P.E.R.C. NO. 78-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVON and WILLIAM SMITH,

Respondents,

Docket No. CI-76-28-78

-and-

MICHAEL FOWLER,

Charging Party.

SYNOPSIS

In an unfair practice charge filed by a lifeguard captain, the Commission determined, in agreement with the Hearing Examiner, that the Borough had violated the Act by not rehiring the lifeguard captain for the 1976 summer season because of his exercise of protected rights.

The Borough contended that the lifeguard captain was a managerial executive and therefore not protected by the Act. The Hearing Examiner rejected this contention as did the Commission.

The Hearing Examiner recommended that the lifeguard captain be reinstated with back pay and that he be awarded counsel fees as a credit against the monies earned in mitigation of the back pay award.

In its exceptions, the Borough disputed the authority of the Commission to order back pay, citing Galloway Twp. Bd. of Ed. v. Galloway Twp. Asso. of Educational Secretaries, 149 N.J. Super. 346 (1977), pet. for cert. granted ___ N.J. ___ (July 20, 1977). Additionally, the Borough disputed the authority of the Commission to award counsel fees. These points were also raised in oral argument before the Commission.

The Commission distinguished Galloway on several grounds including the fact that Galloway related to a refusal to negotiate whereas the instant matter relates to discrimination. The Commission concluded that not to award back pay would be totally contrary to the legislative intent under these circumstances.

Without reaching the question of authority of the Commission to award counsel fees, the Commission concluded, based on the totality of the circumstances in this case, that an award of counsel fees would not be appropriate herein. Accordingly, that portion of the Hearing Examiner's Recommended Order was not adopted by the Commission.

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MICHAEL FOWLER,

Charging Party.

Appearances:
For the Respondents, Peter P. Kalac, P.C.

For the Charging Party, Meehan & Kenny, P.C.
(Mr. Joseph Meehan, Of Counsel)

DECISION AND ORDER

On June 18, 1976, Michael Fowler filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Borough of Avon (the "Borough") and its agent, William Smith, had committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq., (the "Act"). It was alleged that Fowler had not been rehired for the position as lifeguard captain for the 1976 summer season because of his exercise of rights protected by the Act, thereby violating N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5), (6) and (7).[1/] It appearing that the allegations of the

1/ These subsections prohibit the following conduct by public employers, their representatives or agents: "(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 (Continued)

charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued, and a hearing was conducted by Commission Hearing Examiner Robert T. Snyder on February 24, March 22 and March 28, 1977. All parties were given the opportunity to introduce evidence, examine and cross-examine witnesses and file briefs, which were submitted by May 2, 1977.

On June 24, 1977, the Hearing Examiner issued his Recommended Report and Decision in which he found the Respondents to have violated subsections (a)(1) and (a)(3), and recommended dismissal of the complaint as to the remaining subsections. Exceptions were filed by Respondents on July 13, 1977 and the Charging Party replied on August 11, 1977. At the request of the Respondents, oral argument was granted and heard by the Commission on October 18, 1977. At the request of the parties, the briefs submitted to the Hearing Examiner have been made a part of the record before the Commission.

The Respondents have objected to a number of findings of fact by the Hearing Examiner which were based on his evaluation of witness credibility and evaluation of some documentary evidence. As to these exceptions, we simply note that as we have made clear

1/ (Continued) by this Act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

in the past,[2/] credibility judgments by a Hearing Examiner will not normally be reversed by the Commission as they are the proper function of the finder of fact. We have reviewed the record and find no cause to vary from the above rule.

Respondents urge that the Hearing Examiner erred in his conclusion that Fowler was not a managerial executive within the meaning of the Act,[3/] and thereby excluded from its guarantees of rights. Emphasized is that portion of the definition of managerial executive which refers to effectuating management policy. References are made to certain specific findings of fact regarding work rules.

Our independent review of the record leads to the conclusion that the Hearing Examiner was correct in his finding. We agree that the term "managerial executive" should be narrowly construed, and that the relevant National Labor Relations Board precedent as cited by the Hearing Examiner indicates that a wider range of discretion than that possessed by Fowler is needed. Fowler was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives - excluded from coverage - from supervisors - eligible to be represented in appropriate units. Therefore, finding

2/ In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977).

3/ N.J.S.A. 34:13A-3(f) defines "managerial executives" as follows: "Managerial executives" of a public employer means 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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district."

Fowler not to be a managerial executive, we sustain the Hearing Examiner's finding of a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3), adopting the reasoning set forth in his Recommended Report.[4/]

Remaining are the objections to the remedies recommended by the Hearing Examiner. The exception to the order to reinstate Mr. Fowler is based solely on the claim that he is a managerial executive and in light of our ruling on that score above, it is without merit.

The Hearing Examiner recommended that the Borough be ordered to pay to Fowler the salary he would have earned for the 1976 and 1977 summer seasons and any season thereafter prior to compliance with the order to offer reemployment, minus mitigation consisting of his earnings as a lifeguard in Belmar in 1976 and any other amounts actually earned by him during summer seasons while not employed by Avon as lifeguard captain. Respondents claim the Commission has no authority to award back pay.

It is true that the Appellate Division has held that the Commission is lacking in authority to award back pay for services not rendered. Galloway Twp. Bd. of Ed. v. Galloway Twp. Asso. of Educational Secretaries, 149 N.J. Super. 346 (1977), pet. for cert. granted ___ N.J. ____ (July 20, 1977). However, that holding was "without reference to statutory remedies for recovery of back pay

4/ No evidence was presented to support the allegations of violation of the remaining subsections and we adopt the recommendation to dismiss them.

by illegally dismissed or suspended public employees." 149 N.J. Super. at 352. We believe that by specifically distinguishing cases involving illegal dismissals, the Appellate Division was recognizing that an award of back pay is an indispensable remedy in (a)(3) situations without which any order by the Commission would be a hollow remedy. The Act grants authority to effectuate the policies enumerated therein. Clearly subsection (a)(3) is designed to allow a public employee to engage in protected activities without jeopardizing his/her livlihood. Not to award back pay would be totally contrary to this expression of legislative intent. 5/

Finally, the Respondents object to the Hearing Examiner's recommendation that counsel fees be granted to the Charging Party as a credit against the monies earned in mitigation of the back pay award on the ground that the Commission lacks the authority to award such a remedy. The Hearing Examiner disagreed, relying upon New Jersey Supreme Court decisions in Penella v. Board of Education of Jersey City, 51 N.J. 323 (1968) and Mastrobattista v. Essex County Park Comm., 46 N.J. 138 (1965) which allowed such a credit in Civil Service proceedings. In view of the totality of circumstances in this case, and noting that the extent of the Commission's remedial authority is currently in doubt and is before the Supreme Court, Galloway, supra, we do not believe that any

5/ Furthermore, the Supreme Court's grant of certification indicates that the denial of back pay authority in (a)(5) cases is itself still open to question.

award of counsel fees is appropriate herein.[6/]

ORDER

IT IS HEREBY ORDERED that Respondents, Borough of Avon and William A. Smith - in his official capacity - shall

1. Cease and desist from:

a. Discouraging their employees in the exercise of the rights guaranteed to them by this Act by discriminating in regard to hire or tenure of employment or any term or condition of employment.

b. Interfering with, restraining or coercing their employees, in any like or related manner, in the exercise of the rights guaranteed to them by this Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Offer to Michael Fowler immediate and full reemployment to his former position as lifeguard captain, for the 1978 summer season, if not already done so, without prejudice to any rights or privileges previously enjoyed by him, restoring, insofar as possible, the order of rank or chain of command existing on the force of lifeguards at the completion of the 1975 summer season when Fowler was last employed as lifeguard captain.

b. Borough of Avon only shall make whole Michael Fowler

6/ An alternative theory for the award of counsel fees - presentation of a defense that was frivolous - was considered by the Hearing Examiner who found that assuming such a theory was applicable to PERC proceedings he could not find the defense herein was frivolous. We agree and adopt his reasoning in that regard.

by paying to him:

The sum of $2,080.00 relating to the summer season of 1976; and a sum of money equal to the amount he normally would have earned in employment with the Borough from the first date he would have commenced employment as lifeguard captain for the summer season of 1977 until the completion of employment as said captain for that season and continuing for the same period for each summer season thereafter, or to the date when such re-employment is offered to him in accordance with the provisions of paragraph 2a, above, or until such time as he is no longer available for such employment, whichever first occurs, less the amounts, if any, actually earned by him in other employment during such periods.

c. Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

d. Post immediately, in plain sight, at the Avon Municipal Building in the Borough of Avon by the Sea, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission, shall, after being duly signed by Respondent Borough's representative and by Respondent Smith, be posted by Respondents immediately upon receipt thereof, and maintained by them for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted.

Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced or covered by any other material.

e. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of the Commission's Order, what steps the said Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the Complaint alleging that the Borough of Avon and William A. Smith were engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(2), (4), (5), (6) and (7) with regard to Michael Fowler's non-renewal of employment be dismissed in their entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Forst, Hurwitz and Parcells voted for this decision. Commissioner Hipp voted against this decision.

DATED: Trenton, New Jersey
November 15, 1977
ISSUED: November 16, 1977

"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 discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer Michael Fowler immediate and full reemployment to his former position with us as Lifeguard Captain /without prejudice to any rights or privileges enjoyed by him/ that the Commission has determined was unlawfully denied to him for the 1976 summer season and thereafter because of his exercise of the rights guaranteed to him by the New Jersey Employer-Employee Relations Act.

WE WILL make Michael Fowler whole for any loss of pay he may have suffered by paying him a sum of money equal to the amount that he would have earned as wages as Lifeguard Captain from the date that he was refused reemployment to the date of an offer of employment, less his actual earnings during that period of time.

BOROUGH OF AVON
(Public Employer)

Dated _____ By William A. Smith, (Title)
Director of Public Affairs and Safety

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 77-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVON & WILLIAM A. SMITH

Respondents,

- and -

Docket No. CI-76-28-78

MICHAEL FOWLER

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The complaint alleges that the Respondents discriminatorily discharged the Charging Party from his position as lifeguard captain in the Borough because of his exercise of acts protected by the Act in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3). The parties also litigated the issue as to whether the Charging Party was a "managerial executive" and outside the Acts protections pursuant to N.J.S.A. 34:13A-5.3.

The Hearing Examiner concludes that the Charging Party is not a "managerial executive" within the meaning of the Act, and finds that the Respondents have discriminatorily discharged the Charging Party for his exercise of protected activities in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3).

The Hearing Examiner recommends that the Commission order the Respondents to, cease and desist from such activity; offer to the Charging Party immediate and full re-employment to his former position as lifeguard captain for the 1977 summer season; make whole the Charging Party by an award of backpay, and limited attorney's fees, and to post notices, supplied by the Commission, whereby its employees will be notified of the Respondent's corrective actions; and to notify the Commission in writing of the steps taken to comply with its order.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transfered 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. 77-21

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

In the Matter of

BOROUGH OF AVON & WILLIAM A. SMITH[1/]

Respondents,

- and -

Docket No. CI-76-28-78

MICHAEL FOWLER,

Charging Party.

Appearances:
For the Respondent, Norton and Kalac, P.C.
(Peter P. Kalac, Esq., of Counsel)

For the Charging Party, Meehan and Kenny, P.C.
(Joseph Meehan, Esq., of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Statement of the Case

An unfair practice charge having been filed on June 18, 1976 by the Charging Party, Michael Fowler, and it appearing to the Director Unfair Practice Proceedings, Carl Kurtzman, that the allegations, if true, may constitute unfair practices within the meaning of N.J.S.A. 34:13A-1 et. seq. ("Act") on the part of the Respondents, Borough of Avon and William A. Smith ("Boro" and "Smith"), a complaint and notice of hearing issued against the Borough of Avon and William A. Smith on January 12, 1977 alleging violation of N.J.S.A. 34:13A-5.4(a)(1),(2),(3),(4),(5),(6) and

1/ At the outset of the hearing the Charging Party's counsel stated that William A. Smith was named as Respondent in his capacity as Director of the department in which the beach activities were conducted - the Department of Public Safety - and not in his individual capacity. While no formal motion to amend the complaint was made, in view of this statement on the record, the undersigned has considered Smith to be a Respondent only in his representative capacity. See N.J.S.A. 34:13A-3(c) where the term "employer" is defined to include any person acting, directly or indirectly, on its behalf or in its interest with the employer's knowledge or ratification.

(7). [2/] The complaint alleges that the Boro, by Smith, its Commissioner of Public Safety, failed to rehire Fowler as lifeguard captain for the 1976 summer season because of Fowler's exercise of rights guaranteed him by the Act. The Respondents filed an Answer on January 24, 1977 denying commission of the unfair practices alleged, and, during the hearing, amended their Answer to plead as an affirmative defense that Fowler at all material times was a "managerial executive" within the meaning of the Act [3/] and was thus not protected in the exercise of the rights other-

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2/ These sub-sections prohibit the following conduct by public employers, their representatives or agents:

> (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
> (2) Dominating or interfering with the formation, existence or administration of any employee organization.
> (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.
> (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.
> (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.
> (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.
> (7) Violating any of the rules and regulations established by the commission.

3/ N.J.S.A. 34:13A-3(f) defined "managerial executives" as follows:

> "Managerial executives" of a public employer means 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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

wise available to public employees under N.J.S.A. 34:13A-5.3.[4/] Hearing was conducted in this proceeding on February 24, March 22 and March 28, 1977. All parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Post hearing briefs were submitted on behalf of Respondents and Charging Party on May 2, 1977. [5/]

Upon the entire record in the case and from my observations of the witnesses and their demeanor I make the following:

Findings of Fact

I. The Alleged Unfair Practices

A. Background

Fowler was first employed as a lifeguard in the Boro [6/] in 1964. He was

4/ That section of the Act, provides, in pertinent part:

> "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent..."

5/ During the course of the hearing the undersigned granted leave to the Charging Party, in support of a specific prayer for relief, to submit along with his brief, an affidavit of attorney's services to supplement testimony by Fowler of legal expenses he incurred in litigating his complaint before the Commission. That affidavit, filed and served on Respondent's counsel with the filing of Charging Party's brief, has been received in evidence as Charging Party's Exhibit No. 3. Respondents, who were provided an opportunity to file objections to any of the factual matters contained in the affidavit, have not filed any opposing papers.

6/ The parties stipulated that Avon is a public employer within the meaning of the Act. Under the so-called Walsh Act, the Boro operates under the Commission form of government. See N.J.S.A. 40:72-1 et. seq. The Commission in Avon comprises three members who serve as Director of Public Affairs and Safety, Revenue and Finance, and Public Works. The Mayor is that Commissioner designated by the three to preside at all meetings, N.J.S.A. 40:72-10. While he has supervisory authority over all departments, power of appointment resides exclusively in the director of the department to which a particular position has been assigned, and is exercisable by that Commissioner alone. Daly v. New Brunswick, 3 N.J. 397, 70 A. 2d 744 (1950).

designated a beach captain, supervising a group of guards, in 1965. In 1966 he achieved the top position of lifeguard captain and continued to serve the Boro in that capacity through the 1975 summer season. For some years up to the present, Fowler has been employed as an assistant professor of business management at Brookdale Community College. Until May, 1975,[7/] during the course of his continued employment by the Boro, Fowler had reported to Harry Crook, a Boro Commissioner, who, in his capacity as Director of Public Safety, had jurisdiction over the lifeguards in the beach area. Under a reorganization following a Boro election held on May 20, William A. Smith was elected a Commissioner, succeeded Crook as Director of Public Safety and was selected as Mayor. Crook continued as a Commissioner, and became Director of Public Works, which includes under its jurisdiction the maintenance of the beach area but not the lifeguard function.

B. Protected Activities

Prior to the May election Crook had planned to continue Fowler as lifeguard captain, delegating responsibility to him to interview for hire, subject to his final decision, the remainder of the lifeguard crew, consisting of 15 to 17 guards, including among them 3 beach captains with supervisory authority at each of the 3 Avon beaches. After the May 20th reorganization, Smith continued with the tentative guard roster and budget figures which Fowler had proposed during the off season.

