P.E.R.C. NO. 81-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SEASIDE PARK,

Respondent,

-and-

Docket No. CI-80-7-49

ARTHUR CLARKE,

Charging Party.

SYNOPSIS

The Commission in an unfair practice proceeding concludes in agreement with the Hearing Examiner that the Borough of Seaside Park violated subsections 5.4(a)(1) and (a)(3) of the Employer-Employee Relations Act when it failed to rehire Arthur Clarke as a lifeguard for the summers of 1979 and 1980. The Commission agreed that Clarke had engaged in protected activities under the Act when he assisted in the preparation of a document which in part criticized the quality of water safety on the Borough's beaches and criticized the performance of the Captain on the Borough's beach patrol. The Commission, in rejecting exceptions filed by the Borough, adopted the Hearing Examiner's conclusion that the Borough had failed to establish any legitimate business justification for not re-hiring Clarke as a lifeguard for the summers of 1979 and 1980 and that its failure to do so was a pretext and was in fact in retaliation for Clarke's exercise of activities protected by the Act.

The Commission in part ordered that the Borough reinstate Clarke as a lifeguard for the remainder of the summer of 1980 and further ordered that he be made whole for any loss suffered during the summer of 1979.

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In the Matter of

BOROUGH OF SEASIDE PARK,

Respondent,

Docket No. CI-80-7-49

-and-

ARTHUR CLARKE,

Charging Party.

Appearances:
For the Respondent, Hiering, Grasso, Gelzer and Kelaher, Esqs. (Robert C. Shea, of Counsel)

For the Charging Party, Sachar, Bernstein, Rothberg, Sikora and Mongello, Esqs. (Kieran E. Pillion Jr., of Counsel)

DECISION AND ORDER

On August 30, 1979, Arthur Clarke (the "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission which, as amended on October 1, 1979, alleges that the Borough of Seaside Park (the "Borough") engaged in certain conduct in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("the Act"). Specifically, the charge alleges that, as a result of certain organizational activities among the Borough's lifeguards during the summer of 1978 by the charging party and another lifeguard, John Reilly, the Borough failed to follow its usual custom of contacting the charging party in May to determine whether he desired to work as a lifeguard for the 1979 summer season. The charging party alleges that the Borough's failure to hire him for the 1979 season was in retaliation for his organizational activities during the summer of 1978, in violation of N.J.S.A.

34:13A-5.4(a)(1), (2), (3) and (4).[1/]

A Complaint and Notice of Hearing was issued on January 7, 1980 and hearings were held before Commission Hearing Examiner Alan R. Howe on March 3, 4 and 5, 1980 at which both parties had the opportunity to examine and cross-examine witnesses, present evidence, and argue orally. On the last day of hearing, March 5, 1980, both parties waived the right to argue orally before the Hearing Examiner and to file post-hearing briefs.

The Hearing Examiner issued his Recommended Report and Decision on May 16, 1980,[2/] a copy of which is attached hereto and made a part hereof. The Hearing Examiner concluded that: 1) the Borough's proffered reason for not rehiring the charging party for the summer of 1979 was pretextual; 2) the Borough established no legitimate business justification for not rehiring the charging party; 3) the Borough's conduct was in fact in retaliation against the charging party for having engaged in the exercise of organizational activities protected by the Act. Accordingly, the Hearing Examiner recommended that the Commission find that the Borough

1/ These subsections provide that employers, their representatives or agents are prohibited from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

2/ H.E. No. 80-47, 6 NJPER ___ (¶___ 1980).

violated N.J.S.A. 34:13A-5.4(a)(1) and (3). Timely exceptions and a brief in support thereof were filed by the Borough on June 26, 1980.[3/]

The Commission, after a careful consideration of the record in this matter, rejects the exceptions filed by the Borough and adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order substantially for the reasons cited by the Hearing Examiner in his Recommended Report and Decision.

In its initial exception, the Borough contends that the charging party is not an "employee" as defined by N.J.S.A. 34:13A-3(d) and thus is not protected by the Act. Among its arguments, the Borough contends that since the charging party obtained other regular and substantially equivalent employment for the summer of 1979 he is excluded from the definition of employee.

