

H.E. NO. 97-7

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

In the Matters of

NEW JERSEY TURNPIKE AUTHORITY,
Respondent,

-and-

Docket No. CO-H-95-115

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 73,
Charging Party.

NEW JERSEY TURNPIKE AUTHORITY,
Respondent,

-and-

Docket No. CI-H-95-18

ROBERT I. ELMS,
Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the New Jersey Turnpike Authority did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by terminating Joseph Veni, Andrew Takacs, Robert Elms and Walter Luger.

AFSCME presented little evidence regarding Veni's termination and the Hearing Examiner dismissed that portion of the charge concerning Veni on the record.

AFSCME was unable to demonstrate that the Authority's decision to terminate Takacs and Elms was motivated by their protected activity. AFSCME proved that Takacs and Elms were engaged in protected activity. However, AFSCME failed to demonstrate that the Authority had knowledge of Takacs' protected activity. AFSCME established that the Authority had knowledge of Elms' union membership, but did not prove that it had knowledge of his union activity or that such activity was a motivating factor in his termination.

AFSCME did prove that Walter Luger was engaged in protected activity, the Authority had knowledge of that activity and that Luger's protected activity was a substantial or motivating factor in its decision to terminate him. However, the Hearing Examiner finds that Luger would have been terminated absent his protected conduct. A management consulting firm retained by the Authority recommended elimination of the entire department Luger worked in. The Authority did not selectively implement the consultant's report to target Luger. It eliminated his entire department based upon the Authority's financial condition, and an anticipated decrease in that department's workload.

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.

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Appearances:

For the Respondent,
Riker, Danzig, Scherer, Hyland & Perretti, attorneys
(James P. Anelli, of counsel)

Schwartz, Tobia & Stanziale, attorneys
(Frank R. Campisano, of counsel)

For the Charging Party - AFSCME, Council 73,
Pellettieri, Rabstein & Altman, attorneys
(Elyse C. Genek, of counsel)

For the Charging Party - Robert I. Elms,
Robert I. Elms, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 13, 1994, the American Federation of State,
County and Municipal Employees Council 73 filed an unfair practice

charge with the Public Employment Relations Commission alleging that the New Jersey Turnpike Authority violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act N.J.S.A.

34:13A-1 et seq.^{1/} AFSCME alleges that the Authority terminated employees Walter Luger, Joseph Veni, Robert Elms and Andrew Takacs in retaliation for their activity on behalf of Council 73.

On October 24, 1994, Robert Elms filed an unfair practice charge with the Commission alleging that the Authority violated subsections 5.4(a)(2), (3), (4), (5) and (7) of the Act N.J.S.A.

34:13A-1 et seq.^{2/} by terminating him and by engaging in bad faith negotiations with AFSCME.

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.

2/ These subsections prohibit public employers, their representatives or agents from: "(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."

On January 19, 1995, the Director of Unfair Practices issued an Order Consolidating Cases and a Complaint and Notice of Hearing for both charges. However, the Director dismissed the portions of Elms' charge alleging that the Authority did not negotiate in good faith because only majority representatives have standing to bring such charges. The Director issued the complaint on paragraphs A, D and E of Elms' charge, which address Elms' termination by the Authority.

I conducted hearings on June 8, 9, 13 and 15, 1995 at which the parties examined witnesses and presented exhibits.^{3/} The parties filed briefs by October 30, 1995.^{4/} Based upon the entire record in this matter, I make the following:

FINDINGS OF FACT

1. Gerard Meara^{5/} has been an AFSCME staff representative for ten years (1T28). He first became involved with the Authority in 1988 or 1989 when he was contacted by his brother Brian Meara,^{6/} who is an employee in the Authority's engineering

^{3/} The transcripts of the June 8, 9, 13 and 15, 1995 hearings will be referred to as "1T", "2T", "3T", and "4T" respectively. Exhibits are designated as follows: Joint exhibits are "J", AFSCME and Elms' exhibits are "CP" and the Authority's exhibits are "R".

^{4/} Elms did not desire to file a brief.

^{5/} Gerard Meara is referred to throughout this report as Meara.

^{6/} Brian Meara is referred to throughout this report as Brian Meara.

department (1T29, 1T70, 1T71). Brian Meara told Gerard that the Authority's unrepresented employees were concerned because they received lower pay and cost of living increases than the Authority's unionized workers (1T29, 1T109). Brian Meara was involved from the inception of AFSCME's organizational efforts and it is widely known that Brian and Gerard are brothers (1T70).

2. Meara became formally involved at the Authority in 1991, when he met with Authority employees Brian Meara, Ernie Cerrino, Dave Wingerter, Richard Walley, Lawrence Goerke, Walter Luger, and Richard Majorkurth (1T69, 1T70, 1T99).^{7/} The employees were interested in being represented by AFSCME and Meara give them authorization cards (1T30).

3. In June 1991, AFSCME filed a representation petition with the Commission seeking to represent a group of upper level supervisors employed by the Authority (1T30, 1T31). Before filing its representation petition with the Commission, AFSCME sent the Authority a letter requesting voluntary recognition, but the Authority did not respond (1T31). After the petition was filed, the Authority challenged the titles of employees AFSCME sought to

^{7/} Employees in the supervisory and professional units AFSCME organized were referred to throughout this proceeding as the "management" group. These employees' status as managerial executives under the Act is the subject of a separate representation hearing that is currently before the New Jersey Supreme Court. The use of "manager" in this report refers to the group of employees that was unrepresented prior to AFSCME's involvement at the Authority. It is not a reflection on the parties' or the Commission's position in the pending representation matter.

represent, asserting that they were either managerial executives or confidential employees. A Commission Hearing Officer held hearings on the representation petition. The Commission ordered an election among professional and upper-level supervisory employees. N.J. Tpk. Auth. and PERC and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), pet. for certif. pending. In October 1993, AFSCME Council 73, Local 3914 was certified as the majority representative of a unit of the Authority's professional and upper-level supervisory employees (CP-1, 1T36, 1T38). Robert Elms and Andrew Takacs were included in this unit (CP-1).

4. AFSCME then filed petitions seeking to represent separate units of non-supervisory professionals and third-level supervisors. The Director of Representation ordered elections in those two units. N.J. Tpk. Auth. and PERC and AFSCME, D.R. No. 94-29, 20 NJPER 295 (¶25149 1994), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), pet. for certif. pending. In August 1994, AFSCME locals were certified as the majority representatives of employees in those two units (CP-2, CP-3, 1T37, 1T38). Walter Luger was included in the non-supervisory professional unit and Joseph Veni was included in the third-level supervisory unit (CP-2, CP-3). At the time this hearing was conducted, the representation matter was appealed by the Authority to the Appellate Division (1T38, 3T101). The Appellate Division subsequently remanded the matter to the Commission. AFSCME and the Commission are currently awaiting a

decision from the Supreme Court on their Petitions for Certification.^{8/}

5. In September 1993, before the election for the main unit of professional and upper-level supervisors, Meara presented a press release to the Authority's Commissioners. He protested the legal fees spent to oppose unionization and requested that the Authority bargain with AFSCME if it won the election (CP-4). Also in September 1993, Meara testified before the Authority's Commissioners and relayed the frustrations of the managers' group (1T39, 1T40, 1T101, 1T102). Executive Director Donald Watson tried to prevent Meara from speaking at that meeting (1T40). Meara then wrote a letter to the membership summarizing his presentation to the Commissioners and urging them to vote for AFSCME in the upcoming election (CP-5, 1T42, 1T43).

6. In September 1993, AFSCME Council 73 Executive Director Jack Merkel asked State AFL-CIO Director Charles Marciante to meet with then Commissioner Goldberg of the Authority on AFSCME's behalf (CP-6). Marciante met with Goldberg and reported to AFSCME that the Authority was adamantly opposed to higher level supervisors organizing, it would not recognize AFSCME and it would appeal the Commission's representation decision to the Appellate Division (1T52, 1T53).

