

P.E.R.C. NO. 87-145

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF MARGATE,

Respondent,

-and-

Docket No. CI-86-82-1

THOMAS P. GALLAGHER,

Charging Party.

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CITY OF MARGATE,

Respondent,

-and-

Docket No. CI-86-86-2

MARK C. BOOTHBY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Margate violated the New Jersey Employer-Employee Relations Act when it discharged Thomas P. Gallagher and Mark C. Boothby from their positions as lifeguard lieutenants. The Commission finds that the City discharged these two employees to retaliate against their filing of a lawsuit in Superior Court seeking pension benefits.

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CITY OF MARGATE,

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Docket No. CI-86-86-2

MARK C. BOOTHBY,

Charging Party.

Appearances:

For the Respondent, Fitzsimons & Baylinson, Esq.  
(David R. Fitzsimons, Jr., of counsel)

For Thomas P. Gallagher, Valore, McAllister, Westmoreland,  
Gould, Vesper & Schwartz, Esqs. (Antonia Z. Cowan, of  
counsel)

Mark C. Boothby, pro se

DECISION AND ORDER

On May 20 and June 18, 1986, Thomas P. Gallagher and Mark C. Boothby, respectively, filed unfair practice charges against the City of Margate ("City"). The charges allege that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., specifically subsections 5.4(a)(1),(3),(4) and (7),<sup>1/</sup> when it discharged Gallagher and Boothby from their positions as lifeguard lieutenants because they and seven other employees filed a lawsuit seeking pension benefits for City lifeguards.

On July 1, 1986, the Director of Unfair Practices consolidated the cases and issued a Complaint and Notice of Hearing. The City then filed Answers asserting that it: (1) discharged Gallagher because it believed it had too many officers; it could better spend its money on regular guards, and Gallagher was taking the bar examination and would not be available for summer employment, and (2) discharged Boothby because it had too many officers; he had used City facilities to operate a private business, and he had been uncooperative when asked to remove his property from City premises.

On November 12, 1986, Hearing Examiner David F. Corrigan conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They filed post-hearing briefs by December 15, 1986.

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<sup>1/</sup> 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; (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; and (7) Violating any of the rules and regulations established by the commission."

On February 5, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-46, 13 NJPER \_\_\_\_ (¶ \_\_\_\_ 1987). He found that the filing of the pension lawsuit was protected activity and that the City had in fact discharged Gallagher and Boothby because they had filed that lawsuit. Finding a violation of subsections 5.4(a)(1) and (3), he recommended an order requiring the City to offer Gallagher and Boothby reinstatement, make them whole for lost wages and post a notice.<sup>2/</sup> He recommended dismissal of the Complaint's remaining allegations.

On February 18, the City filed an exception asserting that Gallagher and Boothby's participation in the pension lawsuit should not be considered protected activity. On March 5, Gallagher filed a response supporting the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-9) are accurate. We adopt and incorporate them. We specifically accept his credibility determinations.

In re Bridgewater Tp., 95 N.J. 235 (1984) sets forth the standards for determining whether a discharge violates subsections 5.4(a)(1) and (3). The charging party must prove that hostility towards protected activity was a motivating or substantial factor in the discharge; this burden requires proof that the employee engaged

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<sup>2/</sup> He did not order the City to resume allowing Boothby to use its facilities for personal business.

in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of protected rights. If the charging party establishes that illegal considerations were a motivating factor, the employer may demonstrate, as an affirmative defense, that it would have discharged the employee even absent the protected activity. If the employer meets this burden, the Complaint will be dismissed. Id. at 244; see also UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

The Hearing Examiner found that the City discharged Gallagher and Boothby because they participated in the lawsuit seeking pension rights and that the City would not have discharged them if they had not done so. The City has not excepted to these conclusions. Based on our independent review of the record, we adopt them. The only remaining question is whether the employees' participation in the collective lawsuit was activity protected by the New Jersey Employer-Employee Relations Act.

Art. I, Par. 19 of the New Jersey Constitution guarantees public employees the right to organize and to present to and make known to public employers their grievances and proposals through representatives of their own choosing. The Act is remedial legislation implementing the constitutional guarantees. Lullo v. IAFF, 55 N.J. 409 (1970). Section 5.3 thus protects the right of public employees to form, join and assist any employee organization or to refrain from such activity. While employee organization is not defined, section 3(c) defines "representative" as including "any

organization, agency or person authorized or designated by a...public employee [or] group of public employees to act on its behalf and represent it or them."

