P.E.R.C. NO. 99-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SEASIDE HEIGHTS,

Respondent,

-and-

Docket No. CI-H-98-20

JOEL MARASCO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommendations and dismisses a Complaint against the Borough of Seaside Heights. The Complaint, based on an unfair practice charge filed by Joel Marasco, alleges that the Borough violated the New Jersey Employer-Employee Relations Act when it reassigned him from an ocean to a bay beach lifeguard stand and dismissed him when he refused to accept the assignment, allegedly because of his plans to use the Lifeguard Association of Seaside Heights (LASH) to negotiate for a higher salary for lifeguards. The charge also alleges that the Borough violated the Act when a Captain took over and dominated LASH by forcing members to observe a constitution he drafted and by appointing LASH officers of his choosing. The Commission finds that LASH was not an employee organization and that Marasco did not engage in protected activity.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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In the Matter of

BOROUGH OF SEASIDE HEIGHTS,

Respondent,

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Docket No. CI-H-98-20

JOEL MARASCO,

Charging Party.

Appearances:

For the Respondent, Gilmore & Monahan, P.A., attorneys (Jean Louise Cirpriani, of counsel)

For the Charging Party, Joel Marasco, pro se

DECISION

On September 19 and November 24, 1997, Joel Marasco filed an unfair practice charge and amended charge against the Borough of Seaside Heights. Marasco alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (7),[1/] when it

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission

reassigned him from an ocean to a bay beach lifeguard stand and dismissed him when he refused to accept the assignment, allegedly because of his plans to use the Lifeguard Association of Seaside Heights (LASH) to negotiate for a higher salary for lifeguards. The charge also alleges that the Borough violated the Act when its agent, Captain Al Aires, took over and dominated LASH by forcing members to observe a constitution he drafted and by appointing LASH officers of his choosing.

On March 5, 1998, a Complaint and Notice of Hearing issued. On March 23, the Borough filed an Answer denying that it had violated the Act. It contended that LASH was not an employee organization within the meaning of the Act; Marasco was not involved in the exercise of any rights protected by the Act; and he was properly terminated for insubordination when he refused to accept the bay beach assignment.

On June 23 and 24 and July 23, 1998, Hearing Examiners Regina A. Muccifori and Edmund Gerber conducted a hearing.[2/] The parties examined witnesses, introduced exhibits, argued orally, and filed post-hearing briefs.

On September 30, 1998, Hearing Examiner Muccifori recommended dismissing the Complaint. H.E. 99-6, 24 NJPER 524 (¶29244 1998). She concluded that Marasco had not proved a 5.4a(2) violation because LASH was a social organization and there

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2/ Mr. Gerber conducted the hearing on July 23 due to Ms. Muccifori's illness.

was no evidence that it represented the lifeguards or engaged in collective activity on their behalf. In this vein, she found that while Marasco believed that LASH had organized and called a one-day lifeguard strike in 1987, he was not employed by the Borough in 1987 and his opinion was based on hearsay statements.

Similarly, the Hearing Examiner recommended dismissal of the 5.4a(1) and (3) allegations, finding no evidence that Marasco had engaged in protected activity. She did not credit Marasco's statement that, during the summers of 1996 and 1997, he discussed with a majority of the lifeguards the possibility of using LASH to negotiate higher salaries. Ibid. She noted that the two lifeguards Marasco called did not corroborate his statements. Finally, she recommended dismissal of the 5.4a(7) allegation because Marasco presented no supporting evidence. Ibid.

On November 2, 1998, Marasco filed exceptions. He contends that the Hearing Examiner's evaluation of the facts was distorted and he objects to several of her findings. Marasco also objects to the Hearing Examiner's admission of a July 1997 disciplinary report that he received, as well as to the admission of three photographs that, according to Aires, prompted him to reprimand Marasco orally. Marasco requests that the Hearing Examiner's decision be "disregarded" and that he be allowed to present his case to a different Hearing Examiner.

On November 6, 1998, the Borough filed an answering brief urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-18).

We start with a factual summary and chronology. The Seaside Heights Beach Patrol (SHBP) is made up of lifeguards or "redshirts" who perform rescues, along with a captain (Aires), three lieutenants and two sergeants. Aires appointed Marasco a lifeguard in June 1992. During the summers of 1994 through 1997, Aires gave Marasco "senior man" lifeguard responsibilities at three different ocean lifeguard stands.

In 1995, Marasco was elected treasurer of LASH and, in 1996 and 1997, was elected secretary. Only the lifeguards, not SHBP officers, are LASH members. For the past several years, LASH functions have included compiling a yearbook, selling T-shirts, and conducting a lobster bake and fundraising banquet.

