

P.E.R.C. NO. 99-6

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WASHINGTON,

Respondent,

-and-

Docket No. CO-H-95-211

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO, Local 1040 against the Township of Washington. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it laid off three of the nine employees in CWA's negotiations unit of public works supervisors in retaliation against one of the supervisors for his protected activity as a CWA organizer, shop steward and negotiations representative. The Commission accepts the Hearing Examiner's conclusion that the layoff was not discriminatorily motivated.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Ruderman & Glickman, attorneys  
(Steven S. Glickman, of counsel)

For the Charging Party, Weissman & Mintz, attorneys  
(Judianne Chartier, of counsel)

DECISION

On December 21, 1994, the Communications Workers of America, AFL-CIO, Local 1040 filed an unfair practice charge against the Township of Washington. The charge, as amended on January 4, 1995, alleges that the Township violated 5.4a(1), (2), (3), (4), (5), and (7)<sup>1/</sup> of the New Jersey Employer-Employee

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4)

Relations Act, N.J.S.A. 34:13A-1 et seq., when it laid off three of the nine employees in CWA's negotiations unit of public works supervisors. The charge specifically alleges that the Township laid off Anthony Sebastiano, Kenneth Ryker and John Rakus in retaliation against Sebastiano for his protected activity as a CWA organizer, shop steward and negotiations representative.

On March 27, 1995, a Complaint and Notice of Hearing issued. The Township's Answer denied that the layoffs were retaliatory or otherwise violated the Act.

On October 8, 1996, Hearing Examiner Stuart Reichman began a hearing. The parties examined witnesses and introduced exhibits. The Hearing Examiner permitted CWA to amend its charge to allege that Ryker's layoff was motivated by hostility towards his support of CWA. But at the end of CWA's case, the Hearing Examiner dismissed that allegation because he found no evidence that the Township knew of such support. Special permission to appeal that ruling was denied. P.E.R.C. No. 98-64, 24 NJPER 5 (¶29003 1997).

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1/ Footnote Continued From Previous Page

Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

On July 10, 1997, a second day of hearing was held. The Hearing Examiner dismissed the charge insofar as it contested the layoff of Rakus since no evidence showed that he had engaged in CWA activity. After the Township presented its case, the hearing ended.

On April 27, 1998, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 98-27, 24 NJPER 281 (¶29133 1998). He found that the layoffs were prompted by a two million dollar decrease in revenues; the layoffs encompassed 14 employees spread throughout several departments; and Business Administrator Mary Ann Chalow, the person who decided which employees would be laid off, selected employees for layoff based on inverse seniority and did not know about Sebastiano's CWA activity.

On May 12, 1998, CWA filed exceptions. It asserts that the Hearing Examiner erred when he found that: the employer did not know of Ryker's CWA support; Chalow did not know of Sebastiano's CWA activity; CWA's negotiations unit was not disparately affected by the layoffs; and the Township was not hostile towards Sebastiano's and Ryker's CWA activity.

On May 21, 1998, the Township filed a response. It asks that the Hearing Examiner's findings and recommendations be adopted.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-13) are accurate. We adopt and incorporate them. We add that Chalow began her employment with

the Township in November 1993 and did not know of CWA's organizing campaign before then or participate in negotiations with CWA afterwards (2T47-2T49).

In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth the standards for assessing whether a disputed personnel action was illegally motivated by hostility towards protected activity. Under Bridgewater, 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 another 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 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

anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Sebastiano helped form the negotiations unit of public works supervisors and to gain representational rights for CWA. In doing so, he communicated with the Mayor, the Council, and the former Business Administrator (Doug Chastain). He asked the Township to recognize CWA as the majority representative and he presented a list of the employees, presumably including Ryker and Rakus, to be included in the negotiations unit; the record, however, does not indicate that the Township representatives received authorization cards from these employees or were told that Ryker or Rakus personally supported CWA. Once CWA was elected as the majority representative, Sebastiano became a shop steward and a member of its negotiations team and he met with the Mayor and other Township representatives (but not Chalow). We thus conclude that the Township knew about Sebastiano's activity on CWA's behalf, but not any CWA activity by Rakus or Ryker.

