

P.E.R.C. NO. 2010-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HADDON HEIGHTS,

Respondent,

-and-

Docket No. CO-2008-124

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 71, LOCAL 3869,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommendation that the Borough of Haddon Heights violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) through (7), when it laid off eight of 13 Department of Public Works employees who were either union organizers and/or officers in the union in retaliation for their protected activity. The unfair practice charge was filed by the American Federation of State, County and Municipal Employees, AFL-CIO, Council 71, Local 3869. The Commission holds that even if it were to find anti-union animus, it would still dismiss the Complaint because the Borough met its burden of proving that it would have implemented the layoffs for economic reasons even absent any anti-union hostility.

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

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Appearances:

For the Respondent, Parker McCay, attorneys (Elizabeth M. Garcia, of counsel)

For the Charging Party, O'Brien, Belland & Bushinsky, attorneys (Mark Belland, of counsel)

DECISION

On April 28 and July 21, 2008, the American Federation of State, County and Municipal Employees, AFL-CIO, Council 71, Local 3869 ("AFSCME") filed an unfair practice charge and amended charge against the Borough of Haddon Heights. The charge, as amended, alleges that the Borough violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) through (7)^{1/}, when it laid off eight of 13 Department of

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard (continued...)

Public Works ("DPW") employees in the AFSCME negotiations unit who were either union organizers and/or officers in the union in retaliation for their protected activity. The charge further alleges that Borough officials made intimidating comments to unit members and that the Borough did not negotiate with AFSCME in good faith.

On September 9, 2008, a Complaint and Notice of Hearing was issued on the 5.4a(2) and (3) allegations. The Acting Director of Unfair Practices dismissed the 5.4a(4), (5) and (7) allegations.^{2/} The Borough filed an Answer on October 3 that: denies it violated the Act; asserts that the employees were laid off as a result of a budgetary shortfall; states that the layoff was in order of seniority; denies that any Borough official made

1/ (...continued)
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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ We presume the Acting Director of Unfair Practices inadvertently omitted the 5.4a(1) and (6) allegations in the Complaint. We note that the Hearing Examiner considered alleged violations of those provisions in his decision.

intimidating comments to unit employees; and asserts that the Borough negotiated in good faith.

Hearing Examiner Arnold J. Zudick conducted five days of hearing between January 6 and April 1, 2009 during which the parties examined witnesses and introduced exhibits. The parties filed post-hearing briefs and on October 29, the Hearing Examiner issued his report and recommended decision. H.E. No. 2010-3, 35 NJPER 404 (¶137 2009). The Hearing Examiner found that the Borough did not violate 5.4a(1), (2), (3) or (6) of the Act and recommended that the Complaint be dismissed.

On December 9, 2009, after an extension of time, AFSCME filed exceptions to the Hearing Examiner's decision arguing that: the Hearing Examiner applied the wrong legal standard; the Hearing Examiner erred in finding that the reasons proffered by the Borough for the layoff were not a pretext; and specific findings and determinations of the Hearing Examiner are arbitrary, capricious, or unreasonable and not supported by sufficient, competent, and credible evidence in the record. AFSCME also relies on the arguments set forth in its post-hearing brief.

On December 16, 2009, the Borough filed a response contending that: the Hearing Examiner applied the correct legal standard; the record supports the Hearing Examiner's determination that the reasons proffered by the Borough for the

layoff were not a pretext; and the Hearing Examiner's decision is supported by sufficient, competent, and credible evidence in the record. The Borough also relies on its post-hearing brief.

We have reviewed the record. After consideration of AFSCME's exceptions and the Borough's responses, we find that the Borough laid off the DPW employees for economic reasons and dismiss the Complaint. Even if we were to agree with AFSCME that there was evidence of hostility to protected activity, we would nevertheless find that the Borough proved that it would have instituted the layoffs even absent that hostility. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 4-90) with one modification. We grant AFSCME's exception number 17 and correct the Hearing Examiner's finding of fact number 83 to reflect that the retirement party of Gary Gesrick, DPW Superintendent, was held on March 28, 2008 and not March 28, 2009. We agree with the Borough that this was a typographical error that is not material to the case. An overview of the facts follows.

On February 5, 2007, the Director of Representation issued a "Certification of Representative Based Upon Authorization Cards" certifying AFSCME as the exclusive representative of all full-time and regular part-time blue and white collar employees and crossing guards employed by the Borough. The unit was previously unrepresented. The employees' organizing effort began

in the Fall of 2006 led by four employees from the DPW - Dan O'Neill, Frank Spadea Jr., Dan Phifer and Robert Lebb. DPW employees were the initial organizers, but eventually other Borough employees joined. There were 13 employees actively involved in the organizing campaign - 10 DPW employees and 3 employees from other departments.

The first negotiations session was held on September 20, 2007. At that session, there was a general discussion about salaries, health benefits and safety issues. AFSCME presented a proposed collective negotiations agreement that was modeled after the Borough's employee handbook. No agreement was reached at the first session, and the Borough did not at that time have a response to the union's proposal. A second negotiations session took place on October 10, 2007 and no agreement was reached.

On October 16, 2007, Borough Solicitor John Kearney faxed the Borough's counter proposal to AFSCME representative Marge Howardell. Howardell claimed that on October 24, AFSCME submitted to Kearney its response to the Borough's October 16 proposal. Subsequently, the Borough cancelled two negotiations sessions scheduled for November and December 2007 due to a change in administrations after the November elections - a new Mayor, Scott Alexander, two new Council persons, Tad Fetter and Rose Fitzgerald, and a new Borough solicitor, Sal Siciliano.

Scott Alexander and Tad Fetter had been concerned taxpayers who analyzed the Borough's 2006-2007 budget and the reassessment process and studied the Borough's then current financial situation. They felt that tax increases year after year had reached a crisis point as some Borough residents had realized a 75% tax increase without taking into account the reassessment.

After appearing at several Council meetings, Alexander and Fetter were approached by members of the local Republican party, including former Borough Solicitor Albert O'Lizi, to run for office. As a result, Alexander, Fetter and Rose Fitzgerald ran successfully as a team in the November 2007 elections. They were sworn in on January 5, 2008. The Borough's government then consisted of Mayor Alexander, Council President Trish Shields, newly elected Council members Fetter and Fitzgerald, and incumbent Council members Lee Wentz, Gordon Shopp, and Don Witzig.

At the January 2008 swearing-in ceremony, Alexander thanked his supporters and assured the residents he would do everything in his power to reverse the trend of tax increases. Fetter became finance chair. Neither Fetter nor Alexander had previous experience interacting with unions. The only union covering Borough employees that they were aware of after the November 2007 election was the PBA, representing the Borough's Police officers. The PBA and Borough had just concluded interest arbitration

proceedings, and an award was issued. Fetter and Alexander reviewed the PBA's collective negotiations agreement before it was signed three weeks after they took office in January 2008. Shortly thereafter, they discovered that the IAFF and AFSCME also represented Borough employees. Fetter learned that there was a union representing DPW employees when he saw a memo in late January or early February scheduling the February 19, 2008 negotiations session with AFSCME.

Alexander and Fetter began extensive budget reviews. Fetter met with the Borough's CFO, Ernie Merlino, to do a year-by-year budget comparison in order to identify potential savings. Based on these discussions and reviews, Fetter saw what he described as a perfect storm consisting of interest payments on loans to cover bills that would have to be paid before any tax revenue was collected and a significant reduction (10%) in State and federal aid from 2007. Fetter concluded that fixed costs would have to be lowered to have a serious impact on tax levies or the Borough would need to find another revenue source or make structural changes.

Alexander came to a similar conclusion based on his review of the Borough's finances. In his experience managing international operations, a top-down review is standard procedure in order to understand where expenses are allocated, what functions are performed, and the output and quality of services.

