

P.E.R.C. NO. 93-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-91-258

TEAMSTERS LOCAL 115,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Teamsters Local 115 against the City of Somers Point. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act by laying off a shop steward and two other union members in retaliation for their filing grievances. Local 115 also alleges that the City violated the Act by negotiating directly with the three laid off employees about ways to avoid layoffs. The Commission accepts the Hearing Examiner's findings that the City Council laid off the three clerical employees for legitimate budgetary reasons and that the mayor did not negotiate with employees over any terms and conditions of employment.

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Charging Party.

Appearances:

For the Respondent, Roger C. Steedle, attorney

For the Charging Party, Walt DeTreuX, attorney

DECISION AND ORDER

On March 25, 1991, Teamsters Local 115 filed an unfair practice charge against the City of Somers Point. Local 115 alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),^{1/} by laying off a shop steward and two other union

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

members in retaliation for their filing grievances. Local 115 also alleges that the City violated the Act by negotiating directly with the three laid off employees about ways to avoid the layoffs.

On April 26, 1991, a Complaint and Notice of Hearing issued. On May 13, the City filed an Answer asserting that it had laid off these employees for legitimate budgetary reasons and not in retaliation for protected activity.

On June 13 and 21, 1991, Hearing Examiner Illse E. Goldfarb conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On August 24, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-8, 18 NJPER 456 (¶23207 1992). She found that the City's business administrator had recommended that the three employees be laid off because they had engaged in protected activity. But she also found that the City Council had independently determined that layoffs were necessary and that laying off these three employees would be the least disruptive. Finally, the Hearing Examiner concluded that the mayor was not negotiating with unit employees when he discussed with them what part-time positions might be available if the Council were able to secure the necessary funds.

On September 24, 1992, Local 115 filed exceptions. It claims that the Hearing Examiner erred in rejecting testimony that the City had sufficient funds to avoid layoffs. It argues that even

if the City Council believed it was acting in the City's financial interests, a violation occurred if the administrator's recommendation was based on anti-union animus.

On September 29, 1992, the City filed a reply. It claims that any anti-union animus on the part of the administrator does not establish that the layoffs resulted from anti-union animus. It argues that it laid off clerical staff because those layoffs would have the least impact on City services and the welfare of the public, because they had the least seniority, and because their positions had only recently changed from part-time to full-time. The City also urges adoption of the Hearing Examiner's finding that it did not unlawfully negotiate with the affected employees.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-18) are accurate and essentially undisputed. We reject Local 115's one factual exception to the finding that it did not prove that the City had sufficient funds to avoid laying off employees. Even if Local 115 had shown that less than 50 percent of the City's budget had been spent by mid-year, that would not prove that the City's overall budget projections were wrong. And even if those projections were wrong, that would not necessarily prove that the City knew or should have known six months earlier that they were wrong.

This claim of anti-union discrimination is governed by the standards set out in In re Tp. of Bridgewater, 95 N.J. 235 (1984).

No violation will be found unless the charging party has proved, 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 the employer did not present 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. However, a record may demonstrate that both a motive unlawful under our Act and another motive 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.

The Hearing Examiner found direct and indirect evidence that the City's business administrator recommended to the City Council that it lay off three clerical employees because they had exercised protected rights. The City has not excepted to that finding and we will assume it is correct for purposes of our analysis.

The Hearing Examiner also found that the City Council, although presented with the business administrator's recommendation, laid off the three clerical employees for legitimate budgetary

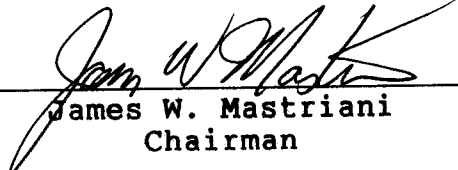
reasons. The record supports that finding and we accept it. This Council took an aggressive and independent role in developing the budget. It rejected a number of the administrator's recommendations, including three budget drafts that exceeded legal spending limitations. It was reluctant to reduce services, but it wanted to stabilize the tax rate. It ultimately saw no alternative to laying off employees and it made a policy decision to lay off clerical employees based upon its judgment that this action would have the least negative impact. The Council rejected any layoffs in the police department, which had recently hired three officers, and in the public works department, which had laid off employees in 1988 and 1989. Based on the Hearing Examiner's findings of fact, we believe the City has proved that the Council would have laid off these clerical employees even absent the administrator's recommendation. Contrast Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990) (violation where there was discriminatory recommendation to transfer employee and no independent investigation by board before adopting recommendation). We thus dismiss the allegation of discriminatory layoffs.