In June 1997, Aires took over LASH and appointed a president, vice-president, secretary and treasurer. He removed Marasco from the secretary position and appointed him sergeant-at-arms. Aires stated that he took these actions because: (1) there was discontent among LASH members and he was afraid that the organization would disband; (2) LASH was "in the red" and vendors complained to him about not being paid; and (3) LASH had made questionable expenditures in 1995 and 1996 and he

feared repercussions against him because he was head of the force.[3/]

On July 26, 1997, the Borough held a special event for disabled children and adults called a "Day on the Bay for [the] Disabled." Aires believed he needed additional, experienced lifeguards to assist the one lifeguard ordinarily stationed at the bay.[4/] During the morning, Jason Varano, a lifeguard with eight years experience, was assigned to the bay along with another, less experienced lifeguard. Marasco was assigned to an ocean lifeguard stand. Aires planned to have Varano and Marasco switch assignments at mid-day and, at about 12:20, Marasco was asked to report to lifeguard headquarters. When he did, Aires told him that he was assigned to the bay beach lifeguard stand for the afternoon and, according to Marasco, for the next day as well. Marasco viewed the assignment as a punishment and a demotion because, although he suffered no loss in pay, the bay assignment was less desirable and prestigious. Marasco contends that Aires reassigned him because Aires believed that he planned to use LASH to negotiate for higher pay. This charge followed.

Marasco does not challenge the Hearing Examiner's conclusions that LASH was not an employee organization within the

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3/ Aires stated that LASH checks were written for car payments, air conditioners, and dinners for lifeguards and their dates.

4/ Aires did not usually assign the most experienced lifeguards to the bay.

meaning of the Act and that, therefore, the Borough did not violate 5.4a(2) when Aires assumed control of the organization. In the absence of exceptions, we accept the Hearing Examiner's recommendation to dismiss the 5.4a(2) allegation. While Marasco does not expressly challenge the Hearing Examiner's conclusion that he did not engage in protected activity, some of his objections to her factual findings focus on those aspects of the record that, in his view, establish that he engaged in protected activity and that Aires was hostile to it. We turn to those objections.

Marasco's charge is based in part on an alleged interchange between him and Aires on the morning of July 20, 1997. Marasco testified that, when he arrived at lifeguard headquarters, Aires asked him if he was going to be negotiating for higher pay through LASH. According to Marasco, he responded that he did not want to talk about it but that it was a possibility.[5/] Marasco claims that Aires then stated "[i]t doesn't matter anyway, because we have ways of getting rid of guys like you." Aires did not recall speaking with Marasco on the morning of July 20 and denied telling Marasco that the Borough had ways of "getting rid of" employees like him. However, Jennifer

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5/ Marasco does not except to the finding that he did not discuss with other lifeguards the possibility of using LASH to negotiate for higher salaries. But we will assume for the purpose of analysis that acknowledgement of a future intent to use LASH for that purpose constitutes protected activity.

Dacpano, a Borough beach attendant, stated that she overheard the conversation that Marasco described while waiting outside lifeguard headquarters for Marasco. The Hearing Examiner did not credit Dacpano because, although she alleged that she heard the conversation verbatim, she was several feet away, lifeguards were talking and laughing directly next to her, and she did not mention the conversation to Marasco until about a week later, despite ample opportunity to do so. Finally, the Hearing Examiner questioned Dacpano's motive because, at the time of the hearing, she was Marasco's girlfriend. On the other hand, the Hearing Examiner credited Aires' denial of the alleged conversation and found that he testified credibly throughout the hearing.

Marasco excepts to these credibility determinations, but we find no grounds to disturb them. While Marasco alleges that Aires was "evasive" in answering his questions regarding the number of lifeguards who went on strike in 1987 and who were still working in 1992, Aires responded straightforwardly to that query after Marasco asked Aires to assume that the 1992 work force was represented by a photograph that Marasco showed him. Similarly, Aires' statement that he wanted experienced lifeguards at the bay on July 26 is not undermined -- or his overall credibility impeached -- by the fact that when Varano left the bay at noon, there was only one "rookie" lifeguard on the stand. Aires' intent was that Marasco would replace Varano. Similarly, the Hearing Examiner's reasons for not crediting Dacpano are logical. See

State v. Holmes, 290 N.J. Super. 302, 313 (App. Div. 1996) (bias may be induced by witness' like, dislike or fear of a party, or by the witness' self-interest).

We also reject Marasco's argument that the Hearing Examiner should have made a finding as to whether, as Marasco contends, Aires had told the lifeguards that they were all "expendable." Marasco maintained that that statement demonstrated the "maniac and tyrannical" fashion in which Aires ran the force but he never connected it with, or alleged that it was indicative of, Aires' response to protected activity under the Act. Therefore, whether or not Aires made the statement was not relevant to the charge.

In sum, we reject those of Marasco's exceptions that challenge the Hearing Examiner's conclusions that he did not engage in protected activity. We therefore adopt her recommendation to dismiss the 5.4a(1) and (3) allegations. See In re Bridgewater Tp., 95 N.J. 235 (1984) (charging party must prove by a preponderance of the evidence that protected conduct was a substantial or motivating fact in the adverse action). As a consequence, we need not reach Marasco's contention that, contrary to the Hearing Examiner's finding, a bay assignment is generally intended as a punishment for an experienced lifeguard.