In performing this review, Alexander learned that salaries and benefits accounted for 56% of the Borough's budget. A closer examination of the salary/benefit figures revealed that 45% was allocated for Police salaries and benefits, 27% to DPW, and the other departments (administration, fire, finance, municipal court and construction) accounted for between 2% and 6% of the remaining salaries and benefits. Eventually, Alexander prepared a PowerPoint presentation, entitled "Optimization of HH Services Overview," detailing his top-down review and presented it in the public session of the March 4, 2008 Council meeting.

Prior to the March 4, 2008 Council meeting, Fetter and Alexander also conducted individual department operational reviews. More time was spent reviewing the Police Department and DPW because they represented 72% of the salaries and benefits paid to Borough employees. It was determined that the other departments were efficient.

Analyzing the number of police officers and civilians, the Borough's square mileage, and the crime index, the Mayor determined that the Borough's Police Department model was working well compared to other municipalities, although the department was severely understaffed with the death of a captain and other personnel changes. Fetter met several times with Police Chief Richard Kinkler in order to understand the impact of the new collective negotiations agreement on the Borough's budget. In

order to contain costs in the department, it was determined not to immediately fill a vacant patrol position and to have the detective sergeant take on a patrol officer's duties. A number of operating expenditures, such as overtime and short shifts, were eliminated. Instead of purchasing an additional patrol car in 2008, the Borough leased one for a savings of between \$30,000 to \$40,000. By these cost saving measures, no one was laid off or demoted in the department, and the 2008 department budget was decreased by \$147,432, which reduced the impact of the new collective negotiations agreement. Because the department at that point was understaffed, three promotions were made - a captain and two sergeants - but vacated positions were left open for the remainder of the year to recapture some salary savings. Retirements were treated in the same way - e.g. positions were not filled. Although two officers were hired, they were placed at the lowest step of the salary guide.

There was a four-pronged approach to the DPW budget review - gathering data from then DPW Superintendent Gesrick, gathering DPW data from surrounding municipalities, obtaining input and recommendations from a DPW consultant (former DPW Superintendent Jim Young), and obtaining an analysis from Borough CFO Merlino about the cost savings from privatizing operations.

Gesrick was observed by Phifer doing paperwork and Phifer asked what Gesrick was doing. Gesrick told Phifer he was getting

numbers together for the Mayor about the DPW operations to determine what everything cost. Gesrick then asked Phifer and other DPW employees to calculate the cost of fuel for each truck on a recycling run. When Phifer asked him why he needed this information, Phifer was told that although the cost of doing business in DPW was low compared to other departments and Gesrick returned money each year to the Borough, "you guys shouldn't have unionized." Gesrick also commented that Phifer was high enough on the seniority list.

A week before that conversation, Phifer, Chris Comly and O'Neill were in Gesrick's office getting their job assignments and discussing the new mayor, wondering what the Mayor's plans were for the Borough. According to Phifer, Comly and O'Neill, Gesrick responded that the union was screwing up the Mayor's plans and that they should not have organized. They did not know what "plans" Gesrick was referring to nor did they question him further about it, but they all speculated that Gesrick's comment was negative. Phifer also testified regarding another earlier conversation when Gesrick stated "f. . ." the union and informed Phifer that he (Gesrick) still ran the department.

Alexander testified that during his various discussions with Gesrick, Alexander never expressed an opinion about unions and, in particular, made no comments that AFSCME was "messing up his plans."

In order to gain further insights into the DPW operations and based on what Fetter perceived to be Gesrick's lack of cooperation with his request for additional information, Fetter met in late February/early March 2008 with former DPW Superintendent Young to help Fetter understand the DPW operations and staffing.

Young confirmed that Fetter told him that the State was cutting back funds to the Borough and that, therefore, cutbacks were necessary to save money and keep down tax increases. Fetter was particularly interested in what work DPW employees were performing between January and April and who was performing the work. When Fetter reviewed DPW operations in November 2007, outside of recycling and trees, he did not know what was being done in the period before brush pickup began in the spring. He also asked Young to itemize equipment and staff.

Councilman Witzig, chair of the DPW committee, arranged a March 10, 2008 meeting between Young and Gesrick. Rich Edelen and Spadea Jr. also attended the meeting as possible successors for Gesrick. On March 10, at about 7:00 p.m., as Young was about to go into the meeting with Gesrick, he saw some of the DPW employees. Because of rumors going around about possible layoffs, he stopped and explained to them that he was only there to do a survey. Phifer asked Young how many employees were going to be laid off. Young told him he knew nothing about layoffs.

During the meeting, either Edelen or Spadea Jr. asked Young about layoffs. Young told them he knew nothing about layoffs. He then explained, however, that the Borough was trying to save money, so if the Borough could get outside vendors to work for less than the in-house operation, the only way to save money would be to lay off personnel.

Young learned that there were 14 employees plus Gesrick and a part-time secretary, approximately the same number as when Young was superintendent. As to tree services, he learned that three employees did the tree work. He also learned that the bucket truck used for tree work was 25 years old and needed to be replaced at a cost of approximately \$160,000.

As Young was leaving the March 10, 2008 meeting, he was again approached by Phifer who asked him how many layoffs there were going to be in DPW. Young repeated that he knew nothing about layoffs, just that the Borough was looking for ways to save money and that he was only doing a survey. Young denied, as claimed by Phifer, that he told Phifer there would be no layoffs. Young testified that he had no authority to make such promises and that he was doing the survey not as a member of the government but as an independent citizen.

After the March 10 meeting, Young issued his report and concluded that there would be a savings of \$16,775 to outsource tree services. That savings was based on Fetter's salary/benefit

figures and an estimate Young received from a friend of \$2500 per tree for removal. The report did not take into account the \$160,000 replacement cost of the bucket truck.

Young estimated that nine employees would be sufficient to perform DPW functions - a supervisor, mechanic, assistant mechanic, three CDLs (employees with commercial driver's licenses) and three laborers - if tree services were privatized. Otherwise he recommended that DPW function with 12 employees as opposed to the current 16. Additionally, if recycling as well as tree services were privatized, Young recommended that only seven full-time DPW employees were needed. Young's report indicated that four current employees were in a position to take early retirement, if given an early retirement incentive package, "otherwise cut backs would have to start at the bottom of the list (Union)."

When Fetter received Young's report, he did his own due diligence. In speaking with other municipalities and tree companies, Fetter concluded that \$1000 to \$1500 per tree for removal was a more realistic figure because tree service was a highly competitive business, so Young's estimates in this regard were high.

The Borough eventually contracted with outside tree service vendors at an average cost of \$1000 per tree. Fetter also learned from Young's report that the DPW vehicle fleet was

decrepit and that there would be a lot of future replacement costs, specifically as related to the \$160,000 bucket truck. By outsourcing tree removal, the bucket truck would not have to be replaced.

Alexander met several times with officials in Barrington, Haddonfield and other municipalities to understand how they delivered DPW services. The common denominator in the staffing review and comparisons was equivalent full-time employees (EFT). Compared to the size of Barrington and Haddonfield and the number of residents and housing units in those municipalities, the Borough had 30% to 50% more EFTs than the surrounding communities. Based on those facts, Alexander concluded that the DPW had more staff hours than needed to provide the services performed.

The Borough decided to outsource tree services. As to recycling, Alexander and/or Fetter asked CFO/Treasurer Merlino to prepare a cost analysis itemizing expenditures, such as depreciation, insurance, maintenance and health care benefits. The report detailed what savings would be realized if recycling was outsourced.