^{8/} The State of New Jersey filed an amicus brief in support of the Authority's position (R-4, 1T82).

7. In the fall of 1993, Watson and Director of Human Resources Meg Garrity met with Meara. Meara requested that negotiations begin (1T43, 1T44). Watson stated that the Authority was against the formation of a managers union, it would fight unionization and that he did not believe managers should be unionized (1T43, 1T44, 4T106).^{9/} Garrity recalled Watson stating that the Authority did not feel it was appropriate for any level of managers to organize and that some positions within the AFSCME unit were key management positions that were legally inappropriate for inclusion in a bargaining unit (4T106). She characterized the meeting as fairly friendly (4T99, 4T100). Meara characterized the Authority's conduct as hostile and manifesting anti-union sentiments towards organizing to a degree that he had never encountered in his 16 years of labor relations experience (1T45).

8. Negotiations for the main unit began in November 1993 (1T45). The Authority's negotiations team members were attorney Ronald Tobia, Maintenance Director Ralph Bruzzichesi, Director of Tolls Burke and Garrity. AFSCME team members were Brian Meara, Walter Luger, Dave Wingerter, Rich Scott, Larry Goerke and John Ferindino (1T45, 1T46, 1T83, 4T97, 4T101, 4T102, 4T129). Elms, Takacs and Veni did not attend negotiations sessions (3T72, 3T73, 4T102).

^{9/} Meara testified that this meeting took place right after the election for the main unit, which was held in the fall of 1993, but also testified that the meeting took place in 1991. I find that this meeting took place in 1993, since Meara's recollection of the meeting coinciding with the election was more vivid than his recollection of the year (1T80).

9. The parties met four to seven times within a year and a half before AFSCME filed for impasse (1T46, 4T102). Meara did not think that any issues were tentatively agreed to until the parties reached impasse and the mediator came in (1T105, 1T106, 1T107). It took thirteen months - from November 1993 to December 1994 - for the Authority to put a written monetary offer on the table to AFSCME (1T46, 1T47, 4T108). In December 1994 while the parties were in mediation, the Authority made an offer concerning wages that AFSCME rejected (4T103, 4T104). The parties had five or six mediation sessions which were still ongoing at the time of the hearing and had still not agreed to a contract (1T46, 1T49, 1T98, 4T102, 4T103). Meara characterized the length of the negotiations process as "highly unusual" (1T49, 1T106). Members of the negotiations team urged Meara to file an unfair practice charge alleging bad faith negotiations, but Meara refrained from doing so (1T105, 1T106).

10. During the course of negotiations, the Authority transferred some employees, resulting in their working more hours for less pay (1T86, 1T87). The Authority did not unilaterally reduce health or pension benefits or implement an overall wage reduction (1T87). In the course of negotiations, the Authority offered AFSCME unit employees the same four percent raises it was granting non-unionized employees (1T104). Meara updated unit members on the status of negotiations in February 1994 (CP-7). He stated that the Authority did not submit any negotiations counterproposals and had requested that the union accept a

retroactive increase of four percent (CP-7). AFSCME accepted the four percent increase, with a stipulation that acceptance would not limit its right to continue to negotiate for additional compensation (1T104, 1T105, CP-7). The update letter also identified members who could be contacted to answer questions - one of whom was Walter Luger (CP-7, 1T54, 1T55).

11. Meara met with Herbert Olarsch and Tobia shortly after Olarsch was appointed Acting Executive Director in 1994 (3T104). Olarsch told Meara that the word from the top was that the Authority was not going to recognize the union and that it would continue to fight the effort to unionize managers in court (3T100). Meara asked Olarsch if the Authority was willing to drop subsequent legal action and Olarsch said no (1T80).^{10/} Olarsch stated that the legal position of the Authority was that certain positions were statutorily ineligible for inclusion in any negotiations unit (3T55, 3T56).

12. Meara discussed the Authority's position on AFSCME with Garrity on several occasions. Garrity said that the decision not to recognize AFSCME was coming from above, the Authority's position was clear and she and the Authority felt that the Turnpike's managers should not be unionized (1T50). Garrity told

^{10/} Olarsch disagreed with Meara's characterization of this meeting (3T104) - but I credit Meara (1T80). Meara's testimony was forthright, unequivocal and direct. In contrast, Olarsch's testimony was often evasive, non-responsive to the questions asked, and sometimes barely audible.

Meara that the Authority's legal position was that under the Act and case law, some titles in the AFSCME units were not appropriately included in a collective negotiations unit and that the Authority was appealing (4T119).^{11/}

13. Robert Elms is a licensed professional engineer who has been employed by the Authority since October 1992. When Elms started with the Authority, he was an Engineering Project Supervisor (1T114). He developed requests for proposals sent to engineering firms to design and write specifications for the Authority's engineering projects (1T115).

14. Elms became aware of efforts to organize the Authority's upper-level employees about two days after he started employment. Elms shared an office with Andrew Takacs; Brian Meara's

^{11/} Olarsch stated that there were certain positions the Authority felt were incompatible with union membership under the law, however, he claimed no knowledge as to whether the Authority opposed organization of all of the positions (3T126). Olarsch also claimed no knowledge of which individual positions the Authority opposed, but "to the best of his knowledge and recollection..." believed the Authority took exception to union membership for certain positions, rather than organization of the group as a whole (3T126, 3T127). I do not credit Olarsch's testimony. As Director of Law, he was involved with the Authority's appeal and was certainly aware that it opposed organization of specific positions. Although the Authority opposed organization of a large number of positions, as Director of Law and then Acting Executive Director, Olarsch had to be aware of which specific positions were the subject of its appeal. It is not credible that he could barely recall if the Authority opposed the organization of positions, let alone which positions it opposed. I also do not credit Olarsch's testimony that the Authority did not oppose organization of the group as a whole. Its opposition to organization of its managers was consistent throughout this record.

office was next door to theirs. The three of them talked about forming a bargaining unit and Elms was asked if he was interested. Elms was interested in a union but first wanted to complete his six-month probationary period (1T116, 1T117).

15. Elms had experience as a union officer when he was employed by the federal government. Elms helped Brian Meara with early organizational efforts and Meara used Elms' experience as a former union president to assist him with making decisions in the organizing campaign (1T61, 1T62).

16. In the fall of 1993, Senior Engineer Linfante said to Elms that Linfante did not understand why engineers needed unions. Elms perceived that Linfante was not in favor of the engineers forming a union (1T119, 1T120).^{12/}

17. Elms met with Garrity in March 1994 concerning a promotion he did not receive.^{13/} Brian Meara accompanied Elms as a union representative and was permitted to sit in on the meeting (1T119).

18. Elms signed an authorization card, talked to people about the formation of the union, was involved in membership meetings and meetings regarding negotiations. Elms was not a member

^{12/} Linfante's remark did not appear in Elms' answer to the Authority's interrogatories (1T138). However, I credit Elms on this point and find that its omission from the interrogatories was inadvertent.

^{13/} Elms has filed an age discrimination suit against the Authority regarding his failure to receive this promotion (1T131).

of the AFSCME negotiations team and Meara did not recall if Elms testified at the Commission representation hearing (1T92, 1T94). Elms was not an election observer, and was not present at the initial AFSCME organizational meetings or any meetings between AFSCME and the Authority (1T93).

19. Andrew Takacs started employment at the Authority in August 1988 as a Project Supervisor (2T7, 2T8). He was responsible for buildings and facilities related design projects (2T8).

20. There were discussions regarding the formation of a management association when Takacs arrived at the Authority in 1988 (2T9). In October 1989, Takacs was one of ten employees who signed a petition addressed to the Chief Engineer (CP-19). The petition requested a meeting with the Executive Director to discuss problems facing grade 13 employees - the lowest level of management employees at the Authority (2T9, 2T10, CP-19).^{14/} The petition did not mention forming a management association (CP-19, 2T39, 2T40). The Authority's failure to respond to the petition was the genesis of the union movement among the managers (2T13, 2T40).

