

H.E. NO. 2014-4

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

In the Matter of

PALISADES PARK BOROUGH,

Respondent,

-and-

Docket No. CO-2012-305

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 97,

Charging Party.

**SYNOPSIS**

In an unfair practice proceeding before the Public Employment Relations Commission, a Hearing Examiner recommends that the Commission find the Borough of Palisades Park did not commit an unfair practice when it chose to lay off five employees. It was found that although sufficient evidence of anti-union animus existed to establish a prima facie case, the employer demonstrated the Borough had a non-discriminatory justification for the layoff - - the loss of available work sufficient to support the workforce.

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.

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

In the Matter of

PALISADES PARK BOROUGH,

Respondent,

-and-

Docket No. CO-2012-305

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 97,

Charging Party.

Appearances:

For the Respondent,  
Mariniello and Mariniello, P.C. attorneys  
(Joseph R. Mariniello, of counsel)

For the Charging Party,  
Mets, Schiro, and McGovern, LLP attorneys  
(Kevin P. McGovern, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On May 24, 2012, Teamsters Local 97 ("Teamsters") filed an amended unfair practice charge against the Borough of Palisades Park ("Borough") with the Commission. (J-1).<sup>1/</sup> The charge alleges that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act ("Act")<sup>2/</sup> when

---

1/ Joint exhibits are referred to as "J-"; Charging Party's exhibits are referred to as "CP-"; Respondent's exhibits are referred to as "R-".

2/ These sections prohibit public employers, their agents or  
(continued...)

on May 15, 2012, it increased the number of employees employed in the Department of Public Works ("DPW") to be laid off in a reduction in force, in retaliation for the Teamsters having filed an unfair practice charge and grievance over the Borough's reduction in work hours.<sup>2/</sup>

On August 12, 2012, a Complaint and Notice of Hearing issued. (J-2).

On September 5, 2012, the Borough filed an Answer denying the allegations, nor that it had violated the Act. The Borough denies having retaliated against the Teamsters for its protected activity on behalf of Borough employees in carrying out the layoff in May 2012, and asserts the layoff was because there was not enough work for the five affected employees.

---

<sup>2/</sup> (...continued)  
representatives from (1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed by this act; and (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 by this Act.

<sup>3/</sup> On May 4, 2012, the Teamsters filed an unfair practice charge (also Docket No. CO-2012-305) alleging that the Borough violated §5.4a(5) of the Act by unilaterally reducing the work hours of the entire DPW, which it asserted amounted to a repudiation of the collective negotiations agreement. (CP-4; T61-62). In its opening statement and post-hearing brief the Teamsters clarified that the instant dispute is limited to the alleged §5.4a(1) and (3) violations though it did not formally withdraw the initial allegation of a violation of §§5.4a(5). (T11-12, T16-17). ["T" refers to the transcript of the May 7, 2013 hearing, followed by the page number.]

On May 7, 2013, I conducted a hearing at which the parties examined witnesses and entered documents into the record. Both parties filed post-hearing briefs on July 29, 2013.

Based on the entire record, I make the following:

**FINDINGS OF FACT**

Teamsters Local 97 is the majority representative of all blue-collar employees employed by the Borough. The Teamsters and the Borough are parties to a collective negotiations agreement ("CNA") for the period January 1, 2010 through December 31, 2014. (T26; J-4). Article V of the agreement is the management rights article. (J-4). Article X, section 1 of the CNA, "Work schedule overtime and compensatory time," provides:

1. The standard workweek for all employees hired prior to December 31, 1987 shall consist of eight hours per day Monday to Friday, 40 hours per week with a starting time that is in effect December 31, 1986.

A. Employees hired on or after January 1, 1998 may be hired for work to consist of 8 hours per day, 40 hours per week, 5 consecutive days in a workweek established by the appropriate department heads. [J-4; T49-50].

Thus, the Borough could require those hired after 1998 to work other than a Monday-to Friday-schedule but all were required to have a 40-hour week. (T50).

Article XX of the CNA, "Seniority", provides:

1. It is hereby agreed that the parties hereto recognize and accept the principle of

seniority in all cases of transfers, promotions, assignment of schedules, lay-offs, and recalls.

. . . . .

3. In the event of lay-offs and rehiring, the last person hired shall be the first to be laid off, and the last person laid off shall be the first to be recalled in accordance with his seniority provided the more senior employee is able to do the available work in a satisfactory manner. [J-4].