The charging party having been employed every summer season since 1974 does have a continuity and regularity of employment to be considered an "employee" as that term is defined by the Act. In re Bridgewater-Raritan Regional Bd of Ed, D.R. No. 79-12, 4 NJPER 444 (¶4201 1978). Moreover, the Commission specifically adopts the decision of the Hearing Examiner in In re Borough of Avalon, H.E. No. 79-30, 5 NJPER 71 (¶10044 1979), who found that lifeguards were employees within the meaning of the Act. Finally, there is a well established

3/ The Borough's request for oral argument before the Commission is hereby denied. No unique legal issues are presented by this case and the fact pattern is not complicated. The Borough had ample opportunity to present its defenses through three days of hearing and the Commission concludes that this record provides an ample basis for the rendering of a decision.

principle of statutory construction that a literal reading of statutory language is to be avoided if it would lead to an absurd result.[4/] Under the Borough's analysis of N.J.S.A. 34:13A-3(d) an employee who was discriminatorily discharged and wished to pursue a complaint against his employer would have to forego all employment in his chosen profession during litigation in order to preserve his rights in this regard. The Commission cannot accept that the Legislature intended such a disability as a condition on the right of an employee to pursue a claim of discriminatory discharge. To hold otherwise would be contrary to the fundamental policies and purposes of the Act since it would constitute a severe limitation on the ability of employees to pursue unfair practice charges in order to protect the rights guaranteed to them by the Act.

In its second exception, the Borough essentially disputes the Hearing Examiner's credibility judgments and his reading and weighing of the testimony. It is for the trier of fact to weigh the testimony based on observations of demeanor and the like and the Commission will not substitute its second hand reading of the transcript absent the most compelling evidence that the Hearing Examiner's determination was clearly erroneous. In re Long Branch Bd of Ed, P.E.R.C. No. 77-70, 3 NJPER 300 (1977); In re Hudson County Bd of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978); In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶4011 1977). Since the transcript does not

4/ See Wasserman v. Tannenbaum, 23 N.J. Super. 599 (1953) and State v. Gill, 47 N.J. 441 (1966).

show that the Hearing Examiner's determination was clearly erroneous, the Commission finds no justification for reversing his credibility findings. Moreover, in reviewing the record, the Commission finds substantial evidence to support the Hearing Examiner's conclusion that the Borough's proffered justification for not rehiring the charging party was in fact pretextual. The charging party has been employed by the Borough since the 1974 summer season without any apparent problems in his performance. Three other lifeguards whose evaluations were roughly equivalent to that of the charging party were offered re-employment for the 1979 season. The statement of Councilwoman Mitchell at a meeting with the lifeguards on August 10 or 11, 1978 constitutes direct evidence of anti-union animus. Accordingly, this exception is dismissed as being without merit.

In its third exception, the Borough contends that the unfair practice occurred on September 4, 1978 when Captain Keppler gave the charging party his negative evaluation and explained that he would not be rehired for the following summer. This event, the Borough contends, acted as notice to the charging party and began the running of the six-month statute of limitation. Using this September 4, 1978 date, the charge would be untimely by several months.

The Commission does not agree with this analysis. The conduct complained of in the charge was the Borough's failure to rehire the charging party for the 1979 season. The charge stated, and the evidence presented at the hearing confirmed, that the Borough did not hire employees for the next summer season at the

beginning of the previous autumn. Rather, the Borough's customary practice was to send letters each spring to the lifeguards employed during the last season to determine whether they desired to return for the coming season. Accordingly, the operative event from which the instant unfair practice arose was the Borough's failure to send a letter to the charging party in May 1979.[5/]

Finally, the respondent contends that the demand for damages contained in the complaint should be dismissed because any money damages are too speculative and uncertain in nature. Specifically, the Borough contends that during the years from 1975 through 1978 the charging party did not work a regular schedule for the months of May and June and it is impossible to determine the exact number of days the charging party would have worked during the summer of 1979 had he been employed as a Borough lifeguard.