We agree with the Hearing Examiner that Gallagher and Boothby were exercising rights guaranteed by the Act when they banded together with other lifeguards to file a lawsuit vindicating their statutory pension rights. Pensions are benefits which directly and intimately affect employees. While N.J.S.A. 34:13A-8.1 proscribes collective negotiations agreements which annul or modify statutory pension rights, the Appellate Division has held that a negotiated agreement implementing such rights may be enforced. PBA Local No. 145 v. PERC, 187 N.J. Super. 202 (App. Div. 1982) certif. den. 93 N.J. 269 (1983). By the same token we believe that our Act protects collective action through litigation to enforce statutory pension rights. In effect, this group of employees formed an employee organization to secure their rights to a fundamental term and condition of employment and they invoked the proper and peaceful legal channel to accomplish that end. The United States Supreme Court has held that the policy of the federal Labor-Management Relations Act, 29 U.S.C. §141 et seq., will be frustrated unless employees enjoy the right to improve working conditions through resort to administrative and judicial forums, Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), and the Third Circuit Court of Appeals has recognized that such resort is even more necessary in the public

sector where many terms and conditions of employment, such as pensions, are set by statute or regulation. Robinson v. State of New Jersey, 741 F.2d 598 (3d Cir. 1984), cert. den. \_\_ U.S. \_\_, 105 S.Ct. 1228 (1985). Employees may not be discharged with impunity simply because they have invoked the proper forum to improve their terms and conditions of employment.<sup>3/</sup> See New Jersey Dept. of Higher Ed., P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), aff'd App. Div. Dkt. Nos. A-2920-8417 and A-3124-8477 (4/7/86) (employer violated Act when it reduced work hours of unrepresented part-time employees who had complained about their terms and conditions of employment to the Governor's Task Force on Human Relations). Accordingly, we hold that the City violated subsections 5.4(a)(1) and (3) when it discharged Gallagher and Boothby. We adopt the Hearing Examiner's recommended remedy and dismiss the Complaint's remaining allegations.

#### ORDER

The Public Employment Relations Commission orders the City of Margate to:

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<sup>3/</sup> Section 5.3, unlike 29 U.S.C. §157, does not specify that it protects concerted activity for employees' mutual aid or protection. But that omission is not significant given the constitutional rights of New Jersey public employees to present grievances through representatives of their own choosing and our Act's broad definition of representative as encompassing a group of employees. Compare North Warren Reg. Bd. of Ed., H.E. No. 79-33, 4 NJPER 279 (¶4142 1978), adopted P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978) (section 5.3 entitles employees to request representation during investigatory interviews which may result in discipline).

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

B. Take the following affirmative action:

1. Offer Thomas P. Gallagher and Mark C. Boothby reinstatement to the position of lifeguard lieutenant for the summer of 1987.

2. Make Thomas P. Gallagher and Mark C. Boothby whole for lost wages and other benefits they would have received had they been employed in the summer of 1986 less income that should be credited in mitigation; plus interest pursuant to R. 4:42-11.

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 at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.



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

The Complaint's remaining allegations are dismissed.

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey  
May 20, 1987  
ISSUED: May 21, 1987

# 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 by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

WE WILL offer Thomas P. Gallagher and Mark C. Boothby reinstatement to the position of lifeguard lieutenant for the summer of 1987.

WE WILL make Thomas P. Gallagher and Mark C. Boothby whole for lost wages and other benefits they would have received had they been employed in the summer of 1986 less income that should be credited in mitigation, plus interest pursuant to R. 4:42-11.

Docket No. CI-86-82-1  
CI-86-86-2

CITY OF MARGATE  
(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-46

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

In the Matter of

CITY OF MARGATE,

Respondent,

-and-

Docket No. CI-86-82-1

THOMAS P. GALLAGHER,

Charging Party.

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CITY OF MARGATE,

Respondent,

-and-

Docket No. CI-86-86-2

MARK C. BOOTHBY,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the City of Margate violated the New Jersey Employer-Employee Relations Act when it did not rehire Thomas P. Gallagher and Mark C. Boothby as lifeguards for the 1986 summer. The Hearing Examiner finds that the City's actions were in retaliation for Gallagher's and Boothby's filing a Superior Court lawsuit seeking pension benefits. As a remedy, the Hearing Examiner recommends reinstatement and backpay.