Finally, although the mayor may have told the employees slated to be laid off about certain terms and conditions of employment for part-time employees, we adopt the Hearing Examiner's determination that the City did not negotiate over any terms and conditions of employment with those employees.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Regan voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision. Commissioner Wenzler was not present.

DATED: February 22, 1993
Trenton, New Jersey
ISSUED: February 23, 1993

H.E. NO. 93-8

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

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-91-258

TEAMSTERS LOCAL 115,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Commission find that the City of Somers Point did not violate 5.4(a)(1), (3) or (5) when it laid off three employees, one of whom was a shop steward. The Charging Party, Local 115, proved that the City's business administrator was motivated to recommend that the three employees be laid off because they engaged in protected activities. The City, however, demonstrated that the City council's adoption of the recommendation was based upon fiscal considerations and that the council chose to RIF clerical staff rather than other employees in order to preserve basic municipal services. The Hearing Examiner also finds that the City did not negotiate with the three employees when it discussed other possible future part-time employment.

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

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Appearances:

For the Respondent, Roger C. Steedle, attorney

For the Charging Party, Walt DeTreuX, attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 25, 1991, Teamsters Local 115 filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of Somers Point violated subsections 5.4 (a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} Local 115 alleges that the City

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

laid off a shop steward and two other union members in retaliation for filing grievances. Local 115 also alleges that the City negotiated directly with the three laid off employees to rehire them as part-time employees.

A Complaint and Notice of Hearing issued on April 26, 1991 (C-1).^{2/} On May 13, 1991 the City filed an Answer (C-2), denying that any of its actions towards the three employees were prompted by anti-union hostility. The City asserts that the layoffs were based upon legitimate budgetary concerns. On June 13 and 21, 1991 I conducted a hearing at which the parties examined witnesses and presented exhibits.^{3/} The parties filed briefs by August 28, 1991. Based upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. Local 115 represents all full-time blue and white collar City employees. The parties' collective agreement was effective from January 1, 1990 to December 31, 1991 (J-1).^{4/}

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- ^{2/} The exhibits are designated as follows: Commission exhibits are "C"; the Charging Party's exhibits are "CP"; Respondent's exhibits are "R" and joint exhibits are "J".
- ^{3/} At the City's request all witnesses were sequestered except for Business Administrator Judson A. Moore, attending for the City, and Business Representative Karen Aughenbaugh, attending for the Local 115, as resource persons.
- ^{4/} J-1 does not explicitly exclude part-time employees. Article 32, Salaries, lists all employees by title, name and yearly salary. I infer from the salaries listed that all the employees covered by the agreement are full-time.

The City is a civil service municipality governed by an elected mayor and council (1T41).^{5/} Carroll Burke, Tracey Hughes and Kathy Ruth were clerical employees of the City and Local 115 members. Judson Moore was appointed as business administrator and chief financial officer by the City on May 21, 1990. Moore was hired by the council to "run a tight ship" and to control operational expenses (1T37; 2T172). He is responsible for the day-to-day administration of the City, as well its financial decisions. He reports directly to the mayor and council (2T22).

2. In the first two weeks after Moore was hired, Tracey Hughes asked Moore to settle a pending grievance for compensation for out-of-title work. The grievance was settled at the second step in June of 1991 (1T50-1T51; 2T43-2T44).^{6/}

3. Until July, 1990, clerk typist Kathy Ruth and account clerk Ann Leonetti worked in the City's finance office (1T12). Moore felt the finance office was over-staffed with three employees; whereas neither the tax collector nor the tax assessor had a full-time secretary. The tax collector, who has a deputy, requested that Moore assign a clerk to her office. On July 13, 1990, Moore

^{5/} Transcript references are designated as: "1T" for the June 13, 1991 hearing and "2T" for the June 21, 1991 hearing.