The DPW employees maintain the streets and roads and facilities in the Borough. (T28, CP-12). Their activities have included maintenance, landscaping and related services to the Board of Education and swim club, collecting materials for recycling, recycling electronics and emptying Borough-maintained waste baskets on the main street. (T28-29, T66-68, T109-111, T146, T154). There was a mechanic in the DPW and, on occasion, the DPW would help clear clogged sewer and storm drains.

Borough Administrator David Lorenzo ("Lorenzo") was appointed in 2008; he had been a five-term council member and served on the Borough's Planning Board for 20 years. (T100-101). Jill Pitman ("Pitman") is a Teamsters Business Representative assigned to the Borough's DPW unit. She has enforced, through the shop stewards, the parties' collective negotiation agreements through the filing of grievances and negotiation of agreements. (T25). Since December 2004, Pitman has served the DPW, and the Borough's white-collar and library employees. (T26). Lorenzo and

Pitman testified at the hearing.

**Background: Reduction in Hours and Layoff**

Lorenzo was the first Borough administrator; prior to his appointment, the Mayor, the Department Heads and Borough Clerk managed the Borough's operations. (T104). Upon being hired in 2008, the Mayor and Council asked him to review the overall operations to improve the budget and reduce staffing. (T104). Lorenzo studied the Borough's operations and, in time, on February 19, 2010, Lorenzo wrote to the Mayor and Council advising them of his concern that further cuts would be required to maintain a balanced budget; that the attrition experienced in the previous year, generating cost savings of \$500,000.00, would not be enough to balance the 2010 budget because of contractual obligations, increasing health benefits and other insurance costs, mandated pension costs, and decreases in revenues and State and Federal aid. (T106; R-1). Lorenzo wrote, in relevant part:

In an attempt to provide a balanced 2010 budget, after countless reviews, it is with great anguish that I recommend a reduction in the staffing of the DPW by 10 employees. We have identified this department as the only viable area where budget and personnel cuts have not been made and as an area which can sustain additional cuts and/or privatization if needed. If implemented the Borough will realize a cost savings of approximately \$850,000 which can immediately start to close the budget gap which we face.

After reviewing this potential cost savings

measure with the DPW Superintendent, we are in agreement that such a budget cut will have no effect on the services provided to the Borough by this department. It is our opinion that the areas of the budget cut can be outsourced at considerable savings.

I respectfully urge the Mayor and Council to implement this cost saving measure sooner rather than later as the budget adoption date is rapidly approaching.  
[R-1].

In 2010, Lorenzo proposed a layoff of ten employees in the DPW but ultimately none were laid off. (T76, T105-106; R-1). The mayor opposed any layoffs. (T107-108). Instead, the Borough addressed the fiscal concerns by a tax increase and refraining from filling positions left vacant by attrition. (T108).

In 2010, the parties negotiated a five-year CNA with no increases for the first two years of the CNA. (T-26; J-4).<sup>4/</sup> The wage agreement was generated from a Borough proposal, and the

---

<sup>4/</sup> Pitman believed the members had accepted two years of zero percent increases in their 2010-2014 CNA in exchange for no layoffs for the entire period of the agreement. (T36-37, T92). Pitman believed this was the unit members' understanding and that they ratified the CNA unanimously on this basis. (T38-39). No other testimony or evidence corroborates the quid pro quo of no layoffs for the duration of the contract for two years of no increases, and, thus, I do not credit it as the parties' agreement. Pitman did not recall which of the Borough's negotiators had made the representation, and on cross-examination, she acknowledged that a promise of no layoffs infringes on management's rights. (T77). Lorenzo stated that he was involved with collective negotiations in 2010 in a limited way, and recalled that layoffs were not discussed in those negotiations. (T134).

two-year zero percent increase helped address the Borough's fiscal concerns and avoided layoffs. (T135-136).

Lorenzo continued to look for ways to save money and jobs and continue to balance the budget. In early 2011, the Borough solicited bids for the recycling work and awarded the bid in June 2011. (T114-115; R-2). In a memorandum dated June 17, 2011, from Lorenzo to the Mayor and Council outlining the bids and savings to be realized and proposing changes in the organization of the DPW, Lorenzo wrote:

As you know the Borough received bids yesterday for garbage collection including recycling and miscellaneous other functions.

...

