P.E.R.C. NO. 82-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-80-32-59

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 788, AFL-CIO,

Charging Party.

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-80-363-60

LOCAL 788, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

Charging Party.

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-80-60-97

LOCAL 2578 & LOCAL 788, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, in the absence of Exceptions, adopts a recommendation of a Hearing Examiner and dismisses three Complaints issued on unfair practice charges the IAFF, Local 788, AFL-CIO had filed against the City of Camden. The charges had alleged the City violated the New Jersey Employer-Employee Relations Act when it: (1) refused to ratify a tentative agreement, (2) reassigned Battalion Chiefs' Aides to regular fire fighting duties, and (3) distributed a memorandum with false information. The Commission finds that none of these alleged unfair practices has been proved by a preponderance of the evidence.

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Charging Party.

Appearances:
For the Respondent, Murray, Granello & Kenney, Esqs.
(James P. Granello, of Counsel)
For the Charging Parties, Trimble & Master, Esqs.
(John W. Trimble, of Counsel)

DECISION AND ORDER

On August 14, 1979, Local 788 of the International Association of Firefighters ("Local 788") filed an unfair practice

charge against the City of Camden ("City") with the Public Employment Relations Commission. The charge alleged, in pertinent part, that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(2),(5) and (6),[1/] when its governing body disclaimed the authority of its chief negotiator and refused to pass an ordinance ratifying a tentative agreement.

On September 14, 1979, Local 788 and Local 2578 of the International Association of Firefighters ("Local 2578") filed another unfair practice charge against the City. This charge alleged that the City violated subsection 5.4(a)(5) of the Act, when on August 13, 1979, its Fire Chief, without prior negotiations, reassigned all Battalion Chiefs Aides to regular fire fighting duties, thereby potentially endangering the safety and welfare of the firefighters and their superior officers.

On June 9, 1980, Local 788 filed a third charge against the City. This charge alleged, in pertinent part, that the City violated subsections 5.4(a)(1),(2),(3) and (5),[2/] when on May 21,

1/ These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; and (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ Subsections (a)(1) and (3) 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 and (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."

1980, its Fire Chief distributed a memorandum containing false information in an effort to cause dissension in the ranks.[3/]

On December 4, 1980, the Director of Unfair Practices issued Complaints and Notices of Hearing together with an Order Consolidating Complaints on the first and third charges described above. On December 17, 1980, the City filed Answers denying the commission of unfair practices and raising several affirmative defenses.

On January 28, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the second charge described above. He also issued an Order Consolidating the three Complaints. On February 6, 1981, the City filed an Answer to the third Complaint in which it admitted the reassignment of the Battalion Chiefs Aides to regular firefighting duties without prior negotiations, denied the remaining allegations, and raised several affirmative defenses.

On March 19, 1981, Commission Hearing Examiner Edmund G. Gerber conducted a hearing and afforded all parties an opportunity to present evidence, examine and cross-examine witnesses, and argue orally. On May 13, 1981, Local 788 filed Proposed Findings of Fact and Conclusions of Law. On May 14, 1981, the City filed a post-hearing brief.

3/ The three unfair practice charges contained a number of other allegations of unfair practices which the parties subsequently settled.

On February 25, 1982, the Hearing Examiner issued his Recommended Report and Decision. H.E. No. 82-34, 8 NJPER ___ (¶_____ 1982) (copy attached). He recommended the dismissal of the Complaints.

The Hearing Examiner served a copy of his report on all parties and notified them that Exceptions, if any, were due on or before March 10, 1982. No exceptions were filed.

We have reviewed the record. We agree with the Hearing Examiner that none of the alleged unfair practices has been proven by a preponderance of the evidence. In the absence of any Exceptions, we adopt his recommendation and dismiss the Complaints.

ORDER

The Complaints are dismissed in their entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp and Suskin voted in favor of this decision. Commissioner Graves was opposed. Commissioner Newbaker was not present.