We next examine the record for evidence of hostility towards Sebastiano's activity on behalf of CWA. The Mayor was hostile. He told Sebastiano that he was unhappy that the public works supervisors were joining a union because the Township already had too many unions. During negotiations, the Mayor stridently objected to Sebastiano having discussed with Rakus an issue about Rakus's work week that had arisen in negotiations.

The Mayor believed that since Sebastiano was not the sole CWA representative, he had no business discussing this negotiations issue with Rakus. He wrote Sebastiano a memorandum stating that Sebastiano's discussion with Rakus had undermined the "trust which must prevail at the negotiations table" and urging that Sebastiano remove himself from CWA's negotiations team. The memorandum concluded:

The response of the negotiating team to my direct request relative to your continuing as part of that team, will dictate any further action taken by me and my position relative to future negotiations with the Communications Workers of America.

This memorandum proves the Mayor's hostility towards Sebastiano for his activity as a negotiations representative.<sup>2/</sup>

CWA must prove more than that the Mayor was hostile towards Sebastiano's protected activity. It must prove that this hostility was a motivating factor in the decision to lay off Sebastiano. The Hearing Examiner concluded that this nexus was not established. While we believe this is a close issue, we accept that conclusion.

There is no direct evidence of a nexus between the Mayor's hostility and Sebastiano's layoff. However, the timing is

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<sup>2/</sup> CWA filed an unfair practice charge asserting that this memorandum independently violated 5.4a(1), but the parties settled that charge. We therefore do not determine whether its issuance constituted an unfair practice by itself. However, the memorandum may be considered as evidence of anti-union animus relevant to the instant charge.

suspicious since the planning for the layoffs began in August 1994, shortly after the Mayor issued his intemperate memorandum on July 19, 1994 and probably about the time or soon after that Sebastiano attended two more negotiations sessions despite the Mayor's "direct request" that he discontinue his participation. Further, while the layoffs were spread through the Township's departments, supervisors in the public works department and CWA's negotiations unit were hit proportionally harder by the layoffs than employees in other departments and other negotiations units. And the Mayor had the final say in approving the list of employees to be laid off. Nevertheless, the record supports the Hearing Examiner's findings that: the Township faced a two million dollar shortfall in anticipated revenues for 1995; Business Administrator Chalow decided which employees would be laid off; she did not know about Sebastiano's CWA activity or the Mayor's memorandum and was not motivated by anti-union animus; and the Mayor accepted all her recommendations concerning the 14 employees to be laid off. Chalow spread the layoffs among all departments to minimize the effect on any one department and she selected employees for layoff in each department according to their seniority.

Given the Hearing Examiner's acceptance of Chalow's testimony and absent any specific proof that the Mayor interfered with, influenced, or modified her recommendations, we accept the Hearing Examiner's conclusion that Sebastiano's layoff was not




discriminatorily motivated. We also agree with him that the other allegations in the Complaint have not been proven.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. Commissioners Boose and Wenzler were not present.

DATED: July 30, 1998  
Trenton, New Jersey  
ISSUED: July 31, 1998

H.E. NO. 98-27

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

In the Matter of

TOWNSHIP OF WASHINGTON,

Respondent,

-and-

Docket No. CO-H-95-211

COMMUNICATIONS WORKERS  
OF AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission found that the Township of Washington did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it laid off Anthony Sebastiano and other negotiations unit employees. The Hearing Examiner found that Sebastiano was laid off based on his seniority and as part of an overall reduction in force which affected all Township departments. The Hearing Examiner rejected the charging party's claim that Sebastiano and Kenneth Ryker were laid off in retaliation for engaging in protected activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall 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.