I believe we now have an opportunity to increase the quality of overall services ... with a net savings between the Borough and Board of Education ... without the necessity of laying off or furloughing any of our current employees by implementing the following 6 step program. [R-2].

The steps Lorenzo proposed included splitting the DPW into two divisions: one to maintain roads and right-of-way, and a new division to maintain all parks and public properties. He also proposed transferring five DPW employees to the new division. As of June 2011, Lorenzo knew that the Borough was going to have surplus staff because of having lost the recycling work. (T116). To avoid layoffs, he created the new division that would primarily work for the Board of Education doing landscaping



maintenance. (T116; CP-11). Lorenzo had proposed that the DPW unit members, who were then extras, would work at locations assigned by the Board of Education, and then the Borough would bill the Board for the time the workers spent on Board projects. (T118) The Board had been paying another contractor for landscaping before the arrangement. (T117; CP-11). The program began in July 2011 but did not work well because the Board required extraordinary support functions for a building project that were unlike regular landscaping and maintenance, and resulted in higher bills. (T117-118). This work included trenching for footings, exterior drain lines and the like. (T117). Eventually, the superintendent of schools became upset at the bills, and in April 2012, the Board of Education told Lorenzo that because of the high costs, it would discontinue using DPW workers at its sites. (T199-200; CP-11). Thus, by early 2012, the program ended. (T119-120).

The municipal pool is open from Memorial Day to Labor Day; preparing the pool, grounds and buildings begins in March each year. (T191). In addition to providing DPW workers for this preparation, the Borough uses prisoners who do not appear on a regular basis. (T191). Pool duties include landscaping, cleaning and painting. (T192). DPW workers do not perform the mechanical preparation of the pool, and in the summer months only do lawn work at the pool. (T193). Between February and May 2012, the

date of the layoff, Kowal, Tansey, Raimondo, G. Giannantonio, and N. Giannantonio worked most of their time at the pool or at the Board of Education. (T166-168, T172; CP-12).<sup>5/</sup>

#### April 2012 Reduction in Hours

On April 1, 2012, Mark Pasquali ("Pasquali") was the Superintendent of the DPW. He reported directly to Lorenzo. As of April 1, 2012, there were 13 DPW unit members. (T27, T30; CP-1). Recycling Coordinator Joe Ferguson works in the office as a working foreman. (T29). Senior Bus Driver Glenn Pallotta, also in the unit, provides transportation services for senior citizens of the Borough. (T29-30). In addition to Ferguson and Pallotta, there were eleven other laborers and drivers. (CP-1).

On April 5, 2012, Superintendent Pasquali wrote to Lorenzo recommending one of two courses of action to address the decreases in workload the DPW had experienced. (CP-2). Pasquali proposed either laying off three employees or reducing the weekly hours of each of 18 employees by 10 hours per week from 40 hours to 30 hours per week. (T31-32; CP-2). Pasquali stated, in relevant part:

---

<sup>5/</sup> CP-12 was introduced by charging party's counsel through Borough witness Lorenzo on cross-examination. Though Lorenzo could not verify or authenticate the information in CP-12 and stated he could not confirm or refute it, I credit the information within as reliable and accurate because CP-12 was provided by the Borough's counsel to the charging party's counsel in response to a discovery request and the Borough did not object to the document. The Borough agreed to the introduction of the document into evidence.

It has become obvious for quite some time that there is not sufficient work in the Dept. of Public Works, including the newly formed Dept. of Parks and Public Buildings, to keep the entire staff employed on a continuing full-time basis of 40 hours per man, per week.

Accordingly, in accordance with my responsibility as expressed in ARTICLE V of the contract ... I make the following recommendations ... :

Recommendation # 1

The Borough establish a Reduction In Force (R.I.F.) of three (3) full-time employees x 40 hours each for an overall reduction of 120 man hours per week.

Or

Recommendation # 2

The Borough not R.I.F. any current employees but instead reduce the present 40 hour work week of eleven (11) full-time employees to 30 hours each for an overall reduction of 110 man hours per week. [CP-2].

Lorenzo contacted Pasquali after receiving his letter.

(T113). Later that day, Lorenzo chose the option of reducing the weekly hours of all in the unit because he knew that the Mayor and Council strongly opposed layoffs of any employees; he wrote to Pasquali of his choice, to be effective on April 16, 2012.

