

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOUSING AUTHORITY OF
THE CITY OF NEWARK,

Respondent,

-and-

Docket No. CI-80-29-99

FRED D. BUTLER,

Charging Party.

SYNOPSIS

The Commission adopts its Hearing Examiner's recommendations that the Newark Housing Authority be found to have violated N.J.S.A. 34:13A-5.4(a)(1) by disciplining an employee for his refusal to meet with his supervisors solely to discuss a letter being circulated in an attempt to organize certain employees. Proof of motive is not necessary to find an independent (a)(1) violation.

Also adopted is the recommendation that a charge alleging a violation of N.J.S.A. 34:13A-5.4(a)(3) be dismissed. Denial of an increment was not discriminatory in that no proof was adduced to show disparate treatment from other employees.

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In the Matter of

HOUSING AUTHORITY OF THE
CITY OF NEWARK,

Respondent,

-and-

Docket No. CI-80-29-99

FRED D. BUTLER,

Charging Party.

Appearances:

For the Respondent, William D. Manns, Jr., Esq.
Associate Counsel, City of Newark Housing Authority

For the Charging Party, Love & Randall, Esqs.
(John C. Love, of Counsel)

DECISION AND ORDER

On February 14, 1980, Fred D. Butler (the "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission which, as amended on March 28, 1980, alleges that the Housing Authority of the City of Newark (the "Authority") 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 (1) that the Authority suspended the Charging Party for five days as of January 28, 1980 for alleged insubordination in refusing to meet with the Deputy Executive Director alone on January 22, 1980 regarding a memo of January 16, 1980 addressed to fellow employees which was signed by the Charging Party and several other employees; and (2) that the Authority

refused to make payment of an annual increment to the Charging Party in retaliation for his organizational activity. All of this was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7).^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, could constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 30, 1980. A hearing was held before Commission Hearing Examiner Alan R. Howe on July 1, 1980 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived both oral argument and the filing of post-hearing briefs.

The Hearing Examiner issued his Recommended Report and Decision on July 8, 1980, a copy of which is attached hereto and made a part hereof. He concluded that the Authority's conduct in suspending Charging Party for five days for refusing to meet with his supervisor alone to discuss the letter to his fellow employees was a violation of N.J.S.A. 34:13A-5.4(a)(1). He recommended that the suspension be rescinded and Mr. Butler be repaid the five days lost pay. As to the other charges, he concluded that the Authority did not violate the Act in any regard when it

^{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; and (7) Violating any of the rules and regulations established by the commission."

did not pay Charging Party an annual increment in 1979 or 1980. As to this latter allegation, the evidence established that apart from a few employees in Mr. Butler's category who received special merit increases or promotions, the bulk of the employees had not received increments in 1979 or 1980. (In fact this was one of the complaints contained in the letter in question). No evidence was presented to the Hearing Examiner which indicated that Mr. Butler was being treated differently than the majority of other supervisory employees in this regard. The Hearing Examiner therefore recommended that this aspect of the complaint be dismissed, along with the allegation of a violation of N.J.S.A. 34:13A-5.4(a)(2) and (7). The Authority filed timely exceptions to the finding of a violation of N.J.S.A. 34:13A-5.4(a)(1).^{2/} The Charging Party responded to these exceptions, but filed no exceptions to the dismissal of the other charges or the findings on the non-payment of the increment.^{3/}

The Commission, after a careful consideration of the record in this matter, rejects the exceptions filed by the Authority 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.

^{2/} A question was raised as to whether the Authority's exceptions were filed in a timely fashion. The Commission concludes that they were timely filed. The Authority had been granted an extension of time to file its exceptions, and while a misunderstanding may have occurred between the parties on the exact terms of the extension, we deem them to have been timely filed.

^{3/} N.J.A.C. 19:14-7.3(b) of the Commission's Rules provides in pertinent part: "Any exception which is not specifically urged shall be deemed to have been waived."

The facts, as found by the Hearing Examiner, and not really disputed by the Authority, indicate that Charging Party is employed by the Authority in a capacity which places him in a category referred to by the parties as "middle management." While the rank and file employees of the Authority are organized in a collective negotiations unit, the "middle management" personnel are not. During the period just prior to January 16, 1980, Mr. Butler and several other "middle management" people attended two meetings with the President of the employee organization that represents the rank and file employees, at which their concerns over terms and conditions of employment of the middle management employees were discussed.

