P.E.R.C. NO. 93-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOUSING AUTHORITY OF THE
CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-91-56

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Housing Authority of the City of Newark violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it discharged attorney Sharon Wade-Spearman because of her support of unionization for attorneys. The Communications Workers of America, AFL-CIO proved that hostility towards Wade-Spearman's protected activity motivated her discharge and the Authority did not prove that it would have discharged her absent that hostility and protected activity. The Commission orders the Authority to reinstate Wade-Spearman and to pay her back pay, subject to mitigation, and to post a notice to employees. The Commission dismisses allegations that subsection 5.4(a)(2) was violated.

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Appearances:

For the Respondent, Grotta, Glassman & Hoffman, attorneys
(M. Joan Foster, of counsel; Judith S. Miller, on the brief)

For the Charging Party, Lisa Morowitz, attorney

DECISION AND ORDER

On September 13 and September 24, 1990, respectively, the Communications Workers of America, AFL-CIO filed an unfair practice charge and an amended charge against the Housing Authority of the City of Newark. The charge, as amended, alleged that the Authority violated subsections 5.4(a)(1), (2) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,[1/] when

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

it terminated Sharon Wade-Spearman, a Senior Associate Counsel, allegedly in retaliation for her efforts in securing union representation of Authority attorneys.

On October 26, 1990, a Complaint and Notice of Hearing issued. The Authority's Answer asserts that Wade-Spearman was terminated as part of a reorganization of the Authority's legal staff. The Answer also asserts that the Authority's attorneys are confidential employees and managerial executives outside the Act's protection.

On May 1, 3 and 8; June 26, 27 and 28; and July 8, 11, 12 and 15, 1991, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits.[2/] CWA argued orally, but the Authority waived oral argument. Both parties filed post-hearing briefs and reply briefs by September 24, 1991 and supplemental submissions on the issue of confidential employee status in February 1992.

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1/ Footnote Continued From Previous Page

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."

2/ Those exhibits include transcripts of two days of hearing in a representation case (RO-H-91-18) and the exhibits in that case. CWA had petitioned to represent the attorneys in the Authority's legal department and the Authority had responded, in part, that the attorneys were confidential employees and managerial executives. CWA withdrew its petition before any decision was issued.

On March 31, 1992, the Hearing Examiner issued his recommended decision. H.E. No. 92-22, 18 NJPER 183 (¶23089 1992). He found that Wade-Spearman was not a confidential employee or managerial executive; her termination was motivated by the Authority's hostility towards her support for unionization; and the Authority would not have terminated her absent that support. He accordingly concluded that subsections 5.4(a)(1) and (3) had been violated. He recommended an order requiring the Authority to reinstate Wade-Spearman, pay her the fringe benefits and monies, plus interest, she would have received had she not been terminated; and post a notice of its violation and remedial action. He recommended dismissal of the allegation that subsection 5.4(a)(2) had been violated.

On June 12 1992, after receiving an extension of time with CWA's consent, the Authority filed exceptions. It asserts that many recommended findings of fact are erroneous. It also asserts that these recommended conclusions are erroneous: Wade-Spearman engaged in protected activity and the Authority knew of this protected activity; the Authority manifested anti-union animus; the Authority's reasons for terminating Wade-Spearman were "shifting"; the Authority would not have terminated Wade-Spearman absent her protected activity; the Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (3); and the Authority should be ordered to reinstate Wade-Spearman with full back pay.

On July 21, 1992 CWA, after receiving an extension of time with the Authority's consent, filed a response.

## Findings of Fact

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 5-31) with these corrections, modifications and additions.

We add to finding no. 4 that the Mayor's appointments are subject to confirmation by City Council (R-26, pp. 13-14).

We add to finding no. 5 that the Authority monitors and manages housing units; repairs units to ensure they pass quality standards; administers special programs such as the Section 8 program, a modernization program, and a development program; administers Section 8 programs for other large housing complexes; and oversees construction. The Authority has a budget of $40,000,000, redevelopment assets of $100,000,000, and a staff of about 950-1,000 employees (R-26, pp. 15-17). As Executive Director, Blue administers the Authority's activities with respect to residents, the business community, and federal, state, and county governments (8T82-83). Blue's main responsibility is to bring money in to keep the Authority running. Terminations of employees are a low priority for him (8T108).

We modify finding no. 7 to state that Commissioners are not normally informed before employees are terminated and do not approve terminations in advance (8T97). Consistent with that practice, Blue did not recall talking to any Commissioners before Wade-Spearman's termination (8T99). Blue's testimony contradicted the testimony of the Assistant Executive Director, Benjamin Bell, that Blue usually

secured the approval of a majority of Commissioners before terminating an employee and that Blue followed that procedure in this case (4T81-82). Bell could not identify any Commissioners who had discussed the termination with Blue before the fact (7T5-6, 72); and no Commissioner testified to having done so. We accept Blue's testimony on this point.

We add to finding no. 8 that Bell sought General Counsel Nardachone's resignation and that it was a "mutually-agreed upon action." (4T89). Bell testified that Nardachone's resignation was sought because he did not adequately supervise the legal department (4T88). Nardachone testified that Blue said that "downtown" had initiated the request for Nardachone's resignation (9T34-35).

We correct finding no. 8 to state that the General Counsel was first directed to report to the Executive Director in the fall of 1989, not in May 1990 (CP-4).

We correct finding no. 9 to state that Mena was hired in March, 1990, after Wade-Spearman (2T157). When hired, Mena was told he could have a private practice as long as it didn't interfere with his work for the Authority (2T172).

We add to finding no. 9 that Wade-Spearman and other attorneys also attended meetings of Commissioners. These meetings started at 5:00 p.m. and sometimes went to midnight. The General Counsel would release attorneys from these meetings if they were not involved in any matters to be discussed. Wade-Spearman was also assigned to a committee on urban renewal and development and

required to attend meetings starting at 7:00 or 7:30 a.m. (9T74-75).

We modify finding no. 16, footnote no. 13 to reflect more precisely Bell's testimony in the representation proceeding. Before the October, 1989 memorandum (CP-4) directing attorneys in the legal department to work full-time, "there were attorneys who would spend a maximum of about eight hours a week in the office.... In some cases, they would stay in the law library or whatever." (R-26, p.25). The Authority did not offer any documentation or other evidence to support this assertion and Bell did not identify Wade-Spearman as one of these attorneys. On this record, we cannot say that Wade-Spearman was "lying" when she testified that she had worked 50-60 hours a week in many instances (2T5). Nardachone also testified that all his attorneys worked more than 37 1/2 hours per week and probably substantially more (9T74).

We add to finding no 19 that the resolution (CP-5) contained several "whereas" clauses. These clauses stated:

> WHEREAS, the Board of Commissioners at its regularly scheduled Board meeting held on October 19, 1989 adopted a Policy Memorandum regarding the Legal Department.
>
> WHEREAS, the current administration is reshaping and molding new procedures and refining existing methods of operation. The Authority is continually thrust into litigation which requires an aggressive and offensive legal defense.
>
> WHEREAS, a higher level of performance is necessary to meet the needs of the Authority. The Board deems a resolution would produce a greater impact on the day-to-day output of the existing staff.

> WHEREAS, the productivity and management of the Legal Department would be improved significantly by formally adopting the existing Policy as a resolution which requires that the attorneys assigned to the Legal department become full time.

This resolution was introduced in March, 1990, but not passed until May, 1990 (2T24). Its introduction triggered the attorneys' quest for representation since the resolution would have compromised their ability to engage in private practice by requiring them to be present from 8:30 a.m. to 5:00 p.m., thus effectively precluding them from appearing in court. After the resolution passed, Bell monitored the attendance of staff attorneys very closely for the next month or so (4T80).

We add to finding no. 21, footnote no. 16 this description of Bell's evaluation of Nardachone's performance during 1989. Nardachone received ratings of "satisfactory" under supervision; "very good" under job knowledge, quality of work, work output, and attendance and punctuality; and "excellent" under judgment, communication, initiative, willingness and cooperation. The narrative section noted that he had made valiant attempts to improve his efforts and his staff's efforts, but his supervisory skills needed improvement and he was too lenient with his staff, leading to inefficiency. The narrative concluded: "I have no doubt that this is being dealt with at this time and will improve dramatically in 1990." (R-51).

We add to findings no. 22 and 23 that a rating of "3" signifies "satisfactory" and a rating of "4" signifies "very good."

We modify finding no. 23 to state that in his 1989 evaluation Atwell received a "3" in seven categories, not six, and that Atwell had the lowest ratings. Wade-Spearman, Barone, and Atwell all received a "3" under attendance and punctuality.

We accept the Hearing Examiner's determination in finding no. 24 to credit Nardachone's testimony concerning the teaching seminar and Bell's direction to him to be tougher in his evaluations. That Nardachone was forced to resign does not automatically make his testimony untrustworthy, just as the testimony of employees who testify for their employers is not automatically untrustworthy. The Hearing Examiner considered Nardachone's unhappiness with having to resign, but found that this unhappiness did not affect his candor. The Hearing Examiner based this finding of fact and other findings concerning Nardachone and Bell on demeanor evaluations. Such evaluations are committed to the Hearing Examiner since we cannot see or hear the witnesses testify. We add to finding no. 24 that Nardachone told Wade-Spearman that Bell told him to drop everybody's evaluation down a level or two because they were in the process of trying to "weed out" people (1T149).

We accept the Hearing Examiner's determination in finding no. 25 to credit Nardachone's testimony that he believed Wade-Spearman had performed her job satisfactorily and that he had received no more complaints from Bell about Wade-Spearman than about any other attorney. Bell's contrary testimony was not specific or

supported by documentation and the Hearing Examiner evaluated the demeanor of each witness and found that Nardachone was forthright and truthful. Nor is this finding inconsistent with other evidence concerning complaints about Wade-Spearman since that evidence did not concern what Nardachone believed or what he heard from Bell. We correct the last sentence in finding no. 25 to state that Bell, not Nardachone, testified about the encounter between Currey-Williams and Wade-Spearman.

We add to finding no. 26 that Bell's main concern about Wade-Spearman's 1989 evaluation was her "memo war" with Karimu Harvey; copies of the memos were sent to the commissioners and made the agency look bad. The evaluation stated that Wade-Spearman needed to establish relationships with personnel in other departments (9T54-55; CP-2). We add also that Wade-Spearman was concerned about her evaluation because she believed that the 1989 evaluations would be used to "weed out" employees (1T149).

We add to finding no. 27 that Wade-Spearman's time records from May 28 through July 3, 1990 (R-33) show that she often did not punch in and out, sometimes because she was in court in the morning. Bell reviewed these records (5T113).

We accept the Hearing Examiner's determination in finding no. 28 to credit the testimony of witnesses from the Authority's administration concerning Wade-Spearman's performance deficiencies. We modify this finding to be more specific.

Donald Baker, the director of finance and previously the director of administration (1T17), heard dissatisfaction concerning Wade-Spearman's handling of a development parcel project. This discussion took place after October, 1989 when the attorneys were first required to work full-time (1T50-51, 60-61; CP-4).

Gloria Currey-Williams was Bell's assistant chief of administrative services (4T8). She was the liaison to directors to make sure that reports were submitted from one department to another on time (4T9-10). She testified that Wade-Spearman's reports were normally untimely and lacked caselaw citations (4T11-12). She did not have a problem with other attorneys (4T13). Currey-Williams could not recall how many times Wade-Spearman's reports were late (4T33) and could not specify cases where the reports were inadequate (4T23).

Karimu Harvey is associate counsel/chief of operations-urban renewal redevelopment department (7T107). She described two cases in which she found that Wade-Spearman had done unsatisfactory work.

The first case involved a board of education contract, a kind of contract which had previously been drafted by the redevelopment department. Harvey gave Wade-Spearman a contract involving Saint James AME Church as a sample, but the contract drafted by Wade-Spearman came back with references to the church in it (7T111-112). When Harvey had asked for an earlier status report on the contract, Wade-Spearman responded with a sarcastic memorandum

(R-36), dated June 3, 1990, asserting that Harvey "forgot" she had the contract in her possession; Wade-Spearman had apparently given the contract to one of Harvey's subordinates (7T111, 125-126). Bell, Nardachone, and Chranewycz were sent copies of this memorandum.

The second case involved a Newark Stamp & Die condemnation proceeding. This case was assigned to the legal department in July, 1989 to prepare pleadings; Harvey was not sure which attorney was assigned to the case originally, but Wade-Spearman was assigned eventually. Harvey kept sending memos, with copies to Nardachone and Bell, asking about the status of the case, but the pleadings were not prepared until the next April (7T112, 127). Harvey found errors in the pleadings including the use of small letters instead of capitals, the description of the metes and bounds, the chairman's name, and the resolution numbers (7T113, 136-137). Wade-Spearman responded with a sarcastic memorandum (R-37), dated June 13, 1990, stating that 95% of the errors were clerical, the title report description was followed, the resolution number was supplied by Frank Armour, and Anthony Ammiano was the chairperson when the documents were submitted to Harvey. Bell, Nardachone and Chranewycz were sent copies of this memorandum.

Harvey also testified that Wade-Spearman was sometimes unavailable and that her memoranda lacked case citations (7T116, 131). Harvey had more problems with Wade-Spearman than any other attorney, although she also criticized Elio Mena (7T123-124, 143).

Dalton Barrett is chief of tenant selection in Section Eight (8T3). He complained that Wade-Spearman was unprepared on court dates and had settled a case involving a tenant named Jacqueline Scavella without authority (8T4-6, 8). The stipulation of settlement was entered on May 23, 1990. Bell was aware of the problems associated with the Scavella case (8T14-15). Barrett did not have similar problems with other attorneys (8T7-8).

Denise Coleman is the Director of Housing Management (8T55). She confirmed that Wade-Spearman had settled the Scavella case without authority (8T58-59). Coleman believed that Wade-Spearman was preoccupied with her business; she had to be pushed to complete assignments, including a lease addendum; and she was hard to find (8T57, 75-78).[3/]

The Hearing Examiner also found that Bell received many complaints about Wade-Spearman from various directors and other employees. Vernita Sias-Hill, the contracting officer, passed on

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3/ The Hearing Examiner did not make any findings about an incident involving Raymond Spinelli, chief of maintenance (8T20). According to Spinelli, Wade-Spearman was assigned to all abatement proceedings. He received notice on a Friday afternoon that a warrant had been issued for his arrest because Wade-Spearman had not notified him he had to appear in an abatement proceeding; Wade-Spearman was not in her office that afternoon and Coleman took care of the matter (8T23-26). According to Wade-Spearman, other attorneys also handled these cases and she was not assigned to this case (1T201). Nardachone confirmed that other attorneys were assigned to such cases (9T37-38). Wade-Spearman and Nardachone both testified that bench warrants were commonly issued because the municipal court sent summonses to low echelon employees at the various projects instead of to the Executive Director or the General Counsel's office (2T111; 9T37-40).

complaints from her staff about contracts (5T31-33). Harvey also complained (5T34). Coleman passed on complaints from her staff, specifically Spinelli and Barrett (5T45). Bell testified that three Directors of Housing and Redevelopment -- Salvatore Dispenziere, George Chranewycz (Acting Director) and Joseph Bianco -- complained about Wade-Spearman (5T36-39), but he could specify only one example -- Dispenziere's complaint about an Industrial Land case (5T38, 42-45; 10T50, 55-56, 62-63). Dispenziere (who was fired and has sued the Authority) denied complaining about Wade-Spearman and stated instead that she was helpful, instrumental and well-prepared (9T5-7, 9-10). Bianco did not become a director until July 2, 1990 (10T3-5), and since Wade-Spearman was sick, on vacation, or disabled for most of July and August, she was only at work six days while Bianco was director. There is no evidence that Wade-Spearman worked on any cases for him after he became a director or that he complained about her work on specific ongoing cases (10T29-30). We add that Anthony Carrino, the Commissioner who was in charge of the redevelopment and reconstruction committee, praised Wade-Spearman's promptness and performance, especially her handling of the Industrial Land case (3T45-47).

We add to finding no. 28, footnote no. 23 that Coleman testified that she did not tell Wade-Spearman that she was a good attorney (8T66-67). However, Coleman did not testify that she told Wade-Spearman that she was dissatisfied about any matter. Nor did any other director testify that they complained to Wade-Spearman.

Currey-Williams, Harvey and Hill complained; but they were not directors (1T141; 4T14; 5T37-38; 7T113; R-35). We thus cannot say that Wade-Spearman was "lying" when she testified that no directors complained to her (1T141).

We add to finding no. 30 that Wade-Spearman had received permission from Nardachone to appear in court on a non-Authority matter on May 29, 1990 (1T187-188) and that she was already in the same court that day on an Authority case. This appearance was consistent with the May 17, 1990 resolution which gave in-house attorneys 60 days to comply with its directive that they work from 8:30 a.m. to 5:00 p.m. (CP-5). Bell did not conclude that the resolution had been violated (5T94).[4/] We also add that Bell did not specify cases or produce documents to show that Wade-Spearman's work lacked preparation and completeness or held up the work of other Directors (5T29, 42-46, 82; 7T43, 45; 10T62).