On March 10, 2008, Merlino provided Alexander and Fetter with his analysis of the Borough's recycling effort. In order to compare the recycling costs to what it would cost if the service were outsourced, the Mayor obtained quotes from outside vendors

of between \$170,000 and \$180,000 annually for recycling services. When the recycling operations were eventually bid publically, the contract that was certified by Merlino came within this range.

Fetter reviewed Merlino's report and compared it to the overall year-to-year budgets. He called other municipalities to understand what their recycling costs were and also called their trash vendor to ascertain the charge for taking over the Borough's recycling. Fetter determined that, similar to tree service companies, there is price competitiveness among companies providing recycling services.

Eventually, based on both Young's and Merlino's reports and their own investigations, Alexander and Fetter concluded that the DPW was overstaffed and that the Borough was paying for resources it did not need. They determined that by outsourcing both recycling and tree services, there would be an annual net savings of approximately \$250,000, although that savings would not be fully realized in 2008 because any layoffs would not take place until several months into the budget year. They also concluded that outsourcing gave the Borough added flexibility in providing these services and responding to budgetary crises.

The February 19, 2008 negotiations session was the first since the November 2007 elections. It lasted about 30 minutes. This was the first time that Alexander met with AFSCME. Although he reviewed the negotiations file, he did no research before

attending the meeting. Based on that review, Alexander concluded that the Borough was still waiting for the union's response to the last Borough counterproposal from October 2007, which was a response to the initial AFSCME proposal.

Phifer testified that the first words out of Alexander's mouth were "why did you guys get a union?" Although Alexander denied that this was the first thing he asked, he did not deny asking the question. Alexander asked the question because he had never been involved in union negotiations and was curious about the employees' concerns.

Howardell told Siciliano that Alexander's question was inappropriate. Other members of the AFSCME team voiced their concerns to Alexander. During the negotiations session there was also a general discussion of what the Borough was seeking to achieve in negotiations. Siciliano explained that the Borough was waiting for the union's response to the Borough's counter proposal sent by the former solicitor (Kearney) in October 2007.

There were no discussions about layoffs. According to Alexander and Fetter, at this time the Council was nowhere near having discussions about layoffs because that decision was not finalized until the April 1, 2008 Council meeting.

Moreland's notes reflect that more meetings would be scheduled, "Next mtg? 3/13 5 p.m., 4/1/08 5 p.m." AFSCME was under the impression that March 13 and April 1 were scheduled negotiations sessions. Alexander, however, understood that the

March 13 date was an internal meeting for the Borough's team only to discuss the union's response to the Borough's October 2007 counterproposal that the Borough anticipated receiving from Howardell.

The March 13 meeting never took place. When the AFSCME negotiations team showed up on March 13, the Borough's team was not present. Siciliano informed Howardell that the March 13 meeting was only intended to be for the Borough's team. Moreland explained that the March 13 meeting was cancelled because the Borough never received the union's counterproposal requested by Siciliano.

On March 14, 2008, Siciliano wrote Howardell explaining that he had not yet received AFSCME's reply to the Borough's October counterproposal and requested that the union's response be sent as soon as possible so that the Mayor and Council could review it in advance of the April 1 meeting.

On March 17, 2008, Howardell wrote Alexander, copying Siciliano, expressing disappointment with what she described as the cancellation of the March 13 negotiations session and explaining that, therefore, she was filing for mediation. She also inquired as to whether the April 1 meeting was still scheduled.

The Borough did not receive AFSCME's counterproposal before the April 1 meeting so it too was cancelled, at least in part, because there would be nothing to discuss. On April 3, Siciliano

faxed a letter to Howardell confirming that he spoke to her on April 1, 2008 with respect to the Borough's October 2007 counterproposal and the union's response and that he was sending the Borough's October 2007 counterproposal to her for the third time. Siciliano again asked for the union's response to the counterproposal.

On April 11, 2008, Howardell sent the union's response asserting, however, that it had been previously submitted to the Borough on October 24, 2007. Moreland claims that this was the first time she had seen the response.

While the parties were negotiating in February 2008, the department budget reviews were being completed and reports generated. Alexander and Fetter prepared PowerPoint presentations for the March 4 Council meeting to demonstrate the Borough's 2008 fiscal situation in light of State and County aid cuts. The presentation for the public session was entitled "Corzine's Proposed State Budget Impact, and Camden County Tax on HH Budget." Alexander illustrated to the public how State-aid cuts would impact the local budget process and the Borough's out-of-pocket cash flow. The presentation gave residents an overview of department costs and suggested that the Borough was paying an unfair share of County costs.

The PowerPoint presentation for the March 4 closed session Council meeting was entitled "Optimization of HH Services

Overview" and was prepared for and presented by Alexander. The presentation was, in essence, Alexander's top-down operational review. The presentation itemized expenses by department, attributing the greatest costs to the Police Department and DPW. Out of a total operating budget of approximately \$3,800,000, salaries and benefits in the Police Department represented approximately \$1,700,000 and in DPW approximately \$1,000,000.

Under the heading of "Optimization Process," the report suggested that privatization of services or job sharing should be analyzed to achieve the desired savings. As to privatizing operations, the report listed pros (eliminating costs to purchase and maintain assets as well as costs associated with management, benefits and pensions) and cons (reducing the amount of control over the delivery of services). Finally, the report identified recycling, tree services, grass cutting and line painting as potential opportunities for privatization in DPW.

There were two budget presentations to the public at the March 18, 2008 Council meeting. First, Alexander presented a PowerPoint presentation entitled "Overview of Haddon Heights 2008 Municipal Budget." The presentation was prepared by Alexander together with the Council finance committee - Chair Fetter and committee members Fitzgerald and Shields.

The presentation provided a budget overview and objectives for 2008. Those objectives included (1) increasing budget

appropriations no more than 3%; (2) automating the process for budget summaries, department worksheets and tax-levy analysis; (3) working on three-year departmental budgets, in particular for the Police Department; (4) eliminating the Borough's dependence on municipal aid; (5) reviewing all operations to identify expense reductions and implementing reductions where possible; and (6) maintaining and/or increasing the level of services offered to residents, in particular by bringing the Police Department to full strength. Among the items listed in the presentation as outstanding or concerns were reorganizing the DPW.

The Mayor and Council's 2008 proposed budget would cut \$686,958.13 from the initial proposed budget for 2008 necessitating cuts from all departments even though all services would cost more in 2008. It illustrated that as to the Police Department, funds would be decreased by \$147,432 from the 2007 adopted budget and decreased by \$323,768 as between the initially proposed 2008 budget and the 2008 budget being currently proposed by the Mayor and Council. As to DPW, it explained that a proposed reorganization would save over \$115,000 during 2008 and would translate into a net annualized savings of over \$250,000 (gross savings of \$500,000). Not included in the DPW estimate was additional savings from fuel, insurance, maintenance, and future capital expenditures.

The second PowerPoint presentation in public session was entitled "HH Public Works Analysis." This presentation was also prepared by Alexander together with Fetter as well as the public works committee consisting of Chair Wentz and members Shopp and Shields.

This presentation explained the methodology undertaken in analyzing DPW operations and provided the four-pronged approach to conducting the analysis. The top-level findings of the report were that:

- (1) the Borough was overstaffed compared to Haddonfield and Barrington;
- (2) privatizing recycling provides an annual net savings of approximately \$81,000 based on the in-house recycling cost of \$256,533 and two quotes from outside vendors for the service at \$175,000 and \$180,000 respectively;
- (3) the Borough could realize an annual savings in the range of \$500,000 to \$600,000 by implementing the recommendations; and
- (5) the Borough could maintain all service levels with a new operational model.

The report then recommended four courses of action based on the findings - reorganize DPW, privatize recycling and tree work, auction off unneeded equipment, and maintain or increase the level of services to residents.