It is clear from the record that the beginning and termination dates of this seasonal employment are relatively similar from year to year and that the charging party as a lifeguard would have been paid on a daily rate. Accordingly, the amount of money the charging party would have earned during the summer of 1979 can be approximated with a sufficient degree of certainty by calculating the average number of days the charging party worked

5/ See for example In re Warren Hills Regional Board of Education, P.E.R.C. No. 78-69, 4 NJPER 444 (¶4201 1978), where the Commission held that the operative event which gave rise to the unfair practice was the Board's unilateral September 1976 implementation of a split session not its prior February 1976 decision to schedule split sessions for the coming fall.

during the summers from 1974 through 1978 and multiply this average number by the daily wage rate for the 1979 season. The Commission concludes that such an approximation is a sufficient basis on which to award damages and the Hearing Examiner's recommended order will be amended to reflect this conclusion.

Since the charging party failed to present any evidence that the Borough has violated subsections (a)(2) and (4) of the Act, the Commission adopts the Hearing Examiner's recommendation that the complaint be dismissed as it relates to these two subsections.

ORDER

Accordingly, for the reasons set forth above IT IS HEREBY ORDERED that the Borough shall:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to rehire Arthur Clarke as a lifeguard because of his exercise of such rights.

B. Cease and desist from discriminating in regard to the 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 the Act, particularly, by failing to rehire Arthur Clarke as a lifeguard for the summers of 1979 and 1980.

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

1. Rehire Arthur Clarke as a lifeguard for the remainder of the summer of 1980 with compensation at the rate of

pay he would have received had he worked in each successive summer since 1974.

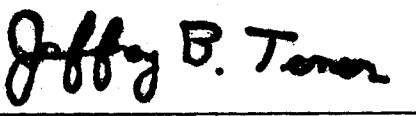
2. Forthwith make payment to Arthur Clarke of monies, if any, due him based upon the difference between his earnings as a lifeguard at Island Beach State Park in the summer of 1979 and the earnings he would have received if employed as a lifeguard by the Borough in the summer of 1979. Also make payment to Arthur Clarke monies, if any, due him based upon the difference between the earnings he would have received as a lifeguard from the Borough in the summer of 1980 up until such date as he shall have been offered reinstatement and any other earnings through mitigation thereof. The earnings which the charging party would have received for the summers of 1979 and 1980 had he been employed by the Borough will be calculated by determining the average number of days the charging party worked during the summer since 1974 through 1978 and multiplying this average by the daily pay rate for the 1979 and 1980 seasons.

3. Post immediately at all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Public Employment Relations Commission shall after being duly signed by the Borough's representative, be posted by the Borough immediately upon receipt thereof and maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Borough to insure that such notice will not be altered, effaced or covered by any other material.

4. Notify the Chairman in writing within twenty (20) days of receipt of this Order what steps the Borough has taken to comply herewith.

D. The allegations of the complaint which allege that the Borough violated subsections 5.4(a)(2) and (4) of the Act are hereby dismissed in their entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Graves, Parcells and Hipp voted for this decision. Commissioner Newbaker voted against this decision. None opposed.

DATED: Trenton, New Jersey
July 10, 1980
ISSUED: July 25, 1980

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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to rehire Arthur Clarke as a lifeguard because of his exercise of such rights.

WE WILL cease and desist from discriminating in regard to the 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 the Act, particularly by failing to rehire Arthur Clarke as a lifeguard for the summer of 1979.

WE WILL rehire Arthur Clarke as a lifeguard for the remainder of the summer of 1980 with compensation at the rate of pay he would have received had he worked in each successive summer since 1974.

WE WILL forthwith make payment to Arthur Clarke of monies, if any, due him based upon the difference between his earnings as a lifeguard at Island Beach State Park in the summer of 1979 and the earnings he would have received if employed as a lifeguard by the Borough in the summer of 1979. We will also make payment to Arthur Clarke monies, if any, due him based upon the difference between the earnings he would have received as a lifeguard from the Borough in the summer of 1980 up until such date as he shall have been offered reinstatement and any other earnings through mitigation thereof. The earnings which the charging party would have received for the summers of 1979 and 1980 had he been employed by the Borough will be calculated by determing the average number of days the charging party worked during the summer since 1974 through 1978 and multiplying this average by the daily pay rate for the 1979 and 1980 seasons.

