

H.E. No. 2010-3

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

In the Matter of

BOROUGH OF HADDON HEIGHTS,

Respondent,

-and-

Docket No. CO-2008-324

AFSCME COUNCIL 71, LOCAL 3869,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Borough of Haddon Heights did not violate the New Jersey Employer-Employee Relations Act when it laid off eight employees, some of whom were union officers. AFSCME Council 71 argued that the employees were laid off because of their conduct on behalf of the union. The Borough had conducted a comprehensive analysis and determined that it could operate its DPW department more efficiently, avoid a tax increase and save money by implementing the layoff. The Hearing Examiner concluded that the layoffs were for business reasons and not based upon union animus.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Parker McCay, attorneys
(Elizabeth Garcia, of counsel)

For the Charging Party,
O'Brien, Belland and Bushinsky, attorneys
(Mark Belland, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 28 and July 21, 2008, AFSCME Council 71, Local 3869 (Charging Party or AFSCME) filed an unfair practice charge (C-1A) and amended charge (C-1B)^{1/}, respectively, against the Borough of Haddon Heights (Respondent or Borough) alleging that the Borough violated 5.4a(1) through (7)^{2/} of the New Jersey

^{1/} "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits respectively.

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

AFSCME was certified as the majority representative on February 5, 2007. The parties met for negotiations in September and October 2007 and once in February 2008. Subsequently, the Borough cancelled the March 13, 2008 negotiations session, leading in part to AFSCME's allegation that the Borough did not negotiate in good faith. AFSCME further alleges that on April 3, 2008, 8 out of 13 public works employees who were either union organizers and/or officers were laid off in retaliation for their protected activities. AFSCME also asserts that Borough officials made intimidating comments to employees. AFSCME seeks to have the eight employees rehired and an order that the Borough negotiate in good faith.

2/ (...continued)

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

On September 22, 2008 a Complaint and Notice of Hearing issued on the 5.4a(2) and (3) allegations (C-1). The 5.4a(4), (5) and (7) allegations were dismissed.

On October 3, 2008, the Respondent filed its Answer (C-2C) incorporating by reference two previously submitted position statements dated, respectively, June 3 (C-2B) and August 28, 2008 (C-2A). Respondent generally denies that it violated the Act and, specifically, denies that it laid off eight DPW employees in retaliation for the exercise of protected activities. Respondent asserts that all layoffs were necessary as a result of a budgetary shortfall and were conducted solely on the basis of seniority with the least senior employees being laid off.

Respondent denies Borough officials made intimidating comments. The Borough also maintains that it negotiated in good faith.

Hearings were held on January 6 and 21, February 24 and 26, and April 1, 2009 at which the parties examined witnesses and presented documentary evidence.^{3/} Briefs and replies were filed by July 10, 2009. Based on the record, I make the following:

^{3/} Transcript references to hearing dates are "1T" through "5T" respectively.

FINDINGS OF FACTBackground

1. The Borough and AFSCME are public employer and public employee representatives, respectively, within the meaning of the Act.

2. The Borough has a weak Mayor/Council form of government. The Council is the legislative body, and the Mayor represents the executive branch of government. The Mayor makes recommendations to the Council, and the six Council members vote to accept or reject the Mayor's recommendations. Only in the event of a tie Council vote does the Mayor cast a vote. Both the Mayor and Council members are volunteers (5T115).

Organizing AFSCME

3. In the fall of 2006, a group of four employees from the department of public works (DPW) - Dan O'Neill, Frank Spadea Jr., Dan Phifer and Robert Lebb - met with other DPW employees to discuss forming a union (1T143, 2T28). This group was previously unrepresented. After the meeting, Spadea Jr. contacted Marge Howardell, an AFSCME staff representative, to assist them in organizing a union (1T25-1T26).

4. Gary Gesrick was the DPW superintendent during the organizing campaign (1T144-1T145). DPW employees were the initial organizers, but eventually other Borough employees joined them (CP-2, CP-3; 1T26-1T27). In the end, there were 13

employees actively involved in the organizing campaign - 10 DPW employees and 3 employees from other departments. The DPW employee-organizers were Daniel Phifer, Robert Lewis, John Lambing, Robert Lebb, Jonathan Alvarez, Dennis O'Neill, James Hanton, Christopher Comly, Frank Spadea Jr., and Frank Spadea Sr. The non-DPW employee organizers were Deputy Municipal Court Administrator Catherine Lawson, Police Department Secretary Ellen Hendry, and Janitor Patrick Crilly (C-1B; CP-2).

5. On February 5, 2007, the Director of Representation issued a "Certification of Representative based upon Authorization Cards" certifying AFSCME as the exclusive representative of all full-time and regular part-time blue and white collar employees and crossing guards employed by Haddon Heights Borough (CP-1).

On March 8, 2007, then Borough Solicitor John Kearney wrote Howardell informing her that Hendry told him the crossing guards were universally opposed to membership in AFSCME and would, therefore, quit (R-1). In light of the concern that the guards would quit, Kearney explained he felt constrained to investigate the certification, especially since AFSCME had authorization cards representing more than 50% of the unit and the crossing guards represented 20% of the total bargaining unit. He suggested to Howardell that if she agreed that the crossing

guards were not included in the AFSCME unit, there would be no need to investigate further (R-1).

The record does not illustrate whether Kearney followed up with an investigation or whether Howardell responded. Howardell did not recall seeing or receiving the letter (1T95-1T97). Howardell does recall, however, Hendry telling her that the crossing guards' incomes were limited, and they were very concerned over the cost of union membership (1T95). Apparently either Howardell did not agree to remove the crossing guards at this time and/or Kearney's investigation, if any, did not support doing so, because by resolution at the July 17, 2007 Council meeting, the Borough formally recognized AFSCME as the bargaining agent for the certified unit (CP-4).^{4/}

6. Officers were selected for the newly organized union - President Frank Spadea Jr., Vice-President Dennis O'Neill, Recording Secretary Catherine Lawson, Treasurer Patrick Crilly, Trustee/Shop Steward Dan Phifer and Trustee John Lambing (1T31-1T32, 2T17). A negotiations committee was also formed consisting of union officers Spadea Jr., O'Neill, and Lawson as well as organizers Phifer, Hanton and Hendry and AFSCME representative Howardell (1T32-1T33, 1T93).

^{4/} In August 2008, the Borough filed a clarification of unit petition (CU) seeking to remove the crossing guards from the AFSCME unit. Pursuant to a settlement agreement, AFSCME agreed to remove the guards. [see generally fact nos. 102 and 103]

Fall 2007 Negotiations

7. The first negotiations session between AFSCME and the Borough was held on September 20, 2007 (CP-24; 1T36, 3T98). AFSCME's entire negotiations team was present (1T36-1T37, 3T98). Representing the Borough was then Mayor Beth Ann Haven, then Borough Solicitor Kearney, Municipal Clerk Joan Moreland and Council President Trish Shields (CP-24; 1T36-1T37).

At that session, there was a general discussion about salaries, health benefits and safety issues. AFSCME presented a proposed collective negotiations agreement that was modeled after the Borough's employee handbook (CP-5; 1T37-1T38, 2T31-2T32, 3T99). AFSCME also requested that the Borough put a bulletin board up in a central location for communication with its members (3T99). No agreement was reached at the first session, and the Borough did not at that time have a response to the union's proposal (1T39).

8. A second negotiations session took place on October 10, 2007. Everyone was present (CP-24; 3T100). No agreement was reached at that time. On October 16, 2007, however, Kearney faxed the Borough's counter proposal to Howardell (CP-6; 3T100-3T101). Howardell admits receiving CP-6 at that time (1T111).

9. Howardell claimed that on October 24, 2007, AFSCME submitted to Kearney its response (CP-7) to the Borough's October

16 proposal (CP-6; (1T42-1T43, 1T50, 1T139-1T140). [see generally discussion at Fact No. 68].

10. Subsequently, the Borough cancelled two negotiations sessions scheduled in November and December 2007 due to a change in administrations after the November elections - a new Mayor, two new Council persons and a new Borough solicitor (1T46-1T47, 2T37, 3T101-3T102). Moreland personally contacted Howardell to explain that the Borough had not forgotten about AFSCME but with the change in administrations, she would get back to Howardell as soon as possible with a new date for negotiations (1T47, 3T133-3T134).

11. When asked to describe the demeanor of the Borough towards AFSCME in September and October 2007, Howardell testified:

Well, Beth Ann Haven seemed to be receptive. Whenever we were in the room together everyone seemed cordial. Mr. Kearney could not have been nicer. He was a very nice gentleman. They appeared they wanted to work with us, if - you know, go over certain issues. They seemed very supportive at that time. [1T41]

The November 2007 Elections

12. Scott Alexander is a life-long resident of the Borough and his family have been residents of the Borough for 100 years (5T58). Alexander holds advanced educational degrees in several fields, including engineering, marketing, organizational dynamics and finance (5T57). He is currently vice-president of product

management for a software company. His duties include, among other responsibilities, financial investments, portfolio management and product development (5T57-5T58).

13. Tad Fetter is also a resident of the Borough. He has a business degree in accounting and finance and holds various financial certifications in advising and selling private and public investments. He is currently in the process of attaining a CFA (chartered financial analyst) certification, a master's level program that requires specialized knowledge in the areas of finance, economics, accounting, and portfolio management (4T60-4T61). Fetter is presently employed by a boutique investment firm as a liaison between portfolio management and advisor services (4T61-4T62).

14. Both Alexander and Fetter decided to run for Borough office as a result of their participation in a review of the 2006-2007 town-wide reassessment (4T63-4T64, 5T61-5T62). There had been an outcry among residents that there was a lack of transparency in the reassessment - Alexander in particular believes in transparency in government - and that the tax levies based on the reassessments were not fair (5T61-5T62, 5T106). Certain areas of the Borough were hit hard, particularly where Fetter lived (4T63).

15. Fetter, Alexander and others analyzed the 2006-2007 budget and the reassessment process and studied the Borough's

then current financial situation. Fetter concluded that there was a lack of financial controls in place, and that the budget process appeared to be more reactive than proactive (4T66-4T67). He and Alexander appeared before the Council and presented figures on tax revenues and costs (4T65, 5T58-5T59). They felt that tax increases year after year had reached a crisis point. For instance, some Borough residents had realized a 75% tax increase without taking into account the reassessment (4T65).

16. During Alexander's presentations to the Council, Council President Shields challenged his budget figures. Alexander felt that he had a better grasp of the numbers than Shields (5T58-5T59, 5T105). Shields became a Council member in 2004 and was Council president from 2005 through 2008. She has some college credits (5T4-5T5).

17. After appearing at several Council meetings, Alexander and Fetter were approached by members of the local Republican party - former Borough Solicitor Albert O'Lizi, Jim Jenkins and Cathy Davidson - to run for Mayor and Council respectively (4T65, 4T124, 5T58-5T59, 5T104-5T105). As a result, Alexander, Fetter and Rose Fitzgerald ran as a team in the November 2007 elections (5T104).

18. O'Lizi is Fetter's neighbor (4T124). O'Lizi supported the ticket comprised of Alexander, Fetter and Fitzgerald by handing out literature, helping with fund raisers and providing

advice during the campaign (4T14, 4T124, 4T126, 5T104-5T105). After the campaign, O'Lizi spoke to Alexander every couple of weeks and continued to provide general advice, namely what to expect as a minority Council person (after the November 2007 election, there were only two Republican votes on the Council - Fetter and Fitzgerald), how to set up committees, and how to work with Council President Shields who, O'Lizi felt, controlled the remaining four Democratic Council votes (4T15-4T16). However, during this transitional period and thereafter, O'Lizi provided no advice on substantive issues such as the budget reviews and reorganization of DPW (4T20).

19. Alexander, Fetter and Fitzgerald were elected in November 2007, and sworn in on January 5, 2008 (4T67, 5T58-5T59, 5T103). The Borough's government then consisted of Mayor Alexander, Council President Shields, newly elected Council members Fetter and Fitzgerald, and incumbent Council members Lee Wentz, Gordon Shopp and Don Witzig (5T5).

At the January 2008 swearing-in ceremony, Mayor Alexander thanked his supporters and assured the residents he would do everything in his power to reverse the trend of tax increases (32% increase in Borough tax appropriations in the previous three years) and contain costs. He presented a challenge to the school board, the county and the Borough not to increase their tax levies by more than 3%. He called this approach the "3-3-3

challenge". Alexander explained that county and municipal expenditures accounted for 23% of the tax levy respectively and schools for 54% (5T60-5T61).

20. Fetter was asked to become finance chair because he was willing to contribute his expertise. According to Fetter, the existing Council felt that the current budget was out of control, and they did not know how to fix it (4T68). Also on the finance committee was Rose Fitzgerald and Trish Shields (3T29).

21. Neither Fetter nor Alexander had previous experience interacting with unions (4T120-4T121; 5T97-5T98). The only union covering Borough employees that they were aware of after the November 2007 election was the PBA, representing the Borough's police officers. The PBA and Borough had just concluded interest arbitration proceedings, and an award was issued. Fetter and Alexander reviewed the PBA's collective negotiations agreement before it was signed three weeks after they took office in January. Shortly thereafter, they discovered that the IAFF and AFSCME also represented Borough employees (4T130, 5T98-5T99, 5T107-5T108). Indeed, Fetter only learned that there was a union representing DPW employees when he saw a memo in late January or early February scheduling the February 19, 2008 negotiations with AFSCME (4T117, 4T137).

The Budget Reviews Generally

22. According to Borough Clerk Joan Moreland, the budget forecast for fiscal 2008 was gloomy. State aid had dropped 19% in 2007 and another 15% in 2008. The cost of the state health benefits plan (SHBP) was rising. In her opinion, the Borough's choice was either to raise taxes or make changes in municipal government (3T111).

23. Both Alexander and Fetter began extensive budget reviews (4T82, 5T62). Fetter began his review immediately after the November 2007 election. He met with the Borough's CFO, Ernie Merlino, to do a year-by-year budget comparison in order to identify potential savings (4T82). Based on these discussions and reviews, Fetter saw what he described as a perfect storm consisting of interest payments on loans to cover bills that would have to be paid before any tax revenue was collected and a significant reduction (10%) in state and federal aid from 2007 levels (R-4 at page 7; 4T98).^{5/} Fetter concluded that fixed costs would have to be lowered to have a serious impact on tax levies or the Borough would need to find another revenue source or make structural changes (4T100).