21. Andrew Takacs was involved in the union from its beginning (2T12). He participated in union meetings, signed an authorization card immediately, talked to fellow employees regarding union membership and attended membership meetings that were held to

^{14/} Of the ten employees who signed CP-19, seven were employed by the Authority at the time of hearing, two had retired and Takacs was terminated (2T42, 2T43).

inform employees of the status of negotiations (1T61, 1T88, 1T89, 2T15). Takacs actively recruited engineering department employees for the union because some were reluctant to join (2T14, 2T15).

22. Takacs did not attend negotiations sessions, did not attend or testify at representation hearings or conferences at the Commission, did not serve as an election observer, and did not attend any meetings between the Authority and AFSCME (1T88, 1T89, 2T14, 2T44).

23. Walter Luger was hired by the Authority in 1989 as a Real Estate Analyst (2T70, 3T90). The position did not exist before he was employed because the Real Estate Section did not exist continuously at the Authority - it was eliminated in 1982 and outside consultants performed real estate functions (2T107, 2T108, 3T89, 3T90). He dealt with the acquisition and maintenance of properties and tax payment on surplus properties (2T70, 2T71). Luger and a Real Estate Attorney who was hired in 1991 also worked on the Turnpike widening projects, which were winding down in 1994 (3T91).

24. Luger became aware that the managers were considering organizing in early 1990 by talking to employees and an Authority Commissioner he was friendly with (2T71). Before the union was formed, Luger spoke to Olarsch, who was then the Director of Law. Luger told Olarsch that he was thinking of getting involved with the

union and Olarsch said it was the best thing for him to do (2T72, 2T110, 2T111). ^{15/}

25. Luger first became involved in some organizational meetings at the Hightstown office in late 1990 or early 1991 (2T72, 2T74). Before bringing in AFSCME, the managers met with Authority officials in early 1991. Luger presented the case for the managers, who stated that they really did not want to form a union but were unhappy with their treatment by the Authority. Tobia, Garrity, Bill Burke and Bruzzichesi attended the meeting on behalf of the Authority (2T73). After the meeting, there was no formal response from the Authority but informal word got back to the managers to do what they had to do (2T73, 2T74).

26. Walter Luger was involved with AFSCME from the start of Meara's involvement. He attended all of the initial organizational meetings and actively solicited employees to sign authorization cards. After the representation petition was filed, Luger participated in the Commission representation hearings, acted as AFSCME's election observer and participated on its negotiations

^{15/} Olarsch had a "vague recollection" of this conversation with Luger. Olarsch recalled that he did not advise Luger against joining the union, but told him whatever his rights, he certainly should exercise his rights as a citizen of the State (3T94). I credit Luger's recollection of this meeting. Olarsch's second statement is inconsistent with his initial statement of having only "vague recollections" of the conversation. Luger's demeanor throughout his testimony was also more forthright and assured than Olarsch, who was often vague, unresponsive to the questions asked and sometimes barely audible.

team (1T60, 2T74, 2T75). Luger was President of the local, and hung the local charter on his office wall with some other union paraphernalia (2T74, 2T75).

27. Many of the organizational meetings for the managers group were held in Hightstown after work and included discussions where Luger acted on behalf of the union with other employees (2T116). Those present at the meetings were primarily employees involved on the negotiating team. Bruzzichesi observed the meetings in Hightstown a number of times (2T117).

28. Dino Loretangelo and Karen Jeffreys heard grievances for the Authority as its labor committee (2T75).^{16/} Luger was in their office when Bruzzichesi entered and said that there was talk about people who would be losing their jobs. Loretangelo said he heard that he and Jeffreys would be wiped out and Bruzzichesi replied that they probably would not have to worry about having their jobs eliminated if they ever made some pro-management decisions (2T75). Luger felt that Bruzzichesi made this statement in his presence to send him a message (2T75). Bruzzichesi also said that people who supported the union should be careful about what they were doing (2T75).

29. Luger and Bruzzichesi had a later discussion in Luger's office about things that had occurred in a negotiations

^{16/} Loretangelo and Jeffreys did not hear grievances for AFSCME members, they heard grievances for IFPTE Local 194, which represented the toll collectors (2T127).

session. Bruzzichesi said that everybody knew that Luger was the brains behind the union and Bruzzichesi could not understand, given Luger's political background, why he would be involved in a union (2T75, 2T76, 2T79). Luger said a union was necessary because the managers were being discriminated against and not treated equally to unionized employees (2T75, 2T76). Luger interpreted Bruzzichesi's statement as a warning that top management was aware of what he was doing and a threat that "top management is aware of your role and you are to be careful" (2T76, 2T114, 2T115, 2T128, 2T129).

30. In October 1993, Luger and Bruzzichesi went on a goose hunting trip (2T112, 2T133, 2T134). They discussed some matters pertaining to the Authority. Bruzzichesi said he did not think it was a good idea for Luger to be involved in the union - it could cost Luger his job (2T129). There were no other witnesses to the conversation (2T135, 2T136). Bruzzichesi was on the Authority's negotiations team since the onset of bargaining (2T133, 2T134, 2T135, 2T136). Bruzzichesi was not Luger's supervisor, did not review Luger's work performance, give him assignments or inform management if Luger was performing inadequately (2T113). 17/

17/ Bruzzichesi testified that he did not make any express or implied threats towards Luger based on Luger's union affiliation or union activities and uttered no warning statements that Luger should watch it or else he could be fired because of his union activities. Bruzzichesi had no recollection of a conversation while goose hunting warning Luger that he could be terminated (4T126, 4T144, 4T145).

31. Joseph Veni was Elms' immediate supervisor in the Engineering Department. Veni's position was terminated in the fall of 1994, but he accepted another position with the Authority (2T27, 4T22). He was present at some of the meetings between Meara and Authority employees, but not at the initial meeting (1T93). Veni was not a member of the negotiations team, was not an election observer and was not present at any meetings between AFSCME and the

17/ Footnote Continued From Previous Page

Bruzzichesi also testified that he did not threaten Luger for his union activities outside of the goose hunting trip (4T128). Bruzzichesi did not recall referring to Luger as the brains of the union or telling Luger to watch it because he was a rabble rouser (4T127). Bruzzichesi described his relationship with Luger as cordial and stated that he bore no animosity towards him because of his union activities (4T127). Bruzzichesi also testified that he did not suggest that Jeffreys and Loretangelo would be terminated because of decisions made in connection with their positions on the labor committee (4T127). I credit Luger's testimony - not Bruzzichesi's - regarding their conversations about Luger's activities on behalf of AFSCME. Bruzzichesi's demeanor and body language throughout this portion of his testimony was nervous. When testifying about other issues such as funding for construction projects or attempting to find positions for laid-off employees, his demeanor was noticeably more relaxed. I found Luger's testimony regarding the exchanges with Bruzzichesi to be forthright, consistent and credible, with no changes in demeanor between this area and other areas of testimony. Bruzzichesi testified that he worked with many members of AFSCME, he did not discriminate against them, he promoted their careers and attempted to create or find other positions within the Authority for the terminated employees (4T128, 4T129, 4T130, 4T132, 4T136, 4T150). I find no reason to discredit this testimony. However, it is insufficient to overturn my determination crediting Luger's version of his conversations with Bruzzichesi. The contrast in demeanor between Luger and Bruzzichesi, as well as the change in Bruzzichesi's demeanor between testimony regarding his conversations with Luger and other subjects is compelling.

Authority (1T93, 1T94). Meara did not recall if Veni testified at the representation hearings or attended any conferences at the Commission (1T94). AFSCME presented no other evidence or testimony regarding Veni, whom it stated failed to cooperate with its counsel (2T138). At the end of AFSCME's case, I granted the Authority's Motion to Dismiss the portion of the charge concerning Veni's termination (2T149, 2T150).