Findings no. 32 through 37 concern Wade-Spearman's discussions about the attorneys' desire to secure union representation. We add that Wade-Spearman was the most outspoken. Mena testified that she was the most outspoken and that she often spoke about the union in the legal department hallways and throughout the building. By contrast, Mena spoke about the union only behind closed doors (2T183-184). Atwell concurred that Wade-Spearman was the most outspoken (3T64-65). Barone kicked

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4/ An attorney outside the department (Harvey) occasionally appears in court on non-Authority matters (7T144).

Wade-Spearman under the table when Wade-Spearman told Nardachone the attorneys were trying to organize (1T96; 9T44). Wade-Spearman also testified that it was generally known that she was the most concerned about getting the union in and that she let it be known (2T127).[5/]

We add to finding no. 32 that there is no evidence that commissioners Carrino and Ammiano played a role in Wade-Spearman's termination or communicated the information about unionization to Blue or Bell.

We add to finding no. 33 that Coleman testified that she had not heard any rumors about unionization before the representation petition was filed (8T68). Nevertheless, the Hearing Examiner appears to have implicitly credited Wade-Spearman's testimony that she asked Coleman about getting a union. We will not resolve this factual question since it is not critical. There is no evidence that Coleman or Sirchio played a role in Wade-Spearman's termination or communicated any information about unionization to Blue or Bell.

We modify finding nos. 34 and 40 to state that, although Baker's testimony is somewhat unclear, it appears that he was describing two distinct discussions among the administrators. The

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5/ Wade-Spearman testified at one point that she spoke with "everybody" about getting a union (2T51) and at another point that she spoke only with "people who I thought could help us get a union." (2T51). This slight discrepancy does not undermine a finding that Wade-Spearman was the most outspoken attorney about unionization.

first discussion was around the time the union was being organized; in that discussion some concern about getting a new legal department or "wiping out" the department was expressed (1T45-48, 55). The second discussion was after the representation petition was filed; in that discussion either Blue or Bell stated that the administration did not want another union and they would get a new legal department (1T18-19, 23).

We modify finding no. 36 to state that Bell overheard Wade-Spearman asking Jacobs about unionization outside a Commissioners' meeting in May 1990. Wade-Spearman testified that Bell was immediately behind her when she questioned Jacobs and that when Jacobs gestured, she turned around and saw Bell roll his eyes at her (1T94-95; 2T150-151). Jacobs testified that Bell stood behind Wade-Spearman as she and Jacobs discussed unionization and that she covered up her mouth when she realized Bell was standing there (3T26-27, 41). Mena and Atwell corroborated that Jacobs and Wade-Spearman discussed unionization at this time; they were not asked whether or not Bell was there (2T185; 3T66). We specifically accept the Hearing Examiner's determination in footnote 27 not to credit Bell's testimony that he did not know of Wade-Spearman's role in unionization. The Hearing Examiner based this determination on an evaluation of Bell's demeanor.

We modify finding no. 37 to state that Atwell's testimony was too equivocal to permit us to determine whether he talked with Wilson before or after McMillon was hired.

We accept the Hearing Examiner's determination in finding no. 38 to credit Nardachone's testimony that Bell told him in May 1990, that "they were aware of an attempt by various members of the legal department to try and unionize and that the administration would not look kindly on that." (9T45, 57). We also accept the Hearing Examiner's determination to discredit Bell's testimony. These credibility determinations are within the province of the Hearing Examiner who saw and heard the witnesses. That Bell might not have told Armour or McMillon about the organizing drive does not establish that Bell did not express his knowledge and dissatisfaction to Nardachone.

We add to finding no. 38 that Bell was attuned to concerns and rumors circulating throughout the agency. Thus, he testified that he was aware that employees were unhappy with having to punch a time clock, attorneys were disgruntled about having to work a full day, and rumors were rampant that the administration wanted to wipe out the legal department (4T114; 5T121-123; 7T67). Bell did not keep a diary or log of rumors or discuss these rumors in-depth. He testified:

> In passing, in leaving a meeting, people would say I heard that the lawyers are trying to get a petition together, and I would say yes, yeah, I heard it too, something to that nature (5T150).

We accept the inference in finding no. 39 that Blue knew of the organizing drive before the representation petition was filed in August. At an executive session on July 19, 1990, Blue stated that he did not have confidence in the legal department and that he could

"wipe out everybody" except Armour (R-41). When asked to explain this comment, Bell stated that Blue was very frustrated by the attempted unionization and lacked confidence in the legal staff because of that unionization (7T70-71). We accept the Hearing Examiner's determination not to credit Blue's contrary testimony. Under all the circumstances, we believe it reasonable to infer that Bell had passed on his knowledge about unionization to Blue and that Bell and Blue had shared their frustration. We also note that Bell's testimony on this point, along with other findings, establishes Bell's own pre-petition knowledge of the organizing drive.

We accept the Hearing Examiner's determination in finding no. 41 to credit Mena's testimony that Bell called him into Bell's office and told him that Blue intended to fire the attorneys involved in the union (2T157-158). Mena understood this to mean all the attorneys except Nardachone and Acting General Counsel Armour since everyone else had signed cards seeking CWA's representation (2T167). Bell did not tell Mena that the Authority was concerned about the costs of litigation (2T168) or that it was seeking to reorganize or restructure the department (2T160). In the same conversation, Bell praised Mena's work and said he was considering promoting Mena (2T169). Bell probably did not know that Mena supported unionization since authorization cards are secret and Mena was secretive.

We modify finding no. 42. While Bell stated that he decided "early in 1990" to terminate Wade-Spearman (4T80-82), we find that he did not decide to terminate her until after she and the other attorneys sought union representation. Bell was vague about when he first decided to terminate Wade-Spearman and his testimony was uncorroborated by other witnesses or supported by any documents. It is unlikely that he decided to terminate Wade-Spearman immediately after she had received a satisfactory evaluation at the end of 1989 and immediately after Bell had expressed his appreciation of Nardachone's valiant efforts to improve his staff and his expectation that there would be dramatic improvement in the next year. Further, Bell did not discuss his decision with Blue until the end of June or July (8T85-86) and it is unlikely that he would have waited many months before doing so. Bell testified that he got unofficial approval earlier and that Blue had to speak to the Commissioners before Wade-Spearman could be terminated (5T75); but we have accepted Blue's testimony that Bell did not discuss the termination with Blue until the end of June or early in July and that Blue did not discuss this termination in advance with any Commissioners. Moreover, Bell told McMillon that the decision to terminate Wade-Spearman was made about the second week of July (6T91, 100). Under all the circumstances, we conclude that Bell did not decide to terminate Wade-Spearman until after he learned of the unionization drive. Once they discussed the termination, Bell and Blue were prepared to act quickly and

Wade-Spearman would have been terminated on July 16, 1990 if she had not been on vacation.[6/]

We correct finding no. 43. As we have already found, the record does not support a finding that Blue spoke with any Commissioner before Wade-Spearman was terminated.

We add to finding no. 45 that Nardachone was not consulted about Atwell's demotion (7T51).

We add to finding no. 47, footnote no. 37 that Bell normally does not get involved in the process for terminating low-level employees. He testified, however, that this termination was unusual because a Councilperson had asked that Wade-Spearman, his friend, not be terminated and because Bell thought Wade-Spearman was unpredictable (4T94-95).

We correct finding no. 47, footnote no. 38. Wade-Spearman did not go to Carmichael's office a day or two before July 23. According to Carmichael, she went to his office late in the afternoon on the day she returned to work (August 20) or on the next day (4T40). According to Wade-Spearman, she went to see Carmichael at about 5:00 p.m. on the day she returned to work, immediately after being told in the parking lot by Calvin Chambers that he had heard she would have been terminated back in July if she had not

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6/ We do not agree with the Hearing Examiner that Bell and Blue should have known that Wade-Spearman would be on vacation that day (H.E. at 67).

been injured (1T101-102, 215).[7/] We find that this conversation did not occur on the day that Wade-Spearman was fired since she and Chambers agreed that they talked about 5:00 p.m. and Wade-Spearman had left much earlier on that day (6T81; 10T15). During this conversation, Carmichael denied that the Authority was going to fire her, adding that she was a good attorney (1T102; 4T52-53).

Analysis

The Hearing Examiner concluded that Wade-Spearman was not a managerial executive or a confidential employee. The Authority has not excepted to these conclusions. We adopt and incorporate them (H.E. at 37-55). We limit our holding to Wade-Spearman's prior status and express no opinion about the status of any current attorneys.

The Hearing Examiner found that the Authority did not violate subsection 5.4(a)(2). CWA has not excepted to that conclusion. We adopt and incorporate it (H.E. at 55).

In re Bridgewater Tp., 95 N.J. 235 (1984), sets the standards for determining whether anti-union animus motivated a personnel action. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence

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7/ The Hearing Examiner did not resolve a dispute as to whether Chambers told Wade-Spearman she was going to be terminated because of her union activity or because she was never there. We do not resolve this dispute since it is not critical.

or by circumstantial evidence showing that protected activity occurred, the employer knew of this activity, and the employer was hostile towards the exercise of the protected rights.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both a motive unlawful under our Act and another motive contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

1. Has CWA proved that anti-union animus was a motivating factor in Wade-Spearman's termination?

Wade-Spearman engaged in activity protected by our Act. In response to the March 1990 introduction of the resolution which would have required attorneys to work daily from 8:30 a.m. to 5:00 p.m., Wade-Spearman and other department attorneys sought legal advice and union representation. They contacted and met with different unions and signed cards authorizing CWA to represent them. Wade-Spearman was not more active than other attorneys in

organizing, but she was the most outspoken. Whereas Barone did not want Nardachone to know and Mena spoke only behind closed doors, Wade-Spearman talked to many people and spoke freely throughout the building.

Bell and Blue knew about the organizing drive before they decided to terminate Wade-Spearman. In May 1990, Bell overheard Wade-Spearman discussing union representation with a union president. About the same time, Bell told Nardachone that "they were aware of an attempt by various members of the Legal Department to try and unionize...." On July 19, 1990, Blue discussed the possibility of wiping out the legal department (except Armour); according to Bell, Blue made these comments because the attempted unionization was very frustrating to Blue and Blue lacked confidence in the staff with unionization on hand.8/

Bell and Blue were hostile to the attorneys' attempts to gain union representation. When Bell told Nardachone he knew of these attempts, he added that "the administration would not look kindly" on them. Bell explained that Blue discussed wiping out the legal department because he was frustrated by the attempted unionization. Baker heard either Bell or Blue say that they did not want another union and would get a new legal department. And Bell

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8/ While Wade-Spearman told two Commissioners and other Authority officers about the attorneys' desire for union representation, we do not rely on these discussions and do not decide whether they could be a basis for imputing knowledge to Bell and Blue.

told Mena that Blue would fire the attorneys involved in the union.9/

Given the proof of protected activity, employer knowledge and hostility, CWA has proved that anti-union animus was a substantial and motivating factor in the decision to terminate Wade-Spearman. Indeed, a strong case of illegal motivation has been established.

2. Has the Authority proved that it would have terminated Wade-Spearman even if it had not been motivated by anti-union animus?

The Authority has asserted that Bell and Blue would have terminated Wade-Spearman because of the reorganization of the legal department and her performance deficiencies, even if she and the other attorneys had never sought union representation. In analyzing

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9/ The Hearing Examiner drew an inference of anti-union animus from the Authority's "shifting reasons" for terminating Wade-Spearman -- that is, the termination letter (CP-7) stated that the Authority had "determined to reorganize and restructure the legal department" whereas Bell's reasons at the hearing related to performance deficiencies. The Authority contests this inference, asserting that the reorganization and restructuring consisted of many steps which began before the attorneys sought representation and which carried through Wade-Spearman's termination. The Hearing Examiner also drew an inference of anti-union animus from the convoluted and suspicious manner in which Wade-Spearman was terminated (H.E. at 67-70). The Authority contests this inference, asserts that the termination process, while unusual, was consistent with its concern about Wade-Spearman's friendship with a Councilperson. We do not rely on these inferences or determine whether they are valid. We do note, however, that the congruence in timing between the attempts to gain union representation and the termination is suspicious and indicative of hostility. Bridgewater at 247.

this claim, we cannot ask whether the Authority could have or should have fired Wade-Spearman; we must ask instead whether the Authority has proved that it would have terminated Wade-Spearman when it did, absent its agents' illegal motive. Presbyterian/St. Luke's Med. Center v. NLRB, 723 F.2d 1468, 115 LRRM 2306 (10th Cir. 1983); Boston Mutual Life Ins. Co. v. NLRB, 692 F.2d 169, 111 LRRM 2983 (1st. Cir. 1982).

Blue and Bell began to reorganize the legal department long before the attorneys sought union representation. In January 1989, Blue became Executive Director and Bell became Assistant Executive Director. They sought to make all Authority employees more accountable and productive. With respect to the legal department, they were dismayed by a lack of attorney availability and the high costs of using outside counsel to handle personnel matters. They decided to have that work performed by the in-house attorneys and to have these attorneys work full-time -- 37 1/2 hours a week. In October 1989, the Board of Commissioners approved a policy memorandum requiring attorneys to work full-time and also requiring the General Counsel, for the first time and over his objection, to report directly to the Executive Director. In-house attorneys were then required to sign in and out and Nardachone was required to certify that each attorney had worked at least 37 1/2 hours each week. Bell also directed Nardachone to be "tougher" on the in-house attorneys; Nardachone consequently lowered everyone's 1989 evaluations, leading Wade-Spearman to protest her evaluation because

she was concerned that the 1989 evaluations would be used to "weed out" employees. In March 1990 a resolution formally adopting the October 1989 policy memorandum was introduced. The resolution noted that the Authority was seeking an aggressive and offensive legal defense and needed a higher level of performance, output and management. This resolution for the first time directed the attorneys to be at work from 8:30 a.m. to 5:00 p.m., Monday through Friday, and prohibited them from conducting non-Authority business during those hours. The in-house attorneys had been assured when hired that they could maintain their private practices and they were upset when the resolution was introduced because it imperilled these practices. They responded by seeking legal advice and union representation.

Changes in the legal department continued after the union drive began. The resolution requiring attorneys to work between 8:30 a.m. and 5:00 p.m. was approved in May 1990 and the attorneys were immediately directed to punch time clocks. Bell monitored the attorneys' attendance for the next month or so. Bell and Blue decided to seek Nardachone's resignation to improve supervision and to demote Atwell and terminate Wade-Spearman at the same time.

The record also demonstrates that Wade-Spearman had many performance problems. Harvey described two cases in which Wade-Spearman's performance was inadequate and her responses were sarcastic and Barrett and Coleman described a case which Wade-Spearman had settled without authority. Wade-Spearman did not

always punch in and out as attorneys were required to do and Nardachone had to issue a memorandum directing her to do so. Moreover, Bell had received many complaints from directors and other employees; and Wade-Spearman was late in handing in some assignments; had to be pushed to complete others; handed in some memoranda without case citations; and was hard to find. We conclude that these deficiencies were probably a factor in the decision to terminate Wade-Spearman.

Given that the Authority had begun reorganizing the legal department and given that Wade-Spearman had some performance problems, we now consider whether the Authority would have fired Wade-Spearman if she had not been an outspoken advocate for union representation. We repeat that the question is not whether the Authority could have fired her, but whether it would have. Presbyterian/St. Lukes Med. Center; Boston Mutual Life Ins. Co. Under all the circumstances, we are not persuaded that the Authority has carried its burden of proof. We have found that Bell did not decide to terminate Wade-Spearman until after he learned that she and other attorneys were seeking union representation -- this is not a case where a decision had been made and only needed to be carried out. Blue and Bell were hostile to unionization, to the point of threatening to "look unkindly" on attempts to organize, to "wipe out" the legal department, and "to fire any attorneys involved in the union." Bell and Blue were the only decisionmakers and their decisionmaking was tainted by a virulent illegal motivation -- no

other recommendation had come from a dispassionate source. Wade-Spearman had received a satisfactory evaluation in December 1989 at a time when Nardachone still retained Bell's confidence. Bell could not give specific examples or offer any documentation of Wade-Spearman's performance problems -- no incident was so vivid as to lead inexorably to termination. Bell did not complain more often about Wade-Spearman than about other attorneys to Nardachone and Wade-Spearman received no warnings that her performance had placed her job in jeopardy or any other discipline. The record does not demonstrate that any other attorneys were terminated because of performance problems similar to Wade-Spearman's, and an attorney with lower ratings was demoted, not fired. While we believe that Wade-Spearman could have become a candidate for discipline given the Authority's higher performance standards, we are not persuaded that the Authority would have terminated her when it did except for her outspoken support for union representation. We accordingly hold that the Authority violated subsection 5.4(a)(1) and (3) when it terminated Wade-Spearman.