According to Fowler, shortly after the Boro elections, he met with Smith at Smith's residence. As related by Fowler, he and Smith reviewed the written rules and regulations which for many years had guided lifeguard conduct and behavior. These rules had initially been proposed by Fowler years before, had been adopted by Crook, Director of Public Safety, and had been modified slightly in the same manner over the years. Smith approved the rules, one by one, and then announced one change he wanted instituted this year. He would require the lifeguards to rake

7/ All subsequent references to dates are during 1975 unless otherwise noted.

the beach in front of the swimming area. Apparently Smith sought thereby to reduce the risk of injury to beach patrons and lessen the possibility of suits against the Boro. In the past, the guards had not been required to rake the beach. Fowler noted this duty constituted a change in working conditions but assented to the change. No other changes of the rules were discussed. At the organizational meeting of the guards held the evening of June 9 at the Municipal Building Smith also announced that he would require all guards to remain on the beach during rainy days. Under the prior practice certain guards would be permitted to leave the beach once it was clear that the rain would continue through the day and only a skelton crew would remain on duty. Fowler expressed surprise and asked whether beach gate tenders and pool employees, whose past practice of retaining only skeleton crews during rain days paralleled that of the lifeguards, would be permitted to leave. After receiving an affirmative response, Fowler continued to press the matter but was cut off by Smith who noted, "You work 40 hours, get paid 40 hours. You stay 40 hours," and stated it was a closed issue and he would not discuss the matter further.

Later that evening, as testified to by Fowler and other guards, a meeting was held at Fowler's residence. The new rule changes were discussed, the guards' concerns noted, particularly as to the change in rain day duty, and it was determined that Fowler would contact the Public Employment Relations Commission (PERC) the following day to request information as to the various options available to them as employees to seek representation or obtain relief under the Act. The following day Fowler telephoned the PERC office in Trenton and spoke with a PERC agent, Gerald Clendenny, who agreed to forward to Fowler a copy of the PERC statute and rules and various forms, including petitions for certification and unfair practice charge forms. Those materials were forwarded to Fowler by letter dated that day, June 10. Several days later Fowler arranged to meet Smith again at Smith's residence. The meeting took place on June 16. According to Fowler, he attended not as

an individual but at the request of the lifeguards. Fowler told Smith that the guards objected to his rain day policy as it stood, that it was not the policy on any beach front and asked him to reconsider his position. Smith remained adamant. According to Fowler, after advising Smith that the entire life guard crew was extremely upset at the decision, that the privilege of retaining a minimal crew on rainy days had been granted to the guards for many years,Fowler then stated, "The lifeguards are upset to the point - I wish to inform you that we have been in touch with the Public Employment Relations Commission." As testified to by Fowler, Smith slid his chair back a bit, raised his right arm, placed a finger close to Fowler's nostrils and said in a loud voice, "If you pull that PERC shit Fowler I'll fire you right now." Smith continued, "I have people banging on my door everyday, asking for a job since I have been Mayor. You think they want to hear about that PERC shit? Your going to PERC, Michael Fowler, put a very big distance between yourself and myself." According to Fowler, Smith continued to mumble over and over, "I just can't believe you've gone to PERC. I can't believe this." After some minutes Smith calmed down, regained his composure and advised Fowler that he would look into the matter and try to get the dispute resolved and that he would be in touch with Howard Rowland, Director of Water Safety for Monmouth County and Chief Lifeguard for the neighboring borough of Belmar. Shortly after Fowler arrived home that evening he received a telephone call from Smith advising that he had reached Rowland and that the guards were to adopt the rain day procedure used in previous years.

Commissioner Crook testified as a witness for Fowler. According to Crook, sometime during June just prior to the beach opening, he met Smith on Ocean Avenue. Smith asked for his help stating to him, "You can help me get rid of that asshole Fowler." When Crook asked Smith what his problem with Fowler was, Smith responded, "The son-of-a-bitch went to PERC and complained about the way I was attempting to organize the lifeguards for the summer."

Mayor Smith's testimony with respect to the sequence of events just des-

cribed and the conversations between himself and Fowler on these occasions differs markedly from Fowler's. In Smith's interpretation, he first spoke to Fowler at his residence on June 6 to go over plans for the coming summer season after discussing the rules and regulations and point system governing discipline of the guards. Smith noted a change of procedure requiring that the guards rake the beach. At this point he claims that Fowler stated he didn't like it and would like to take it to PERC, to which Smith testified he replied, "If he wanted to, he could seek it out, because I really don't know." Next, according to Smith, he met the guards at the Municipal Building on June 16 where he announced both the raking procedure and the new rain day policy requiring two men at each beach to guard the area. When Fowler protested, Smith asked Fowler not to discuss it in front of the men stating, "Let's you and I discuss it together. It is a decision that both of us as managers should sit down and talk about." As related by Smith, that meeting took place in his office directly after the general meeting with the guards at which time Smith told Fowler he would contact Howard Rowland to find out what other beaches were doing. Smith further testified that Fowler came to his home that very evening, June 16. With his wife and children present in the house on the same floor, Smith told Fowler that he had been unable to reach Rowland but would continue trying and indicated that Avon would adopt whatever procedure Belmar had covering rain days. Fowler agreed to this procedure and left.

I do not credit Smith's version of these matters. Smith's testimony as to dates, sequence of events and conversations appears to be illogical, inconsistent and calculating to the extent of stressing Fowler's alleged managerial status at a time, before the litigation, that Smith could not have been aware of, or motivated by, this defense. It seems strange that Smith would have delayed an initial meeting with Fowler to go over plans for the beach season until June 6, more than two weeks after his election. The major dispute between the guards and Smith was over the rain day policy, not the raking. It would have been highly unlikely

and illogical for Fowler to have mentioned the Public Employment Relations Commission to Smith in a private conversation between them immediately on hearing of a new raking policy only - not the rain day policy change - and without having first discussed the matter with the other guards. Indeed, Fowler later testified that he had no reason to mention PERC at his first meeting with the new Mayor. The letter in evidence from PERC agent Clendenny to Fowler, dated June 10, follows in close sequence the June 9 meeting at which Fowler and the guards discussed and agreed upon an approach to the Commission. That meeting was the guards' immediate response to their surprise at Smith's announcement of the rain day change earlier the same evening. A memo in evidence establishes the scheduled organizational meeting date for the guards as the evening of June 9, yet Smith later changed his testimony to indicate that the organizational meeting was held on June 16, the same evening he claims Fowler came to his home. Furthermore, independent evidence of Smith's animosity towards Fowler's contact with PERC and the expression of a desire to get rid of him was supplied by Commissioner Crook, who, although apparently a political opponent of Smith's was restrained and careful in his responses on the witness stand, particularly on cross-examination, and whose testimony is worthy of belief. Fowler, in contrast to Smith, testified in a straight forward manner and I, accordingly, credit Fowler's version of the dates and substance of conversations he held with the Mayor during the 3 to 4 week period following May 20. 8/

Occasions arose during July for Smith to become further aware of Fowler's

8/ I am not persuaded that the stipulated testimony of Smith's wife and 13 year old daughter, that neither heard any shouting, yelling, and screaming during the time the Mayor and Fowler were conversing on the same floor in another room separated from them by an open passageway, precludes crediting Fowler. There are sufficient variables, such as the carrying power of Smith's voice and the degree of concentration of his wife and daughter on other tasks (cooking, eating, reading and watching television), which make the family members' testimony an unsatisfactory basis for concluding that Fowler was inaccurate when he claimed that Smith shouted at him during their meeting. Even if Fowler was in error as to the volume of Smith's voice, I nonetheless conclude that Fowler's version of the conversations, both as to timing and substance, is far more creditable than Smith's version.

championing of lifeguard concerns regarding terms and conditions of employment. On one occasion Smith directed Fowler to have the lifeguards remain at their posts until 5:30 p.m., lengthening the longstanding quitting time by a half hour. After confirming that a Boro ordinance then in effect listed 5:30 p.m. as quitting time for guard patrols of the beaches, Smith within a day or two of the initial conversation passed word to Fowler, and the guards changed their practice and continued to remain at their posts to 5:30. However, Fowler, on behalf of the other guards, pressed Smith to try to get the gateguards, who regulate paid entry to the beaches, to also lengthen their work day to at least 5:15 p.m. in order to control after 5:00 p.m. a heavy influx of beach patrons whom the guards found a somewhat rowdy group and difficult to control. This effort was not successful. For example, on July 28, Fowler wrote Smith stating, inter alia, "We would also like to know when the gateguards will start their 5:15 schedule, as you indicated to us at the meeting. After talking to Joe Murphy and a number of the gateguards, they stated that they have received no such directive. We are anxious to have this problem remedied."