BOROUGH OF SEASIDE PARK
(Public Employer)

Dated _____ By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 80-47

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

In the Matter of

BOROUGH OF SEASIDE PARK,

Respondent,

- and -

Docket No. CI-80-7-49

ARTHUR CLARKE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it failed to rehire Clarke as a lifeguard for the Summer of 1979. The Hearing Examiner found that Clarke engaged in protected activities under the Act when he assisted in the preparation of a "letter," which he also signed along with 15 other lifeguards, and thereafter was one of two lifeguards who presented the contents of the "letter" to the Borough's Council at a regular meeting and, also, at a special meeting in August 1978. The "letter" was critical of "...the quality of water safety on the Borough's beaches" and also contained critical allegations regarding the Captain of the Beach Patrol. In September 1978 Clarke received an adverse evaluation from the Captain of the Beach Patrol, who said that if he was Captain in 1979 Clarke would not be rehired. When the Captain was rehired by the Borough's Council in March or April 1979 his recommendation that Clarke not be rehired was adopted by the Council and Clarke was thereafter advised that he would not be rehired as a lifeguard for the Summer of 1979.

The Hearing Examiner concluded that the Council failed to establish any legitimate business justification for not rehiring Clarke as a lifeguard for the Summer of 1979 and that its failure to do so was a pretext and was in fact in retaliation for Clarke's exercise of activities protected by the Act in the Summer of 1978, supra. The Hearing Examiner, by way of remedy, recommended that the Commission order that Clarke be rehired as a lifeguard for the Summer of 1980 and that he be made whole for any losses suffered in the Summer of 1979.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. No. 80-47

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

In the Matter of

BOROUGH OF SEASIDE PARK,

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Docket No. CI-80-7-49

ARTHUR CLARKE,

Charging Party.

Appearances:

For the Borough of Seaside Park
Hiering, Grasso, Gelzer & Kelaher, Esqs.
(Robert C. Shea, Esq.)

For Arthur Clarke
Sachar, Bernstein, Rothberg, Sikora & Mongello, Esqs.
(Kieran E. Pillion, Jr., Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 30, 1979, which was amended on October 1, 1979, by Arthur Clarke (hereinafter the "Charging Party" or "Clarke") alleging that the Borough of Seaside Park (hereinafter the "Respondent" or the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent, as a result of organizational activities among certain of its lifeguards led by Clarke and a Joseph Reilly in the Summer of 1978, did not during May 1979, as was customary, send a letter to Clarke with respect to his desires to return as lifeguard for the 1979 season. Out of the approximately 30 lifeguards employed by the Respondent in the Summer of 1978, only Clarke and Reilly did not receive letters in May 1979 and, it is alleged that

the failure to hire Clarke for the Summer of 1979 was in retaliation for his organizing activities in the Summer of 1978, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (4) of the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 7, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 3, 4 and 5, 1980 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties waived oral argument and the filing of post-hearing briefs on March 5, 1980. 2/

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the entire record, including a post-hearing exhibit on behalf of the Charging Party, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The Borough of Seaside Park is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Arthur Clarke is a public employee within the meaning of the Act, as

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1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the 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."

2/ The transcript of the March 5, 1980 hearing was not received by the Hearing Examiner until March 31, 1980. Further, at the conclusion of the hearing on March 5, 1980 the record was left open for the receipt of further Charging Party Exhibits. Counsel for the Charging Party submitted the last Charging Party Exhibit on May 6, 1980 and indicated that there would be nothing further on behalf of the Charging Party; the Respondent did not respond thereafter.

amended, and is subject to its provisions. 3/

3. At the end of July 1978 Clarke, Reilly and two other lifeguards 4/ prepared an unsigned "letter," which contained enumerated instances reflecting adversely upon "...the quality of water safety on the Borough's beaches." 5/ This "letter" was presented by Clarke and Reilly to members of the Beach Committee of the Respondent, consisting of Councilman Harms and Councilwoman Mitchell, on July 31, 1978 (1 Tr. 22, 23). Based upon the reaction of the Beach Committee to the "letter," Clarke and others of the lifeguards decided that they "needed more clout" and, thereafter Clarke and 15 lifeguards, who had worked at least three years on the Beach Patrol,signed the "letter" on August 3, 1978 (CP-3; 1 Tr. 23, 26, 27).

4. Clarke and Reilly presented the signed "letter" to the Respondent's Mayor and Council at a regular meeting on August 10, 1978 and, after discussion, the Council decided to hold a special meeting on the subject on August 14, 1978 (CP-4).