Remedy

The Authority asserts that we should reject the Hearing Examiner's "extraordinary" recommendation that it should be ordered to reinstate an employee whom the Hearing Examiner believed it had cause to terminate. That recommendation is not extraordinary at all -- reinstatement is the normal remedy to redress a discharge which was illegally motivated and which would not have occurred absent that illegal motivation. It is also necessary to effectuate the purposes of our Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n

of Ed. Secs., 78 N.J. 1, 8-10 (1978). We add, however, that Wade-Spearman has now learned through this litigation of perceived problems with her past performance and the employer is free to evaluate all employees' future performance to ensure that its performance standards are met.

The Authority also asserts that the Hearing Examiner should have permitted discovery and evidence on the issue of mitigation of damages. Our normal practice is to defer consideration of mitigation and related questions about the amount of back pay to compliance proceedings after the respondent has been found liable. See, e.g., Bergen Cty. Special Services. School. Dist., P.E.R.C. No. 91-9, 16 NJPER 442 (¶21190 1990); Randolph Tp. Bd. of Ed., P.E.R.C. No. 84-106, 10 NJPER 205 (¶15100 1984). We will modify our order to require that Wade-Spearman's back pay be reduced by the amount of mitigated damages. Should there be a dispute about the amount of back pay due, either party may request a hearing.

ORDER

The Housing Authority of the City of Newark is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by terminating employees such as Sharon Wade-Spearman because of their support for unionization;

B. Discriminating in regard to tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by terminating employees such as Sharon Wade-Spearman because of

their support for unionization.

II. Take this action:

A. Restore Sharon Wade-Spearman to the position of in-house attorney.

B. Make Sharon Wade-Spearman whole for all monies and fringe benefits lost as a result of her illegal termination, subject to mitigation, plus interest pursuant to R.4:42-11.

C. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent'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.

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The allegations concerning N.J.S.A. 34:13A-5.4(a)(2) are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Bertolino, Regan, Smith and Wenzler voted in favor of this decision. None opposed

DATED: August 20, 1992
Trenton, New Jersey
ISSUED: August 21, 1992

# NOTICE TO EMPLOYEES

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by terminating employees such as Sharon Wade-Spearman because of their support for unionization;

WE WILL NOT discriminate in regard to tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by terminating employees such as Sharon Wade-Spearman because of their support for unionization.

WE WILL restore Sharon Wade-Spearman to the position of in-house attorney.

WE WILL make Sharon Wade-Spearman whole for all monies and fringe benefits lost as a result of her illegal termination, subject to mitigation, plus interest pursuant to R.4:42-11.

Docket No. CO-H-91-56 NEWARK HOUSING AUTHORITY

Dated: _____ 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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 92-22

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

In the Matter of

HOUSING AUTHORITY OF THE
CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-91-56

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.


SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Authority violated Sections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when its Executive Director and its Assistant Executive Director determined, in a convoluted way, to terminate the services of Sharon Wade-Spearman, Esq., an in-house attorney in the Authority's Legal Department on August 22, 1990. Although Spearman's on-the-job performance had been less than satisfactory since the latter part of 1989, and a decision had been made by the Assistant Executive Director to terminate her in the early part of 1990, nothing was done until August after organizing efforts among the in-house attorneys were well underway.

Both of these Directors had learned of efforts to unionize in the Legal Department by April or May, 1990 and while no retaliatory action was taken against any of the other attorneys, it was clear that Spearman's open exercise of protected activities, inter alia, in speaking out to administrators was the motivating force behind the decision to terminate her. Back pay was recommended with interest under R.4:42-11.

It was also recommended that the Charging Party's allegation that the Respondent violated Section 5.4(a)(2) be dismissed for lack of proof.

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.

H.E. NO. 92-22

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

In the Matter of

HOUSING AUTHORITY OF THE
CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-91-56

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, Attorneys
(M. Joan Foster, of Counsel)

For the Charging Party, Lisa Morowitz, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on September 13, 1990, and amended on September 24, 1990, by the Communications Workers of America, AFL-CIO ("Charging Party" or "CWA") alleging that the Housing Authority of the City of Newark ("Respondent," "Authority" or "NHA") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on August 7, 1990, CWA filed a representation petition with the Commission on behalf of a unit of lawyers in the Authority's Legal Department; that Sharon Wade-Spearman, Elio Mena and Anthony Atwell are

employees within the petitioned-for unit, all of whom had signed the said petition; that Benjamin R. Bell, the Assistant to the Executive Director of the Authority, advised Mena that Dr. Daniel W. Blue, Jr., the Executive Director, intended to terminate all lawyers involved with the union, mentioning the possibility of a promotion for Mena; that Wendell Wilson, of the Personnel Department, entered the office of Atwell and questioned him as whether or not Spearman had initiated the union effort; that on August 22, 1990, Spearman was terminated without cause or warning; that on August 31, 1990, Thomas Carmichael, the Director of Personnel, advised Spearman in the presence of others that Bell should not have talked with Mena about the union; that Bell was "in violation" because once the petition came in there should have been no communication with anyone; that Carmichael then apologized for the termination of Spearman, stating that he had no control over the actions of the Assistant to the Director; that on August 31, 1990, Wilson also stated to Spearman in the presence of others that he told Bell not to talk to Mena about the union, adding that "they messed up this time"; that Wilson repeated the above statements in the presence of others on September 14, 1990; all which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act.[1/]

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 26, 1990. Following the issuance of the Complaint and Notice of Hearing, the parties engaged in extensive discovery. CWA's original representative was replaced by its present counsel around March 1st, which had resulted in the cancellation of the original hearing dates in December 1990. Thereafter, hearings were scheduled and the case was heard on ten days as follows: May 1, 3, 8; June 26, 27, 28; July 8, 11, 12 & 15, 1991,[2/] in Newark, New Jersey.

Prior to the hearing, the Authority had requested that the Hearing Examiner issue a bifurcated decision, based upon the Authority's contention that the "(a)(3)," discriminatee, Sharon Wade-Spearman, was, as an attorney for the Authority, a "confidential" within the meaning of the Act. As such she was not an individual who could assert rights as an "employee" under the Act. The Hearing Examiner was requested to adjudicate first the

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1/ Footnote Continued From Previous Page

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."

2/ The transcript for each hearing will be referred to as 1 Tr through 10 Tr seriatim."

question of Spearman's "confidential" status by written decision. If that inquiry resulted in a finding of "confidential" status then the case would be at an end and there would be no need to decide the merits of the alleged discriminatory "(a)(3)" termination by the Authority.

The Hearing Examiner had initially acceded to the Authority's request. However, the Hearing Examiner, upon reflection, had second thoughts as to the efficacy of the requested procedure. Coincidentally, the Authority reconsidered and withdrew its request for bifurcation. Thus, the instant decision will simultaneously adjudicate the Authority's contentions as to Spearman's "confidential" and/or "managerial executive" status[3/] and the counter-contention of CWA that the decision should be based solely upon the merits of the Authority's alleged discriminatory conduct under the Act.

At the hearing, the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Counsel for CWA argued orally (10 Tr 66-75) while counsel for the Authority waived oral argument (10 Tr 66). The parties simultaneously filed their initial post-hearing briefs, precisely as

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3/ The alleged "managerial executive" status surfaced for the first time in the Authority's post-hearing brief but this presents no problem since CWA has joined issue in its Reply Brief.

scheduled, on September 4, 1991. Reply Briefs were filed by September 24, 1991.[4/]

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, exists and, after hearing, and after consideration of the oral argument of counsel for CWA and the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

## FINDINGS OF FACT

1. The Housing Authority of the City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act as amended, and is subject to its provisions.

3. Sharon Wade-Spearman ("Spearman") is a public employee within the meaning of the Act as amended, and is subject to its provisions.

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4/ Upon leave, the Authority, on February 19, 1992, filed three Opinions of the Attorney General in support of its claim that Spearman was either a "managerial executive" or a "confidential" employee under the Act, infra. On February 26th, CWA filed a memorandum in opposition to the Authority's submissions.

Findings as to NHA's Organization and Modus Operandi:

4. The Authority is a semi-autonomous governmental agency, funded, in part, by the Department of Housing and Urban Development. It is governed by a seven-member Board of Commissioners ("Board" or "Commissioners"), six of whom are appointed by the Mayor of the City of Newark and one being an appointee of the Governor. The Commissioners formulate policy for implementation by the Authority's staff. [R-26, pp. 13, 14; 8 Tr 84].

5. At all times material hereto, Daniel W. Blue, Jr. was the Authority's Executive Director. His responsibilities involved executing the policies established by the Board of Commissioners, to whom he reported directly. Blue was assisted by Benjamin R. Bell, the Assistant Executive Director, whose responsibilities included coordinating the activities of the Directors of the seven departments within the Authority. These Departments are Housing, Modernization, Redevelopment, Finance, Legal, Administration and Personnel. In the case of the Legal Department, its Director is the Authority's General Counsel, who oversees the Department and supervises the several Senior Associate and Associate Counsels, one of which was Spearman, who is the subject of the instant proceeding. [R-26, pp. 12-14, 19; 1 Tr. 62; 4 Tr 71].

6. The Personnel Department is responsible for the administration of all personnel matters, including the hiring and

firing of personnel, the maintenance of all personnel records, relations with the Authority's several labor unions (4 Tr 42, 43).

7. All personnel actions are submitted to the Board by its Personnel Committee at its regular meeting on the third Thursday of each month in the form of a "Personnel Committee Report." The purpose of this Report, which is prepared by the Personnel Department, is to save the Board's time in the administration of personnel matters. Decisions to terminate employees are made by the Executive Director, who may or may not formally or informally discuss contemplated terminations with the Commissioners prior to implementation. Often, as in the case of Spearman, the Board of Commissioners is advised of terminations along with other personnel actions after the fact. For example, although Spearman was terminated by the decision of Blue on August 22, 1990, infra, this fact was not reported to the Board until its regular meeting on the third Thursday of September 1990. At that meeting, her termination was listed among a number of others on the September "Personnel Committee Report," which carried only the date "September 1990." [R-42; 5 Tr 96-99; 7 Tr 6-15; 8 Tr 84, 85, 96, 97].

8. Emil W. Nardachone was first employed by the NHA in February 1974 as its Associate General Counsel. He was later appointed Senior General Counsel. In February 1979, he was appointed General Counsel, the position in which he served until his resignation on July 9, 1990, effective September 1st. [1 Tr 210; 9

Tr 20, 21, 31].[5/] Prior to 1989, Nardachone, as General Counsel, reported directly to the Board of Commissioners. Blue and Bell, having become Executive Director and Assistant Executive Director, respectively, in January 1989, decided, in the fall of 1989, to require the General Counsel to report and be responsible to the Executive Director thereby eliminating his direct link to the Board. This proposed change was eventually implemented in May 1990. [4 Tr 70-78; 8 Tr 83; 9 Tr 23-25; CP-4; CP-5; R-40].

Findings As To The Terms Of Spearman's Hire And Initial Assignment

9. Spearman was hired by the Authority in November, 1987, as a Senior Associate Counsel and she was terminated on August 22, 1990. At the time of her hire, Spearman was interviewed by certain of the Authority's Commissioners, in addition to General Counsel Nardachone, who were made aware that she maintained a private law practice. This was of no concern to the Authority as long as Spearman performed her work satisfactorily. At the time of Spearman's hire, there were five other in-house attorneys in the Legal Department, including Nardachone,[6/] and all but one (Armour) maintained an outside law practice. In addition to having initially interviewed Spearman, Nardachone thereafter supervised her up until

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5/ Frank L. Armour, who had been employed in the Legal Department since October 1985, became Acting General Counsel on July 17, 1990 (8 Tr 45).

6/ Susan J. Barone, Anthony R. Atwell, Elio R. Mena and Frank L. Armour (1 Tr 65, 66; 2 Tr 156, 157).

Spearman's last two days of employment in August 1990. Spearman's initial assignments at the Authority included the handling of landlord-tenant cases, housing and building code violations, the review of real estate contracts and attending zoning board and community hearings. [1 Tr 62-65, 67, 122; 2 Tr 8; also, R-30].

Findings As To Spearman's Alleged Status As A Managerial Executive And/Or Confidential Employee

10. From time to time, the in-house attorneys render legal opinions upon request and provide guidance to the Directors and other administrators on matters relating to Authority policy and its operations (R-18 to R-25). The attorneys attend meetings where matters described as "confidential" are sometimes discussed[7/] among the Board of Commissioners, the Executive Director and the Assistant Executive Director together with the Directors and other administrators. Of the in-house attorneys, only Atwell was assigned by Nardachone to assist in personnel and collective negotiations matters. Nardachone never gave Spearman a like assignment in this area.[8/] The Authority conducts its collective negotiations

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7/ The various lay witnesses' colloquial use of the term "confidential" is not binding upon the Hearing Examiner, who must apply Commission precedent in construing Sections 3(f) an 3(g), the statutory definitions of "managerial executive" and "confidential employee," infra.

8/ Prior to January 1989, the Authority had used "outside" counsel for the handling of its personnel and labor negotiations. This continued on a reduced basis after January

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through a Negotiations Committee comprised of its administrative staff and, possibly, the Personnel Committee. [R-18 to R-25; R-26, pp. 50-55; R-27, pp. 20-22, 94-96, 107, 108; 1 Tr 25-27, 31-39, 43, 44, 55; 5 Tr 165, 184-186; 7 Tr 15-19; 9 Tr 43, 44, 74-76].

11. Spearman's areas of practice on behalf of the Authority, supra, covered the preparation of legal opinions, the review of contracts, landlord and tenant matters, and building and housing code violations (1 Tr 62, 63). Spearman testified without contradiction that she was never a member of the Personnel or Negotiations Committees nor did she ever represent the Authority in labor matters before "PERC" or participate in disciplinary hearings, Civil Service proceedings or arbitrations. Further, Spearman never drafted a legal opinion regarding a collective bargaining agreement, nor was she ever consulted about personnel actions or the administration of labor agreements. [1 Tr 117-119].[9/] Wendell Wilson, the Chief of Labor Relations, denied that he ever interacted directly with Spearman in the area of labor relations but he acknowledged that he had done so with Atwell (7 Tr 84, 85). Grady

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8/ Footnote Continued From Previous Page

1989, but was discontinued entirely by the latter part of 1990. [R-1; R-26, pp. 17-19, 21-23, 27-32; 6 Tr 8, 9, 12; 9 Tr 42, 43]. A Personnel Committee had been formed by one of the Commissioners in 1989, during a period when the Authority had lessened the work of its in-house attorneys in the personnel area (6 Tr 10, 11; 7 Tr 6, 7).

9/ Since Bell had no direct knowledge of any of these matters, he could neither affirm nor contradict her testimony (6 Tr 9-11).

McMillon acknowledged that when he commenced employment as a Senior Associate Counsel in the Legal Department on August 13, 1990, the labor relations files that he received contained no reference to matters that had been handled by Spearman nor did he believe that she had been involved in the collective negotiations process (6 Tr 86, 91, 94, 107, 108).

12. The minutes of Directors' meetings reflect that during Spearman's thirty-three months of employment she attended only six such meetings on March 14, June 6, August 15, October 24, November 16, 1989; and June 26, 1990. [R-2, R-4, R-7, R-8, R-9, R-12]. Among the subjects discussed in her presence were labor negotiations, collective bargaining preparation, amounts appropriated for collective bargaining agreements, hiring determinations, potential layoffs and salary increases. [R-26, pp. 61, 62, 75, 76; R-27, pp. 12, 13, 25-27, 58-61].

13. The record, including the minutes of the above six Directors' meetings where Spearman was present, discloses that while personnel and labor-related matters may have been discussed, the subject matter was more were often "status reports of negotiations" rather than "confidential discussions" [see R-2; and Donald D. Baker, Director of Finance, 1 Tr 32, 33]. When Spearman was asked whether she had ever heard discussions at Directors' meetings regarding collective negotiations with the Authority's various bargaining units, she credibly replied: "No, I did not." The details of collective negotiations were never explored. The

Directors' meetings were "...not of a confidential nature..." because all in attendance were expected to report back to fellow staff members. [1 Tr 115, 116].

14. Since May 28, 1990, Spearman and the other in-house attorneys were required to "punch in and out" each day. Also, Spearman and the other in-house attorneys were each evaluated annually by Nardachone, who used basic non-supervisory criteria that were then slotted into generic categories. [See Findings of Fact Nos. 21-23, infra]. Settlements by in-house attorneys, including Spearman, of such routine matters as rent collection cases had to be approved by the General Counsel, the Executive Director and the Assistant Executive Director (8 Tr 70, 71). When Spearman was working with Commissioner Anthony Carrino on a major matter involving 42 disputed acres of land in Newark, she was specifically overruled by the "hierarchy of the...Authority..." (3 Tr 46, 47). The distinction made between the in-house attorneys of the Authority and those of the National Labor Relations Board is found to be unpersuasive and irrelevant (see Authority's Main Brief, pp. 33, 34, contending to the contrary).

