

P.E.R.C. NO. 2014-54

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PALISADES PARK BOROUGH,

Respondent,

-and-

Docket No. CO-2012-305

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 97,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms the Hearing Examiner's recommended dismissal of a complaint issued in an unfair practice case filed by the International Brotherhood of Teamsters, Local 97 against Palisades Park Borough. Local 97 alleges that the Borough violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3), when it laid off five employees in retaliation for protected activity. The Hearing Examiner found evidence of the Borough's hostility to protected activity, but concluded that the layoffs were instituted for economic reasons. The Commission rejects Local 97's exceptions, holding that the record supports the Hearing Examiner's finding that the layoff was motivated by economic reasons and not by retaliation for protected activity.

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, Mariniello & Mariniello, P.C.  
attorneys (Joseph R. Mariniello, of counsel)

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

DECISION

On May 24, 2012, International Brotherhood of Teamsters, Local 97 ("Local 97") filed an amended unfair practice charge with the New Jersey Public Employment Relations Commission alleging Palisades Park Borough ("Borough") violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3)<sup>1/</sup>, when it laid off five employees in the

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

Department of Public Works ("DPW") in retaliation for protected activity. A Complaint and Notice of Hearing was issued by the Director of Unfair Practices on August 12, 2012. On September 5, the Borough filed an Answer denying the allegations and asserting it laid off the employees due to a lack of work.

A hearing was held on May 7, 2012 before Hearing Examiner Daisy B. Barreto. Both parties filed post-hearing briefs and on October 30, the Hearing Examiner issued her recommended decision dismissing the Complaint.

Local 97 filed exceptions to the Hearing Examiner's report and the Borough filed a response. Local 97 requests this Commission reject the Hearing Examiner's report and reinstate the two employees with most seniority with full back pay benefits and seniority retroactive to the date of the layoff. It further seeks an Order directing the Borough to post an unfair practice notice to employees. We have reviewed the Hearing Examiner's findings of fact and incorporate them here. (H.E. At 3-18). A brief summary follows.

Local 97 is the majority representative of all blue-collar employees employed by the Borough. Local 97 and the Borough are parties to a collective negotiations agreement ("CNA") for the period January 1, 2010 through December 31, 2014. The DPW employees maintain the streets, roads, and facilities in the Borough. Their activities have included maintenance, landscaping

and related services to the Board of Education and swim club, collecting materials for recycling, recycling electronics and emptying Borough-maintained waste baskets on the main street. There was a mechanic in the DPW and, on occasion, the DPW would help clear clogged sewer and storm drains.

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

Lorenzo was the first Borough Administrator. Upon being hired in 2008, the Mayor and Council asked him to review the overall operations to improve the budget and reduce staffing. Lorenzo studied the Borough's operations and, in time, on February 19, 2010, Lorenzo wrote to the Mayor and Council advising them of his concern that further cuts would be required to maintain a balanced budget; that the attrition experienced in the previous year, generating cost savings of \$500,000.00, would not be enough to balance the 2010 budget because of contractual obligations, increasing health benefits and other insurance

costs, mandated pension costs, and decreases in revenues and State and Federal aid. Lorenzo wrote, in relevant part:

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

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

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

In 2010, Lorenzo proposed a layoff of ten employees in the DPW but ultimately none were laid off. The mayor opposed any layoffs. Instead, the Borough addressed the fiscal concerns by a tax increase and refraining from filling positions left vacant by attrition.

In 2010, the parties negotiated a five-year CNA with no increases for the first two years of the CNA. Lorenzo continued to look for ways to save money and jobs and continue to balance the budget. In early 2011, the Borough solicited bids for the

recycling work and awarded the bid in June 2011. In a memorandum dated June 17, 2011, from Lorenzo to the Mayor and Council outlining the bids and savings to be realized and proposing changes in the organization of the DPW, Lorenzo wrote:

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

. . .