24. Alexander was coming to a similar conclusion based on his review of the Borough's finances. In his experience managing

^{5/} Eventually some of the state aid was restored to municipalities but the Borough's aid for 2008 was still down by approximately \$174,000 from 2007 levels (R-4; 4T115).

international operations, a top-down review of operations is standard procedure in order to understand where expenses are allocated, what functions are performed, and what the output and quality of services are (5T64). In performing this review, Alexander learned that salaries and benefits accounted for 56% of the Borough's budget (5T62). A closer examination of the salary/benefit figure revealed that 45% was allocated for police salaries and benefits, 27% to DPW, and the other departments (administration, fire, finance, municipal court and construction) accounted for between 2% and 6% of the remaining salaries and benefits (R-18). Eventually, Alexander prepared a power point presentation (R-18), entitled "Optimization of HH Services Overview", detailing his top-down review and presented it in the public session of the March 4, 2008 Council meeting.

25. Before the March 4 Council meeting, however, Fetter and Alexander conducted individual department operational reviews (4T70, 5T64-5T65). Since the Mayor and Council are volunteers, those who have outside jobs, such as Fetter and Alexander, had limitations in the amount of time to spend on these reviews. In order to maximize their efforts and prioritize their time commitment in terms of having the greatest budget impact and achieving immediate budget relief, some departments were studied in depth, while others were given a cursory review. Therefore, more time was spent reviewing the police department and DPW

because they represented 72% of the salaries and benefits paid to Borough employees (R-18; 4T71, 4T81, 5T67).

Department Budget Reviews

Clerk's Office, Finance, Municipal Court and Construction

26. There were four positions in the Clerk's office and Finance Department. In the Clerk's office, were Borough Clerk Joan Moreland and Deputy Clerk Pat Cooper, while in the Finance Department were CFO/Treasurer Ernie Merlino, and Accounts Payable Clerk Pat Johnson (4T184-4T185, 5T68-5T69). After reviewing expenses and functions as well as succession planning and based on positive feedback from residents it was determined that these departments were efficient (5T68-5T69).

27. Moreland, however, is scheduled to retire in the next few years, with no clear line of succession.^{6/} The lack of a successor for the borough clerk was especially concerning because the mayor and council members are volunteers and the clerk's position provides them with continuity and knowledge about the Borough. To address the concern about replacing Moreland upon her retirement, Marie Holcombe was promoted to deputy clerk with a significant salary increase (4T177). She was viewed as a valuable asset, having worked previously in both the Finance Department and the tax assessor's office, and had good

^{6/} It is unclear from the record why Deputy Clerk Cooper was not in line to succeed Moreland, but this fact is not material.

computer/technology skills (4T184). With Holcombe's promotion, Cooper was moved to a full-time position in the tax office. She is presently represented by AFSCME (4T184-4T185).

28. In the Finance Department, Merlino and Johnson also planned to retire but were persuaded to stay on another year to assist in the transition period of the new administration (5T69). Both have since retired, and the Borough replaced them with two part-time employees with no benefits and automated the accounts payable functions. The savings from these two retirements is approximately \$60,000 annually (5T70).

29. Neither Fetter nor the Mayor spent a lot of time reviewing the Municipal Court because of limited time and the prioritization of their reviews (4T80, 5T70). However, a cursory review revealed that the number of employees was acceptable. For the current budget year (presumably 2009), one of the new Council members is reviewing the concept of shared services (4T80, 5T70).

30. In the Construction Department, the Mayor and Fetter reviewed revenues and expenses and whether or not revenues could be sustained based on resources needed to enforce codes and issue permits. It was determined that in 2008 the department was appropriately staffed and revenues could cover expenses (5T71).

31. Based on these reviews, no one was laid off in these departments, although personnel were reassigned in some instances or replaced with part-time employees where appropriate.

The Fire Department Budget Review

32. The Fire Department is a volunteer department with one employee - a full-time paid firefighter who wears multiple hats, including inspector and fire marshal (4T81-4T82, 5T67). From 8:00 a.m. to 5:00 p.m., the department is severely understaffed (4T82). As in the prior two budget years, the department requested permission to hire four additional full-time paid firefighters (4T82, 5T68). After speaking to the Haddonfield fire chief, Alexander and Fetter felt that having one full-time firefighter was sufficient and denied the hiring request for 2008 (5T68).^{2/} Although a new fire truck was purchased in 2008, the capital expenditure and financing had been approved before the November 2007 elections. In total, the cost of the fire truck was between \$400,000 to \$500,000 with installation (4T132-4T133).

The Police Department Budget Review

33. In the Police Department, Mayor Alexander learned that the Borough had one of the best crime indexes in the county under the state's formula ranking municipalities in terms of crime stopping (5T65). He compared the number of police officers and civilians as a metric of population and square mileage versus the crime index and determined that the Borough's police department model was working well compared to other municipalities, although

^{2/} Presumably, the Borough uses the services of the Haddonfield fire department, although this fact is not in the record.

the department was severely understaffed with the death of a captain and other personnel changes (4T78, 4T127-4T128, 5T66).

34. Fetter met several times with Police Chief Richard Kinkler in order to understand the impact of the parties' new collective negotiations agreement on the Borough's budget (4T71-4T72). Kinkler participated in the changes that the Council was seeking to make to reduce expenditures (R-16 at February 15, 2008 e-mail). He and Fetter tried to build a budget for 2008 and strategically plan for budgets through 2010 (4T72).

35. In order to contain costs in the department, it was determined not to immediately fill a vacant patrol position and to have the detective sergeant take on the patrolman's duties. A number of operating expenditures, such as overtime and short shifts, were eliminated (4T73, 4T127). Instead of purchasing an additional patrol car in 2008, it was leased for a savings of between \$30,000 to \$40,000. By these cost saving measures, no one was laid off or demoted in the department, and the 2008 department budget was decreased by \$147,432 which dulled the impact of the new collective negotiations agreement (R-4 at page 5; 4T74, 4T116, 4T128, 5T66).

36. Nevertheless, because the department at that point was understaffed, three promotions were made - a captain and two sergeants - but vacated positions were left open for the remainder of the year to recapture some salary savings.

Retirements were treated in the same way - e.g. positions were not filled. Although two officers were hired, they were placed at the lowest step of the salary guide (4T73-4T75, 4T78, 4T127-4T128, 5T66).

Fetter explained how the Borough saved money in the Police Department even though promotions were made and two officers hired:

Well, you can - basically what you can do with the contract in a way we were able to work with the Chief is, with the open spots you could - and this is how we would defer things - [the Chief] could essentially take a \$50,000, \$60,000 salary and promote it to a \$70,000 salary. And in promotion that frees up a patrolman's position and he could replace it with a person with only six months left to go in the year. So if I was promoted, the spot that I came from I would be able to keep open for approximately six months. And bring somebody in at half a year's salary of Step 1 or earlier I think I used the term Step 1 salary, so roughly \$15,000 that you essentially really minimize the impact of the budget. [4T74-4T75]

As a result of what was accomplished in 2008, Fetter projects that with retirements, the 2009 Police Department budget will be below the 2005 budget level (4T77).

The DPW Budget Review

37. There was a four-pronged approach to the DPW budget review - gathering data from then DPW Superintendent Gary Gesrick, gathering DPW data from surrounding municipalities, obtaining in-put and recommendations from a DPW consultant

(former DPW superintendent Jim Young) and obtaining an analysis from Borough CFO Ernest Merlino about the cost savings from privatizing operations (R-3; 4T83, 5T72).

38. Fetter and/or Alexander interviewed DPW superintendent, Gary Gesrick, to determine as a baseline what functions his department currently performed and how its resources were allocated. Fetter asked the same basic questions he had raised in his other departmental reviews and gave Gesrick a homework assignment to address additional issues such as what would happen to DPW operations if certain functions like recycling, tree services, and sewer work were removed (4T83).

Unlike other department heads who had been willing to work with him and were very helpful in their responses, Fetter found Gesrick uncooperative. Basically, Gesrick told Fetter that he would get back to him with the additional information, but never did. Gesrick retired shortly thereafter (4T83-4T84, 4T131). Gesrick's letter of resignation was read at a March Council meeting. Fetter never saw or spoke to Gesrick after his resignation (4T84, 4T131-4T132). Gesrick apparently told Shields he was retiring because "he was asked to let go of people and he would refuse to do it (5T23-5T24)."

39. Even though he did not communicate again with Fetter, Gesrick began to gather information. Phifer observed him doing paperwork and inquired what Gesrick was doing. Gesrick told

Phifer he was getting numbers together for the Mayor about the DPW operations to determine what everything cost. Gesrick then asked Phifer and other DPW employees to calculate the cost of fuel for each truck on a recycling run (2T60). When Phifer asked him why he needed this information, Phifer was told that although the cost of doing business in DPW was low compared to other departments and Gesrick returned money each year to the Borough, ". . . you guys shouldn't have unionized (2T61)." Gesrick also commented that Phifer was high enough on the seniority list (2T61).

40. Phifer wasn't sure what Gesrick meant by these comments but, about a week before, Phifer, Chris Comly and Dan O'Neill were in Gesrick's office getting their job assignments and discussing the new mayor, wondering what the mayor's plans were for the Borough (1T145-1T146, 1T161, 2T4-2T5, 2T58-2T59). According to Phifer, Comly and O'Neill, Gesrick responded that the union was screwing up the Mayor's plans and that they shouldn't have organized (1T145-1T146, 1T161, 2T6, 2T9, 2T58). They did not know what "plans" Gesrick was referring to nor did they question him further about it, but they all speculated that Gesrick's comment was negative (1T146, 1T161-1T162, 2T6, 2T60). Therefore, taken together with the earlier conversation from the week before, Phifer concluded that Gesrick knew more than he was willing to tell them and that "it didn't sound good" (2T61).

41. Phifer also recalled another earlier conversation with Gesrick when Phifer, as shop steward, approached Gesrick about an employee who had gotten in trouble (2T62). Phifer wanted to discuss the situation, but Gesrick apparently responded "f. . ." the union and informed Phifer that he (Gesrick) still ran the department (2T62). Phifer told Gesrick he understood, but that he (Gesrick) couldn't do whatever he wanted without first speaking to the union (2T62).

42. Alexander testified that during his various discussions with Gesrick he never expressed an opinion about unions and, in particular, made no comments that AFSCME was "messing up his plans" (5T97). I credit Alexander that he did not discuss the union or any particular "plans" with Gesrick. Gesrick did not testify in this case, but Charging Party's witnesses testified consistently that since at least 2006 when AFSCME was organizing, Gesrick expressed that forming a union was not a good idea. For instance, DPW employees Lebb, Alvarez and Lambing all testified to conversations between 2006 and 2008 wherein Gesrick told them individually that if the employees organized they might get laid off, that forming a union would not work, and that he had advised the employees not to join a union (2T17-2T18, 2T157, 2T165). While I credit their testimony, I find Gesrick's remarks were his opinion, but did not reflect the Borough's position. Therefore, the fact that Gesrick told Phifer and others that forming the

union was a bad idea and that it was allegedly messing up the mayor's plans was consistent with Gesrick's long-held beliefs - beliefs that pre-dated the November 2007 election.

I infer that, after speaking to Fetter and Alexander during the department review and being asked for information about the cost of DPW operations, Gesrick concluded that he was right all along that forming a union was not a good idea and that the union would interfere with Alexander's plans to reduce costs. Gesrick's comments to Phifer and others conformed with his own opinions in this regard. However, there is no evidence that Gesrick was speaking on behalf of Alexander or the governing body or reflecting their views.

Lambing also testified on cross examination that Gesrick told him several times that the new mayor was totally against the union (2T21). Lambing, however, did not specify whether Gesrick was expressing an opinion that the Mayor was against the union or whether Gesrick was relating an actual conversation with the Mayor wherein the statement may have been made. Without Gesrick testifying, and based solely on Lambing's hearsay about the Mayor, I cannot find that the Mayor stated he was against the union.

43. From the brief discussions with Gesrick, however, Alexander gleaned enough preliminary information to prepare a chart illustrating man hours allocated to various DPW functions

in 2007 (R-15). He and Fetter learned that recycling accounted for 34% of DPW man hours, while brush, leaf and sewer collection used approximately 13%, and tree maintenance accounted for just under 10%. The rest of the functions used 5% or less of DPW man hours (R-15).

44. In order to gain further insights into the DPW operations and based on what Fetter perceived to be Gesrick's lack of cooperation with his request for additional information, Fetter met in late February/early March 2008 with former DPW superintendent Jim Young who was Fetter's neighbor. Young had been a police sergeant for 28 years before retiring to take on the position of DPW superintendent, a position he held for six years from 1988 through 1994. Fetter asked Young to help him understand the DPW operations and staffing (4T29-4T30, 4T41, 4T47, 4T85).

Young confirmed that Fetter explained to him about Gesrick's lack of cooperation, told Young that the state was cutting back funds to the Borough and that, therefore, cutbacks were necessary to save money and keep down tax increases (4T45). Fetter was particularly interested in what work DPW employees were performing between January and April and who was performing the work. When Fetter reviewed DPW operations in November 2007, outside of recycling and trees, he did not know what was being done in the period before brush pickup began in the spring (4T85,

4T132-4T133). He also asked Young to itemize equipment and staff (4T85).

45. Young agreed to do the survey but only if the entire Council and Mayor agreed that it was appropriate, because he did not want to be in the middle of a political fight (4T31). Young was an independent voter, aligned with neither party, and wanted to contribute his expertise only as a taxpayer, not for any promise of getting a job from this activity - he was 72 years old (4T31).

After meeting with the Council, who accepted his terms, Young agreed to conduct the survey, although this was the first time he had ever prepared such information (4T32, 4T48). Councilman Don Witzig, Chair of the DPW committee, arranged a March 10, 2008 meeting between Young and Gesrick (R-12; 4T32). Young knew that there was a union representing the DPW employees, because sometimes the employees would stop by his house to talk. They told him that they were forming a union. Young saw no problem with that because, even when he was superintendent, the DPW employees were, in his opinion, the lowest paid employees compared to the surrounding municipalities (4T55).

46. On March 10, at about 7:00 p.m., as Young was about to go into the meeting with Gesrick, he saw some of the DPW employees. Because of rumors going around about possible layoffs, he stopped and explained to them that he was only there

to do a survey (4T40). Phifer, whose deceased father had been a friend of Young's, asked Young how many employees were going to be laid off. Young told him he knew nothing about layoffs (4T40).

