

H.E. NO. 2012-1

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

In the Matter of

PASSAIC COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CO-2008-231

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Passaic County Prosecutor's Office did not violate the New Jersey Employer-Employee Relations Act when it laid off two prosecutor's agents who had been on the Union's negotiations committee. The Charging Party alleged they had been laid off because of their exercise of protected conduct. It later alleged they were laid off due to the exercise of protected conduct by the President of the PBA negotiations unit representing detectives/investigators employed by the Prosecutor. The Hearing Examiner concluded that the two Agents were laid off due to business considerations and not due to their protected conduct or the protected conduct of the PBA President.

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
Genova, Burns, & Giantomas, attorneys
(Brian W. Kronick, of counsel)

For the Charging Party
Cohen, Leder, Montalbano & Grossman, attorneys
(Bruce D. Leder, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 11 and 15, 2008, the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM or Charging Party) filed an unfair practice charge and amended charge, respectively, with the New Jersey Public Employment Relations Commission (Commission) alleging that the Passaic County Prosecutor's Office (Prosecutor) violated subsections 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act,

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

N.J.S.A. 34:13A-1 et seq. (Act). The IAM alleged that the Prosecutor laid off employees Lisa Bresemann DeMarco and Christine Vozzella on March 1, 2008 in retaliation for their exercise of protected conduct. The IAM specifically alleged, "[t]he sole reason for the layoff of these two (2) women is in retaliation for their Union activities."

The IAM seeks to rescind the layoffs and require the Prosecutor to offer DeMarco and Vozzella reemployment; compensate them for any loss in wages and benefits retroactive to March 1, 2008; and post the appropriate notice.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the Prosecutor from laying off DeMarco and Vozzella on March 1, 2008. The Commission Designee denied that application during a hearing on February 29, 2008. The written decision followed on March 7, 2008. Passaic County Prosecutor's Office, I.R. No. 2008-008, 34 NJPER 56 (¶20 2008).

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

A Complaint and Notice of Hearing was issued by the Director of Unfair Practices on April 24, 2008. The Prosecutor filed an Answer on May 7, 2008, denying the allegations and it listed several affirmative defenses.

Hearings were held on March 31, August 26 and December 1, 2009, and February 4 and May 4, 2010.^{2/} The Prosecutor moved to dismiss the complaint at the conclusion of the Charging Party's direct case (3T102-3T124). The Charging Party opposed the motion (4T4-4T8). I reserved decision on the motion and completed the hearing in this case (4T8). Both parties filed post-hearing briefs by December 14, 2010. Since the hearing is closed and the record is complete a decision on the motion to dismiss is unnecessary and would be administratively inefficient. This written decision incorporates a decision on the motion.

Based upon the entire record I make the following:

Findings of Fact

1. James Avigliano became the Passaic County Prosecutor in September 2002 (1T19). The Prosecutor employs three categories of employees: assistant prosecutors who are attorneys and represented in their own negotiations unit; sworn law enforcement officers, either detectives or investigators, who are represented by PBA Local 265; and a variety of clerical employees which

^{2/} The transcripts will be referred to as 1T (3/31/09); 2T (8/26/09); 3T (12/1/09); 4T (2/4/10); 5T (5/4/10).

includes the title "Prosecutor's Agent" who have been represented by the Charging Party.

2. Prior to March 1, 2008, the Prosecutor employed twelve individuals in the unclassified title "prosecutor's agent." The original job description for that position (CP-20) defined the title duties and responsibilities as:

Functions as an agent of the Prosecutor under the supervision of an experienced Assistant Prosecutor, Detective or Investigator. Reviews case files and assists in their preparation, through witness interview, location and/or transportation. Transports certain types of evidence; does related work as required.

Examples of work included locating and interviewing witnesses as required; inventories files for completeness and prepares cases under the supervision of an assistant prosecutor, detective or investigator; obtains information required for presentation of case to a grand jury; appearing before a grand jury and at trial as a witness in cases where their investigative support is required; obtain copies of search warrants; request arrest information from other agencies; examine crime scenes; locate, obtain and transport evidence as needed.

The revised job description for the title "prosecutor's agent" issued by the State Department of Personnel on October 19, 2006 (CP-21) defined the duties and responsibilities as:

Under the direction of the County Prosecutor, performs non-law enforcement duties to assist the Prosecutor in one or more of the

following areas: trial preparation; administration; media/community relations; research and data analysis; does other related duties as required.

Examples of work include assisting in preparing cases for legal action; testifying; conducting interviews; obtaining information; issuing/executing legal documents and maintaining files.

3. The Prosecutor employed eight male and four female prosecutor's agents. The eight men were all former detectives or police officers who had retired from those positions and were receiving a pension. As civilian prosecutor's agents they primarily investigated crimes in the homicide unit; narcotics unit; the gang unit; the insurance fraud unit; vehicular homicide unit; or the white collar unit. The four women, including DeMarco, Vozzella, Fran Raguso and Giselle Henriquez, were not former police officers and were not receiving pensions while employed in the Prosecutor's Office. They primarily worked in special units such as the forfeiture unit, special victims unit, Megan's Law unit, court unit, or the juvenile unit (1T13-1T15; 4T20). The work performed by the eight male prosecutor's agents was similar and sometimes identical to the work performed by detectives employed by the Prosecutor, except the agents did not carry guns (1T15-1T18).

4. Effective March 1, 2008, all twelve prosecutor's agents were laid off.

5. DeMarco and Vozzella were employed as prosecutor's agents for many years. They had worked in several different sections of the Prosecutor's office including the forfeiture unit, court squad and the Megan's Law unit (1T92, 1T96). In early 2008, they were both working in the juvenile unit. DeMarco was responsible for obtaining case files, getting witnesses to appear in court and providing documents to the assistant prosecutors. She sometimes took notes for the assistant prosecutors during trials or hearings. Vozzella did more data entry (1T93, 1T96).