5. At a preliminary private meeting on August 11, 1978 between the Respondent's Beach Committee 6/ and the 16 lifeguards, at which the contents of the "letter" (CP-3) were discussed, it was agreed that Clarke and Reilly would be the spokesmen at the special meeting on August 14, 1978. 7/

3/ Counsel for the Respondent refused to stipulate that Clarke was a public employee within the meaning of the Act for reasons not placed upon the record, but which are contained in Respondent's Answer (C-2). Because of the allegation by Clarke that he worked in the Summer of 1979 as a lifeguard at Island Beach State Park, the Respondent contends that Clarke had obtained "other regular and substantially equivalent employment" within the meaning of Section 3(d) of the Act and is, therefore, not a"public employee" vis-a-vis the Respondent. The Hearing Examiner finds and concludes that Clarke is a "public employee" within the meaning of the Act, as amended, without regard to whether or not employment at Island Beach State Park constitutes "other regular and substantially equivalent employment" from that of employment with the Respondent. The actions of the Respondent, about which Clarke complains, occurred before employment with Island Beach State Park. Also, the fact that Clarke, whose summer employment with Respondent dates back to 1974, is a "seasonal employee" does not disqualify him from public employment status under the Act: Borough of Avalon, H.E. No. 79-30, 5 NJPER 71, 74 (1979) (settled without Commission decision).

4/ Gerard Alloco and John Fox.

5/ Certain derelictions of the Captain of the Beach Patrol were specifically alleged.

6/ The members present were Councilmen Appleby and Maday and Councilwoman Mitchell.

7/ At either the regular meeting on August 10, 1978, supra, or the preliminary private

(continued next page)

6. At the special Council meeting on August 14, 1978 Clarke and Reilly made a point-by-point presentation with respect to the safety matters contained in the "letter" (CP-3) and, as the minutes (CP-5) indicate, "Conclusions" were reached by the Council as to the various points raised. Regarding Point No. 8, which was that a list of lifeguards not recommended by the Captain for hiring for the next year must be explained, and that this list should be made public by Labor Day, the "Conclusion" reached by the Council was that the recommendation for hiring or not hiring would be made at the end of the season by the Captain "after an evaluation" (CP-5, p. 3). By way of clarification of the authority of the Captain, Councilman Maday explained that the Captain had the "right to hire and fire" but that the Beach Committee had to be advised "first" (CP-5, p. 5).

7. Clarke received an evaluation from the Captain, Richard P. Keppler, Jr., on September 4, 1978 (CP-6). This evaluation by Keppler rated Clarke as "good" in three categories, "average" in one category and "poor" in four categories. 8/ In response to Clarke's inquiry about returning in the Summer of 1979, Keppler testified that if he was Captain in 1979 Clarke would not be back (3 Tr. 24, 25,31), giving as the reason job-related problems, including an incident of alleged insubordination by Clarke (3 Tr. 30, 36). Keppler denied that Clarke's activities in connection with the "letter" (CP-3), which was critical of the Captain, played any part in Keppler's evaluation of Clarke or his decision on Clarke's rehire for 1979 (3 Tr. 36, 37).

8. Although there was no formal organization of the lifeguards in 1978,

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7/ (continued)

meeting on August 11, 1978, Councilwoman Mitchell made a statement, which was directed to all 16 of the lifeguards who had signed the "letter" (CP-3), that, "If we do not fire you for this, we will fire you for something else" (1 Tr. 61, 62, 112, 113; 2 Tr. 5, 6, 83, 114).

8/ One other evaluation was offered in evidence by the Charging Party, that of John Lavin (CP-11), which indicated that Lavin was rated "good" in one category, "average" in five categories and "poor" in two categories. Alloco, whose evaluation was not offered in evidence, nevertheless testified that his evaluation was essentially similar to Clarke's evaluation (2 Tr. 92, 93). Unlike Clarke, Lavin and Alloco were among the lifeguards who were asked to return in the Summer of 1979, but both chose not to do so. It is noted that Alloco was one of the lifeguards who drafted the "letter" (CP-3) in July 1978 and that Keppler and the Council had knowledge of his activities on behalf of the lifeguards (1 Tr. 21; 2 Tr. 95, 96).

the lifeguards group was identified by Clarke as the "Senior Guards" (1 Tr. 56, 100). It was Clarke's intention, on behalf of the other lifeguards, to "...definitely start an organization..." if he was rehired by the Respondent in 1979 (1 Tr. 58).