As a result of these meetings, a memo was drafted by Butler dated January 16, 1980, addressed to "Dear Fellow Supervisors." It was signed by Butler, the three middle management employees who attended the two meetings and the President of the rank and file organization. The letter, placed in evidence, was sent to 37 other middle management employees, and made reference to past lay-offs, budget cuts and the absence of salary increments for these employees. It invited the addressees to attend a meeting on January 23, 1980 to "discuss our future with this agency."

On January 22, 1980, Butler was called by his immediate superior, the Deputy Executive Director of the Authority, and requested to meet with him to discuss the memo. Butler indicated that he felt any meeting should be a group meeting including all

the signers of the memo, rather than an individual meeting. The Deputy Executive Director apparently informed Butler that he would have to tell the Executive Director of Butler's refusal to meet and then "hung up". The next day, January 23, 1980, the Deputy Director again called Butler and informed him that he had met individually with the other signers of the memo, which was apparently true. Butler then did meet alone with the Deputy Director. The concerns of the memo were discussed, on their merits, but the Deputy Director did indicate that the Executive Director looked with disfavor on its having been written. On January 28, 1980 the Deputy Director summoned Butler to his office and informed him that he had been suspended for the next five days without pay for insubordination solely for his refusal to meet alone to discuss the memo on January 22, 1980.

The Authority, in its exceptions, argues that Mr. Butler had resisted the supervision of the Deputy Director in the past, feeling he should report to the Director and that his conduct on January 22, 1980 in refusing the meeting was indicative of this. It argues that all the other signatories did meet with the Deputy Director alone, and that they had never agreed among themselves to meet only as a group. It further argues that since the Hearing Examiner recommended the dismissal of the charges of violations of N.J.S.A. 34:13A-5.4(a((2), (3) and (7)), no specific intent to interfere with the formation of an employee organization or to retaliate for the exercise of protected rights was found and that therefore no illegal action could have occurred.

Assuming arguendo that these arguments are based on correct factual assertions, they miss the point of the violation found by the Hearing Examiner. N.J.S.A. 34:13A-5.3 guarantees and protects public employees in "the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity." N.J.S.A. 34:13A-5.4(a)(1) makes it an unfair practice for a public employer its agents or representatives to interfere, restrain or coerce employees in the exercise of these rights. Proof of motive or anti-union animus are not essential elements to establish an independent violation of this subsection. In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 80-11, 4 NJPER 421 (1978); In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), affm'd App. Div. Docket No. A-3562-77 (unpublished opinion 1979); In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). If the action itself interferes with the employees' rights or has that tendency, it will constitute an independent violation of N.J.S.A. 34:13A-5.4(a)(1), in the absence of substantial legitimate business justification, regardless of motive or good faith.^{4/}

^{4/} See e.g. Welch Scientific Co. v. NLRB, 340 F.2d. 199, 58 LRRM 2237 (2nd Cir. 1965) and cases cited therein for private sector law on this point. The Supreme Court has commended federal decisional law in unfair practice cases arising before the NLRB for use as a guide in unfair practice cases under the New Jersey Employer-Employee Relations Act. Galloway Twp. Ass'n of Educational Secretaries v. Galloway Twp. Bd of Ed, 78 N.J. 1, 10 (1978) and Galloway Twp. Bd of Ed v. Galloway Twp. Ed Ass'n, 78 N.J. 25 39-40 (1978).