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. 87-46

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
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Appearances:

For the Respondent, Fitzsimons & Baylinson, Esq. (David R. Fitzsimons, Jr., of counsel)

For Thomas P. Gallagher, Valore, McAllister, Westmoreland, Gould, Vesper & Schwartz, Esqs. (Antonia Z. Cowan, of counsel)

Mark C. Boothby, pro se

HEARING EXAMINER'S REPORT AND  
RECOMMENDED DECISION

On May 20 and June 18, 1986, Thomas P. Gallagher ("Gallagher") and Mark C. Boothby ("Boothby"), respectively, filed unfair practice charges against the City of Margate ("City"). The charges allege that the City violated the New Jersey Employer-Employee Relations Act, ("Act") N.J.S.A. 34:13A-1 et seq., specifically subsections

5.4(a)(1), (3), (4) and (7), when it terminated Gallagher and Boothby, City lifeguard superior officers, in retaliation for their participation in filing a lawsuit against the City seeking pension benefits.

On July 1, 1986, the Director of Unfair Practices issued complaints and notices of hearing and ordered the cases consolidated. On July 9, 1986, the City filed its Answers. It admitted that it terminated Gallagher and Boothby, but denied that it was in retaliation for their involvement in the pension suit. It contends that Gallagher was terminated because the City had too many officers and believed in view of budgetary constraints, that the money would be better spent on regular guards. It further contended that Gallagher was terminated because he would not have been available in future years because he intended to practice law. The City contends Boothby was terminated because: it had too many officers; he had improperly used City facilities to operate a private business and was "uncooperative and abusive" when requested to remove his property from City premises.

On November 12, 1986, I conducted a hearing. The parties examined witnesses, presented evidence and argued orally. They filed post-hearing briefs by December 15, 1986.

#### FINDINGS OF FACT

1. Thomas P. Gallagher and Mark C. Boothby are veteran City lifeguards: Gallagher was employed for 21 consecutive

summers; Boothby for 15. (TA135; 158)<sup>1/</sup> Both Gallagher and Boothby have been lieutenant life guards for the last several years and were continuously employed by the City up to and including the 1985 summer. (TA136)

2. The City operates under a Commission form of government, with three elected Commissioners. Commissioner Zigmund Rimm is in charge of the Department of Public Safety, which includes the Beach Patrol. (T264)

The City is a beach and resort community. The beach operation, and specifically, the safety of beackgoers is of paramount concern to the community. (T115-116) The beach patrol is headed by a Chief. For the last ten years, James Gallagher, the brother of Thomas Gallager, (T28) headed the beach patrol. (T24) Directly under the Chief are lieutenants, who function as superior officers. For the 1985 beach season, five lieutenants were employed. Directly under lieutenants are the lifeguards. Between 30 to 56 lifeguards are hired each summer, depending upon budgetary considerations. Because of safety consideration, the City prefers to hire experienced lifeguards. (T23) (T36) Therefore, its policy, which was applied uniformly up until 1986, was to offer employment to lifeguards who had worked the previous year. (T19) The only exception

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<sup>1/</sup> TA refers to transcript of November 12, 1986 hearing.

was one employee that had been subjected to disciplinary action. (T20)

3. Thomas Gallagher became aware of the existence of a statute, N.J.S.A. 43:13-23 et seq.,<sup>2/</sup> that allegedly entitled certain lifeguards to receive pensions after being employed for a specified period of time. (T137) He contacted other City lifeguards and nine agreed, in late August or early September to file suit in Superior Court. (JCP1) Commissioner Rimm became familiar with the statute in the 1985 summer but decided not to comply with it at that time because of lack of funds. (T208) Rimm believed Thomas Gallagher spearheaded the suit because Gallagher worked for the attorney that filed it. (T228)
4. On November 15, 1985, the parties entered into a consent order in which the City agreed to implement a pension in accordance with N.J.S.A. 43:13-23 (JCP2). The parties have yet to agree, however, as to what plaintiffs are entitled to a pension. (T210) Rimm was upset by this suit. After receiving the complaint, he called James Gallagher in the

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<sup>2/</sup> N.J.S.A. 43:13-24 provides: "In all cities of the fourth class any member of the life guard force, whether employed as an officer or a guard, who has or shall have served on such force for a period of twenty years, and shall have attained the age of forty-five years, and for a period of ten years preceding his application has been continuously in such service, may, either by the governing body of any such city or upon his own application, be retired upon half pay."