On another occasion, Boro Commissioner Brautigan, during a period of Smith's absence on vacation from the Boro, advised Fowler that he had contacted Belmar Chief Lifeguard Rowland and assured himself that if the lifeguards, as rumored, engaged in a collective job action or walkout in the event disciplinary action was taken against any guards for fouling the municipal pool at an evening party some days prior, Belmar would be able to supply lifeguards to provide adequate beach coverage. After spreading word among the guards of Brautigan's comments, Fowler learned from a Belmar assistant lifeguard captain that Belmar had no intention of covering Avon beaches in the event of a stoppage. Fowler then told Brautigan what he had learned from his Belmar source, concluding with the statement that Brautigan's information regarding Belmar assistance was inaccurate. A few days later, after Smith's return to the Boro, Fowler invited Smith to a meeting with the guards for Sunday, July 26, to obtain the Mayor's response to rumors which had

been circulating among them since the pool incident that many guards would not be rehired for the following year. Smith, who admitted he had received a report from Brautigan and Boro Police Chief Cuttrell immediately on his return regarding the events of the pool incident and guard reaction to consideration of disciplinary action, probably learned from Brautigan that contrary to Brautigan's understanding Belmar guards would not be available to assist during a stoppage. 9/ At this meeting Smith assured the Boro lifeguards that the pool fouling incident was nothing for the guards to be concerned about. 10/ As to the rumors regarding Boro disposition not to rehire them, Smith claimed he informed the guards that he would evaluate them through the rest of the summer and advise them later as to who would be rehired. 11/ Here I credit Fowler's version of these remarks, corroborated by guard Captains Compton Jenkins and Howard Hardie, Jr. that if all guards continued to perform up to present standards in performance of their duties, they would be rehired next year. This version is also consistent with the fact, with which even Mayor Smith agreed, that all rumors that guards would not be rehired for the following season ceased after the meeting.

9/ Smith testified that on his return Police Chief Cuttrell assured him that policemen would probably be available to assist on the beach in the event of such an emergency.

10/ Smith claimed he was compelled by fear of a work stoppage during his first year on the job in making such an assurance. Yet, Smith never received confirmation of the rumored threat of a stoppage from any guard. Furthermore, Smith was not a novice in labor relations, having served for some time as shop steward for his union at the telephone company where he was employed and having served as a school board member for nine years dealing with labor problems arising from collective negotiation relationships with employee organizations. Thus, his fear of such a rumor appears somewhat disingeneous, particularly in view of the assurance of aid from the police chief. Furthermore, all the lifeguards, with the exception of Fowler, who sought to return the following year, including all guards involved in the pool incident, were offered re-employment. Finally, Smith never raised the incident with, or reprimanded, any guard after his return to Avon in mid-July. Accordingly, I do not credit Smith's asserted motivation for downgrading the pool fouling incident.

11/ Yet as will be shortly noted, Smith refused on Labor Day to provide Fowler with a requested evaluation of his performance.

Late in the 1975 beach season, Fowler requested and received assurance from Smith, in accordance with past practice, that if foul weather prevailed on Labor Day, enabling the lifeguards to spend their time clearing the beach and storing equipment, thus obviating the necessity for retaining a skeleton crew to store and secure in the week following, the guards would receive an extra half day's pay. However, on Labor Day, Smith told Fowler the men would not receive the bonus, but offered no explanation for this change in position. The guards, nonetheless, worked to 5:30 p.m. and no skeleton crew was retained after Labor Day. Also on Labor Day Smith declined to provide Fowler with an informal evaluation of his performance as captain - an evaluation which, in light of past events between the two, Fowler had requested.

After the close of the 1975 season, Fowler wrote to the Avon Board of Commissioners in October, forwarding copies to each Commissioner, including Smith, regarding his interest in continuing as lifeguard captain the next season. Fowler did not receive any reply. However, in November, Beach Captain Jenkins telephoned Fowler to advise him that Smith had called to ask Jenkins if he would be interested in the captain position for the following summer. Still Fowler received no word from the Boro or Smith. During that winter of 1975-1976, apparently Fowler spoke at a public meeting of the Board of Commissioners. While there was no direct testimony on the subject of Fowler's remarks, after the public meeting, Smith turned to Crook during a caucus and said, "That son-of-a-bitch has done it again. He tried to embarrass me publicly, he'll never be lifeguard captain in Avon as long as I'm Director of Public Safety." I credit Crook's attribution of these remarks to Smith.

On February 18, 1976 Fowler wrote Smith requesting a meeting, at his convenience, to discuss the preliminary 1976 lifeguard budget figures which Fowler had prepared. Fowler listed both his home and college telephone numbers. Mayor Smith did not respond. Then in March, 1976 Fowler telephoned Smith and asked for a meeting to review the proposed budget figures. Smith did not deny the remarks and behavior

attributed to him by Fowler. Smith appeared to be upset. He told Fowler he had fouled up the pool and left the anchor barrels in the water. Smith continued that Fowler had embarrassed him in a speech he had made. Smith noted that after Fowler's talk at the Board of Commissioners meeting he had some nerve to call and ask for a meeting.

Fowler again wrote Smith on March 9, 1976 enclosing a copy of his letter to the Boro dated October 10, 1975, which Fowler noted Smith had claimed he had not received. Fowler closed by indicating his interest in continuing as lifeguard captain. On April 16, 1976 Fowler again wrote Smith noting that because of pending circumstances at Brookdale Community College he would appreciate confirmation of his position with the Boro as soon as possible. 12/ In response, Mayor Smith left a telephone message with Fowler's wife inviting him to an April 22 evening meeting at the Boro Hall. When Fowler arrived, Smith was together with a Mr. Healey, Boro attorney. When Fowler objected to Healey's presence, Healey excused himself. Smith then informed Fowler that he was not going to be rehired for the 1976 season and prepared to leave. Fowler asked Smith to wait and pressed Smith to review the facts involved in his decision, reminding him of the fourteen consecutive years of service Fowler had given to the Boro. Smith declined to provide any reasons for his decision and the interview concluded. Consistent with the Mayor's decision expressed to Fowler at the April 22 meeting, Fowler was not rehired for the 1976 beach season and Beach Captain Jenkins was employed in his place. 13/ By the close of hearing on March 28, 1977, there was no indication from Mayor Smith that Fowler would be reinstated for the up-coming 1977 summer season.

C. Asserted Defenses to Fowler's Re-employment

Mayor Smith testified that Fowler was not retained for several reasons.

12/ Fowler testified at the hearing that the deadline for application at the College for a twelve month contract of employment, including summer employment, was sometime in March or mid-April at the latest.

13/ At Jenkin's hiring interview in April, Smith indicated unhappiness with Fowler's performance, expressed annoyance at his speaking about him at a Commission meeting and commented that Fowler's contacting legal counsel and PERC were unnecessary.

One reason was that everything was in turmoil in the summer of 1975. Lifeguards were fighting with cashiers and gate tenders about the time they were leaving the beach and rumors were constantly circulating about Smith not hiring them back. As a consequence, the lifeguard operation was not smooth running. Smith listed other reasons. Fowler never reported stolen equipment. At the end of the season, he left the boats exposed to possible vandalism, necessitating a police watch. He didn't inform Smith of the various rules and regulations which governed lifeguard conduct. Smith was advised by both Commissioner Brautigan and Police Chief Cuttrell that the lifeguards would walk off the job and leave the beaches unprotected if he took disciplinary action against any guard because of the incident involving the pool. In his supervisory capacity, Fowler had imposed insufficient disciplinary action against the two guards in a life boat who had been escorted out of the racing lane for the Bennihanna Grand Prix speed boat race held in mid-July. And the lifeguards had no respect for Fowler as their captain.