^{6/} The grievance procedure, Article XV of the parties' agreement, has three steps (J-1). The first step is between the shop steward and employer's representative, who is Moore. The second step is between the Local 115' business representative and the employer, who is represented by the City's negotiations team (2T104).

reassigned Leonetti from the finance office where Ruth worked to the tax collector's office. Moore made the transfer in order to provide more effective clerical coverage to the offices of the tax collector and the tax assessor (2T24-2T25). The tax assessor is part-time and was assisted by Hughes, who is also assigned to the City clerk's office. Hughes had complained to Moore about the inconvenience of dividing her time between the two offices. Moore felt that Leonetti's assignment to the tax collector's office would add a needed third person and relieve Hughes, because Leonetti could also assist the tax assessor whose office functions are similar. Moore picked Leonetti because she had more experience than Ruth or Hughes (2T27).

Ruth complained to Moore about the transfer because she felt the move was unfair to Leonetti and suggested that she be assigned to the tax collector's office instead (1T12). Moore rejected Ruth's offer. On July 23, 1990, Ruth filed a grievance seeking out-of-title compensation for assuming Leonetti's work after her transfer (1T11).^{7/}

4. Anyone parking at City Hall, including employees, must use a parking lot adjacent to the City Hall. On August 22, 1990, Moore issued a memo to all department heads advising them that nine of the parking spaces along the side of City Hall would be reserved for parking for taxpayers and visitors only (R-3). Because there

^{7/} Leonetti, as an account clerk, was compensated at a higher rate of pay than Ruth, who was a clerk typist (2T28; 1T13).

were fewer remaining undesignated spaces, employees accustomed to parking on the side of the building would now have to park their cars approximately 15 feet further away in the center of the parking lot (1T16; 2T36-2T37). Moore, the city clerk and the mayor retained their parking places on the side of the building (1T81). Carroll Burke complained to Moore about the memo. She told him that she thought he was trying to "break down the morale" of the employees (1T82; 1T88).^{8/}

5. On September 19, 1990, Moore agreed to settle the out-of-title grievance at the first step by offering to pay Ruth compensation for the out-of-title work and to assign her, instead of Leonetti, to the tax collector's office (1T13). His settlement offer was rejected by the mayor and the council who wanted to wait for a desk audit to confirm whether or not Ruth actually performed the work of a higher title (2T86). Ruth and Leonetti switched offices on September 24, 1990; but Ruth did not receive her back pay (1T18). When she questioned the delay, Moore sent her a memo dated October 3, 1990, explaining that the council had requested that the state department of personnel conduct a desk audit of the position in the finance office (R-8; 2T14; 2T29-2T30).

A Local 115 representative then met with the mayor to discuss the grievance (1T14). The State department of personnel

^{8/} There was extensive testimony about further changes in employee parking occurring on February 5, 1992, concerning Moore and Hughes. That testimony is not relevant to a decision here.

notified the City that it could not conduct an audit in a timely fashion because of its backlog of cases. The City decided not to request the audit and Ruth was paid on November 2, 1990 (1T18; 2T86).

6. September 21, 1990 was the last day Ruth worked in the finance office before being transferred to the tax collector's office. The director of finance, Ruth's immediate supervisor, asked Ruth to distribute the paychecks because she would not be in the office that day. Ruth gave out the paychecks sometime before noon and left at 3:30 p.m. after informing the City clerk that she was sick (1T15).^{9/}

On September 24, Moore sent Ruth a memo informing her that she had distributed the paychecks too early; that she had left work without giving the proper notification to her supervisor; and that she left the finance office unattended (1T16; 2T32-2T33). Ruth wrote a memo to Moore in response, indicating that she felt he was harassing her because of her recent grievance (1T16).

The record shows that Moore issued many directives aimed at implementing tighter supervision and more consistent office policies (1T36; 2T 34). Among these were a directive to the finance director about not distributing checks before 11 a.m. and a directive that Moore be notified if an employee is sick and the immediate

^{9/} Local 115 asserts that Ruth had called her supervisor who gave her permission to leave early (2T89). I find no support in the record for this assertion.

supervisor is not available (1T29; 2T33). Moore usually addressed these directives to the department heads who were then responsible for briefing their staffs (1T87). There is no evidence to refute Ruth's testimony that she was unaware of these directives. But I do not completely credit Moore's testimony that he merely wanted to inform Ruth of these recent changes in office policy in order to ensure her compliance (2T35). The day Ruth distributed the checks before noon was her last day in the finance office; therefore, she would not be performing this duty again. Moore issued the memo within one work week of settling Ruth's out-of-title grievance. Based on the timing of the memo, I infer that Moore's issuance of it was motivated in part by Ruth's grievance.