We also reject Marasco's procedural objections. The Hearing Examiner properly admitted evidence that Marasco had received an oral reprimand and a written warning during the summer

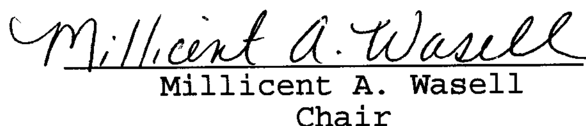
of 1997. Those documents were admitted for the purpose of impeaching Marasco's credibility, after he denied having been disciplined. There is no merit to Marasco's contention that those documents should have been provided to him prior to the hearing, in response to his discovery request for all evidence that the Borough intended to use at trial. The Borough did not know that it would use the documents until Marasco testified. Finally, we need not dwell on whether the Hearing Examiner should have allowed Aires to state that Marasco's application for unemployment compensation was denied. That finding did not figure in her analysis.

For all these reasons, we adopt the Hearing Examiner's recommendation to dismiss the 5.4a(1), (2) and (3) allegations. In the absence of exceptions, we also adopt the recommendation to dismiss the a(7) allegations. Finally, Marasco has offered no basis why he should be granted a new hearing, and we deny that request.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999

H.E. NO. 99-6

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

In the Matter of

BOROUGH OF SEASIDE HEIGHTS,

Respondent,

-and- Docket No. CI-98-20

JOEL MARASCO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a complaint filed by Joel Marasco against the Borough of Seaside Heights, alleging 5.4a(1), (2), (3) and (7) violations. The Hearing Examiner finds that Marasco failed to meet his burden under Bridgewater and that even assuming he had, the Employer demonstrated a legitimate business justification for Marasco's termination.

The Hearing Examiner further finds that the Lifeguard Association of Seaside Heights (LASH) is not a bonafide employee organization under the Act and thus Marasco's 5.4a(2) allegation must be dismissed.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-6

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

In the Matter of

BOROUGH OF SEASIDE HEIGHTS,

Respondent,

-and- Docket No. CI-98-20

JOEL MARASCO,

Charging Party.

Appearances:

For the Respondent, Gilmore & Monahan, P.A.
(Jean Louise Cipriani, of counsel)

For the Charging Party, Joel Marasco, pro se

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On September 19 and November 24, 1997, Joel Marasco filed an unfair practice charge and amendment, respectively, with the Public Employment Relations Commission. The amended charge (C-1)[1/] alleges that the Borough of Seaside Heights violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

1/ "C" refers to Commission exhibits received into evidence at the hearing in this matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearing are referred to as "1T", "2T" and "3T".

seq., specifically provisions 5.4a(1), (2), (3) and (7)[2/] when it forced Marasco to accept a demotion to the bay beach and then dismissed him because he planned to use the Lifeguard Association of Seaside Heights (LASH) to negotiate a higher salary for lifeguards. The amended charge also alleges that the Borough violated the Act when its agent, Captain Al Aires, illegally took over and dominated LASH by forcing LASH members to observe a constitution he drafted, and by appointing LASH officers of his choosing.

On March 6, 1998, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On March 23, 1998, the Borough filed an Answer (C-2) denying that it violated the Act. It claims that LASH is not a labor organization under the Act and thus does not fall within the Act's protection. Further, even if LASH qualifies as a labor organization, the Borough asserts that Marasco fails to set forth an unfair practice. The Borough also claims that it acted within its managerial prerogative in asking Marasco to move to the bay beach; that such an assignment does not

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

constitute a demotion; and that Marasco was terminated because of his insubordination in refusing the assignment. According to the Borough, its actions were unrelated to Marasco's involvement with LASH.

A hearing was held in this matter on June 23 and 24, and July 23, 1998. Post hearing briefs were filed by both parties by September 14, 1998. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. The Seaside Heights Beach Patrol (SHBP) is comprised of officers, who are supervisors, and the lifeguards or "redshirts" who perform the actual rescues. In 1997, Captain Al Aires was the head of the SHBP; below him were three lieutenants, two sergeants and the lifeguards (1T18). Aires has been an officer in the SHBP since 1990 (1T103).

Aires is responsible for assigning the employees below him (1T180; 2T9-2T10, 2T41-2T42). Aires does not usually explain in detail his reasons for assigning particular guards to particular stands (1T68, 1T81).

2. Aires appointed Joel Marasco to the position of lifeguard in June 1992. During the summers of 1994, 1995, 1996 and 1997, Aires gave Marasco senior man lifeguard responsibilities at three different ocean lifeguard stands. The senior man is responsible for watching over the activities in the ocean and on

the beach. He also trains and acts as a mentor to the junior lifeguard who is assigned to work with him (1T21).

The Bay Lifeguard Stand

3. Besides the several ocean lifeguard stands, there is a single bay lifeguard stand to which lifeguards are assigned (1T26). The bay stand is traditionally opened later than the ocean stands, due to a lack of staff in the early part of the summer (1T158).

Marasco perceives an assignment to the bay to be punishment. Marasco claims that Aires assigns lifeguards to the bay for three reasons: 1) Aires is displeased with that individual; 2) the lifeguard is a rookie or early in his second year; and 3) the lifeguard has an injury or is sick and can not perform his or her duties as an ocean lifeguard. The bay is sometimes closed by the Environmental Protection Agency because of a high bacteria count. The ocean is also closed sometimes for this reason, but not as often (1T26-1T27, 1T31-1T32, 1T77; 3T21-3T22).