Conspicious by its absence from this list of reasons is Fowler's involvment and alleged responsibility for the fouling of the municipal pool by lifeguards throwing watermelons the evening of the lifeguard party in mid-July. 14/ While a number of the asserted reasons had their genesis in improper conduct by individual lifeguards, e.g. the improper storage of boats, and interference with the race lanes, and other reasons involved an indeterminate number of the guards who protested the early leaving of beach gate tenders and cashiers and discussed a work stoppage, not one guard, other than Fowler, was precluded from returning to work the following summer. 15/

14/ The pool incident was relied upon by Smith as a reason for not reappointing Fowler during their conversation in March, 1976. Smith's silence on this matter when given the opportunity to specify the grounds of his decision at the hearing followed pressing cross-examination of Fowler and other guards by his own counsel on the pool fouling incident and Fowler's role in the matter.

15/ Only one guard other than Fowler did not return in 1976. He had been offered a job but declined it in favor of a better paying position as a lifeguard in Belmar.

Mayor Smith's failure to hold individual guards responsible for infractions would normally lead one to conclude that he held Fowler strictly accountable for guard performance. Yet, at no time during the 1975 beach season did Smith threaten, warn, discipline or even talk with Fowler with regard to his asserted shortcomings in the exercise of supervisory authority. It was not until March, 1976, after repeated requests by Fowler for a response to his application for re-employment, that Smith alluded to any of the incidents. That occasion was five months after Smith had determined Jenkins' availability for employment as captain.

The turmoil to which Smith alluded was unspecific and vague. No incidents or behavior were described which evidenced the claimed turmoil or unsatisfactory performance of their guarding duties by the lifeguard force. Much of the "turmoil" was adverse reaction by the guards to Smith's failure to fulfill a promise to seek a comparable lengthening of the workday for gate tenders by 15 minutes. Smith failed to provide any evidence that Fowler was responsible for talk of a stoppage. 16/ In fact, all such rumors ceased after Smith's assurance to the guards on July 26 that the pool incident was nothing for them to be concerned about. The lack of bona fides for this defense is evidenced by the fact that the Mayor failed to mention it until directed to the subject matter by his counsel.

As to the rules and regulations, Smith admitted that he reviewed the existing rules and regulations with Fowler during their first meeting following Smith's election to the Board of Commissioners, and that he personally approved them, but made certain modifications regarding raking, rain day assignments and length of work day.

16/ The question remains open, of course, assuming Fowler was responsible for any such threats, and assuming Smith had direct evidence thereof, whether such conduct is unprotected under the Act and could form the basis for a determination not to rehire. Under the law of a sister state whose statue, unlike the Act, specifically prohibits strikes or concerted stoppages or slowdowns by public employees, the threat of a strike by an employee organization was found not to violate the prohibition. Rome Teachers Association and Rome City School District, 9 PERB 3071 (1975)

Smith derived his conclusion that Fowler was not respected by the men from hearing the Charging Party often addressed by the guards as "foulball Fowler." Fowler explained that this was a nickname which he had received years ago when he was a youngster playing volleyball and soft ball at Avon Grammer School. He permitted his friends to use it, and it had always been used in a friendly and non-hostile manner. This conclusion was supported by the testimony of Beach Captain Howard Hardie, Jr. The Respondents failed to introduce any evidence of conduct on the part of the guards manifesting disrespect toward Fowler. As to stolen equipment, the item involved some 150 feet of beach line, used to mark off the permitted bathing area. Smith claimed Fowler never reported the loss to the police, nor advised Smith of the matter. No insurance claim was filed. Fowler claimed he had called the police and had understood that the police would in turn notify a Boro clerk who would prepare the claim. The Respondents did not produce the police reports which would have resolved the question, raised in defense, that no report was made. In any event, Smith admitted on cross-examination that the value of the loss was so little as to preclude any recovery under the Boro's insurance policy. Smith did not reprimand Fowler nor direct Fowler to change his procedures in the future on reporting lost or stolen equipment.

The Bennihanna incident involved a report to the Boro from the Coast Guard that two lifeguards out in a lifeboat had to be escorted in from an area where boats engaged in a boat race were going to pass later in the day. The guards had rowed out during the morning of the race, July 16, as part of their regular exercise activity. In their absence the beach to which they were assigned had other guards on beach watch. Smith called Fowler to report the incident and asked him to investigate and take proper action. Fowler, who agreed the guards had used poor judgment, met with Captain Klug of the Coast Guard who told Fowler not to worry about the matter, that the guards had been out too far and were told to move in, which they did. Fowler

then spoke to the guards and orally reprimanded them. 17/ The record is devoid of any evidence that Smith sought any report from Fowler as to the nature of the discipline of the guards involved or that he ever expressed criticism to Fowler for his handling of the incident.

The Labor Day activity has been discussed. Among other duties, the guards were to remove the three lifeboats from the beach to a secure location. Both Fowler and Smith agree that Smith directed the boats to be stored in a locked, fenced off enclosure adjacent to the pool. Both agree that the anchor barrels could not be removed that day because of the rough water. Fowler claims his men secured the boats as directed and that, as agreed, the anchor barrels were to be left in the water and would be removed by firemen with water hoses. Smith testified that "we would try another day" to remove the anchor barrels. As to the boats, Smith claimed they were not put away, but he also testified that they were secured behind the locked gate as of Labor Day. Mayor Smith's testimony on these points is so ambigious and contradictory as to provide an insufficent basis for concluding, even were I to credit Smith's versions, that Smith's rejection of Fowler's application for rehire was motivated, even in part, by a failure to properly secure the equipment at the close of the season. It is also clear that Smith avoided raising with Fowler any claim of improper performance of duties in this regard until March, 1976, six months after the incident and after many unsuccessful attempts by Fowler to reach Smith.

Respondents' major defense which they briefed in depth, would deny to Fowler employee status and the protections of the Act because of his claimed status as a "managerial executive." The Act's definition and denial of protection to those individuals so defined are set forth at pages 2,F.N.3, and 3,F.N.4, supra. Respondents argue that the definition of "managerial executives" which first appeared in the 1974 amendments of the Act, (L. 1974, c. 123), was modeled closely after the National La-

17/ Smith testified he was told by Fowler that Fowler had spoken to the guards. Although Smith did not indicate to Fowler what measure would be appropriate, it was his view expressed at the hearing that speaking to them was not enough.

bor Relations Board's working definition, never incorporated into the federal statue. Cases interpreting the federal working definition and the Act's statutory definition, containing two independent clauses separated by a comma, are claimed to support the conclusion that a person who either formulates, or directs the effectuation of, management policies and practices is a managerial executive. Respondents' rely on the following evidence adduced at the hearing to support their conclusion that Fowler formulated management policies and practices: He prepared the budget for the beach operation; authorized and modified the rules and regulations and created the point system used in disciplining guards; authorized changes in work week for individual guards; in his discretion added guards to the payroll to cover emergencies; caused the Mayor to reverse his rain day policy and the Boro to adopt the earlier quitting time by ordinance and participated in several management meetings with the Mayor. Fowler directed the effectuation of management policies: By directing the guards in preparing the beach for the season and dismantling and storing equipment at its conclusion, managing the beach and supervising the guards on a day-to-day basis; and by being responsible for training and scheduling of all lifeguards.

The Act, prior to the 1974 amendments, while denying its protections to managerial executives, failed to define them. (34:13A-5.3, L. 1968, c. 303). 18/ Nonetheless, decisions by the Commission and Executive Director issued under the original Act, show the adoption of a working definition of managerial executives which is substantially similiar to the statutory definition adopted by the 1974 amendments. 19/

18/ 34:13A-3 did exclude from the definition of "employee"..." heads and deputy heads of departments and agencies..."

19/ "The essential characteristic of the term denote one who determines and executes policy through subordinates in order to achieve the goals of the administrative unit for which he is responsible or for which he shares responsibility," City of Elizabeth and Elizabeth Police Superior Officers Association, Inc., P.E.R.C. No. 36 at 4, rev'd and remanded on other grds., 114 N.J. Super. 33 (1971), on remand, chief and deputy chiefs excluded from officers' unit, P.E.R.C. No. 71.