In this case Butler was engaged in protected activity. The memo was part of an incipient organizing campaign. It is of no import whether it was successful or not. It was directed at fellow employees on matters of mutual concern relating to their employment and called for an employee meeting. Mr. Butler was summoned to meet with his employer's representative to discuss the memo and for no other purpose. While the Authority argues in its exceptions that Mr. Butler's attitude toward the Deputy Executive Director was not good, the discipline was imposed only for his refusal to meet alone and be questioned on the concerns of the letter. His conduct in participating in the writing and distribution of the memo and his initial refusal to meet alone with the Deputy Director to be questioned concerning it was protected.^{5/}

Under all the circumstances of this case, the Authority's disciplining of Mr. Butler does violate the Act. Even if the Authority was not motivated by a general anti-union bias or an intent to inhibit the organizing effort of the middle management employees generally, its conduct did penalize Butler for his exercise of protected rights.^{6/}

^{5/} Interrogation of employees as to the exercise of protected rights has been held to be a violation of N.J.S.A. 34:13A-5.4(a)(1) by both the NLRB and PERC. See e.g. NLRB v. Ford Bros., 170 F.2d. 735, 23 LRRM 2088 (1948); Joy Silk Mills v. NLRB, 185 F.2d. 732, 27 LRRM 12 (1950); and Cape May City Bd of Education, P.E.R.C. No. 80-37, 5 NJPER 411 (1979).

^{6/} Inasmuch as the Charging Party did not file exceptions to the dismissal of the alleged violation of N.J.S.A. 34:13A-5.4(a)(2) and (a)(3), and the finding of a violation of N.J.S.A. 34:13A-5.4(a)(1) is sufficient to support the remedy ordered, we have adopted the Hearing Examiner's recommended conclusions on these subsections. However, we would note that the conduct of the employer herein in suspending Butler could be considered
(continued)

ORDER

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

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from suspending or otherwise disciplining employees, including Fred D. Butler because of their exercise of such rights.

B. Take the following affirmative action:

1. Rescind the five-day suspension of Fred D. Butler as of January 28, 1980, and compensate him for the loss of five days' pay.

2. Forthwith remove from the personnel file of Fred D. Butler any documentation with respect to the aforesaid suspension of January 28, 1980.

3. Post in 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

6/ (continued)

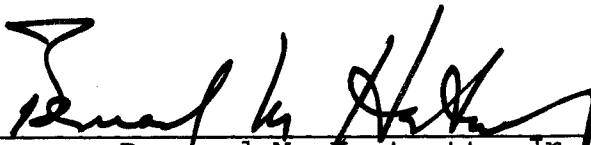
to have as its motive an intent to discourage him from exercising his protected rights in the future or to punish him for having done so. A suspension motivated by such an intent could also be violative of N.J.S.A. 34:13A-5.4(a)(3) even if the employer did not exhibit a general anti-union animus. Similarly, the Authority's entire course of conduct herein does raise questions of domination and interference with its employees' initial efforts at organization within the meaning of N.J.S.A. 34:13A-5.4(a)(2).

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 insure 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), (3) and (7) of the Act be dismissed in their entirety.

BY ORDER OF THE COMMISSION



Bernard M. Hartnett, Jr.
Acting Chairman

Acting Chairman Hartnett, Commissioners Parcells, Graves and Hipp voted for this decision. Commissioner Newbaker concurred with dismissing the (a)(3) violation but dissented with the finding of an (a)(1) violation.

DATED: Trenton, New Jersey
September 30, 1980
ISSUED: October 1, 1980

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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by refraining from suspending employees such as Fred D. Butler from employment because of their exercise of such rights.

WE WILL rescind the five-day suspension of Fred D. Butler as of January 28, 1980 and compensate him for the loss of five days' pay.

WE WILL forthwith remove from the personnel file of Fred D. Butler any documentation with respect to the aforesaid suspension of January 28, 1980.

HOUSING AUTHORITY OF THE CITY OF NEWARK

(Public Employer)

Dated _____

By _____

(Title)

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

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

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- and -

Docket No. CI-80-29-99

FRED D. BUTLER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Authority independently violated Subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act when it suspended Fred D. Butler for five days without pay on January 28, 1980 because of the exercise by Butler of activities protected by the Act. The Hearing Examiner found that Butler was suspended because he refused to meet with the Deputy Executive Director alone on January 22, 1980. Butler insisted that the Deputy Executive Director should meet with all of the five signers of a certain memo of January 16, 1980 directed to supervisors of the Respondent. Butler met alone with the Deputy Executive Director on January 23, 1980 after learning that all of the other signers of the January 16, 1980 memo had met alone with the Deputy Executive Director. The Respondent offered no persuasive evidence of a legitimate business justification for suspending Butler for alleged insubordination. The Hearing Examiner recommended that Butler's suspension be rescinded and that he be compensated for the five days' loss of pay, and that any evidence of suspension be removed from his personnel file.