6. Beginning sometime prior to March 1991 and continuing until approximately April of 2006 when it affiliated with the IAM, the Prosecutor's Agents, clerical employees and a variety of other white collar titles employed by the Prosecutor were represented by the Clerical Association (Association). DeMarco became a member of the Association's negotiating team in 1993, and was president of the Association from approximately 1996 until 2006 (1T102-1T103).

7. DeMarco and Vozzella were both on the Association's negotiations team that negotiated the 2002-2004 collective negotiations agreement directly with Prosecutor Avigliano and his attorney (1T105, 4T109). DeMarco and the Prosecutor's attorney exchanged correspondence in October 2003 regarding those

negotiations (CP-7a, b, c). DeMarco was the Association's chief spokesperson during those negotiations (1T105).

Although the parties reached an agreement in 2003 for the 2002-2004 contract, DeMarco characterized Avigliano's conduct during those negotiations as being dishonest and she felt he was untrustworthy. She alleged that Avigliano would agree to things and then take it back at the next meeting, and she claimed that she felt threatened by his conduct. When she confronted him he allegedly responded "Too bad, that's the way it is. If you don't like it, there is nothing you can do about it" (1T106-1T107, 2T14-2T16).

As a result of the discomfort DeMarco felt based upon her characterization of Avigliano's conduct in 2003 during the negotiations for the 2002-2004 contract, and because she was the Association's chief spokesperson, DeMarco felt Avigliano could retaliate against her at any time. Consequently, she believed she would have more protection affiliating with a bigger union (1T107, 2T17).

DeMarco claimed that in 2003, during negotiations for the 2002-2004 Association agreement, Avigliano "retaliated" against her for her role in prior negotiations by asking her if the four female Prosecutor's Agents would consider "going over to the clerical side" because "he gets more bang for his buck with men as retired police officers" (1T108). She told Avigliano she did

not expect anyone would be willing to do that and she never heard anymore from him on that issue (1T107-1T109, 2T18-2T20).

While I credit DeMarco's testimony that she subjectively felt threatened by Avigliano in 2003, I do not find he "retaliated" against her during that time period. Any alleged retaliation that may have occurred in 2003 is well beyond the statute of limitations based on the charge in this case and was not alleged in this charge.

8. In May 2008, the IAM reached its first agreement with the Prosecutor covering 2006 through 2010. DeMarco was on the Charging Party's negotiations team, but Avigliano did not participate in those negotiations. He had delegated his authority to negotiate to Passaic County Administrator, Anthony DeNova (1T104, 2T15-2T16, 4T111).

9. During all the years of DeMarco's involvement with the Association and the IAM, she was only aware of two grievances having been filed (1T121, 2T28). Supervising Clerk Typist Vicki Ricker filed a grievance with First Assistant Prosecutor Bruno Mongiardo on May 19, 2005 regarding her removal from the on-call list (CP-2). DeMarco assisted Ricker in filing the grievance (1T113, 1T115, 2T23). Mongiardo gathered information and issued a response on May 25, 2005 denying the grievance (CP-3). That grievance was presented to the Prosecutor who agreed with

Mongiardo and denied the grievance. The grievance was not appealed to arbitration (1T115-1T116, 2T22-2T24).

10. On or about December 13, 2005, the Association filed a grievance with Mongiardo on DeMarco's behalf concerning payment for an on-call and sick time issue (1T118). Mongiardo sent a memo to Association representatives that same day requesting more specificity for the grievance (CP-4). The Association responded on December 16, 2005 noting that an attorney would be handling the grievance and could be contacted for any additional information (CP-5). Mongiardo denied the grievance by memo on December 19, 2005 (CP-6). The Prosecutor apparently agreed with Mongiardo and denied the grievance. The Association pursued the grievance to arbitration with their attorney. The arbitrator found in favor of the Prosecutor and denied the grievance (1T118-1T121; 2T24-2T27).

11. William Marotta is employed by the Prosecutor as a detective and is president of PBA Local 265, the majority representative of the detectives (1T11, 1T20). On November 29, 2007, the Prosecutor conducted separate meetings with the Charging Party and the PBA to discuss the decrease in the budget and resultant consequences. The Prosecutor informed both organizations that the County had reduced its expenditure to his office by \$2.2 million forcing him to cut that amount from his budget (1T25, 1T61, 1T124, 1T130).

12. The Prosecutor, acting alone, met with the IAM first on November 29 (2T37), which included the Charging Party's negotiating committee, DeMarco, Vozzella, Debbie Dixon and Awilda Connor (1T123, 2T35). He told them he had to cut his budget, advised them there were alternatives to layoffs, and asked DeMarco to speak to her membership to see if anyone would retire or leave employment to avert any need for layoffs (1T124, 2T35). The Prosecutor gave DeMarco the names of some of her unit members who were eligible to retire and he asked her to contact Kathy Debiak, the Prosecutor's Chief Clerk, for a complete list of eligible retirees (1T124, 2T35).

The Prosecutor did not mention layoffs of the prosecutor's agents or other "clerical" titles during that meeting. The meeting lasted about thirty minutes and when she left the meeting DeMarco did not believe layoffs from her unit were a possibility (1T126-1T127). After the meeting DeMarco obtained the names of about five people in her unit who were eligible to retire. She spoke to those employees who were all in classified civil service clerical titles, and, at that time, none of them were willing to retire (1T127-1T128).

13. Also on November 29, 2007, after meeting with the Charging Party, the Prosecutor and Chief Mike Sika met with Marotta and the PBA Executive Board to notify them of his need for budget cuts (1T24-1T25, 1T60). The Prosecutor reviewed with

them the alternatives for layoff, but he also noted he had to consider layoffs and furloughs (1T25-1T26, 1T61-1T62).