In City of Elizabeth, P.E.R.C. No. 36, the Commission determined that although the police chief and deputy chiefs assist in the policy making process of the department and although the deputy chief is involved in the initial preparation of the budget, the responsibility of passing upon their recommendations and the final determination of policy resides with the director. The Commission thus concluded that the chief and deputy chiefs do not exercise the role of managerial executives. On remand from Superior Court, the Commission, after further hearing, reaffirmed its earlier ruling that the disputed titles are not managerial executives, while excluding them from the existing units on grounds of conflict of interest. P.E.R.C. No. 71 (1972). 20/

Fowler, in his preparation of a proposed budget and of rules and regulations governing guard conduct, including a point system providing for docking of pay for accumulated lateness, just as were the chief and deputy chiefs in City of Elizabeth, is not independent of administrative authority but is rather responsible to the administrative authority of the director. In both instances, the subordinate provides aid and assistance by recommending policy, budget figures and operational guidelines, but in the final analysis, only the director has final responsibility to formulate, determine and direct the effectuation of policy.

The proof of Fowler's advisory and subordinate role in the formulation and direction of policy is well illustrated by the facts regarding Fowler's relationship with Mayor Smith. After reviewing, and approving for 1975 rules and regulations which Fowler had submitted for approval by Commissioner Crook over the years, Smith, without consultation with Fowler, changed three of the rules, adding raking of the beach area in front of the bathing area, requiring all guards to remain on duty on rain days and then, after consultation with a person outside the Borough, reversing

20/ See Essex County Board of Chosen Freeholders and Superior Officers Association of The Essex County Jail, where, in a decision arising under the 1974 amendments to the Act, the Director Representation Proceedings found it unnecessary to consider the Hearing Officer's conclusion, inter alia, that deputy wardens are not managerial executives.

that decision, and, finally, extending the work day by a half hour. Smith, and not Fowler, made the decision and informed the guards that the pool fouling incident was not a matter of concern and that all guards who continued to perform up to current standards would be rehired for the next season. 21/ Smith, and not Fowler, first approved and then rejected the payment of an extra half day's pay for clean up work on labor day and directed the placement of lifeboats and leaving the anchor barrels in place because of the heavy surf.

The working definition of "managerial employee" adopted by the National Labor Relations Board ("NLRB") closely parallels the Act's definition of managerial executive. 22/ It has defined them as those employees who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. Eastern Camera & Plate Corp., 140 NLRB 569, 52 LRRM 1068 (1963). The Supreme Court recently determined that the NLRB had improperly excluded from the National Act's coverage only those managerial employees who were in positions susceptible to conflicts of interest, NLRB v. Bell Aerospace, Division of Textron, Inc., 416 U.S. 267, 85 LRRM 2945 (1974). Nevertheless, NLRB decisions both prior and subsequent to Bell Aerospace, demonstrate that the NLRB has denied managerial status to employees whose discretion and latitude for independent action is exercised within the limits of established policy, similar to Fowler's degree of latitude. Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975), on remand from U.S. Supreme Court; Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); Chrysler Corp.,192 NLRB

21/ Even Smith's own version of his remarks, not credited, that he would evaluate the guards in due course, evidences his, and not Fowler's, managerial authority. As to Fowler's apparent authority to hire, without further approval, extra guards during emergency conditions, this did not provide him with authority to hire generally. Even this limited authority was itself subject to continued approval by Smith's higher authority.

22/ The legislature had indicated an intention to use the experience and adjudications in the private sector as a guide in the administration of the Act, Lullo v. I.A.F.F., 55 N.J. 409 (1970).

1208 (1971); American Radiator and Standard Sanitary Corp., 119 NLRB 1715 (1958). Even the power to exercise considerable judgment in the performance of his duties, including the appearance of no supervision in its exercise - a claim advanced by Respondents with respect to Fowler's responsibility in supervising the guard operation on the beach - does not exclude the subject employee from coverage. See Albert Lea Cooperative Creamery, 119 NLRB 817 (1957)

Contrary to Respondent's brief, it was not because of their exercise of day-to-day authority with respect to store operations, but rather because "their community of interest lies more closely with management than with the rank and file employees," that the co-manager and manager trainee were excluded from a unit of food store employers as managerial in Allied Supermarkets, Inc. 167 NLRB 362 (1967). Similarly, in LTV Electrosystems, Inc., 169 NLRB 532 (1968), also cited by Respondents, not only did the employee at issue interview and inform job applicants about the employer's labor policy, but also had authority to reject applicants if he deemed them unqualified. In the instant proceeding, the record establishes that Smith rejected Fowler's recommendation as to which of two part time lifeguards during 1974 should be hired full time for the 1975 season, and instead determined to hire the other.[23]

Furthermore, while Fowler clearly exercise supervisory authority over the other lifeguards, the evidence clearly indicates that his interests were more aligned with the guards than with the Director of Public Safety. [24] Mutual work problems were discussed among the guards, with Fowler being a recognized and open participant. Fowler's salary was paid on the same basis as all other guards, with his rate exceeding the highest paid beach captain by only $10 weekly. Just as other guards' pay was

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23/ Respondents stress Commissioner Crook's 1974 letter of recommendation to Brookdale College on behalf of Fowler describing his duties as including "full responsibility for the hiring, training, scheduling and overseeing the duties of... lifeguards..." Aside from the fact that this letter recommending promotion may be legitimately viewed as a form of 'puffing' the record, considered as a whole, evidences that Fowler's hiring authority was subject to ultimate review.

24/ But see Bell Aerospace, supra.

docked from time to time for an accumulation of points for habitual tardiness, so did Fowler assess points against himself at times. In his activity of patroling and filling in on the beach front,where he spent the overwhelming portion of his time, Fowler held himself to the same standards of operational and personal conduct as required by the rules and regulations for all other guards. These factors strengthen the conclusion that Fowler was not a managerial executive.

Finally, even were one to conclude on the instant record that Fowler's status as a covered employee is still not altogether clear, "it is particularly important in the early phases of the development of experience in this relatively new area of the administrative process that a broad and flexible latitude of interpretation of the statute be accorded the agency charged with its implementation". State v. Prof. Assoc. of N.J., Dept. of Ed., 64 N.J. 231, 259 (1974). The legislature clearly intended to provide the full protection of the Act to employees whose tenure or term or condition of employment is affected by reason of their exercise of the rights of self organization. See N.J.S.A. 34:13A-5.4(a)(3). Those rights were clearly extended by the legislature to supervisors exercising direction and control over subordinates. 25/ Thus, unless Fowler can clearly be held to exercise managerial authority as narrowly construed by the Act and interpreted by the Commission, the Act's definition of "employee" should be accorded its broadest possible reach so as to enable the Commission to discharge its statutory responsibilities and permit the fullest accomplishment of the legislative intent.

Based upon the foregoing analysis and the record made in this proceeding,

25/ See N.J.S.A. 34:13A-5.3 which reads, in pertinent part:

> "nor, except where established practice, prior agreement of special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations."

Respondents' defense that Fowler was a managerial executive, excluded from the Act's coverage, is hereby rejected, and Respondents' motion to dismiss upon this ground, as to which decision was reserved pending this report, is hereby denied.

D. Analysis

Respondents' asserted grounds for not renewing Fowler's employment have been found wanting in veracity and substance. Their claim of managerial status has been rejected as lacking in merit. It has been concluded that Smith threatened Fowler with discharge after learning that Fowler had contacted and sought assistance for the guards from the Commission. On that occasion Smith held out dismissal as the ultimate deterrent if Fowler pressed for employee organization and negotiating rights under the Act. In a contemporaneous conversation with Commissioner Crook, Smith discussed his desire to rid his department of an employee who had indicated that unless Smith ceased unilaterally imposing additional work duties and withdrew his new rain day policy, the employees would seek the protections of the Act to require Smith to deal with them and refrain from such changes.