15. It is found as a fact that Spearman's activities as an in-house attorney in the Authority's Legal Department, supra, including mere attendance at six Directors' meetings over the course of her thirty-three months of employment, fails to qualify her as "...one of only a handful of attorneys privy to highly sensitive information involving both confidential labor relations and

budgetary matters..." making her a "...part of an elite group who act as top advisors to the highest officials on crucial matters, and who have tremendous input into high-level policy decisions having significant financial and political impact..." [Authority's Main Brief, pp. 30, 31]. The record is devoid of any evidence that Spearman's attendance at the six Directors' meetings, without proof of measurable input, elevated her to "managerial" and/or "confidential" status as contended by the Authority.[10/] There is nothing in the instant record to demonstrate that Spearman exercised any greater discretion or independent judgment in the discharge of her assignments than thst of any other attorney.[11/]

Findings As To The Legal Department's Performance

16. In recent years, the Authority engaged two "outside" law firms, namely, Gerald L. Dorf and Carpenter, Bennett & Morrissey, to handle the majority of its labor and employment matters. These services included providing advice to the NHA's executive staff on strategy for labor negotiations with the various unions with whom the Authority had negotiated contracts.[12/] When

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10/ For example, Spearman's presence in these meetings was essentially that of an observer, who provided no apparent input. Thus, in the minutes of the October 24, 1989, Directors' meeting (R-8), Spearman is listed only under the heading "Additional Personnel."

11/ It is also noted that there is no evidence that Spearman had any involvement in the Authority's budget process. [See Authority's Main Brief, p. 35, to the contrary].

12/ The recognized negotiating units cover all but 75 of the Authority's 950-1000 employees (R-26, pp. 17-19).

Blue and Bell assumed their executive duties in January 1989, they terminated the services of the two "outside" law firms, inter alia, for fiscal reasons. Simultaneously, they decided to require the Authority's in-house attorneys to work full-time for the Authority, which would enable them to assume the legal work previously performed by the two "outside" law firms. [R-26, pp. 17-19, 21-23, 27, 30; 1 Tr 131; 4 Tr 70].[13/]

17. Before Blue and Bell implemented their intention to require that in-house attorneys work at least 7-1/2 hours per day, five days per week, they first discussed this matter with Nardachone, who was less than enthusiastic with their intrusion upon his function. This resulted in Blue and Bell bypassing Nardachone, and on October 23, 1989, Blue issued a Policy Memorandum, which was quickly adopted by the Board. This Memorandum required all in-house attorneys, including the General Counsel, to execute their duties and responsibilities on a full-time basis of 37-1/2 hours per week. Further, this Policy Memorandum required Nardachone to report directly to Executive Director Blue rather than to the Board.[14/]

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13/ The decision of Blue and Bell to terminate the two "outside" law firms was also based upon the perceived necessity to increase the productivity of the in-house attorneys in the Legal Department who, they learned, had been spending as few as eight hours per week working for the Authority with the balance of their time being devoted to the pursuit of their private law practices during the regular work day. This had resulted in the Legal Department's attorneys being often unavailable to the Directors when needed. [R-26, pp. 23-25; 4 Tr 73; 5 Tr 23-28, 30, 31, 60, 61].

14/ See Finding of Fact No. 8, supra.

Bell next issued a memorandum to Nardachone on November 1, 1989, which required all in-house attorneys to complete a daily "sign in-sign out" log. In order to enforce this policy, Nardachone was required to submit a memorandum certifying that in-house attorneys had worked 37-1/2 hours for the Authority each week. [CP-4; R-40; 4 Tr 73, 74, 76, 77; 5 Tr 62, 80; 9 Tr 23, 24].

18. The certifications thereafter submitted by Nardachone failed to improve the attendance of the Authority's in-house legal staff since the attorneys often failed to sign in and out properly and Nardachone was not always present to certify whether or not the attorneys had actually worked the required 7-1/2 hours per day. In practice, the attorneys merely stated to Nardachone that they had worked the required hours or he routinely compiled the logs and submitted them to Bell. [5 Tr 67-73, 81; 6 Tr 130, 131; 7 Tr 59, 60; 9 Tr 73, 74].

19. In May 1990, the Legal Department staff attendance problem had still not been corrected to the satisfaction of Blue and Bell. Bell claimed that, in many instances, he knew of in-house attorneys who were, in fact, not signing in and out. This was based upon his staff having personally monitored the attendance of the Authority's legal staff. To deal with this continuing problem, another step was taken by the Board on May 17, 1990, when it adopted Resolution No. 90-5-13. This Resolution provided, inter alia, that "...the attorneys assigned to the Legal Department become full-time..." and that all attorneys, including the General Counsel,

will execute their duties and responsibilities on a full-time basis, namely, 37-1/2 hours per week, Monday through Friday, 8:30 a.m. to 5:00 p.m. While this Resolution did not prohibit outside "legal practices," it restricted attorneys "...from conducting non-Authority business during regular work hours..." (CP-5, ¶6). Finally, the Resolution granted the in-house attorneys 60 days within which to comply. [CP-5; 4 Tr 77-79; 6 Tr 86, 87].

20. Shortly after the Board adopted its Resolution of May 17, 1990, Blue sent Nardachone a memorandum on May 23, 1990, which required attorneys in the Legal Department to punch time cards as of May 28th.[15/] This was consistent with discussions within the administration regarding its intent to move toward a Legal Department composed of full-time attorneys. Thereafter, the mandatory punching of time cards in the Legal Department was monitored by Bell and his staff. [1 Tr 45-50, 87-89; 4 Tr 79, 80; 5 Tr 117-119; 7 Tr 39, 40; R-32].

Findings As To Spearman's Job Performance

21. During the course of her employment in the Legal Department, Spearman received two written evaluations from Nardachone, the first on December 28, 1988, for the period June 1 through December 31, 1988 [CP-1] and the second on December 19, 1989, for the period January 1989 through December 1989 [CP-2]. The following nine categories were rated: Job Knowledge, Quality of

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15/ Spearman's pattern of attendance in and after May 17th is dealt with in Finding of Fact No. 27, infra.

Work, Work Output, Judgment, Communication, Attendance and Punctuality, Initiative, Willingness and Cooperation. Pairs of like evaluations covering the identical evaluation periods were introduced into evidence by the Authority for three of the other in-house attorneys, namely, Barone, Atwell and Armour. These evaluations are bracketed respectively as follows [R-45 & R-46]; [R-49 & R-50]; and [R-47 & R-48]. All of these evaluations were done by Nardachone as the supervisor of the Legal Department.[16/]

22. A comparison of the respective evaluations of Spearman, Barone, Atwell and Armour during the period June 1, 1988 through December 31, 1988 [CP-1, R-45, R-49 & R-47] discloses that the ratings were almost identical, each having received a "4" [on a scale of "1" to "5"] on all nine categories except that Atwell, a Senior Associate Counsel, was given a rating of "3" in the two categories of Job Knowledge and Work Output (see R-49).

23. For the second evaluation period January 1989 through December 1989, the ratings took a lower turn. For example, six of Spearman's nine evaluation categories dropped from a "4" to a "3" (see CP-2). Significantly, Barone's 1989 ratings dropped from a "4" to a "3" in three of the nine categories as did Spearman's. In her 1988 evaluation, Barone had received a "4" in each of the nine rating categories. [Compare R-46 to R-45]. Also, similar to

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16/ The Authority also introduced the evaluation of General Counsel Nardachone for the period January 2, 1989 through December 31, 1989, which is deemed irrelevant (R-51).

Spearman, Atwell's ratings dropped further in his 1989 evaluation. Atwell received a "3" instead of a "4" in six of the nine rating categories in like manner to the 1989 ratings of Spearman, supra. The only differentiation to be made between the respective rated performances of Spearman and Atwell was that Atwell did increase by one rating number in the category of Job Knowledge (compare R-50 with R-49). Armour alone was essentially untouched in the evaluations that he received for the period June 1, 1988 to December 31, 1988 and the year 1989. Armour "dropped" from a rating of a "4" to a "3" in the single category of Cooperation (compare R-48 with R-47).[17/]

24. Nardachone impressed the Hearing Examiner as forthright and truthful.[18/] In explaining the basis for his having reduced the evaluation ratings for all of the in-house attorneys in 1989, including Spearman, Nardachone testified credibly that "...there was a teaching seminar by the Personnel Department and they were concerned that all of the employees' evaluations throughout the agency were extremely high and they wanted you to be

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17/ The reasons given by Nardachone for having had to rank Spearman lower in her 1989 evaluation apply equally to his 1989 evaluations, of Barone and Atwell, but not Armour; see Findings of Fact Nos. 23 & 24, infra.

18/ This is so, notwithstanding that Nardachone displayed some unhappiness with the circumstances under which he resigned from the Authority in July 1990. The Hearing Examiner is persuaded that the circumstances surrounding his resignation in no way detracted from his candor or truthfulness of his testimony in this proceeding.

a little tougher this time going around..." (9 Tr 66). Nardachone also testified that Bell, in the course of doing Nardachone's evaluation, had commented that he, Nardachone, should be "tougher" on the in-house attorneys (9 Tr 67). Thus, did Nardachone downgrade the 1989 evaluations of the four attorneys under his supervision because of pressure from Bell and the Personnel Department (9 Tr 49, 53, 54, 57, 66-68).

25. Nardachone also testified credibly that, in his opinion, Spearman performed her job satisfactorily and that he had received no more complaints from Bell about her than he had received as to any of the other in-house attorneys under his supervision (9 Tr 26-28, 50-53, 68). Nardachone acknowledged that he placed a comment on Spearman's 1989 evaluation that she must "...establish relationships with other departments (sic) personnel..." (see 9 Tr 26, 27, 29, 30, 50; CP-2). In Nardachone's second comment on CP-2, he stated that Spearman "Must learn Agency procedures," meaning that she must no longer communicate directly with members of the Board (9 Tr 57, 58). However, Nardachone did not qualify his testimony that Spearman performed her job satisfactorily (9 Tr 68). Nardachone testified further that Bell had complained to him about the unavailability of Spearman. However, the Hearing Examiner credits Nardachone, who insisted that her problem in this area was no different than that of the other in-house attorneys, including

himself (9 Tr 52, 53).[19/] Nardachone explicitly testified that Bell "...seemed to be preoccupied with Miss Spearman because...she would speak her mind and give a legal opinion whether or not it was contrary to what the administration wanted..." (9 Tr 52). According to Nardachone, an instance in which Bell appeared to have been "preoccupied with Miss Spearman" occurred when he referred to Currey-Williams having asked Spearman for some information (possibly a written document), which resulted in Spearman "...accusing somebody else of not doing something..." in a louder than normal voice. [5 Tr 135, 136].

26. Following receipt of her 1989 evaluation, supra, Spearman sent a memorandum of response to Nardachone on January 4, 1990 (CP-3). In this memorandum, Spearman objected to certain instances where Bell had told Nardachone to include items in her 1989 evaluation and to lower Spearman's score (1 Tr 156-158; 9 Tr 54, 55). A search of the record fails to indicate that Bell denied that he had engaged in the conduct testified to above by Spearman and acknowledged by Nardachone. Thus, the testimony of Spearman and Nardachone on this issue is credited. [See also, Spearman's testimony as to her evaluations and her apprehension that these evaluations might lead to subsequent disciplinary action: 1 Tr 71-76, 149-158, 163; 4 Tr 116, 117; 6 Tr 136-138].

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19/ The Hearing Examiner does not credit Bell's testimony that he received more complaints about Spearman than he did about the other in-house attorneys, for two reasons: (1) Bell's testimony lacks specificity and, (2) the Hearing Examiner has previously credited Nardachone on this subject matter (see Bell: 10 Tr 43, 44).

27. Bell's testimony regarding Spearman's attendance in and around and after the Board's May 17, 1990 Resolution, supra, clearly indicates that Spearman had become the subject of "surveillance" by Bell and his staff.[20/] Although Bell could not identify by name any of the "other staff members" engaged in the surveillance of Spearman, he stated that Executive Director Blue was one from whom "...he had received a complaint that certain people were not coming to work...and...at times it was Miss Spearman..." (7 Tr 39, 40). Bell testified that compared to other attorneys in the Legal Department, Spearman's attendance "...was generally more problematic..." After the May 1990 Resolution, attendance problems did not continue with the other attorneys. (7 Tr 41). However, Nardachone had to issue a brief memorandum to Spearman on July 9, 1990, which stated that: "Effective immediately you are to punch your time card when you arrive, depart for lunch, return from lunch and leave for the day." (R-31; 1 Tr 165-167). In the face of the direct language of this memo from Nardachone, the Hearing Examiner cannot credit the testimony of Spearman that it was, after issuance, "...since revoked..." and, further, that after the attorneys met several days later they determined that "...it's crazy to punch in and out for lunch, we'll sign in and out for lunch, etc...." (1 Tr 167, 168).

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20/ "Surveillance" is the Authority's characterization of this situation in its Main Brief at p. 10, ¶13.

28. Although the evidence adduced by the Authority with respect to Spearman's performance as an attorney in the Legal Department bordered on overkill, and was often vague as to the time frame in which Spearman's alleged derelictions in performance occurred, the Hearing Examiner finds as a fact that the testimonies of the several Directors and/or or employees within the Authority's administration must be credited on the issue of Spearman's deficiencies in performance as a professional within the Legal Department.[21/] For example, the record discloses that certain Directors and other administrators complained to Bell regarding Spearman's unavailability, her failure to complete assignments in a timely fashion and to assess properly the legal issues, and that this was coupled with an uncooperative and belligerent attitude: Donald D. Baker, Director of Finance (1 Tr 50, 51); Gloria Currey-Williams, Assistant Chief of Administrative Services (4 Tr 10-13, 19, 22, 24); Karimu Harvey, Associate Counsel/Redevelopment Department (7 Tr 112-115, 118, 123, 124, 126, 127, 130-132); Dalton E. Barrett, Chief of Tenant Selection (8 Tr 4-6, 8); Denise Coleman, Director of Housing Management (8 Tr 57-59, 62-67, 69, 75-79). Bell himself received numerous complaints regarding Spearman from the Authority's various Directors[22/] and others, including Harvey,

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21/ See Authority's Main Brief ¶'s 8, 15-17 and 19 at pp. 7, 8, 11-14, 17.

22/ Bell also testified that he had received complaints about the availability of Barone (5 Tr 30).

Joseph Bianco, Salvatore Dispenziere, George Chranewycz and Raymond Spinelli (5 Tr 31-34, 36, 38, 42, 43, 45-50).[23/]

29. Bell disclosed that when he was Director of Housing, immediately before becoming Assistant Executive Director in January 1989, he was aware of complaints regarding the in-house attorneys in the Legal Department. However, when he was asked on cross-examination if he could be "specific" regarding any complaints about which he had become aware, including the non-availability of attorneys, he was unable to respond. Nor did Bell mention Spearman or any other attorneys in the Legal Department by name. [5 Tr 24-29].

30. Bell's continuing complaints about Spearman also included one, based upon information from an unnamed staff member, that Spearman was supposed to be in court at a time on a case other than for the Authority. While Bell's reaction was that Spearman had not acted "flagrantly," he did not condone it. [5 Tr 91, 92; R-34]. Bell also expressed his conclusions that Spearman's work lacked preparation and that her lateness in submitting assignments held up the work of certain of the Directors (7 Tr 41, 42, 45). Bell also testified regarding the shortcomings of Spearman in the readiness or timeliness of her reports to the Directors, her

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23/ It is noted that Spearman testified that most of the Authority's Directors spoke in positive terms regarding her performance as an attorney and that they never expressed any dissatisfaction (1 Tr 76, 77, 136, 141, 146, 148, 206; 2 Tr 126).

disputes with members of other Departments, and, finally, adding that Spearman's work when completed lacked the completeness that he would have expected from a Senior Associate Counsel (6 Tr 125-128).

Findings As To Spearman's Protected Activities And The Authority's Knowledge Thereof

31. Beginning in March 1990, four of the in-house attorneys in the Legal Department, namely, Spearman, Barone, Atwell and Mena, became concerned about such matters as being required to sign in and sign out and, possibly, losing their past permission to engage in private practice (1 Tr 91; 2 Tr 23, 24, 158; 3 Tr 58). These concerns had been prompted by the efforts of Blue and Bell as early as March 1990 to have the Board enact a resolution imposing such restrictions (2 Tr 24, 25).[24/] Beginning in March or April 1990, Spearman et al sought a lawyer to provide assistance. The lawyer that they first contacted advised them "...that we should start getting unionized..." (1 Tr 92).[25/] The four attorneys next arranged to meet with Local 65. However, Local 65 refused to accept them because "...it was only four of us..." [1 Tr 92; 2 Tr 32-36]. In June 1990, Spearman contacted the CWA prior to going on vacation

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24/ A resolution dealing adversely with these concerns of the in-house attorneys was adopted by the Board on May 17, 1990 (CP-5, supra).