14. Marotta then explained to the Prosecutor that prior to any layoffs from the PBA unit, the eight prosecutor's agents who had been police officers and were concurrently collecting pensions while working in the Prosecutor's Office, had to be laid off first or the PBA would be forced to file a grievance and/or lawsuit claiming those eight employees were violating pension rules because they were not allowed to collect a pension while holding a job in the Prosecutor's Office (1T26-1T28, 1T62, 1T63). Marotta did not threaten any other litigation (1T63, 1T87), and did not say the other four prosecutor's agents should be laid off (1T67, 4T187).

15. Marotta and DeMarco were involved in a personal, non-business relationship (2T36). Upon leaving his November 29 meeting with the Prosecutor, Marotta met with DeMarco, told her about the meeting, and told her that he told the Prosecutor that the eight prosecutor's agents who received pensions had to be laid off before anyone in the PBA unit (2T37).

16. Since the Prosecutor had told Marotta at their November 29th meeting that he was not meeting with the eight prosecutor's agents to tell them about their possible layoffs, Marotta, that same day and after meeting with DeMarco, went to the Prosecutor's office in Totowa where most of the agents worked to explain what

was happening (1T29, 1T64, 1T65). Marotta and his executive board initially met with four or five of the pensioned agents that day. They told those agents why they had to be laid off, including the pension issue, and told them if they did not agree to layoffs the PBA would file a grievance. Those agents then grudgingly agreed to take the layoffs and they telephoned the Prosecutor and informed him of their decision (1T29, 1T64-1T66, 4T180).

17. After Marotta's meeting on November 29, 2007, the PBA issued a memorandum to its membership dated November 29, 2007, (Exhibit CP-22) explaining what happened that day. The memo referred to a budget cut of approximately \$3.2 million, but the record shows it was \$2.2 million (1T25, 1T61, 1T124, 1T130). The memo also explained Marotta's remarks to the Prosecutor about the need to layoff the eight agents first:

President Marotta explained to Prosecutor Avigliano that it was the position of the Local that before Detectives be laid off that Prosecutor's Agents collecting pensions from previous law enforcement jobs be laid off first. President Marotta also explained that it was the Local's position that these employees were violating personnel guidelines that prohibited Agents from doing law enforcement-type duties. President Marotta stated that if this was true, these particular agents would be in violation of certain pensions guidelines and that this Local may be forced to file a grievance. President Marotta stated that this would be necessary if these agents were not laid off.

Prosecutor Avigliano stated that he understood our position and our need to protect our membership. President Marotta asked the Prosecutor if he wished to relay our intentions and positions to the agents, to which he replied no. Prosecutor Avigliano requested that he have a meeting with the agents and apprise them of what we had discussed with him.

18. Subsequent to the Totowa meeting, several agents began giving Marotta a hard time about asking them to agree to layoffs. On December 5, 2007, Marotta went to Chief Sika's office to complain about being harassed by the agents. The Prosecutor was there and made a remark that Marotta shouldn't have threatened people -- referring to Marotta's Totowa meeting with the agents on November 29 (1T30-1T31, 1T67-1T68, 4T181-4T187).

19. Chief Sika then set up a meeting that day (December 5, 2007) with all but one of the eight pensioned agents in Totowa, and Marotta, the Chief and others spoke to them about why they would be laid off. Several of those agents expressed their anger over the situation (1T31-1T33, 1T68-1T69). At least two of the eight pensioned agents, John Serafin and George Jadlos, suggested that DeMarco and Vozzella be laid off too (2T38).

20. The PBA issued a memorandum dated December 5, 2007 explaining the events that occurred that day (Exhibit CP-23).

Pertinent portions of that memo state:

Chief Sika explained that he had heard the content of the meeting between the local and the agents and wanted the infighting that had come out of it to stop. He stated that

President Marotta had apologize about the way the message had been delivered and was asking the agents to accept this apology. President Marotta explained to the agents that it was not the intention of the Local to file any grievances with the Pension Board. He stated that it was still the position of the Local that agents should be terminated before any detectives and that this was what he was trying to convey during the meeting. Several agents stated that they felt that they were threatened during this meeting and feared having to pay back large amounts of their pensions. Again President Marotta stated that he was not going to file any grievances with the Pension Board unless he had to due to the agents not either resigning or being terminated. He also stated that it was not his intention to have to meet with the agents but that the Prosecutor said that he would not.

At this point several agents voiced opinions about the fact that they should be laid off first. One agent stated that he felt their pensions should be viewed as supplemental income similar to a second job, inheritance or financial state. He stated that these people could be looked at to be laid off as well, since their financial status was similar to the agents -- income from work and a supplemental income source. I stated that this was true except that the pension income was guaranteed income as opposed to a second job, investments or inheritance.

President Marotta explained to the agents that it was the position of the Local that the agents were not targeted because of their pensions but because they were filling positions that should be filled with detectives, in violation of their job description. He stated that this violation ultimately led to the issue they may or may not have with their pensions. President Marotta also stated that he did not know, if the Local filed a grievance, if they would

win. This was simply the position of the local.