fall of 1985 and told him, "I want you to know that I am taking this personal. I am hurt and will be different to deal with." He also said that changes would be made and that he would get even. (T30) Mayor William Ross said that Rimm told him he was going to "get rid of all the officers." (T127)<sup>3/</sup>

5. In the 1984-1985 season, the City faced severe budgetary problems. It submitted a referendum to the residents to exceed the "CAP" law, but it was defeated. Therefore, the City reduced the lifeguard salary budget from \$110,000 to \$95,000. The City only manned 8 lifeguard stands during the week in 1985; 4 less than in previous years. It also reduced the number of guards from 50 to 30. (T36) Nevertheless, guards who had worked the previous year were offered employment;<sup>4/</sup> new employees were not hired.

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3/ Ross denied this. Rimm did not recall the statement. (T229) I, however, credit Ed Humphreys' testimony in this regard. Humphreys is president of the Margate Beach Patrol Alumni Association and acts as liaison between the beach patrol and the City. Humphreys has frequent dealings with the City and appears neutral in this suit: his only interest is that there be a good beach patrol. (T114-116) I credit his testimony. There was also testimony that Mayor Ross told Chief Gallagher that "[I know this dispute started with the pension] but I'm a team player and I'm going to have to see this through." (T44) This statement was introduced to evidence hostility on the part of the City, but I do not make such a finding. The statement was made after the charge was filed, is ambiguous and could be interpreted only as the Mayor's loyalty to the City or his reluctance to intervene.

4/ In 1981, the City had faced a similar budget constraint. The lifeguard salary budget was reduced from \$90,000 to \$80,000. However, all lifeguards were offered reemployment. (T20)



6. City residents were quite upset that lifeguard services were reduced in 1985 (T118). Therefore, in January 1986, Commissioner Rimm advised James Gallagher that the lifeguard salary budget would be restored to \$110,000 and staffing would increase from 1985 levels. (T25)
7. On March 2, 1986, Commissioner Rimm met with Chief Gallagher to discuss the upcoming beach season. Rimm told the Chief that Thomas Gallagher, John Slattery and Boothby would not be rehired.<sup>5/</sup> He told the Chief it was for budgetary reasons and had nothing to do with the pension lawsuit. He also stated, however, that he did not believe that seasonal employees deserved a pension. (T35)<sup>6/</sup>
8. In 1986, the City hired new guards and employed 56 guards, compared to 30 guards in 1985. (TA36) Rimm had told Chief Gallagher that he should recruit experienced guards -- the City hired several from other beaches. (T37) These

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<sup>5/</sup> The City later rehired Slattery (T39) after he met with Commissioner Rimm. (T78) Slattery was friends with Ward Holland, a former Margate lifeguard and Mayor Ross' friend, and it is reasonable to find that Holland intervened to help Slattery get his job back. (T188).

<sup>6/</sup> Gallagher called Rimm concerning his not being rehired, but Rimm refused to discuss it, except to say, "You're finished, you're fired." (T141) There was also testimony from Chief Gallagher that Rimm offered his position to others in the fall of 1985. This testimony was based on what the "others" told Gallagher and therefore is hearsay. I do not challenge Gallagher's credibility, but I am not going to make this finding since it was based solely on the hearsay testimony. (T2141-42)

employees were paid based on this experience: one senior guard was paid \$40.40/day; the lieutenant's rate was \$42.00/day.

9. Mark Boothby had been a member of the City's Beach Patrol for the last fifteen years. He has been in charge of equipment maintenance and repair for the past eight years and for the last 13 years worked in maintenance. (T159) He was promoted to lieutenant several years ago. He used his own equipment to make repairs and the City provided him with building space in the lifeguard building. (T192) During this time he had access to the building with his own key. (T169) The building was about 3,000 square feet; his equipment occupied 2/3 of it. (T160) Boothby was paid as a lifeguard from April to September. (T268) During the off-season, he would do sporadic repair work and would receive compensatory time off and be able to store his equipment in the lifeguard building. (T168) This "arrangement" lasted for 13 years. (T161) Boothby would occasionally work on his private construction business. Commissioner Rimm and Mayor Ross saw him there and would check to see what he was doing. (T169)
10. In December 1985, the City decided to reorganize its facilities. The pumping station was converted to the police station. Electrical equipment which had been stored in that station was moved to the lifeguard building.