(T107-108, T121; CP-3). Lorenzo responded in writing to Pasquali (T41; CP-3). Lorenzo chose to reduce hours in lieu of layoffs.

(T44). He stated, in relevant part:

After careful review of your two (2) recommendations I am of the considered opinion that the interests of both the Borough as well as the affected employees are best served by your RECOMMENDATION #2.  
[CP-3].

He identified the 11 DPW employees who would have their hours reduced effective April 16, 2012. (CP-3).

Lorenzo also copied Teamsters Shop Steward Joseph Ferguson, who notified Pitman, of the directive late in the afternoon on April 5, 2012, the Thursday before a three-day holiday weekend. Pitman was unable to take any action before Monday, April 9, 2012. Pitman advised the unit members that until the recommendations were finalized, there was nothing to be done, and she tried to find out why the memorandum was sent. (T36) No one from the Borough had contacted her in advance of her receipt of Pasquali's memorandum. (T36).

On Monday, April 9, 2012, Pitman made Teamsters Local 97 President John Gerow ("Gerow") aware of the proposed reduction in hours. (T42-43). He attempted to reach Pasquali, but Pasquali was unavailable. Unable to reach Pasquali, on April 9, 2012, the Teamsters filed a grievance objecting to the change in hours and asserting that the Borough violated the contract by putting forth a plan to reduce work hours of all employees, that violated "Article X of the contract providing that the work week is eight hours per day 40 hours per week." (CP-5). Pitman was shocked that the Borough chose to reduce hours because that clearly violated the DPW's contract. (T45). The unit members were upset about the effect the decision would have on them. (T48).

On April 10, 2012, Pitman called Borough Counsel

Mariniello, and sent him copies of the memorandum via email; he told her he would look into the matter. (T46-47; CP-4). Pitman thought Mariniello was surprised at Lorenzo's action. (T45-46, T51-52).

On April 13, 2013, Pasquali responded to the grievance. (CP-6). He wrote:

It has come to my attention that Teamsters Local No. 97 may have attempted to file one or more grievances in violation of the contract, and more particularly, in violation of Article XVIII which states in pertinent part:

The procedure for settlement of grievance shall be as follows

Step 1 The aggrieved employee shall discuss his problem with his Union Steward and Department Head who shall attempt to settle the problem within forty-eight (48) hours.

This is to advise that, if indeed you have attempted to take such unlawful and inappropriate action, as the appropriate Department Head, I do hereby proclaim your action to be nullified and of no force or effect since no allegedly aggrieved employee has attempted to settle the problem with me nor have I been served with a written copy of any alleged grievance. [T56; CP-6].

However, on April 9, 2012, Gerow had unsuccessfully attempted to contact Pasquali. (T56). There is no evidence that Pasquali attempted to reach Gerow, Pitman or Shop Steward Ferguson to "discuss the problem." Further, given the nature of the issue (reduction in hours), it is unreasonable for him to

assert that this grievance would have been settled, even if a meeting and discussion between Pasquali and an aggrieved employee and/or shop steward had occurred, as he did not likely have the authority to settle the issue. From the substance and tone of this letter, I infer that Pasquali was hostile towards the Teamsters' grievance. Further, between April 9 and 17, 2012, Pitman contacted Borough Counsel Mariniello and Mayor Rotundo, but was unable to set up any discussions on the proposed reduction in hours. (T53-55).

At some point between April 9 and 16, 2012, Lorenzo, after consulting Borough Counsel, the Mayor, and a couple of Council Members, realized that the change in hours violated the contract and that the Borough would have to reinstate the 40-hour workweek. (T122-123).

However, that reversal did not occur until May 15, 2012, at the next possible Council meeting by a formal resolution. (CP-9). I do not credit Lorenzo's assertion that because the Mayor was on vacation and because Council only meets once a month, it was impossible to undo the decision prior to May 15, 2012. (T183). There is no evidence in this record of the Council's having adopted the reduced-hours policy in the first instance. The decision to reduce hours in the DPW was made by Lorenzo the same day he received Pasquali's written recommendation. Further, Lorenzo acknowledged that the Borough could have decided not to

reduce the hours on April 16 but did not do so despite understanding that the reduction in hours violated the CNA. (T183). Consequently, between April 16 and May 15, 2012 the DPW members worked 30 hours per week instead of 40. (T183). Given the absence of corroborating evidence that the Mayor and Council had voted on the reduction in the first place, I do not credit Lorenzo's assertion that the Mayor and Council could not have reversed the reduced-hours policy even though the Mayor and Council appeared to have realized it was an error soon after its implementation. (T122, T189-190).