Howardell attended the March 18, 2008 Council meeting together with Spadea Jr., O'Neill, Phifer and most of the DPW employees because she and the AFSCME negotiations team felt that

negotiations were stalled, and they wanted to address the public to garner support for their position. Howardell learned from the PowerPoint presentations that some outsourcing in DPW might occur.

During the public session of the March 18 meeting, Howardell read a prepared statement addressing what she termed "cutting jobs in the Department of Public Works." She noted that the budget deficit was a town-wide problem, not just a DPW problem, and that, therefore, DPW should not be the "only department being affected in negative and drastic measures." Howardell questioned why jobs were created in other departments - the Police Department for example - while DPW jobs were being considered for cuts. This would, she predicted, hurt Borough services. Finally, she stated:

A union was brought in because the DPW and non-contracted employees were never treated fairly and then it came to their attention that there were discussions of cutting their benefits. Ever since the D.P.W. joined the union, it seems that they are now the sole target for dealing with the occurring problems.

In response, Siciliano objected generally to Howardell's statement, which he characterized as serious charges. He explained that the Council would not respond specifically due to on-going negotiations with AFSCME.

There were several communications between March 25 and 27, 2008 between Siciliano, Moreland and members of the governing

body concerning layoffs (implementation and procedures) and the DPW reorganization.

On March 27, 2008, Alexander sent an e-mail entitled "Lay Offs" to Shopp and Moreland with copies to the Council and Siciliano. The e-mail was partly in response to Shopp's expressed concerns about implementing the downsizing of DPW. Alexander wrote, in pertinent part:

Lee [Wentz], why are we having two leaders for dpw? How was this vetted? Do you realize that rich edelan [sic] is willing to retire this year or that we have the opportunity to take rich out of the union by making him a deputy super until he retires, thereby potentially not having to layoff rodney clark? I have heard negatives about Spedea [sic] jr.

* * *

We are laying off 9 workers for two reasons, overstaffing and cost savings due to privatizing. Overstaffing cuts have nothing to do with privatizing. Also, it is a fact that we can still pick up recycling and brush with the cuts in place using remaining staff, and we have money to hire outside tree help if needed until we sign a tree contract. So the cuts can move forward without contracts in place.

I am trying to understand why there is little sense of urgency [sic] to save the residents of this town tax dollars.

On March 27, 2008, Fetter forwarded an e-mail from Moreland to Alexander, who was on vacation. That e-mail explained layoff procedures. Alexander responded that he would call Fetter later that day. Alexander also indicated that he felt like having a

public fight with Shields and Wentz. Fetter shared Alexander's frustration with Shields and Wentz. In a follow-up e-mail to Alexander, Fetter shared an anecdote about his neighbor's making fun of Wentz. The neighbor quoted Wentz as saying "are we liable for anything?"

Gesrick's retirement party was held on March 28, 2008. After the party, Wentz, as chair of the Council's DPW committee, asked Shields to post a notice in the DPW garage announcing that Edelen was the new acting superintendent and Spadea Jr. was the new assistant acting superintendent (Spadea Jr. was still in the AFSCME unit and remained President). Shields went to the garage, handed the notice to Frank Spadea Sr. for posting and walked out. As she was leaving, several DPW employees began questioning her.

Phifer testified that he heard Shields comment as she was leaving, "Have a nice weekend, don't come back on Monday." Because he had been in negotiations with her, he followed her outside and asked her what was going on. He wanted to know about layoffs and, in particular, how many employees were to be laid off. According to Phifer, Shields told him all of the employees would be laid off and that when he asked her if it was because of the union, she allegedly said "yeah."

Alvarez also testified about the conversation with Shields. He stated that he followed Phifer outside the DPW garage as Shields was leaving. He stood next to Phifer when Phifer

questioned Shields about what was going on, whether the Borough was getting rid of DPW employees, and how many. According to Alvarez, Shields was not hesitant to talk to them, even glad to give them information and responded that all of them were being laid off. According to Alvarez, Phifer then asked Shields why the Borough was getting rid of all the DPW employees, Shields allegedly told him "[b]ecause of the union, they don't want it, they don't want to deal with it." Alvarez concluded that the Borough was "prejudiced against us because we wanted to better our conditions." He was shocked and offended at Shield's comments.

Shields testified that, at first, three employees questioned her about layoffs. She said Phifer was not one of the three. She told them she was only there to drop off a memo and that everything was not perfect in DPW but that the appropriate place to ask questions was at a Council meeting. Shields strongly suggested to them that they come to the Council meeting. Then, Phifer came up to her, and she said she reiterated what she told the other three employees.

The Hearing Examiner credited Phifer and Alvarez that Shields spoke to Phifer about the layoffs and that she attributed the reason for the layoffs to the union.

Shields' statements to the DPW employees on March 28, 2008 prompted Phifer, Spadea Jr. and a few others to get together on

Saturday, March 29, to create and distribute flyers to the Borough residents soliciting support against layoffs and privatization of DPW services. Both Phifer and Spadea Jr. created flyers entitled "ATTENTION YOUR TAX DOLLARS AT RISK." Both flyers challenged the Mayor's budget plan.

While walking through a park near his home on March 29, Fetter received a flyer from a DPW employee. Fetter did not know the employee's name. Fetter disagreed with statements in the flyer, namely that Alexander had doctored budget figures and that the entire DPW department was going to be wiped out, but he kept his feelings to himself on the advice of Siciliano. The employee also told Fetter that Shields told them that the DPW employees were going to be laid off.

During the course of distributing the flyers, Alvarez handed one to former Borough Solicitor Albert O'Lizi who happened to be going door-to-door getting signatures on an unrelated political petition for the Republican party. Phifer asserted that O'Lizi then pulled him aside and the following conversation occurred:

[O'Lizi] said we don't want to deal with another union. He said this flyer, this union, is going to cost you. He says haven't we always taken care of you before. I says like you're taking care of us now. And he says, well, why don't you stop over the house some time. That was it. I went back to handing out flyers. They didn't want to deal with another union.

[2T64-2T65]

Alvarez, who did not know O'Lizi and did not participate in the conversation but overheard what was said, testified that O'Lizi said "the flyer was a bad idea, your union is a bad idea and you're all going to pay for this." Later, when Alvarez learned that O'Lizi was the former Borough solicitor, he inferred that O'Lizi was speaking on behalf of the governing body and that they didn't want the employees to have a union.

O'Lizi testified that when Phifer handed him the flyer, Phifer told him that "they are going to fire us all." When O'Lizi asked Phifer what he meant, Phifer insisted that O'Lizi already knew about it. O'Lizi denied any knowledge, but Phifer still insisted that O'Lizi knew that the Mayor was going to fire all of the DPW employees. O'Lizi responded that the Mayor and two new councilmen were in the minority party and that he doubted that the Mayor was going to fire them all. Nevertheless, Phifer kept insisting that O'Lizi knew something.

O'Lizi asserted that Alexander had never spoken to him about possible layoffs and that when he read the flyer he learned for the first time that layoffs were being contemplated. O'Lizi was surprised when Phifer told him about the layoffs, because, in his opinion, layoffs could be a hot issue politically but, no one had asked his opinion.

O'Lizi then testified that Phifer asked him if there was anything O'Lizi could do. O'Lizi felt that Phifer was looking

for a political favor, since he and Phifer had been in the same political party until O'Lizi switched to the Republican party. Also, Phifer knew that O'Lizi had some friends on the Council.

As to whether O'Lizi made any comments to Phifer about the union, O'Lizi stated:

A. Well, I gave him my opinion. He said, you know, we are unionizing. I said, well, you know, I guess they are laying you off, playing hardball with you. I guess you can't expect the same kind of feeling you had when we were in control. It was different. We were in control. We knew we would deal with our employees because we knew most of the employees. I mean, we knew that - when I was solicitor I knew one of our guys who was in charge wanted to make sure that the Public Works guys were brought up on salary. And so we had a plan put in, initially was take care of the foreman, later on was take care of the laborers. And so, I mean, we did this only because they were our employees and we wanted to equalize things.