(T212) This required Boothby to move his equipment. He was made aware of these plans on December 31, 1985, when a City employee went to Boothby's house and ordered him to move his equipment out of the building. (T161) Boothby said he would discuss it with Mayor Ross, who was a family friend. Ross however, was unavailable until January 6. (T163-164).

On that day, Boothby spoke with Ross by phone. (T164-165) Ross told him to remove his equipment and that Rimm had decided not to rehire him for the beach patrol because of his pension suit involvement. (T166)<sup>7/</sup> A week later, he met with Rimm, Ross and another Commissioner to discuss his leaving the premises. (T166) Boothby and the City had an argument concerning his moving the equipment: The City set a two week deadline, but he was not able to vacate until March. (T167) This resulted in strained feelings between the City and Boothby. (T213-215)

The City claims, however, that they were not aware that he was using his equipment for his business; rather, Commissioner Rimm admitted knowledge that Boothby occasionally did personal work, (T198) but became aware only in January 1986 that he was working on a business

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<sup>7/</sup> Ross denied making this statement, but I credit Boothby's version. (T201) Rimm also denied telling Ross. (T212)

venture while on company property. Rimm found this out when the Police Chief reported to him that he had been working on furniture. (T198-199)

Commissioner Rimm denied that Gallagher and Boothby were not rehired because of their involvement in the pension suit. Rather, he stated budgetary reasons motivated this action: the City could save money by reducing higher-paid officers and replace them with cheaper guards. (T216) Boothby was not rehired because his private business was in conflict with his lifeguard duties and Rimm was not happy with his "arrogant" behavior in vacating the lifeguard building. (T218) Rimm testified that he did not know that Boothby was using the City facility to conduct a private business until January 1986. (T219) Gallagher was not rehired, according to Rimm, because he was planning to become a lawyer and would not be able to devote full time to the beach. (T220) Rimm also said he was dissatisfied with the lieutenant's work performance in 1985. (T221) Other lifeguards who had also filed suit (Martinelli, Slattery, James Gallagher, George Kind and Carl Smallwood) were rehired. (T226)

#### ANALYSIS

The issue in this case is whether the City illegally discriminated against Thomas P. Gallagher and Mark C. Boothby when it did not rehire them as lifeguards for the 1986 summer season. In

re Bridgewater Tp., 95 N.J. 235 (1984) sets forth the standards I must apply in making this determination:

...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, \_\_\_ U.S. \_\_\_, 103 S. Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. at 244

In the absence of direct evidence of anti-union animus, to establish a prima facie case, the charging party must show (1) that the employee engaged in protected activity; (2) that the employer had knowledge of this activity; and (3) that the employer was hostile toward the exercise of protected rights. Bridgewater, supra at 246; In re Gattoni, P.E.R.C No. 81-32, 6 NJPER 443, 444 (¶11227 1980); In re North Warren REgional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978).

The first aspect to consider is whether charging parties were engaged in protected activity. I conclude that they were. A group of employees acted together and went to the appropriate forum -- Superior Court -- to seek economic benefits they were allegedly entitled to. Our Commission has not issued any decisions, to my knowledge, on whether this particular activity is protected by our Act. However, the United States Supreme Court has held that such

activity would be protected under Section 7 of the National Labor Relations Act. In Eastex, Inc. v. NLRB, 437 U.S. 556, 98 LRRM 2717 (1978) it stated:

[the Act] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums...to hold that activity at this nature is entirely unprotected...would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions...we do not think that Congress could have intended the protection of §7 to be as narrow as petitioners insist.  
[98 LRRM at 2720-2721]

I believe the Commission will likewise hold that such activity is protected under our Act. First, resort to federal precedent is an appropriate tool in determining protected activity under our Act. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n.16 (¶4205 1978). See generally, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n Ed. Sec., 78 N.J. 1, 9 (1978). Secondly, in view of the limited scope of negotiations in New Jersey public sector negotiations, see e.g. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n., 78 N.J. 54 (1978), it is more likely that disputes will be resolved outside of the collective negotiations process. Therefore, there is a greater need that such activity be given protection. In this regard, it is of no moment that pension benefits are not mandatorily negotiable. Both the Supreme Court and our Commission have recognized that employees have