H.E. NO. 98-27

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

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Appearances:

For the Respondent, Ruderman & Glickman, attorneys  
(Steven S. Glickman of counsel)

For the Charging Party, Weissman & Mintz, attorneys  
(Judianne Chartier, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On December 21, 1994 and January 4, 1995, Communications Workers of America, AFL-CIO, Local 1040 ("Local 1040" or "Charging Party") filed an unfair practice charge (C-2)<sup>1/</sup> and amended unfair practice charge (C-3) with the Public Employment Relations Commission ("Commission") against the Township of Washington<sup>2/</sup>

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<sup>1/</sup> Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to the Charging Party's exhibits, and those marked "R" refer to Respondent's exhibits. The transcript citation 1T1 refers to the transcript developed on October 8, 1996 at page 1, and 2T refers to the transcript developed on July 10, 1997.

<sup>2/</sup> The Township of Washington is located in Gloucester County.

("Township" or "Respondent"). Local 1040 alleges that the Township violated the Act by laying off Anthony Sebastiano, a union shop steward and activist, and by laying off three of nine negotiations unit members. Local 1040 contends that the Township's actions violated N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act ("Act").<sup>3/</sup>

On March 27, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On April 4, 1995, the Township filed its answer (C-4) generally denying that its actions violated the Act. Hearings were conducted on October 8, 1996 and July 10, 1997 at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the Charging Party's case-in-chief,

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<sup>3/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

I granted Charging Party's motion to amend the unfair practice charge at which time it alleged that the Township violated subsections a(1) and (3) of the Act when it laid off Kenneth Ryker in December 1994 (1T77-1T78). Respondent orally answered denying it engaged in any violations of the Act with respect to Ryker (1T78). I granted Respondent's motion to dismiss against Ryker (2T6). I found no evidence that Respondent had any knowledge of Ryker's union activity (2T6).

Another element of the charge alleged that the Township's decision to lay off three of the nine negotiations unit members was retaliatory. The three unit members at issue are Sebastiano, Ryker and John Rakus. Having granted the motion to dismiss regarding the Ryker allegation, and having no evidence concerning Mr. Rakus' union activity or the employer's knowledge with respect thereto, I also granted Respondent's motion to dismiss regarding this element of the unfair practice charge (2T7). At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by March 5, 1998.

Upon the entire record, I make the following:

#### FINDINGS OF FACT

1. The parties stipulated that the Township was a public employer, the Association was a public employee representative and individual employees were public employees within the meaning of the Act at all times relevant to this case (1T9).

2. In June 1989, Anthony Sebastiano started as superintendent of public works (1T13). Sebastiano had a good relationship with Mayor Gerald Louango in 1989 and that positive relationship has been maintained through the time of this hearing (1T14; 1T41). In 1989, the title superintendent of public works was not included in any collective negotiations unit (1T14).

3. As a head mechanic, Frank Campbell was a supervisor and eligible for inclusion in the supervisors collective negotiations unit (1T47). Prior to Campbell's serving as head mechanic, he worked in a non-supervisory position in the public works department. Non-supervisory public works employees were represented by AFSCME. Campbell served as an AFSCME shop steward and, in that capacity, gained experience handling grievances and arbitrations (1T31-1T32).

4. During a conversation, Campbell told Sebastiano that police supervisors had formed a union. Campbell suggested that the public works supervisors also consider forming a union because if they did not, they would be the only group left that was unrepresented (1T44). Since he had a preexisting relationship with AFSCME, Campbell contacted an AFSCME representative to obtain literature and authorization cards (1T15-1T16; 1T34-1T35). Campbell and Sebastiano met with the other supervisors, spoke to them about organizing and gave out literature and authorization cards (1T15-1T16). Some of the supervisors were uncomfortable with the same employee organization representing both rank and

file and supervisory employees, so the supervisors ultimately withdrew from AFSCME and sought to be represented by Local 1040 (1T34-1T35). A CWA representative met with the supervisory employees and distributed authorization cards (1T16).