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

H. E. No. 82-34

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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SYNOPSIS

In an unfair practice proceeding before the Public Employment Relations Commission a Hearing Examiner found that the City of Camden did not commit unfair practices in its conduct with Local 788, IAFF. Specifically, it was held that in a matter where the City in a ratification vote did not vote on the tentative contract itself, but rather attempted to vote upon a modification of the tentative contract then tabled the vote on the modified contract and one month later voted down the tentative contract, did not violate § (a)(5). The evidence was clear that the tentative contract was subject to ratification by the City. It was also found that the City had a right to reassign Battalion Chief Aides to duties of regular firefighters since the reassignment was based upon efficiency of the department and not on matters of safety, and the Battalion Chief Aides were already members of the same unit to which they were assigned. Finally, it was not an unfair practice for the Fire Chief to send a letter to firefighters accusing the president of the local of misrepresentation. The Hearing Examiner recommended that the Commission

adopt the N.L.R.B. standards for the expressing of views and opinions, which holds that, except where there is an election, the parties are free to make statements as they wish provided that they do not contain threats of reprisal or force or promise of benefit. Under this test the Chief's statements do not constitute an unfair practice.

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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Appearances:

For the Respondent
Murray, Granello & Kenney, Esqs.
(James P. Granello, Esq.)

For the Charging Party
Trimble & Master, Esqs.
(John W. Trimble, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 14 and September 14, 1979, Local 788 of the International Association of Firefighters (Charging Party or Firefighters) filed a series of Unfair Practice Charges with the Public Employment

Relations Commission (Commission) against the City of Camden (Respondent) alleging the City violated N.J.S.A. 34:13A-5.1 et seq. (the Act). All charges save three were subsequently settled between the parties. The three outstanding charges alleged 1) after reaching a tentative agreement in negotiations the City of Camden's governing body refused to pass upon an ordinance ratifying said agreement; 2) the City unilaterally reassigned all Battalion Chief Aides to regular fire fighting duties without prior negotiations. It was further alleged this action could endanger the safety and welfare of the firefighters and their superior officers; and 3) the Fire Chief, Theodore L. Primas, distributed false information to members of the Charging Party in an effort to cause dissension in the ranks when on May 21, 1980, the Chief issued a memorandum to all personnel.

It was claimed that these actions were violative of § 5.4 (a)(1), (2), (3) and (5). 1/

It appearing that the allegations, if true, might constitute unfair practices within the meaning of the Act, three Complaints and Notices of Hearing, along with an Order Consolidating the Complaints were issued on January 28, 1981. Pursuant to the Notices of Hearing a hearing was held on March 19, 1981, in Trenton, New Jersey, at

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; (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."

which time all parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and submit briefs. 2/

The charges herein shall be treated individually.

The Failure Of The City To Ratify The Proposed Agreement.

In January 1979 the Firefighters, primarily through Frank McGuckin, commenced negotiations for a successor contract with the City Attorney, Martin McKernan. In June of 1979 a tentative contract was signed. Although the Firefighters in its brief, maintain McKernan had full authority to bind the City administration, the record is clear that McGuckin knew that any agreement was only tentative and was subject to ratification by the City Council.

McGuckin testified, "I basically knew they could reject or accept the package." 3/

Before the City Council voted on the contract, the contract was reviewed by the City Fire Chief,Theodore Primas. He was asked if there was anything he couldn't live with. There was a provision in the contract which concerned the number of men required on a vehicle for it to remain in service. Primas wanted this language modified so that the minimum number of men required on a vehicle could be varied in accordance with the type of fire being fought, i.e. different requirements for building fires as opposed to car and brush fires.

At an open public meeting the City Council reviewed the tentative contract but did not vote to adopt it as it was submitted

2/ Briefs were received by May 14, 1981.

3/ Transcript, p. 73, l. 14.

but rather tabled the proposed city ordinance.

A second proposed city ordinance was read at the City Council meeting which would adopt the tentative contract with two modifications: one was to the manning provision in accordance with Primas' recommendations and the other was a modification of the contract's severance pay provision. This latter modification originated with the City Council itself.

McGuckin was in the audience at the council meeting. When he heard this proposal he publicly objected and stated that the City did not have the authority to modify the contract; it had to either adopt or reject the tentative proposal and could not modify it in this manner.