When you deal with the union it's kind of different. You're not dealing with your friend or your neighbor, you're dealing with a rep. I said, you know, they are going to play hardball with you. That's what you got to expect.

Q. And when you made that comment, was that your comment or did you get that from anybody else?

A. No. That was my opinion as private citizen O'Lizi. At that time that's all I was, was private citizen O'Lizi. I was not in any position or any capacity. I held no political position. I held no Borough position.

Q. Had you had any conversations with the Mayor or anybody in council that would

lead you to believe that that was their opinion and that's why you said that?

A. I had no discussion with Mayor or anyone in council regarding anything that was discussed that day. That day that letter was the first time I knew that there was a problem with Public Works and they were considering layoffs. I did not know it before that day.

[4T11-4T12]

Immediately after this conversation with Phifer, O'Lizi went to Alexander's house and spoke to him. O'Lizi told him about getting the flyer from Phifer and questioned him as to what he thought he was doing with an election to run the next year. O'Lizi felt that the Mayor should at least have warned him what was planned. In response to O'Lizi's concerns, Alexander explained that, to save money, layoffs were being contemplated as well as consolidation and whether it was financially feasible.

A negotiations session was scheduled immediately before the April 1, 2008 Council meeting. The reason for the cancellation was discussed in e-mails exchanged on March 31 between Moreland and Fetter. Fetter wanted to know whether the meeting was still on or whether it was postponed. Moreland responded that she was not sure but was waiting to hear from Siciliano. Fetter suggested to Moreland that, in his opinion, the negotiations session with AFSCME should be postponed until after the layoffs, but left it up to Siciliano to decide.

Alexander testified that he did not know why the meeting was cancelled but that he had been told by Siciliano that Howardell

had cancelled the meeting. Moreland testified that the Borough did not meet with the union in March or April because they still had not received the union's counterproposal.

Siciliano sent Howardell an e-mail at approximately 6:25 p.m. on March 31 confirming that he had called her office and left a message cancelling the negotiations session scheduled for the next day at 5:00 p.m. The e-mail suggested that Howardell call him if she had any questions but offered no explanation in the e-mail for the cancellation. Siciliano and Howardell spoke again on April 1 about the Borough's lack of a counterproposal.

Howardell had heard rumors about layoffs, although as of the April 1 Council meeting, she had not been officially informed. Because of the rumors and the cancellation of the April 1 negotiations session, Howardell, Spadea Jr., Phifer, O'Neill and their spouses attended the Council meeting. There was no discussion about layoffs in the open session.

During the open session, Phifer asked whether it was true that eight of the 15 DPW employees were going to be laid off. Shields testified she heard Alexander turn to Siciliano and ask him "[to] get me out of this." Siciliano responded to Phifer that the question could not be answered because AFSCME and the Borough were currently in negotiations. Phifer called Siciliano a liar and walked out before Siciliano was finished speaking.

Shields testified that while the Council was in closed session, the Mayor commented, "if we lay these guys off, the union could go away" and Siciliano immediately had the tape recorder shut off."

The Hearing Examiner credited Moreland and Alexander's testimony that at the April 1 Council meeting closed session, the tape recorder was turned off only to change tapes. The Hearing Examiner based this determination on his review of the closed session transcript and his finding Shields' testimony to be vague.

Shields testified to the following regarding the Mayor's comment about the layoffs and possibly getting rid of the union:

Q. Do you believe that the layoffs were caused as a result of the mayor's view of this union?

A. It was always stressed the fact that it was a money issue. However, as the year revolved, comments had been made little things that you see, I felt that that was a silk screen. I think the Mayor did not want to deal with the union. Honestly, I didn't want to see the union myself. I apologize for that, but nobody wanted to go through another contract negotiations and, you know, we rather deal with people as individuals instead of, you know, as a union. However, we had to respect their right to do so and we had to proceed. The Mayor actually relinquished himself from negotiations a couple of times because - I don't know reasons - but we did get e-mail saying he would not be attending negotiations anymore. He did come back to negotiations towards the end in 2008. But, in my opinion, he didn't

want to deal with [the union]. And it could be looked at as a way of getting rid of them.

[5T21-5T22]

On cross examination, Shields admitted that the reason Alexander removed himself from negotiations was that he and Siciliano did not get along and Alexander wanted to retain a different attorney to represent the Borough in negotiations.

The Hearing Examiner credited Shields to the extent that in her opinion, Alexander was opposed to the union. The Hearing Examiner did not infer from Shields' testimony that Alexander was in favor of the layoffs because he wanted to get rid of the union or that he was hostile to AFSCME. The Hearing Examiner found that Shields' testimony was vague and inconsistent with subsequent actions of the Borough.^{3/} The Hearing Examiner also found that Shields' opinions of Alexander were formed because of her political rivalry with him and that her sympathies rested with the employees and not the Council in matters regarding the layoff.

During the closed session, budget data was reviewed. Fetter explained cuts in extraordinary aid, State funding cuts and the

3/ For example, to support her opinion that the Mayor wanted to get rid of AFSCME, Shields recalled generally that the Mayor wanted to keep the crossing guards in the union because he knew they did not want to be included in the unit and, if they stayed in the union, it could be "debolished." [sic] The Hearing Examiner found this testimony inconsistent with the Borough's subsequent filing of a clarification of unit petition seeking to remove the crossing guards.

Borough's depleted cash surplus, and, basically, told the Council that it was time to make a decision.

After he assured the Council that he had lost a lot of sleep over the layoff decision, Alexander then summarized his thoughts, which are reflected in the transcript of the closed session:

And I thought about it, you know like it went through my head and through my head and through my head, and I said okay and that is part of why I did the presentation tonight. . . . There's eight employees that you know, need to move on, but we have 7600 residents, we've got 3,000 properties . . . we've got . . . people who can't pay their taxes as they are. We can't afford to increase our taxes any more than they are. And all we are saying, all we are doing is just becoming more efficient as a borough. We are not saying taking away the services, we are just becoming more efficient and we are looking to save increased tax burden to the residents. . . . And unfortunately, you can't get blood from a stone so we have to do something and unfortunately, because our DPW is inefficient by 30% (thirty percent), we know that. . . . We know that we have had success in privatizing our trash so we are looking at recycling. We are not the only ones doing the privatization of recycling. . . . Ernie has done the cost analysis. We know we can save money. The tree service, we know we can save money there, as well. So you look at it in total, this is my thinking when I wasn't sleeping, I came up and said it is a no-brainer. At the end of the day, it was a no-brainer.

[R-17 at p. 25]

During the meeting, a number of Council members, including Shopp and Witzig, asked Siciliano what the appropriate procedure was for laying off employees and how other municipalities had

handled reductions in force. Siciliano advised them on the procedures, namely that if employees were not mentioned by name in closed session, it would not be necessary to give them Rice^{4/} notices.

Based on Siciliano's advice, during the closed session, there were lengthy discussions about layoffs generally but no names were mentioned. In fact, Alexander did not discuss layoffs in open session and reserved the discussion about the layoffs for the closed session specifically on Siciliano's advice. Siciliano also raised concerns during the closed session about terminating unionized employees while in collective negotiations, but expressed that if layoffs were done strictly by seniority, a reduction in force was permissible.

A resolution authorizing the layoff of "8 employees from DPW to be laid off from lowest in seniority up" was adopted by a majority of the Council at the April 1, 2008 meeting. Councilmen Fitzgerald, Fetter and Shopp voted yes. Wentz and Witzig abstained without explanation. Shields voted no. Although Alexander made suggestions and recommendations based on his budget reviews, he did not cast a vote.