There is no question that Fowler was exercising protected rights by contacting the Commission and advising Smith that he had done so. See e.g., Sassaquin Convalescent Center, 223 NLRB 267, 92 LRRM 1107 (1976). The proposition is also well supported that informal presentation by an employee of a grievance concerning employees' terms and conditions of employment, unrelated to employee organization, constitutes protected activity. See Triangle Tool & Engineering, Inc., 226 NLRB No. 205, 94 LRRM 1108 (1976); Wall's Manufacturing Co. v. NLRB, 321 F. 2d 753, 53 LRRM 2428 (CA DC, 1963), cert. denied 375 US 923, 54 LRRM 2576 (1963); In re Sandy Hill Iron and Brass Works, 55 NLRB 1 enf'd, 145 F. 2d 631 (C.A.2 1944). During the 1975 season Fowler continued to press employee concerns regarding their terms of employment. He organized the July 26 meeting for Smith to discuss rumors of non-renewal with the guards. After Smith ordered a half hour extension to the guards' work day,

he wrote Smith seeking his aid in requiring other beach employees to stay after 5:00 p.m. Near the end of the season, Fowler sought additional pay for the guards for cleaning and storing equipment on labor day. As a consequence of Fowler's continued activism for the guards, Smith had good reason to believe he would be faced with continued militancy and the possibility of organization any time the guards and Fowler objected to his work orders and directions. Smith, who exhibited hostility to employee utilization of the Commission's services to protect their work interests, seized upon a general atmosphere of "turmoil" as well as routine incidents of employee work infractions as a basis for claiming Fowler failed to exercise proper supervisory authority and should not be retained. Every employee who had contributed to the claimed upsetting work environment or who had failed to provide adequate guard service or had interfered with public use of recreational facilities or had failed to secure Boro equipment was offered re-employment. Only the captain, who had worked continually for the Boro for eleven consecutive seasons, in progressively more responsible positions, without prior warning or adverse criticism of the conduct of his duties, was finally notified, many months after unsuccessfully seeking information about his prospects, that he would not be retained. At that time the Mayor relied, in part, for his action upon an incident in which certain guards at an evening social event, off duty hours, had fouled and failed to timely clean the pool. Later, during the hearing, when provided an opportunity to provide reasons for his action, the pool incident was dropped and other reasons, including vague and unsupported claims of "turmoil" in the lifeguard operation and lack of respect for Fowler by the guards, were substituted. All of these factors lead to the conclusion that Smith's reasons were pretextual, shielding Smith's real desire to rid the beach operation of a guard captain who vigorously sought to assert the protected rights of the lifeguards. This desire Smith had expressed forthrightly, in an agitated manner during a heated conversation with Fowler, and innocently, in a frank give and

take with a fellow Commissioner; [26] and later reaffirmed with the same Commissioner following a Boro public meeting over the winter at which Fowler had addressed the Board of Commissioners, apparently concerning his failure to obtain reappointment.

While not controlling, it is noteworthy that Smith's June, 1975 threat to Fowler appeared to have the desired effect of chilling any interest among the guards in seeking to avail themselves of the services of the Commission or the benefits of the Act. For example, at the time in July, 1975 that the guards became concerned about possible disciplinary action against them growing out of the pool incident, no attempt was then made to follow through on the petition for certification of representative which a PERC agent had supplied Fowler nor was there any follow up thereafter.

Smith had sole authority to deny Fowler re-employment. See p. 3, F.N.6, supra. Yet Smith as an elected Commissioner with authority over the Department of Public Affairs and Safety acted in a representative capacity as agent for the Boro within the meaning of N.J.S.A. 34:13A-3(c). Therefore, the Boro is responsible for his unlawful conduct. [27] It is accordingly, concluded that the Boro and Smith have violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by refusing and failing to re-employ Fowler as lifeguard captain for the 1976 season. [28]

26/ Smith's threat and call for assistance in carrying it out were made more than six months prior to the filing of the instant charge, N.J.S.A. 34:13A-5.4(c). Such events are nevertheless admissible to explain Smith's ambiguous and equivocal conduct within the six month period, such as his failure to respond to Fowler's repeated request for information as to his status, hiring Jenkins as captain and informing Jenkins that Fowler's approach to PERC was unnecessary and finally refusing re-employment to Fowler on grounds which were unsubstantial and contradictory. While no independent nor controlling weight has been given Smith's June, 1975 remarks, they have been considered in seeking an explanation for the Mayor's conduct within the six months period in denying Fowler rehire in the absence of any other valid reasons. See Local Lodge 1424 v. NLRB (Bryan Manufacturing Co.) 362 US 411, 45 LRRM 3212 (1960); Paramount Cap Manufacturing Co., 119 NLRB 785 (1957).

27/ See, e.g. Henry I. Siegel Co., 172 NLRB No. 88, 69 LRRM 1094 (1968).

28/ Respondents' conduct has not violated any of the other cited subsections, including (2),(4),(5),(6) and (7), because of Fowler's failure to submit any proof in their support.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following recommended:

Conclusions of Law

1. By refusing and failing to re-employ Michael Fowler as lifeguard captain for the Borough of Avon for the 1976 summer season, the Respondent Borough of Avon through William A. Smith, its Director of Public Safety, and Respondent William A. Smith have discriminated in regard to hire and tenure of employment to discourage their employees in the exercise of the rights guaranteed to them by the Act. The said Respondents have engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(3).

2. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them by the Act, the respective Respondents have engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

3. The Respondents, by the conduct described in paragraph 1, above, have not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2),(4),(5),(6) and (7).

The Remedy

Having found that the Respondents have engaged in, and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (3), I will recommend that Respondents cease and desist therefrom and take certain affirmative action. As I find that Fowler would have been offered re-employment for the current 1977 summer season but for the unlawful conduct in which Respondents have engaged, affirmatively, I shall recommend that the Respondents offer Michael Fowler, if they have not already done so, immediate re-employment in his former position as lifeguard captain, for the 1977 summer season, without prejudice to any rights or privileges previously enjoyed by him, restoring, in so far as possible, the order of rank and/or chain of command existing on the force of lifeguards at the completion

of the 1975 summer season when Fowler was last employed as lifeguard captain. I shall also recommend that Respondent, Borough of Avon make Fowler whole for the loss of earnings suffered by him as a result of the unlawful conduct committed by payment to him of a sum of money equal to the amount he would normally have earned as wages absent discrimination against him, computed from the first date, following notice to him that he would not be re-employed for the 1976 summer season, that Fowler would have commenced such employment as Boro of Avon Lifeguard Captain and continuing, for each summer season thereafter, to the date when such re-employment is offered to him in accordance with the foregoing, or until such time as he is no longer available for such employment. 29/

In addition to the foregoing remedies, during the hearing and in his brief, Fowler requested that he receive the reasonable attorney's fees and costs he incurred in the proceeding.

The normal rule in this state is that each litigant bears his own counsel fees except in those few situations specifically designated in R. 4:42-9 Gerhardt v. Continental Ins. Cos., 48 N.J. 291 (1966)

29/ In Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc. of Ed. Secs., P.E.R.C. 76-31 (1976), aff'd in part, rev'd in part, - N.J. Super - (App. Div. 1977), pet. for cert. pending Sup. Ct. Docket No. 1300819, the Court vacated the Commission's order requiring the employer to make payment to employees whose hours were unilaterally reduced in violation of the employer's negotiation obligation under the Act. The Court, voiding such payments as ultra vires because made for services not rendered, specifically reserved judgment as to statutory remedies for recovery of back pay by illegally dismissed public employees, the case sub judice. The Act provides the Commission adequate authority"to take such reasonable affirmative action as will effectuate the policies of this Act" (N.J.S.A. 34:13A-5.4(c)) as may encompass the awarding of back pay for a discriminatory refusal to re-employ in violation of 5.4(a)(3). The back pay in such circumstances constitutes a restoration of status quo ante in recognition of the concept that only by deeming the employee to have been reinstated (or re-employed) from the date of the discrimination could he be made whole and a full and adequate remedy be provided.

The ommission of the phase from the Act "including reinstatement with or without back pay," which appears in the NLRA, should be held to be illustrative only, Jackson V. Concord Co., 54 N.J. 113 (1969). In any event, while the Commission seeks to appeal the Appellate Division determination, I am obliged to follow its continuing practice and policy.

This rule accords with the general "American rule" that in the absence of statutory authority the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. However, the NLRB has held and the courts have sustained the view that attorneys fees may be assessed when the losing party has acted frivolously in bad faith or for oppressive reasons. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Tiidee Products, Inc., 194 NLRB 1236 (1972); Tiidee Products, Inc., 196 NLRB No. 27

I cannot find under the facts of the instant case that respondent's defense has been frivolous. Certainly the question alone of Fowler's status as a managerial employee raises a real issue in regard to his right to protection under the Act and his recovery.