5. Sebastiano and Campbell compiled a list of all employees who they thought should be included in the supervisors' collective negotiations unit (1T17-1T18; 1T36). They gave the list to Township Administrator Doug Chastin and told him that the supervisors wanted to form a union (1T18). Chastin told Campbell and Sebastiano that he would bring the list of proposed unit employees to the Mayor and the Township Council in an effort to obtain the Township's voluntary recognition of the employee organization (1T18). During the Council meeting at which voluntary recognition of the supervisors unit was raised, Council President Regal stated that supervisors were well treated and he did not know why they needed a union (1T42). During a conversation between Mayor Louango and Sebastiano, the Mayor told Sebastiano that he was not happy that supervisors were forming a union because he believed that the Township already had too many unions (1T26; 1T41; 1T43). Louango asked Sebastiano why the supervisors decided to organize (1T26). Sebastiano told the Mayor that since the police supervisors had formed a union, the public works supervisors were the only group that would not be represented by an employee organization (1T44). The Township Council voted not to voluntarily recognize the supervisors'

employee representative (1T42). Sebastiano told the Council that the employees had a right to form a union and they would file with the Commission in pursuit of that goal (1T42). Subsequently, a representation petition<sup>4/</sup> supported by an adequate showing of interest was filed with the Commission. The Township objected to some of the names included on the list and the parties ultimately agreed upon a unit consisting of nine employees (1T17; 1T36). An election was conducted which resulted in a majority of employees voting in favor of representation (1T16-1T17; 1T35-1T36). The employees' authorization cards were never disclosed to the employer (1T35-1T36).

6. Negotiations between Local 1040 and the Township began at the end of 1993 (1T19; 2T61). Sebastiano, Campbell and Cathy Wenzel were elected by the membership to comprise its negotiations team (1T18-1T19; 1T36-1T37). Local 1040's negotiations team conducted meetings with the membership periodically to keep it informed of issues arising during the sessions and to receive input from unit members (1T20-1T21).

7. During one of the negotiations sessions, an issue arose concerning a thirty-two (32) hour work week for John Rakus, Township Recycling Coordinator. After the session had concluded, Sebastiano spoke to Rakus about the 32 hour work week issue, however, Rakus knew nothing about it (1T21-1T22). Following

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<sup>4/</sup> I take administrative notice of Docket No. RO-93-124.



Sebastiano's and Rakus' conversation, Rakus called the Mayor in order to talk to him about the 32 hour work week matter (1T22). On July 19, 1994, as the result of that conversation, Louango issued the following memorandum to Sebastiano:

This afternoon, sometime after 2:00 P.M., John Rakus called my office and questioned me as to what I said regarding his salary. He indicated that you had come to him and shared a part of the conversation which ensued at negotiations earlier that day. Obviously, you chose to tell Mr. Rakus about a third of the conversation, rather than the entire discussion, in context, which was for all intensive (sic) purposes, hypothetical. The discussion was precipitated by a reference to a thirty-five hour week vs. a forty hour week and overall job responsibilities.

Given the fact that this was supposed to be negotiations in good faith, there was absolutely no reason for you to share any part of the meeting with anyone since in fact, you are not the sole agent representing the union. The only reason for such a blatant disrespect for the negotiations process was to create a problem, an adversarial position between Mr. Rakus and myself. You were overtly attempting to pit one person against another, something which seemingly has become a hallmark of your tenure with this township.

When there is reason for the matters of negotiations to be discussed with the rank and file, it should be done with all members of the negotiating team present as well as your professional representative. Obviously, this was not even remotely the case with regard to the unprofessional discussion which you had with Mr. Rakus.

The supervisor's negotiator constantly harps on the matter of "unfair labor practices". I submitted to all members of the negotiating team that your conduct was inexcusable, unprofessional and was an attempt at undermining the very basis of trust which must prevail at the negotiations table. As mayor, I will be hard pressed to

conduct meaningful negotiations in an atmosphere that dictates that every word must be measured forefend (sic) that it be repeated, out of context, in public. Believe me, Mr. Sebastiano, if I have something to say to any employee, I will do the talking, not an unofficial messenger.

Perhaps in the best interest of this entire process, you should remove yourself from the negotiations team in order that the balance of the team and this administration can work towards an acceptable agreement in an atmosphere of mutual respect and trust.