On April 3, 2008, Moreland called Acting DPW Superintendent Edelen and told him to report to Borough Hall with all employees

^{4/} Rice v. Union Cty. Reg. H. S. Bd. of Ed., 155 N.J. Super. 69, 73-74 (App. Div. 1977)

from Phifer down the seniority list - eight employees in total including Phifer, Lewis, Lambing, Lebb, Alvarez, O'Neill, Hanton and Comly. According to Moreland, the number of employees laid off was calculated based on the amount of money needed to meet a budget savings goal.

The employees asked to report with Edelen were the least senior DPW employees. Phifer and O'Neill were the only AFSCME officers on the list. President Spadea Jr. was not laid off. Of the six employees on the AFSCME negotiations team, O'Neill, Phifer and Hanton were laid off. Hanton was later rehired.

When the employees reported to Borough Hall, they were each handed a letter signed by the Mayor, Council President Shields, and Director of DPW Wentz explaining that due to State budget cuts and extraordinary aid and revenue problems, their positions were being terminated effective immediately. The employees were then informed of their entitlement to two-weeks pay, accumulated sick and vacation days. They were also advised that as a result of the layoff, they could apply for unemployment compensation and COBRA benefits.

Comly recalled Phifer yelling to Shopp that the Borough could not do what they were doing and that the layoffs were "union busting." Comly heard Shopp reply loudly that "we can do whatever we want." Comly did not ask Shopp what he meant because

Comly was not a part of Shopp's conversation with Phifer. He also did not know how the conversation ended.

According to Alexander, there were across-the-board savings attributed to the actions taken by the Council. The Borough realized a 2% property tax reduction for the first time in 56 years. The DPW layoffs and outsourcing contributed \$250,000 to this savings as did a reduction in the school budget and a flat County tax levy.

At the time of the hearing, Moreland had not yet seen an analysis or report reflecting the savings but in her opinion there had been cost savings. Shields had also not seen a study reflecting the savings but admitted that she had not yet looked at the entire budget.

Although the number of temporary employees was increased to assist in getting work done after the layoff and, therefore, the cost attributed to this budget line item also increased, the total annual staff hours was reduced from approximately 30,000 before the layoff to about 22,000 afterwards. In 2008, \$80,000 was saved in recycling services.

Rodney Clark, an 18-year DPW employee, was not laid off on April 3, 2008. However, on May 20, 2008, Alexander ordered all full-time DPW employees to have a CDL. Clark did not have a CDL. The Mayor and Council at first wanted to let Clark go because his lack of a CDL was putting a strain on the other DPW employees.

Edelen and Alexander reached a compromise and Clark was given 45 days to get his CDL, but he never did.

When Clark did not get his CDL, Alexander gave Edelen the authority to hire someone for the position, although he still had to approve the hire. The Borough ran an advertisement for the position and applications were taken. Edelen interviewed some applicants, but although some of the laid off employees had a CDL, including Alvarez, and applied for the position, Edelen did not interview all of them personally. Some of the other laid off employees also had the requisite sewer experience. Edelen felt that the only person qualified to do the job was James Hanton.

Hanton had worked for the Borough for a couple of years when he was laid off on April 3, 2008. Hanton did not have a CDL and he was not the least senior of the employees laid off. He had more seniority than Alvarez and as much seniority as Lambing and Comly. Hanton had been on the AFSCME negotiations team and was listed in the charge as an organizer, although Dennis O'Neill denied Hanton was an organizer.

Edelen decided to rehire Hanton if he got his CDL and agreed to give Hanton the necessary time. Edelen also hired Hanton because the State was starting to more tightly regulate storm water systems and, at the time that he was rehired, Hanton was working for Barrington handling their storm water system. Edelen considered him knowledgeable.

Phifer was the most senior of the laid off employees and had a CDL. He had also done sewer maintenance and had a tanker license. He was never advised that the Borough was looking to rehire an employee and was not offered the opportunity to come back. Hanton is currently a member of the AFSCME unit.

Under In re Bridgewater Tp., 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. Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner recommended that the Complaint be dismissed because the Borough instituted the layoff for economic reasons. The Hearing Examiner did not find evidence of union animus. Even if we were to conclude that there is some evidence of anti-union animus, we would nevertheless dismiss the Complaint because the Borough proved that it would have instituted the layoffs for economic reasons even absent any hostility for the DPW union. AFSCME filed the following exceptions to the Hearing Examiner's recommended decision.

Exception No. 1

AFSCME argues that the Hearing Examiner erred in finding that the issue to be decided was whether the Borough was hostile to the members protected activity and whether hostility was the substantial or motivating reason for the layoffs. H.E. at 92. AFSCME contends that Bridgewater requires the Hearing Examiner to determine whether hostility to protected activity was "a" substantial or motivating reason for the layoff and not "the" substantial or motivating factor of the layoff. It alleges that the Hearing Examiner did not consider all of its evidence before

considering the Borough's justification for the layoffs, which resulted in the Hearing Examiner's failure to accord the Union's evidence due weight.

The Borough responds that the Hearing Examiner applied the correct legal standard under Bridgewater and did not find any of the member's protected activity to be "a" or "the" substantial or motivating factor for the employee's termination.

We reject this exception. Under Bridgewater, AFSCME has the initial burden to prove that the employees were engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected activity. The Hearing Examiner found that the employees were engaged in protected activity and the employer knew of the activity, except for Mayor Alexander and Councilman Fetter who were not aware until sometime in January 2008. H.E. at 92. The Hearing Examiner did not find evidence of union animus and analyzed each argument of AFSCME as it related to alleged animus and rejected them all. H.E. at 92-99. The Hearing Examiner concluded that the layoffs were not in response to protected activity, but resulted from the new administration's efforts to address economic realities and to contain and/or reduce the local tax levy that had burgeoned out of control in the previous few years. There is credible evidence in the record to support the Hearing Examiner's conclusion that there was no anti-union animus. The

Hearing Examiner applied the proper legal standard^{5/}, AFSCME did not meet its initial burden under Bridgewater, and the burden did not shift to the employer at all.

Exception Nos. 2-4

AFSCME takes exception to the Hearing Examiner's findings that "whether some aspects of the [efficiency] analysis were inaccurate is immaterial" (H.E. at 93) and "the accuracy of the Borough's projected budget savings or whether other measures could have been taken" was not a pertinent issue in this case. H.E. at 94.

Specifically, AFSCME argues that the Hearing Examiner's determination that the reasons proffered by the Borough for the DPW terminations did not constitute pretext was arbitrary, capricious, or unreasonable and not supported by sufficient, competent and credible evidence. AFSCME renews its arguments made to the Hearing Examiner in support of pretext because: the PowerPoint presentations and the information contained in them were inaccurate and deceptive; the "Corzine State Cuts" were exaggerated; the Borough was not overstaffed in comparison to surrounding municipalities; it was and is cheaper for recycling to be performed in-house; the Borough claimed the layoffs would

^{5/} The Hearing Examiner twice recited the correct legal standard under Bridgewater - a substantial or motivating factor. He once said "the" substantial or motivating factor, but he applied the correct standard when he found that anti-union animus was not a factor at all.

result in the privatization of tree removal, yet it continued to do the work in-house with assistance from seasonal, and non-union employees; and the Borough could never realize \$500,000 to \$600,000 in savings by "reorganizing" the DPW and terminating its employees. AFSCME takes exception to the Hearing Examiner's finding that its evidence was immaterial or irrelevant because it went through the painstaking process of analyzing the Borough's data to establish that it was misleading and therefore a pretext for the employees' termination.