The Hearing Examiner also concluded that Butler failed to prove by a preponderance of the evidence that the Respondent had failed to grant him a salary increase in 1979 and 1980 because of the exercise by Butler of rights protected by the Act.

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.

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Appearances:

For the Housing Authority of the City of Newark
William D. Manns, Jr., Esq.

For Fred D. Butler
Love & Randall, Esqs.
(John C. Love, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 14, 1980 by Fred D. Butler (hereinafter the "Charging Party" or "Butler") alleging that the Housing Authority of the City of Newark (hereinafter the "Respondent" or the "Authority") 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 had (1) suspended the Charging Party for five days as of January 28, 1980 for alleged insubordination in having refused to meet with the Deputy Executive Director on January 22, 1980 regarding a memo of January 16, 1980, which the Charging Party had signed along with several other employees and (2) that the Respondent refused to make payment of a regular annual increment to the Charging Party as a result of the foregoing conduct of the Charging Party, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7) of the Act. ^{1/}

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.

"(7) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 30, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 1, 1980 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived both oral argument and the filing of post-hearing briefs.

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

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

FINDINGS OF FACT

1. The Housing Authority of the City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. Fred D. Butler is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
3. At all times material hereto Butler was Chief of Community Relations and Social Services, a Grade D position, which was classified under Civil Service.
4. Except as indicated hereinafter, Butler was never disciplined in any respect during his 11 years of employment with the Respondent.
5. The employees of the Respondent who are in Grade 1 through 14 are in a collective negotiations unit represented by Local 305 of the Service Employees International Union (hereinafter "Local 305").
6. The employees of the Respondent who are in Grades 15 and above, including "letter grades" such as Butler, are not in any collective negotiations unit recognized by the Authority. These employees are referred to in this proceeding as "Middle Management" employees.
7. Immediately prior to January 16, 1980, Butler attended two meetings with three other Middle Management employees and the President of Local 305 where the terms and conditions of employment of Middle Management employees were the subject of discussion.

8. As a result of the discussion at the foregoing two meetings, Butler drafted a memo dated January 16, 1980, addressed "Dear Fellow Supervisor," which he signed together with the three other Middle Management representatives and the President of Local 305. This letter was received in evidence as Exhibit CP-2 and indicates on page two thereof the names of 37 Middle Management employees to whom copies were sent. The memo made reference to past lay-offs, budget cuts and the absence of salary increases for Middle Management employees. It invited the persons to whom copies were sent to attend a meeting on January 23, 1980 to "discuss our future with this agency." The memo attributed to the new Executive Director, Milton A. Buck, the statement that "You guys will pay for your sins."

9. On January 22, 1980 Butler received a call from his immediate superior, Deputy Executive Director, Hugh R. Hill, requesting that Butler meet with Hill to discuss the memo of January 16, 1980 (CP-2). Butler stated that he felt that any meeting to discuss the said memo should be a meeting including all of the signers thereof. Hill said that he would inform Executive Director Buck of Butler's refusal to meet with Hill and thereafter Hill immediately "hung up." Butler called Buck immediately after Hill's telephone call and left a message with Buck's secretary, to which Buck never responded. The purpose of Butler's call was to advise Buck that he had no intention of manifesting insubordination to Hill by refusing to meet with him on January 22, 1980.

10. The next day, January 23, 1980, Hill again called Butler and informed Butler that he had met individually with all of the other signers of the memo of January 16, 1980 (CP-2) and on that date Butler met with Hill alone. At this meeting Hill indicated that the subject matter of the memo of January 16th might be a "good thing" and that he would report his feelings on the matter to Executive Director Buck. Hill also indicated that Buck looked with disfavor on the January 16th memo. Hill never indicated to Butler that he had been insubordinate in refusing to meet with Hill the day before, January 22nd.