The City Attorney, McKernan, then explained that if the City were to adopt the resolution it would not create a binding contract between the parties. Rather, the parties would have to return to the bargaining table to work out the conflicting language. In any event this proposal was also tabled. The dispute as to whether or not the City Council could adopt an ordinance ratifying the modified contract or whether it had to first vote upon the old contract lasted for two months. Finally, sometime in August, the City Council voted upon the original tentative contract and voted it down.

The Firefighters claim that the City Council's failure to vote upon the original tentative contract constituted an unfair practice and in the alternative that the City was obligated to sign the agreement. 4/

4/ In late September a contract was signed and ratified by both parties.

Taking the latter claim first the Commission has long held that where a negotiator has apparent authority to bind his principal if the agreement reached contained no conditions precedent, that agreement is binding on the principal regardless of the principal's understanding. Bergenfield Bd/Ed, P.E.R.C. No. 90, 1 NJPER 44 (1975); East Brunswick Bd/Ed, P.E.R.C. No. 77-6, 2 NJPER 279 (1976); Mt. Olive Twp. Bd/Ed, P.E.R.C. No. 78-25, 3 NJPER 284 (1977); Long Branch Bd/Ed, P.E.R.C. 78-6, 3 NJPER 314 (1977).

However as noted above, McGuckin testified that he knew any agreement entered into in negotiations was subject to ratification by City Council and accordingly the City had no obligation to sign the agreement. As to the obligation of the City to sign or reject the agreement,if the City Council would have passed the ordinance enacting the second modified agreement, this would have inferentially constituted a rejection of the contract which it had a right to do. It was only at McGuckin's insistence that they did not vote on the modified agreement. Further, as an accommodation to McGuckin, it did ultimately vote on the original tentative contract. The City Council did not do anything that is violative of the Act.

Reassignment Of Battalion Chief Aides

On August 10, Fire Chief Primas proposed to his superior, City Administrator Kelly, via a memo, that in order to cut down on rising costs of overtime in the Fire Department the position of Battalion Chief Aides be temporarily eliminated and those persons holding those positions should be reassigned to active duty fighting fires.

On August 13 Primas sent out a notice to firefighters that Battalion Chief Aides would be assigned to regular fire fighting duty.

The Battalion Chief Aides are unit members and are represented by Local 788. Their function was to assist the battalion chiefs. They were paid at the standard contract rate for firefighters but they would drive the chiefs to a fire and, according to the testimony of Battalion Chief Penn, when they arrived at the scene of a fire the aide would station himself to the rear of the building on fire and remain in communication with the chief,who stayed at the front of the building. The aide would then advise the battalion chief as to any problems in the back of the building, i.e. people in danger or a fire erupting in back of the building. Further, if there were another alarm sent, the aide would coordinate the activities of the incoming fire captain with the battalion chief. Battalion Chief Penn who was called as a witness by the Firefighters was asked if the existence of the aide served as a safety function. Penn acknowledged that it did serve as a safety function but testified that the main purpose of having an aide at the scene of a fire was for efficiency.

It is noted that the contract, Article IV--The Management Rights, provides the employer the right "to hire all employees and, subject to the provisions of law, to determine...conditions for... assignment and to promote and transfer employees." It is therefore clear that the City has the right under the contract to make assignments. Moreover there is no question that the Battalion Chief Aides were performing a supervisory function and the assignment of super-

visory responsibilities is a fundamental management prerogative and is not a term and condition of employment within the meaning of 5.4(a)(5). See Ridgefield Park Bd/Ed, 68 N.J. 144 (1978; In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976).

The Charging Party argues that "firefighters were given broader rights under N.J.S.A. 34:13A-14 et seq."

The fact that assignments may be permissibly negotiable is not controlling. The phrase "term and condition of employment" is a legal term which has been defined by the Supreme Court. 5/ A violation of a contract provision governing a permissive subject may be enforceable in arbitration but such a right is not enforcible in this unfair practices proceeding. 6/ Township of Jackson & Jackson Township PBA Local 165, P.E.R.C. No. 82-79, 8 NJPER (1982).

