H. E. No. 79-30

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

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and-

Docket No. CO-77-115-103

AVALON BEACH PATROL and
LEON J. GAROFALO, JR., and
G. MURRAY WOLF,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Commission that they find that the Borough of Avalon committed an unfair practice when it failed to renew the Captain and a Lieutenant of the Lifeguards for the 1977 and 1978 summer seasons. It was found that the Captain and the Lieutenant were active in an employee association and it was because of their activity in the association on behalf of the lifeguards that they were not renewed. The Captain and the Lieutenant have since been rehired to their respective positions by the Borough and, therefore, it was recommended that the remedy be limited to any monies actually lost by the Borough's failure to rehire them to their summer positions for the 1977 and 1978 summer seasons.

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 facts and/or conclusions of law.

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Appearances:

For the Respondent, Gerald L. Dorf, P. A.
(David A. Wallace, of Counsel)

For the Charging Party, Perskie & Callinan, Esqs.
(John F. Callinan, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On October 26, 1976, the Borough of Avalon notified the Captain of the Lifeguards, G. Murray Wolf, and a Lieutenant of the Lifeguards, Leon Garofalo, that they would not be renewed for the following summer season in 1977. On November 9, 1976, Leon Garofalo, G. Murray Wolf, and the association of guards known as the Avalon Beach Patrol brought this action alleging that the Borough of Avalon (the Borough) failed to rehire Wolf and Garofalo because of their activity in collective negotiations on behalf of the Avalon Beach Patrol.

It was specifically alleged that the Borough violated §5.4(a)(1), (2), (3), (4) and (5) of the Public Employer-Employee Relations Act (the Act). 1/

1/ These sections provide that employers, their representatives or agents are prohibited from: (1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (2) dominating or interfering with the formation, existence or administration of any employee organization; (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (4) discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued, and a hearing was conducted before the undersigned on June 13, June 27, July 25, September 9 and November 16, 1977. All parties were given the opportunity to introduce evidence, examine and cross-examine witnesses and file briefs, which were submitted by April 5, 1978.

Background

The Borough of Avalon is a seaside community that hires approximately 75 lifeguards to patrol its numerous beaches during the summer. The Borough has a commission form of government. Each of the three commissioners is assigned to administer specific functions. Commissioner Bruce, as head of Public Safety, was in charge of the lifeguards from 1971 until October 1973 at which time Commissioner Riggal assumed those duties, and he continued to do so at the time of the hearing.

In the summer of 1976 Murray Wolf was employed as Captain of the lifeguards, a position he held for at least five years. He has served as a lifeguard for the Borough for 20 years. Leon Garofalo was employed as a guard by the Borough for 13 years and during the summer of 1976 he served as Senior Lieutenant.

Prior to 1976, there was no labor relations contract between the Borough and a representative for the lifeguards nor did the Borough ever formally recognize such a representative. When Commissioner Bruce administered the lifeguards, he would confer with Wolf as to budget needs of the guards and included in those discussions would be disputes as to salaries for the guards. Bruce testified that these disputes would become rather hard fought and he considered them negotiations. 2/

When Riggal took over from Bruce these meetings stopped. But in Riggal's first summer, 1974, there were talks concerning salaries between Garofalo and another lieutenant, as representatives of the guards, and two Borough representatives, Mayor Armacost and Commissioner Bruce. 3/ As a result of the meetings, an agreement was signed granting each lifeguard ten days retroactive pay. In 1975 Captain Wolf and two other guards, Sam Downs and Lieutenant Michael McCaffery, met with Mayor Armacost, Commissioner Riggal, Commissioner Bruce and the Borough's solicitor Vincent

2/ Vol. I, p. 69.

3/ Vol. IV, p. 100.

Lamana, to discuss salaries. As a result of these meetings, the guards received a raise.

Events of Summer of 1976

Every spring a competitive test would be conducted for new applicants for lifeguard positions. The returning guards did not have to take this test. Instead they would participate in a two-week conditioning program which culminated in a separate test.