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

The steps Lorenzo proposed included splitting the DPW into two divisions: one to maintain roads and right-of-way, and a new division to maintain all parks and public properties. He also proposed transferring five DPW employees to the new division. As of June 2011, Lorenzo knew that the Borough was going to have surplus staff because of having lost the recycling work. To avoid layoffs, he created the new division that would primarily work for the Board of Education doing landscaping maintenance. Lorenzo had proposed that the DPW unit members, who were then extras, would work at locations assigned by the Board of Education, and then the Borough would bill the Board for the time the workers spent on Board projects. The Board had been paying another contractor for landscaping before the arrangement. The

program began in July 2011 but did not work well because the Board required extraordinary support functions for a building project resulting in higher bills to the Board. Thus, by early 2012, the program ended.

On April 1, 2012, Mark Pasquali ("Pasquali") was the Superintendent of the DPW. He reported directly to Lorenzo. As of April 1, 2012, there were 13 DPW unit members. On April 5, 2012, Pasquali wrote to Lorenzo recommending one of two courses of action to address the decreases in workload the DPW had experienced. Pasquali proposed either laying off three employees or reducing the weekly hours of each of 18 employees by 10 hours per week from 40 hours to 30 hours per week. Pasquali stated, in relevant part:

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

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

Recommendation # 1

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

or

Recommendation # 2

The Borough not R.I.F. any current employees but instead reduce the present 40 hour work

week of eleven (11) full-time employees to 30 hours each for an overall reduction of 110 man hours per week. [CP-2].

Lorenzo contacted Pasquali after receiving his letter. Later that day, Lorenzo chose the option of reducing the weekly hours of all in the unit because he knew that the Mayor and Council strongly opposed layoffs of any employees; he wrote to Pasquali of his choice, to be effective on April 16, 2012. Lorenzo responded in writing to Pasquali. Lorenzo chose to reduce hours in lieu of layoffs. He stated, in relevant part:

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

He identified the 11 DPW employees who would have their hours reduced effective April 16, 2012.

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



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

On April 10, 2012, Pitman called Borough Counsel Mariniello, and sent him copies of the memorandum via email; he told her he would look into the matter. Pitman thought Mariniello was surprised at Lorenzo's action.

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

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

The procedure for settlement of grievance shall be as follows

Step 1 - The aggrieved employee shall discuss his problem with his Union Steward and

Department Head who shall attempt to settle the problem within forty-eight (48) hours.

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

At some point between April 9 and 16, 2012, Lorenzo, after consulting Borough Counsel, the Mayor, and a couple of Council Members decided that, in their opinion, the change in hours violated the contract and that the Borough would have to reinstate the 40-hour workweek. The reversal occurred on May 15, 2012, at the next possible Council meeting by a formal resolution. Prior to the reversal, Local 97 filed their original unfair practice charge on May 4 alleging the Borough's unilateral reduction in hours repudiated the clear terms of the contract and the Act.

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

services with other public entities, and outsourcing. Despite these reductions, there were still too many employees and too little work in his opinion. Thus, he recommended to the Mayor and Council a layoff of the five most recently hired DPW employees, and it adopted his recommendation.

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

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

Local 94 believed that the increase from three to five employees to be laid off, having occurred so near to the grievance and unfair practice charge over the hours reduction, was retaliatory and, on May 24, 2012, it amended its unfair practice charge.

In May 2012, at the time of the layoff, a decision had been made to contract out the DPW's pool work. The DPW workers remained on pool duty until the first week of June 2012, past the

layoff date, to ensure the work was completed. In January 2013 the Borough prepared to out source the pool work.

As of the date of the hearing one unit member was still laid off, one now works in the Borough's library full-time at or near his former salary, one is available to return to work, and one works part-time in the police department.