32. Executive Director Roger Nutt and Garrity handed Elms a termination letter dated October 3, 1994 (1T120, CP-10). The letter stated that Elms' position was "...one of those eliminated by the Hay Report", a management consulting report commissioned by the Authority (1T121, CP-10).

33. On October 4, 1994, Takacs was called to Nutt's office, advised he was being terminated and given a termination letter (CP-20, 2T22, 2T23). Nutt told Takacs that the Hay Group recommended termination of his position (2T23).

34. Luger received a termination notice dated October 3, 1994 (CP-23, 2T83). The reason given for the termination was the overall financial condition of the Authority and its inability to respond to future new directions (2T83).

35. The Authority issued a notice to employees stating that several positions would be eliminated and that employees who were going to be terminated would be offered reassignment to vacant positions (CP-9A). That notice contained two riders listing positions affected by the Hay Report recommendations (Rider I) and positions not affected (Rider II) (CP-9B).

36. Tobia and Executive Assistant Diane Scaccetti gave employees who were terminated a verbal list of Authority positions they could apply for. The list was later reduced to writing and the 11 terminated employees were offered the opportunity to apply for 12 vacant positions at the Authority (CP-27, 2T26, 4T22). Only two of available positions were management positions (CP-27, 2T27).

37. Takacs did not have the necessary computer proficiency for one of the management positions and the other was offered to and accepted by Veni (2T27, 4T22, 4T23). Takacs was encouraged by the Authority to apply for two maintenance positions (2T54, 2T55). He investigated the job duties and learned that they required physical labor that he was incapable of because of his age and heart condition (2T27, 2T28, 2T29, 2T31, 2T55). Luger felt the list was insulting and walked out of a meeting with Tobia and Scaccetti where the positions were discussed (2T84, 2T85). Luger did not express interest in another position at the Authority and was not offered one (4T24, 4T25). Instead, he retired (2T85). Elms took another position within the Authority - Communications Technician, that paid \$7000 less than his former position and required 5 more hours of work a week (1T115, 1T127, 1T128, 4T22). Takacs', Elms' and Luger's former positions no longer exist (1T131, 1T132, 2T61, 3T96, 3T97).

38. In late November 1994, Luger, Elms and Takacs were offered severance packages which required them to waive the right to

take any legal action related to their terminations^{18/} (CP-21, CP-24, 2T24, 2T25, 2T26, 2T83, 2T84). Luger, Elms and Takacs did not accept the severance package (1T115, 1T127, 1T128, 2T26, 2T84, 4T22).^{19/}

39. Takacs wanted to continue working at the Authority for three years to reach retirement eligibility, or at a minimum, until 1995 (CP-22, 2T32, 2T33). He discussed this with Nutt, who suggested that Takacs put his desires in writing (2T63). Takacs sent a letter to Nutt detailing his projects, the reasons why he should continue employment, and a summary of their meeting (2T33, 2T34, 2T64).

40. Luger met with Nutt and requested a three month extension of his employment to maximize his retirement benefits (2T93, 2T118). Nutt suggested that Luger make the request in writing, which he did (CP-25, 2T85, 2T86, 2T92). Luger explained the number of projects he was working on and stated that there was nobody in the Law Department with his unique skills (CP-25, 2T93). Luger also stated that he did not believe the Hay Group understood the nature of his job and may have relied on an outdated job

^{18/} This testimony of Scaccetti conflicts with Elms' testimony that he was not offered a severance package because he took another position at the Authority (1T127, 1T128, 4T94, 4T95). However, I credit Scaccetti on this point and find that Elms confused the offer of a package with his decision not to accept it.

^{19/} Takacs had also filed an age discrimination lawsuit against the Authority (2T51, 2T53, R-1).

description (2T119). Luger thought efforts to keep his job or get an extension were futile and he never received a reply to CP-25 (2T92, 2T93).

41. Brian Meara attended virtually every meeting between AFSCME and the Authority and most of the conferences convened by the Commission (1T70, 1T71). He was not laid off or demoted as a result of the 1994 Hay Report, but was transferred from engineering to maintenance, which increased his hours from 35 to 40 per week without additional compensation (1T71, 3T71, 3T72). Brian Meara was also working on an ongoing project with the State Police and his services were considered essential to its completion (1T103, 1T104).

42. Other employees such as Wingerter, Walley, Campbell and Scott who were involved with the formation of the AFSCME units, testified at the Commission representation hearings or were members of AFSCME's negotiations team were not affected by the 1994 terminations nor subject to any adverse personnel actions on account of their union activities (1T73, 1T74, 1T75, 1T83, 3T72, 3T85, 3T86, 4T101). Brian Campbell had negotiated on behalf of AFSCME, but was not affected by the Hay Report's recommendation to eliminate one managerial position in the Buildings and Facilities Section (3T85, 3T86).

43. In September 1994, Meara saw an article in the Home News that referred to the elimination of 30 managerial positions at the Authority. Meara sent a memorandum to Authority attorney Tobia

requesting a list of the 30 managerial slots referred to in the article by Authority Chairman Frank McDermott, as well as a timetable for the layoffs (CP-8, 1T55, 1T56). The Authority never responded to CP-8 (1T56). The Authority did not discuss layoffs with AFSCME - Meara's first notice of the layoffs was from the newspaper (1T56).

44. Meara learned which employees were terminated when affected unit employees received termination letters. Meara received a copy of a notice to all employees from Garrity notifying them of the elimination of positions and offering terminated employees the opportunity to be reassigned to vacant positions (CP-9A, 1T58). Garrity did not send AFSCME a copy of termination letters before they went to Elms, Luger and Takacs (1T56, 1T57, 4T112). The termination letters sent to Elms, Luger and Takacs advised them that their positions were eliminated by the Hay Report, an organizational study commissioned by the Authority (CP-10, CP-20, CP-23).

45. Meara asked Garrity for specific information on the layoffs, including the exact positions affected by the Hay Report recommendations (1T58, 1T59). Meara received two lists from the Authority dated November 17, 1994 - a list of positions affected by the Hay Report recommendations and another list of positions not affected by the recommendations (CP-9B, 1T60, 1T88). The Hay Report did not specifically mention elimination of Takacs' or Elms' positions (4T112). Luger's position of Real Estate Analyst was

identified in the Hay Report (4T123). The positions of four AFSCME members were eliminated by the reduction in force. AFSCME represents approximately 69 titles in its Authority locals (1T77).

46. The letters given to terminated employees and the Authority's explanation of the layoffs to AFSCME stated that the layoffs were for financial reasons, although the Hay Report recommended that the Authority create several new high-level positions and departments (CP-7, 1T66, 1T67, 1T96). However, the report stated that most of the recommended new positions could be staffed internally with existing employees and would therefore result in no material increased costs to the Authority (1T98, CP-7).

47. Meara submitted authorization cards for employee dues deduction to the Authority sometime in the spring of 1995, after the Authority implemented its reduction in force in the fall of 1994 (1T90, 1T91, 1T92). Takacs was no longer employed by the Authority when Meara submitted the authorization cards (1T90, 1T91, CP-20). Meara submitted an authorization card for Elms, because he occupied a unit position at the time of this hearing (1T91, 1T92). Meara also submitted Veni's authorization card to the Authority in the spring of 1995, but was unsure if Veni's new title of General Foreman was included in the unit (1T77, 1T78, 1T93).

48. The Authority had retained management consultants before the 1994 Hay Report issued. Mitchell Management Consulting was hired by the Authority in the spring of 1988 to analyze a major

capital construction project known as the '85-90 widening project (3T9, 3T10). Mitchell concluded that the Authority was exceeding the budget for that project by almost 1 billion dollars (3T10). After the Mitchell report, the Authority felt that there was a need for organizational restructuring and analysis (3T12). In 1989 it retained the Hay Group, an international management consulting firm, to review the structure of the Authority and make recommendations on its management (R-6, 3T155, 3T156, 3T157). George McCormick is a Managing Consultant with the Hay Group who was responsible for both the 1989 and 1994 Hay Reports (R-6, 3T161, 3T162).