In the spring of 1976 Riggal had told Wolf that he felt the returning guards should be tested with the new applicants. In accordance with Riggal's directive all tests were set for June 12. On the morning of the tests, Riggal arrived at the Beach Patrol Headquarters and was immediately approached by three guards, Garofalo, McCaffery and Downs. Garofalo told Riggal that he was elected by the guards to present a list of grievances to Riggal [4/] and went on to say that the guards would not participate in the test until they met with Riggal. Riggal told Garofalo that he would not take any demands and, before he discussed anything, he wanted to talk to the Captain. The guards then walked out of the Headquarters and Riggal was left by himself.

When Wolf arrived he was apprised of what was happening by the guards and he went inside to talk to Riggal. Riggal handed Wolf the written demands and asked him to talk to the guards to convince them to get back to work. Accordingly, Wolf talked to the guards. The guards agreed to go to work if Riggal would agree to drop the new testing procedure and return to the old routine. Riggal agreed and the guards went to work.

July 2nd was the first payday of the season and McCaffery went to the Commissioner's office that morning to pick up the checks. Riggal was not in his office but the paychecks were left on his desk. A secretary told McCaffery that

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[4/] The grievance list contained three items: 1) That Wolf remain as Captain of the Avalon Beach Patrol for the 1976 season. The grievance stated that since August of 1973, Commissioner Riggal threatened Wolf's position several times although the Borough has never suggested that Mr. Wolf was incompetent. It was alleged that there was a personality conflict between Wolf and Riggal. 2) All matters of employment should be handled by the Captain. The guards objected to Riggal creating a fourth lieutenant position for a member of the patrol. They felt that Riggal was making a political decision. They also wanted to be guaranteed employment on the basis of their past record or evaluated by the Captain and his Lieutenant and they did not want to participate in the guard test administered by Riggal. 3) Third demand centered around sufficient equipment and supplies on the beach.

she couldn't release the checks without Riggal's permission because Riggal wanted to review them before they were distributed. The secretary was then called away and McCaffery picked up the checks and brought them back to the beach house to distribute them to the men. McCaffery maintained that since the guards worked for the first three weeks without receiving a paycheck, it was customary for the administrative lieutenant to pick up the paychecks at 9 o'clock and distribute them at roll call so the guards could get to the bank and be on the job by 10 a.m. Since the checks had to be at the beach house by 9:30, McCaffery testified he felt justified in his action.

Later that same morning at 11:30 a.m. McCaffery returned to the municipal building with Garofalo. They walked into Riggal's office. Garofalo told Riggal that he wanted to speak to him. Riggal responded that he only does business with the Captain.

Riggal claims then Garofalo said, "Goddamn it, you're going to listen to us. You are going to hear all about your stupid, fucking, goddamn orders. We're not going to listen to them." 5/ Riggal responded that he wouldn't listen to you or anyone until I talk to the Captain." Riggal asked if they had the Captain's permission to be there. They said they didn't need it, they represented the man. The lieutenants questioned Riggal about O'Donnell, a guard, [redacted] than a [redacted] Riggal responded that this was an issue between him and the Captain. They responded that they would let the newspapers know about Riggal's political favors.

Fire Marshall Clayton's office is next door to Riggal's and the two offices share a common doorway. In the midst of this argument Riggal walked to the doorway and asked that Clayton come in and remove McCaffery and Garofalo. Clayton asked them to leave. They did not and the police were called. When the police arrived the guards were already gone.

[redacted] state, "You better fucking well have the facts straight because the taxpayers want to know what's going on here." 6/ However, Clayton wrote a report to Riggal on the same day concerning this incident. No mention was made of the use of offensive language. This report did

5/ Vol. III, p. 170.

6/ Vol. II, p. 96.

state that Garofalo and McCaffery told Riggal that they were picked by the guards to represent them and a police report which was filed by the police concerning this incident states they were arguing over working conditions.