7. In August 1990, the State legislature made changes to the municipal cap law (2T150). Shortly thereafter, the City council began to formulate its 1991 budget. The council felt that the City was "coming upon hard times;" therefore, unlike the previous year, council members made a conscious effort to be "active participants" in the budget process from the beginning (2T161-162).

Councilman Michael Barnes, the City's finance director and a member of its negotiations team, "pounded" away at the council about the fact that these changes would negatively affect the City's budget, and that one of the problem areas was health care costs (2T164; 2T70). The council considered changes in the employee prescription plan and on October 4, 1990, presented a proposal to the PBA and Local 115 (R-14). Local 115 did not respond to the offer (2T171).

8. Moore was aware that Ruth was taking her lunch hour from 2 p.m. to 3 p.m. (1T52, 2T95). Moore testified that the City clerk had complained to him that Hughes' lunch hour, from 11:45 a.m. to 12:45 p.m., interfered with her and the deputy clerk's lunch hours (1T52; 2T38).^{10/} On October 19, 1990, Moore issued a memo to all office staff concerning lunch breaks and other office procedures and policies, directing that lunch breaks were to be taken for one hour between the hours of 12 noon and 1 p.m. or from 1 p.m. to 2 p.m. (R-2). Moore knew that this policy affected only Ruth and Hughes (1T68; 2T94). Shortly after Ruth received the memo, she filed a grievance concerning both her and Hughes' lunch hours (1T18).

At a first step grievance conference on December 5, 1990, Moore agreed to allow Hughes' lunch period to return to 12:30 p.m. to 1:30 p.m. (2T92-2T93). Moore testified that he agreed to the settlement because the 12:30 p.m. to 1:30 p.m. lunch hour was a compromise acceptable to the City clerk and Hughes (2T92). Hughes' and Burke's testimony does not support Moore's rationale that the 12:30 p.m. to 1:30 p.m. was a compromise. Hughes testified that this time had been her lunch hour for four and a half years until it was change by Moore's policy (1T52). I credit her testimony. Burke testified that the City clerk told her that Hughes's lunch hour was never her problem and that she was willing to put Hughes back to her

^{10/} Hughes testified that her lunch hour was from 12:30 p.m. to 1:30 p.m. (1T52).

original lunch hour as soon as the deputy clerk returned from vacation (1T80; 1T52). Given the fact that the grievance settlement was Hughes' original lunch hour and Burke's testimony that this time was never the City clerk's problem, I do not credit Moore's testimony that his motive for changing Hughes' lunch hour was because of a complaint by the City clerk (2T38).^{11/}

The issue of Ruth's lunch break, however, was not settled until the second step grievance meeting held on January 25, 1991 (R-13). At the first step grievance meeting, Moore had learned that in 1988 Ruth's previous supervisor agreed to the lunch hour when Ruth made it a condition of her accepting a full-time position with the City (1T18; 2T53). Local 115 and the City agreed to let Ruth continue her taking her lunch hour from 2 p.m. to 3 p.m. (2T93; 2T175-2T176).

9. One week before the City's annual Halloween party, Moore agreed to release Ruth and Leonetti to help decorate. It was customary for Ruth and Leonetti to be released for a half-day for this purpose. However, two days before the party, Moore told Ruth and Leonetti that if they wanted to participate they would have to use their vacation time (1T17; 2T11; 2T40). I do not credit Moore's testimony that he acted on advice from Karen Aughenbaugh, Local 115 Business Representative, in this matter. Moore testified that

^{11/} I did not find Moore's testimony credible on a number of issues concerning his interactions with the three employees. It was generally unresponsive or self-serving.