On May 4, 2012, the Teamsters filed an unfair practice charge alleging the Borough's unilateral reduction in hours repudiated the clear terms of the contract and the Act. (T61-62; CP-8).

#### **May 2012 Layoff**

Lorenzo believed that Pasquali's recommendation for a layoff of three was too conservative, given the loss of DPW work and the need to lower the Borough's expenses. (T124-126). Lorenzo also had in mind the recommendation he had made in 2010 to reduce the unit, then comprised of 18 employees, by laying off ten employees. (T124). In the intervening years, the unit had fewer employees because of normal attrition and the movement of the mechanic's duties to another jurisdiction, some sharing of services with other public entities, and outsourcing. Despite

these reductions, there were still too many employees and too little work. (T126). Thus, he recommended to the Mayor and Council a layoff of the five most recently hired DPW employees, and it adopted his recommendation. (T132). Lorenzo denied that the number he recommended to be laid off was based on retaliation; rather, after reviewing the outsourcing and ineffective attempts to contract enough work to other entities such as the Board of Education, the Borough determined that it could adequately staff the DPW with five fewer people. (T130-132).

On May 10, 2012, the Borough attorney notified Pitman that the Borough would reinstate the DPW 40-hour work week but would lay off five employees, two more than Pasquali had recommended to Administrator Lorenzo on April 5, 2012. (T62, T98).

On May 15, 2012, the Borough Council passed two resolutions restoring the hours with retroactive compensation to April 16, 2012, and adopting the superintendent's recommendation to lay off five employees from the DPW "based on the outsourcing of the recycling contract and various other changes in the responsibilities of the Department." (T65-66; CP-9).

The Teamsters believed that the increase from three to five employees to be laid off, having occurred so near to the grievance and unfair practice charge over the hours reduction,



was retaliatory and, on May 24, 2012, it amended its unfair practice charge. (T11-12, T16-17).<sup>6/</sup>

In May 2012, at the time of the layoff, a decision had been made to contract out the DPW's pool work. (T66-69, T196-197). The DPW workers remained on pool duty until the first week of June 2012, past the layoff date, to ensure the work was completed (T191-192). In January 2013 the Borough prepared to outsource the pool work. (T154, T194-195).

The employees who were laid off include Nicholas Giannantonio, Gino Giannantonio, Fred Kowal, Kenny Tansey and Scott Raimondo. (T69). As of the date of the hearing Nicholas Giannantonio was still laid off, Gino Giannantonio now works in the Borough's library full-time at or near his former salary, and Fred Kowal is available to return to work. (T71-72). Scott Raimondo works part-time in the police department.

### Overtime

According to Lorenzo, since the layoff, the DPW has been able to continue doing all necessary work, with no significant delays or deficiencies, and that overtime has decreased. (T198-199). However, Lorenzo admitted on cross-examination that

---

<sup>6/</sup> Pitman testified that she has had a good working relationship with Borough Attorney Mariniello on issues concerning the DPW, and that there were no conversations between Pitman and the Mayor, Borough Administrator, Borough Attorney or Superintendent of the department of public works that indicated hostility toward the Teamsters. (T75, T89-90).

because of Hurricane Sandy in late October 2012, DPW overtime increased after the layoff. (T203-205). I credit Lorenzo's testimony. I conclude that work associated with the aftermath of Hurricane Sandy, which occurred on or around October 28, 2012, after the layoff in May 2012, contributed to a spike in overtime that is not representative of normal overtime. The DPW time sheets for the period July 22, 2012 through December 22, 2012 show that for the periods reported prior to the Hurricane, overtime was 18 and six hours per two-week period, and after the hurricane and a snow storm in November 2012, overtime rose to 62, 77, and 52 hours in each two-week period, during the seven weeks after the hurricane, then went down to seven hours in early December 2012. (T204; CP-14). Lorenzo would not concede that without the layoff there would have been less overtime after the hurricane, citing the fact that some workers normally report on Saturdays and/or work beyond the normal shift ending time of 3:00 p.m. (T206).