The response of the negotiating team to my direct request relative to your continuing as part of the team, will dictate any further action taken by me and my position relative to future negotiations with the Communications Workers of America. [CP-1]

8. Local 1040 filed an unfair practice charge with the Commission in response to CP-1 (1T25).<sup>5/</sup> In that charge, Local 1040 alleged, among other things, that:

On or about July 19, 1994, Mayor Gerald Louango wrote an intimidating memorandum to Superintendent of Public Works, Anthony Sebastiano, which threatened possible strained relations with Local 1040 of the CWA with respect to ongoing negotiations to achieve a first-time contract for supervisory employees. Sebastiano is a member of the negotiations team and was a key Union supporter in the organization of the Supervisory Unit.

As a result of discussions held during an exploratory conference conducted by a Commission staff attorney, the parties resolved the unfair practice charge (Docket No. CO-95-24) by executing a

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<sup>5/</sup> I take administrative notice of the unfair practice charge filed by Local 1040 against the Township in Docket No. CO-95-24, filed July 28, 1994.

settlement agreement. The Township did not admit that its conduct constituted an unfair practice with respect to its issuance of CP-1 nor did Local 1040 acknowledge that the Township's actions did not constitute an unfair practice within the meaning of the Act. Local 1040 withdrew the unfair practice charge as part of the settlement agreement.

9. Sebastiano continued as a member of Local 1040's negotiations team for two negotiations sessions after Louango's letter (1T25). The Mayor did not attend either of those sessions (1T39-1T40). Neither CP-1 nor the "Rakus issue" was raised during either of those sessions (1T40). Director of Public Works McKeever and Personnel Director and Assistant to the Mayor Jacqueline Lauletta attended those sessions on behalf of the Township (1T39-1T40). Neither of the Township's representatives gave any indication that they would not engage in collective negotiations because Sebastiano was present (1T40). Negotiations continued with discussions of areas to which the parties had not reached agreement and "give and take" was evident at the table during those sessions (1T40-1T41). Nevertheless, Sebastiano felt that his presence at the negotiations table might impede progress, so he told the other members of his negotiations team that it would be best for him to remove himself (1T25-1T26). Sebastiano voluntarily removed himself from the Local's negotiations team (1T26). Negotiations ultimately concluded in an initial collective agreement (1T41).

10. In August 1990, Kenneth Ryker was hired by the Township as superintendent of public works (1T51). Serving in that title, Ryker was eligible for inclusion in the supervisors' collective negotiations unit. Ryker signed a Local 1040 authorization card and voted in the mail ballot election conducted by the Commission (1T52). Prior to the election, Ryker's only involvement in the organizing campaign consisted of his attending informational meetings conducted by Local 1040 (1T53). Ryker and the Mayor never engaged in any discussion concerning the union (1T53).

11. In August 1994, the Township began preparations for a reduction in force (2T47). On or about November 30, 1994, employees, including Ryker, and union representatives were asked to attend a meeting to be conducted by the Mayor on December 1, 1994 (1T54). Ryker and Local 1040 representatives attended the meeting (1T54). On December 1, 1994, Sebastiano was injured so he did not attend the Mayor's meeting (1T27). Campbell told Sebastiano about the Mayor's meeting and advised him (Sebastiano) that he would be laid-off along with other Township employees (1T27-1T28). On December 1, 1994, Campbell did not say anything to Sebastiano concerning whether he would be rehired if the Township were able to secure additional funding (1T27-1T28). The Mayor advised employees during the meeting that they were being laid-off for fiscal reasons, however, if the Township's budget circumstances improved, employees might be called back (1T54-1T55).

12. Business Administrator Chalow was responsible for determining the number of positions to be laid-off in each department. She tried to spread the lay-offs among the departments in an effort to minimize any negative impact on any single department's efficiency (2T46). Employees represented by an employee organization were laid-off in order of least senior employee first (2T26). In Local 1040's negotiations unit, three employees were laid-off: Ryker, Sebastiano and Rakus. Ryker was the least senior employee and Rakus was the most senior employee among those laid-off (2T27). Campbell was not laid-off (1T58).

