superior officer, even though the speech may relate to matters of public concern and does not adversely affect the functioning of the department."

12/ Some of the legitimate State interests that may limit a public employee's First Amendment right of speech include: "(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to limit conduct which impedes the public employee's proper and competent performance of his duties; and (4) the need to encourage close and personal relationships between employees and their superiors." Hall, 176 N.J. Super. at 232 (citing Winston v. South Plainfield Bd. of Ed., 64 N.J. 582, 588 (1974)).

Id. at 233. We note that the facts of this case are even less compelling since the Mayor was not Renda's direct superior officer.

Therefore, the Hearing Examiner's Report and Recommended Decision finding that the Borough violated section 5.4(a)(3) and, derivatively, (a)(1) of the Act is affirmed.

ORDER

The Borough of Carteret is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by bringing and/or sustaining disciplinary charges against Officer Salvatore Renda because of his comments at the October 21, 2010 public meeting of the governing body.

2. Discriminating in regard to the 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, particularly by bringing and/or sustaining disciplinary charges against Officer Salvatore Renda because of his comments at the October 21, 2010 public meeting of the governing body.

B. Take the following affirmative action:

1. Immediately rescind the disciplinary charges and any disciplinary penalty recommended or imposed against Officer Renda and remove any copies thereof from Renda's personnel file.

2. Post in all places where notices to employee are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Borough's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, the Borough notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioners Jones and Wall were not present.

ISSUED: October 29, 2015

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by bringing and/or sustaining disciplinary charges against Officer Salvatore Renda because of his comments at the October 21, 2010 public meeting of the governing body.

WE WILL cease and desist from discriminating in regard to the 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, particularly by bringing and/or sustaining disciplinary charges against Officer Salvatore Renda because of his comments at the October 21, 2010 public meeting of the governing body.

WE WILL rescind the disciplinary charges and any disciplinary penalty recommended or imposed against Officer Salvatore Renda and remove any copies thereof from Renda's personnel file.

Docket No. CO-2011-225 Borough of Carteret
(Public Employer)

Date: _____ By: _____

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, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372