9. On March 17, 1979 Clarke met with John T. Moyse, who was then Chairman of the Beach Committee, [9/] for the purpose of ascertaining whether or not he, Clarke, would be returning as a lifeguard for the Summer of 1979. Moyse said that no final decision had been made regarding employment at that point, but that Keppler had recommended that Clarke, Reilly and two other lifeguards [10/] not be rehired for the Summer of 1979. Moyse invited Clarke to talk to him again in two weeks, after the Council had reviewed Keppler's recommendations. [11/] On April 7, 1979 Clarke again spoke to Moyse, at which time Moyse told Clarke that he would not be rehired for the Summer of 1979, nor would Reilly be rehired, but that the other two lifeguards would be rehired inasmuch as the "Borough didn't want to seem to be too vindictive over our organization the previous Summer..." (1 Tr. 65). [12/]

10. Clarke earned $24 per day as a lifeguard for the Respondent in the Summer of 1978. During the Summer of 1979 Clarke was employed as a lifeguard at Island Beach State Park where he earned $25.20 per day. (1 Tr. 70).

THE ISSUE

Did the Respondent Borough violate the Act when its Council, acting on the recommendation of the Captain of the Beach Patrol, an agent of the Respondent, failed to rehire Arthur Clarke as a lifeguard for the Summer of 1979?

9/ Moyse became a Councilman as of January 1, 1979.

10/ Alloco and either Michael Moran or John Fox (Cf., 1 Tr. 63, 65 and 2 Tr. 17, 3 Tr. 53).

11/ Keppler was rehired by the Council in March or early April 1979 as Captain for the Summer of 1979 (2 Tr. 21).

12/ This testimony of Clarke was not contradicted by Moyse, who was called as a Charging Party witness. Moyse testified that Clarke was not rehired for the Summer of 1979 because of the adverse recommendation of Keppler and that the evaluation of Clarke by Keppler (CP-6) was also considered by the Council in its decision not to rehire Clarke (2 Tr. 23, 24, 27-29).

DISCUSSION AND ANALYSIS

The Respondent Borough Violated Subsection (a)(3) Of The Act, And Derivatively Subsection (a)(1) Of The Act, When Its Council, Acting Upon The Recommendation Of Its Agent, The Captain Of The Beach Patrol, Failed To Hire Arthur Clarke As A Lifeguard For The Summer of 1979 [13/]

Based upon the foregoing Findings of Fact, the Hearing Examiner finds and concludes that the Charging Party has proven by a preponderance of the evidence that the Respondent Borough violated Subsection (a)(3) of the Act because the action of its Council in failing to rehire Clarke as a lifeguard for the Summer of 1979 was "...motivated, at least in part, if not exclusively, by (anti-) union animus:" Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978),[14/] aff'd., App. Div., Docket No. A-4824-77 (Jan. 9, 1980). It is noted that the Charging Party preliminarily proved that he was exercising rights guaranteed to him by the Act, [15/] and that the Respondent had actual or implied knowledge of such activity: Haddonfield, supra (3 NJPER at 72).

In so finding and concluding, the Hearing Examiner notes that the Respondent has failed to establish any legitimate business justification for its decision not to rehire Clarke for the Summer of 1979. The Hearing Examiner rejects as pretextual the Council's reliance upon Keppler's adverse evaluation of Clarke on September 4, 1978, and Keppler's recommendation, either to the Council as a whole

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13/ See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976)

14/ As precedent, the Commission cited its standard for a Subsection (a)(3) violation in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71, 72 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modif., 81 N.J. 1 (1980). Further, for a Subsection (a)(3) violation to be found the actions of the public employer must be "discriminatory" (see Haddonfield, supra) and must have been committed with a "discriminatory motive" (see Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45, 46 (1980)).