47. At the meeting, Young found Gesrick to be very helpful (R-12; 4T53). At the beginning of the meeting, Young asked Gesrick who he would recommend to replace him since Gesrick had already indicated he was retiring. Gesrick mentioned Rich Edelen, a foreman with 24 years experience, and Frank Spadea Jr., a driver/operator with 20 years experience, so Young included them in the meeting that lasted about an hour (R-12; 4T49).

During the meeting, Edelen and Spadea Jr. informed Young that they got along so well together they could share the superintendent's job, but Young told them it was not a good idea because there was only one captain of the ship (4T35). He told them, however, that they were free to ask for a shared position (4T35). Either Edelen or Spadea Jr. asked Young about layoffs (4T39). Young told them he knew nothing about layoffs. He then explained, however, that the Borough was trying to save money, so if the Borough could get outside vendors to work for less than the in-house operation, the only way to save money would be to layoff personnel (4T39).

48. Young questioned them about their equipment, how many men it took to do recycling and tree work and, generally, what

services DPW was providing because it had been 15 years since he was superintendent (4T33). He learned that there were 14 employees plus Gesrick and a part-time secretary, approximately the same number as when Young was superintendent (4T43-4T44, 4T55, 4T58).

As to tree services, Young learned that three men - O'Neill, Comly and Lambing - did the tree work (4T34). He also learned that the bucket truck used for tree work was 25 years old and needed to be replaced at a cost of approximately \$160,000 (4T35).

Regarding recycling, the operation had changed from Young's tenure as superintendent when everything had to be separated. The present operation dumped everything into one bin (4T36).

Gesrick also explained to Young that a lot of the work that used to be done in-house was now done by outside contractors such as tree stumping and street cleaning. For instance, the Borough paid \$7,000 annually to Haddonfield for cleaning the business district streets (4T37).

49. As Young was leaving the March 10 meeting, he was again approached by Phifer who asked him how many layoffs there were going to be in DPW (2T62-2T63, 4T40). Young repeated that he knew nothing about layoffs, just that the Borough was looking for ways to save money and that he (Young) was only doing a survey (4T40-4T41). Young denies, as claimed by Phifer, that he told Phifer there would be no layoffs (2T63). Young testified that he

had no authority to make such promises and that he was doing the survey not as a member of the government but as an independent citizen (4T41). I credit Young that he made no such statements or promises to Phifer. Since by March 10 no decision had yet been made as to layoffs or any other course of action in DPW, Young would have no definitive knowledge about layoffs to impart to Phifer or anyone on March 10.

50. After the March 10 meeting, Young received a quote from a friend who was in the tree business regarding the cost of tree removal (4T38, 4T49). The cost was \$2500 per tree. He received no other cost estimate for this service (4T38).

Fetter gave Young a list of salaries and benefits for the DPW employees (4T38). Benefits alone were \$17,400 per employee (R-12; 4T51). Using Fetter's list as well as the information gleaned from the March 10 meeting and the \$2500 cost estimate for tree removal, Young prepared a report in about an hour (4T50). In preparation for the report, he reviewed no DPW records (4T49).

51. The report (R-12) that he gave to the Mayor and Council concluded that there would be a savings of \$16,775 to outsource tree services (4T38). That savings was based solely on Fetter's salary/benefit figures and Young's friend's estimate of \$2500 per tree for removal. It did not take into account the \$160,000 replacement cost of the bucket truck (4T39, 4T52).

Young's report included no recommendation as to recycling but recommended that certain functions be kept in-house, including leaf pick-up using part-time help during leaf season, snow removal, sewer maintenance, brush pick-up, line painting, and street sweeping.

As to employees, Young estimated that nine employees would be sufficient to perform DPW functions - a supervisor, mechanic, assistant mechanic, three CDLs (employees with commercial driver's licenses) and three laborers - if tree services were privatized. Otherwise he recommended that DPW function with 12 employees as opposed to the current number of 16. Additionally, if recycling, as well as tree services, was privatized, Young recommended that only seven full time DPW employees were needed. Young's report indicated that four current employees were in a position to take early retirement, if given an early retirement incentive package, "otherwise cut backs would have to start at the bottom of the list (Union)" (R-12).

52. Young met with Alexander and Fetter to review his report (4T57). Although Young knew that they were exploring outsourcing as a less expensive alternative to the current operations, no one mentioned that during the review. Young was not asked to do a follow-up report (4T57-4T58).

53. When Fetter received Young's report, he did his own due diligence with the help of some others and checked into Young's

figures, including the cost of outsourcing tree services (4T88). In speaking with other municipalities and tree companies, Fetter concluded that \$1000 to \$1500 per tree for removal was a more realistic figure than the \$2500 figure Young gleaned from speaking to his friend (4T88). In particular, Fetter learned that providing tree services was a highly competitive business, so Young's estimates in this regard were high and the savings were, therefore, greater than what Young anticipated (4T90-4T92).

Indeed, when the Borough eventually contracted with outside tree service vendors, the average cost of tree removal was \$1000 per tree (R-11, R-13, R-14; 3T54, 4T91-4T92). Specifically, in April 2008, the Borough awarded a contract to take down 23 trees to Lyon & Son Tree Service, the lowest out of six bidders (R-13). In October 2008, the Borough received eight bids for the take down and removal of 20 trees, but determined that only three bidders provided a complete package as specified in the specifications and legal advertisement - Colonial Tree Service, Lyon & Son, and Ryan Bansky Expert Tree Service. The Borough awarded the contract to Colonial, the lowest among the qualified bidders (R-14).^{8/}

Fetter also learned from Young's report that the DPW vehicle fleet was decrepit and that there would be a lot of future

^{8/} One bidder was lower by \$1,000.00 than Colonial, namely Tree Awareness, but it was not a qualified bidder because it did not meet the legal specifications of the contract (R-14).

replacement costs, specifically as related to the \$160,000 bucket truck (R-12; 4T93). By outsourcing tree removal, the bucket truck would not have to be replaced (4T95).

54. Young's report confirmed what Alexander suspected, that DPW was overstaffed based on the functions performed and the man hours required to perform those functions (5T74). This conclusion was reconfirmed when Fetter asked Alexander and other Council members to assist him in gathering information on surrounding municipalities and also to do a staffing review based on man hours required to do the various functions (4T96, 5T76).

Alexander met several times with officials in Barrington, Haddonfield and other municipalities to understand how they delivered DPW services (R-19; 4T96, 5T75-5T76). The common denominator in the staffing review and comparisons was equivalent full-time employees (EFT) (5T76). Compared to the size of Barrington and Haddonfield and the number of residents and housing units in those municipalities, the Borough had 30% to 50% more EFTs than the surrounding communities. Based thereon, Alexander concluded that the DPW had more man hours than needed to provide the services performed (R-3; 5T76).

55. Ultimately, it was decided to outsource tree services because there was a cost savings attached to salaries and benefits as well as capital expenditures (4T96). The Borough also believed that services would be improved by utilizing a more

sophisticated tree services company that was focused only on this function (4T97).

Additionally, the decision to outsource this service meant that it was no longer a fixed cost. Therefore, outsourcing complimented Fetter's efforts to limit the impact of expenditures on the tax levy by eliminating fixed costs. Fetter understood that the Borough had finite rateables and no gross increases in those rateables with few homes being built. State aid was static or declining and tax increases inevitably flowed from high fixed costs. Outsourcing in general and specifically outsourcing tree services allowed for more flexibility in responding to budgetary situations. For instance, if finances became critical, the Borough could chose to cut down only critical trees and adjust as the revenue situation improved (4T98, 4T103).

56. Regarding the recycling, Alexander and/or Fetter asked CFO/Treasurer Ernie Merlino to prepare a cost analysis itemizing expenditures, such as depreciation, insurance, maintenance and health care benefits (3T18, 3T42, 4T105). Merlino has been the Borough's CFO/Treasurer since 1988 and was responsible for maintaining financial records in accordance with local budget law and regulations issued by the Department of Community Affairs . He is an accountant (3T17). Merlino was told to prepare the report but was not told why (3T49).

Merlino's report (R-7) detailed what savings would be realized if recycling was outsourced. He already knew from Alexander's chart (R-15) that a majority of the man hour effort in DPW was directed toward recycling (34% of total effort). He also learned from Alexander that recycling was done two days a week with a crew consisting of a driver and two laborers on each of three trucks (3T29-3T30). Using this information and the 2007 budget figures, Merlino calculated the total cost for the Borough's recycling effort was \$256,533.80 (R-7).

Merlino calculated employee salary and wages as \$131,539.20; employee service expenses (medicare, social security, disability insurance, pensions and life insurance, clothing allowances and health benefits) as \$67,902.68; miscellaneous expenses (fuel, maintenance and repairs) as \$30,700.32; superintendent's salary (calculated as 40% of base based on two out of five days per week that recycling operated) as \$26,391.60.^{2/} Merlino calculated depreciation as zero because the three trucks were fully depreciated (R-7).

57. On March 10, 2008, Merlino provided Alexander and Fetter with his analysis of the Borough's recycling effort (R-7). In order to compare the recycling costs to what it would cost if the service were outsourced, the Mayor obtained quotes from

^{2/} On cross examination, Merlino admitted that the superintendent's job remains a full-time position despite the outsourcing of recycling.

outside vendors of between \$170,000 and \$180,000 annually for recycling services (5T79). When the recycling operations were eventually bid publically, the contract that was certified by Merlino came within this range (R-3; R-10; 4T112). There were three bidders: (1) Casworth at \$110,160.00; (2) Republic Services at \$177,876.00; and (3) Waste Management at \$187,140.00. The Borough awarded the contract to Republic Services for one-day pick-up of recycling goods (R-10). The contract approved by resolution and awarded to Republic was for \$118,584 for the balance of 2008 with pick-up beginning on May 7, 2008 (R-10).

Fetter reviewed Merlino's report and compared it to the overall year-to-year budgets (4T107). He called other municipalities to understand what their recycling costs were and also called their trash vendor to ascertain the charge for taking over the Borough's recycling (4T109). Fetter determined that, similar to tree service companies, there is price competitiveness among companies providing recycling services (4T110).

February 2008 E-Mail Exchanges re DPW Review

58. While Alexander and Fetter were talking to Gesrick and investigating DPW operations in surrounding communities, e-mails were being exchanged between them and Councilman Lee Wentz that illustrate how the DPW review was being conducted and the thought

processes of and conclusions drawn by those conducting the reviews. The e-mails are summarized below.

On February 14, 2008, Fetter e-mailed Councilman Lee Wentz explaining his and Alexander's conclusions regarding their DPW investigations based on their meeting with Gesrick and department heads as well as their comparison of the Borough's DPW operations with surrounding communities such as Haddonfield, Haddon Township and Barrington. Fetter sought Wentz's in-put regarding solutions and explained that the hope was to improve services at a lower cost like they had done in the Police Department.

Fetter further explained that DPW was significantly overstaffed and mismanaged. The mismanagement, he felt, had a direct impact on tax dollars and needed to be changed immediately. Fetter wrote that compared to surrounding communities the difference in output versus cost was substantial and concluded "our services stink and we pay more for them too relative to our neighbors" (R-16).

Fetter continued:

I am hopeful we can move quickly on this as we cannot afford to allow this to continue further into 2008. Let's take a lesson from Haddon Township who recently fired their head of DPW saving over \$100,000 in annual expenses and really look at how we can improve these services while lowering costs.

The budgetary impact of any change in 2008 would be very welcome. We don't qualify for extraordinary aid due to surplus. We need to retain or build off this surplus

going forward for many reasons but we would have to use portions towards minimizing 2008 tax increases. Improving in this area is critical. [R-16]

Wentz responded that he would review the material given to him and was open to discuss changes but did not want to move too quickly (R-16). Fetter addressed Wentz' comment in a subsequent e-mail explaining that if they moved too slowly nothing would get done but acknowledging the danger of moving too rapidly. Fetter felt the secret was to be efficient and effective. He also lamented Gesrick's apparent lack of cooperation unlike Police Chief Kinkler and suggested that if no one objected, he would approach Jim Young as former superintendent and taxpayer to lend his expertise and assist in the DPW review (R-16).

59. On February 20, 2008, Fetter again e-mailed Wentz, asking him to speak to Gesrick about the possibility of a full-time staff of 10 or 11 employees with the use of part-time employees to meet or exceed current staffing levels. He wrote Wentz that if Gesrick was not able to work with Alexander and the Council to obtain immediate long term cost savings, it would be necessary to get someone who could [CP-30; R-16]. Fetter then wrote:

I respect your views on employment and loyalty to our workers but there just has to be a middle ground where we can make this work. The decision to hire more people to assist an aging work force, physically unable to maintain their prior pace of efficiency, is costing our town almost a \$1,000 a day.

We are not a charity and I feel council's prior heart-felt leniency on staffing with [Gesrick] has been abused by his team. The model needs to be adjusted as keeping full time laborers on staff until retirement and bringing new guys to assist as they age and slow down is just insane from all angles and I for one do not appreciate paying for it at all. [CP-30; R-16]

As we discussed two approaches:

1) Dire Strait scenario: where he would have to let people go, plus upcoming retirements, etc. to achieve immediate results of the 10/11 FTs

2) Conservative approach: combining retirements with removal of documented troubled employees to meet 10/11 FTs over time

As with the police, this exercise is simply stress testing Gary's preferences and does not mean we are attempting to let go this many employees. [CP-30; R-16]

In an e-mail response, Wentz agreed to speak to Gesrick and wrote:

Thank you for respecting my view on the employment of our employees but it may not matter with the Union in place. [R-16]

Wentz also suggested that they look into a shared services with Barrington to free up the DPW site for rateables and achieve long-term savings (R-16). Fetter had no idea what the comment about the union meant and had no follow-up discussion with Wentz on this comment (4T191-4T192).

60. In a February 22, 2008 e-mail from Alexander to the Council, Alexander summarized the multi-step approach he and

Fetter had taken to analyze DPW operations and reorganize DPW more efficiently. He wrote:

1. Complete a comparative operational and manpower analysis

a. This has been completed as compared to Haddonfield, Barrington, and a bit of Audubon. It is very clear that we are overstaffed for our town size, population and number of housing units. We are over budgeted by about 30%. There is absolutely unquestionably an opportunity to reduce our expense in DPW and still provide good if not better services. This department has clearly been under managed for a while.

b. Gary has been asked to come up with two scenarios to move toward more efficient operations. The goal is to at least mimic Haddonfield and possibly Barrington, but Barrington is not as efficient as Haddonfield.

c. This should be implemented as part of the budget adoption.