Aughenbaugh advised him against continuing the custom of giving release time for this activity as it could be construed as a past practice and might lead to claims for overtime. I do find credible Moore's testimony that keeping costs down was a concern; and therefore he did not want to pay for non-work related activities (2T41).^{12/}

10. On October 26, 1990, Moore issued a memo to department heads indicating that budgetary constraints made it unlikely that the City would buy back unused vacation days as it had in the past (R-7). On November 9, 1990, Moore sent another memo to department heads stating that the City would close its offices on December 24, 1990 on the condition that employees use their vacation time for that day (R-6). In the past the Council had occasionally granted employees a half day holiday on Christmas eve and/or New Year's eve (2T179). On November 11, 1990, Moore sent a follow-up memo stating that no employee chose to take a vacation; therefore City offices would be open on December 24th (R-6).

11. On November 29, 1990 Local 115 appointed Burke as co-shop steward with Bernis Pieretti (1T65). On December 5, 1990, Moore met with Pieretti and Burke, who was attending her first step one grievance meeting (1T71). Burke took notes while Pieretti and

^{12/} It was also customary for Ruth and Hughes to work in the City's dog and cat vaccination clinic held on Saturday for compensation (1T16-17; 1T53). Instead of hiring Ruth and Hughes for the clinic in February 1991, the borough clerk cut back on the clinic's hours and she, Moore and the deputy clerk worked the clinic without pay (1T38; 1T62).

Moore discussed the changes in parking and several grievances that had been filed, including Ruth's and Hughes' lunch breaks, buy-back and carry-over of vacation days and closing City Hall on December 24 (1T77-1T78; 1T50). During the discussion about the change in Ruth's lunch hour, Moore stated that he did not like Ruth, and that he would lay her off if he had the opportunity (1T67; 1T96). Although Moore denied this statement (2T50), Pieretti and Burke corroborated each other's testimony. Both testified under a sequestration order; therefore I credit their testimony.^{13/}

There were other grievance meetings held before the end of January 1991 (1T69; 2T49). Pieretti and Burke complained that Moore was unresponsive during these meetings, telling them that he had to take matters back to City council (1T70; 1T97). Burke felt that Moore became increasingly antagonistic. Burke characterized Moore's complaints about the grievances as petty issues from whining women (1T70). At one grievance meeting, Moore told Burke that the City council had instructed him "to take back some of the things in the contract." (1T70; 1T84).

^{13/} Pieretti also testified that Moore stated he didn't like Hughes' attitude because Hughes talked about him to other employees (1T96). This heresay testimony is not corroborated by Burke's testimony. Although Burke testified that she took notes at the meeting, the notes were never submitted in evidence.

12. Moore gave the council an initial draft of the budget on January 4, 1991, that was approximately \$81,000 over the City's allowable cap expenditure of \$219,000 (2T153).^{14/}

Auditor Harry Scott demonstrated that insurances (health and liability insurances and surety bonds), and solid waste tipping and transfer fees were put under a 4 1/2% cap for 1991. When these new costs were added to the City's previous year's cap expenditures that must be rolled into the 1991 budget, the total cap expenditures for budget year 1991 come to approximately \$301,000: Insurances - \$90,000; solid waste expenses - \$57,000; salary and wages - \$124,000; pensions - \$14,000; and \$14,500 - other expenses (2T153).^{15/}

13. During January 1991 the City revised the draft budget twice (2T124). Moore asked Scott to check each of these preliminary budgets. Scott advised Moore that both of them were still over the cap allowance (2T156-2T157). None of the draft budgets called for layoffs (2T65)

^{14/} Councilman Barnes knew from his quick calculations in December, even before Moore presented the initial final draft budget to council, that the City had to make some "eliminations" (2T164). Given the unrefuted testimony that the council did not begin to consider layoffs until the end of January 1991, I do not interpret Barnes testimony to be an elliptical reference to layoffs.

^{15/} The City eliminated or reduced certain items that were subject to the cap: police cars, library services and legal expenses. The City had purchased new police cars in 1990; it turned over the administrative control of the library to the county; and reduced its legal expenses because of completed litigation from 1990 (2T74-2T75; 2T165).

The council did not discuss layoffs until late in January 1991, when it decided that the only way to get the budget below the cap without raising taxes was to reduce staff (2T76-2T77). The Council was bitterly divided about the decision of which department should be reduced (2T165-2T167). The council was reluctant to lay off any of the City's police, three of whom were hired in 1990, or any employees in the public works department which absorbed layoffs in 1988 and 1989 (CP-2; 2T77-2T78). Moore recommended that a reduction in clerical staff would have the least effect on City operations (2T166). Ruth, Hughes and Burke were in clerk-typist positions that had been converted from part-time in the past three years (2T169).^{16/} At a budget meeting on January 31, 1991, the council decided to lay off all three clerk-typists (2T124; 2T169).