15/ In this connection, the Hearing Examiner notes Clarke's involvement in the preparation of the "letter" (CP-3) pertaining to water safety, which was impliedly critical of the Council and specifically critical of the Captain of the Beach Patrol (Keppler), which Clarke signed on August 3, 1978, and which Clarke, along with Reilly, presented to the Council at a regular meeting on August 10, 1978 and in more detail at a special meeting on August 14, 1978 (see Findings of Fact Nos. 3, 4, 6, supra).

or to its Beach Committee, that Clarke not be rehired as a lifeguard in 1979. 16/ The Hearing Examiner bases this rejection upon the following:

1. The Hearing Examiner refuses to credit Keppler's denial that Clarke's activities in the Summer of 1978 with respect to the "letter" (CP-3), which was highly critical of Keppler, played any part in Clarke's adverse evaluation by Keppler or Keppler's negative decision on Clarke's eligibility for rehire in 1979. The Hearing Examiner notes that Clarke had been employed by the Respondent as a lifeguard for the years 1974-1977 without any apparent problems in his performance. Although Keppler reached the same decision with respect to Reilly, Alloco and Fox (3 Tr. 53), it is only Clarke who is the subject of the instant charge of unfair practices.

2. The Hearing Examiner also points to the undisputed testimony of Clarke that Councilman Moyse told Clarke on April 7, 1979 that Clarke and Reilly would not be rehired, but that the other two lifeguards would be rehired inasmuch as the "Borough didn't want to seem to be too vindictive over our organization the previous Summer..." (See Finding of Fact No. 9, supra).

3. Although the consequences only directly affected Clarke, the Hearing Examiner takes specific note of the undisputed statement by Councilwoman Mitchell on August 10 or August 11, 1978 that, "If we do not fire you for this (the "letter": CP-3), we will fire you for something else" (see footnote 7, supra). The Hearing Examiner concludes that the foregoing statement by a Council member is evidence of anti-union animus attributable to the Respondent.

Having found and concluded that the Respondent failed to establish a legitimate business justification for its failure to rehire Clarke as a lifeguard for the Summer of 1979, the Hearing Examiner holds that the Respondent violated Subsections (a)(1) and (3) of the Act by its conduct herein. However, the Charging Party having failed to adduce evidence of a Subsection (a)(2) and (4) violation of the Act by the Respondent, the Hearing Examiner will recommend dismissal as to these Subsections.

16/ Clearly, Keppler, having the authority to effectively recommend as to hiring and firing of lifeguards, was a supervisor and agent of the Respondent and the Respondent was responsible for his actions and conduct. See, e.g., S & M Grocers, Inc., 236 NLRB No. 210, 98 LRRM 1471 (1978); American Lumber Sales, Inc., 229 NLRB No. 66, 95 LRRM 1237 (1977); and Propak Corp., 225 NLRB No. 160, 93 LRRM 1048 (1976).

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when it failed to rehire Arthur Clarke as a lifeguard for the Summer of 1979.

2. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(2) and (4) inasmuch as the Charging Party failed to adduce any evidence of violation of these Subsections.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to hire lifeguards, such as Arthur Clarke, because of their exercise of such rights.

2. 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 the Act, particularly, by failing to rehire Arthur Clarke as a lifeguard for the Summer of 1979.

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

1. Rehire Arthur Clarke as a lifeguard for the Summer of 1980 and compensate him at the rate of pay he would have received had he worked in each successive summer since 1974.

2. Forthwith make payment to Arthur Clarke of any monies due him based upon the difference between his earnings as a lifeguard at Island Beach State Park in the Summer of 1979 and what he would have received if employed as a lifeguard for the Respondent in the Summer of 1979.

3. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days

thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. That the allegations in the Complaint that the Respondent violated Subsections 5.4(a)(2) and (4) of the Act be dismissed in their entirety.

Dated: May 16, 1980
Trenton, New Jersey

Alan R. Howe
Hearing Examiner

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to rehire lifeguards, such as Arthur Clarke, because of their exercise of such rights.

WE WILL NOT discriminate 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 the Act, particularly, by failing to rehire Arthur Clarke as a lifeguard for the Summer of 1979.

WE WILL rehire Arthur Clarke as a lifeguard for the Summer of 1980.

WE WILL forthwith make payment to Arthur Clarke of any monies due him based upon the difference between his earnings as a lifeguard at Island Beach State Park in the Summer of 1979 and what he would have received as a lifeguard at the Borough of Seaside Park in the Summer of 1979.

BOROUGH OF SEASIDE PARK
(Public Employer)

Dated _____ By _____
(Title)

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

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