2. Review Outsourcing and shared Services Opportunities

a. As part of step 1, this is already under consideration. This is not as low hanging as making our operations more efficient, but there is till potential. For example, recycling and tree work might provide some cost savings in the health benefits and pension contribution area.

b. I have heard mention of completely outsourcing public works, and that is not something that seems prudent to me at this point. I think we should use a stepped process as we are doing. Since there is conversation about completely removing DPW from HH, can someone provide the detailed analysis that supports this.

C. I see this step as taking place throughout the year.

3. Analyze Facilities Needs

a. Once we move to a more efficient model, have time to understand what is working and what is not with the new model, implement shard [sic] services, etc. We should review how much square footage we need for people and equipment.

b. From there we should start to look at options to house DPW, if that is the path the Planning Board wants to take. The planning board as suggested putting together a sub-committee on this effort.

c. I don't see this happening until next year at the earliest. [R-16]

61. In an e-mail dated February 25, 2008 from Alexander to Fetter and Gordon Shopp, Alexander suggested two possibilities from his analysis of DPW operations to pursue, namely to use SJ Sanitation for recycling services because Barrington used them and to look into outsourcing or sharing tree services. Alexander related that he wanted to consult Jim Young on these suggestions (CP-21).

62. Eventually, based on both Young's and Merlino's reports and their own investigations, Alexander and Fetter concluded that DPW was overstaffed and that the Borough was paying for resources it didn't need. They determined that by outsourcing both recycling and tree services, there would be an annual net savings of approximately \$250,000, although that savings would not be fully realized in 2008 because any layoffs would not take place

until several months into the budget year (4T108-4T109, 4T113, 4T116, 5T80). They also concluded that outsourcing gave the Borough added flexibility in providing these services and responding to budgetary crises (4T108-4T109).

The February 19, 2008 Negotiations Session

63. The February 19, 2008 negotiations session was the first since the November 2007 elections. It lasted about 30 minutes (1T50).

Representing AFSCME was Cathy Lawson, Frank Spadea Jr. (DPW), Patrick Crilly, Ellen Hendry, Dan Phifer (DPW), Dennis O'Neill (DPW), James Hanton (DPW) and Marge Howardell. The union's team introduced themselves by name and title (1T48). Representing the Borough was Joan Moreland, Council President Shields, new Borough Solicitor Sal Siciliano and Mayor Alexander (CP-24). The Mayor and his staff also introduced themselves.

This was the first time that Alexander met with AFSCME. Although he reviewed the negotiations file, he did no research prior to attending the meeting. Based on that review, Alexander concluded that the Borough was still waiting for the union's response to the last Borough counterproposal from October 2007 which was a response to the initial AFSCME proposal (CP-6; 5T108).

64. Phifer testified that the first words out of the Alexander's mouth were "why did you guys get a union?" (2T38,

2T114-2T115). Although Alexander denied that this was the first thing he asked, he did not deny asking the question. Alexander asked the question because he had never been involved in union negotiations and was curious about the employees concerns (5T89). Moreland's testimony supports that Alexander sounded inquisitive. She concluded that he wanted to know what was on the employees' minds (3T102).

Howardell told Siciliano that Alexander's question was inappropriate (1T49). Nevertheless, his question garnered several serious responses from the union's negotiations team. For instance, Lawson explained that the employees thought the Borough was going to take away benefits. Alexander told her that he had not heard that (5T90). Another employee explained that the reason they organized was because of safety issues related to the DPW building (5T92). Alexander explained he would look into it, and the next day had the Borough engineer examine the DPW facility. Alexander also inspected it and took pictures (5T92).

Finally, Spadea Jr. told him that the employees organized because of low wages compared to surrounding communities (5T90). Alexander responded that he would work with Spadea Jr. to determine the correct pay and asked him to put together information on salaries in surrounding communities (5T90). Subsequently, a week or so later, Spadea Jr. gave Alexander copies of salary ordinances from Audubon and Barrington as well

as a summary of current negotiations in Barrington (R-21). As a result of Spadea Jr.'s concerns, Alexander instructed Moreland to purchase a county-wide salary survey to help address this issue (5T91).^{10/}

65. During this negotiations session there was also a general discussion of what the Borough was seeking to achieve in negotiations. Siciliano explained that the Borough was waiting for the union's response to the Borough's counter proposal sent by the former solicitor (Kearney) in October 2007 (2T87, 5T93).

There were no discussions about layoffs because the governing body was still looking into the budget, doing their due diligence and investigating. According to Alexander and Fetter, at this time the Council was nowhere near having discussions about layoffs because that decision was not finalized until the April 1, 2008 Council meeting (4T140, 5T110-5T111).

Alexander characterizes the February negotiations session as cordial (5T88). According to Howardell and Phifer, Alexander seemed "agitated and annoyed" and unprepared (1T49, 2T38). Apparently, Alexander's demeanor was a matter of opinion.

^{10/} O'Neill testified that he did not recall whether the Mayor responded to the negotiations team's answers to his question about organizing. O'Neill, however, inferred that the Mayor laughed to himself (1T149). O'Neill's testimony was self serving. Mayor Alexander credibly testified that he gave serious answers to each response. There is no testimony to support that the Mayor took the responses lightly or laughed to himself.

66. Moreland's notes reflect that more meetings would be scheduled, "Next mtg? 3/13 5 p.m., 4/1/08 5 p.m." AFSCME was under the impression that March 13 and April 1 were scheduled negotiations sessions (1T50, 1T54, 2T40-2T41). Alexander, however, understood that the March 13, 2008 date was an internal meeting for the Borough's team only to discuss the union's response to the Borough's October 2007 counterproposal that the Borough anticipated receiving from Howardell (5T94, 5T123).

In any event, the March 13 meeting never took place. When the AFSCME negotiations team showed up on March 13, no one from the Borough's team was present. Siciliano informed Howardell that the March 13 meeting was only intended to be for the Borough's team, although evidently no one from the Borough was present. Moreland explained that the March 13 meeting was cancelled because the Borough never received the union's counterproposal requested by Siciliano (3T104, 3T135).

67. On March 14, 2008, Siciliano wrote Howardell explaining that he had not yet received AFSCME's reply to the Borough's October counterproposal and requested that the union's response be sent as soon as possible so that the Mayor and Council could review it in advance of the April 1, 2008 meeting (R-2).

On March 17, 2008, Howardell wrote Alexander, copying Siciliano, expressing disappointment with what she described as the cancellation of the March 13 negotiations session and

explaining that, therefore, she was filing for mediation (CP-8). She also inquired as to whether the April 1 meeting was still scheduled (CP-8).

The Borough did not receive AFSCME's counter proposal before the April 1 meeting so, it too was cancelled, at least in part, because there would be nothing to discuss (CP-9, CP-25; R-22; 3T104, 3T135, 5T95).

68. On April 3, 2008 Siciliano faxed a letter to Howardell confirming that he spoke to her on April 1, 2008 with respect to the Borough's October 2007 counterproposal (CP-6) and the union's response and that he was sending the Borough's October 2007 counterproposal to her for the third time. Siciliano again asked for the union's response to the counterproposal (R-22).

Howardell admits that she was contacted on several occasions by Siciliano during this time to provide the union's response to the Borough's October 2007 counterproposal and that former Borough Solicitor Kearney had apparently not turned over some documentation to Siciliano. Thus, on April 11, 2008, Howardell sent the union's response asserting, however, that it had been previously submitted to the Borough on October 24, 2007 (CP-7). Moreland claims that this is the first time she had seen CP-7 (3T107).

The only exhibit in evidence as to AFSCME's October 24, 2007 counterproposal is the letter dated April 11, 2008 from Howardell

to Scilliano attaching the counterproposal that Howardell asserts she had previously sent to Kearney (CP-7). The attached counterproposal, however, is dated October 24, 2008 with the year 2008 scratched out and the year 2007 superimposed and handwritten over the 2008. Howardell denies making this change, stating that it is not her handwriting (1T105). She testified that the AFSCME counterproposal (CP-7) was written at a 2007 meeting with Kearney but did not recall when that meeting took place (1T105). Howardell's testimony was vague and confusing on this point. She had no idea when exactly the union's counterproposal was transmitted (1T104-1T114). Phifer testified that he helped prepare the union's counterproposal (CP-7) but other than recalling that it was prepared and that Howardell told him it was sent to Kearney and then later to Siciliano, he did not recall how it was transmitted (2T36).

Even if I credit that the handwritten change in the year from 2008 to 2007 was inadvertent and that the counterproposal was prepared on October 24, 2007, it does not support that CP-7 was given to the Borough on that date without other testimony or documentary evidence to support when it was transmitted. There is no cover letter in evidence to support that CP-7 was sent on or about October 24, 2007. Kearney was not called to testify about this matter. At best, I can infer that if the document was sent on or about that date to Kearney, it was misplaced in the

change of administrations or Kearney never forwarded it to Siciliano.

In any event, based on Howardell's and Phifer's inconclusive testimony and the lack of supporting documentary evidence, I find that, despite several requests that Howardell send AFSCME's counterproposal^{11/}, the Mayor and Siciliano only received AFSCME's response to the Borough's October 16, 2007 proposal on April 11, 2008. Howardell herself admits that she did not transmit AFSCME's counterproposal sooner to Siciliano despite his requests to do so, because she did not understand why Siciliano kept asking for it when she insisted to him she had previously given it to Kearney (CP-7; R-2, R-22; 1T111-1T114). Siciliano, also at Howardell's request, once again sent the Borough's October 16, 2007 counterproposal previously submitted to her by Kearney (R-22; 1T111).

I find that until April 11, 2008, the current administration had not received the union's response to the Borough's last negotiations proposal either because former Solicitor Kearney had not forwarded it to Siciliano or because AFSCME never sent it in the first instance. In either case, negotiations were not proceeding until the proposals were exchanged and could be reviewed by the new administration.

^{11/} Requests were made by Siciliano at the February 19, 2008 negotiations session and again by letter dated March 14, 2008 as well as by telephone on April 1, 2008.

The March 4, 2008 Council Meeting

69. While the parties were negotiating in February 2008, the department budget reviews were being completed and reports generated. Alexander and Fetter were preparing power point presentations for the March 4 Council meeting to demonstrate the Borough's 2008 fiscal situation in light of state and county aid cuts (R-18, R-20; 5T64, 5T82-5T83). The presentation for the public session was entitled "Corzine's Proposed State Budget Impact, and Camden County Tax on HH Budget" (R-20). Alexander illustrated to the public how state-aid cuts would impact the local budget process and their out-of-pocket cash flow (5T82-5T83). The presentation gave residents an overview of department costs and suggested that the Borough was paying an unfair share of county costs (R-20).

Alexander needed residents to understand that the net effect of the Governor's proposed budget changes would cost the Borough an extra \$651,430 for that budget year unless additional expenses were cut from the municipal, school and county budgets. In other words, even if expenses were maintained at the same or reduced levels but revenues decreased substantially, the tax levy was going to increase. Indeed, there were anticipated huge revenue decreases for the 2008 budget based on state-aid cuts (R-20; 5T84).

70. To address the fiscal crisis, Alexander and others on the Council felt that an application for extraordinary aid was not an option, because it would be an abuse of the system. Extraordinary aid was designed to help municipalities in severe trouble with double digit tax increases and no cash surplus. The Borough was not in that situation and, with the right controls in place and good basic business practices, it was felt that the Borough would not need extraordinary aid. Nor were Alexander and the Council willing to put the Borough in such dire financial straits just to qualify for this aid (5T85, 5T122). The ultimate goal was to keep increases in appropriations less than 3% - e.g. the rate of inflation (5T87).

71. The power point presentation for the March 4 closed session Council meeting was entitled "Optimization of HH Services Overview" and was prepared for and presented by Alexander. The presentation was, in essence, Alexander's top-down operational review (R-18; 5T64).

The presentation itemized expenses by department, attributing the greatest costs to the Police Department and DPW. Out of a total operating budget of approximately \$3,800,000, salaries and benefits in the Police Department represented approximately \$1,700,000 and in DPW approximately \$1,000,000 (R-18).

Under the heading of "Optimization Process", the report suggested that privatization of services or job sharing should be analyzed to achieve the desired savings. As to privatizing operations, the report listed pros (eliminating costs to purchase and maintain assets as well as costs associated with management, benefits and pensions) and cons (reducing the amount of control over the delivery of services) (R-18). Finally, the report identified recycling, tree services, grass cutting and line painting as potential opportunities for privatization in DPW (R-18).

The March 18, Council Meeting

72. There were two budget presentations to the public at the March 18, 2008 Council meeting (R-3, R-4; 4T118, 5T85-5T86). First, Alexander presented a power point presentation entitled "Overview of Haddon Heights 2008 Municipal Budget" (R-4). The presentation was prepared by Alexander together with the Council finance committee - Chair Tad Fetter and committee members Rose Fitzgerald and Trish Shields.

Alexander's purpose for the presentation was to provide transparency to the residents regarding the budget process (5T86). He knew that it was necessary to reduce appropriations to address, what he described as, a dire budget situation resulting from a 40% decrease in 2007 revenues and the need to

control tax-levy increases. The tax levy had risen a total of 32% in the previous three years (5T86-5T87).

The presentation (R-4), therefore, provided a budget overview and objectives for 2008. Those objectives included (1) increasing budget appropriations no more than 3%; (2) automating the process for budget summaries, department worksheets and tax-levy analysis; (3) working on 3-year departmental budgets, in particular for the Police Department, (4) eliminating the Borough's dependence on municipal aid; (5) reviewing all operations to identify expense reductions and implementing reductions where possible; and (6) maintaining and/or increasing the level of services offered to residents, in particular by bringing the Police Department to full strength. Among the items listed in the presentation as outstanding or concerns were reorganizing DPW (R-4).

R-4 also explained that municipal appropriations for the proposed 2008 budget were \$118,089 (1.6%) less than the adopted appropriations in the 2007 budget which was approximately \$7,000,000. The initially proposed 2008 budget contemplated a \$568,869 or 7.34% increase from the 2007 budget. According to R-4, the Mayor and Council's 2008 proposed budget would cut \$686,958.13 from the initial proposed budget for 2008 necessitating cuts from all departments even though all services would cost more in 2008.

R-4 illustrated that as to the Police Department, funds would be decreased by \$147,432 from the 2007 adopted budget and decreased by \$323,768 as between the initially proposed 2008 budget and the 2008 budget being currently proposed by the Mayor and Council. As to DPW, R-4 explained that a proposed reorganization would save over \$115,000 during 2008 and would translate into a net annualized savings of over \$250,000 (gross savings of \$500,000). Not included in the DPW estimate, was additional savings from fuel, insurance, maintenance, and future capital expenditures.