25/ Spearman and the other Legal Department attorneys ultimately met with three "outside" attorneys during March and April of 1990 who told them of Local 65 in New York (2 Tr 25-27, 29-31, 178-181).

in July (2 Tr 41-44). Spearman returned from vacation on July 18th and on July 23rd she fell down the stairs at work and did not return until August 20, 1990 (1 Tr 97-100; 2 Tr 42, 43). While Spearman was disabled, a CWA representative met with the other three in-house attorneys, each of whom signed an authorization card for CWA (2 Tr 44, 45). The attorneys immediately informed Spearman by telephone that they had "...Great news, we have a union..." and that she would have to sign a card. The CWA representative went directly to Spearman's house where she signed an authorization card. [2 Tr 44, 45 (see also, 1 Tr 93; 2 Tr 158, 159, 175, 176)].

32. Spearman testified credibly that in and around the time of the adoption of the May 17, 1990 Resolution by the Board, she stated to Commissioner Anthony Carrino "...With all of these new policies regarding time clocks..." the Board was changing the "...conditions of our employment..." and that "...the only hope for us is a union..." [2 Tr 51-54]. Spearman also testified without contradiction that she had spoken to another Commissioner, Anthony Ammiano, sometime between April and June 1990, and when Spearman stated to him that "...we were trying very hard to get a union..." Ammiano stated that he wished her well (2 Tr 54, 55). Carrino stated that he and Ammiano were aware that the attorneys in the Legal Department were seeking to organize and that once or twice he asked Spearman how things were "...going in regards to...getting representation..." (3 Tr 43, 44).

33. In the same time frame above, Spearman spoke with Director William Sirchio about "...going to get a union...," to which Sirchio made no response (2 Tr 65, 66). Spearman next informed Coleman that the Legal Department was seeking a union because they were displeased with "...what was going on with this time clock business..." (2 Tr 66). Coleman made no response. Spearman stated that she had spoken to Coleman and to Sirchio as friends in the hope that "...somebody would come up with a union...(or) be able to tell us something..." (2 Tr 67, 68).[26/]

34. Baker became aware that the attorneys in the Legal Department were seeking union representation from "discussions" with legal staff members and sometimes from other staff members. Baker stated that he heard management representatives discussing the "attorneys' organizing drive" and that at a meeting some concern was expressed about the legal staff organizing and "...they did not want another union...". This concern was expressed by either Blue or Bell, who stated "...that they would get a new Legal Department..." [1 Tr 17-19].

35. It is uncontradicted that at some point Spearman told Nardachone that the in-house attorneys were going to "...get involved in a Union..." and that Nardachone stated to her that she should "...forget about the Union, all of this is going to blow over

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26/ Spearman also testified equivocally that she had spoken to Thomas Carmichael, the Authority's Personnel Officer, about her union activity (2 Tr 129, 130).

anyway..." This statement was made by Nardachone in April or May 1990. [1 Tr 96; 2 Tr 60]. Nardachone himself testified that at a staff meeting of his attorneys reference was made to their attempting to form a union and that "...it might have been Sharon" who made the comment (9 Tr 44).

36. Spearman and Mena testified that prior to the commencement of a meeting of the Board of Commissioners in May 1990, the date that the Resolution (CP-5) was adopted, Bell, who was immediately behind Spearman, overheard her speaking out for the union. She drew this conclusion from Bell's facial expression, which she had personally observed. [2 Tr 149-152].[27/] This incident was corroborated by Mena and Jessie Jacobs, the President of OPEIU Local 32, one of the units recognized by the Authority (2 Tr 184-186; 3 Tr 26, 27, 32, 33, 65-67).

37. Wendell Wilson, the Chief of Labor Relations, flatly denied that he indicated to Spearman or Atwell that he had any knowledge of union activities among the attorneys in the Legal Department, notwithstanding statements by Spearman and Atwell to the contrary, supra (7 Tr 85-90). Atwell testified to a conversation with Wilson regarding union organization within the Legal Department on an occasion when Wilson came into Atwell's office on a

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27/ Bell's insistence that he had no knowledge of Spearman's having played any role in union organization within the Legal Department is not credited, based upon his overall knowledge of unionization in these Findings and his demeanor on this issue (4 Tr 115, 116).

work-related matter. According to Atwell, Wilson "...abruptly requested or asked me whose idea it was to bring the union in...," following which Wilson immediately asked whether it was "Sharon." Atwell replied that it was "...inappropriate for us to even discuss it..." (3 Tr 59, 60). Although Atwell was somewhat confused as to whether his conversation with Wilson was before or after the hiring of Grady McMillon,[28/] the Hearing Examiner finds as a fact, based upon the overall testimony and demeanor of Atwell, that his conversation with Wilson was prior to McMillon's hire and is credited (3 Tr 59, 68, 69, 72; 6 Tr 86).[29/]

38. Nardachone testified credibly that sometime in April or May 1990, he had a discussion with Bell in Bell's office, during which Bell indicated that "...they were aware of an attempt by various members of the Legal Department to try and unionize and that the administration would not look kindly on that..." (9 Tr 45, 55-57)(Emphasis supplied). The Hearing Examiner has no doubt but that Bell's reference to "they" referred to himself and Blue and he so finds. At the hearing, Bell's only response was that he did not "...recall ever having that conversation..." with Nardachone, adding, however, that it might have occurred "...after the petition..." (10 Tr 45, 59, 60)(Emphasis supplied). Bell's denial

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28/ McMillon was hired and started as a Senior Associate Counsel in the Legal Department on August 13, 1990 (6 Tr 86, 91).

29/ When asked at the hearing who was the most outspoken for the union, Atwell replied that "...Sharon was very vocal about it..." (3 Tr 65).

that he had any knowledge of the organizing activities among the in-house attorneys prior to receipt of the CWA petition, which was posted by the Authority on August 15, 1990, is not credited (see 5 Tr 146, 147; 6 Tr 138).

Findings As To The Authority's Hostility Or Animus To Unionization

39. The Hearing Examiner infers that Blue, as well as Bell, knew of the efforts of the attorneys in the Legal Department to unionize, at least by the date of the Executive Session of the Board of Commissioners on July 19, 1990, where both men were present (R-41; 8 Tr 85-87). The proceedings of this session were tape recorded and Blue spoke at length on the personnel situation in the Legal Department. His statements included, in part, "...there are people in the Law Department who cannot do the work. I don't have the confidence in them...I could wipe out everybody...except Frank (Armour)...We're getting ready to terminate another lawyer soon for non-productivity (Spearman), we demoted one (Atwell)...We've got another one we're going to get rid of (Spearman)..." [Partial transcript, R-41 (Emphasis supplied); 8 Tr 87; see also, 1 Tr 47, 48] An additional basis for discrediting Blue's claim that he lacked knowledge of union activities by the in-house attorneys generally may also be inferred from the testimony of Bell, who stated, in the context of the July 19th Executive Session, that "...the attempted unionization..." of the Legal Department employees, when added to the administration's task of trying to get

the attorneys "...to work full time...was just very frustrating to him (Blue) as Executive Director..." (7 Tr 71). Bell also added that Blue, as Executive Director, "...did not have confidence with a unionization on his hand where he could talk to any and everybody..." (7 Tr 71). Thus, the Hearing Examiner cannot credit either Blue's or Bell's testimony that each only learned of the union in mid-August from McMillon (8 Tr 88, 89).

40. Baker testified without contradiction that he attended an administration meeting where the organization of the Authority's legal staff was discussed and that those present "...did not want another union..." (1 Tr 18). Baker added that either Blue or Bell were among those who expressed this concern (1 Tr 19). Baker stated that he heard it said that "...they would get a new Legal Department..." (1 Tr 19). Although Baker acknowledged that the above meeting took place after the petition was posted (August 15, 1990) [1 Tr 23], he later testified credibly that at the time of the May 1990 resolution on the legal Department attorneys, he was privy to discussions, as follows: "...that they were considering getting a new Department...(and) new attorneys...There was some concern about wiping out the Department..." [1 Tr 47, 48].

41. Mena, who impressed the Hearing Examiner as a truthful and candid witness, testified that in August 1990 (probably after the CWA's petition was posted on August 15th), Bell called him into his office and raised the subject of "the union," stating that "...Dr. Blue intended to -- or would fire anyone who was involved in

the union..." (2 Tr 157, 158). Mena stated that Bell told him that Blue would fire the attorneys involved in the union, which he took to mean the entire department since no specific names were mentioned to (2 Tr 167, 168, 173, 174). Bell testified that after the date that the "...petition came in...,"[30/] he called Mena into his office since he was one of the more recent hires who he wanted to reassure that the Authority was not planning "...a witch hunt or something like that..." Bell also stated that he wanted to assure Mena that he had no ulterior motive. [4 Tr 113, 114]. However, Bell acknowledged that Mena might have construed that he, Bell, had said that all of the attorneys in the Legal Department were going to be terminated (4 Tr 114, 115). [See also, additional citations on Mena's and Bell's meeting - 5 Tr 147-153; 7 Tr 4, 5, 65-69].

Findings As To The Authority's Decision
To Terminate Spearman And Its Timing

42. Bell stated that it was his decision to terminate Spearman and that this decision was made by him early in 1990 (4 Tr 80-82).[31/]. However, Bell first had to discuss this decision with Blue, and he did so at the end of June or early in July (8 Tr 85, 86). Blue then authorized Bell to move ahead (8 Tr 90-94).

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30/ At all times during the hearing, Bell claimed that his first knowledge that the attorneys were seeking a union was when the CWA petition was received in the Personnel Office and Carmichael called him and told him of this fact (4 Tr 113).

31/ For the details of Bell's decisional process see Findings of Fact Nos. 44 & 45, infra.

43. Bell explained in detail the workings of the Personnel Committee, which was established by the Board of Commissioners to review personnel matters for the Board. The Department of Personnel prepares monthly "Personnel Reports," which the Board receives about a week before its meeting. [7 Tr 6-10].[32/] The Board of Commissioners is not informed of terminations in advance (8 Tr 97). Also, Blue does not need Board approval to effect a termination (8 Tr 85). However, in connection with Spearman's termination, Blue spoke with some of the Commissioners. The Board, in Executive Session, acted without discussion on the basis of the appearance of Spearman's name on the "Personnel Report" of September 1990, which "...was passed as is..." (R-42; 5 Tr 83-87; 7 Tr 11-13; 8 Tr 99, 101).[33/]

44. Bell's reasons for terminating Spearman centered upon her attendance; the timeliness of her reports and their quality; the fact that Bell's office was being "...bombarded with complaints..."

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32/ Spearman's termination appeared on the "Personnel Report" for the September 1990 meeting of the Board (R-42; 7 Tr 7).

33/ At an earlier stage of the instant hearing, Bell's description of the Board's role in terminations generally, was quite different, i.e., the Board was that of an actual participant. Thus, Bell stated that after Blue meets with the Commissioners they ask for any needed information "...before an action of this nature takes place..." (4 Tr 81)(Emphasis supplied). After a period of time for discussion, "...insuring everybody that...there were enough reasons so that we could carry out an action of this type..," Bell decides when the termination is to occur. (Emphasis supplied). [4 Tr 80-82].

about "...trivial matters..." and Spearman's "attitude,"[34/] which should not be occurring among professionals (4 Tr 82).

45. Bell backed up his decision to terminate Spearman with information received from the various Directors and others on the Authority's administrative staff, including consultations from time to time with General Counsel Nardachone, Spearman's supervisor (4 Tr 83-87). Asked when the decision to terminate Spearman became final, Bell responded "...That (it) was in June right after the resolution had gone through..." (4 Tr 87, 88).[35/] Bell added that Spearman's termination presented "...a very sensitive situation that we didn't want it spread all over the agency in a manner that we considered was less than prudent...until we were sure of what day she was going to actually be terminated..." (4 Tr 91). Not even Nardachone was told of the decision of the Authority to terminate Spearman (4 Tr 90; 9 Tr 36).

46. At or around the time of Spearman's intended termination in June, Bell stated that other decisions were also being made regarding personnel in the Legal Department, and, particularly, that Blue and Bell were seeking Nardachone's resignation on the ground that he did not "...put in the time necessary to run the Department from a supervisory perspective on a

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34/ Bell reiterated that when he made his decision to terminate Spearman he had no knowledge that the in-house attorneys were seeking a union (4 Tr 112, 113).

35/ This reference was, obviously, to the May 15, 1990 Commissioner's meeting.

daily basis..." (4 Tr 88). On July 16, 1990, Blue and Bell informed Armour that Spearman was to be terminated and that Nardachone had resigned that morning (8 Tr 48). Also, Blue and Bell had decided to demote Atwell at the same time that Spearman was being terminated (4 Tr 88, 89). However, the earlier hope of Blue and Bell to execute all three of these personnel actions on the same day was frustrated by their having learned, belatedly, that Spearman had gone on vacation at the beginning of July 1990. Spearman returned on July 18th. Only Nardachone's resignation and the Atwell demotion were effected simultaneously on July 16th. [1 Tr 210; 2 Tr 122; 3 Tr 58; 4 Tr 90-92].

47. On July 23, 1990, Bell telephoned Thomas Carmichael, the Personnel Officer,[36/] and directed him to prepare a termination letter since, he, Bell, had decided to terminate Spearman that day (4 Tr 36, 37, 93).[37/] Spearman was instructed by Carmichael to report to his office at 4:00 p.m. that day (1 Tr 211, 212; 4 Tr 36, 37). Prior to the appointed time, Carmichael received two telephone calls, one from Spearman and one from a Newark Councilman, Ralph Grant (4 Tr 37, 38). In Spearman's call,

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36/ Carmichael testified that the date was July 20, 1990, which was clearly in error since his overall testimony discloses that the telephone call from Bell was on the same date that Spearman fell down the stairs at work, i.e., July 23rd (see 4 Tr 36, 37, 39 and 1 Tr 97, 98).

37/ Bell explained that his reason for using Carmichael in effecting the termination was that he had decided "...to keep it as far away from the executive office as possible..." (4 Tr 94, 95).

she had asked Carmichael if he was going to terminate her, to which he replied "no," adding that he still wanted to speak to her that afternoon (4 Tr 38). In Grant's call, he had stated to Carmichael that Spearman was one of his favorite people and that he had an interest in anything that might happen to her. Carmichael refused to discuss the matter with him. [4 Tr 38; 1 Tr 216].38/ Bell subsequently heard on July 23rd that Spearman had fallen down the stairs that day and, after he talked to Blue, they thought "...it would not be an appropriate time to go through with the action..." (4 Tr 93, 94) Bell then called Carmichael and told him to hold the matter in abeyance and to return the letter (4 Tr 94). Spearman did not return to work from leave until August 20, 1990 (2 Tr 44, 73).

48. A day or two prior to August 22nd, Blue and Bell were at a press conference at the Stella Wright Homes, during which Bell advised Blue that Spearman had returned to work (4 Tr 108-110). They had earlier agreed that "...we should go ahead with the plans..." (5 Tr 140). Carmichael, who was also present at Stella Wright, was informed that day of their intention to terminate Spearman (4 Tr 109, 110). Upon arriving back at his office that

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38/ A day or two prior to July 23rd, Spearman had gone to Carmichael's office to ask whether or not she was going to be fired. In order to avoid a sensitive situation, Carmichael had prepared an "Agenda" as a "diversionary tactic" [CP-6; 4 Tr 40, 41, 49-51]. Carmichael's explanation for this action was that he had not as yet been told that Spearman was in fact to be terminated but there were "rumors" and he was merely trying to "...buy some time." [4 Tr 49-51; compare: 4 Tr 111, 112].

day, Bell, with the assistance of McMillon, prepared the termination letter and Carmichael signed it (4 Tr 110; 6 Tr 91, 92, 101).

49. On August 22, 1990, the actual date of Spearman's termination, Carmichael was called to Bell's office and was told that the "action" (termination) was "...to be taken then and taken swiftly..." Bell did not disclose to Carmichael why swift action was necessary, stating only that it was "...going to happen today." [4 Tr 53, 54]. Carmichael, Bell and McMillon then proceeded to Spearman's office and handed her the termination letter, the first paragraph of which stated , in part:

> We regret...that upon receipt of this letter your services...will be terminated. After careful evalution, the Authority has determined to reorganize and restructure the Legal Department... (Emphasis supplied).
>
> [CP-7; 1 Tr 108, 109; 4 Tr 36, 53, 111; 6 Tr 93].

When Spearman asked why she was being terminated Bell said "...we're restructuring..." and that it was "...all there...," referring to the termination letter (1 Tr 110).