Fellow lifeguard Jason Varano does not believe the bay is punishment. He claims the Captain assigns guards to the bay as relief from the hectic pace of the ocean (3T23-3T25). However, he and fellow lifeguard Troy Van Hise acknowledge a bay assignment is generally for less experienced guards and that it is not usual for a six year guard to be assigned to the bay (1T77; 3T20-3T21). Varano admits an ocean assignment is more prestigious (3T23).

However, there is no decrease in pay for a bay assignment (1T64, 1T80).

Experienced part-time lifeguards may be assigned to the bay and officers may be temporarily assigned to the bay to relieve the permanent guards assigned there (1T60-1T61, 1T134-1T135, 1T179-1T180).

Based on the testimony, I conclude that a bay assignment, while perhaps not as desirable as an ocean assignment, is not a "punishment" for lifeguards.

The Lifeguard Association of Seaside Heights (LASH)

4. The Lifeguard Association of Seaside Heights (LASH) is comprised solely of the lifeguards; no SHBP officers are members of LASH. When Aires was a lifeguard from 1980 through 1989, he was a member of LASH. Until 1997, LASH had a staff of officers, specifically, a president, vice-president, secretary and treasurer, who were elected by their fellow lifeguards (1T24, 1T34, 1T73, 1T103). In 1995, Marasco was elected LASH treasurer and in 1996 was elected LASH secretary. Marasco was also elected to LASH secretary early in the summer of 1997 (1T24, 1T34, 1T71-1T72).

The functions of LASH currently, and over the past several years, include compiling a yearbook which identifies the LASH officers, selling T-shirts, and conducting a lobster bake and a fundraising banquet (1T33, 1T86, 1T103; 3T26-3T27; CP-1, CP-3).

Marasco testified that during the summers of 1996 and 1997, he discussed with a majority of the lifeguards the possibility of using LASH to negotiate a higher salary for them (1T24, 1T38-1T39). This statement was not corroborated by any of Marasco's fellow lifeguards, although two testified. Thus, I do not find it reliable. Further, Aires and Officer John Bach specifically deny hearing Marasco or any other lifeguard in the summers of 1996 or 1997 talking about using LASH to negotiate with the Borough (1T136-1T137; 1T180-T181).

Marasco believes Aires is involved with setting the base pay for lifeguards (1T39). However, the Borough's Mayor clarified that he and Council set salaries for lifeguards (2T9). Aires would not object to LASH negotiating higher pay for the lifeguards, because he believed if this occurred, he would also receive a pay raise (1T171-1T172).

I find there is simply no evidence in the record that LASH represents or engages in collective activity on behalf of the lifeguards. There is no proof that LASH has negotiated a collective negotiations agreement or filed grievances or in any way collectively represented its members. Rather, it appears that LASH is a social organization and has been for the past several years, conducting lobster bakes and banquets and compiling a yearbook.

5. In June 1987, the lifeguards engaged in a strike or "work action" to obtain higher pay and better working conditions.

Most of the lifeguards simply did not report to work on a specified day (1T18, 1T103-1T104, 1T160-1T161).

Marasco claims LASH went on strike, rather than the lifeguards as a group, "because the lifeguards are LASH". Marasco, however, has no first hand knowledge of this, since he was not a lifeguard then. He learned of the 1987 work action through hearsay (1T32-1T33). Aires, who was then a lifeguard and LASH member, does not recall LASH organizing the work action. Aires did not participate in the work action; nor did several other lifeguards who were LASH members (1T18, 1T103-1T104, 1T161)

I conclude there is no legally competent evidence in support of Marasco's contention that LASH engaged in a strike in 1987; therefore, I cannot make such a finding. See N.J.A.C. 1:1-15.5(b).

Mario Colitti, who was the LASH President then, was centrally involved in the strike (1T18-1T19, 1T161). Marasco believes Colitti was fired three years later by Aires because of his LASH activities. However, Aires denies this (1T38, 1T105). Marasco's testimony was wholly unsupported and based on hearsay and, as such, I do not credit it. See N.J.A.C. 1:1-15.5(b). Therefore, I cannot find that Mario Colitti was terminated by Aires because of his LASH activities.

6. The lifeguard of the year award is voted on by LASH members. Inside of lifeguard headquarters, there is a plaque honoring past recipients of the award (1T18-1T19; CP-2).

Although Colitti was voted lifeguard of the year in 1987, his name was omitted from the plaque. Marasco believes Aires is responsible for this omission, because the plaque has to be approved by him (1T20-1T21, 1T55).

Aires denies responsibility for the omission. He claims there was a concern as to whether Colitti had officially won the honor in 1987. Some lifeguards claimed they never voted for Colitti and there was a question about the accuracy of the election. Thus, according to Aires, Colitti's name was omitted, based upon the recommendations of several people (1T159-1T160, 1T169-1T170).

The plaque is paid for and compiled by LASH. If LASH membership today wanted to put Colitti's name on the plaque they could, and Aires would not object (1T170-1T171).