21. The Prosecutor's meetings with the IAM and the PBA on November 29, 2007, had been preceded and precipitated by a meeting on November 27, 2007 with the County Freeholder Budget Committee and all County constitutional and statutory officers. That was where the Prosecutor learned his budget would be cut by \$2.2 million. By letter of December 6, 2007 from County Administrator DeNova (Exhibit R-8), the Prosecutor was notified that after their (November 27) meeting the County learned that based upon a Court decision the County had to further reduce its appropriations to constitutional and statutory agencies. Exhibit R-8 notified Avigliano that he now had to reduce his 2008 budget by \$2.7 million (4T112-4T113, 4T140-4T143). DeNova also wrote:

Since you are your own appointing authority it is respectfully requested that you begin the process of your anticipated lay-off plan and or cost reduction plan. [Exhibit R-8]

22. As a result of Exhibit R-8, the Prosecutor held a meeting with all twelve prosecutor's agents, assistant prosecutors, detectives, and all clerical staff in Totowa on December 10, 2007. He told the staff that his budget deduction changed from \$2.2 million to \$2.7 million; that he was filing a "Bigley" application in Superior Court in an attempt to force the County to increase its funding of the Prosecutor's office; and that he had other avenues to pursue to avoid layoffs (1T130-

1T131, 2T39). The Prosecutor stated he thought he could easily reduce his budget by \$1.1 million, but did not explain at that time how that might happen. No indication of layoffs was expressed at that meeting (1T131-1T132).

23. On December 11, 2007, DeMarco sent Avigliano an email (Exhibit CP-7) thanking him for trying to protect the staff. At that point DeMarco did not expect to be laid off (1T133), but she knew from her conversation with Marotta on November 29, 2007, that Marotta had told the Prosecutor that if there were layoffs, the eight agents receiving pensions had to be laid off first.

24. On or about December 17, 2007, it became more clear to DeMarco there would be some layoffs. Kathy Debiak called DeMarco and asked her to again meet with eligible retirees on the clerical staff to see if they would retire. DeMarco agreed and, accompanied by Debiak, met with several classified employees on December 17. At least three classified clerical employees agreed to retire (1T134-1T137, 2T40).

25. Sometime after December 17, 2007, the Prosecutor, searching for ways to avoid layoffs, asked DeMarco if the employees in her unit would agree to a 10% pay cut. The Charging Party's membership rejected the idea (1T139-1T140).

26. On December 19 or 20, 2007, the Prosecutor mentioned to Marotta that he (the Prosecutor) might need to keep some of the prosecutor's agents and move them to the courts units --

specifically referring to keeping some of the eight pensioned agents (1T33-1T34, 1T69-1T70). Marotta responded:

"You are going to create a blood bath amongst the members of PBA 265 if you do that" (1T70)

The Prosecutor responded:

"if I don't do it I may have to wipe out the whole class of agents" (1T34).

By that remark the Prosecutor was referring to all twelve agents (1T34). Marotta responded:

"you know the PBA's position. I don't know what else to say to you" (1T34).

27. After DeMarco and Debiak had earlier spoken to eligible retirees on the clerical staff about retiring, the Prosecutor, by letter of December 24, 2007, notified the State Department of Personnel (Civil Service) that four employees were voluntarily retiring and one classified employee volunteered for layoff (Exhibit R-1). Avigliano concluded the letter saying in pertinent part:

The balance of retirements and layoffs will be done out of the unclassified at-will employees in the legal and investigative staffs.

28. On December 24, 2007, after discussions with the Prosecutor, Todd Stanley, the assistant fiscal officer in the Prosecutor's Office, prepared two documents, Exhibits CP-10 and CP-11, showing two different layoff plans. CP-10 shows which employees had to be separated from service, including layoff, in

order for the Prosecutor's Office to reach its target of \$2.7 million (3T18). The Prosecutor decided the list of names on the forms. Most of the employees were unclassified and included attorneys, detectives, and agents (3T19-3T20). DeMarco and Vozzella were listed for layoff on CP-10, but the other two female agents, Henriquez and Raguso were not listed for layoff on that form (3T21). A total of ten agents were listed.

29. The names for CP-11 were also provided by the Prosecutor (3T87). DeMarco's name wasn't listed for layoff on CP-11, but Vozzella and five other agents were listed for layoff (3T87). The Prosecutor selected names primarily based upon whether they were classified or unclassified. He did not mention the IAM (3T88). Both CP-10 and CP-11 reflected dollar amounts exceeding the County's sought budget reduction from the Prosecutor's Office (3T38, 3T44). The Prosecutor did not implement either CP-10 or CP-11 (T39, T45-T46).

30. On December 26, 2007, Stanley prepared two more proposed layoff plans, Exhibits CP-12 and CP-13. The Prosecutor did not ask Stanley to prepare CP-12, Stanley and Kathy Debiak together prepared that document which did not include Vozzella for layoff, to see if they could save Vozzella's job (3T46-3T47). CP-12 shows the layoff of five agents but did not include DeMarco or Vozzella; CP-12 did include several attorneys and investigators. The Prosecutor requested the proposed budget in

CP-13 which listed ten agents for layoff including DeMarco and Vozzella, but did not include Henriquez or Raguso (3T52-3T53). Both CP-12 and CP-13 reflected savings of more than the County's required budget reduction for the Prosecutor's Office (3T51, 3T54-3T55). Neither the budgets nor layoff plans in CP-12 or CP-13 were implemented (3T52, 3T55).

31. On December 26, 2007, the Prosecutor met with Marotta informing him that ten PBA members were being laid off by March 1, 2008. The Prosecutor selected the more senior -- higher paid -- employees who were eligible to retire (1T34-1T36, 1T47). The PBA filed a grievance over the Prosecutor's selection of employees for layoff because the layoff was not by seniority (4T104).

32. DeMarco testified that the Prosecutor met with IAM representative Juan Negrón, on December 26, 2007, and told him one clerical person from the unit may be laid off. She also testified that Avigliano told Negrón that it was not anyone on the negotiating committee (1T142, 1T146). DeMarco's testimony on these points is hearsay. While I am able to credit that Negrón met the Prosecutor on December 26 and that Negrón told DeMarco about their conversation, since Negrón did not testify I cannot credit DeMarco about what Avigliano allegedly said during that meeting.