13. After compiling the list of Township employees to be laid-off, Chalow presented the list to the Mayor for approval (2T47). All of the employees included on Chalow's list were laid-off. The Mayor accepted Chalow's list and made no changes (1T48). The lay-off list included both employees represented by an employee organization and unrepresented employees (2T26). Fourteen employees were laid-off (2T10). While Chalow was involved in negotiations with several negotiations units, she had no involvement with Local 1040 (2T48). Chalow had met Sebastiano in her office and knew that he worked in the Township's Public Works Department, however, she knew nothing else about him. Chalow was not aware of the CWA's organizing campaign or any of the Township employees involved in the campaign (2T49).

14. For budget year 1995, the Township anticipated a decrease in actual revenues in excess of \$2 million dollars (2T8;

2T39). Decreases in revenues were anticipated in state aide, local revenues, surpluses, delinquent tax receipts and other budgetary areas (CP-2; 2T40-2T41; 2T45). Since the Township had raised taxes in each of the prior three years, the Mayor did not wish to raise taxes again (2T8). Thus, it was decided that budget cuts were necessary and reductions in the level of personnel would be made (2T8-2T9). Overall, personnel reductions through attrition and lay-off totaled \$584,000 (R-2). Savings from lay-offs totaled \$386,000, of which \$252,000 was from municipal services (R-1; 2T11). Reductions in personnel were experienced not only in the unit represented by Charging Party but also among employees working in other Township departments both represented by various employee organizations and unrepresented.

15. Blue collar, non-supervisory employees in the public works department are represented by AFSCME (2T9). Reductions in the public works department were affected through lay-offs and attrition (2T37). Ultimately, the number of positions in the public works department went from 41 to 38 (2T20; 2T32). Two of the public works employees, Hubert and Levy, whose positions were eliminated, were offered part-time positions doing security and maintenance work (2T12; 2T36). They were employed in positions which were not represented by any collective negotiations representative (2T21; 2T36; 2T38). Chalow decided to offer Hubert and Levy the part-time positions (2T36).

16. The police department experienced a net reduction of three police officers at the time of the lay-off (2T23; R-6). The elimination of those positions resulted in a net savings of approximately \$116,000 (2T23; R-6). Subsequently, the Township received grants which covered 90% of the cost of a police officer and the Township has added six police positions (2T31). At the time of the lay-off, the Township eliminated one dispatcher in the police department for a savings of approximately \$44,000 (2T24-2T25; R-7). Subsequently, the dispatcher was rehired (2T30).

17. Four clerical positions were eliminated through attrition resulting in a savings of approximately \$121,000 (2T25-2T26). AFSCME serves as the majority representative for the clerical employees. During calendar year 1994, four public works employees were promoted to higher positions (2T38-2T39).

18. Neither Sebastiano nor Ryker were recalled after the lay-off occurred (1T29; 1T57). Subsequent to the lay-off, Ryker sent Louango a letter advising that he was available for re-employment by the Township (1T56). While Ryker believed that Ray Wenzel, a public works superintendent, stepped down from his position, Wenzel's job was never offered to Ryker or Sebastiano (1T29; 1T55-1T57). The Township appointed Cianci to oversee the parks and handle complaints (1T56). Sebastiano believes Cianci's position was considered managerial and not included in any collective negotiations unit (1T48). The position filled by Cianci was never offered to Sebastiano or Ryker.

**ANALYSIS**

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates section 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Under Bridgewater, 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. 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 anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the



employer's motives are for the hearing examiner then the Commission to resolve.

The record contains no direct evidence that Sebastiano's protected activity was a substantial or motivating factor in the Township's determination to eliminate his position through the lay-off. Consequently, the Charging Party must rely on circumstantial evidence.