Dorothy Sharp, Riggal's secretary, was in Riggal's office during the entire incident and, although she said she tried not to listen, her desk is in Riggal's office. She testified that she did hear obscene language but she never heard anyone use a four-letter curse word that started with the letter F. 7/

Both McCaffery and Garofalo denied using the specific language attributed to them by Clayton and Riggal but they admitted they used profanity. It is noted that while under oath in another proceeding Riggal testified about this incident but did not mention that the guard used the specific language in question.

In light of Sharp's testimony as an unbiased witness and the inconsistencies in the testimony of Riggal and Clayton as to when the disputed language was used, the undersigned finds that although obscenities were used by McCaffery and Garofalo, the Borough here failed to prove by a preponderance of the evidence exactly what obscenities were used in Riggal's office.

Later that day, Riggal called Wolf into his office. Wolf arrived with McCaffery and Garofalo. The Borough solicitor Vincent Lamana was also present. Lamana wouldn't talk in front of Garofalo or McCaffery so the two lieutenants left the room.

At the meeting the guards' complaint about the lack of equipment was discussed. Riggal was concerned about the lieutenant forcing their presence on the group and the Borough wanted Murray to act in behalf of the guards as their representative and talk with Riggal since he was the Captain rather than have the lieutenants engage in a shouting match with Riggal. 8/

Lamana claims that no formal request for recognition was made but after the meeting there was an indication that the guards would strike. On July 13, 1976, the guards met and every guard but one signed a petition authorizing six guards, including McCaffery and Garofalo, to act as their representatives. Wolf signed this petition.

7/ While Sharp did not testify about this language directly, she testified that a transcript of a conversation in which she made this statement was accurate.

8/ Vol. III, p. 75.

There was another meeting between the parties on July 12 and immediately afterwards the Avalon Beach Patrol submitted a petition to this Commission seeking designation as the majority representatives for lifeguards, lieutenants and captains. At this time the guards let it be known that they intended to strike. The Borough got a restraining order, however; the guards honored the court order and no strike ever took place. At the behest of the judge who issued the order the Borough adopted a resolution acknowledging "the Avalon Beach Patrol has sought to bargain collectively and seek job security and remedies to other alleged grievances." The resolution stated that

1) The Captain of the lifeguards shall have the right to hire and fire personnel subject to review by the Commissioner of the Department of Public Safety.

2) The review by the Commissioner will be appealable to the Board of Commissioners.

3) Failure to rehire or dismissal shall be supported by reasons in writing.

After this incident there was no further labor unrest until October 21, 1976, when Wolf and Garofalo received word that they would not be rehired the following year. Each received a letter which read:

> "Please be advised that we have reviewed your position and the performance of your duties during the 1976 season and we have determined that we do not wish to rehire you for the 1977 season."

Apparently, since McCaffery was a college senior, it was known that summer that he would not be returning the following year.

Borough Position as to Refusal to Rehire Wolf and Garofalo

Riggal's proffered reasons for firing Wolf and Garofalo was their "lack of cooperation and refusal to carry out orders." This action was based solely on factors unrelated to union activities. 2/

The competency of Wolf and Garofalo in supervising the beaches was never in issue. However, there was a good deal of testimony as to Wolf's poor record in regards to administrative procedures and supposed lack of cooperation with the Borough's Commissioners.

Robert Bruce testified that Wolf "ran the beaches right -- except for

2/ Respondent's brief, p. 63, line 18.

detail where I entered into it." [10] Under Bruce, Wolf had complete control of discipline, hiring and firing and the appointment and supervision of the lifeguards.

Bruce testified that he and Wolf had disagreements concerning purchase orders, for the guards would buy materials without purchase orders.