a legitimate interest in presenting such views on matters that affect them even if it does not pertain to a mandatory subject of negotiations. Bd. of Ed. Bernards Tp. v. Bernards Tp. Ed. Ass'n., 79 N.J. 313 (1979); Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982) aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83); Salem Cty. Bd. Voc. Ed., P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd in part. App. Div. Dkt. No. A-3417-78 (9/29/80). Nor do I find it relevant that Gallagher and Boothby were not members of a negotiations unit. Our Act protects such unrepresented employees from retaliation for pursuing complaints concerning working conditions. New Jersey Dept. of Higher Ed., P.E.R.C. No. 85-77, 10 NJPER 74, 83 n. 19 (¶16036 1985), aff'd App. Div. Dkt. Nos. A-2920-8417 and A-3124-8477 (4/7/86). See generally, Gorman, Basic Text on Labor Law (1976) at 297-298. Accordingly, I find that Boothby and Gallagher were engaged in protected activity when they filed the suit in Superior Court seeking pension benefits.

The second element of the Bridgewater test has also been met: the City had knowledge of the protected activity.

The final element required to establish a prima facie case is that the City was hostile towards the protected activity. I find that they were. First, there is direct evidence of hostility. Rimm threatened to "get even" after the suit was filed and was going to "get rid" of all the officers. Mayor Ross told Boothby that Rimm was not going to rehire him because of his pension suit involvement. This direct evidence is sufficient to find that the

City unlawfully discriminated against Gallagher and Boothby. There is also direct evidence that the City was against giving lifeguards pensions and was upset the suit was filed. They, of course, have the right to express their political views and it does not violate the Act to express disappointment that a suit has been filed. They cannot, however, express their disappointment by retaliating against employees who file suit.

Circumstantial evidence also warrants a discrimination finding. Timing is an important factor in assessing motivation. e.g. State of New Jersey (Seaman), P.E.R.C. No. 87-88, 13 NJPER \_\_\_\_ (¶ \_\_\_\_ 1987); Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517, 519 (¶17193 1986). In this case, the timing is startling. Boothby and Gallagher were veteran City lifeguards. In fact, they had both been promoted to the lieutenant positions several years' previous. They were good employees and had been rehired year after year. Yet, the suit was filed and the following year they were not rehired. Another important factor in assessing motivation is departure from a prior practice. The City had a uniform practice of rehiring all lifeguards who had worked the previous season. This practice applied even when the City faced budgetary problems which required it to reduce its lifeguard workforce.<sup>8/</sup> Yet, the City departed from this practice, in a year when it was increasing its

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<sup>8/</sup> In both 1981 and 1985, budgetary problems resulted in a reduction in the lifeguard complement. However, veteran lifeguards were offered the opportunity to return. The City only departed from this practice in the rare instance of a disciplinary problem.



workforce and did not rehire two experienced lifeguards who had not been subject to disciplinary action. Under the circumstances, this evidences a discriminatory intent. See, e.g. University of Medicine and Dentistry, P.E.R.C. No. 86-5, 11 NJPER 447, 449 (¶16156 1985).

The charging parties have established that their protected activity was a motivating or substantial factor in the City's decision not to rehire them. The burden now shifts to the City to establish by a preponderance of the evidence that it had a business justification for the action taken -- i.e., it would have taken the same action, event absent the protected activity. Bridgewater at 244. I find that it has not met this burden. The City's first and primary defense is budgetary -- it believed that money could be saved by hiring less experienced lifeguards. I do not believe that the City established that defense. First, the resulting savings were meager -- the City hired experienced lifeguards from other towns and paid them at a higher rate than new lifeguards. The City, therefore, saved no more than two dollars per day. Secondly, I do not believe the City was motivated by a cost factor when it came to employing lifeguards. The City's primary qualification was that the lifeguard be experienced. In fact, the City had reduced its lifeguard force in 1985 to save money. But even in that year, experienced lifeguards were rehired. In 1986, the budget was less important. The 1985 reduction upset its residents. Therefore, in 1986, it significantly increased its budget and workforce. Thirdly,

it could only save money by hiring "new" lifeguards. But, by all accounts, it preferred to hire experienced guards because safety was of paramount concern to the City.

The City has offered other reasons to justify its action. Rimm believe there were too many "chiefs." Yet, it reduced the number of superior officers at the same time it was increasing the number of guards. There would appear to be a need for more chiefs, not less. Beyond that, in view of the City's conceded need for experienced guards, they could have reassigned the lieutenants to work the beaches. But it did not. Nor is it dispositive that not all those who filed suit were dismissed. The City fired its "ringleader" (Gallagher) and originally intended to fire two officers, but later fired only one. The rehiring of certain employees does not justify the failure to rehire others because of protected activity.