The numbers contained in R-4 were estimates for analytical purposes only (R-4). The budget, however, described revenues as "a perfect storm" with decreases in state and federal aid of 40% from 2007 and a proposed municipal tax increase for 2008 of 3% more than in 2007 (R-4).

Under the sub-heading of "Outstanding Items/Concerns", R-4 recommended following through with the DPW reorganization stating "time is money" and "adjusted 2008 numbers are conservative w/\$90,000 of contingency for transitional costs and \$30,000+ for overtime and PT assistance."

73. The second power point presentation in public session was entitled "HH Public Works Analysis" (R-3; 5T73). This presentation was also prepared by Alexander together with Fetter

as well as the public works committee consisting of Chair Lee Wentz and members Gordon Shopp and Trish Shields.

This presentation (R-3) explained the methodology undertaken in analyzing DPW operations and provided the four-pronged approach to conducting the analysis. The top-level findings of the report were that:

(1) the Borough was overstaffed compared to Haddonfield and Barrington;

(2) privatizing recycling provides an annual net savings of approximately \$81,000 based on the in-house recycling cost of \$256,533 and two quotes from outside vendors for the service at \$175,000 and \$180,000 respectively;

(3) the Borough could realize an annual savings in the range of \$500,000 to \$600,000 by implementing the recommendations; and

(5) the Borough could maintain all service levels with a new operational model.

The report then recommended four courses of action based on the findings - reorganize DPW, privatize recycling and tree work, auction off unneeded equipment, and maintain or increase the level of services to residents.

74. Although she was not formally invited, Howardell attended the March 18 Council meeting together with Spadea Jr., O'Neill, Phifer and most of the DPW employees because she and the AFSCME negotiations team felt that negotiations were stalled, and they wanted to address the public to garner support for their

position (1T58, 1T138). Howardell learned from the power point presentations that some outsourcing in DPW might occur (1T121).

75. Phifer listened to the presentations but disagreed with some of the findings in R-3, in particular that the Borough's DPW was overstaffed and that comparisons with Barrington and Haddonfield were accurate because these municipalities had different demographics (2T70). Phifer has some college credits but no background or education in finance, accounting or economics (2T87-2T88). Nevertheless, after the presentation, he did his own research into the costs of the recycling operation and concluded that several figures presented in R-3 were inaccurate. Phifer admits, however, his calculations did not include the costs of repairs or truck replacement, information included in the R-3 report (2T88-2T90).

In Phifer's opinion, the Borough was appropriately staffed considering the size of the community and the services provided (2T70-2T72). According to Phifer, when Jim Young was superintendent, the Borough explored privatizing but concluded that it was cheaper to do the work in-house (2T73). In general, Phifer disagreed that the Borough could realize an annual savings of between \$500,000 and \$600,00 by implementing the recommendations outlined by the Mayor's presentation, because the Borough's employees knew better than anyone how to cut costs and provide better services (2T74).

76. During the public session of the March 18 meeting, Howardell read a prepared statement addressing what she termed "cutting jobs in the Department of Public Works" (CP-12, CP-13). She noted that the budget deficit was a town-wide problem, not just a DPW problem, and that, therefore, DPW should not be the "only department being affected in negative and drastic measures" (CP-13). Howardell questioned why jobs were created in other departments - the Police Department for example - while DPW jobs were being considered for cuts. This would, she predicted, hurt Borough services. Finally, she stated:

A union was brought in because the DPW and non-contracted employees were never treated fairly and then it came to their attention that there were discussions of cutting their benefits. Ever since the D.P.W. joined the union, it seems that they are now the sole target for dealing with the occurring problems. [CP-13]

In response, Borough Solicitor Siciliano objected generally to Howardell's statement which he characterized as serious charges. He explained that the Council would not respond specifically due to on-going negotiations with AFSCME (CP-12; 1T59, 2T119, 5T37).

March 25 to 27, 2008 E-Mails re Layoffs/DPW Reorganization
(CP-26, CP-28, CP-29)

There was a flurry of e-mail communications between March 25 and 27, 2008 between Siciliano, Moreland and members of the governing body concerning layoffs (implementation and procedures)

and the DPW reorganization. These communications are set forth below.

77. On March 25, 2008, Borough Clerk Moreland e-mailed the Mayor and Council and Solicitor Siciliano about the layoffs. She wrote:

The following DPW employees will be receiving layoff notices on Friday afternoon. They will also be receiving 2 weeks severance and payment for sick and vacation days per the Personnel Manual. They will be qualified to collect unemployment.

John Alvarez
John Lambing
Chris Comly
James Hanton
Dennis O'Neill
Bob Lebb
Rex Lewis
Dan Phifer

The Mayor has requested that I am joined by Councilman Witzig, Council President Shields, Councilman Wentz and Gary Gesrick. I would like to ask the men to come up to the Borough Hall at 2:30 p.m., Friday afternoon.

Please advise me if you are able to be here at that time. Thank you. [CP-28]

The employees listed in the e-mail were the least senior DPW employees (3T124).

Moreland had only learned that week that the layoffs would actually take place (3T139). There had been rumors of layoffs, and although she had a very cordial relationship with Howardell, Moreland never spoke to Howardell about it because, in her opinion, that was the Mayor's or Borough solicitor's job to speak

on behalf of the governing body (3T141). Likewise, although she knew there were going to be cutbacks and suspected there would be layoffs, Howardell never spoke to Moreland about the layoff rumors or called to discuss the impact of the layoffs or inquire about the cost of privatizing DPW work (1T127, 1T137-1T138, 3T119).

78. On March 26, Shopp, having been out of town on vacation and apparently out of touch with recent events, responded to Moreland's e-mail of the previous day. He raised several concerns about implementing the downsizing of DPW, namely: (1) that everything was being done within applicable laws, including labor laws; (2) that services would be provided after the layoffs even if outside vendors were not yet selected; (3) that everything would be done with complete transparency with the public; and (4) that things would be done at the right pace - e.g. not too quickly to avoid creating other problems (CP-26).

Fetter responded to Shopp that day. He explained that everything was being lined up for discussion and approval by Siciliano, finalization by the Council and then implementation. Communication to the public, Fetter wrote, would be done when everything was finalized (CP-26). Fetter had been advised by Siciliano to communicate only general information and financial impact to the public or union, not specifics as to personnel (4T167-4T168).

As to Shopp's concern about outside vendors, Fetter explained that there were only 23 trees left to service and, therefore, the Borough had several weeks to decide on a vendor. Any tree emergencies, Fetter explained to Shopp, could be done by "ad hoc" hires. In regard to recycling, Fetter wrote that it could be done with a skeleton crew and part-time employees until a vendor was in place. He and the Mayor had requested Jim Young and Gary Gesrick to put together a work schedule for the remaining employees to address such issues. Fetter himself intended to take a day off to pick up recycling, if permitted (CP-26).

79. On March 27, 2008, in an e-mail entitled "Lay Offs", Mayor Alexander wrote Shopp and Moreland with copies to the Council and Siciliano (CP-29). This e-mail was also a response to Shopp's expressed concerns about implementing the downsizing of DPW. He wrote in pertinent part:

Lee [Wentz], why are we having two leaders for dpw? How was this vetted? Do you realize that rich edelan [sic] is willing to retire this year or that we have the opportunity to take rich out of the union by making him a deputy super until he retires, thereby potentially not having to layoff rodney clark? I have heard negatives about Spedea [sic] jr.

* * *

We are laying off 9 workers for two reasons, overstaffing and cost savings due to privatizing. Overstaffing cuts have nothing to do with privatizing. Also, it is a fact

that we can still pick up recycling and brush with the cuts in place using remaining staff, and we have money to hire outside tree help if needed until we sign a tree contract. So the cuts can move forward without contracts in place.

I am trying to understand why there is little sense of urgency [sic] to save the residents of this town tax dollars. [CP-29]

In explaining the context of this e-mail, Alexander testified that Wentz was Chair of the DPW committee and had recommended that Spadea Jr. and Edelen share the responsibilities as co-superintendents, but Alexander disagreed. He questioned whether Wentz understood that Edelen was willing to retire and that if he was promoted he would be out of the union, thus, potentially saving Clark's job (5T153, 5T156). Alexander intended that the best person be promoted, not that Edelen should be promoted only to remove him from the union (5T156). Regarding his comments about Spadea Jr., Alexander was referring to negative comments that Jim Young had made to him when he (Young) was reviewing DPW operations (5T154-5T155). I credit Alexander's explanation as to the meaning of the communication to Wentz.

80. On March 27, 2008, Shopp sent Moreland another e-mail in response to her March 25 e-mail listing the eight employees subject to layoffs. He confirmed that it was his understanding the layoffs had been postponed until after the April 1, 2008 Council meeting on Tuesday (CP-28, CP-29).

81. That same day March 27, 2008, there was an e-mail exchange between Fetter and Moreland entitled "layoff procedures" (CP-21). Fetter had telephoned Moreland asking her to determine what other municipalities did regarding procedures for implementing layoffs - how they worked with their attorneys and how they treated the public and their unions in this regard (4T182). In her e-mail response, Moreland explained to Fetter that she had contacted Runnymede and that Runnymede's council met in closed session and discussed the issue generally but did not mention any individuals by name. The Runnymede council then opened the meeting to the public and approved the layoffs by resolution.

That same day, Fetter forwarded Moreland's e-mail to Alexander who was on vacation and explained that as to layoff procedures, this is what they needed to do. Alexander responded that he would call Fetter later that day. He also indicated that he (Alexander) felt like having a public fight with Shields and Wentz (CP-21). Fetter testified that he understood this last comment referred to the fact that Alexander was upset with Shields for going to the DPW garage and upsetting the employees who now thought that everyone was going to be laid off (4T159). However, since Alexander's e-mail was sent on March 27 and Shields did not go to the DPW garage until March 28, it appears that Fetter was incorrect in his explanation of Alexander's

e-mail comment, although clearly Fetter understood that Alexander was upset with Shields and Wentz.

Fetter shared Alexander's frustration with Shields and Wentz. In a follow-up e-mail to Alexander, he shared an anecdote about his (Fetter's) neighbor making fun of Wentz (4T164-4T165). The neighbor quoted Wentz as saying "are we liable for anything?" (CP-21). This comment was not related to the subject of layoff procedures but was mocking Wentz for repeatedly asking during a Council meeting discussion about prescription drug cards whether there was any liability attached to the cards (4T158).

82. On March 28, 2008, Alexander confirmed by e-mail a meeting the following day with Jim Young at the American Water Building to explore moving DPW to that location because of the deplorable working conditions in the Borough's DPW building (CP-21; 4T166).

March 28, 2008 Gesrick Retirement/Shields Conversation at DPW

83. Gesrick's retirement party was held on March 28, 2009. After the party, Wentz, as chair of the Council's DPW committee, asked Shields to post a notice in the DPW garage announcing that Edelen was the new acting superintendent and Spadea Jr. was the new assistant acting superintendent (Spadea Jr. was still in the AFSCME unit and remained President of the union). Shields went to the garage, handed the notice to Frank Spadea Sr. for posting

and walked out. As she was leaving, several DPW employees began questioning her (2T51, 5T45).

Phifer testified that he heard Shields comment as she was leaving "Have a nice weekend, don't come back on Monday (2T51)." Because he had been in negotiations with her, he followed her outside and asked her what was going on. He wanted to know about layoffs and, in particular, how many employees were to be laid off. According to Phifer, Shields told him all of the employees would be laid off and that when he asked her if it was because of the union, she allegedly said "yeah (2T51)."

Alvarez also testified about the conversation with Shields. He states that he followed Phifer outside the DPW garage as Shields was leaving. He stood next to Phifer when Phifer questioned Shields about what was going on, whether the Borough was getting rid of DPW employees, and how many. According to Alvarez, Shields was not hesitant to talk to them, even glad to give them information and responded that all of them were being laid off. According to Alvarez, Phifer then asked Shields why the Borough was getting rid of all the DPW employees, Shields allegedly told him "[b]ecause of the union, they don't want it, they don't want to deal with it (2T167)." Alvarez concluded that the Borough was "prejudiced against us because we wanted to better our conditions (2T167-2T168)." He was shocked and offended at Shield's comments.

84. Shields refutes Phifer's and Alvarez' versions of their conversation. She testified that, at first, three employees questioned her about layoffs. She said Phifer was not one of the three. She told them she was only there to drop off a memo and that everything was not perfect in DPW but that the appropriate place to ask questions was at a Council meeting. Shields strongly suggested to them that they come to the Council meeting. Then, Phifer came up to her, and she said she reiterated what she told the other three employees (5T45-5T46).

85. Phifer, Alvarez and Shields were Charging Parties' witnesses. I credit Phifer and Alvarez that Shields spoke to Phifer about the layoffs and that she attributed the reason to the union. Shields had seen Moreland's list of employees to be notified of lay off (CP-28) and knew when Phifer confronted her outside the DPW garage that both Phifer and Alvarez were on the list. Shields also felt that the employees should be notified of the layoffs and given an opportunity to be heard. In addition, Fetter testified that the day after Shields was at the DPW garage, on March 29, a DPW employee handed him a leaflet protesting potential layoffs and told Fetter that Shields told them that the DPW employees were going to be laid off (CP-25; 4T172). This supports that Shields spoke to Phifer about the layoffs.

Although Shields denied saying that the reason for the layoffs was the union, her later testimony established that this is what she believed. When asked if she believed that the layoffs were caused as a result of Mayor Alexander's view of the union, she stated:

It was always stressed the fact that it was a money issue. However, as the year revolved [sic], comments had been made, little things that you see, I felt that that was a silk [sic] screen, I think the Mayor did not want to deal with the union. Honestly, I didn't want to see the union myself. I apologize for that, but nobody wanted to go through another contract negotiations and, you know, we rather deal with people as individuals instead of, you , know, as a union. However, we had to respect their right to do so and we had to proceed. . . . (5T21-5T22).

Shields admitted that ever since Alexander and others were elected to Council, she has butted heads with them. They made her feel that she was not entitled to have an opinion (5T41). For instance, Shields wanted the Borough to at least apply for extraordinary aid before laying off employees. Her suggestion was rejected:

They just felt like, okay, let's not - let's just pull the Band-Aid off and take care of it. They felt that the cost savings would be - we have to take care of the residents and the costs savings were needed. [5T12]

Shields testified that everyone knew that she was against the layoffs unless they were absolutely necessary and felt left out of the deliberative process by Alexander, Fetter and the

others on the Council (5T8, 5T11, 5T48). Although I do not find that Shields was excluded from the budget process since she was on the finance committee and there is no evidence that she was excluded from any meetings, discussions or e-mail exchanges concerning the budget review and presentations^{12/}, her sympathies clearly lay with the employees not her fellow Council members or Mayor Alexander. Therefore, based on Shields' opinion that the Mayor did not want to deal with a union and her opposition to the layoffs, I find that she made the statements attributed to her by Phifer and Alvarez.