Time sheets were kept by Wolf. These sheets were due on Monday morning for payroll purposes. [11] Bruce testified that there were continuing problems with these sheets and invariably they would be late. Also the guards had several Jeeps which were operated on the beaches. There were complaints that they were driven in the water and driven at excessive speeds. Bruce had asked that they not be driven in the water since ocean water is highly corrosive and that the Jeeps be thoroughly washed down everyday, underneath as well as on top, but these things were not done.

In general, Bruce felt that there was a lack of necessary cooperation and after the '73 season Bruce felt that Wolf should be replaced; but since his duties as Commissioner were being changed he left that to the incoming Commissioner, Riggal. Riggal testified it was an uphill fight to get Wolf to do anything. He was hard to get ahold of in the off season. Riggal had difficulty with purchase orders for equipment and at the end of the '74 and '75 seasons, Riggal was considering not rehiring Wolf. He testified that he held off because somewhere along the way he would realize that, if he continued, he would lose his job.

Riggal also testified as to other areas of disagreement between him, Wolf and Garofalo during the 1976 summer.

The Borough received fresh oars for the guards' life boats for the upcoming season which were stored in the police building. Riggal went to the beach house with Garofalo and looked over the oars left over from the year before. Riggal maintained that Garafalo found enough oars to use until the full beach opened later in the summer, but a short time later McCaffery and Garofalo took the new oars from police headquarters without permission.

Riggal wanted to have O'Donnell [12] made Lieutenant and supervisor. Wolf disagreed claiming O'Donnell lacked seniority and competence and Riggal agreed to hold this matter in abeyance. This same issue appeared on the list of grievances handed to Riggal on June 12 (see footnote 4).

10/ Vol. II, p. 42.

11/ Vol. II, p. 128.

12/ Riggal claimed that O'Donnell was threatened not to take the job. But this was purely hearsay evidence concerning the alleged threat and the undersigned finds such evidence too self-serving to give it much weight.

There was a disagreement about the number of lifeguards needed on the beach. Wolf wanted to hire two additional guards. Riggal refused and they were never hired. 13/

Bruce Miller testified on behalf of the Charging Party. He stated that he was formerly a lifeguard lieutenant and was in charge of the budget under Wolf. At that time he was principal of an elementary school where he had to supervise a million dollar budget and he dealt with purchase orders all year long. He emphatically testified that he never ordered anything without a purchase order. He did testify that the format for the preparation of purchase orders was unstable. It changed from year to year. Miller testified neither Bruce nor Riggal ever complained to him about these orders and they both were aware that he completed them.

Michael McCaffery testified that he had Miller's position in the summer of 1976. He testified that he spoke directly to Riggal about the procedure for purchase orders and was often in contact with Mrs. Sharp during his two years in the position and was never criticized for his handling of purchase orders.

Thomas McCaffery, who was a lifeguard in prior summers and Michael's brother, testified in the summer of 1976 he had planned to row from Miami to New York City and in March of '76 Riggal let him select 24 oars out of the remaining ones from the prior year and after he picked his oars, 10 usable oars and 10 to 20 marginal ones were left.

Michael McCaffery and Garofalo both testified that there were not enough usable oars left from the year before and if he and Garofalo did not take them, the guards could not use the life boats on the beaches.

Analysis

On the basis of the evidence before me the undersigned is satisfied that at a minimum, one of the factors in the non-renewal of both Garofalo and Wolf was their representation of the other guards during the summer of 1976.

It is possible that both Bruce and Riggal were unhappy with the way in which Wolf performed his administrative functions. Yet the testimony of Miller is highly creditable. At best, it is surprising that if both men considered firing

13/ Evidence was also proffered to indicate that some of the life boats were modified for racing, but since the modifications were not discovered until after the discharge, the undersigned has not considered them.

Wolf for poor performance over a four-year period, warnings as to his poor work were never put in writing. 14/

The undersigned cannot believe that the Borough seriously considered discharging Wolf for his poor administrative skills for four years before they took action. The complaints against Wolf in 1976 were of the same nature that Bruce had in 1973. He was only discharged when there was an increase in labor unrest in the summer of 1976. The NLRB has long held that when an employer fails to discipline a long-standing course of conduct, but suddenly disciplines an employee for engaging in such conduct when said employee engages in union activity, it may be presumed that the discharge was effectuated to discourage union activity. NLRB v. Kohen-Lison Folz, 128 F.2d 502 (5th Cir. 1942), 10 LRRM 675.