11. On January 28, 1980 Hill summoned Butler to his office and said that he had "bad news" whereupon he handed to Butler an envelope containing a written memorandum of suspension for five days without pay for insubordination by Butler on January 22, 1980. Butler, upon reading the memorandum of suspension, refused to accept it, stating that a verbal warning should have preceded a written notice of suspension.

12. After Butler reported to work on January 29, 1980, Hill threatened to call the police unless Butler left the premises, whereupon Butler left the premises and commenced serving his five-day suspension.

13. Under date of January 29, 1980 Butler filed a "formal grievance" with Hill concerning his suspension of January 28th. Butler requested a departmental hearing on the matter. ^{2/}

14. Under date of February 1, 1980 Hill responded to Butler's grievance (CP-6) and on February 20, 1980 a departmental hearing took place before the Chief of Personnel and Labor Relations, Howard Gottlieb, who, after hearing, sustained Butler's five-day suspension for insubordination (CP-7).

15. On March 5, 1980 Butler filed a "formal grievance" with Hill regarding Butler's failure to have received either an increment, a cost of living increase or a longevity increase during 1979 and 1980 (CP-10). Butler contended that this was an "unfair practice." Hill responded to Butler under date of March 13, 1980, in which he advised Butler that no "Middle Management" employees had received increases during 1979 and 1980, but, however, advising Butler that longevity increases would be included in the pay of all eligible employees in the next pay (CP-11).

16. There was received in evidence as Exhibit CP-12 a list of employees, Grade 15 and above, who had received salary increases since April 1979. Of these employees, two received "merit increases," four received increases as a result of promotions and one employee received an increase as a result of becoming a "contract employee." The Charging Party adduced no other evidence indicating that Middle Management employees had received increases since 1979, which were denied to the Charging Party.

THE ISSUES

1. Did the Respondent violate the Act when it suspended the Charging Party on January 28, 1980 for a period of five days?

2. Did the Respondent violate the Act when it failed to grant the Charging Party an increase in salary in 1979 and 1980?

^{2/} On January 28, 1980 Butler had sent a memo to Buck complaining of "undue harassment" in connection with his confrontation with Hill on January 22nd, and also, Butler complained about the five-day suspension notice which Hill had given him on the same date. (See CP-5).

DISCUSSION AND ANALYSIS

The Respondent Independently Violated
Subsection (a)(1) Of The Act When It
Suspended The Charging Party For Five
Days On January 28, 1980

The Hearing Examiner finds and concludes that the Respondent independently violated Subsection (a)(1) of the Act when it suspended Butler for a period of five days on January 28, 1980. An independent Subsection (a)(1) violation is established when the public employer's conduct meets the following test:

"...It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification..." ^{3/} (Emphasis supplied)

It was stipulated that Butler is a public employee within the meaning of the Act. ^{4/} As a public employee Butler was clearly engaged in the exercise of activities protected by the Act when, after meeting with other "Middle Management" employees, he drafted the memo of January 16, 1980 (CP-2), which pertained to problems concerning terms and conditions of employment of "Middle Management" employees, and thereafter circulated the said memo to some 37 "Middle Management" employees.

The Hearing Examiner is of the opinion that when Butler refused to meet with Hill alone on January 22, 1980 he did not manifest insubordination to his immediate supervisor, Hill, the Deputy Executive Director. Butler respectfully stated to Hill that he thought that Hill should meet all of the signers of CP-2 together and not individually. Further, any taint of insubordination by Butler on January 22, 1980 was effectively cured by Butler's having met with Hill the next day, January 23rd, after Butler learned that all of the other signers of CP-2 had met with Hill individually. Butler correctly perceived that there was no purpose

^{3/} New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550, 551 (1979).

^{4/} There was received in evidence as Exhibit CP-9 a memo dated February 15, 1980 from the Respondent's General Counsel, giving advice on the status of "Middle Management" personnel as possibly precluded from coverage under the Act by virtue of being "Managerial Executive" employees within the meaning of the Act. The status of Butler as a Managerial Executive was not litigated before the Hearing Examiner and counsel for the Respondent stipulated that Butler was a public employee within the meaning of the Act.

in declining to meet with Hill after all of the other signers had met with Hill individually.