49. In 1989, the Hay Group interviewed Takacs, Luger and other employees regarding their job descriptions and responsibilities and asked them to fill out a questionnaire (2T15, 2T16, 2T58, 2T59, 2T80).

50. The 1989 Hay Report concluded that there was an unusual concentration of operating and control responsibilities in the Authority's Engineering Department, and a lack of financial oversight over the Chief Engineer's capital budgeting responsibilities (3T13, 3T32, 3T33, 3T34, 3T36). The 1989 Hay Report stated that the Authority had a weak organization with few financial and construction controls, no business planning, no real contract administration and a finance department that was in need of increased control (3T166, 3T167, 3T168, 3T169, 3T170, 3T171, 3T172, 3T173). The 1989 Hay Report was issued on August 11, 1989. The Grade 13 employees submitted their petition to the Chief Engineer in October 1989 (CP-19, 2T41).

51. The 1989 Hay Report did not recommend the termination of any positions (3T109, 3T217). It was not implemented to any significant extent, including its recommendations regarding the Engineering Department (3T26). The report was not implemented because of a change in the Authority's administration (3T26). Executive Director Donald Watson reviewed the Hay Report in 1990 and told Olarsch he disagreed with it (3T26, 3T27, 3T28). The transition team for the Florio administration also requested that there be no implementation of Hay or any personnel changes until the new administration assumed responsibility at the Authority (3T105).

52. In 1989, the Authority's stable financial condition changed (3T40). In 1989-90, the structure of the Authority's debt indicated that a toll increase would be necessary by April 1, 1990, although that increase was delayed for approximately one year and implemented in 1991 (3T46, 3T50, 3T51). There was a major financial restructuring in 1991-92, which was necessary to fund the Authority's 400 million dollar purchase of 5.5 miles of Interstate 95 (3T46, 3T47, 3T48, 3T49). The Authority conducted a reduction in force in late 1991, eliminating approximately eleven positions before its financial restructuring (3T54, 3T122). There was also a personnel restructuring that affected different departments (3T123).

53. In early 1994, Authority Chairman Frank McDermott discussed the 1989 Hay Report with Olarsch (3T7, 3T8, 3T9). Olarsch explained the background of the Hay Report and developments at the

Authority between 1989 and 1994 (3T9). Olarsch believed that the recommendations of the 1989 Hay report were still valid and even more important in 1994 (3T59). There were discussions regarding reorganizing the Authority to make it more competitive. The Authority's Commissioners were also very interested in cost control and reduction in early 1994 (3T65).

54. The Hay Group was retained in 1994 to update its 1989 recommendations on the structural outline and organization of the Authority and to make new recommendations where necessary (3T182, 4T6). Hay was asked to examine management functions at the Authority and to recommend how the Authority could be streamlined and made more efficient where there might have been duplicative functions (4T6, 4T7). The Chairman felt he had a mandate from the State to downsize which he and Olarsch discussed with Hay (3T59). Many of the concerns raised by Hay in 1989 regarding processes, structures and accountabilities remained in 1994 (3T174, 3T175).

55. As part of the supplemental report, McCormick was asked to look at whether the 1989 recommendations were still valid and to apprise himself of what changes had occurred (3T175). The most significant change since 1989 was the financial condition of the Authority. The initial debt capacity had changed, and the Authority had become heavily constrained in terms of future growth and overall expenditures (3T182). Olarsch felt the Authority required a financial restructuring in 1994 in order to meet the terms of its bond resolutions (3T38). In 1994, documentation

revealed the need for toll increases over a series of years (3T51, 3T52). The need for a toll increase was based upon a shortfall, the Authority's debt ratio, the projections of a consultant and traffic revenue studies (3T52).

56. The Authority told the Hay Group that it wanted to save money and needed to reduce operating expenses because of its financial condition. The Authority wanted to save a million dollars but did not instruct Hay that its report had to generate a specific amount of savings, an estimated amount of savings or that the savings had to come from anything that their report generated (3T221, 4T7).

57. McCormick learned that the managers had organized from Olarsch, in the course of catching up with developments at the Authority between 1989 and 1994 (3T114, 3T199, 3T226, 3T227). McCormick was not instructed to shape his recommendations in order to terminate any employees in the AFSCME units and his recommendations were not influenced by the fact that a union member or a non-union member occupied a position (3T75, 3T157, 3T162, 3T163, 3T200, 3T201, 4T7, 4T26). McCormick was specifically told that unionization was not an issue that Hay was to address (4T8, 4T26).

58. McCormick was never asked to eliminate a certain number of positions or any specific positions (4T7). When drafting the Hay Report, McCormick did not look at the names of employees in various positions, just the positions (3T149, 3T163, 3T200).

McCormick generally knew if a position was occupied by a unit member because he was aware of the 32 or 33 positions that were not organized, so he knew that the rest were (3T200).

59. Neither Takacs, Elms nor anyone from the Engineering Department was interviewed for the 1994 Hay Report, nor was Luger (1T120, 2T18, 2T81). McCormick did not interview all of the Authority's employees for the 1994 report because the project was not funded to do so (3T176). McCormick interviewed all of the Commissioners and all of the Directors including Olarsch (3T111, 3T176). McCormick was also provided with information by the Authority's senior management which he did not independently research and analyze (3T111).

60. A key finding of the 1994 Hay Report was the Authority's change of direction from a construction organization to a safety and maintenance organization. The Authority had stopped building, construction activities were winding down in 1994 and it went into a maintenance mode (3T61, 3T62, 3T63, 3T186). The 1994 Hay Report recommended that the Authority change its direction to focus on maintenance cost control and the marketing of non-toll revenue sources (3T62). The Authority's financial condition precluded further construction, including construction of proposed Route 92. McCormick heard from the Commissioners at the Department of Transportation that any major construction projects would be done by an entity other than the Authority (3T64, 3T186, 3T187). The Authority's financial condition also affected its ability to

construct roadways, undergo maintenance projects and to design and build buildings (3T64).

61. The 1994 Hay Report found that there were heavily staffed functions where automation or rationalization would reduce headcount (3T68, 3T191, CP-17). Rationalization or rationalizing is a term for downsizing (3T68, 3T69, 3T179, 3T180). The 1994 Hay Report recommended combining Buildings in the Maintenance Department and Facilities in the Engineering Department into one department entitled Maintenance Engineering Services. It also recommended rationalizing the department in view of future workload requirements (3T74, 3T78, 3T79, 3T84, 3T191, 3T193, 3T194, CP-17). McCormick recommended that the departments be combined under one Director, since the total headcount in both did not economically justify two managerial level positions (3T204, 3T205, 3T206).

62. This recommendation was based upon McCormick hearing that the Authority's workload would be reduced, and his conclusion that there were people doing similar or related things in different parts of the organization (3T193, 3T206, 3T207). McCormick believed that maintenance and engineering were essentially the same thing because both areas dealt with vertical structures such as buildings, as opposed to bridges and highways (3T84, 3T85). McCormick did not list specific positions in his recommendation to combine and rationalize facilities and maintenance because he did not have enough knowledge of each function or enough specific information on future workload (3T214, 3T215). That decision was left for the

Authority to make at a later time, depending upon its future workload (3T215, 3T235, 4T18, 4T19).

63. McCormick felt he had sufficient information to make a recommendation at the managerial level, where there were two positions (3T234). He recommended elimination of the Senior Engineer position with the intent of flattening out the organization and giving individuals more authority (3T82, 3T83, 3T84).