33. Based upon information she received about layoffs from Negron on December 26, 2007, DeMarco sent the Prosecutor an email early on December 27, 2007 (Exhibit CP-8) (1T146). DeMarco asked the Prosecutor to tell her the names of people in her unit who were selected for layoff. Later that day the Prosecutor and First Assistant Prosecutor Mongiardo met with DeMarco, Vozzella and two other IAM members. The Prosecutor informed them that sixteen people from the Charging Party's unit were selected for layoff including DeMarco and Vozzella (1T146-1T148). The Prosecutor read the sixteen names which included the three or four clerical employees who had volunteered to retire, one clerical employee who had volunteered for layoff, one person who was being transferred, the eight male prosecutor's agents and DeMarco and Vozzella (1T148-1T149). DeMarco testified that Henriquez and Raguso were not mentioned by the Prosecutor for layoff at that meeting (1T149-1T150, 2T70). The Prosecutor testified that he told DeMarco and the others that all the agents (presumably including Henriquez and Raguso) were being laid off (4T123). While I credit DeMarco's testimony that Avigliano did not specifically read the names of Henriquez and Raguso when he read the list of laid off employees on December 27, 2007, I find the Prosecutor told her that all the agents were being laid off.

After reading the list of laid off employees from the IAM unit, Vozzella left the room upset (1T150, 4T123), and DeMarco said to Avigliano:

"Fuck you, you can't lay me off"

Avigliano responded:

"Well, I just did" (4T123).

Avigliano then said to DeMarco:

"I know you're going to sue me"

She responded:

"You're damn right" (1T150, 2T45).

According to DeMarco, a conversation ensued with Avigliano in which reference was made to Marotta's conversations with Avigliano about filing a grievance if prosecutor's agents were not laid off (1T150-1T151). While I believe a conversation which included Marotta's name occurred, the exact nature of the conversation is unclear. I draw no inferences therefrom.

34. At the end of the meeting with the Prosecutor on December 27, 2007, DeMarco asked Avigliano if there was anything else he could do -- presumably to save DeMarco's and/or Vozzella's jobs. There was discussion about the Bigley application and/or about two clerical employees who were going out on other leave. Apparently, one clerical employee was going out on a maternity leave, and one considering disability leave. DeMarco testified that the Prosecutor told her that if she

(DeMarco) could get the one employee to extend her maternity leave and the other employee to file for disability, or if he won the Bigley application, that she (DeMarco) and Vozzella would have their jobs (1T154). Avigliano testified that when DeMarco asked him if she could keep her job if she got clerical employees to take leave he responded "no" (4T124-4T125). I credit the Prosecutor.

Just a few minutes before DeMarco testified that the Prosecutor allegedly said she could save her job if other employees took leave, DeMarco testified that when she asked him if there was any way he would change his mind he allegedly said he would "consider giving us our jobs back" and that with respect to some employees taking leave he said, "I will see if I can, you know, at least get one of your jobs back" (1T151-1T152). This testimony by DeMarco which preceded her testimony that Avigliano said they could get their jobs back, is not the definitive remark DeMarco subsequently claims Avigliano made. Her testimony changed within a short period of time.

35. Additionally, DeMarco testified that when she told Debiak about what the Prosecutor allegedly said about getting her job back if some employees took leave, DeMarco admitted Debiak expressed surprise and doubted that the Prosecutor would have made such a remark (1T155-1T156). Marotta also testified on this point and said Avigliano screamed at him on December 28 that he

(Avigliano) never told DeMarco or Vozzella that if they got people to leave they could stay (1T43). Noting the confusion within DeMarco's own testimony on this point and the solid denial by Avigliano, I credit the Prosecutor that no such promise was made.

36. On December 28, 2007, DeMarco and Vozzella were sent form letters giving them notice of layoff effective March 1, 2008 (Exhibits R-2a and R-2b).

37. After meeting with Avigliano on December 27, 2007, DeMarco met with Marotta later that day. DeMarco informed Marotta that she and Vozzella had been laid off in addition to the eight male agents, and she told him of the alleged remarks Avigliano made about him (Marotta) and his grievance threat during Avigliano's conversation with him (Marotta) (1T37-1T38). Marotta testified that in part of his conversation with DeMarco, she told him (Marotta) that the Prosecutor made a remark to her to the effect that he (the Prosecutor) did not like Marotta "putting a knife to his neck forcing him to let the agents go" (1T38), and that Marotta "is suing me [the Prosecutor] if I don't get rid of the agents" (1T77). This testimony by Marotta is hearsay because he is testifying about what DeMarco allegedly told him (Marotta). While I, therefore, cannot be certain as to what Avigliano said to DeMarco, I credit Marotta that Avigliano expressed to DeMarco that he (Avigliano) took seriously Marotta's

insistence that the eight former police who were agents needed to be laid off before any PBA unit members.

38. After learning on December 27, 2007 of DeMarco's and Vozzella's layoffs scheduled for March 2008, and feeling some responsibility for their layoffs, Marotta met with the Prosecutor on December 28, to try to "rectify a misunderstanding" as to why they were laid off (1T37-1T38). Marotta told the Prosecutor that he (Marotta): "was not suing him [the Prosecutor] in regards to the eight agents as long as they're laid off" (1T40). Marotta wanted to save DeMarco's and Vozzella's jobs (4T187). Marotta testified that Avigliano then said he'd save DeMarco's job but not Vozzella's (1T41). Marotta said, "why do you have to do this" and he testified Avigliano responded, "she talks too much" (1T41). The Prosecutor recalled that Marotta wanted to save DeMarco's and Vozzella's jobs, but he denied saying he'd spare DeMarco but not Vozzella, and denied saying Vozzella talked too much (4T187-4T188). I credit the Prosecutor. His testimony on this point is consistent with his testimony about whether he would keep DeMarco and Vozzella if they convinced other employees to leave.