I find there is insufficient evidence to conclude that Aires was responsible for Colitti's name being omitted from the plaque.

7. In June 1997, Aires took over LASH. During roll call, he appointed a LASH president, vice-president, secretary and treasurer of his own choosing without receiving any input from the lifeguards. He also unilaterally removed Marasco from his secretary position and appointed him sergeant-at-arms (1T24-1T25, 1T83-1T84, 1T105-1T106, 1T110-1T111).

Aires does not deny he took over LASH in June 1997 and appointed his own officers. He did so because he was worried that

LASH was going to collapse, because of the level of discontent among its members (1T109-1T110).

Aires claims that there had been problems with LASH since he became Captain in 1990. LASH Presidents would ask for his help regarding LASH activities because they could not get the cooperation of their own membership. Outside vendors complained to him about the LASH ad book and he learned of monies that needed to be paid by LASH for certain banquets. These vendors approached Aires because he was a point of authority (1T106-1T108).

In the summers of 1995 and 1996, Aires felt that some LASH checks were written for questionable purposes such as car payments, air conditioners and dinners for lifeguards and their dates. LASH was "in the red" and Aires thought that there could be repercussions against him by virtue of the fact that he was the SHBP Captain. Thus, he decided to appoint the LASH officers in 1997 (1T108-1T111).

Discipline of Marasco Prior to his Termination

8. In June 1997, Marasco and fellow lifeguards Rich Prell and Mike Reilly were assigned to the north end lifeguard headquarters beach. Either Prell or Reilly took three pictures then involving Marasco with two female bathers (1T42, 1T115-1T116; R-1).

Aires learned of the pictures in the course of his investigation of the incident. Aires believed the activities in

the picture warranted a reprimand. The first picture showed Marasco with the bathers when he should have been watching the water. The second picture was taken at the headquarters deck, where bathers are not permitted under SHBP policy and reveals a bather holding a lifeguard safety device, which is also a violation of SHBP policy. In the final picture, the bathers are on the lifeguard stand, which is also not permitted (1T80, 1T115-1T118; R-1).

Aires spoke to Prell, Reilly and Marasco about the incident. He told them not to allow bathers on the stand and ordered them to watch the water and not be at headquarters (1T117-1T118). Marasco discussed the pictures with Aires, but, to him, the discussion was not disciplinary in nature (1T42-1T44).

9. On July 6, 1997, Marasco was involved in an incident with beach concession worker Nicole Best, whereby Best made a formal complaint against Marasco (1T44, 1T124-1T125; R-2). Aires showed Best's statement to Marasco and asked him to respond (1T125). An Employee Disciplinary Report of the incident was made by Aires. The document was signed by him and Marasco and indicates that Marasco received a warning (1T46, 1T48-1T50, 1T124-1T125; R-2). Marasco, however, testified he did not receive any discipline as a result of the incident (1T44). The Report also specifies that the consequences of failure to improve will be discipline up to and including termination (R-2).

I conclude that Marasco did in fact receive discipline as a result of the Nicole Best incident. While Marasco denied ever receiving discipline, the Employee Disciplinary Report speaks for itself (R-2).

The Alleged July 20, 1997 Conversation

10. On July 20, 1997, Marasco arrived at headquarters as usual, at about 8:15 a.m., and as usual, Aires was already there. According to Marasco, Aires asked him if he was going to be negotiating for higher pay through LASH. Marasco told Aires that he did not want to talk about it, but that it was a possibility. Marasco claims that Aires then stated to him "It doesn't matter anyway, because we have ways of getting rid of guys like you." (1T25, 1T52-1T54). Then the conversation ended (1T54).

Aires does not recall being alone with Marasco that morning in headquarters or any conversation with him. He denies making any statement along the lines of "Don't worry, we have ways 20 getting rid of guys like you." (1T136-137).

On that morning, beach attendant Jennifer Dacpano, upon reporting to her work location at the beach control office next to headquarters, walked up to Marasco after she saw him arrive at headquarters that morning (2T22, 2T26-2T28, 2T36). Marasco was a friend of Dacpano's at the time. When Marasco walked into headquarters, she waited outside for him (2T28).

Dacpano claims she overheard the conversation between Aires and Marasco. Dacpano corroborated Marasco's account. She testified that Marasco walked into headquarters and greeted Aires. Aires did not respond with a greeting, but rather said "Hey Joel, what is this that I hear about you negotiating higher pay through LASH." Marasco replied that he did not want to talk about it and it could have been a possibility that he was going to do that. Dacpano claims that Aires blatantly responded, "Well we have ways of getting rid of people like you." She then heard Aires walk away (2T21, 2T29-2T30).

Dacpano claims Aires could not see her and she could not see him. Dacpano was standing by the door outside of headquarters during the conversation. According to Dacpano, there were about five or six other lifeguards on the other side of the door that she was standing by. Dacpano also heard their conversations which were taking place simultaneously. Dacpano stated that they were laughing and talking about the prior night; however, she asserts she still heard the Marasco-Aires conversation which occurred some distance away, because the lifeguards were quiet at times. Dacpano believes the lifeguards standing there also could have heard the Aires-Marasco conversation (2T21, 2T24, 2T36-2T40).