## Findings As To Business Justification For Spearman's Termination

50. The Findings of Fact as to "Business Justification" for Spearman's termination have previously been made under "Findings As To Spearman's Job Performance" and need not be repeated here. Thus, Findings of Fact Nos. 18-27, supra, are incorporated herein.

## ANALYSIS

As A Senior Associate Counsel, Spearman Was Neither A "Managerial Executive" Nor A "Confidential" Employee Under The Act.

An "employee" under the Act is defined as any person holding a position or employment in the service of a public employer excluding, however, managerial executives and confidential employees N.J.S.A. 34:13A-3(d). Managerial executives are those:

> ...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...
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> N.J.S.A. 34:13A-3(f).

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Confidential employees are those:

> ...employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties...
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> N.J.S.A. 34:13A-3(g).

Before proceeding to determine the status of Spearman as an alleged "managerial executive" or "confidential" employee, the Hearing Examiner first considers the relevance of three Attorney General Opinions submitted by the Authority on February 19, 1992. CWA's response was received on February 26th.

The Authority contends that three Opinions of the Attorney General, infra, are persuasive in resolving the question of whether or not Spearman was a "managerial executive," a "confidential" employee, or both. However, the Hearing Examiner concurs with the position of CWA as to the relevance of the three Opinions.

Substantively, they address three factual situations wholly tangential to the facts presented in the case at bar. Thus, the Opinions contribute nothing to the task of resolving the issue of Spearman's alleged "managerial executive" or "confidential" employee status. This is the case, notwithstanding that the three Opinions draw liberally upon Commission precedent in these areas. These Opinions in no way bind the Commission or the Hearing Examiner on the twin issues at hand as will be apparent.[39/]

1. Opinion No. 91-0092 (September 20, 1991): This Opinion addresses the question of whether a "municipal attorney" is a "local government officer" who, if so, would be required to file an annual financial disclosure statement under the Local Government Ethics Law. Because the terms "managerial executive or confidential" appear in the definition of "local government officer" resort was had to our Act and decisions for guidance. Since the conclusion reached was that a "municipal attorney" is a "local government officer," he or she is subject to the Ethics Law.

2. Opinion No. 91-0093 (September 20, 1991): This Opinion responded to a broad request for guidance as to the types of positions which are considered "local government officers." It is, therefore, necessarily similar to but somewhat more extensive than Opinion No. 91-0092, supra. Here, again, the same terms,

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39/ The Dept. of Community Affairs, which requested the three Opinions, is in a very different position from that of the Commission since the Department initiated the request for advice to the Attorney General.

"managerial executive" and "confidential" were analyzed and a number of Commission decisions were cited and discussed. The conclusion stated only that "...a case-by-case approach is necessary in determining who is a 'managerial executive' or a 'confidential employee'..." Thus, the Attorney General has stated nothing more than what the Commission has stated in its decisions on this subject, which fails to aid the Hearing Examiner in his decisional process.

3. Opinion No. 91-0133 (November 1, 1991): This Opinion responded to the question of whether an attorney who regularly advises a Municipal Planning Board or a Zoning Board of Adjustment is a "local government officer" and, hence, subject to the Local Government Ethics Law, supra. Again, the same consideration was given to the manner in which the Commission construes the terms "managerial executive" and "confidential" employee under our Act. Thus, this approach was identical to that employed in the two prior Opinions. The conclusion was that an attorney who regularly advises a Municipal Planning Board or a Zoning Board of Adjustment is a "local government officer," who is subject to the Ethics Law.

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It is clear beyond peradventure of doubt that none of the three Opinions of the Attorney General above has even the remotest bearing upon determining Spearman's status as a Senior Associate Counsel. The closest argument that might be made for Spearman's being subject to one of the three above Opinions is No. 91-0092

where a "municipal attorney" was deemed to be a "local government officer." However, Spearman is not a "municipal attorney" as defined and discussed in this Opinion.

First, the term of appointment for a "municipal attorney" is one year under the statute and Spearman was never hired on this basis nor was anyone else in the Authority's Legal Department. Second, the position of "municipal attorney" is deemed an "office," which has been defined as involving the continuous exercise of a portion of governmental power or authority with the exercise of broad responsibilities to provide legal advice to the governing body, etc. Spearman plainly fails to meet this requisite.

Further, Spearman having been neither an attorney for a Municipal Planning Board or Zoning Board of Adjustment, her status is in no way governed by any of the three above Opinions of the Attorney General. The Hearing Examiner can place no reliance upon the Opinions since to do so would constitute a circular exercise. Thus, while the Attorney General has considered Commission precedent on the issues before him, the Commission and the Hearing Examiner are in no way bound in this proceeding by any gloss placed on Commission precedent by the Attorney General vis-a-vis who is a "managerial executive" or "confidential" employee under our Act.

I.

Managerial Executive

Taking first the question of whether or not Spearman was a "managerial executive," the Hearing Examiner notes that the

Authority has cited five decisions which it contends support a finding that Spearman was a "managerial executive."[40/] In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission elaborated on its standards for determining whether an "employee" formulates or directs the effectuation of policy within the statutory definition. It stated that such a person "...develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives..." Further, a "managerial executive" directs "...the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors..." Finally, the "managerial executive" must "...possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purpose or its means of effectuation of these purposes..." [6 NJPER at 508, 509]. Having articulated these criteria for determining "managerial executive" status, the Commission also added that the determination should focus upon the interrelationship of three factors: "...(1) the relative position

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40/ See Authority's Main Brief, pp. 30-32. However, since the cited case of Essex County, D.R. No. 84-7, 9 NJPER 574 (¶14239 1983) involved "confidentials," and not "managerial executives," it will be considered, infra.

of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises..." (6 NJPER at 509).41/

The cited cases of Perrella v. Bd. of Ed. of Jersey City, 51 N.J. 323 (1968) and Battaglia v. Union Cty. Welfare Bd., 88 N.J. 58 (1981) add nothing of relevance to the issue at hand. The emphasis of the Court in each case was upon the trust, confidence and honesty required of a governmental attorney in the context of maintaining the integrity of the attorney-client relationship, which any appointed attorney owes to the public body that he or she represents.

In addition to Montvale, supra, the Hearing Examiner finds relevant the case of Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). There, a Lifeguard Captain was found not to be a managerial executive, notwithstanding that he prepared the beach operations budget, authorized and modified rules and regulations, created the disciplinary system, authorized changes in the workweek, added lifeguards to the payroll in emergencies, participated in management meetings, influenced the Borough's and the Mayor's policies, trained and scheduled all guards, managed the beach and, additionally, supervised the guards on a day-to-day basis. The Commission stated:

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41/ The Authority has also cited City of Newark, D.R. No. 82-18, 7 NJPER 640, 641 (¶12288 1981), which held that Deputy Chiefs in the Fire Department were "managerial executives." This case will be considered later.

> [T]he term "managerial executive" should be narrowly construed...[R]elevant National Labor Relations Board precedent...indicates that a wider range of discretion than that possessed by [the lifeguard captain] is needed. [He] 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 supervisors--eligible to be represented in appropriate units. Id. at 374. (Emphasis supplied).

More recently, in State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246 (¶22112 1991), the Commission restated the policy of the Act favoring the organization of all employees desiring representation. At the same time it was noted again that the term "managerial executive" must be narrowly construed, consistent with its decision in Borough of Avon, supra. See also, State of New Jersey v. Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231, 253 (1974). Then, after citing Montvale, the Commission observed that the Appellate Division has approved the Montvale standards: Bergen Pines Cty. Hosp., D.R. No. 83-8, 8 NJPER 535 (¶13245 1982), rev. den., P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982), aff'd App. Div. Dkt. No. A-564-82T2 (1983).

In Gloucester Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) the Commission held that a REACH Program Coordinator, who was a department head was a "managerial executive" under the Act because she reported directly to the County Administrator, participated in department head meetings, formulated proposals for submission to the Freeholders, oversaw compliance with REACH-funded contracts, developed the departmental budget and

supervised the staff, had no higher-level interference with choices of how to realize goals of the administrative unit, exercised real authority and had discretion to make and effectuate policy (15 NJPER at 625, 626). It would appear, preliminarily, that Spearman's duties and responsibilities never remotely approached the level of those of the Coordinator in Gloucester Cty.

The City of Newark decision referred to by the Authority, supra, dealt with Deputy Chiefs in the Newark Fire Department who were found to be "managerial executives" under circumstances wholly dissimilar from the facts as found as to Spearman. The fourteen Deputy Chiefs in that case performed a variety of administrative and operations functions in fire fighting within the Department. Further, they exercised total discretion in the deployment of some 748 fire fighters and had discretion to require the personnel to obtain additional training. In adopting the factual findings of the Commission's Hearing Officer, the Director in Newark observed that in Montvale and Avon, supra, neither the title "Chief of Police" nor "Lifeguard Captain," respectively, was deemed to be that of a "managerial executive." Although the Chief in Montvale performed a wide range of duties, it was the Mayor and the Commissioner who exercised practically complete control over the departmental operations. Similarly, while the Lifeguard Captain in Avon prepared the budget, authorized certain rules and regulations, changed work schedules and hired guards in emergencies he did so as a mere "supervisor" whose responsibility did not include the formulation or

effectuation of policy. Montvale and Avon are to be contrasted with the Newark Deputy Chiefs above, who exercised a high level of authority and independent judgment. [see 7 NJPER at 641].

When the Authority's factual argument that Spearman was a "managerial executive,"[42/] is examined in light of the Commission precedent cited above, the ineluctable conclusion is that Spearman was not a "managerial executive." The Authority's use of such terms as "elite," "privy" and "cadre" in an effort to elevate Spearman from her position as Senior Associate Counsel in the Legal Department to a more exalted position is unavailing and is not supported by the record. For example, it is doubtful that Spearman was "...privy to highly sensitive information..." regarding labor relations or budgetary matters. Nor does Spearman appear to have been a part of "...an elite group who act as top advisers to the highest officials on crucial matters..." with "...tremendous input into high-level policy decisions having significant financial and political impact..."[43/] The Authority also stresses the difference between the in-house attorneys in its Legal Department vis-a-vis attorneys who are employed by the National Labor Relations Board; their presence at meetings of the various Directors; [44/]

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42/ See Authority's Main Brief, pp. 30, 31, 33-41.

43/ See Authority's Main Brief, pp. 30, 31, 34 & 35.

44/ It is noted again that Spearman only attended six Director's meetings in the course of her thirty-three months of employment with the Authority.

and their attendance at on-call meetings with the Executive Director and the Assistant Executive Director.[45/]

Counsel for CWA notes, inter alia, that when Spearman was terminated she was punching a time clock, hardly an indicia of a high-level management employee. Further, Spearman had no discretion in rejecting or accepting the assignments given her by her supervisor, General Counsel Nardachone. It was Nardachone who evaluated Spearman, using basic non-supervisory criteria in generic categories (CP-1 & CP-2). Settlements by in-house attorneys of such routine matters as rent collection cases had to be approved by the Authority's General Counsel, Blue and Bell (see 8 Tr 70, 71). When Spearman was working with Commissioner Carrino on a major matter involving 42 disputed acres of land in Newark, Spearman was specifically overruled by the "hierachy of the...Authority" (3 Tr 46, 47). Would this have happened to a true "managerial executive"?

Further, the mere attendance at six Directors' meetings, on assignment by Nardachone, over the course of thirty-three months of employment would appear insufficient to satisfy the criteria set forth in Borough of Montvale where the Commission emphasized the necessity that a managerial executive is one who formulates policy, selects alternative courses of action and effectuates the policy or policies developed, all with the exercise of independent judgment.

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45/ See Authority's Main Brief, pp. 33-40.

Nothing in the instant record suggests that Spearman's mere attendance at six Directors' meetings, without proof of measurable input, satisfies the required criteria for a finding and conclusion that Spearman was, in fact, a "managerial executive" within the Authority's hierarchy. Restated, there is no competent evidence that Spearman exercised any discretion or independent judgment at the six Directors' meetings of a quantum sufficient to satisfy the criteria set forth in Montvale, supra at p. 508, 509. The record also fails to establish that either Spearman, or any of the other in-house attorneys, were ever called upon at Directors' meetings to advise the Directors or other administrators on any specific matters, which were crucial to the Authority's operation (see Authority's Main Brief, p. 34).

Finally, there is no credible evidence that Spearman had any involvement whatever in the preparation of the Authority's budget. Spearman had no supervisory authority of her own, this being vested in the General Counsel nor was she involved in the hiring process. The only conceivable discretion which Spearman exercised was that attendant to the discharge of her professional duties as an Authority attorney, which, in and of itself, falls far short of qualifying her as a "managerial executive" under Section 3(f) of the Act.

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II.

Confidential Employee

The next area of inquiry is whether or not Spearman was a "confidential" employee under Section 3(g) of the Act, supra. The parties each refer to Essex County, D.R. No. 84-7, 9 NJPER 574 (¶14239 1983), which appears to be the sole Commission precedent on attorneys as "confidential" employees. In that case the Director found that Assistant County Counsels were "confidential" employees, who must be excluded from the union's collective negotiations unit. The duties, as found, are worth enumerating in detail since the scope of those duties will intimately bear upon the determination as to whether or not Spearman was a "confidential" employee in the case at bar.

In Essex the Assistant County Counsels assigned to the Finance and Employment Section of the County's Legal Department, five in number, functioned as labor attorneys for all labor relations matters, including proceedings before our Commission, disciplinary hearings, Civil Service and arbitration proceedings. The latter required that the Counsels collect information regarding grievances, which they discussed with the Office of Labor Relations, after which they formulated a position for the County. Additionally, these Counsels drafted legal opinions concerning contract language and attended meetings to discuss the County's labor relations policies. [See 9 NJPER at 574]. The Director, in support of his decision, cited River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983) where he noted that the element of

exposure to confidential materials and the absorbing of their contents is a factor to be considered (at 181).[46/] See also, Linden Free Public Library, D.R. No. 82-32, 8 NJPER 76 (¶13031 1981).

In Old Bridge Tp. Bd. of Ed., D.R. No. 82-17, 7 NJPER 639 (¶12287 1981) a research assistant was deemed confidential where he assisted various labor-relations functions, including collective negotiations and grievance processing by evaluating the union's contract proposals and preparing the initial Board's negotiations proposals, in addition to keeping a record of the status of grievances and the preparation of information for processing grievances at the second step. Also, he had advance knowledge of the Board's maximum salary increase to unit members and had advance knowledge of the Board's position with regard to the processing of grievances.

The Hearing Examiner notes that the Commission, in adjudicating cases where "confidential" status of employees is alleged, also narrowly construes the claimed exclusion of such

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46/ In River Dell two secretaries were deemed confidential where one calculated the cost of the union's proposals, typed the memorandum concerning the budget, took notes of discussions between the Superintendent and his assistant with respect to current negotiations, maintained the files of the Superintendent, which included confidential communications with respect to negotiations, to which one secretary and the assistant superintendent had access. The second secretary took notes and dictation with respect to the negotiations progress reports, typed correspondence for the Superintendent to the Board's attorney with respect to grievance responses and inserted and removed material re: the general and negotiations files.

individuals from their right to be deemed an "employee" within a collective negotiations unit. The policy of the Act favors the organization of all employees desiring representation: see State v. Prof. Assn. etc. and Avon, supra. Thus, in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985) the Commission stated that it scrutinizes the facts of each case to:

> ...find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit...(11 NJPER at 510).47/

In Brookdale Comm. College, D.R. No. 78-10, 4 NJPER 32 (¶4018 1977), the job title of chief accountant was deemed confidential since he was found to have performed functions used to determine costs for a labor budget and negotiations, including the act of preparing, revising and finalizing the budget coupled with being the principal source of information regarding wage and budget proposals during negotiations.48/

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47/ The Commission there cited with approval Parsippany-Troy Hills Bd. of Ed., D.R. No. 80-35, 6 NJPER 276 (¶11131 1980); River Dell Reg. Bd. of Ed., supra; City of East Orange, P.E.R.C. No. 84-101, 10 NJPER 175 (¶15086 1984); Tp. of Mt. Olive, P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985); and Wayne Tp. v. AFSCME, etc., P.E.R.C. No. 87-82, 13 NJPER 77 (¶18035 1987), rev'd 220 N.J. Super. 340, 344-346 (App. Div. 1987).

48/ Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86T7 (1988); Cliffside

Footnote Continued on Next Page

In Tp. of Mine Hill, D.R. No. 91-33, 17 NJPER 315 (¶22139 1991), the municipal clerk was deemed a "confidential" because she was required to attend and prepare the minutes of council meetings, including closed meetings, where labor relations matters were discussed, and she was generally privy to confidential labor relations discussions by the township officials and managers. It was noted that the key to confidential status was the employee's access and knowledge to materials used in labor relations processes, including contract negotiations and administration, grievance handling and the preparation for these processes. Additionally, a confidential finding always requires an examination of the employee's knowledge of information which could compromise the employer's position in the collective negotiations process (17 NJPER at 316).