14. On February 4, 1991, Mayor Parker and Moore called Ruth, Hughes, Burke and court clerk Debbie Havrilchak into Moore's office for a meeting, where the mayor informed Ruth, Hughes and Burke that they were to be laid off. They were in fact laid off effective on March 22, 1991 (1T19; 1T55; 1T72). Havrilchak was

^{16/} Ruth was hired part-time in 1988, becoming full-time that same year (1T10; 1T18); Hughes was hired part-time in 1986 becoming full-time in 1987 (1T56); and Burke was hired part-time in 1988, becoming full-time in 1990 (1T73-1T74).

present because Moore and the mayor believed that she had replaced Pieretti as Burke's co-shop steward (2T54).^{17/}

Ruth, Hughes and Burke testified under a sequestration order. Their testimony differs widely as to what the mayor said to them after he announced that they were to be laid off.^{18/} Burke was the only one who testified that the mayor explained that they would be reinstated immediately as 15-hour, part-time employees and given single medical coverage effective the first day of their layoff, March 22, 1991 (1T72). Hughes testified on direct, stating twice that the mayor said that he would "try" to reinstate them as part-time employees on the first day of their layoff (1T55).

^{17/} Five days before the meeting, Pieretti sent a memo dated January 30, 1991, addressed to all blue and white collar workers in Local 115, with copies to Moore and Local 115 Business Agent Aughenbaugh, saying:

Effective immediately, I am no longer Shop Steward for the White Collar Workers. Debbie Havrilchak has agreed to take my place. If you have a problem or any question please contact Debbie or Carroll Burke. (R-1)

Havrilchak's "appointment" by Pieretti had not been authorized by Local 115 business agents, and therefore was not official under the parties' agreement (Article 8, J-1; 1T106). Given the conclusiveness of Pieretti's memo and the fact that the Local 115' business representative had not contacted Moore to disavow the "appointment", I find that the City's acceptance of Havrilchak as a shop steward reasonable.

^{18/} Ruth and Burke testified that they were all shocked by the news (1T38; 1T72); Hughes testified that she cried (1T55). Given the emotional impact that the mayor's news had upon these three witnesses, it is understandable that there were differences in what each witness understood was said to them after the mayor made the initial announcement of their layoff.

However, on cross, Hughes stated that the mayor said he would reinstate them as part-time employees (1T63). Only Ruth testified on direct that the mayor asked them to cooperate with the City and with each other by choosing whom among them would "step away," because the City could only afford to offer part-time employment to two of them (1T20). On cross-examination, she contradicted herself, testifying that the mayor was very clear that she would be offered her job back the day after she was laid off at 15 hours, half pay and single benefit (1T41). Ruth added that the offer was never discussed again, nor reduced to writing (1T40).

Even though there are discrepancies in the testimony of these three witnesses, they all agreed that the mayor talked in terms of part-time employment at half-pay and single medical coverage. There were three part-time clerical positions in the draft budget at the time of the lay off meeting (2T55; 2T126; 2T193); therefore it is credible that the mayor was discussing three part-time positions.^{19/} I cannot, however, conclude from the Hughes and Burke's conflicting testimony that the mayor was making

^{19/} Ruth's direct testimony was the most divergent of the three witnesses on this point. Her statement that the City did not have three part-time positions to offer them is seemingly corroborated by other testimony and documents. Hughes and Burke were notified of a part-time position in the court clerk's office on April 9, 1991; and on April 30, 1991, Ruth was offered a part-time position in the tax office (R-10; R-11). But there is no support for Ruth's assertion that the City knew on February 4, 1991, that two months later one of the three part-time positions presently proposed in the budget would be eliminated; therefore I cannot credit her direct testimony.

an offer of employment for those three positions. Therefore, I credit Moore's testimony and find that the mayor was explaining what the City planned to offer if there were sufficient funds (2T55).