64. In 1994, McCormick interviewed Bruzzichesi regarding combining the Facilities Section of Engineering and the Buildings Section of Maintenance. McCormick also interviewed Olarsch regarding these sections (3T152, 3T153, 3T224, 3T225, 4T28, 4T69, 4T133). Bruzzichesi felt that the combination would be effective based upon his experience in other workplaces (4T133). Bruzzichesi described the roles various units played in both maintenance and engineering, discussed the employees in both sections and their titles and job responsibilities (4T133, 4T141). Bruzzichesi did not speak to McCormick about terminating employees, nor did he suggest to either Hay or the Authority that members of the Facilities Section should be terminated because of their union affiliation (4T141). Bruzzichesi did not provide any plan on how to combine the two work groups and had no idea who decided which part of each group would be retained (4T149, 4T150). When he spoke to McCormick about the Engineering Department, Bruzzichesi had only a month of experience working there (4T148, 4T149).

65. McCormick reviewed ongoing projects in the Facilities Section of Engineering by looking at the Authority's current and previous business plans, capital budget documents prepared by the Engineering Department, the surplus funds budget and the special projects and maintenance reserves (4T10, 4T11, 4T18, 4T83). McCormick based his projection of the Authority's future workload on budget projections given to the Finance and Budget Departments by the Engineering Department (4T83). Determinations on workload were made by looking at the names of employees in the facilities group which appeared in the capital budget next to the projects they were responsible for (4T83, 4T84). The Authority did not perform an independent study of the anticipated future work load of the Facilities Section of Engineering and the Buildings Section of Maintenance (4T36, 4T37). The 1993-94 capital and surplus funds budgets were prepared prior to the release of the 1994 Hay Report (4T10, 4T11).

66. The Authority looked at the capital budget to determine its future workload and concluded that the future workload were in the construction side of facilities, not on the engineering and design side. Based on Hay's recommendation and the Authority's anticipated future needs, the Authority felt that the construction side still had valid responsibilities but could not validate the

responsibilities of the design and development side^{20/} (4T19, 4T20).

67. Elms had only one capital budget project under the special project reserve fund in 1994. He was working on a lighting project at I-95 that was not related to buildings (4T11, 4T70, 4T84, 4T137, 4T138).^{21/} Takacs had four projects under the special reserve budget in 1994 - the addition of women's facilities to certain maintenance districts, two air conditioning projects at toll booths and an asbestos abatement project (4T12, 4T138, 4T139). There was minimal design work done on those projects because the majority of funds for 1994 and beyond was allocated for the construction phase, not the design phase of the projects (4T12, 4T13, 4T139). Projects that were handled in the Design Section of Facilities were assigned to Brian Meara, who was the Project

20/ This testimony seems to contradict Hay's assertion that the Authority was changing focus from a construction to a maintenance organization. However, the record shows that there were still construction projects in progress, although there was little to no funding to design new projects. This testimony is therefore consistent.

21/ Elms testified that he was responsible for other projects under the capital portion of the budget. However, Scaccetti testified that Veni was solely responsible for some of them, one was transferred to Brian Meara before the Hay Report was implemented and another was cancelled (4T70, 4T71, 4T72). Scaccetti based her assessment of Elms' workload on a budget document submitted by either Wally Grant or Bruzzichesi. I credit Scaccetti's testimony on Elms' workload (4T36, 4T88, 4T89). She was an authoritative witness whose testimony was supported by extensive financial and budget documentation.

Engineer responsible for the five projects that Elms and Takacs had worked on (4T20, 4T21).^{22/}

68. Before the reorganization resulting from the 1994 Hay Report, Elms and Takacs were in the Project Design and Development Section of the Facilities Department and Veni was the Supervising Engineer in the Facilities Section (4T14, R-5). None of these employees was in the Construction Section (4T13). Brian Meara and Assistant Construction Supervisors William Applegate and John Fisher were in the Construction Services Section of Facilities (R-5, 4T14, 4T15). Brian Meara was transferred to Project Engineer in the Buildings Section and Applegate and Fisher were reassigned with Meara as part of the Hay reorganization (R-8). At the time of this hearing, there was outstanding design work that had not been completed on some projects, but there was limited expectation for future work in facilities because there was no funding (4T140).

69. There was no discussion that implementing the Hay Report's recommendation to combine maintenance and engineering into one department was done to eliminate the positions of union members Takacs, Elms and Veni, or to discriminate against any AFSCME member (3T74, 3T79, 3T82, 3T87).

^{22/} Takacs testified that he was working on seven active projects when he was terminated (2T34, 2T35). However, I credit Scaccetti's testimony on this point - she was an authoritative witness whose testimony was supported by extensive financial and budget documentation (4T12, 4T138, 4T139).

70. McCormick interviewed Acting Director of Law Ann Christine Monica regarding the Authority's Law Department and the 1994 Hay Report made specific recommendations about that department (CP-17, 4T28). McCormick felt that the Authority could benefit from the trend to outsource work and analyzed each area of the Law Department to see which ones could be eliminated or outsourced. McCormick believed that the workload affecting real estate did not justify the cost of carrying the Real Estate Section of the Law Department (3T208, 3T209). He recommended elimination of the Senior Attorney because of a one over one reporting relationship, and elimination of the Real Estate Analyst and Real Estate Attorney positions due to a decreased volume of real estate activity (3T95, 3T96). Olarsch agreed with McCormick that real estate work was winding down in the Law Department because the widening project was concluding and there would be less construction in the future (3T97). The Real Estate Analyst, Real Estate Attorney and Senior Attorney have not been replaced (3T96, 3T97). The union status of the affected employees in the Law Department was irrelevant to the recommendation to eliminate positions there (3T208).

71. Page 22 of the 1994 Hay Report states that:

Executive authority at the Turnpike Authority has traditionally been out of balance with executive responsibility because of the Authority's lack of human resource policies.

While this imbalance did not in the past represent an impediment to the Turnpike's survival, the organization of managerial employees into a bargaining unit could perpetuate the imbalance (CP-17).

McCormick believed that organization of the Authority's managerial employees would leave it with only 32 or 33 positions that were not organized, which "will make it very, very difficult for the organization to be properly run" (3T197). McCormick thought that organization of the Turnpike's managers was an impediment at some level to the Authority, but did not intend this portion of the Hay Report to be an anti-union statement (3T199, 3T220). Meara viewed this section of the report as substantiating his belief that the Authority opposed AFSCME's efforts (1T95).

72. The Hay Report affected positions held by non-AFSCME members including the Labor Relations Administrator and labor relations committee members Dino Loretangelo and Karen Jeffreys who were also terminated in 1994, although the Hay Report recommended that they become part of the Human Resources Department (CP-9B, 1T75, 1T76, 2T76, 2T77, 2T104, 2T105). Other non-AFSCME members terminated as a result of the 1994 Hay Report were Senior Engineer Linfante and Real Estate Attorney Joseph Gottlieb (1T76, 1T77, 2T105, 3T67, 3T68, CP-17).

73. McCormick did not know which of his recommendations or findings from the 1994 Hay Report were implemented and had no input or discussions with Authority officials regarding implementation (3T222).

74. The Authority directed its Executive Director and staff to prepare an implementation plan based on the staff's analysis of the 1994 Hay Report (CP-29, 4T45). Scaccetti reviewed

the final document, looked at its recommendations, determined what positions were affected and created a rationale for them so it could be reviewed and approved by Olarsch (4T90, 4T91). Scaccetti made preliminary recommendations to Olarsch in August 1994 based on drafts of the Hay Report (4T91).

75. Scaccetti's recommendation to the Authority was to eliminate the managerial position in the facilities side of engineering (Veni's position), to eliminate project design and development from the facilities group and to transfer the construction section to the maintenance organization known as buildings (4T20, 4T21). Olarsch concurred with the decision to eliminate the facilities section, which included Takacs' and Elms' positions (4T21, 4T22).