Garofalo was involved in only one incident that was not related to his activity in representing the guards. 15/ That was when he and McCaffery took the oars from the police station without Riggal's permission and it strains credibility to think that he was discharged for this one incident.

Wolf was the focal point of the labor unrest. The demands of the beach patrol (see footnote 4) as well as the resolution which was adopted after the strike threat center around Wolf's powers and duties. His status became the dominant issue in the relationship and Garofalo and McCaffery were the spokesmen of the guards.

The undersigned is satisfied that the activity of Wolf and Garofalo on behalf of the Avalon Beach Patrol was one of the factors in their non-renewal (see 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), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), pet. certif. granted ___ N.J. ___ 1978.)

The Borough argued by way of a separate motion that since the lifeguards are employed only in the summertime they are casual employees and, as such, their activities are not protected by the Act.

It is undisputed that the Commission has recognized that certain employ-

14/ On direct testimony Riggal testified that he took notes everyday on summary of conversations. But then under cross-examination (Vol. II, p. 161) Riggal claimed he took notes in longhand while conversations were taking place and he quoted people precisely. Upon examination of these notes it is clear that they are chronologically out of sequence. Further, all of the transcriptions which were dated were done in late August and September. They were clearly prepared in contemplation of the discharge of Wolf and not in an orderly contemporaneous manner. They are without probative value.

15/ Except for the supposed threats to Donnelly discussed in footnote 12, which the undersigned cannot credit due to the hearsay nature of this testimony.

ment relationships are so irregular and brief that they lack the type of ongoing employment relationships which are envisioned by the Act. Contrary to the arguments of the Borough, however, there is far more than a casual employment relationship involved here.

Riggal testified that the average length of time of service for the guards is three summers. Wolf testified that the turnover from summer to summer would vary, but for some years the turnover would be as few as three or four guards. Of the 13 guards who testified at the hearing, they had an average of nine years experience as lifeguards as of the date of the hearing, with a minimum of four years experience.

The NLRB has established principles for dealing with seasonal employees to determine if they are casual employees who are not entitled to the protections of the National Labor Relations Act or regular seasonal employees who are entitled to said protections.

Regularity of employment is demonstrated when the employees are drawn from the same labor force each season (Kelly Brothers Nurseries Inc., 140 NLRB 82, 51 LRRM 1572 (1962)), where former employees are given preference in rehiring (Aspen Skiing Corp., 143 NLRB 707, 53 LRRM 1397 (1963)), and where there is a relatively stabilized demand for, and dependence on, such employees by the employer and, likewise, a reliance on such employment by a substantial number of employees who return each year (California Vegetable Concentrates, Inc., 137 NLRB 1779, 50 LRRM 1510 (1962)). Conversely, where these three conditions are absent regularity will not be found. The purpose of requiring regularity of employment is to ensure the continuity and effectiveness of the organization and its negotiations.

The NLRB has not established any numerical standards for making such a determination but a look at some of these cases is helpful. Seasonal employees were held to be regular in Kelly Bros., supra, where 29 out of 75 employees returned for work the following season. In Aspen Skiing, supra, out of 50 employees, 14 were newly hired and 20 (or 40%) had worked at least five consecutive winters. In California Vegetable, supra, out of 275 seasonal employees, over 50% had worked in prior summers.

Certainly, the evidence adduced at the hearing indicates that there is a sufficiently regular and stabilized work force for the Commission to assert jurisdiction under NLRB standards.