15. After the City notified Ruth, Hughes and Burke of their layoff on February 4, 1991, the council continued deliberations on the draft budget (2T183). The council wanted to guarantee a zero tax base increase in 1991 (2T166). With that goal in mind, Barnes sent budget recommendations to the mayor and other council members on February 24, 1991 (CP-2). He recommended that the council cut the requests for part-time positions in Moore's office, the city clerk's office, the court clerk's office, and in department of building and grounds (2T187).

16. After Ruth, Hughes and Burke were laid off on March 22, 1991, the City advised Hughes and Burke on April 9 that one part-time position was available in the court clerk's office. On April 30, Ruth was offered her former job in the tax office as a part-time position. All three employees refused the offers (R-10; R-11).

17. The official final draft budget (the sixth revision) was completed on May 1, 1991 (R-12)^{20/} In order to ensure that the City would be able to continue to offer adequate services to the public, particularly in those departments where the demand is seasonal or periodic (2T190), the council provided in the budget for

^{20/} This budget was sent to the State department of community affairs for review (2T126).

two part-time positions: One part-time employee was hired in the court clerk's office on May 1, 1991 (2T140), and a second part-time employee was hired in the highway department in April, 1991 (2T134). The salary for the court clerk is outside the cap (2T144). A sum of \$10,460 was also provided for hiring temporary clerical employees (2T126): Temporary help was hired in the tax office for three weeks; in the construction office for two weeks; and in the City clerk's office for three days (2T128-2T133).

18. Local 115 attempted to discredit the City's budgetary information through the testimony of the City's finance director, Lisa Mell. Mell was Ruth's former supervisor (1T12). Mell testified that the City was carrying a \$40,000 surplus as of the end of June, mid-way through the 1991 budget year (2T195). Mell testified that this figure represents the salary for two of the three laid-off employees (2T202). Mell admitted, however, that her estimate of a surplus was arrived at by simply comparing the total expenditures with the total appropriations (2T195). She also admitted that the surplus will change, most likely downward, throughout the next six months. For example, some seasonal salary expenditures had not yet been incurred (2T199).^{21/} In addition, other costs such as health care were already well over the 50% mark and could continue to escalate (2T200). I was not convinced by Mell's testimony that the City had sufficient funds to avoid laying off employees, or that the City's budget was incorrect.

^{21/} Mell resisted the suggestion by Local 115 that those accounts that were under 50% were "over-budgeted" (2T196).

19. The City's part-time tax assessor, F. William Mitchell, told Moore just before the three employees were laid off in March, that he was disappointed to lose Ruth. Moore responded, "Well, if they had not fought me when I first came here." (2T10). Moore testified that Mitchell misunderstood the context in which the comment was made. Moore stated that he was referring to the fact that Local 115 fought the City's proposal for a revised health care plan which, if accepted, might have provided sufficient funds to save the three employees' jobs (1T58). I do not credit Moore's explanation. There is nothing in the record to suggest that Mitchell was involved in the City's proposal, thereby giving him a point of reference for Moore's comment.

ANALYSIS

Local 115 alleges that the City's layoff of three employees, ostensibly due to budgetary reasons, was pretextual. Local 115 asserts that there were sufficient funds in the City's budget to retain these employees, but that the City laid them off because they antagonized Moore, the City's business administrator, by filing and processing grievances. Local 115 also argues that the City attempted to negotiate directly with the three employees to reduce their hours of work from full-time to part-time. As a remedy, Local 115 seeks reinstatement of these employees to their former positions with back pay and benefits, without loss in seniority.

The City denies that it acted with anti-union feeling when it laid off Ruth, Hughes and Burke. It asserts that the layoffs were a cost-cutting measure necessary to comply with the mandatory state cap law. The City argues, in the alternative, that even if Moore exhibited hostility toward the three employees, the council acted solely for economic reasons when it laid them off. The City also denies that it negotiated directly with Ruth, Hughes and Burke.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, 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 the employer did not present any evidence of a lawful motive 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 motives unlawful under our Act and other motives together 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 anti-union animus was a motivating or substantial reason for the personnel action.

Ruth, Hughes and Burke were engaged in protected activity and Moore knew of that activity. Ruth and Hughes filed grievances which were processed by Moore as the City's step one grievance representative. Ruth was a particularly active participant in the grievance process. Although Burke had not filed any grievances, she served as shop steward for three months before she was laid off. In that capacity, Burke met several times with Moore at grievance meetings.