39. Marotta left the Prosecutor's office after the above recited exchange with Avigliano on December 28, 2007, but soon returned. Upon his return Avigliano screamed at him that he (Avigliano) never told DeMarco or Vozzella that if they got other

employees to leave, they could stay, and he told Marotta that DeMarco and Vozzella "are gone" (1T43). Marotta left Avigliano's office again to talk to the employees in his unit that were notified of layoff. Upon his return to the Prosecutor's office he met with First Assistant Mongiardo and Avigliano. Marotta was told that all 12 prosecutor's agents would be laid off (1T44, 2T51). Marotta told DeMarco what he had learned.

40. Marotta attempted to discuss other issues with the Prosecutor after December 28, 2007 but claimed the Prosecutor would not talk to him. Marotta thought the Prosecutor was unreasonable (1T48).

41. In response to the events and meetings of December 28, 2007, DeMarco sent Avigliano a long email on December 31, 2007 (Exhibit CP-9). She recounted her view of events including that if two employees took leave her job and Vozzella's would be spared; she repeated a remark by Marotta that the Prosecutor at one point said DeMarco could stay but Vozzella had to go, and she (DeMarco) defended Vozzella. She concluded her email telling the Prosecutor to have all future contact with her union representative or attorney.

42. Going into December 2007 the Prosecutor was hoping to avoid layoffs by reaching an agreement with the County, by a Bigley suit if necessary, and/or through alternatives like retirements and the use of forfeiture funds to help pay salaries,

but attorney general approval was needed for some of that and was not received (4T27, 4T29). The Prosecutor made an offer to the County to reduce his budget by \$1.1 million by retirements and not filling vacancies, returning some cars and cell phones, but the County determined that was not enough (3T16). The County wanted permanent staff reductions (3T17).

43. During that time frame Todd Stanley had prepared Exhibits CP-15 and CP-17. Exhibit CP-15 reflected that the Prosecutor was trying to get to a total budget figure of \$15,561,763 which included the \$2.7 million deduction imposed by the County. Exhibit CP-17 reflected the Prosecutor's proposed settlement of a \$1.1 million reduction which would have allowed the Prosecutor's budget to grow to \$17,200,606 and would not have included any layoffs (CP-15, CP-17; 3T61-3T65, 3T68-3T71). The County rejected that idea (3T16, 4T69).

44. When it became apparent that layoffs could not be avoided, Debiak and Stanley explained they considered an office-wide approach, not just employees in the clerical association. They looked at leaving vacancies unfilled, retirements and then unclassified titles because by avoiding a civil service (classified) layoff they would have more flexibility with unclassifieds to layoff higher paid employees and avoid civil service bumping rights (3T85, 4T27-4T28, 4T43, 4T63).

45. While the Prosecutor's intent was to spread layoffs somewhat evenly throughout the different groups of employees and attempt to lessen the impact of layoffs by first choosing pension and health benefit eligible employees for layoff (4T30, 4T160-4T161, 4T77-4T78, 4T126), his primary goal was to keep as many of the sworn law enforcement officers and attorneys as he could (4T122, 4T127, 4T135). The record shows that the prosecutor's agents did investigative work and/or case preparation, not clerical work, which was the same as or very similar to the work performed by sworn officers and/or attorneys (1T18, 1T86, 2T5, 4T49, 4T57). In an effort to reach his goal of keeping as many sworn officers and attorneys as possible, and aware of the similarity between the agents' and investigators' jobs, the Prosecutor decided to layoff all agents based, in part, upon the recommendation by First Assistant Prosecutor Mongiardo who recommended all the agents and other higher paid employees who could collect pensions be laid off to preclude any lawsuits (4T159, 4T175-4T176). The Prosecutor did not think it fair to single out individual employees for special treatment (4T78). Given the gender differences amongst the agents, the Prosecutor did not want to pick and choose which agents would go and which would stay. He felt it needed to be all or none (4T63). While the Prosecutor knew that two of the female agents worked with

special victims units, he was unaware of what the other two female agents did (4T166).

46. The Prosecutor's budget was not finalized by the end of 2007. By January 2008 he had decided to pursue the Bigley application but still needed to make layoff plans. He prepared two plans, Plan A and Plan B. Plan A was the Plan involving the layoff of only unclassified employees including all the agents, ten investigators (sworn officers) who were all eligible to retire, several attorneys, one voluntary layoff and several clerical retirements (4T40, 4T95, 4T127). Plan B involved classified employees. The Prosecutor filed a layoff plan with the Department of Personnel to give himself the option to implement layoffs amongst classified employees (4T40).

47. In anticipation of making classified layoffs Debiak distributed a general notice of layoff to each employee on or about January 23, 2008 setting the date for layoff as March 31, 2008 (Exhibit R-3; 4T36-4T37). The Prosecutor's layoff Plan B was approved by the Department of Personnel on January 29, 2008, and Debiak reminded Avigliano to make certain that affected employees received their notice (Exhibit R-4; 4T39).

48. In February 2008 Todd Stanley prepared several additional spreadsheets to assist the Prosecutor in deciding which layoff plan to follow (Exhibits CP-14, CP-16, CP-18 and CP-19). Exhibit CP-14 prepared on February 21, 2008, reflected the

retirement of four clerical employees and the voluntary layoff of one clerical employee, the layoff of all twelve prosecutor's agents, and the layoff or retirement or voluntary leave of nine attorneys and 13 investigators. It was not implemented in its exact form (3T60).

49. Exhibit CP-16 included all twelve agents, but fewer attorneys and investigators. It was not followed. Exhibit CP-18 involved six employees and was in part based upon the County agreeing to the Prosecutor's proposal to limit his budget reduction to \$1.1 million (3T72-3T75). It was not adopted (3T75).