It must be borne in mind that most of the cases creating these tests arose in the representation, rather than an unfair practice charge, context and some of

the cases involve businesses which operate with a permanent work force and add seasonal employees only during peak periods. Also, students and teachers were excluded from units where they otherwise exhibited sufficient regularity, but this was done on the basis of community of interest, for in those cases the bulk of the unit members depended upon their positions as their regular employment, not as an interim source of earnings. The teachers and students were not excluded on jurisdictional grounds. In the instant case almost all guards are students and teachers so there is a strong community of interest among them. The Commission has taken a very broad policy as to including part-time employees within the protection of the Act.

In, In the Matter of Rutgers University, D.R. No. 77-5, 3 NJPER 12 (1976), the Director of Representation had to determine which member of the co-adjutant faculty (employees who teach part time) are regular and which are casual employees. It was determined that all co-adjutant faculty members who commenced employment for at least the second semester during a given academic year who expressed a willingness to be rehired to teach at least one semester during the next succeeding school year were considered regular employees.

See also, In re Bridgewater Raritan, D. R. No. 79-12, 4 NJPER ___ (¶ 1978), where the Director of Representation found that all substitutes in the district who worked for at least thirty days during the school year and who express a willingness to accept employment as substitutes for the following school year were considered regular employees.

It is not necessary here to create a test for regularity and continuity of employment for all lifeguards employed by the Borough, but with 20 and 13 consecutive years on the job for Wolf and Garofalo respectively, there can be no question that Wolf and Garofalo have more than a casual employment relationship and fall within the jurisdiction of the Act as regular part-time employees. 16/

The Borough argued that Wolf and Garofalo are managerial executives and accordingly are not entitled to the protection of the Act. It is maintained that Board of Education of Orange v. Wilton, 57 N.J. 404 (Jan. 26, 1971), is a standard for determining those persons who are managerial executives in contexts other than school districts. The undersigned is not impressed with this argument. Wilton, supra, created a test as to the appropriateness of including different level supervisors into one common supervisory unit. Under the statute as it was then worded, Wilton was unquestionably not a managerial executive. The court did use the term managerial, but only to define the duties of different level supervisors, not man-

16/ The Borough argues that it would impose an undue hardship on them if they would have to bargain with summer employees and still comply with the Commission guidelines for negotiations prior to the budget submission dates. But the Borough itself functions all year long; the only hardship would fall on the guards for they would be the ones who arguably might have to engage in negotiations in the off season.

agerial executive. 17/

In the Matter of City of Elizabeth, P.E.R.C. No. 36 (on remand from the Appellate Division, 114 N.J. Super. 33 [App. Div. 1971]), the Commission determined that although the police chief and deputy chief assist in the policy-making process of the department and although the deputy chief is involved in the initial preparations of the budget, the responsibility of passing upon their recommendations and the final determination of policy reside with the director of police. The Commission concluded that the chief and deputy chief do not exercise the role of managerial executives although they were excluded from the existing units on grounds of conflict of interest.

In the Matter of Borough of Avon and William Smith and Michael Fowler, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), the Captain of the Lifeguards Fowler was delegated responsibility to interview for hire, subject to the mayor's decision, and propose budget recommendations, subject to review by the mayor. In general, Capt. Fowler's supervisory duties in Avon were at least as great as Capt. Wolf's duties in Avalon. The Commission upheld the analysis of its Hearing Examiner who determined that Fowler was not a managerial executive within the meaning of the Act. In his Report and Recommended Decision, H.E. No. 77-21 (June 24, 1977), it was found that Fowler in Avon, (as in City of Elizabeth, supra), "the subordinate provides aid and assistance by recommending policy, budget figures and operational guidelines but in the final analysis only the superior has the final responsibility to formulate, determine and direct the effectuation of policy." (Witness Riggal's refusal to hire the two guards recommended by Wolf at the end of the season.)