The Firefighters' own witness Battalion Chief Penn, testified the Aide's primary duty was for efficiency and not that of promoting safety for the firefighters.

Accordingly, the City did not commit an unfair practice when it reassigned the Battalion Chief Aides.

Notification of the transfer of the Battalion Chief Aides was distributed on August 13, four days after the City Council voted down the original tentative contract. It was claimed by the Firefighters that the transfer was motivated by the difficulties in ratifying the contract.

This close timing is evidence of anti-union animus but,

5/ See Ridgefield Park, supra.

6/ A permissibly negotiable clause may otherwise be enforcible in an appropriate forum.

absent more, does not prove it. No other testimony was introduced by the Charging Party to support this allegation.

Primas however testified that he was asked by city administrators in early August to come up with a plan to cut down on overtime. He testified that his alternatives were either to lay off employees or abolish other positions. He concluded that the least disruptive manner in which to resolve the fiscal crisis created by the excessive overtime for the year was reassignment of battalion aides. In light of the lack of any other testimony as to the motivations of the transfer other than its time, which seems on the basis of Primas' testimony coincidental, this aspect of the charge is also without merit.

Primas' Letter To Firemen.

During the ongoing negotiations in the spring of 1980 both Chief Primas and McGuckin were quoted in the local papers concerning a minority recruitment program.

On May 21, 1980, Primas distributed a memorandum to all personnel entitled "Misinformation and Misrepresentation Spread by Frank McGuckin, President, Local 788." The memorandum concluded with the following statement: "This episode is similar in nature to the misrepresentation he (McGuckin) made in the contract negotiation dispute which cost every firefighter $524.48 (3%) in 1980 and $563.26 in 1981 as previously indicated."

It is claimed by the Firefighters these statements were false and since they were "on official stationery of the fire department the[y] gave the reader the impression that management was

alleging things which were obviously anti-union and had the effect of interfering with the administration of the union."

In City of Jersey City and Jersey City POBA and Jersey City Fire Fighters Local 1066, IAFF, AFL-CIO, H. E. No. 79-2, 4 NJPER 276 (¶ 914141 1978), a Commission Hearing Examiner analyzed the question of the unfair practice implication of communications by employers to its employees during the period of negotiations (as opposed to election campaigns). He recommended the adoption of the NLRB standard in accordance with Lullo v. International Assn of Fire Fighters, 55 N.J. 409 (1970). The NLRB standard is in keeping with State and Federal constitutional free speech requirements. Section 8(c) of the National Labor Relations Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Subsequent to Jersey City, supra, the New Jersey Supreme Court in Galloway Twp. Bd/Ed v. Galloway Twp. Assn. of Ed'l Secys, 78 N.J. 1 (1978) reasoned that the Public Employment Relations Act was based on the N.L.R.A. and, accordingly, "the absence of specific phraseology in a statute may... be attributable to a legislative determination that more general language is sufficient to include a particular matter within the purview of the statute without further elaboration," at p. 15.

It would therefore be appropriate for the Commission to adopt the standard of 8(c).

Here there was no claim that, or evidence introduced to demonstrate that, Primas' memorandum contains a threat of reprisal or force or a promise of benefit. See N.L.R.B. v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953), 32 LRRM 2136; Proctor & Gamble Mfg. Co., 160 NLRB 334, 62 LRRM 1617 (1966); Safeway Trails Inc., 216 NLRB No. 171, 89 LRRM 1017 (1975); T.M. Cobb Co., 224 NLRB No. 104, 93 LRRM 1047 (1976) and PPG Industries Inc., 172 LRRM No. 61, 69 LRRM 1271 (1968).

Accordingly, regardless of the accuracy of the memorandum, the Charging Party did not demonstrate the City committed an unfair practice when Primas distributed the memorandum.

Accordingly for the reasons stated above, I hereby recommend that the consolidated complaints in this matter be dismissed in their entirety.

Edmund G. Gerber
Hearing Examiner

Dated: February 25, 1982
Trenton, New Jersey