Finally, the Commission, in pursuing its policy of narrowly construing the "confidential" employee exclusion, will not exclude an employee as a "confidential" if the record is based upon "speculation or conjecture" as to an employee's job function: Commercial Tp., supra (16 NJPER at 512).

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48/ Footnote Continued From Previous Page

Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988); State of New Jersey v. Council of N.J. State College Locals, etc., P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd Dkt. No. A-1445-89T1 (App. Div. 1991) and Commercial Tp., D.R. No. 91-9, 16 NJPER 511, 512 (¶21223 1990).

Counsel for the Authority stated at the June 28th hearing that whether Spearman herself "...had hands-on labor relations activities..." during her employment was not dispositive of the "confidential" issue since she would still be deemed a confidential "...by virtue of being an in-house attorney, one of five in the agency..." (6 Tr 113). However, under this theory the Authority has effectively avoided the necessity of establishing that Spearman was in fact a "confidential" employee as defined in Section 3(g) of the Act. How can the above theory of the Authority be squared with the requisites of Section 3(g), which states that a "confidential" employee is one whose "...functional responsibilities or knowledge..." are so connected with the "...issues involved in the collective negotiations process..." that membership in a negotiating unit would be incompatible with the employee's official duties? Obviously, the two are irreconcilable.

Prior to January 1989, the Authority had used "outside" counsel for the purpose of handling its personnel and labor negotiations. This continued on a reduced basis after January 1989 but was discontinued entirely by the latter part of 1990. [R-1; R-26, pp. 17-19, 21-23, 27-32; 6 Tr 8, 9, 12; 9 Tr 42, 43]. A Personnel Committee had been formed by one of the Commissioners in 1989, during a period when the Authority had lessened the work of its in-house attorneys in the personnel area (6 Tr 10; 7 Tr 6, 7). The Personnel Committee discusses, in depth, potential personnel changes, major policy revisions or such matters as attendance, punching in and out, the wearing of uniforms, etc. (7 Tr 6, 7).

The Authority conducts its collective negotiations through a Negotiations Committee[49/] comprised of its administrative staff and, possibly, the Personnel Committee (1 Tr 43, 55). According to Nardachone, none of the in-house attorneys, except Atwell, was ever assigned to, or involved in, personnel matters or negotiations (9 Tr 43, 44; see also, 7 Tr 85).

Spearman's areas of practice on behalf of the Authority, supra, covered the preparation of legal opinions, the review of contracts, landlord and tenant matters, and building and housing code violations (1 Tr 62, 63). Spearman testified without contradiction that she was never a member of the Personnel or Negotiations Committees nor did she ever represent the Authority in labor matters before "PERC" or participate in disciplinary hearings, Civil Service proceedings or arbitrations. Further, Spearman never drafted a legal opinion regarding a collective bargaining agreement, nor was she ever consulted about personnel actions or the administration of labor agreements. [1 Tr 117-119].[50/] Wilson, the Chief of Labor Relations, denied that he ever interacted directly with Spearman in the area of labor relations but he acknowledged that he had done so with Atwell (7 Tr 84, 85).

The record, including the minutes of the above six Directors' meetings where Spearman was present, discloses that while

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49/ Baker was a member of this Committee (1 Tr 44, 55).

50/ Since Bell had no direct knowledge of any of these matters, he could neither affirm nor contradict her testimony (6 Tr 9-11).

personnel and labor-related matters may have been discussed, the subject matter was more were often "status reports of negotiations" rather than "confidential discussions" [see R-2; and Baker, 1 Tr 32, 33]. When Spearman was asked whether she had ever heard discussions at Directors' meetings regarding collective negotiations with the Authority's various bargaining units, she credibly replied: "No, I did not." The details of collective negotiations were never explored. The Directors' meetings were "...not of a confidential nature..." because all in attendance were expected to report back to fellow staff members. [1 Tr 115, 116].

The record regarding Spearman's status as an alleged "confidential" employee persuades the Hearing Examiner that she never had any real involvement in the Authority's collective negotiations process. Her participation in six Directors' meetings, was de minimis during her thirty-three months of employment with the Authority as a Senior Associate Counsel in the Legal Department. A brief review of several of the Commission decisions discussed earlier is warranted at this point.

First, there can be no doubt but that the factual situation in Essex County is totally dissimilar to the Spearman situation. There the five Assistant County Counsels were hip deep in functional responsibilities or knowledge regarding issues involving the County's collective negotiations process. The details of their duties need not be restated again (see p. 48, supra). They actively gathered information relating to the collective negotiations process

and, after discussing it with the Office of Labor Relations, the Counsels formulated the County's position.

In River Dell, the Director noted that exposure to and absorption of the content of confidential materials were factors to be considered in deciding the question of "confidential" status. Spearman's exposure to and absorption of confidential materials within the meaning of River Dell is negligible, at best.

To conclude other than that Spearman fails to qualify as a "confidential" employee under Section 3(g) of the Act would be to run afoul of two of the Commission's policies: the exclusion of an employee as a "confidential" is to be "narrowly" construed; and no such exclusion may be based upon "...speculation or conjecture" as to job function. (Commercial Tp., supra, 16 NJPER at 512). It would, thus, appear that this record clearly supports the conclusion that Spearman was not a confidential employee under the Act and the Hearing Examiner has so decided.

The Authority Violated Sections 5.4(a)(1) And (3) Of The Act When It Terminated Spearman On August 22, 1990.[51/]

A. Spearman Engaged In Activities Protected By The Act And The Authority Had Knowledge Of the Exercise Of These Activities.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the Supreme Court there articulated the following

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51/ The record in this case fails to support the allegation by CWA that the Authority violated Section 5.4(a)(2) of the Act by its conduct herein. Therefore, the Hearing Examiner will recommend dismissal of this allegation.

test in assessing employer motivation: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).52/

Further, the Court stated that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence, which demonstrates that the employee engaged in protected activity, that the employer knew of this activity, and, finally, that the

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52/ See Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980); approved by the U.S. Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393, 113 LRRM 2857 (1983).

employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].[53/]

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or if its explanation has been rejected as pretextual, then there is a sufficient basis for finding a violation of the Act without more. However, where the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have occurred even in the absence of protected conduct [Id. at 242].[54/]

The Hearing Examiner has previously found in Findings of Fact Nos. 31 through 38 that Spearman engaged in extensive protected activities under the Act and, further, that the Authority had knowledge of the exercise of these activities. In recapitulating these findings, in part, recall that beginning in March 1990, the four in-house attorneys (Spearman, Barone, Atwell and Mena) became concerned about such matters as the requirement that they sign in and out and that they might possibly lose their past permission to

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53/ However, the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

54/ This affirmative defense need only be considered if the Charging Party has proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id].

engage in private practice. These concerns had their origin in the efforts of Blue and Bell at that time to have the Board enact a resolution imposing restrictions in these areas, which ultimately occurred on May 17, 1990. Thus, in or around March or April 1990, Spearman and the other attorneys sought out a lawyer to assist them. This activity continued through April 1990 when the four attorneys met with Local 65. When that failed, Spearman, in June of that year, contacted CWA. This resulted in the four attorneys signing authorization cards, which ultimately led to the filing of a petition by CWA with our Commission and the posting of a notice thereof on August 15th. [Finding of Fact No. 31].

In May 1990, at the time of the adoption of the resolution, Spearman spoke to Commissioner Carrino about the changes in their conditions of employment and that the "...only hope for us is a union..." On another occasion between April and June 1990, Spearman stated to Commissioner Ammiano that they "...were trying very hard to get a union" and he wished her well. Both Carrino and Ammiano were aware that the attorneys in the Legal Department were seeking to organize and they inquired once or twice of Spearman how things were going. [Finding of Fact No. 32].

Although neither Sirchio nor Coleman responded to Spearman's statement to each regarding "...going to get a union...," knowledge of this fact is necessarily imputed to Sirchio and Coleman as members of the administration of the Authority. The same situation obtains as to Carmichael, to whom Spearman had spoken about her union activity. [Finding of Fact No. 33].

Baker learned that the attorneys in the Legal Department were seeking representation from discussions with them and other staff members. Further, Baker heard the matter of the "attorneys' organizing drive" discussed at a meeting of management representatives where the concern was expressed that they "...did not want another union." This concern was expressed by either Blue or Bell who stated that they would "...get a new Legal Department..." [Finding of Fact No. 34].

At some point Spearman told Nardachone that the attorneys were going to get involved in a union and that he said to Spearman that she should forget about "the Union" and that it was going to "blow over anyway." Nardachone made this statement in April or May 1990. [Finding of Fact No. 35]. Spearman and Mena testified that prior to the commencement of the Board meeting in May 1990 when the resolution was adopted, Bell overheard Spearman speaking out for the union. Spearman's conclusion that this occurred derived from her personal observation of Bell's facial expression. [Finding of Fact No. 36].

Although Wilson denied any knowledge of union activities among the Legal Department attorneys, Atwell testified credibly to a conversation that he had with Wilson on an occasion when Wilson came into his office on a work-related matter. Wilson "...abruptly requested or asked me whose idea was to bring the union in...," following which Wilson immediately asked whether it was "Sharon." Atwell deflected this inquiry as "inappropriate" to discuss. This

conversation with Wilson occurred prior to McMillon's commencement of employment on August 13, 1990. Atwell had also testified that Spearman was "very vocal" about the union. [Finding of Fact No. 37].

Finally, Nardachone testified credibly that in April or May 1990, he had a discussion with Bell in Bell's office where Bell indicated that "...they were aware of an attempt by various members of the Legal Department to try to unionize and that the administration would not look kindly on that..." (Emphasis supplied). The reference to "they" clearly referred to Blue and Bell. Although Bell disclaimed recalling that such a conversation had occurred, he then added that it might have occurred "after the petition." However, Bell's denial that he had any knowledge of the attorneys' organizing activities prior to the receipt of the CWA petition, which was not posted until August 15th, is not credited given the time frame of Nardachone's credited conversation with him above, namely, that it occurred sometime in April or May 1990. [Finding of Fact No. 38].

The Hearing Examiner has absolutely no difficulty in concluding that Spearman exercised extensive protected activities. This is so whether she acted individually or on behalf of herself and the other in-house attorneys as a group. Amplifying upon Spearman's protected activities, they were of a varied nature, ranging from meeting with three "outside" attorneys in March and April 1990, regarding organization and then contacting and meeting with Local 65 and CWA. Specifically, she spoke out to two

Commissioners, Carrino and Ammiano. This certainly constitutes high-level notice to the Authority as an entity of her activities in seeking a union. Spearman also spoke out about her interest in union organization to such administrative staff as Sirchio, Coleman and Carmichael. Wilson, the Chief of Labor Relations, clearly knew of her activities as indicated by his conversation with Atwell where Wilson inquired whose idea it was to bring the union in, then adding a telling query: Was it "Sharon"? Nardachone not only was told of Spearman's interest in the union by her, but testified credibly that in April or May 1990, Bell indicated to him that he and Blue were aware of an attempt by members of the Legal Department "...to try and unionize..." and that the administration "...would not look kindly on that..."

Thus, the record in this case leaves no doubt whatsoever but that Spearman engaged in extensive protected activities beginning in March 1990. The Charging Party's proofs not only satisfy the prima facie standard but also satisfy the burden of proof by a preponderance of the evidence. Further, CWA's proofs as to the Authority's knowledge of Spearman's protected activities likewise satisfy the prima facie standard as well as that of the preponderance of the evidence.

B. The Authority Manifested Hostility Or Anti-Union Animus To Unionization.

The Authority's hostility and/or anti-union animus toward unionization by the in-house attorneys in the Legal Department was manifested principally by Blue and Bell. This conclusion finds adequate support in the record.

The facts as found in Finding of Fact No. 39 underscore the difficulty in understanding why Blue, at an Executive Session of the Board on July 19, 1990, would state "I could wipe out everybody," referring to the Legal Department, followed by a patent reference to Spearman (unnamed), employing the unseemly phrase: "We've got another one we're going to get rid of..." Bell attempted to place a positive gloss upon the tenor of Blue's statements above by testifying that "the attempted unionization" of the Legal Department when added to the task of trying to get the in-house attorneys to work full time was "...just very frustrating" to Blue, who did not have "confidence with a unionization on his hand..." Also, what is plainly evident here is that both Blue and Bell had actual knowledge of unionization in the Legal Department at least by mid-July 1990[55/] and they were not about to countenance it.

Added to the above is the uncontradicted testimony of Baker that he heard the legal staff discussed at an administration meeting where those present, including Blue or Bell, "...did not want another union..." and that "...they would get a new Legal Department..." While there was some doubt as to <u>when</u> Baker attended this meeting and heard these remarks, he testified further that at the time of the May 1990 resolution he had heard it said that "they" were "...considering getting a new Department..." and new attorneys and that "...There was some concern about wiping out the Department..." [Finding of Fact No. 40].

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55/ In fact, Bell's knowledge of the unionization dated back to April or May 1990. [Finding of Fact No. 38].

Finally, Mena, an Associate Counsel, testified credibly that in mid-August 1990, Bell summoned him into his office alone and raised the matter of "the union." Bell stated that Blue intended "...to fire anyone who was involved in the union," which Mena took to mean the entire Legal Department since no specific names were mentioned. Bell did not deny Mena's testimony but rather attempted to mitigate its thrust by claiming that he reassured Mena that the Authority was not planning a "witch hunt." While Bell wanted to assure Mena that he had no ulterior motive, he did acknowledge that Mena "might" have construed that he, Bell, told Mena that all of the attorneys in the Legal Department were going to be terminated. [Finding of Fact No. 41].

The Hearing Examiner would have to ignore totally the salient facts contained in this record to conclude other than that the Charging Party has proven not only prima facie but also by a preponderance of the evidence that the Authority by its principal agents, Executive Director Blue and Assistant Executive Director Bell, manifested hostility and/or anti-union animus toward unionization by its attorneys within the meaning of Bridgewater. In so concluding, the Hearing Examiner has thoroughly considered the caveat in Bridgewater that "mere...animus is not enough." The animus must have been a "motivating force or a substantial reason" for Spearman's termination. [95 N.J. at 242]. And such is the case on this record.

While the statements of Blue at the July 19th Executive Session of the Board might, by themselves, be deemed equivocal on the issue of animus and Blue's knowledge of unionization, they were "explained" by Bell at the hearing, who made it crystal clear that "...the attempted unionization" of the Legal Department was on Blue's mind when he spoke of his lack of confidence in the in-house attorneys and that he could "wipe out everybody." The same is true of Blue's reference to getting "rid of" an unnamed attorney (Spearman). Not only did Bell's gloss make reference to "...the attempted unionization" but he spoke of Blue's "frustration" and his lack of "confidence with a unionization on his hand..." When this is added to Baker's credited testimony that they "...did not want another union" and that they would get "...a new (Legal) Department," as early as May 1990, the Hearing Examiner is left with no doubt whatever but that Blue and Bell had actual knowledge of the attorneys' effort to organize and that they were hostile in the extreme to unionization. Bell's interrogation of Mena in mid-August 1990, coming as it did around the time of the posting of the CWA petition, is merely the icing on the cake of animus: "...Blue...would fire anyone who was involved in the union..."

Based on the foregoing, CWA's proofs as to hostility and/or anti-union animus are more than sufficient to satisfy its burden, and the Hearing Examiner so finds and concludes.

C. The Authority's Decision To Terminate Spearman, Its Timing And The Shifting Reasons Advanced.

The Authority's decision to terminate Spearman, the timing and its shifting reasons are inexorably entwined. Thus, Bell stated that he had decided to terminate Spearman early in 1990 but that he first had to discuss it with Blue. For some unexplained reason, he did not do so until the end of June or early July, when Blue authorized him to move ahead (Finding of Fact No. 42).

Bell's reasons for terminating Spearman centered upon her attendance, the timeliness of her reports and their quality, the fact that Bell's office was being "bombarded with complaints" about trivial matters and Spearman's attitude, the latter being inappropriate for a professional. Bell insisted that when he made his decision to terminate Spearman [Query: was it in early January, June or July?] he had no knowledge that in-house attorneys were seeking a union. [Finding of Fact No. 44].

Bell's decision to terminate Spearman had its origin in information received from various Directors and others on the Authority's administrative staff, including Nardachone. Bell insisted that his decision to terminate Spearman became final in June "...right after the resolution had gone through...," obviously referring to the May 15, 1990 Resolution regarding the operation of the Legal Department. Curiously, Bell stated that Spearman's termination presented a "very sensitive situation" which was not to be spread all over the agency until the exact date of her termination was determined. Even Nardachone, her supervisor, was kept in the dark. [Finding of Fact No. 45].