I find direct and indirect evidence in the record that Moore was hostile toward the laid off employees because they exercised their protected rights. I find direct evidence of Moore's hostility in his comment that he would lay off Ruth if he had the opportunity. He made this comment at a grievance meeting where he was discussing the settlement to Ruth's second grievance. Moore attempted to accomplish this by recommending that all three employees be laid off. I find that Moore was, in part, motivated by a reasonable perception that reducing clerical staff would have the least effect on City operations. However, I also conclude that he had a second motive as expressed in his comment to the City tax assessor -- "If they had not fought me when I first come here."

The record establishes by indirect evidence that Moore's reprimand of Ruth for passing out paychecks early on her last day in

the finance office was in part motivated by Ruth's filing an out-of-title grievance. Moore also exhibited mixed motives when he issued his policy on lunch hours. Moore knew that the effect of this policy would be to change only Ruth's and Hughes' lunch hour. I conclude that Moore was reasonably concerned about preventing what appeared to be a special privilege afforded Ruth which could compromise the operation of the office. But I also conclude that Moore's enforcement of the lunch hour policy against Hughes was prompted by her grievance. It is revealing of Moore's attitude that he perceived the employees who filed and processed the grievances as whining women concerned with petty issues.

But the inquiry does not end here. It is not enough that Local 115 prove animus on the part of Moore alone. Although Moore, as the City's business administrator is an agent of the City, I do not find evidence in the record to prove that the City also acted with anti-union animus when it adopted Moore's recommendation to lay off Ruth, Hughes and Burke. Rather I find that the City established a legitimate business justification for its actions and that Local 115 failed to prove that the City's justification was pretextual.

The City's first three budgets, drafted in January, exceeded the State's cap and needed to be pared down. The council was determined not to raise taxes to fund the budgetary overruns; therefore, it scrutinized the one item subject to the cap that could be reduced, salary and wages. The record supports the council's subsequent decision to lay off the three clerical employees as a reasonable response to what it wanted to achieve.

The council then solicited Moore's recommendation, which was that the clerical staff be reduced. It deliberated over Moore's recommendation along with other considerations before it made its layoff decision. The council was concerned that basic City services not be compromised by a reduction-in-force. The records show that the council rejected any layoffs in either the police department, which had recently hired three officers, or in the public works department, which already had layoffs in 1988 and 1989. I conclude that the council decided that layoffs in the clerical staff would be more fair and less disruptive. This conclusion is supported in the record by the fact that the council further revised its provision for part-time staff in the three subsequent draft budgets after February 4, 1991. First, the number of part-time clerical positions provided for was decreased from three to two in the official final-draft budget on May 1, 1991; and second, the City provided for hiring only temporary help to cover any periodic demands for increased clerical services.

I also find that the council chose to lay off Ruth, Hughes and Burke because they were the least senior of the clerical staff. Each employee was in a full-time position that had been converted from a part-time position within the previous three years.

I do not find that Local 115 successfully rebutted the City's argument that budgetary considerations were the reason for the layoff. Therefore, I conclude that the record supports a finding that the council laid off Ruth, Hughes and Burke because of budgetary considerations.

Finally, I consider Local 115's argument that the City refused to negotiate with it when it allegedly offered part-time employment to Ruth, Hughes and Burke during the February 4, 1991 meeting, to announce layoffs. The record supports a conclusion that the mayor was explaining what positions might be available if the council was able to secure the funds. Since there was no offer of employment, the mayor was not negotiating with the three employees.

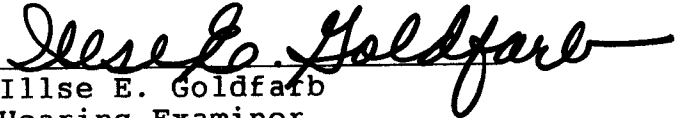
Based on the foregoing, having found that the City did not negotiate with Ruth, Hughes and Burke when it discussed with them possible future part-time employment, I find no violation.

CONCLUSION OF LAW

The City of Somers Point did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) when it laid off three employees or when it discussed other possible part-time employment with them.

RECOMMENDATION

I recommend the complaint be dismissed.


Ilse E. Goldfarb
Hearing Examiner

DATED: August 24, 1992
Trenton, New Jersey