In response to a discovery request made by the Teamsters for the amount of overtime in the DPW between January 1 and April 1, 2012, the Borough only provided a DPW time sheet for the period January 15, 2012 to January 28, 2012. (T200-201; CP-13). The time sheet provided only shows data for the two-week period from January 15 through January 28, 2012, or, a high amount of 128 hours of overtime. (T201; CP-13). The high amount of

overtime during that period was due to a snow storm. (T201). On cross-examination, Lorenzo testified he did not know if any other or how much overtime was worked between January and April 2012. (T202). Other than Pitman's statement that her members tell her they are very busy, no other evidence corroborates that overtime rose and remained high after the layoff. (T69).

#### ANALYSIS

In April 2012, the Borough concluded that it had to eliminate several positions from the DPW because of insufficient workload. Initially a recommendation was made to lay off three employees. The issue presented here is whether in May 2012, the Borough laid off five DPW employees, instead of three, in retaliation for the Teamsters' grievance and unfair practice charge over the Borough's earlier reduction of work hours for the entire unit.

The Teamsters contend that the expansion of the number to be laid off was motivated by union animus and seeks to have the layoff of five invalidated and have the two most senior available employees reinstated. The Teamsters argue that the timing of the decision to lay off five employees - - within weeks after it filed a grievance and unfair practice charge - - reveals the Borough's hostility towards this protected activity.

The Borough denies that the layoff was motivated by union animus, but was because of a lack of available work. It asserts

that for more than a year, after its recycling and other work had been outsourced, the Borough retained the excess DPW employees, but by April 2012 it could no longer retain as many employees as it once had.

The New Jersey Supreme Court, in Township of Bridgewater, 95 N.J. 235 (1984), set forth the standard for determining whether an employer's action violated §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. Id. at 242, 246. This may be done by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, that the employer knew of the protected activity and was hostile toward it. Ibid.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under the Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Ibid. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Ibid. 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 personnel action would have taken place absent

the protected conduct. Ibid. This affirmative defense 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 action. Ibid. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve. Ibid.

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

The Teamsters proved the first two prongs of the Bridgewater test: that it engaged in protected activity, filing a grievance and an unfair practice charge over the Borough's unilateral reduction in hours, and that the Borough was aware of the activity. (Lorenzo acknowledged his receipt of the grievance, and Pasquali responded to the grievance four days after it was filed, denying it on procedural grounds). Further, Teamsters business representative Pitman forwarded the grievance and charge to the Borough's attorney. The issue the Teamsters must prove is whether the Borough was hostile to the grievance and charge, particularly the Administrator since he recommended that five employees, rather than three, be laid off.

I agree with the Teamsters that the Borough was hostile towards it as evidenced by the timing of its decision-making and its lack of responsiveness to the Teamster's representatives. Charging parties are entitled to rely on timing to show respondents' motivations in proving hostility. In Bridgewater, the Court found timing was a factor supporting finding of hostility in an employee's transfer on April 21, after engaging in protected activity on March 5<sup>th</sup>. Bridgewater, supra, 95 N.J. at 247. The Commission has also consistently found hostility where adverse actions are taken after the exercise of protected activity. See also, Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) (reprisals within a concentrated period of time indicated hostility); City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987) (violation where lifeguards sued City in September 1995, settled in November 1985 and learned they were not rehired in March 1986); Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003) (reprisals within a concentrated period of time indicated hostility); and most recently, Passaic Cty. Sup't. of Elections, P.E.R.C. No. 2014-001, 40 NJPER 136 (¶51 2013) (violation found and laid off employees ordered reinstated where close proximity of protected activity and layoff and superintendent's directly hostile statements supported hostility).

Just weeks prior to the layoff decision, though I emphasize not at issue here, the Borough unilaterally reduced the entire DPW unit's hours. Despite its realization that the reduction violated the CNA, it left the reduced hours policy in place for a month. This conduct occurred just prior to the layoff. I infer hostility from the Superintendent's failure or refusal to respond to the Teamster's initial calls and from his subsequent criticism of the Teamster's failure to contact him to settle the grievance, especially since he likely did not have authority to settle that grievance. In fact, no other Borough official (except for the Borough Attorney, who relayed previously made decisions) contacted the Teamsters to give it advance notice or discuss the issues, the change in hours or the layoff. Accordingly, based on all of the Borough's conduct, I infer its hostility toward the Teamster's activities on behalf of the DPW employees.