Dacpano did not initially mention to Marasco that she overheard the conversation (2T30). Marasco did not talk to her about the conversation when he came out of the office (2T30-2T31). Dacpano did not understand what LASH was at the time

(2T29). She then stayed with Marasco for five more minutes until she was summoned into work (2T31).

A week or so later, prior to Marasco's termination, Dacpano questioned Marasco about the conversation. Marasco did not want to talk about it, so Dacpano did not pry (2T31-2T32).

Dacpano saw Marasco on two other occasions in between the conversation and the date she questioned him about it (2T33). Since the July 20, 1997 conversation, she and Marasco have had a close relationship. Marasco is currently her boyfriend (2T33-2T35).

I do not credit Dacpano. Dacpano claims she heard verbatim the alleged Aires-Marasco conversation. However, she was several feet away and laughter and other conversations by several lifeguards were taking place directly next to her. More significantly, I question her credibility and her motive, as she was a friend of Marasco's at the time of the alleged conversation and is currently his girlfriend. Finally, I find it odd she did not question Marasco about the alleged conversation, even though she was his friend, until about a week later, although she had ample opportunity to do so before that time (2T30-2T35, 2T39-2T40).

I further credit Aires. He testified credibly throughout the hearing while Marasco did not. (See Finding No. 9).

The Events of July 26, 1997

11. On July 26, 1997, there was an event involving handicapped adults and children at the bay entitled "Day on the Bay for Disabled" (1T127-1T128; 3T24-3T25; R-3).

Aires had learned of the event in April or May 1997. The event influenced Aires scheduling decision that day (1T127-1T129). Aires believed the event required a more experienced guard and might require an additional guard (1T129, 1T133-1T134).

Aires had decided prior to July 26, that along with the guard ordinarily assigned to the bay, he would also assign a more seasoned guard. He decided he was going to assign eight year guard Jason Varano, followed by Marasco. Aires chose Varano and Marasco because of their experience and because Marasco was assigned close to headquarters (1T139-1T140, 1T165-1T67).

That morning Aires first assigned Varano to the bay; Varano did not question the assignment or refuse it (1T138-1T139; 3T18). Varano's responsibilities that day included insuring that the disabled were getting in boats correctly (3T25). Aires did not tell Marasco that morning that he would be reassigned to the bay later that day (T140).

12. Around noon, Marasco was at the stand on Webster Avenue, which he had been assigned to almost exclusively that summer (1T26). There was a swimmer between the Webster Avenue and Sumner Avenue stands who Troy Van Hise, the lifeguard assigned to Sumner Avenue, believed was in trouble. Van Hise, who does not

blow his whistle unless necessary, began whistling the swimmer to move in (1T73-1T74, 1T141-1T142). In Marasco's opinion, the swimmer was not in trouble and thus he did not assist Van Hise (1T59).

Aires called Marasco over the radio and ordered him to whistle in the swimmer. Marasco hesitated, but then followed Aires's order (1T59-1T60, 1T74, 1T142). Aires did not discipline Marasco for the incident and never intended to do so (1T142-1T143).

13. About twenty minutes later, fellow lifeguards Varano and Mike Kachmar came to Marasco's stand at the direction of Aires. Varano told Marasco that Aires wanted Marasco to go to headquarters and bring his bag up. Varano believed Marasco would be going to the bay where Varano had been that morning (1T60, 1T62-1T63, 1T141, 1T143; 3T18-3T20). Marasco then asked what was going on and said to Varano, "if I am going to the bay, I am going to quit." (3T18-3T19). Varano told Marasco that that was up to him and Kachmar told him to calm down. Varano and Kachmar then left (3T19). Marasco proceeded to headquarters (1T63).

14. Upon arrival at headquarters, Aires told Marasco that his lifeguarding expertise was needed at the bay. Marasco claims Aires handed him a manual and told him to read it that night and that Marasco would be assigned to the bay the next day also (1T62, 1T144). Marasco responded, "I can't do that, I am a six year guy, I have too much experience for that." (1T64, 1T66-1T67, 1T144).

Aires stated, "you are going to the bay, that's your assignment." Marasco refused, replying "I am not going down there, I have six years experience. Aires then said "I am going to ask you again, you are sure, it is a lateral move, you are not losing any money." Marasco refused again, stating "It's not a lateral move, you and me both know that." Aires then told him that he had to let him go. Marasco replied okay and took off his gear (1T144, 1T66-1T67). Marasco acknowledges he was terminated after refusing to follow Aires' order (1T67, 1T144).

Marasco never asked why he was being sent to the bay and was not aware of the "Day at the Bay for Disabled" event (1T64-1T65, 1T144). Aires never indicated that the bay was going to be Marasco's permanent spot (1T144). Marasco acknowledges that he knew positively he would be assigned to the bay, at most, the afternoon of July 26 and all day July 27. However, Marasco assumed that the bay would be his new permanent assignment, based on Aires' tone and demeanor; that is why Marasco refused to go (1T68). Aires denies telling Marasco he would have to sit at the bay the next day (1T144-1T145). Aires intended to assign Marasco to the bay that day only, from Noon to 6:00 p.m. (1T67-1T68, 1T145).