The Borough responds that AFSCME did not introduce any independent evidence to show that the Borough's facts and figures were incorrect and that AFSCME used the Borough's evidence to make baseless assumptions and interpretations of the Borough's data to help its position, which the Hearing Examiner appropriately rejected.

We reject this exception. The Hearing Examiner's conclusions were based upon his assessment of the evidence. We agree with his assessment that:

The record shows, I believe conclusively, that Alexander and Fetter ran for office to improve the Borough's tax structure, not to retaliate against AFSCME. They had little or no knowledge about union activity when they were candidates. Upon taking office, they quickly engaged in a comprehensive examination of the Borough's operation and resources to determine where costs could be contained. They compared DPW operations with other municipalities and determined that a reorganized DPW could operate at a much lower

cost. The meetings they had, the power points and the e-mails predominantly concerned cost savings. Even if some of the cost saving projections were not realized, the Borough's motivation for the layoffs was cost savings, not animus.

For the first time in 56 years, the Borough realized a property tax reduction. Even AFSCME conceded, that for 2009, there will be a small savings.

[H.E. at 95]

Exception Nos. 5-6

AFSCME excepts to the Hearing Examiner's rejection of the following evidence and/or arguments: the DPW was the only department that suffered layoffs and the only department that was repeatedly scrutinized by the Mayor and Council; the Borough stalled negotiations with AFSCME so it would not be limited in the same way that it was with the Police Department; the Borough purchased a new fire truck in 2008 for between \$400,000 and \$500,000; there were several statements from and behavior by the Mayor and Council, including Councilwoman Shields and Councilman Shopp, which clearly displayed anti-union animus; and the Mayor and Council deliberately failed to provide the DPW employees with any kind of notice about impending layoffs as required by N.J.S.A. 10:4-6. AFSCME argues that despite the above evidence, the Hearing Examiner's failure to find union animus was arbitrary, capricious, or unreasonable and not supported by sufficient competent evidence.

The Borough responds that the Hearing Examiner correctly rejected this evidence finding that the Mayor and Council concentrated on the DPW and Police Department because they were the largest; cuts were made to the Police budget and vacancies in other departments were not filled or were filled part-time; the Council members were volunteers and had limited resources to study every department in depth; and the Council did not stall negotiations.

We reject this exception. The record supports the Hearing Examiner's finding that AFSCME did not prove anti-union animus. Many of the Hearing Examiner's findings related to this exception were based on witness credibility. We will not disturb those findings. We may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006) (absent compelling contrary evidence, Commission will not substitute its reading of the transcript for the Hearing Examiner's credibility determinations). The only evidence in the record to support anti-union animus was the testimony of Shields. She attempted to

attribute anti-union animus to Alexander, however that evidence was rejected by the Hearing Examiner. Even if we were to find anti-union animus, we would still dismiss the complaint because the Borough has met its burden under Bridgewater of proving that it would have implemented the layoffs for economic reasons even absent any anti-union hostility.

Exception No. 7

AFSCME argues that despite having credited Councilwoman Shield's opinion that Mayor Alexander was opposed to the union, the Hearing Examiner's finding and determination that Shields' testimony did not mean that Alexander was in favor of the layoffs because he wanted to get rid of the union or that he was hostile to AFSCME, was arbitrary, capricious, or unreasonable or not supported by sufficient competent, and credible evidence. Specifically, because Shields met with the Mayor regularly she has information that AFSCME would not be able to otherwise obtain and that her belief that the financial concerns were a "silk screen" on behalf of the Council and not just her belief constitutes irrefutable evidence of union animus.

The Borough responds that the Hearing Examiner found Shields' testimony to be "vague and confusing at times"; her use of "nobody" and "we" in her testimony carries little weight; Shields was in a rival political party to Fetter and Alexander;

and Shields' testified that it was always stressed that the layoff was a money issue.

We reject this exception. The Hearing Examiner is required to consider all evidence and where testimony conflicts, to determine which testimony is more credible. The Hearing Examiner analyzed AFSCME's case and specifically did not credit testimony that Alexander was hostile towards AFSCME. The record established that Alexander was at all times on a cost-savings mission for the Borough. There was no evidence of hostility found by the Hearing Examiner because he found Shields's testimony to be her opinion and not attributable to Alexander and the Council as a whole. Absent compelling evidence to the contrary, we will not disturb the Hearing Examiner's overall finding that Alexander was not hostile toward AFSCME. See City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

Exception No. 8

AFSCME argues that despite having found that Shields told Phifer and Alvarez that the layoffs were because of the union, the Hearing Examiner's finding and determination that such statements constituted her opinion and were not that of the Mayor or Council was arbitrary, capricious, or unreasonable or not supported by sufficient, competent, and credible evidence. H.E. at 63-64, 98. Specifically, AFSCME argues that because Shields went to the DPW garage after Gesrick's retirement party at the direction of Wentz, the Chair of the Council's DPW Committee, to

post a memorandum naming Edelen as the new acting superintendent and Spadea, Jr. as the new assistant, she was acting as Council president and not a private citizen thus making her comments those of the Council and not her opinion. AFSCME urges that we find Shields' statements to be evidence of anti-union animus.

The Borough responds that Shields did not state that the Mayor did not want to deal with the union, but rather she thought the Mayor did not want to deal with the union and thus it represents her opinion as found by the Hearing Examiner. The Borough also points to Shields's testimony that the Council always stressed that the cutbacks in the Police Department, administration, and public works were for economic efficiency; Shields did not articulate any consistent statements that she could attribute to the Mayor or Council to show animus; and the attempts by Shields to support her opinion and her feelings were contradicted by her own testimony.

We reject this exception. Even if we were to overturn the Hearing Examiner's conclusion that it was only Shields's opinion, we would nevertheless dismiss the Complaint under Bridgewater because the Borough proved that it still would have laid off the employees for budgetary reasons.

Exception No. 9

AFSCME excepts to the Hearing Examiner's finding that Shopp's comment to Phifer did not connote agreement with Phifer

or an admission that the layoffs were union busting, but rather that Shopp was responding emotionally to Phifer's statement. AFSCME argues that the finding is against the clear weight of the evidence. Specifically, AFSCME argues that in the absence of evidence of Shopp denying that the layoff was "union busting" when accused by Phifer, the Hearing Examiner was required to find that Shopp's response that "they could do whatever they wanted" was an admission of union animus.

The Borough responds that there is no credible evidence that its actions were union busting; at no time was Shopp questioned by the employees present what he meant by his response; and tensions between the employees and Council were high from the prior Council meetings.

The Hearing Examiner found the following in regard to the conversation between Shopp and Phifer on April 3, 2008:

Comly recalled Phifer yelling to Shopp that the Borough couldn't do what they were doing and that the layoffs were "union busting." Comly heard Shopp reply loudly that "we can do whatever we want (2T7, 2T14)." Comly didn't ask Shopp what he meant because he (Comly) was not a part of Shopp's conversation with Phifer. He also does not know how the conversation ended (2T15).

[H.E. at 81.]

* * *

AFSCME asserted, that on April 3, when the employees were called down to Borough Hall and informed of the layoff's, Phifer shouted that the layoff's were union busting and

Councilman Shopp responded to this outburst that "we can do whatever the hell we want." Shopp's statement, however, does not connote agreement with Phifer or an admission that, indeed, the layoffs were union busting. Rather, it is apparent that Shopp was responding emotionally to Phifer's statement.

[H.E. at 98.]

We reject this exception. Other than Comly and Phifer's testimony, there is no evidence to support an inference that Shopp agreed with Phifer that the layoffs were union busting. Shopp did not testify regarding the conversation. Comly, who was not a party to the conversation, testified that he did not know how the conversation ended. Phifer's testimony was limited to the fact that the conversation occurred, as found by the Hearing Examiner. Thus, AFSCME has not produced compelling evidence to disturb this determination by the Hearing Examiner. N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed.; City of Trenton.