50. Exhibit CP-19 was prepared after the Prosecutor and County settled the Bigley suit. That settlement resulted in the Prosecutor's budget being credited back with \$650,000 (CP-19; 3T77, 3T79, 4T69). Thus, the Prosecutor's budget reduction decreased from \$2,738,843 to \$2,088,843 (Exhibit R-8; 3T77-3T78).

51. On March 4, 2008, the Prosecutor notified the State Department of Personnel that he was withdrawing his proposed classified employee layoff plan (Plan B) (Exhibit R-5; 4T41). He had decided to use Plan A, the layoff of unclassified employees as well as retirements to reduce his budget. A total of 38 people/positions were eliminated from service through layoffs, retirements or unfilled positions (4T95, 4T120). They included the 12 agents, 5 clerical employees, at least 10 detectives/

investigators, several attorneys and unfilled positions (4T30, 4T95, 4T120, 4T127). One female prosecutor's agent, Henriquez, was recalled apparently due to the receipt of certain grant funding, but no detectives/investigators were recalled (1T88-1T89, 4T67).

The Prosecutor's goal was not just to reduce his budget by the County's projected numbers, but to also provide for other anticipated costs, further cuts or loss of more grant funding (3T96, 4T170).

52. On November 6, 2009, an arbitrator issued an award finding that the Prosecutor did not violate the PBA agreement by laying off the ten investigators without regard to seniority (4T105, Exhibit R-6).

ANALYSIS

The issue in this case is did the Prosecutor violate the Act by laying off DeMarco and Vozzella? The legal theory alleged by the charge is that the Prosecutor violated the Act by discriminating against DeMarco and Vozzella because of their exercise of protected conduct. The IAM did not allege in its charge that the Prosecutor violated the Act by discriminating against Marotta because of his exercise of protected conduct or that it discriminated against DeMarco and Vozzella because of Marotta's exercise of protected conduct. In its post-hearing brief, however, the Charging Party, relying primarily upon Greg

v. Suburban Cablevision Inc., 140 N.J. 623 (1995), and Kenrich Petrochemicals, Inc. v. NLRB, 134 LRRM 2673, 907 F.2d 400 (1990), argued that the Prosecutor violated the Act by retaliating against PBA President Marotta because of the exercise of his protected rights (threatening to file a grievance), that the retaliation was the layoff of DeMarco and Vozzella, and that since the alleged retaliation was in response to the exercise of protected conduct (Marotta's), the layoff of DeMarco and Vozzella violated the Act.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, 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 motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have 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, however, need not be considered unless the Charging Party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

I find that DeMarco and Vozzella were engaged in protected conduct and the Prosecutor knew of their conduct. But the record does not support a finding that the Prosecutor was hostile to either DeMarco's or Vozzella's exercise of protected activities.

The examination of the Prosecutor's actions begins with the knowledge that the County reduced the Prosecutor's budget by a significant amount forcing him to consider layoffs and a variety

of alternatives to layoff. The Prosecutor attempted to find some employees who would voluntarily retire and/or accept layoff, and some did. He offered the County to reduce his budget by retirements, not filling vacancies, returning cars and cell phones, but the County rejected that as not enough and sought staff reductions.

The Prosecutor sought to use forfeiture funds to prevent or lessen layoffs but did not receive attorney general approval to use such funds, and he filed a Bigley application in an attempt to force the County to provide the funds needed to avoid layoffs but only received \$650,000 back from his \$2.7 million reduction, not enough to prevent layoffs. The Prosecutor also considered laying off classified employees to avoid laying off the agents -- he even filed a layoff plan with the State Department of Personnel -- but withdrew that plan because of the complexities associated with bumping when implementing a layoff of classified employees.

This was not a Prosecutor who acted out of union animus. He sought to avoid layoffs.

I found that the Prosecutor did not promise that he would not layoff DeMarco and Vozzella, nor did he say Vozzella "talked too much" which -- even if said -- does not establish union animus. Rather, I find that the decision to layoff all the agents and other employees was a business decision made under

very difficult budgetary circumstances and which would have been made even in the absence of protected conduct.

Most of the protected conduct DeMarco was involved with occurred years before the end of 2007 and early 2008 when the layoff issue was being considered and decided. Any "fears" DeMarco expressed as a result of negotiations with the Prosecutor occurred in reaching the Association's 2002-2004 collective agreement in 2003, the two grievances in 2005, and certainly before affiliating with the Charging Party in April 2006. The only evidence of a difficult exchange between DeMarco and Avigliano in late 2007 was when he informed her of her layoff, and, understandably, it was DeMarco who cursed, not Avigliano. Other than Vozzella's involvement on the negotiations team, the record is devoid of any evidence that would suggest animus towards her for her participation in protected conduct.

Neither the Prosecutor's rejection of a number of layoff scenarios that may have saved DeMarco's and/or Vozzella's jobs, nor his feeling threatened by Marotta's insistence that the eight male agents be laid off before any PBA unit members, suggests Avigliano's decision to layoff all agents was based on union animus.