Counsel for the Borough argues that the Hearing Examiner in Avon, supra, erred when he relied on the National Labor Relations Board standard for determining that Fowler was not a managerial employee, for the NLRB definition is substantially different from N.J.S.A. 34:13A-3(f). §3(f) defines managerial executives as "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices. Counsel for the Borough argues that the NLRB definition requires [illegible] to be a manager one must both formulate and effectuate management policy. 18/

17/ The court in Wilton, supra, when considering whether supervisors should be combined in the same unit speaks of "such an intimate relationship with the management and policy-making function as to indicate actual or potential substantial conflict of interest. No such relationship existed between Wolf and Riggal. As Riggal testified to, whenever Riggal wanted a new procedure instituted or other action, Wolf's response would simply be "Aye, aye, sir."

that to be a manager one must both formulate and effectuate management policy. 18/

The undersigned is not persuaded by this argument. The Commission in reaching their decision in Avon expressly acknowledged the differences in wording between the NLRB standard and §3(f). As they stated, "Fowler was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives -- excluded from coverage -- from supervisor eligible to be represented in appropriate units." The Commission held that the term management executive should be narrowly construed, and that "the relevant NLRB precedents as cited by the Hearing Examiner indicates that a wider range of discretion than that possessed by Fowler is needed."

It is significant that when McCaffery and Garofalo appeared at Riggal's office on July 2nd to present their demands, Riggal's response was that he would only speak to Wolf about their grievances and they should get Wolf to speak on their behalf. Riggal clearly demonstrated his own state of mind. He felt that Wolf's community of interest was with the guards and not with management. If Riggal perceived Wolf to be a managerial executive he more likely would have told the guards to discuss their grievances with Wolf as the representative of the Borough.

The Borough argued that as supervisors the efforts of Wolf and Garofalo in representing the lifeguards were not protected by the Act since there is a potential conflict of interest between them and the lifeguards.

It is argued that although in certain circumstances a supervisor may be included in a unit of non-supervisory personnel, it is improper and unprotected because such activity creates a conflict of interest inconsistent with their obli-

18/ The NLRB defines managerial executives as those employees who formulate and effectuate management policies by expressing and making operative the decision of their employer and those who have discretion in the performance of their jobs independent of their employer's established policy and has denied managerial status to employees whose discretion and latitude for independent action is exercised within the limits of established policy. Eastern Camera and Plate Corp., 140 NLRB 569, 52 LRRM 1068 (1963); Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975), on remand from U. S. Supreme Court; Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); Albert Lea Cooperative Creamery, 119 NLRB 817 (1957).

[illegible] unit of non-supervisors [illegible] is improper and [illegible] such activity creates a conflict of interest inconsistent with their obligation to their employer. This argument mixes two independent concepts: the appropriateness of a unit and the right to enjoy the protection of the Act to engage in protected activity. Even if the unit in question was inappropriate, the protections of the Act are not lost. It is true that Wolf and Garofalo are supervisors and, from the standpoint of representation, it might be more appropriate for them to be in a unit separate from the guards. But the Act in §5.3 permits the mixing of supervisors and non-supervisors in the same unit where established practice, prior agreement or special circumstances dictate. Section 5.3 provides that "the Commission shall not intervene in matters of recognition and unit determination except in the event of a dispute." Accordingly, unless and until an employer brings this issue before the Commission in a representation proceeding there is a presumption that all units, whatever their composition, are valid under law and all members of that unit are entitled to the Act's protection.

The Borough made the argument that since Wolf and the Lieutenant were special police officers their organizational efforts on behalf of the lifeguards were not protected activities. Once again the Borough confused the representation issue with that of basic right under the Act. In any event, since the testimony of Riggal clearly indicated that Wolf and Garofalo were not special police officers in the summer of 1976 when the incident arose, this entire argument is academic and will not be considered.