However, because the evidence demonstrates that the Borough had a legitimate non-discriminatory reason for choosing to lay off five employees, I recommend that the charge be dismissed. Recycling duties, which had been performed by six or seven DPW employees, were removed from the DPW and added to the service contract of the garbage collection contractor in 2011 or early 2012; the mechanic's duties were subcontracted to another town; the collection of discarded electronic equipment and the Broad Avenue waste barrels were also subcontracted. The maintenance

and grounds keeping of the municipal pool were subcontracted and the contract with the Board of Education had ended. Finally, the Borough entered into an inter-local agreement for sewer maintenance with a nearby public utilities authority. Thus, the Borough needed to cut positions and the Business Administrator determined that eliminating five would better address the Borough's needs. No evidence convinces me that this was unreasonable or arbitrary.

The Borough raised objections in its brief that I will now address. The Borough asserts that the Teamsters acted precipitously in filing its grievance or that individual employees should have filed individual grievances. I disagree. The employees chose to be represented by Teamsters Local 97 as their exclusive majority representative. N.J.S.A. 34:13A-5.3. As a party to the CNA, it has standing to file a grievance on their behalf. Here, the employer's action affected the entire unit and it is appropriate and efficient that their exclusive representative speak for them collectively. The employees should not be required to file individual grievances, as the Borough suggests in Superintendent Pasquali's letter of April 13, 2012, the Superintendent's first-step response, and in the Borough's post-hearing brief. (CP-6; Borough's Brief, p. 9). Generally, grievances may be filed as soon as the grievant or union is aware of the underlying facts or basis of the grievance.



The Borough also argues that the Teamsters "set it up" for claims of retaliation:

By filing a grievance within the matter of a day following the discovery of the internal memos between Pasquali and Lorenzo, the Union put the Borough in an unfair light, that any slightest erroneous or seemingly unfair act of the Borough could have been seen as hostile and retaliatory.

I disagree. The Borough's memoranda (CP-2 and CP-3) were not "internal." Joseph Ferguson, the Teamster's shop steward was sent copies by the Superintendent and the Business Administrator, as evidenced on the face of the documents. The hostility I found here is based on the totality of the Borough's conduct. The Borough did not immediately correct the reduction in hours, though its chief witness acknowledged it could have. I credited Administrator Lorenzo's testimony that, after he considered the amount of work lost, he concluded that the recommended number to be laid off was too conservative, meaning too low.

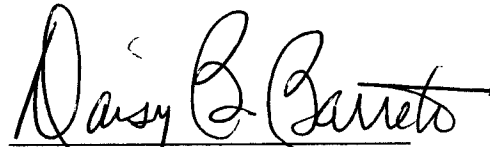
The Borough argues that a negative inference should be drawn against the Teamsters because only one witness testified on its behalf. I decline to do so. The Borough also only called one witness and the same negative inference could be drawn against the Borough's prosecution of its case, and I decline to do that also. In the abstract, employees' motives for not wishing to testify, or their representative's motives for not calling them are complex.

The Borough's cites Haddon Heights Borough, P.E.R.C. No. 2010-072, 36 NJPER 117 (¶49 2010) as similar or analogous to this case. That case was factually different and more complex than this one. Cases alleging discrimination are fact-sensitive. For example, the hearing examiner in that case found that negotiations were not stalled to avoid the union but because of the installation of a new administration; the hiring of one union organizer over another was not animus; anti-union statements made by certain individuals were not opinions of the mayor and council; a council member's response to a heated exchange in a meeting explaining the layoff was not evidence of animus, and when read in context, a statement in an email that promoting someone and thus "removing" him from the union would save another employee's position from layoff was not animus. The facts here are different. I found here, after considering all of the testimony and evidence, that there was circumstantial evidence of hostility. However, as in Haddon Heights, I find that the Borough has a non-discriminatory justification for the layoff - - the loss of available work sufficient to support the workforce. The Borough's reasons for choosing to lay off five employees are not pretextual. The fact that the Superintendent recommended three to be laid off did not bind the Administrator or Mayor and Council, and the loss in 2011 of the Borough's recycling program and all that followed underscore that a layoff of five was not

arbitrary.

CONCLUSIONS OF LAW

The Borough of Palisades Park did not violate N.J.S.A. 34:13-5.4a(3), or, derivatively §5.4a(1) of the Act. Accordingly, I recommend the Commission dismiss the charge Docket No. CO-2012-305.

  
Daisy B. Barreto  
Hearing Examiner

DATED: October 30, 2013  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 13, 2013.