While the various layoff scenarios may have achieved and even exceeded the required amount of the Prosecutor's budget reduction sought by the County, without laying off DeMarco and/or

Vozzella, the Prosecutor had several business and operational issues to consider. The evidence shows that most of the work performed by the twelve agents was in support of and similar to the work performed by the detectives/investigators and even some attorneys. The Prosecutor knew that the detectives/investigators could perform all of the agents work. The Prosecutor determined that in the event layoffs were necessary, his primary goal was to keep as many of the sworn law enforcement officers and attorneys as he could; a business determination he had the right to make. The Charging Party did not object to the layoff of the eight male agents, nor apparently to the layoff of two female agents, Henriquez and Raguso, because the Charging Party never alleged such in its charge. But at least two male agents articulated that DeMarco and Vozzella should be laid off, and Mongiardo recommended that all agents be laid off to avoid potential lawsuits. The Prosecutor concluded it was unfair to single out individual agents (DeMarco and Vozzella) for special treatment and decided that all agents would be treated the same. A decision, he believed, would also protect him against a gender-based discrimination claim. Further, in addition to laying off the twelve agents, the Prosecutor laid off ten PBA unit members and some attorneys. The ten PBA employees were not the least senior earning the lowest salaries, rather, the Prosecutor refused to follow seniority and laid off higher paid more senior

employees who could retire which both saved the jobs of other employees who could not retire and resulted in more money being saved. The PBA grieved those layoffs, but the grievance was denied in arbitration. Lastly, the Prosecutor was concerned that further cuts by the County and/or loss of remaining grant funding could result in further budget reductions. Consequently, he made the business decision to reduce his budget more than required by the County to deal with unanticipated decreases in funding.

When considering all of the evidence and the business/operational issues listed above, I conclude the Prosecutor laid off DeMarco and Vozzella for business reasons and not at all based upon their exercise of protected conduct nor based upon Marotta's protected conduct.

The Charging Party's legal and factual argument that the Prosecutor laid off DeMarco and Vozzella in retaliation for Marotta's protected conduct presents procedural, legal and factual issues.

In Kenrich, the Third Circuit upheld an NLRB decision ordering the reinstatement of a supervisor because she was terminated in retaliation for the participation of several of her relatives (who were also Company employees) in a union organizing campaign. The supervisor had not engaged in pro-union conduct.

In Greg, which concerned the Law Against Discrimination (LAD) and not the New Jersey Employer-Employee Relations Act, the

New Jersey Supreme Court held that co-workers or relatives of an employee who sued their common employer under the LAD may maintain an action against the employer for their own retaliatory discharge.

These cases present a legal theory the Commission may consider employing in the right set of facts. That is, if a charging party alleges and establishes that a public employer took action against an employee in retaliation for that employee's relative's or co-worker's exercise of protected conduct, the Commission should have the authority to remedy the employer's conduct to prevent the employer from chilling the lawful exercise of protected conduct. The facts presented in this case, however, do not support that theory.

The Charging Party never asserted in its charge that DeMarco and Vozzella were laid off because of Marotta's exercise of protected conduct. In fact, it specifically alleged in its charge and amended charge that: "The sole reason for the layoff of these two (2) women is in retaliation for their Union activities" (Emphasis added). That wording cannot be read to mean or include that Marotta's protected conduct had something or anything to do with their layoff. A respondent is entitled to know all of the allegations it must defend against.

The first and only time the Charging Party raised that argument at hearing was in its response and opposition to the

Prosecutor's motion to dismiss. By then the parties had completed examination of several witnesses and the IAM rested its case. The Charging Party's post-hearing brief -- rather than argue how DeMarco and Vozzella were laid off because of their exercise of protected conduct -- concentrated instead on how they were laid off allegedly because of Marotta's exercise of protected conduct. The Charging Party may not pursue its new legal theory so late in the proceeding.

The facts do not support the Charging Party's contention that DeMarco and Vozzella were laid off because of Marotta's insistence that the eight male agents be laid off before PBA unit members were laid off or due to any of the other conversations between Marotta and Avigliano. While I could not find that Avigliano made a "knife at his throat" remark, I did find that Avigliano felt threatened by Marotta's aggressive insistence that the eight male agents be laid off before any PBA unit members were laid off. Having concluded as much, however, I do not find that Avigliano was hostile to the discussions with Marotta regarding that topic including the discussion on December 19 or 20, 2007 when Avigliano suggested he may need to "wipe out the whole class of agents." Rather, I find that the discussions with Marotta on that topic caused Avigliano to reconsider who he had to layoff to avoid new and additional problems. He obviously spoke to First Assistant Mongiardo about those concerns and they

agreed that all of the agents should be laid off to avoid allegations of favoritism and/or discrimination. The decision they made was based upon the legitimate business considerations discussed earlier.

Finally, if the Charging Party had intended to allege that DeMarco and Vozzella were laid off in whole or in part because of Marotta's insistence regarding the eight male agents, one would have expected it to allege that Henriquez and Raguso were laid off for the same reason. While DeMarco had a personal relationship with Marotta, there is no evidence that Vozzella did also, and, thus, Vozzella "walked in the same shoes" as Henriquez and Raguso. Yet, that allegation was not made because the Charging Party concluded, as it alleged in its charge from the outset of this case, that the "sole" reason for laying off DeMarco and Vozzella was "their" exercise of protected conduct. Consequently, I find that DeMarco's and Vozzella's layoffs were not motivated by union animus directed at Marotta. Having found that DeMarco's and Vozzella's protected conduct was not the reason for their layoff, the Charging Party did not establish hostility.

Having considered all of the facts and legal arguments I conclude that the Prosecutor was not hostile to the exercise of DeMarco's, Vozzella's or Marotta's protected conduct in deciding

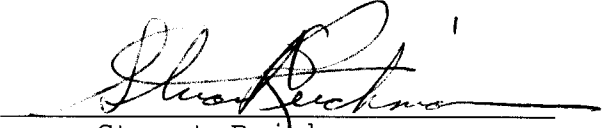
to layoff DeMarco and Vozzella in 2008. The Prosecutor's decision was based on legitimate business considerations.

Conclusions of Law

The Passaic County Prosecutor's Office did not violate 5.4a(1), (3) or (5) of the Act by laying off DeMarco and Vozzella.

Recommendation

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


Stuart Reichman
Hearing Examiner

DATED: August 11, 2011
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 August 24, 2011.