March 29 Flyers - Phifer/O'Lizi Conversation

86. Shields' statements to the DPW employees on March 28 prompted Phifer, Spadea Jr. and a few others to get together on Saturday, March 29, to create and distribute flyers to the Borough residents soliciting support against layoffs and privatization of DPW services (2T51) Both Phifer and Spadea Jr. created flyers entitled "ATTENTION YOUR TAX DOLLARS AT RISK" (CP-14; R-5; 2T101). The flyers differed in minor details but the substance of each was the same.

Both flyers challenged the Mayor's budget plan, specifically, the numbers and facts used to support the cost

^{12/} Shields testified that there were pre-meetings that she was not aware of that took place at building sites that were being considered for purchase (5T11). This testimony does not support that she was excluded from the budget analysis or process.

savings in privatizing tree maintenance and recycling. The flyers also stated that the level of DPW services would decline with privatization. The flyers suggested that DPW operations seemed to bear the brunt of the cost savings efforts and claimed that other departments were hiring, creating new positions, promoting, increasing salaries and making large capitol expenditures. Finally, the flyers requested residents to put a stop to the "Mayor's plan" and suggested they call Borough Hall. Residents were also notified of the public Council meeting on April 1, 2008.^{13/} The April 1 date had been hand written in Phifer's flyer (R-5) and the original meeting date of April 15 crossed out, because the meeting date had been changed. Phifer believed the date was changed to speed up the layoff process before a public outcry developed (2T169). I do not draw that inference.

87. On March 29, 2008, Phifer and Alvarez handed out the flyers to residents on the same street, while other DPW employees handed out flyers in other areas of the Borough (2T64). While

^{13/} In a leaflet created by Phifer, he listed the meeting date as April 15, the date it was originally scheduled, but he crossed out this date and wrote in April 1, 2008, the new meeting date (2T52). There was a Council meeting on April 15, 2008. The Borough suggests in its brief that April 1 as well as April 15, 2008 were both regularly scheduled Council meetings. The Council meets twice a month on the first and third Tuesdays. These facts are not in the record. However, it appears that Phifer and the others thought that the discussion of the layoffs were moved up from the April 15 to the April 1 meeting.

distributing the flyers, Phifer testified he received a call from another employee, Dennis Riggs, who told him that Jim Young told him that Edelen told Young that flyers were being handed out. This conversation is triple hearsay unsupported by other testimony on the record. Nevertheless, based on what he allegedly heard, Phifer concluded that the Borough was monitoring the activities of employees who were distributing the flyers (2T64).

I cannot, however, find as a fact that the Borough was monitoring the employees' activities in distributing the flyers on March 29. The flyers were being distributed at random to residents, some of whom were also Borough employees and/or members of the Borough Council. The distribution of the flyers by DPW employees was not a secretive operation. Apparently, the distribution was common knowledge among those who worked for the Borough and Borough residents.

For instance, while walking through a park near his home on March 29, Fetter received a flyer from a DPW employee. Fetter did not know the employee's name (CP-25; 4T152-4T153). Fetter disagreed with statements in the flyer, namely that Mayor Alexander had doctored budget figures and that the entire DPW department was going to be wiped out, but he kept his feelings to himself on the advise of Siciliano (CP-25; 4T172-4T173). The employee also told Fetter that Shields told them that the DPW

employees were going to be laid off (4T172). Moreland also heard from O'Lizi and from her deputy, Pat Cooper, that DPW employees were handing out flyers (3T154).

88. During the course of distributing the flyers, Alvarez handed one to former Borough Solicitor Albert O'Lizi who happened to be going door-to-door getting signatures on an unrelated political petition for the Republican party (4T9, 4T21). O'Lizi heard someone call his name from across the street and realized it was Phifer (4T9). O'Lizi and Phifer then had a conversation described by each.

Phifer said that he saw Alvarez hand O'Lizi a flyer. When O'Lizi inquired who was handing out the flyers, Phifer responded that he (Phifer) was handing them out. Phifer asserted that O'Lizi then pulled him aside and the following conversation occurred:

. . . [O'Lizi] said we don't want to deal with another union. He said this flyer, this union, is going to cost you. He says haven't we always taken care of you before. I says like you're taking care of us now. And he says, well, why don't you stop over the house some time. That was it. I went back to handing out flyers. They didn't want to deal with another union [2T64-2T65].

Alvarez, who did not know O'Lizi and was not a participant in the conversation but overheard what was said, testified that O'Lizi said "the flyer was a bad idea, your union is a bad idea and you're all going to pay for this (2T170)." Later, when

Alvarez learned that O'Lizi was the former Borough solicitor, he inferred that O'Lizi was speaking on behalf of the governing body and that they didn't want the employees to have a union (2T171, 2T182).

89. O'Lizi testified that when Phifer handed him the flyer Phifer told him that "they are going to fire us all (4T10)." When O'Lizi asked Phifer what he meant, Phifer insisted that O'Lizi already knew about it. O'Lizi denied any knowledge, but Phifer still insisted that O'Lizi knew that the Mayor was going to fire all of the DPW employees. O'Lizi responded that the Mayor and two new councilmen were in the minority party and that he doubted that the Mayor was going to fire them all. Nevertheless, Phifer kept insisting that O'Lizi knew something (4T10).

O'Lizi asserted that Mayor Alexander had never spoken to him about possible layoffs and that when he read the flyer he learned for the first time that layoffs were being contemplated (4T10, 4T20). Indeed, O'Lizi was surprised when Phifer told him about the layoffs, because, in his opinion, layoffs could be a hot issue politically but, then again, no one had asked his opinion (4T20).

O'Lizi then testified that Phifer asked him if there was anything O'Lizi could do. O'Lizi felt that Phifer was looking for a political favor, since he and Phifer had been in the same

political party until O'Lizi switched to the Republican party. Also, Phifer knew that O'Lizi had some friends on the Council (4T10).

As to whether O'Lizi made any comments to Phifer about the union, O'Lizi stated:

A. Well, I gave him my opinion. He said, you know, we are unionizing. I said, well, you know, I guess they are laying you off, playing hardball with you. I guess you can't expect the same kind of feeling you had when we were in control. It was different. We were in control. We knew we would deal with our employees because we knew most of the employees. I mean, we knew that - when I was solicitor I knew one of our guys who was in charge wanted to make sure that the Public Works guys were brought up on salary. And so we had a plan put in, initially was take care of the foreman, later on was take care of the laborers. And so, I mean, we did this only because they were our employees and we wanted to equalize things.

When you deal with the union it's kind of different. You're not dealing with your friend or your neighbor, you're dealing with a rep. I said, you know, they are going to play hardball with you. That's what you got to expect.

Q. And when you made that comment, was that your comment or did you get that from anybody else?

A. No. That was my opinion as private citizen O'Lizi. At that time that's all I was, was private citizen O'Lizi. I was not in any position or any capacity. I held no political position. I held no Borough position.

Q. Had you had any conversations with the Mayor or anybody in council that would

lead you to believe that that was their opinion and that's why you said that?

A. I had no discussion with Mayor or anyone in council regarding anything that was discussed that day. That day that letter was the first time I knew that there was a problem with Public Works and they were considering layoffs. I did not know it before that day [4T11-4T12]

90. Immediately, after this conversation with Phifer, O'Lizi went to Mayor Alexander's house and spoke to him. O'Lizi told him about getting the flyer from Phifer and questioned Alexander as to what he thought he was doing with an election to run the next year. O'Lizi felt that the Mayor should at least have warned him what was planned (4T22). In response to O'Lizi's concerns, Mayor Alexander explained that, to save money, layoffs were being contemplated as well as consolidation and whether it was financially feasible (4T24).

I find that the statements O'Lizi made to Phifer regarding the union - whether O'Lizi's or Phifer's version - were only O'Lizi's opinion. He was not speaking on behalf of or communicating the views of the Mayor or Council who had not previously consulted him about potential layoffs. O'Lizi's testimony in this regard was credible. His description of the conversation was detailed. Also, the fact that immediately after the conversation with Phifer, O'Lizi went to Alexander's house to confront him about what O'Lizi considered his politically problematic actions - e.g. potential layoffs - in light of next

year's elections supports that O'Lizi had no prior knowledge about potential layoffs or that anyone had consulted him beforehand.

March 31, 2008 E-Mails re Cancellation of April 1 Negotiations Session (CP-9, CP-25)

91. A negotiation session was scheduled immediately before the April 1, 2008 Council meeting (CP-25; 2T41). The reason for the cancellation was discussed in e-mails exchanged on March 31, 2008 between Moreland and Fetter (CP-25). Fetter wanted to know whether the meeting was still on or whether it was postponed. Moreland responded that she was not sure but was waiting to hear from Siciliano. Fetter suggested to Moreland that, in his opinion, the negotiations session with AFSCME should be postponed until after the layoffs, but left it up to Siciliano to decide (CP-25).

Mayor Alexander testified that he did not know why the meeting was cancelled but that he had been told by Siciliano that Howardell had cancelled the meeting (5T95, 5T125). Moreland testified that the Borough did not meet with the union in March or April because they still had not received the union's counter proposal (3T94).

Nevertheless, Siciliano sent Howardell an e-mail at approximately 6:25 p.m. on March 31 confirming that he had called her office and left a message cancelling the negotiations session scheduled for the next day at 5:00 p.m. The e-mail suggested

that Howardell call him if she had any questions but offered no explanation in the e-mail for the cancellation (CP-9). Siciliano and Howardell spoke again on April 1 about the Borough's lack of a counterproposal (R-22).

I infer from these exchanges that despite Fetter's feeling that the April 1 negotiations session should be postponed until after the layoffs, Siciliano cancelled the session because the Borough still had not received AFSCME's counterproposal.

April 1 Council Meeting

92. Howardell had heard rumors about layoffs, although as of the April 1 Council meeting, she had not been officially informed (1T59). Nevertheless, because of the rumors and the cancellation of the April 1 negotiations session, Howardell, Spadea Jr., Phifer, O'Neill and their spouses attended the Council meeting (1T138). There were no discussion about layoffs in the open session (1T152).

During the open public session of the meeting, Phifer asked whether it was true that 8 out of 15 DPW employees were going to be laid off (2T52-2T53, 2T118). Shields heard Mayor Alexander turn to Siciliano and ask him "[to] get me out of this (5T16)." Siciliano responded to Phifer that the question could not be answered because AFSCME and the Borough were currently in negotiations (CP-15; 2T53, 2T145, 5T130-5T131). Phifer called

Siciliano a liar and walked out before Siciliano was finished speaking (CP-15; 2T53-2T55).

At some point during the meeting, Councilman Wentz made a motion, seconded by Councilman Shopp, to go into closed session to discuss personnel matters. A motion rather than a resolution was made on the advise of Siciliano (3T142).

Fetter had met with interested Council members in a private session before the Council meeting to review the budget (4T147). The closed session itself was long lasting from approximately 9:40 p.m. to midnight (CP-15; 5T14). According to Moreland, emotions were running high and everyone was talking at once. All of the Council members, Mayor Alexander, Siciliano, Moreland and her deputy Pat Cooper were present. The meeting was recorded (3T142-3T143).

Moreland testified that the recorder was turned off only to change the tape (3T143). Mayor Alexander also supports that the tape recorder was turned off only to change the tape and specifically denies that it was turned off during certain discussions that the Council did not want recorded(5T136).

Shields, however, recalled generally that the tape recorder was turned off a couple of times and that the Mayor and new Council members did not know proper procedures and made comments that she described as inappropriate and possibly illegal. Shields did not recall specifically what was discussed at these

times when the recorder was allegedly turned off, but thinks that the tape might have been shut off when specific employee names were mentioned (5T20, 5T48-5T49). Shields, however, testified that Mayor Alexander commented either on April 1 or at another meeting that "if we lay these guys off, the union could go away" and Siciliano immediately had the tape recorder shut off (5T20-5T21)."

I credit Moreland and Mayor Alexander that at the April 1 Council meeting closed session, the tape recorder was turned off only to change tapes. Shields testimony was vague in this regard - e.g. she recalled no specific discussions. She also admitted that the recorder was turned off only a couple of times. Since the meeting lasted approximately 2 ½ hours, it is highly unlikely, that the recorder was turned off to change tapes as well as at other times when comments were made that the Council did not want recorded. I also find, upon reviewing the transcription of the April 1 closed session and based upon Shields vague recollection as to the time frame of the Mayor's statement (it could have been April 1 or at another meeting), the Mayor did not make this statement (about laying off employees and the union would go away) at the April 1 meeting since it is not in the transcription of the meeting (R-17). Since Shield's testimony on the Mayor's alleged statement is too vague, I cannot find such a statement was ever made.

When Shield's was questioned on direct about the Mayor's comment about the layoffs and possibly getting rid of the union, the following colloquy occurred:

Q. Do you believe that the layoffs were caused as a result of the mayor's view of this union?

A. It was always stressed the fact that it was a money issue. However, as the year revolved, comments had been made little things that you see, I felt that that was a silk screen. I think the Mayor did not want to deal with the union. Honestly, I didn't want to see the union myself. I apologize for that, but nobody wanted to go through another contract negotiations and, you know, we rather deal with people as individuals instead of, you know, as a union. However, we had to respect their right to do so and we had to proceed. The Mayor actually relinquished himself from negotiations a couple of times because - I don't know reasons - but we did get e-mail saying he would not be attending negotiations anymore. He did come back to negotiations towards the end in 2008. But, in my opinion, he didn't want to deal with [the union]. And it could be looked at as a way of getting rid of them.
[5T21-5T22]

On cross examination, Shields admitted that the reason Mayor Alexander removed himself from negotiations was that the Mayor and Siciliano did not get along and the Mayor wanted to retain a different attorney to represent the Borough in negotiations (5T40-5T41).