Exception No. 10

AFSCME excepts to the Hearing Examiner's finding that Gesrick's statements and remarks to various members of the union were his opinion and did not, to any extent, reflect the opinion or position of the Mayor or Borough. Specifically, AFSCME argues that after Gesrick met with Alexander and Fetter, Phifer asked him why he was gathering information about DPW operations and Gesrick responded, "you guys shouldn't have unionized" and that Phifer was high enough on the seniority list. AFSCME asks us to

attribute these statements to Fetter and/or Alexander as evidence of union animus that Gesrick obtained from Fetter and Alexander.

The Borough responds that the evidence showed that Gesrick had made anti-union remarks for two years prior to Fetter and Alexander being elected, which supports that the animosity was his own; there is no evidence that any public works employees questioned Gesrick regarding whether the comments came from Borough officials; Alexander testified that he never expressed an opinion about unions to Gesrick; and Gesrick was uncooperative towards Fetter when he tried to gather information.

We reject this exception. The Hearing Examiner credited Alexander's testimony that he did not discuss the union or any plans he had for it with Gesrick. He also found, based on the testimony of Lebb, Alvarez and Lambing, that Gesrick had been making negative comments about the union since 2006 and thus his remarks were his opinion and not that of current Borough officials. We find that the record supports the Hearing Examiner's finding and will not disturb his determination that Alexander credibly testified that he did not discuss the union with Gesrick. N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed; City of Trenton.

Exception No. 11

AFSCME excepts to the Hearing Examiner's finding that, "eventually based on both Young's and Merlino's reports and their

own investigations, Alexander and Fetter concluded that DPW was overstaffed and that the Borough was paying for resources it didn't need." Pointing to the February 14, 2008 e-mail (five days prior to the first negotiations session with the new administration) from Fetter to Wentz, AFSCME argues that the record established that the Borough had decided, prior to Young and Merlino's reports, that the DPW was overstaffed and inefficient and that changes needed to be implemented. Young and Merlino's reports were issued in March 2008. Thus, AFSCME contends that the Hearing Examiner's conclusion is arbitrary, capricious, or unreasonable and not supported by the sufficient, competent and credible evidence.

The Borough responds that the record supports the Hearing Examiner's findings because he determined that the Borough relied on its own investigation in addition to the reports; the process took several months to conclude; and it is true that one Council member was of the opinion that the DPW was overstaffed, but it was only after Merlino and Young's reports that it was determined that it was economically feasible to trim the staff.

We reject this exception. There is an abundance of evidence in the record to support the Hearing Examiner's finding that the Borough determined after the reports and its own investigation that the DPW was overstaffed.

Exception Nos. 12-14

AFSCME excepts to the Hearing Examiner's finding that Alexander's e-mail to Wentz which said, in part, that by making Edelen a superintendent, the Borough could take him out of the union, did not support animus; the Hearing Examiner's failure to credit Phifer's testimony that Hanton told him that in order to be rehired, he had to renounce the union; and the finding that the Borough's recall of Hanton did not amount to union animus were arbitrary, capricious, or unreasonable and not supported by sufficient, competent, and credible evidence. Specifically, AFSCME argues that the e-mail demonstrates union animus; less than two months after Clark was spared from the layoff, he was directed to get a CDL license in an "impossible" amount of time resulting in the termination of another union employee; Hanton was hired without a CDL license and given sufficient time to obtain one; and Phifer, who was not hired for Hanton's position, testified that Hanton told him that he had to renounce the union in order to return to the DPW.

The Borough responds that the following supports the Hearing Examiner's conclusions: it was legally permissible to require Clark to obtain a CDL; Clark was not a union organizer and AFSCME did not contest his termination; the Borough established that Hanton was uniquely qualified for the position due to his storm water system experience; Phifer did not apply for the posted

vacancy; Hanton, who was a union organizer, was re-hired into the negotiations unit by Edelen, a former member; the record is void of evidence that Edelen harbored animosity towards the union; and Phifer's testimony regarding Hanton's union renunciation was uncorroborated hearsay.

We reject these exceptions. There is ample evidence to support the Hearing Examiner's findings and determinations. We agree with the Hearing Examiner that absent Hanton's testimony, Phifer's testimony that he was told by Edelen to renounce the union is uncorroborated hearsay and cannot be the basis for a finding of fact.

Exception No. 15

AFSCME excepts to the Hearing Examiner's finding and determination that Siciliano cancelled the negotiations session on April 1, 2008 because the Borough still had not received the union's counterproposal. Specifically, AFSCME argues that the Hearing Examiner erroneously inferred, based on evidence absent from the record because Siciliano did not testify, that the negotiations session was cancelled due to the late counterproposal and that the Hearing Examiner should have relied on Fetter's testimony and e-mail that confirmed it was his position that negotiations should be cancelled until after the layoffs.

The Borough responds that the record shows that the Borough had still not received the union's counterproposal by April 1, 2008 and that negotiations were stalled due to the election of a new administration.

We reject this exception. The record supports the Hearing Examiner's inference. It was Siciliano that cancelled the negotiations session, not Fetter. The only exhibit admitted in evidence as to AFSCME's October 24, 2007 counterproposal is a letter dated April 11, 2008 from Howardell to Scilliano attaching the counterproposal that Howardell asserts she had previously sent to Kearney. The attached counterproposal, however, is dated October 24, 2008 with the year 2008 scratched out and the year 2007 superimposed and handwritten over the 2008. Howardell denied making this change, stating that it is not her handwriting. She testified that the AFSCME counterproposal was written at a 2007 meeting with Kearney but did not recall when that meeting took place. The Hearing Examiner concluded that the Borough had not received the union's response to the Borough's October 16, 2007 proposal until April 11, 2008. Howardell testified that she did not transmit AFSCME's counterproposal sooner to Siciliano despite his requests to do so, because she did not understand why Siciliano kept asking for it when she insisted to him that she had previously given it to Kearney. Siciliano, also at Howardell's request, once again sent the

Borough's October 16, 2007 counterproposal previously submitted to her by Kearney.

The Hearing Examiner's inference was based upon credible evidence in the record. Even if the negotiations session was cancelled because the Council did not want AFSCME to know about the layoff, that would not establish animus.

Exception No. 16

AFSCME excepts to the Hearing Examiner's finding and determination that there was a net savings of \$250,000 attributed to DPW as being arbitrary, capricious, or unreasonable and not supported by sufficient, competent, and credible evidence. Specifically, AFSCME argues that Moreland and Shields both testified that they had not seen a report with any analysis to support the Borough's contention that it saved any money; and the only evidence in the record to support his finding is the uncorroborated testimony of Alexander who is not a finance committee member.

The Borough responds that the record supports the Hearing Examiner's finding of a \$250,000 savings because the Borough introduced evidence that it realized a 2% property tax decrease for the first time in 56 years; nothing in the record establishes that Alexander was not a finance committee member in 2009 when he testified; Moreland testified that there has been cost savings and AFSCME conceded that for 2009 there would be a small savings.

We reject this exception. Alexander testified to the \$250,000 savings. AFSCME attempts to discredit him, but does not

point to data to prove Alexander is incorrect. Without compelling evidence to the contrary, we will not disturb the Hearing Examiner's determination. N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed; City of Trenton.

Based on our independent review of the record, we adopt the Hearing Examiner's recommendation that the 5.4a(1) and (3) allegations be dismissed. In the absence of exceptions, we also adopt the Hearing Examiner's recommendation to dismiss the 5.4a(2) and (6) allegations and the independent 5.4a(1) allegations.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Eaton abstained.

ISSUED: April 29, 2010

Trenton, New Jersey