Since the power and authority to terminate was vested in Blue, with an effective recommendation being made by Bell, Bell and, to a lesser extent, Blue, described in detail the personnel network and procedures for terminating employees. For example, the Personnel Committee reviews personnel matters for the Board. The Department of Personnel prepares monthly reports on personnel, which the Board receives about a week before its meeting. The Board is not informed of terminations in advance. Also, Blue does not need Board approval to effect a termination. In the case of Spearman's termination, although Blue had spoken with some of the Commissioners, the Board, in its September 1990 Executive Session, acted without discussion on her termination, which was "passed as is..."

Also, it is somewhat peculiar that at an earlier stage of the instant hearing, Bell described the Board's role in terminations quite differently, i.e., the Board was an actual participant. After Blue meets with the Commissioners, they ask for needed information before action of "this nature" takes place. Then, after a period for discussion to ensure that "...there were enough reasons..." to "carry out an action of this type..." (presumably, in this case, the termination of Spearman), Bell would decide when the termination was to occur. [Finding of Fact No. 43].

At or around the scheduled time for Spearman's intended termination in June 1990, Bell and Blue were undertaking other personnel changes in the Legal Department, namely, the "forced"

resignation of Nardachone, the elevation of Armour in Nardachone's place and the demotion of Atwell. It was intended by Blue and Bell that all of these personnel actions would occur on the same day, July 16th. But, belatedly, they learned that Spearman had gone on vacation at the beginning of the month and would not return until July 18th. [Finding of Fact No. 46]. [Query: would not the two major-domos of the Authority logically know when their intended object of termination was on vacation?]

On July 23rd, Bell telephoned Carmichael of Personnel and directed him to prepare a termination letter since Spearman was to be terminated that day. The use of Carmichael was to keep the matter "...as far away from the executive office as possible..." This would appear to be a rather convoluted way of proceeding on the simple matter of terminating a low-level attorney in the Legal Department. That is, unless this was the type of duplicity and/or subterfuge that was intended to conceal the illegal motivation of Blue and Bell. After a series of diversions during the course of July 23rd, including telephone calls from Spearman and Councilman Grant to Carmichael, the intended termination was aborted by Spearman's having fallen down the stairs at the Authority.[56/]

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56/ Another cryptic event had occurred two days prior to July 23rd when Spearman had gone to Carmichael's office to ask if she was going to be fired. He had prepared an "agenda" as a "diversionary tactic" in order to avoid a sensitive situation. Carmichael weakly explained that he had not as yet been told that Spearman was in fact to be terminated but there were "rumors" to this effect and he was merely trying to "buy some time..."

When Bell heard that Spearman had fallen down the stairs, he spoke to Blue and they concluded that this would "...not be an appropriate time to go through with the action...," following which Carmichael was told to hold the matter in abeyance. [Finding of Fact No. 47].

And, now, the coup de grace. Spearman had returned to work from leave on August 20, 1990. Bell had advised Blue of this fact at an off-the-premises press conference. Once again, Blue and Bell had agreed that they should "...go ahead with the plans..." Carmichael, who was in their company, was informed of their intention to terminate Spearman. On that same day, Bell, who had returned to his office with McMillon and Carmichael, prepared the ultimate termination letter and Carmichael signed it. A day or two later on August 22nd, the actual date of Spearman's termination, Carmichael was told by Bell that the action of termination was to be taken "...and taken swiftly...," adding that it was "...going to happen today..." The three, Bell, McMillon and Carmichael, then proceeded to Spearman's office and handed her the letter. When she asked why she's being terminated, Bell stated "...we're restructuring..." and that it was "...all there," referring to the contents of the letter. It will be recalled that the letter (CP-7) states that Spearman was being terminated with "regret" and that after "careful evaluation, the Authority has determined to reorganize and restructure the Legal Department..." The remainder of the letter dealt with the procedures for her separation from the Authority. [Findings of Fact Nos. 48 & 49].

* * * *

The Authority argues that "...the decision to terminate Spearman was based upon work performance problems, and that it had been made long before the petition had been filed and long before the Housing Authority knew of the union organizing activity. (6 Tr 100-102)..." [Authority's Main Brief, p. 27]. The Hearing Examiner has previously found that Bell's decision to terminate Spearman was made by him early in 1990, but for some unexplained reason termination was not authorized by Blue until the end of June or early in July of the same year (Finding of Fact No. 42). It is undisputed that the thrust of Bell's testimony, in which he stated his reasons for deciding to terminate Spearman, centered on her work performance (Finding of Fact No. 44). However, the ultimate action of termination was not undertaken by the trio of Bell, McMillon and Carmichael until August 22nd. Bell's reason for Spearman's termination, in response to her inquiry that day, was "restructuring." The letter (CP-7) refers specifically to the Authority's determination to "reorganize and restructure the Legal Department..."

Although the Authority states that Spearman's termination "...was part of the reorganization of the Legal Department, begun in 1989..." [Authority's Main Brief, p. 43], it was not until July 16, 1990, that Blue and Bell obtained Nardachone's resignation and demoted Atwell. These two actions were the first visible signs of any "reorganization." The Authority grasps at a slender reed when

it suggests that Spearman would have been terminated on July 16th but for the fact that she had been on vacation for several weeks. It would appear clear beyond doubt that any employer that had decided to terminate an employee for good cause would hardly be inhibited from effecting the termination because the employee was on vacation.

The devious machinations which occurred between mid-July and August 22, 1990, with respect to effectuating the termination of Spearman cast serious doubt upon any justifiable motivation on the part of Blue and Bell, particularly, since the timing of the ultimate determination became prima facie suspect with CWA's arrival on the scene between late June to mid-July.[57/]

From the above, it appears that the Hearing Examiner may draw a negative inference from the Authority's conduct in terminating Spearman, based not only from his prior findings of hostility and animus toward unionization, but also from the machinations of Blue, Bell, McMillon and Carmichael who between early July and August 22, 1990, played the role of "Keystone Cops" in twice undertaking to terminate Spearman only to pull back due to exigent conditions. All the while the organizing activities of CWA proceeded in parallel fashion up until the posting of CWA's petition by the Authority on August 15, 1990.

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57/ The Hearing Examiner has previously found that Spearman contacted CWA in June 1990, prior to going on vacation in early July.

The Commission has on more than one occasion considered the element of "timing" an important factor in determining whether or not hostility or anti-union animus may be inferred. University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 8 (¶17002 1985); N.J. Dept. of Human Services, P.E.R.C. No. 87-88, 13 NJPER 117, 118 (¶18051 1987); and Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988). Also, see Jim Causley Pontiac v. NLRB, 620 F.2d 122, 104 LRRM 2190, 2193 (6th Cir. 1980). These holdings support the Hearing Examiner's conclusion in the case at bar.

A further indicator of the Authority's actual motivation in terminating Spearman is Bell's written reason for her termination, which was handed to Spearman when she was terminated on August 22nd: "to reorganize and restructure the Legal Department" (CP-7, supra). Bell gave Spearman the same reason verbally on August 22nd. Note that this reason for termination surfaced for the first time on August 22nd. Prior to August 22nd, Bell's stated reason for Spearman's termination had always been dereliction in job performance, i.e., "shifting reasons."

Following federal precedent in the private sector, the Commission has found that when an employer offers "shifting reasons" for its alleged discriminatory conduct, the fact of advancing such reasons is relevant to evaluating its motivation. Thus, the Commission found "suspect" and rejected the "shifting reasons"

proffered by the employer in Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985), citing Coca-Cola Bottling Co., 232 NLRB 794, 97 LRRM 1290 (1977). See, also: NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 100 LRRM 2303 (9th Cir. 1978); NLRB v. J. Coty Messenger Service, Inc., 763 F.2d 92, 98, 99, 119 LRRM 2779, 2782 (2nd Cir. 1985); NLRB v. Future Ambulette, Inc., 903 F.2d 140, 134 LRRM 2654, 2656 (2nd Cir. 1990); and Akron General Medical Center, 232 NLRB No. 140, 97 LRRM 1510 (1977).

* * * *

Although the Hearing Examiner is at this point fully persuaded that the Charging Party has proven by a preponderance of the evidence that the Authority violated Sections 5.4(a)(1) and (3) of the Act in having terminated Spearman, there remains, arguendo, the matter of examining the Authority's proofs as to a business justification for its actions.

D. The Authority Has Failed To Demonstrate By A Preponderance Of The Evidence That It Would Have Terminated Spearman Even In The Absence Of Her Protected Activity.

In order to evaluate properly the job performance of Spearman from the latter part of 1989, or early 1990, the period during which Bell decided to terminate her, one must look first at the situation within the Authority's Legal Department from the time that Blue and Bell undertook to end the services of the two "outside" law firms in January 1989. At that time Blue and Bell decided to require the in-house attorneys to work full-time and

thereby assume the legal work previously performed by the "outside" firms. At least by 1989, the in-house attorneys had been spending as few as eight hours per week working for the Authority with the balance of their time being devoted to their private law practices. Thus, they were often unavailable to the Directors when needed. [Finding of Fact No. 16].

Nardachone was not enthusiastic about the intrusion of Blue and Bell upon his bailiwick, which caused the Board to adopt a policy on October 23, 1989, which required that all in-house attorneys work 37-1/2 per week and that Nardachone thereafter report directly to Blue instead of to the Board. This was followed on November 1st by a requirement that the in-house attorneys sign in and out daily with Nardachone certifying that each attorney had worked 37-1/2 hours a week. [Finding of Fact No. 17].

When the above procedures failed to improve the matter of attendance, the Board on May 17, 1990, adopted a Resolution mandating "full-time" status for all attorneys and restricting their outside legal practices from being conducted during regular work hours. This was followed by a memorandum one week later, which required the attorneys to punch time cards and this was monitored by Bell and his staff. [Findings of Fact Nos. 18-20].

None of the above strictures were directed specifically at Spearman since she was merely "in the same boat" as the other four in-house attorneys.

The Authority has laid great emphasis upon the comparative job evaluations of Spearman in relation to Barone, Atwell and Armour for the two annual periods ending in December 1988 and December 1989. [Authority's Main Brief, ¶14, p. 10]. The Authority contends that a comparison of the respective job evaluations of the other in-house attorneys demonstrates that Spearman's performance was severely wanting in 1989. However, the Hearing Examiner's analysis of these evaluations does not support the Authority's position. [Findings of Fact Nos. 21-23]. Essentially, the evaluated performances of Barone, Atwell and Armour, like Spearman's performance, were reduced in 1989 on about an equal basis except for a slight increase in the case of Armour. Also, the evaluations had dropped generally in 1989 as a result of pressure from the Personnel Department, which was concerned that the evaluations of all employees throughout the agency were extremely high. Accordingly, the supervisors were to be a little tougher on this round. This was reinforced by Bell. [Findings of Fact Nos. 23 & 24].

The Hearing Examiner has credited Nardachone's testimony that Spearman performed her job satisfactorily and that he had received no more complaints from Bell about her than he had received as to any of the other in-house attorneys. The two negative comments made by Nardachone on Spearman's 1989 evaluation (CP-2), strike the Hearing Examiner as much ado about nothing. Namely, she was to establish relationships with other departments and, also, she was no longer to communicate directly with members of the Board. [Finding of Fact No. 25].

Bell's testimony that he received more complaints about Spearman has not been credited, particularly in view of Nardachone's credited testimony that Bell seemed to be "preoccupied" with Spearman because she was given to speaking her mind whether or not it was what the administration wanted to hear. There was evidence that Bell told Nardachone to include certain items in her 1989 evaluation and to lower her score. Understandably, Spearman was apprehensive that her evaluations might lead to subsequent disciplinary action. [Finding of Fact No. 26].

Interestingly, the Authority states in its Main Brief (¶13, p. 10) that Spearman had become the subject of "surveillance" by Bell and his staff at or about the time of the Board's adoption of its May 17, 1990 Resolution. Although Bell could not identify by name any of the additional staff members engaged in this surveillance, he stated that Blue was one who had complained that certain people were not coming to work and that at times it was Spearman. Bell insisted that Spearman's attendance was "more problematic" than that of the other attorneys. Finally, Nardachone found it necessary to admonish Spearman by a memorandum of July 9th that she must punch her time card. [Finding of Fact No. 27].

The Authority's extensive evidence regarding Spearman's job performance as an attorney in the Legal Department "bordered on overkill" and was vague as to the time frame in which Spearman's alleged derelictions had occurred. Nevertheless, the Hearing Examiner has no doubt but that there were many derelictions in

performance by Spearman as testified to by the various Directors and other administrators within the Authority's hierarchy. [Findings of Fact Nos. 28 & 30].

However, given the extent of these proofs, the Hearing Examiner is greatly puzzled as to why Blue and Bell did not expeditiously move to terminate Spearman early in 1990 at the time of Bell's initial decision. Instead, Blue and Bell let the matter fester until they decided to act precipitously between mid-July and August 22nd. Significantly, this latter period occurred after the union activities of the in-house attorneys had surfaced with Spearman as an active proponent.

* * * *

When one considers, in the aggregate, all of the complaints regarding Spearman's job performance, whether it was her attendance or her other derelictions, as testified to by the Directors and administrators, the inescapable conclusion is that Spearman should have been terminated in the latter part of 1989, if not in the early part of 1990. The Authority acted at its peril when it embarked on its inexplicable course of delay and indecision until it finally terminated Spearman on August 22, 1990.

The Authority's decisional process has previously been discussed at length and need not be repeated. What it reveals is that Blue and Bell were willing to tolerate Spearman's derelictions in performance for many months but then, coincidental with the

decision of Spearman and the other in-house attorneys in the Legal Department to seek union representation, Blue and Bell altered their course and ultimately terminated Spearman illegally on August 22nd.[58/]

Hence, the Hearing Examiner must reject the Authority's defense that it had a legitimate business justification in terminating Spearman on August 22, 1990, i.e., that Spearman would have been terminated even in the absence of her exercise of protected activities.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

**CONCLUSIONS OF LAW**

1. The Respondent Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by the conduct of its agents and administrators, particularly, Daniel W. Blue, Jr., its Executive Director, and Benjamin R. Bell, its Assistant Executive Director, who, upon learning of the unionization of the in-house attorneys in the Authority's Legal Department in or around April or May 1990, undertook a course of action, which ultimately resulted in the termination of Sharon Wade-Spearman, Esq. on August 22, 1990,

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58/ It will be recalled that the reason volunteered by Bell to Spearman in her office that day was "reorganize and restructure the Legal Department." Bell's statement was patently false since the reason given by him was a "shifting reason," i.e., a palpable manifestation of illegal motivation.

because of her having openly engaged in the exercise of protected activities, and not for the reasons stated to her on August 22nd that the Authority was reorganizing and restructuring the Legal Department.

2. The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(2) by its conduct herein, no supporting evidence having been adduced by the Charging Party.

**RECOMMENDED ORDER**

The Hearing Examiner recommends that the Commission **ORDER**:

A. That the Respondent Authority cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by terminating employees such as in-house attorney Sharon Wade-Spearman, Esq., because of her open exercise of protected activities under the Act and advancing "shifting reasons" as a basis for such termination, namely, that her termination was due to the reorganizing and restructuring of the Legal Department, a reason which had never been made known to her or others theretofor.

2. Terminating employees such as Sharon Wade-Spearman, Esq., or otherwise discriminating against her or other employees in retaliation for having engaged in protected activities on behalf of herself or other in-house attorneys in the Legal Department or the Charging Party (CWA).

B. That the Respondent Authority take the following affirmative action:

1. Forthwith restore Sharon Wade-Spearman, Esq., to the position of in-house attorney held by her prior to her termination on August 22, 1990, and make her whole for all monies and fringe benefits lost, to which she would have otherwise been entitled but for her termination. As to the monies due, interest shall be included at the rates authorized by R.4:42-11 for the years 1990, 1991 and 1992.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent'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. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the allegations that the Respondent Authority violated N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: March 31, 1992
Trenton, New Jersey

Recommended Posting
Appendix "A"

# 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, particularly, by terminating employees such as in-house attorney Sharon Wade-Spearman, Esq., because of her open exercise of protected activities under the Act and advancing "shifting reasons" as a basis for such termination, namely, that her termination was due to the reorganizing and restructuring of the Legal Department, a reason which had never been made known to her or others theretofor.

WE WILL NOT terminate employees such as Sharon Wade-Spearman, Esq., or otherwise discriminate against her or other employees in retaliation for having engaged in protected activities on behalf of herself or other in-house attorneys in the Legal Department or the Charging Party (CWA).

WE WILL forthwith restore Sharon Wade-Spearman, Esq., to the position of in-house attorney held by her prior to her termination on August 22, 1990, and make her whole for all monies and fringe benefits lost, to which she would have otherwise been entitled but for her termination. As to the monies due, interest shall be included at the rates authorized by R.4:42-11 for the years 1990, 1991 and 1992.

**Docket No.** CO-H-91-56 HOUSING AUTHORITY OF THE CITY OF NEWARK
(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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.**