According to Lorenzo, since the layoff, the DPW has been able to continue doing all necessary work, with no significant delays or deficiencies, and that overtime has decreased, however there was a spike in overtime during the aftermath of Hurricane Sandy in late October 2012 and for a snow storm between January 15, 2012 to January 28, 2012.

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 of the five DPW workers for economic reasons. The Hearing Examiner found evidence of hostility in the tone of Pasquali's memorandum as well as the totality of the Borough's conduct in delaying the restoration of the employees' hours coupled with the timing of the reduction-in-force. Thus, the DPW established a prima facie case. However, the Hearing Examiner found that the Borough demonstrated that it instituted the layoffs of five rather than three employees for economic reasons absent any hostility for the DPW union.

Local 97 has filed the following exceptions to the Hearing Examiner's report and recommended decision:

THE HEARING EXAMINER'S DECISION FAILED TO ACCORD THE PROPER WEIGHT TO DIRECT EVIDENCE THAT LOCAL 97'S PROTECTED ACTIVITY WAS A SUBSTANTIAL AND MOTIVATING FACTOR IN THE BOROUGH'S EXPANSION OF THE LAYOFF

THE HEARING EXAMINER ERRED IN FINDING THAT THE BOROUGH HAD A NON-DISCRIMINATORY REASON FOR INCREASING THE SCOPE OF THE LAYOFF FROM THREE (3) TO FIVE (5) EMPLOYEES

THE HEARING EXAMINER FAILED TO APPLY THE PROPER LEGAL STANDARD FOR DETERMINING WHETHER THE BOROUGH'S LAYOFF VIOLATED THE ACT

THE HEARING EXAMINER FAILED TO CONSIDER FACTS OR EVEN ACKNOWLEDGE THE ARGUMENT THAT THE ADVERSE PERSONNEL ACTION WOULD HAVE TAKEN PLACE ABSENT THE PROTECTED CONDUCT

We reject these exceptions. Under Bridgewater, Local 97 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 and we agree that the employees were engaged in protected activity and the employer knew of the activity. We also agree that the conduct of the Borough, although not necessarily intentional based on our review of the record, established hostility to the protected activity. However, we do not agree with Local 97's contention that the layoff was expanded to five employees based upon any reason other than a lack of work and cost-savings.

Beginning in 2008, the record establishes that Lorenzo was charged with finding ways to cut the Borough budget. His initial recommendation was to layoff ten DPW workers. The record reflects that the Mayor and Council, in 2010, rejected this proposal. The record further reflects that the Borough then explored other cost saving measures including failed attempts at working with the school district and creating two departments. Once the recycling duties were outsourced; the mechanic's duties were shared with another municipality; collection of electronics and waste barrels were subcontracted and the municipal pool work was subcontracted there was not enough work to support the unit.

Local 97 objected to the unilateral cutting of its contractual hours, and the Borough unilaterally made the employees whole for that perceived error.<sup>2/</sup> However, the Borough maintains a managerial prerogative to layoff employees due to a lack of work. Public employers in New Jersey have a managerial prerogative to reduce staffing levels through permanent layoffs. State Supervisory; Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979);

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<sup>2/</sup> In a recent unpublished decision of the Appellate Division, Keyport, Belmar and Mt. Laurel, 2013 N.J. Super. Unpub. Lexis 420, it was determined that a form of lay-off achieved by reduction of full time employees to part time in the Borough of Keyport was a managerial prerogative and thus non-negotiable.

Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977).

The record does not reflect that the layoff was expanded from three to five employees in retaliation for protected activity. Pasquali made the recommendation to layoff three workers as the Superintendent of DPW. However, Lorenzo recommended five based on his review of the work load and the finances of the Borough. Based on its financial condition in 2012, as opposed to the 2010 layoff proposal, the Mayor and Council approved Lorenzo's recommendation. Accordingly, the record supports our finding that the substantial and motivating factor for the layoff was a decrease in work available to support the DPW unit.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: February 27, 2014

Trenton, New Jersey