76. Scaccetti was not involved in negotiations with AFSCME. She was aware that there was a movement to unionize, did not know who all of the union members were, but was aware of Luger's union membership (4T9, 4T10, 4T58). Olarsch never gave Hay a list of AFSCME members he wanted terminated (3T59, 3T60, 3T87).^{23/}

^{23/} Olarsch testified that he was not really aware of who the AFSCME members were in 1994, he did not pay much attention to how many of the Authority's managers were included in or excluded from the AFSCME units, was vaguely aware of who the AFSCME negotiators were in 1994 and was not aware that Elms or Takacs were AFSCME members (3T86, 3T99). Although Olarsch received and reviewed the PERC representation decision which contained employee names, he did not concentrate on who the members were - he just studied the law and positions, not

77. After receiving the 1994 Hay Report, Olarsch presented it to the Commissioners for approval and requested authorization to prepare an implementation plan, which would be the responsibility of his successor (3T110). The Commissioners accepted the Hay Report on September 2, 1994 and directed its implementation after September 27, 1994 (3T110, 4T45, 4T46). As the new Executive Director, Nutt was given 30 days to review the Hay Report before its final adoption (4T46). He presented his recommendations along with the Hay Report on September 27, 1994 (4T47). The Hay Report was adopted with Nutt's exceptions (4T47). Olarsch did not make recommendations on what parts of the report should be implemented and did not know which portions were implemented because he left the Authority on the day the report was adopted and never saw the implementation plan

23/ Footnote Continued From Previous Page

individuals so he did not know who held each individual position (3T129). When Olarsch reviewed the Hay recommendations, he was not concerned with specific individuals in positions, just the positions (3T149). I do not credit any of this testimony. The Commission representation decisions not only discussed the positions in dispute, they contained the names of each employee in those positions as well as the testimony they provided. Therefore, the names of affected employees were integrated throughout the text of those decisions. In addition to his evasive responses throughout his testimony, his demeanor and body language during this portion of testimony was noticeably defensive.

(3T75, 3T129, 3T130, 3T144, 3T151). The Authority fully implemented 37 of the Hay Report's 66 recommendations (J-1).^{24/}

78. The Commissioners asked for a summary of personnel actions recommended by the report to calculate what savings the Authority would realize after the Hay Report was implemented. The Authority's Finance and Budget Department prepared a document that indicated current vacant positions at the Authority (CP-30, 4T50). That document contains a gross savings estimate of 2.7 million dollars, which was derived from subtracting the cost of the Hay Report and the severance package offered to terminated employees (CP-30, 4T8, 4T9, 4T51). The savings figure was calculated on the number of filled and vacant positions that were eliminated, as well as elimination of insurance contributions, pension contributions, overtime and vehicle costs (4T9).

79. There were 21 vacant positions listed in the Hay Report - constituting the majority of eliminated positions.^{25/} The Hay Report also recommended creation of new positions, but stated that most could be staffed internally with existing employees at no material increased cost to the Authority (3T76, 3T77). At the time of this hearing, none of the new positions recommended by Hay

^{24/} The Authority excepted to 16 of the remaining recommendations, 10 were partially implemented, one five-part recommendation was implemented in three areas and excepted to in two areas and two were partially implemented and partially excepted to (J-1).

^{25/} Salaries are budgeted for vacant positions (CP-30, 4T9, 4T51, 4T52).

had been filled (3T77, 4T25). The gross number for projected cost savings under Hay was created in mid to late August 1994, before there was an approved severance package. The final number was transmitted to the Commissioners after January 5, 1995, the last day for employees to accept a severance package, since the Authority would then have an idea of how many packages were accepted and how much they would cost (4T64).

80. Elms did not think that the Hay Report recommendation to combine and rationalize departments applied to his work group because there were no engineers with their expertise in the buildings department, there were ample projects for them to work on and there was no specific recommendation to eliminate his position of Engineering Project Supervisor (1T127, 1T134, 1T135). Elms believed that he was terminated because the entire engineering group was very active in trying to form a management union and that the Authority wanted to get rid of them because they were "troublemakers" and to ensure that the union would not exist (1T129, 1T130).

81. Takacs did not believe he was terminated as a result of the Hay Report because the report did not specifically recommend elimination of his position (2T22, 2T23, 2T24). Takacs believed he was terminated because of his union affiliation, the Authority's desire not to be responsive to the union and its members and its attempt to block the union's formation (2T49, 2T50). Takacs also thought his termination was motivated by his age and medical condition in combination with his union activities (2T36).

82. Luger believed he was terminated because of his union activity and the Authority's perception that he was a troublemaker (2T103). Luger believed that there was no substantive basis for his termination because nobody within the Authority could do his job (2T104).

83. Luger's former job duties are now handled by outside counsel and the real estate consulting firm of Abeles, Phillips, Preiss & Shapiro, which was retained for \$400,000 a year (2T95, 2T96, 2T97, CP-26). The Authority had retained Abeles Phillips since 1982, including when Luger was employed (2T120, 2T121, 3T92). Luger's salary was a little bit under \$70,000 per year, exclusive of benefits (2T122). The year before Luger was terminated, Abeles billed the Authority approximately \$80,000. Luger believes that the money spent on real estate consultants will rise after his termination because nobody in the department knows his former work (2T128). Luger also contested the Hay Report's conclusion that real estate activity was slowing down at the Authority since he had worked on cost estimates for acquiring land for proposed Route 92 (2T104). He felt that the 1994 Hay Report recommendations were not independently derived - that Hay was called in, given the Authority's objectives and used as a "CYA"^{26/} statement to accomplish predetermined goals (2T130, 2T131, 2T132, 2T133, 3T137).

^{26/} Cover your ass.

ANALYSIS

AFSCME contends that the Authority terminated Takacs, Elms and Luger in retaliation for their activities on behalf of Council 73.

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 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.

In 1989, Andrew Takacs signed a petition addressed to the Chief Engineer requesting a meeting with the Executive Director to discuss working conditions at the Authority. After AFSCME started to organize the Authority's employees, Takacs signed an authorization card, participated in union meetings, encouraged employees to join the union and updated them on the status of negotiations. All of the above are protected activities within the meaning of the Act and meet the first test of Bridgewater. However, I find that AFSCME did not prove the second part of the Bridgewater standard - establishing that the Authority had knowledge of Takacs' protected activities.

Although Takacs signed an authorization card on behalf of AFSCME, those cards were not submitted to the Authority until the spring of 1995, after Takacs was terminated in the fall of 1994. Takacs' participation in union meetings, encouraging employees to join the union and briefing them on the status of negotiations were all internal activities between the union and its supporters. None of Takacs' activities involved interaction with the Authority or its officials on behalf of AFSCME. Although Authority officials received a petition signed by Takacs and other employees seeking to discuss working conditions, that petition was signed in October 1989 - two years before AFSCME became formally involved at the Authority in 1991 and five years before Takacs was terminated in 1994. I find nothing in this record to establish that the Authority had knowledge of Takacs' activities, beyond the fact that his title was included in one of the AFSCME units.

Robert Elms signed an AFSCME authorization card, discussed formation of a union with employees, and was involved with meetings regarding membership and negotiations. He also offered assistance to both Brian and Gerard Meara regarding forming the union and making decisions in the organizing campaign. Although Elms' activities were protected, I find that AFSCME did not prove that the employer had knowledge of these activities. AFSCME submitted Elms' authorization card to the Authority, but not until well after the 1994 terminations, when Elms had accepted another position within the Authority. I find Elms' activities to be internal between Elms and union members, AFSCME officials or other Authority employees.

Elms was told by Senior Engineer Linfante that Linfante did not understand why engineers needed unions. At best, this is evidence that Linfante was aware of Elms' union orientation. However, it was not proven that Linfante played a role in deciding which employees were terminated, and Linfante himself was terminated in the fall of 1994. Elms also met with Garrity in the spring of 1994 regarding a promotion he did not receive. Brian Meara accompanied Elms as his union representative. Garrity therefore also had knowledge of Elms' union membership. However, this incident standing alone merely shows that the Authority had knowledge of Elms' union membership. It does not demonstrate that the Authority had hostility towards Elms as a result of that membership nor that Elms' union membership was a motive for his termination.