15. Marasco usually did not question his assignment, but he felt the situation was extreme. He believed Aires' order was highly unreasonable and constituted a demotion and loss of status (1T26, 1T32, 1T63-1T64). Marasco, however, acknowledged that

there was no decrease in pay for a bay assignment (1T64, 1T80). Marasco believed the incident which had occurred twenty minutes earlier on July 26, 1997, whereby Aires ordered Marasco to whistle a swimmer in, may have been related to his bay assignment and subsequent termination that day. Aires however denies this (1T65-1T66, 1T165-1T166).

No officer has ever refused an assignment to the bay; nor has any lifeguard refused Aires' assignment to a particular site, aside from Marasco (1T135-1T136, 1T180; 3T25-3T26). Lifeguard Van Hise testified that if Aires assigned him to the bay or if Aires changed his ocean assignment he would not question him, but would carry out the assignment (1T76, 1T81).

16. Marasco does not believe that the Day at the Bay event for the handicapped made his assignment to the bay more reasonable, since Varano had already been assigned there. Fellow lifeguards Varano and Van Hise believed such a group deserves more attention and scrutiny, as does Marasco's friend, Dacpano (1T82; 2T45-2T46; 3T25).

17. Marasco spoke to the Mayor of Seaside Heights after his termination. The Mayor told Marasco that Aires was the boss and that he should listen to him. When Aires informed the Mayor of the situation with Marasco, he also told Aires that Aires was the boss and responsible for his department (2T13). The Mayor believes it is in the Captain's discretion to terminate someone for refusing a direct order (2T10).

18. Marasco, thereafter, applied for unemployment compensation. Aires did not think Marasco should receive it because he was terminated for insubordination. The matter proceeded to hearing and the Unemployment Compensation Hearing Examiner found that Marasco was terminated for misconduct and denied his request for unemployment compensation (1T145-1T156).

ANALYSIS

The Borough Did Not Violate Provision 5.4a(2) of the Act.

N.J.S.A. 34:13A-5.4a(2) prohibits public employers from dominating or interfering with the formation, existence or administration of any organization. This provision is designed to protect bonafide employee organizations representing groups of public employees from improper employer activity which threatens the formation, existence or administration of the organization. Borough of Shrewsbury, D.U.P. No. 79-12, 5 NJPER 13 (¶10007 1978) aff'd. P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979) aff'd. 174 N.J.Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980).

N.J.S.A. 34:13A-3(e) states in pertinent part that the term employee representative "...shall include any organization, agency, or person authorized or designated by a public employer, group of public employees, or public employee associations to act on its behalf and represent it or them." Collective activity is necessary for sustenance of an employee organization. Shrewsbury.

Here, Marasco claims that provision 5.4a(2) was violated when Aires took over LASH and appointed officers of his choosing. However, I found there is no evidence that LASH represents or engages in collective activity on behalf of the lifeguards. (See Finding No. 4). Thus, I conclude that LASH does not qualify as a bonafide employee organization under the Act and, accordingly, I cannot find that provision 5.4a(2) was violated. Shrewsbury.

Marasco believed that in 1987, LASH did engage in collective activity--it engaged in a strike. Public sector strikes in New Jersey, however, are not protected. Union Beach Bd. of Ed., 53 N.J. 29 (1968). Thus, Marasco cannot rely on that collective activity to be protected activity within the meaning of the Act. Even assuming the 1987 activity was protected, Marasco has no first hand knowledge that LASH actually called and organized the strike. He was not even employed by the Borough then; his knowledge is wholly based on hearsay. Moreover, Aires, who was a lifeguard and LASH member in 1987, did not confirm that LASH and simply not some lifeguards, engaged in the work action. In fact, Aires testified that several LASH members, including himself, did not participate. I credit his testimony. Since no legally competent evidence was presented in support of Marasco's contention that LASH engaged in a strike in 1987, I cannot make such a finding. See N.J.A.C. 1:1-15.5(b). (See Finding No. 5)

Nevertheless, even if the 1987 strike was indeed called and conducted by LASH, and that LASH thereby qualified as an

employee organization under the Act, there simply is no evidence that it has engaged in collective activity since then. The fact that LASH may have engaged in collective activity more than ten years ago does not make it a bonafide employee organization under the Act now. Rather, the record reveals that in recent years, LASH has simply been a social organization (See Finding No. 4). Therefore, based on the above, a provision 5.4a(2) violation cannot be found.

The Borough Did Not Retaliate Against
Marasco in Violation of Provision 5.4a(3) of the Act

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates provision 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented 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 motives unlawful under our Act and other motives 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 proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

Since there is insufficient direct evidence of anti-union motivation with respect to Marasco's discharge, he must rely on circumstantial evidence to prove his case. Here, I find that Marasco has not met his burden under Bridgewater. Marasco fails to even prove the first Bridgewater element -- that he engaged in protected activity. Marasco testified that during the summers of 1996 and 1997, he discussed with a majority of the lifeguards the possibility of using LASH to negotiate a higher salary for them. However, not one of Marasco's fellow lifeguards corroborated this, although lifeguards Van Hise and Varano testified as his witnesses and thus I did not credit it. (See Finding No. 4). While Marasco served as an officer of LASH in the summers of 1995, 1996 and 1997, there is no evidence that he engaged in any protected activity during this time. The record reveals that LASH was

simply a social organization then, conducting lobsterbakes and banquets and compiling a yearbook. There is no evidence that LASH negotiated wages or other working conditions, filed grievances or engaged in any other activity protected by the Act (See Finding No. 4).