I credit Shields to the extent that in her opinion, Alexander was opposed to the union. However, I do not infer from Shields testimony that Alexander was in favor of the layoffs

because he wanted to get rid of the union or that he was hostile to AFSCME. In fact, I find that Alexander supported layoffs only for financial reasons. Shield's testimony was vague and confusing at times. For instance, to support her opinion that the Mayor wanted to get rid of the union, she recalled generally that the Mayor wanted to keep the crossing guards in the union because he knew that they did not want to be included in the unit and, if they stayed in the union, it could be "debolished" [sic] (5T22). However, her testimony is inconsistent with the Borough's subsequent action in August 2008 when it filed a clarification of unit petition seeking to remove crossing guards from the AFSCME unit. [see generally fact nos. 102 and 103].

93. During the closed session, budget data was reviewed. Fetter explained cuts in extraordinary aid, state funding cuts and the Borough's depleted cash surplus, and, basically, told the Council that it was time to make a decision. According to Fetter, everyone agreed that there was a budget crisis (4T147). Fetter assured the Council that although the impact of the layoffs and outsourcing would not be great in budget year 2008, the real impact of the actions they were considering would be in the next budget year when there was anticipated savings of \$400,000 to \$600,000 (R-17 at pgs. 15, 58).

Mayor Alexander explained that in comparison to both Haddonfield and Barrington, the Borough was 30% inefficient

especially in regard to the number of employees and the tonnage being picked up in these other municipalities (R-17 at p. 12). Alexander assured the Council that Rich Edelen was prepared to step in and do what he had to do to make the new DPW model work (R-17 at p. 8).

After assuring the Council that he had lost a lot of sleep over the layoff decision, Alexander then summarized his thoughts in pertinent part as follows:

And I thought about it, you know like it went through my head and through my head and through my head, and I said okay and that is part of why I did the presentation tonight. . . . There's . . . There's eight employees that you know, need to move on, but we have 7600 residents, we've got 3,000 properties . . . we've got . . . people who can't pay their taxes as they are. We can't afford to increase our taxes any more than they are. And all we are saying, all we are doing is just becoming more efficient as a borough. We are not saying taking away the services, we are just becoming more efficient and we are looking to save increased tax burden to the residents. . . . And unfortunately, you can't get blood from a stone so we have to do something and unfortunately, because our DPW is inefficient by 30% (thirty percent), we know that . . . We know that we have had success in privatizing our trash so we are looking at recycling. We are not the only ones doing the privatization of recycling. . . . Ernie has done the cost analysis. We know we can save money. The tree service, we know we can save money there, as well. So you look at it in total, this is my thinking when I wasn't sleeping, I came up and said it is a no-brainer. At the end of the day, it was a no-brainer [R-17 at p. 25].

During the meeting, a number of Council members, including Shopp and Witzig, asked Siciliano what the appropriate procedure was for laying off employees and how other municipalities had handled RIFs. Siciliano advised them on the appropriate procedures, namely that if employees were not mentioned by name in closed session, it would not be necessary to give them RICE notices (CP-28; R-17; 4T149, 5T18-5T19, 5T38). RICE notices are given to employees to give them the opportunity to be present at Council meetings when there are discussions about their employment.

Based on Siciliano's advise, during the closed session, there were lengthy discussions about layoffs generally but no names were mentioned (5T132-5T133). In fact, Alexander did not discuss layoffs in open session and reserved the discussion about the layoffs for the closed session specifically on Siciliano's advice (5T139). Siciliano also raised concerns during the closed session about terminating unionized employees while in collective negotiations, but expressed that if layoffs were done strictly by seniority, a reduction in force was permissible (R-17 at p. 6).

Although Mayor Alexander knew in advance that the April 1 meeting concerned whether employees would receive layoff notices, until the Council voted to approve the layoffs and outsource services, the decision was not final (CP-28; 5T134-5T135). There was considerable discussion during the closed session as to the

procedure for notifying employees who were to be laid off, when and where the notification would take place and by whom. The severance package was also discussed - two weeks salary - and payment for accumulated sick and vacation days (R-17).

94. During the closed session, Shields never expressed that she was against the layoffs, but told the Council she wanted to wait until the budget was adopted before laying off the employees. She felt that if the budget was presented to the public, they could be asked whether they were willing to have layoffs to lower their taxes. Shields was also concerned because the Council had not yet received bids for recycling (R-17 at pgs. 9, 29, 64; 5T43). Finally, Shields felt that the employees should have been notified and given an opportunity to be heard in public session (5T31).

Despite these concerns, the resolution authorizing the layoff of "8 employees from DPW to be laid off from lowest in seniority up" was adopted by a majority of the Council. Councilmen Fitzgerald, Fetter and Shopp voted yes. Wentz and Witzig abstained without explanation. Shields voted against the layoffs. Although Mayor Alexander made suggestions and recommendations based on his budget reviews, presumably recommending the layoff and outsourcing, he did not cast a vote (CP-15; 5T115).

April 3, 2008 Layoffs

95. On April 3, 2008, Moreland called Acting DPW Superintendent Edelen and told him to report to Borough Hall with all employees from Phifer down the seniority list - eight employees in total including Phifer, Robert Lewis, John Lambing, Robert Lebb, Jonathan Alvarez, Dennis O'Neill, James Hanton and Christopher Comly (C1B; CP-10; 3T77-3T78). According to Moreland, the number of employees laid off was calculated based on the amount of money needed to meet a budget savings goal (3T124).

The employees asked to report with Edelen were the least senior DPW employees (2T133). Of the five AFSCME officers, only Phifer, who was a trustee and shop steward, and O'Neill, who was vice-president, were on the list. President Frank Spadea Jr. was not laid off (1T88). Of the six employees on the AFSCME negotiations team, O'Neill, Phifer and Hanton were laid off, although Hanton was later rehired (1T93).

When the employees reported to Borough Hall, they were each handed a letter signed by the Mayor, Council President Shields and Director of DPW Wentz explaining that due to state budget cuts, extraordinary aid and revenue problems, their positions were being terminated effective immediately. The employees were then informed of their entitlement to two-weeks pay, accumulated sick and vacation days. They were also advised that as a result of the layoff, they were permitted to apply for unemployment

compensation and Cobra benefits (CP-10; R-8).^{14/} Phifer and Robert Lewis actually submitted a claim for unemployment benefits on March 30, 2008 (R-9).

Comly recalled Phifer yelling to Shopp that the Borough couldn't do what they were doing and that the layoffs were "union busting". Comly heard Shopp reply loudly that "we can do whatever we want (2T7, 2T14)." Comly didn't ask Shopp what he meant because he (Comly) was not a part of Shopp's conversation with Phifer. He also does not know how the conversation ended (2T15).

Howardell learned of the layoffs from Phifer who came to her office with Alvarez (1T62). Although Howardell knew as of March 29 when her members were handing out flyers that there were going to be cutbacks and suspected there would be layoffs, she never received copies of CP-10 nor did she receive official notice prior to April 3 about impending layoffs (1T63-1T64).

Budget Savings as a Result of the DPW Layoffs/Outsourcing

96. According to the Mayor, there were across-the-board savings attributed to the actions taken by the Council. The Borough realized a 2% property tax reduction for the first time in 56 years (5T119). The DPW layoffs and outsourcing contributed

^{14/} An issue arose subsequently in the summer of 2008 involving the entitlement to unemployment benefits of these employees based on the two weeks severance pay that Merlino calculated should have extended their eligible benefits (R-9).

to this savings as did a reduction in the school budget and a flat county tax levy (5T119-5T120). Specifically, there was a net savings for budget year 2008 of approximately \$250,000 attributed to DPW (5T117, 5T119).

Moreland has not yet seen an analysis or report reflecting these savings but in her opinion there has been cost savings (3T157-3T158). Likewise, Shields has not seen a study reflecting the savings but admits that she has not yet looked at the entire budget (5T10-5T11).

Although the number of temporary employees was increased to assist in getting work done after the layoff and, therefore, the cost attributed to this budget line item also increased, the total annual man hours was reduced from approximately 30,000 man hours before the layoff to about 22,000 man hours afterwards (4T136-4T137). In 2008, \$80,000 was saved in recycling services alone (5T118).

97. The issue of temporary workers was discussed in an April 3 e-mail from Alexander to Fetter with a copy to Shopp (CP-31). Alexander explained that Merlino suggested that the Borough hire temporary workers through an agency in order to avoid concerns related to the number of hours they could work - e.g. over 30 is considered full-time - and to avoid having to contribute to a pension system. The Borough hired temporary

employees in the past but needed additional temporary employees to assist after the layoffs (CP-31; 5T141-5T142).

This matter of temporary workers was also discussed at the April 15 Council meeting and the Mayor explained that he and Edelen determined it was more economical to hire temporary help than to rehire the laid off employees, because there would be no FICA, social security, unemployment insurance or other expenses (R-6). Edelen reported that since the layoffs, the temporary help was fitting in, there were four to six temporary men filling in for part of each day, all his men were pitching in for the busy season, and so far all services were being performed (R-6).^{15/}

The tree service records show that between April and October 2008, 79 Borough trees were removed by DPW employees with the help of seasonal or temporary workers. Six trees were trimmed by DPW employees. Shute's Tree Service trimmed eight Borough trees for a total cost of \$2400.00 and Bumblebee Tree Service trimmed 16 trees for a total cost of \$2950.00 (CP-23).

Susan O'Neill - e-mails with Fetter and Conversation with Shields

98. Susan O'Neill is Dennis O'Neill's wife. She is a nurse and has no financial degrees or background in finance. She had many questions about the purported savings to the Borough from

^{15/} Phifer testified that when Edelen spoke at the April 15 meeting he stated that it was too early to tell what was happening in DPW (2T102). R-6 refutes this testimony.

the decision to layoff DPW workers and privatize the recycling and tree service operations (3T8). When she examined the Borough's power point presentation (R-3), some of the figures made no sense to her or her husband. As a result, Susan O'Neill e-mailed Mayor Alexander as well as Council members Fetter and Shields with questions about the projected savings (CP-16; CP-18; 3T8-3T9, 3T11).

In an e-mail dated May 23, 2008 (CP-16, CP-18), O'Neill sought answers to the following questions: (1) how the Borough calculated the direct cost of salary/wages since her figures were less (\$120,057 versus \$131,539) based on her analysis; (2) what costs were attributed to employee service expenses and administration which she felt were high for recycling (a twice-a-week service); and (3) how the Borough calculated \$500,000 to \$600,000 savings when they apparently did not include estimates for replacing the tree crews. She also wanted to know if the projected savings included fall leaf collection and emergency tree and snow removal.

Fetter responded that same day (CP-17). He explained generally that gross savings are savings in salaries and healthcare and do not take into account net costs of outsourcing certain jobs or other items. Fetter further explained that for 2008 only nine months of savings (\$115,000) were captured and clearly would have been higher if the layoffs and outsourcing had

occurred as of January 2008 because savings related to leaf, grass and brush pick-up would have been realized. Fetter told O'Neill that savings for items such as insurance, capital expenditures, and maintenance were not finalized but were projected to go up and increase over time. Fetter expressed that there would be improved services and manpower directed at cleaning up certain areas of the Borough at less cost to the taxpayer. Finally, he explained that the monies expected from the state were to be cut and not finalized so these funds were not included in the projections.

99. On May 23, Shields also replied to O'Neill writing:

Thank you for sending me a copy of your request to Mr. Fetter, did he respond? Your questions are valid and please don't give up the fight, these gentlemen did not deserve this. [CP-19]

After Shields sent O'Neill the e-mail, she (Shields) got what she described as a belligerent telephone call from Fetter telling her that she was causing problems by telling all the DPW employees that they were being fired (5T32). Shields sent another e-mail to O'Neill with her telephone number and explained that because of OPRA (Open Public Records Act), her (Shields') e-mails to O'Neill were open to public scrutiny, but encouraged O'Neill to call her (3T15).

O'Neill did not call Shields right away but again e-mailed her asking about OPRA.^{16/} Shields sent O'Neill an e-mail in red letters that O'Neill should telephone her and that she (Shields) would not respond in an e-mail (5T32). A few days later O'Neill called Shields (3T16).

Shields told O'Neill initially that she understood her plight and that she didn't agree with what happened. Shields explained that when the Council voted to layoff the DPW employees, Fetter had given her a hard time and that she was the only one who voted no (3T17). Shields offered to help behind the scenes, but told O'Neill not to bring her name into things because she was being given a hard time (3T16-3T17).

Shields then related the details of her telephone call with Fetter. She told O'Neill that Fetter called her and that, among other things, Fetter accused Shields of conspiring with O'Neill. Fetter, she claimed, told Shields that she, O'Neill and a third person were seen talking together in front of the courthouse (3T16). O'Neill thought this was particularly strange because she had never met Shields or knew of any third person she spoke to outside the courthouse (3T17). Nevertheless, O'Neill told

^{16/} In December 2008, Susan O'Neill submitted OPRA requests to the Borough (CP-20, CP-21, CP-22) for information, namely audio tapes of the April 1, 2008 closed session meeting, e-mails between Fetter and Alexander from February 18 to 29, 2008 and 2007 DPW tonnage totals for grass, brush and leaf pick-ups. The information was forwarded to her as requested.

Shields that she was sorry Shields was caught in the middle (5T32).

Rodney Clark and James Hanton

100. Rodney Clark, an 18-year DPW employee, was not laid off on April 3, 2008. However, on May 20, 2008, Mayor Alexander ordered all full-time DPW employees to have a CDL (commercial drivers license) (CP-27). Clark did not have a CDL. The Mayor and Council at first wanted to let Clark go because his lack of a CDL was putting a strain on the other DPW employees (CP-27). Edelen and the Mayor reached a compromise and Clark was given 45 days to get his CDL, but he never did (2T138).

When Clark did not get his CDL, the Mayor gave Edelen the authority to hire someone for the position, although he still had to approve the hire (3T70, 3T75, 4T196). The Borough ran an advertisement for the position and applications were taken. Edelen interviewed some applicants, but although some of the laid off employees had a CDL, including Alvarez, and applied for the position, Edelen did not interview all of them personally. Some of the other laid off employees also had the requisite sewer experience (3T74). Edelen felt that the only person qualified to do the job was Hanton (3T74).

James Hanton had worked for the Borough for a couple of years when he was laid off on April 3. Hanton did not have a CDL but he was not the least senior of the employees laid off. He

had more seniority than Alvarez and as much seniority as Lambing and Comly (1T154, 2T3-2T4, 2T16, 3T73). Hanton had been on the AFSCME negotiations team and was listed in the unfair practice charge in this matter (C-1B) as an organizer, although Dennis O'Neill denied Hanton was an organizer (1T155-1T156). I credit that Hanton was an organizer and on the negotiations committee prior to being laid off.