Sebastiano was an active union supporter. He and Campbell were instrumental in organizing employees in the supervisory unit. Sebastiano had discussions with Township Administrator Chasten concerning voluntary recognition of the unit by the Township and also engaged in direct discussions with the Mayor concerning the employees' rationale for organizing. After Local 1040 was certified as the majority representative of the supervisors unit, Sebastiano was designated by unit employees to sit as a member of their negotiations committee. Clearly, Sebastiano was engaged in protected activity and the employer knew of this activity. Thus, as is frequently the case, the critical issue to be resolved in this matter is whether the Township was hostile toward Sebastiano's exercise of protected rights.

Local 1040 contends that Sebastiano was laid off in retaliation for engaging in protected activity. Local 1040 asserts that the Mayor's letter to Sebastiano (CP-1) is clear proof of the animus which the Township harbored toward Sebastiano's protected activity. While it is undisputed that the Mayor authored CP-1, it

is equally clear that the Mayor had merely a tangential involvement in the identification of employees to be laid-off. Business Administrator Chalow was charged with the responsibility of preparing the layoff list. She was not involved in the Township's negotiations with Local 1040. While she knew Sebastiano, she was not aware of his organizing activity or of the dispute which arose between Sebastiano and the Mayor during the course of the negotiations which prompted the Mayor to issue CP-1. In all cases where employees were included in collective negotiations units, Chalow identified particular employees to be laid-off on the basis of seniority; the least senior employee as the first laid-off.<sup>6/</sup> Chalow's identification of Sebastiano as an employee to be laid-off was based on his seniority ranking and was unrelated to CP-1 or his union activity. While Chalow gave the Mayor a list of employees prior to the implementation of the lay-off for his review, the Mayor made no changes. The "Rakus incident" was not considered in the decision to layoff Sebastiano; Chalow was unaware that it occurred.

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<sup>6/</sup> The collective agreements between the Township and the other employee representatives is not part of the record. Laying off employees on the basis of least senior first is traditional and may likely have been mandated in provisions included in the collective agreements covering the other negotiations units. However, at the time of the lay-off, the Township and Local 1040 had not completed negotiations for their initial collective agreement. Thus, the particular methodology to be employed by the Township for the lay-off and recall of supervisory unit employees had yet to be established through the collective negotiations process.

Local 1040 also contends that it was disparately and detrimentally treated in the lay-off and such treatment constitutes evidence of hostility. The layoff occurred because of a loss of revenue and the Township's determination that raising taxes for a fourth consecutive year was not a viable solution. The record clearly establishes that at the time of the lay-off (January 1, 1995) all departments throughout the Township experienced some reduction in force, whether through lay-off or attrition. The mere fact that there was a lack of strict uniformity among the various Township departments or negotiations units does not establish that the Township was hostile toward members of Local 1040. Consequently, I find that Local 1040 has failed to prove by a preponderance of the evidence on the entire record that the Township was hostile toward Sebastiano's exercise of his protected activity and that such protected conduct was a substantial or motivating factor in its decision to lay-off Sebastiano.

The record contains no evidence supporting the Charging Party's allegations that the Township interfered with, restrained or coerced employees in the exercise of their rights guaranteed to them by the Act; dominated or interfered with the formation, existence or administration of the employee organization; discharged or otherwise discriminated against any employee because such employee had signed or filed an affidavit, petition or complaint or given any information or testimony under the act; refused to negotiate in good faith with a majority representative of employees in an appropriate

unit concerning the terms and conditions of employment of employees in that unit or refused to process grievances presented by the majority representative; or violated any of the rules and regulations established by the Commission.

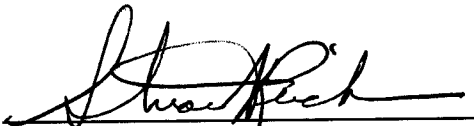
Accordingly, based upon the above findings and analysis, I make the following:

**CONCLUSIONS OF LAW**

Washington Township did not violate N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) or (7) when it laid-off Anthony Sebastiano.

**RECOMMENDATION**

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

  
Stuart Reichman  
Hearing Examiner

DATED: April 27, 1998  
Trenton, New Jersey