Rimm also gave reasons why the individuals were not rehired: Gallagher was in professional school and would not be available in future years and Boothby had been conducting a personal business while on City time and property and therefore was not rehired for disciplinary reasons. I do not accept these proffered justifications under the circumstances of this case. With respect to Gallagher, the City had no policy not to hire lifeguards who were going to professional school. Their policy was to the contrary: all lifeguards who wanted to return after having worked the year before were permitted to do so. This included those who were

attending professional school.<sup>9/</sup> The City's justification with respect to Boothby requires closer scrutiny. There is no question that, in general, working on a private business while on the City payroll would justify a public employer to discharge an employee for cause. Under Bridgewater, this would not constitute an unfair practice. This case, however, presents exceptional circumstances which warrants a departure from this general rule. Boothby's actions were authorized by the City. An informal arrangement existed where Boothby was permitted to store his equipment in the City lifeguard warehouse and do occasional personal and business work there in return for making (uncompensated) repairs to City property during the off-season. I recognize that the City's witnesses denied such an arrangement. But I find that Boothby's testimony was credible. First, it is not likely that Boothby would have agreed to store equipment needed in a business if he were not permitted to use it. Secondly, his use of the tools was open for several years. City employees, as well as elected officials, had access and visited the building while Boothby was working on the equipment. I am not prepared to accept as coincidence that the City first gained knowledge of this purported unauthorized activity which had been going on for years so soon

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<sup>9/</sup> Gallagher did tell Rimm that he would commence work with a law firm in mid-August. But this cannot justify Rimm's refusal to rehire Gallagher because he made the decision before Gallagher informed him. In fact, Gallagher received the job after the March notification that he would not be returning.

after Boothby filed suit against the City. I find it more likely that the City used this justification as a pretext for not rehiring Boothby to retaliate against him for his involvement in the pension lawsuit. I do not find this arrangement to be appropriate. In fact, its legality is questionable. See Espinosa v. Monroe Tp., 81 N.J. Super 283 (App. Div. 1963). I find only that this was not the reason Boothby was not rehired. I also do not believe that Boothby was not rehired because of his quarrels with the City after he was told to vacate the building on New Years Eve. The direct evidence, Boothby's phone conversation with Mayor Ross, is that the City decided not to rehire Boothby before January 1.

The appropriate remedy for the City's violation is to offer reinstatement to Boothby and Gallagher to the lieutenant lifeguard position<sup>10/</sup> for the 1987 summer and give them backpay plus interest (in accordance with R.4:42-11) for the salary they would have received had they worked the 1986 summer. A posting of notice of violation is also appropriate.

I make the following recommendations to the Commission:

#### CONCLUSIONS OF LAW

1. The City of Margate violated subsections 5.4(a)(1) and (3) of the Act when it did not rehire Thomas P. Gallagher and Mark C. Boothby because they filed a lawsuit seeking pensions benefits in the Superior Court of New Jersey.

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<sup>10/</sup> It would be inappropriate given the questionable legality of the City's earlier arrangement with Boothby to order its continuance. I do not.

2. The City's actions did not violate subsections 5.4(a)(4) and (7).

RECOMMENDED ORDER

I recommend the Commission order the City of Margate to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

B. Take the following affirmative action:


1. Offer Thomas P. Gallagher and Mark C. Boothby reinstatement to the position of lifeguard lieutenant for the summer of 1987.

2. Make Thomas P. Gallagher and Mark C. Boothby whole for lost wages and other benefits they would have received had they been employed in the summer of 1986 less income that should be credited in mitigation.

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 at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

  
David F. Corrigan  
Hearing Examiner

DATED: Trenton, New Jersey  
February 5, 1987

# 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 by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not rehiring Thomas P. Gallagher and Mark C. Boothby as lieutenant lifeguards in the summer of 1986 because they filed a lawsuit seeking pension benefits.

WE WILL offer Thomas P. Gallagher and Mark C. Boothby reinstatement to the position of lifeguard lieutenant for the summer of 1987.

WE WILL make Thomas P. Gallagher and Mark C. Boothby whole for lost wages and other benefits they would have received had they been employed in the summer of 1986 less income that should be credited in mitigation.

Docket No. CI-86-82-1 &  
CI-86-86-2

CITY OF MARGATE

(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.