Edelen decided to rehire Hanton if he got his CDL and agreed to give Hanton the necessary time (1T69, 1T130, 3T73). Edelen also hired Hanton because the state was starting to more tightly regulate storm water systems and, at the time that he was rehired, Hanton was working for Barrington handling their storm water system. Edelen considered him knowledgeable (3T69-3T70).

101. Phifer was the most senior of the laid off employees and had a CDL. He had also done sewer maintenance and had a tanker license (2T57, 2T149). He was never advised that the Borough was looking to rehire an employee and was not offered the opportunity to come back (2T149). Presumably, he did not apply for the position which was posted.

Phifer testified that Hanton told him that in order to be rehired, he had to renounce the union (2T139). Hanton did not testify in this matter thus Phifer's testimony is merely uncorroborated hearsay. Since Hanton was rehired into AFSCME's

unit and did not testify here, I cannot credit Phifer's testimony.

August 2008 Clarification of Unit Petition

102. On August 19, 2008, the Borough filed a clarification of unit petition with the Commission seeking to clarify a mixed negotiations unit to exclude crossing guards from AFSCME's unit. The Borough also filed three other petitions (CP-11) seeking to exclude the deputy borough clerk (Pat Cooper), the deputy municipal court administrator (Michele Busarello) and municipal court administrator (Cathy Lawson) from AFSCME's unit as managerial and/or confidential employees, statutory exclusions.

Howardell was surprised when the Borough filed these petitions, although she knew that the crossing guards had not signed showing of interest cards during the organization drive (1T94-1T95). In fact, a month after AFSCME was certified as the majority representative in February 2007, she received a letter dated March 8, 2007 from former Borough Solicitor Kearney telling her that he had been informed by another union organizer, Ellen Hendry, that the crossing guards were universally opposed to membership in AFSCME. He raised a concern that the guards would quit and that, therefore, he felt obliged to investigate the certification, but explained that if she concurred that the crossing guards were not in the bargaining unit there would be no need to investigate (R-1). Both Moreland and O'Neill confirmed

that Hendry told them that the crossing guards did not want to be in AFSCME's unit (1T159, 3T107). The crossing guards represented approximately 20% of the then approximately 40 employees represented by AFSCME (1T66).

103. I take administrative notice that in March 2009, the Borough and AFSCME entered into a settlement agreement resolving all issues raised by the Borough's petitions. The parties agreed that the municipal court administrator and deputy municipal court administrator were included in the unit, while the deputy borough clerk, the deputy superintendent of public works^{17/} and the crossing guards were excluded from AFSCME's unit. The Borough's petitions were withdrawn as a result of the settlement.

ANALYSIS

The 5.4a(3) and derivative (1) Allegations

Charging Party asserted that the Borough violated 5.4a(3) of the Act when it laid off eight DPW employees in retaliation for their efforts in organizing and supporting AFSCME. The Borough responded that the layoffs were effectuated solely in response to dire fiscal constraints caused by state and federal aid cuts and the need to contain costs to prevent significant tax increases. Based on the evidence, I find that the layoffs were not in retaliation for union activity, but resulted from the new

^{17/} The deputy superintendent of public works was not included in the clarification of unit petitions but was included in the settlement agreement.

administration's efforts to address economic realities and to contain and/or reduce the local tax levy that had burgeoned out of control in the previous few years. These goals were clearly expressed during the November 2007 election campaign that brought Mayor Alexander and Councilpersons Tod Fetter and Rose Fitzgerald into office. The Borough's actions are attributable to these cost savings efforts not to union animus.

In re Bridgewater Tp., 95 N.J. 235 (1994) articulates the standards for determining whether personnel actions were motivated by discrimination for the exercise of protected activities under 5.4a(3) and derivatively (1). A charging party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing, that the employee(s) engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer presents no evidence of a non-discriminatory or legal motive for its action(s), or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not violated the Act if it can

prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense is not considered unless the charging party first proves, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

AFSCME demonstrated that the eight laid-off DPW employees were engaged in protected activities as organizers of the union and as either officers or trustees of the union or members of the negotiations committee. The Borough was aware of these activities, even if Mayor Alexander and Councilman Fetter were not aware until sometime in January 2008 that AFSCME represented blue and white collar employees. Nevertheless, the issue here was whether the Borough was hostile to these protected activities and whether hostility was the substantial or motivating reason for the layoffs. I have determined they were not.

AFSCME asserted that the Borough's rationale for laying off the eight DPW employees, a fiscal crisis, inefficiency and overstaffing, was pretextual. In support of that position, it argued that the Mayor and Council overstated the fiscal situation by exaggerating the amount of state-aid cuts. AFSCME argued that the Borough actually received \$73,169 more than it claimed in its March 2008 presentations to the public. The fact that the Borough received more aid than anticipated from the state is immaterial in part, because the aid it actually received still

represented a significant drop in revenue, and in part because the Borough's motivation for the layoff was cost savings.

AFSCME also contended that the Borough's decision to layoff the employees was pretextual because the Borough never sought extraordinary aid which, if granted, could have mitigated the necessity to layoff the employees. The Borough demonstrated that its financial position would have been more precarious if it sought such aid.

AFSCME's argument that DPW was not inefficient and overstaffed as claimed by the Mayor and Fetter also is not supported by the record. The Mayor and Fetter together with other Council members did an analysis of not only the Borough's operations, but also of surrounding communities, particularly Barrington and Haddonfield. Based on the analysis, the Borough determined that the DPW was overstaffed for equivalent full-time hours (EFTs). AFSCME contested that analysis. But whether some aspects of the analysis were inaccurate is immaterial. The record demonstrates that the comparisons relied on were conducted as part of the Borough's effort to address its own fiscal issues. The conclusions that the Borough's DPW was overstaffed were based not only on the Mayor's analysis, but also on the in-put of former DPW Superintendent Jim Young who reached a similar conclusion. The evidence does not support that the Mayor and Council manufactured or manipulated the facts to support their conclusion that DPW could be reorganized to reduce the budget.

AFSCME also contended that the layoffs were pretextual because it believed that recycling was less expensive if performed in-house. To the extent AFSCME disputes the conclusions reached by the Borough from its recycling analysis, I find that the cost analysis relied on by the Borough in concluding that the operation would be less costly if outsourced was a legitimate comparison the Borough undertook for business reasons. Although the parties reached different results, the Borough's reasons for undertaking the analysis were driven by business considerations.

AFSCME argued that although tree services were outsourced, the Borough continued to do a significant amount of tree removal in-house with the assistance of seasonal workers and that between what it paid to the private contractor and seasonal workers, the Borough saved little money. The Borough outsourced tree services not only because it would be less expensive than providing the service in-house, but also because it gave the Borough more flexibility, if the budget worsened, the Borough could delay non-emergency tree removal without paying unnecessary salaries and benefits. Additionally, the Borough would not have to purchase a very expensive bucket truck that needed to be replaced.

It is important to note that the issue in this case is why did the Borough layoff the employees. It is not about the accuracy of the Borough's projected budget savings or whether other measures could have been taken. It is about the Borough's

primary motivation for the layoffs. The record shows, I believe conclusively, that Alexander and Fetter ran for office to improve the Borough's tax structure, not to retaliate against AFSCME. They had little or no knowledge about union activity when they were candidates. Upon taking office, they quickly engaged in a comprehensive examination of the Borough's operation and resources to determine where costs could be contained. They compared DPW operations with other municipalities and determined that a reorganized DPW could operate at a much lower cost. The meetings they had, the power points and the emails predominantly concerned cost savings. Even if some of the cost saving projections were not realized, the Borough's motivation for the layoffs was cost savings, not animus.

For the first time in 56 years, the Borough realized a property tax reduction. Even AFSCME conceded, that for 2009, there will be a small savings.

AFSCME also argued that DPW was the only department to suffer adverse personnel actions and no alternatives to layoffs were considered; that the Borough stalled negotiations with AFSCME so it would not be limited in the same way that it was with the police department and with no collective negotiations agreement the Borough would not have to deal with AFSCME; that it purchased a new fire truck in 2008 for between \$400,000 and \$500,000; that it never notified AFSCME or the employees in advance of the layoffs or discussed alternatives to layoffs with

AFSCME; and that the Borough did not give the employees RICE notices before the Council meeting at which their layoffs were being discussed and approved. Upon review, none of these actions supports animus.

The Mayor and Council did a review of all departments concentrating on the two departments that represented a vast majority of the Borough's operating expenses. Unlike, DPW, the Police Department was understaffed, therefore layoffs were not an option. Nevertheless, savings was achieved by not filling vacant posts and by moving personnel. Some overtime and short shifts, were eliminated. A patrol car was leased, not purchased. Vacated positions were left open for the remainder of the year to recapture some salary savings. Retirements were treated in the same way - e.g. positions were not filled. The Borough reduced costs without reducing services.

The Mayor and Council spent less time reviewing other departments because of limited time and resources and because these departments consisted primarily of a couple of employees, allowing for little budget savings compared to the police department and DPW. Nevertheless, when Merlino and Johnson retired, the Borough replaced them with two part-time employees with no benefits and they automated accounts payable functions. The savings from these two retirements is approximately \$60,000 annually.

AFSCME alleged that the Borough stalled negotiations to avoid discussing the layoffs with the union. But, the record shows that negotiations were stalled primarily because there was a new administration elected between the first negotiations sessions in September/October 2007 and February 2008 when negotiations recommenced. The April 1 negotiations session was cancelled because the Borough had not yet received AFSCME's counterproposal from Howardell.

AFSCME challenged the Borough's recall of James Hanton. The decision to rehire Hanton over Phifer or the others was made by the new superintendent, Edelen, who was formerly an AFSCME member. Phifer did not apply for the job. There is no evidence that Edelen harbored animosity toward AFSCME members. Edelen credibly testified that Hanton had expertise with storm water systems that was necessary for the job. Most importantly, however, is that Hanton was also a union organizer and on the negotiations committee. The fact that the Borough hired one union organizer/negotiator over another does not support that it acted out of union animus.

AFSCME also cited several statements made by various individuals including Mayor Alexander, Council President Shields and Councilman Shopp as well as retired Superintendent Gary Gesrick and former Borough Solicitor Albert O'Lizi to support that the Borough was hostile to the union. I found that neither

Gesrick nor O'Lizi were expressing the opinions of the Mayor or Council.

AFSCME asserted, that on April 3, when the employees were called down to Borough Hall and informed of the layoff's, Phifer shouted that the layoff's were union busting and Councilman Shopp responded to this outburst that "we can do whatever the hell we want." Shopp's statement, however, does not connote agreement with Phifer or an admission that, indeed, the layoffs were union busting. Rather, it is apparent that Shopp was responding emotionally to Phifer's statement.

Although I found that Shields told Phifer and Alvarez that the layoffs were because of the union, that was Shields' opinion, not the opinion of the Mayor or Council.

AFSCME also relied on an e-mail from Mayor Alexander to Councilman Wentz which said in part that by making Edelen a superintendent they will have the opportunity to take him out of the union. But in the e-mail, the Mayor also explained that by taking Edelen out of the union, they could save another unit employee, Clark, from being laid off. This e-mail does not support animus.

Finally, AFSCME argued that animus could be inferred from the Borough's filing of a clarification of unit (CU) petition seeking to remove crossing guards and several employees as confidential or managerial. It asserts the filing of the

petition is evidence of animus, because it significantly reduced the number of unit members. I disagree. It is not an unfair practice to do what our Act permits the parties to do to protect rights under our Act - filing a CU petition. Pursuing an appropriate unit determination to remove asserted confidential or managerial executives from a bargaining unit is a statutory right. The parties resolved the CU petition.

Based on the foregoing, I do not find that the Borough violated 5.4a(3) and derivative a(1) of the Act.

The Independent 5.4a(1) Allegations

AFSCME alleged independent 5.4a(1) violations of the Act regarding statements made by former Borough Solicitor O'Lizi and Mayor Alexander. An employer independently violates subsection 5.4a(1) if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp. Where, however, the action complained of implicates free speech, the Commission balances the rights of the parties.

In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981), a case involving free speech, the Commission held in pertinent part:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, the employer must be careful to differentiate between the employee's status as the employee representative and the individuals coincidental status as an employee of that employer (citations omitted).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other.

Since the statements made by O'Lizi about the union were his opinions, and not attributable to the Mayor or Council, his statements do not constitute an independent violation of 5.4a(1) of the Act.

The charge also alleges that Frank Spadea Jr was told by the Mayor that the union was a thorn in his side and that if he had a hundred dollars and gave him [Spadea Jr.] \$50.00, and \$25.00 to each union member, what do you think you could do for me? AFSCME did not call Frank Spadea Jr. or anyone else to testify regarding that allegation. Therefore, I did not find as a fact that this statement was made. "Generally, failure of a party to produce

before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." State v. Clawans, 38 N.J. 162, 170 (1962).

Based on the foregoing, I do not find that the Borough independently violated 5.4a(1) of the Act.

The 5.4a(2) and (6) Allegations

The complaint did not include the a(6) allegation and no facts were presented to support that charge. Consequently, that allegation is dismissed.

AFSCME also alleged that the Borough violated 5.4a(2) of the Act by laying off a significant number of union officers and members of the negotiations committee, thereby attempting to dismantle the union. The standard for an a(2) violation is explained in Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd 174 N.J. Super 25 (App.Div. 1980), certif. den. 85 N.J. 129 (1980). This provision generally protects employee organizations from improper employer activity which threatens the formation, existence or administration of the organization.

In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764, 765 (¶17291 1986), the Commission explained that "[d]omination exists when the organization is directed by the employer, rather than the employees. . . . Interference involves

less severe misconduct than domination...but goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed at the employee organization as an entity." Finally, the type of activity prohibited by 5.4a(2) must be "pervasive employer control or manipulation of the employee organization itself." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980).

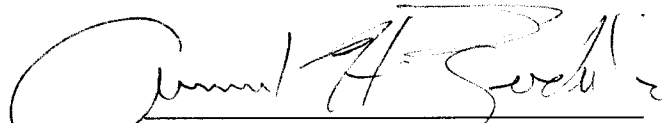
AFSCME generally argued that the Borough dominated and interfered with its organization by laying off the eight employees which decimated the ranks of its unit members. I have found, however, that the Borough acted based on legitimate motives in outsourcing work and laying off these employees. The 5.4a(2) allegation is therefore dismissed.

CONCLUSIONS OF LAW

The Borough of Haddon Heights did not violate 5.4a(1), (2), (3) or (6) of the Act.

RECOMMENDATION

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


Arnold H. Zudick
Hearing Examiner

DATED: October 29, 2009
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and

recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 9, 2009.