I therefore find that although AFSCME demonstrated that both Takacs and Elms engaged in protected activity under the Act, it did not prove that the Authority had knowledge of Takacs' activities. Although AFSCME established that the Authority had knowledge of Elms' union membership, it did not prove that the Authority had knowledge of his union activity or that such protected activity was a motivating factor in the Authority's decision to terminate him.

Since AFSCME did not prove that anti-union animus motivated the Authority's decision to terminate Takacs and Elms, I do not need to consider the Authority's defense regarding these two employees. However, AFSCME's contention that the Authority used the Hay Report as a pretext for illegally motivated personnel actions merits some comment. AFSCME's assertion that the Hay Group had no input into the implementation of its report is correct. However, the Hay Report clearly recommended combination of the Facilities Section in Engineering and the Buildings Section in Maintenance and downsizing the combined staff. The affected employees attempted to prove that this recommendation was unwise because the nature and volume of their work and their unique expertise made this a poor business decision. They also attempted to show that the Authority's decision to terminate them was an unwise economic choice. However heartfelt this testimony was, the opinion of either individual employees or AFSCME is no substitute for the employer's business judgment in deciding to retain a management consultant and follow or implement

its recommendations in an attempt to cut costs^{27/}. AFSCME's burden of proof requires that it demonstrate that protected conduct was a substantial and motivating factor in the Authority's termination of Elms and Takacs. Since AFSCME has not met that burden, it is irrelevant whether Elms' and Takacs' positions were mentioned in the Hay Report, how much or how little cost savings were generated by their terminations or to debate the amount of future work these employees would have been responsible for at the Authority.

AFSCME contends that the Authority's expenditures to challenge organization of the upper-level employees, attempt to prevent Meara from speaking before the Commissioners and the Executive Director and numerous anti-union statements made by its administrators all demonstrated its hostility towards the union and was dispositive of hostility towards Elms and Takacs. It is clear from this record that the Authority opposed AFSCME's efforts. However, that opposition did not impede AFSCME from organizing three units. AFSCME stressed that negotiations with the Authority were

^{27/} I also reject the argument that the statement in the 1994 Hay Report regarding the organization of the Authority's management employees as an impediment to its survival is evidence that the Hay Report was pretext for the Authority's discharge of AFSCME employees. Whether this statement was a reflection of the Authority's opposition towards unionization of its managers or of Hay's view that unionization would leave the Authority with a small number of non-unionized positions that would make management difficult, I find that this statement is a small portion of the 1994 Hay Report and is not dispositive of that document being a pretext for illegally motivated actions, rather than a management consulting report.

hostile and protracted and that the Authority appealed and continues to appeal the Commission decisions resulting in representation of its upper level employees. The Authority responds that it was merely exercising its legal right to appeal and statements opposing AFSCME made by high level Authority employees were expressions of its legal position. However, absent direct evidence of hostility on the part of the Authority or its agents towards Takacs and Elms, there is no need to consider these arguments.

Walter Luger's protected activity was of a different nature and scope than Takacs' or Elms'. Luger met with Authority officials before AFSCME became involved and presented concerns on behalf of unorganized upper-level employees. Luger also discussed the possibility of getting involved with the union with Olarsch. After AFSCME became involved at the Authority, Luger attended its organizational meetings and solicited employees to join the union. Luger's attendance at organizational meetings and solicitation of employees on behalf of AFSCME were internal activities similar to Takacs' and Elms' involvement. However, in addition to his meeting with Authority officials and his discussion with Olarsch prior to AFSCME's arrival at the Authority, Luger had significant and substantial involvement with Authority officials on behalf of AFSCME. After AFSCME filed its representation petition, Luger testified on AFSCME's behalf at the Commission representation hearings. Luger acted as AFSCME's election observer, was its local President and after the union was certified, was a member of its

negotiations team. Luger participated in organizational meetings for AFSCME that were held in the Authority's Hightstown facility and were observed by Bruzzichesi.

I therefore find that Luger was engaged in substantial protected activity, and the Authority had ample knowledge of that activity. Unlike Takacs and Elms, Luger's union activities put him in regular contact with the Authority's upper level management employees.

The third part of the Bridgewater test is whether the Authority was hostile towards Luger's exercise of protected activity. I find that the Authority was hostile towards Luger's protected activity, and that hostility was manifested in statements made to Luger by Bruzzichesi, a member of the Authority's negotiations team. I have credited Luger's testimony that Bruzzichesi made statements to him that people who supported the union should be careful about what they were doing, that everybody knew that Luger was the brains behind the union and that Bruzzichesi could not understand why Luger would be involved in a union. The most telling statement Bruzzichesi made to Luger was that it was not a good idea for Luger to be involved in the union because it could cost him his job.^{28/}

^{28/} There was also testimony that Bruzzichesi made an anti-union statement to two employees of the Authority's labor committee, who were also later terminated as a result of the Hay Report.

AFSCME has proved that anti-union animus motivated the Authority's termination of Walter Luger. It is therefore appropriate to consider the Authority's defense that the personnel action would have taken place absent Luger's protected conduct. The 1994 Hay Report recommended elimination of the Authority's entire Real Estate Department. Not only did it specifically recommend elimination of Luger's title of Real Estate Analyst, it recommended elimination of the Senior Attorney and Real Estate Attorney positions as well - neither of which was represented by AFSCME. The Authority did not selectively implement Hay's recommendation regarding the Real Estate Department to solely target Luger. It implemented Hay's recommendation to eliminate the entire department, consisting of three employees. Only Luger was an AFSCME member, and it was a widely known that he was a prominent, active and vocal union member and supporter. However, there was also compelling evidence that the Authority's financial condition mandated that construction would be limited, and that the need to acquire real estate would decrease as well.

I reject AFSCME's contention that the Hay Report was conceived as a pretext to terminate union supporters. The Hay Group

28/ Footnote Continued From Previous Page

However, those employees were not AFSCME members and the testimony regarding them was hearsay, unsupported by direct testimony. I do not find either these statements or the termination of these employees to be dispositive of anti-union animus towards Luger.

was initially retained in 1989, two years before AFSCME began to organize Authority employees. AFSCME attempted to demonstrate that the decision to eliminate Luger's position was not cost effective because the cost of outside real estate consultants would be higher than Luger's salary. However, the proper test is whether the employer reasonably believed that the action would result in savings. There was precedent for outsourcing real estate work both before and during the period Luger was employed by the Authority. AFSCME contends that although Luger's position was specifically recommended for elimination by the Hay Report, that the Authority had the discretion not to implement that recommendation. That is correct - but the Authority implemented Hay's recommendation to eliminate the entire Real Estate Department, rather than selectively targeting Luger, the only union member in that department. I therefore find that the Authority has demonstrated that it terminated Luger for business reasons that were unrelated to his protected conduct.

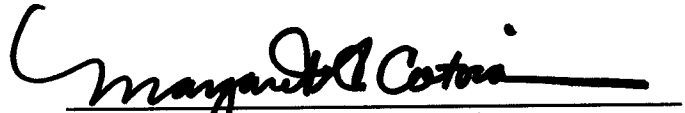
CONCLUSION

The New Jersey Turnpike Authority did not violate N.J.S.A. 34:13A-5.4(a) (1) or (3) by terminating Robert Elms, Andrew Takacs and Walter Luger. The Authority did not violate N.J.S.A. 34:13A-5.4 (2), (4), (5) and 7) by terminating Robert Elms. Elms did not prove on this record that the Authority dominated or interfered with AFSCME's formation, existence or administration, that he was

terminated for signing or filing an affidavit, petition or complaint or providing information or testimony under the Act and he did not cite any Commission rule or regulation that the Authority allegedly violated.^{29/}

RECOMMENDATION

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


Margaret A. Cotoia
Hearing Examiner

Dated: August 29, 1996
Trenton, New Jersey

^{29/} Elms' subsection 5.4(a)(5) allegations were dismissed when the Director issued the Complaint (C-1).