Even if Marasco can establish that he engaged in protected activity and the Borough knew of it, Marasco fails to show that the Borough was hostile toward the exercise of protected rights. Marasco claims that hostility is proven by the July 20, 1997 conversation whereby Aires asked him if he intended to negotiate higher pay through LASH and then later stated to Marasco "well, we have ways of getting rid of guys like you." Marasco's witness, Jennifer Dacpano, also corroborated Marasco's account of the conversation.

I, however, did not credit Dacpano. (See Finding No. 10). I further credited Aires, who denied this conversation ever took place and specifically denied the statements attributed to him by Marasco. (See Finding No. 10). I also did not find reliable Marasco's testimony that in the summer of 1997, he discussed negotiating higher pay through LASH. (See Finding No. 4).

In any event, even assuming that Marasco can prove his burden under Bridgewater--that he engaged in protected activity, that the Borough knew of it and that the Borough was hostile towards the exercise of protected rights--the record reveals that

the Borough would have terminated Marasco anyway, even absent the protected activity.

It is undisputed that on July 26, 1997, Marasco disobeyed a direct order of his supervisor, Captain Aires, to report to the bay. This is the reason he was terminated. His admitted insubordination was the motivating reason for the Borough's action, not any union animus towards Marasco. Further, Marasco had been disciplined earlier that summer over the Nicole Best incident, and on the Employee Disciplinary Report it specifies that he could be subjected to further discipline, including termination as a consequence of failing to improve. (See Finding No. 9; R-2).

Marasco tries to justify his refusal of the bay assignment on the basis that it was unreasonable and a demotion, because it was considered a less prestigious assignment and because he thought he was too experienced to accept that assignment without risking a loss of status among his fellow lifeguards. However, an employer has the managerial prerogative to assign and reassign employees. See City of Newark, P.E.R.C. No. 98-108, 24 NJPER 163 (¶29080 1998); Borough of North Plainfield, P.E.R.C. No. 98-76, 24 NJPER 27 (¶29015 1997). Moreover, it was reasonable for the employer to assign an experienced guard like Marasco to the bay that day, in the light of the handicapped event that was taking place. In fact, Marasco's witnesses testified that the handicapped group deserved more attention and scrutiny (See Finding No. 16).

In any event, Marasco admitted that he would not have lost any pay as a result of the reassignment and his fellow lifeguards did not consider a bay assignment a demotion. Further, although Marasco "assumed" the bay assignment would have been permanent, there is no evidence that it would have been. In fact, even accepting Marasco's testimony, he admits he knew positively that the bay assignment would last only one and one half days (See Findings Nos. 3, 14 and 15).

Further, Marasco's witnesses, fellow lifeguards Van Hise and Varano, while acknowledging that a bay assignment is not as desirable and prestigious, would not have refused to report there if so assigned by Aires. In fact, Varano readily did so that day. (See Findings No. 3 and 15). The record reveals no lifeguard has ever refused an assignment by Aires, including an assignment to report to the bay. (See Finding No. 15).

Finally, Marasco believes Aires' assigning him to the bay and subsequent termination may be related to the earlier incident whereby Aires ordered him to whistle a swimmer in. However, this is merely Marasco's speculation; Aires denies this. Moreover, as stated above, it was within the employer's managerial prerogative to assign him to the bay. City of Newark; Borough of North Plainfield. In any event, even if there was a connection between the events, this is not proof of union animus or illegal motive.

Based on the above, I do not find that Marasco has met the Bridgewater standard. His termination was not motivated by

any protected activity or union animus, but was based on a legitimate business reason--his insubordination in refusing Aires' direct order. Accordingly, I find that the Borough did not violate provision 5.4a(3) and derivatively provision a(1) of the Act with respect to Marasco's bay assignment and subsequent termination.

Finally, the Charging Party presented no evidence in support of his provision 5.4a(7) allegation and thus I recommend that it be dismissed.

CONCLUSIONS OF LAW

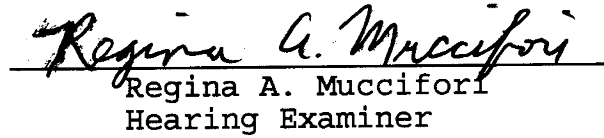
1. The Borough did not violate provision 5.4a(2) of the Act.

2. The Borough did not violate provision 5.4a(3) or derivatively, a(1) of the Act with respect to Marasco's July 26, 1997 bay assignment and subsequent termination.

3. The Borough did not violate provision 5.4a(7) of the Act.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the Complaint be dismissed.



Regina A. Muccifori
Hearing Examiner

Dated: September 30, 1998
Trenton, New Jersey