Thus, when Hill reached the decision to discipline Butler by the issuance of a five-day suspension on January 28th, Hill was clearly disciplining Butler on a pretext, i.e., Butler's refusal to meet with Hill alone on January 22nd, because of the exercise by Butler of the protected activity of having drafted and circulated the memo of January 16, 1980, which pertained to terms and conditions of employment of "Middle Management" employees.

In finding and concluding that the Respondent independently violated Subsection (a)(1) of the Act, the Hearing Examiner has rejected any contention by the Respondent that there existed a legitimate and substantial business justification for its actions in suspending Butler for five days on January 28, 1980. As noted previously, any taint of insubordination on January 22nd was cured by Butler's having met with Hill the next day, January 23rd, in accordance with Hill's request to meet with Butler alone. Hill did not indicate on January 23rd that Butler had in any way been insubordinate prior thereto. Finally, it is noted that Butler in his 11 years of employment had never previously been disciplined in any manner whatsoever.

The Hearing Examiner will recommend that the five-day suspension be rescinded, that any reference thereto be removed from the Charging Party's personnel file, and finally that the Charging Party be made whole for the loss of five days' pay. The Charging Party having failed to prove any manifestation of anti-union animus on the part of the Respondent, the Hearing Examiner will recommend dismissal of the alleged violation by the Respondent of Subsection (a)(3) of the Act. ^{5/}

The Respondent Did Not Violate The
Act By Having Failed To Grant The
Charging Party An Increase In Salary
During The Years 1979 and 1980

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent failed

^{5/} The Hearing Examiner also finds and concludes that the Charging Party has failed to adduce any evidence which would constitute a violation of Subsections (a)(2) and (7) of the Act and will, therefore, recommend dismissal as to the allegations with respect to these two Subsections.

to grant the Charging Party an increase in annual salary for the years 1979 and 1980 in retaliation for the exercise by the Charging Party of any rights protected by the Act. It is noted that the Charging Party introduced in evidence a list of seven employees who had received increases since April 1979 (CP-12). This document indicates clearly to the Hearing Examiner that those salary increases that were granted were largely based on promotions and, in two instances, on "merit increases." Thus, the Hearing Examiner is clearly persuaded that the Charging Party has failed to prove that other "Middle Management" employees were granted increases for reasons other than "promotion" or "merit" while the Charging Party was denied such increases.

Therefore, the Hearing Examiner will recommend dismissal of this aspect of the charge of unfair practices.

* * * * *

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

CONCLUSIONS OF LAW

1. The Respondent independently violated N.J.S.A. 34:13A-5.4(a)(1) when it suspended Fred D. Butler on January 28, 1980 for a period of five days without pay because of Butler's exercise of rights protected by the Act in connection with his drafting and circulating a memo to "Middle Management" employees under date of January 16, 1980.
2. The Respondent did not violate any provisions of N.J.S.A. 34:13A-5.4(a) by its having failed to grant to Fred D. Butler a salary increase for the years 1979 and 1980.
3. Specifically, the Respondent did not violate N.J.S.A. 34:13A-5.4(a)(2), (3) and (7) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Authority cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from suspending employees such as Fred D. Butler from employment because of their exercise of such rights.

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

1. Rescind the five-day suspension of Fred D. Butler as of January 28, 1980, and compensate him for the loss of five days' pay.

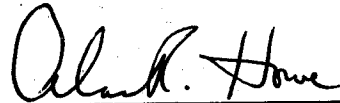
2. Forthwith remove from the personnel file of Fred D. Butler any documentation with respect to the aforesaid suspension of January 28, 1980.

3. Post in 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 insure 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), (3) and (7) of the Act be dismissed in their entirety,

Dated: July 8, 1980
Trenton, New Jersey



Alan R. Howe
Alan R. Howe
Hearing Examiner

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 suspending employees such as Fred D. Butler from employment because of their exercise of such rights.

WE WILL rescind the five-day suspension of Fred D. Butler as of January 28, 1980 and compensate him for five days' loss of pay.

WE WILL forthwith remove from the personnel file of Fred D. Butler any documentation with respect to the aforesaid suspension of January 28, 1980.

HOUSING AUTHORITY OF THE CITY OF NEWARK
(Public Employer)

Dated _____

By _____
(Title)

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

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