In spite of the general American rule against counsel fees a recent federal case has indicated a concern with providing access to complainants to an adequate remedy. In Fitzgerald v. U.S. Civil Service Comm., 407 F. Supp. 380 (D.C. 1975) the court held that the "corrective action" provision of the Veterans Preference Act necessarily implied the power to grant attorney's fees to an illegally dismissed employee. The court stressed the "critical almost indispensable role" to be played by counsel in vindicating the rights of an employee who has suffered from an "unjustified or improper personnel action". It states at p. 386:

> "Indeed the section specifically permits such veteran preference eligible employee to appear at Commission proceedings through a representative and the possibility seems remote that the members of congress who enacted this law, a large percentage of whom were lawyers themselves, could have been unaware that the sine qua non of legal representation in such matters is the payment of a substantial fee for the time expended and costs incurred..."

The Court continues at 386:

> "To hold that Fitzgerald, or any other person in his situation, must bear such an expense as the price of vindicating such basic fundamental rights as these, would make a mockery and a sham of the mandate of congress, and in cases like the present one would make those rights meaningless..."
>
> 407 F. Supp. 380 at 386

The Courts of New Jersey have recognized this problem and have provided affirmation to the view that in appropriate circumstances involving the valid claim of an individually discriminated against public employee, the court may consider legal fees and costs, at least to the extent of permitting their use as a credit against interim earnings by which a backpay award should be mitigated.

In Perrella v. Board of Education of Jersey City, 51 N.J. 323 (1968), while the court held that the discharge involved was valid and denied a claim for lost salary, it discussed at length the propriety of a limited allowance of counsel fees in appropriate circumstances. The court discussed the lower courts misreading of its decision in Mastrobattista v. Essex County Park Comm., 46 N.J. 138 (1965) where it held that in order to insure that improperly discharged civil servants do not suffer any loss in earnings, it would be equitable if consideration be given to the fees and expenses necessarily incurred by them in obtaining vindication:

> "In Mastrobattista it held that when a public employee with tenure was improperly dismissed, he was entitled to recover his lost back pay less his earning in outside employment between the date of dismissal and date of restoration to his position. We recognized, however, that such an employee might well have been obliged to incur expenses and attorney's fees in order to vindicate his right to the position. In this event, whenever his back-pay award was to be mitigated by his outside earnings, it seemed just and equitable to give him a credit against the sum to be applied in mitigation of the reasonable counsel fee and expenses which he had paid or obligated himself to pay in the successful prosecution of his action. Thus his interim outside earnings less such fee and expenses would represent the factor to be applied in diminution of his back-pay recovery. This is the purport of Mastrobattista, as well as of Mason v. Civil Service Comm'n, /51. N.J. 115 (1968)/ (emphasis added).
>
> It was not the purpose of Mastrobattista and Mason to provide a profit for such public employees when they are reinstated. The motive was to see that they do not suffer any loss in earnings. See Mastrobattista, 46 N.J.at p. 150."
>
> 51 N.J. at 344

The absence of specific statutory authority for taking account of counsel fees and expenses in computing backpay is not fatal. Thus, in Jackson v. Concord Company, 54 N.J. 113 (1969) the court held that although not expressly granted in

the law against discrimination, the director had the authority to award as damages against the landlord who had discriminated against the complainant, analogous costs, there compensatory damages equal to the increased rental and traveling expenses resulting from the need of the complainant to live elsewhere. The court stated at 126:

> "Although not expressly granted...we believe the implication is plain enough considering the broad language of the section in the light of the overall design of the Act."
> 54 N.J. 126

Accord, Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973); Gray v. Serruto Builders, 110 N.J. Super 297 (Ch. Div. 1970).

Surely, the provision in the Act for "reasonable affirmative action" equally implies recognition of the necessary role of the attorney in litigating through the Commission a valid complaint of discriminatory job loss.

Because of the late notification to him of his non-renewal as lifeguard captain, Fowler was unable to seek summer employment at his college. See p. 12, F.N. 13 supra. He did obtain employment for the 1976 summer season as a "rookie" lifeguard in the neighboring borough of Belmar. Had Fowler been retained as captain in Avon for 1976, I find he would have earned $2,080.00, the sum received as compensation by Compton Jenkins who replaced him. Thus Fowler's gross backpay to the close of the hearing on March 28, 1977, was $2,080.00. As lifeguard in Belmar during summer 1976, Fowler earned $1,452.36 for a full season, thus comprising his interim earnings to close of hearing. It is clear from the affidavit of attorneys fees submitted in evidence by his counsel, Joseph Meehan, Esq., which has not been disputed, that such services exceed the interim earnings to date. Accordingly, under the courts rationale in Mastrobattista, supra as reaffirmed in Perrelle, supra, to the extent that such services exceed interim earnings I shall disregard Fowler's interim earnings in computing his backpay award to date.

Recommended Order

Upon the basis of the foregoing recommended Findings of Fact, Conclusion of Law, and Remedy it is recommended that the Borough of Avon and its Director of

Public Affairs and Safety, William A. Smith, shall, jointly and severally:

1. Cease and desist from:

   (a) Discouraging their employees in the exercise of the rights guaranteed to them by this Act by discriminating in regard to hire or tenure of employment or any term or condition of employment.

   (b) Interfering with, restraining or coercing their employees, in any like or related manner, in the exercise of the rights guaranteed to them by this Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

   (a) Offer to Michael Fowler immediate and full re-employment to his former position as lifeguard captain, for the 1977 summer season, if not already done so, and for each summer season thereafter, without prejudice to any rights or privileges previously enjoyed by him, restoring, insofar as possible, the order of rank or chain of command existing on the force of lifeguards at the completion of the 1975 summer season when Fowler was last employed as lifeguard captain.

   (b) Borough of Avon only shall make whole Michael Fowler by paying to him:

      (1) The sum of $2,080.00; and

      (2) A sum of money equal to the amount he normally would have earned in employment with the Borough from the first date he would have commenced employment as lifeguard captain for the summer season of 1977 until the completion of employment as said captain for that season and continuing for the same period for each summer season thereafter, or to the date when such re-employment is offered to him in accordance with the provisions of paragraph 2(a), above, or until such time as he is no longer available for such employment, whichever first occurs, less the amounts, if any, actually earned by him in other employment during such periods only to the extent that such amounts of other earnings exceed the reasonable attorneys fees and costs he incurred in prosecuting this proceeding before the Commission.

   (c) Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

   (d) Post immediately, in plain sight, at the Avon Municipal Building in the Borough of Avon by the Sea, New Jersey and at the lifeguards' lounging area at the municipal pool near the beachfront, copies of the attached notice marked Appendix "A." Copies of said notice on

forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, shall, after being duly signed by Respondent Borough's representative and by Respondent Smith, be posted by Respondents immediately upon receipt thereof, and maintained by them for a period of at least sixty (60) consequtive days thereafter in conspicious places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Commission, in writing, within twenty (20) days of receipt of the Commission's Order, what steps the said Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the Complaint alleging that the Borough of Avon and William A. Smith were engaged in violation arising under N.J.S.A. 34:13A-5.4(a)(2),(4),(5),(6) and (7) with regard to Michael Fowler's non-renewal of employment be dismissed in their entirety.

Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
June 24, 1977

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 discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer Michael Fowler immediate and full re-employment to his former position with us as Lifeguard Captain /without prejudice to any rights or privileges enjoyed by him/ that the Commission has determined was unlawfully denied to him for the 1976 summer season and thereafter because of his exercise of the rights guaranteed to him by the New Jersey Employer-Employee Relations Act.

WE WILL make Michael Fowler whole for any loss of pay he may have suffered by paying him a sum of money equal to the amount that he would have earned as wages as Lifeguard Captain from the date that he was refused re-employment to the date of an offer of employment, less his actual earnings during that period of time only to the extent such earnings exceed the reasonable attorneys fees and costs he incurred in prosecuting this proceeding before the Commission.

_____
(Public Employer)

By _____ (Title)

Dated _____

_____
William A. Smith, Director of Public Affairs and Safety

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780