The Borough argued that when Garofalo used abusive language he lost the protections of the Act. In City of Hackensack and IAFF Local 2081, AFL-CIO, P.E.R.C. 78-30, 3 NJPER (1977), the Commission adopted the Hearing Examiner's conclusion of law when he found that where an employee is processing a grievance the Act grants protection from disciplinary action where offensive language is used. "An employee may not act with impunity even though he is engaged in protected activity. An employee's rights under §5.3 must be balanced by an employer's right to maintain order. Offensive conduct which is gratuitous or patently opprobrious may remove the protections of §5.3." Garofalo had the backing of the guards who considered him their representative and he was presenting a series of grievances to Riggal. Given the loose nature of the labor relation between the parties, the undersigned is satisfied that Garofalo was engaging in protected activity. The offensive language was not used in a gratuitous manner. The conversation was heated and Riggal refused to even talk to McCaffery and Garofalo, and there is no evidence at all that any offensive language was used in a personal attack on Riggal. As noted

above, the exact words used by Garofalo were never proved. In any event the conduct of the guards as proven was not so opprobrious to warrant stripping the protections of the Act from Garofalo and to take disciplinary action against Garofalo for the use of such language would be violative of §5.4(a)(1) of the Act.

The Borough also argues that the demands of the guards were illegal subjects of bargaining and the Act does not provide any protection for making illegal demands. Again the Borough is confusing issues. It is evident from the nature of the grievance demands of June and the July resolution of the Borough that there was a struggle to clarify the autonomy of the Captain. Demands of this nature are not legal subjects of negotiations (In re Ridgefield Park, 78 N.J. 144 (1978)) and there is no obligation to negotiate them. However, because an employer does not have an obligation to negotiate concerning certain issues raised by the employer does not mean he is free to fire those employees who raise such issues as in the instant case.

The collective negotiations history of the parties, as laid out in this case, demonstrates a lack of understanding of the process on both sides. But there is no doubt that the parties perceived their own actions to be collective negotiations and in spite of the improper demands for negotiation, lack of written contracts and, perhaps, inappropriate units, the underlying nature of the activities in which Garofalo and Wolf participated in(and for which they were not renewed)were protected activities within the meaning of the Act. The Borough's failure to rehire for the 1977 summer season constituted a violation of §5.4(a)(1) and (3) of the Act. No evidence was adduced at the hearing to indicate that §5.4 (a)(2), (4) or (5) was violated by the Borough.

It is noted that counsel for the charging party has informed the undersigned that Garofalo and Wolf were subsequently rehired by the Borough and, accordingly, the remedy in this matter will be limited to reimbursement of earnings actually lost by Wolf and Garofalo because of the Borough's action.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission issue an order that the Borough of Avalon

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 failing to renew contracts

of Murray Wolf and Leon Garofalo for engaging in protected activity.

2) Discriminating in regards to the tenure of employment of Murray Wolf and Leon Garofalo in order to discourage employees in the exercise of their protected rights under the Act.

B. Take the following affirmative action:

1) Reimburse Murray Wolf and Leon Garofalo for earnings lost in the summer seasons of 1977 and 1978 by paying them the salaries they would have earned had they served as Captain and Lieutenant of the Avalon lifeguards respectively, less any monies actually earned by them during the same time periods.

2) Post the attached notice.

It is further recommended that those sections of the Complaint which allege violations of §5.4(a)(2), (4) and (5) be dismissed.

Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
February 9, 1979

RECOMMENDED POSTING

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 the rights guaranteed to them by the Act by failing to renew contracts of Murray Wolf and Leon Garofalo for engaging in protected activity.

WE WILL NOT discriminate in regards to the tenure of employment of Murray Wolf and Leon Garofalo in order to discourage employees in the exercise of their protected rights under the Act.

WE WILL reimburse Murray Wolf and Leon Garofalo for earnings lost in the summer seasons of 1977 and 1978 by paying them the salaries they would have earned had they served as Captain and Lieutenant of the Avalon lifeguards respectively, less any monies actually earned by them during the same time periods.

WE WILL post in a prominent place at the Beach Patrol Headquarters copies of this notice for a period of sixty (60) consecutive days.

BOROUGH OF AVALON
(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, 429 E. State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.