

P.E.R.C. NO. 2000-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF TEANECK,

Respondent,

-and-

Docket No. CO-H-95-170

AFSCME COUNCIL 52, LOCAL 820,

Charging Party.

TOWNSHIP OF TEANECK,

Respondent,

v.

OAL Dkt. No. CSV-1508-95

LUCIANO REA,

Appellant.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Township of Teaneck. The Complaint was based on an unfair practice charge filed by AFSCME Council 52, Local 820. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by laying off Luciano Rea in retaliation for his protected activity. The charge also alleges that the issuance of a parking ticket to Local 820's president was in retaliation for his protected activity. An appeal of the layoff was also filed with the Merit System Board. The Complaint and the Merit System Board appeal were consolidated for hearing before an administrative law judge. The Commission adopts the ALJ's recommendation to dismiss the Complaint. He concluded that the Township did not discriminate against Rea in retaliation for protected activity or otherwise violate the Act by eliminating the assessing aide title and terminating Rea's employment. He also concluded that the Township did not prove that the parking ticket incident demonstrated any anti-union animus. The matter is transferred to the Merit System Board for deliberations on the appeal.

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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LUCIANO REA,

Appellant.

Appearances:

For the Respondent, Peckar & Abramson, attorneys (Gregory R. Begg, of counsel; Aaron C. Schlesinger, on the brief below)

For the Charging Party and Appellant, Kathleen Mazzouccolo, attorney

DECISION

On November 21, 1994 and June 28, 1995, AFSCME Council 52, Local 820 filed an unfair practice charge and amended charge against the Township of Teaneck. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act,

N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{1/} by laying off Luciano Rea in retaliation for his activity protected by the Act. The charge also alleges that the issuance of a parking ticket to Local 820 president Curtis Caviness was in retaliation for his protected activity.

On or about November 28, 1994, Rea filed an appeal of his layoff with the Merit System Board. That matter was transmitted to the Office of Administrative Law as a contested case.

Pursuant to a Joint Order of the Merit System Board and the Commission Chair, the two matters were consolidated. Hearing Examiner Jonathon Roth was appointed as a temporary administrative law judge to hear the consolidated case. Teaneck Tp., P.E.R.C. No. 98-116, 24 NJPER 177 (¶29088 1998).

On March 2, 3, and 4, 1999, the ALJ conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs and replies.

^{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. (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."

On September 15, 1999, the ALJ issued his Initial Decision (attached). He concluded that the Township did not discriminate against Rea in retaliation for his protected conduct or otherwise violate the Act by eliminating the assessing aide title and terminating Rea's employment. The ALJ also found that Local 820 did not prove that the parking ticket incident demonstrated any anti-union animus. Finally, the ALJ concluded that the Township did not act in bad faith by eliminating the assessing aide title and laying off Rea.

On October 19, 1999, AFSCME and Rea filed exceptions urging the Merit System Board to find that improper considerations were the substantial or motivating factors in the Township's decisionmaking process and that the Township therefore acted in bad faith and not for reasons of economy and efficiency. The exceptions do not contest the ALJ's recommendation to dismiss the unfair practice charge.

On October 28, 1999, the Township filed a response to the exceptions. It did not file a copy of its response to the Commission because it was its understanding that the exceptions only addressed the Merit System Board issues.

We have reviewed the record. We incorporate the ALJ's findings of fact.

Under our Joint Order with the Merit System Board, our role is to determine whether Rea's protected activity was a substantial or motivating factor in abolishing his position and

laying him off. In the absence of exceptions, we adopt the ALJ's conclusion that it was not. We also adopt the ALJ's finding that protected activity did not motivate the issuing of a parking ticket to Local 820 president Caviness. Accordingly, we dismiss the Complaint based on the unfair practice charge and transfer the record to the Merit System Board for deliberations on Rea's appeal.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, and Ricci voted in favor of this decision. None opposed. Commissioner Muscato was not present.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

Jonathon Roth
Administrative Law Judge T/A
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INITIAL DECISION
PERC DKT. NO. CO-H-95-170
OAL DKT. NO. CSV1508-95
CONSOLIDATED

TOWNSHIP OF TEANECK,
Respondent,

v.

AFSCME COUNCIL 52, LOCAL 820,
Charging Party.

LUCIANO REA,
Appellant,

v.

TOWNSHIP OF TEANECK,
Respondent.

Kathleen Mazzouccolo, Esq., for Charging Party and
Appellant

Gregory R. Begg, Esq., for Respondent
Aaron C. Schlesinger, Esq., on the brief
(Peckar & Abramson, attorneys)

Record Closed: August 3, 1999 Decided: September 15, 1999

BEFORE JONATHON ROTH, ALJ t/a

STATEMENT OF THE CASE

The appellant was laid off by the Township of Teaneck. He appealed to Merit System Board, claiming that the layoff was not in good faith. The matter was sent to OAL for hearing.

The charging party filed an unfair practice charge with the Public Employment Relations Commission, alleging that the employee's layoff was in retaliation for engaging in protected

activity, including his participation in collective negotiations. A Complaint issued.

PROCEDURAL HISTORY

On November 21, 1994 and June 28, 1995, AFSCME Council 52, Local 820 filed an unfair practice charge and amended charge, alleging that the Township of Teaneck violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3).^{1/} The charge alleges that Luciano Rea's December 1994 layoff was in retaliation for engaging in protected activity, including his participation in collective negotiations. The charge also alleged that the issuance of a parking violation summons to local president Curtis Caviness was in retaliation for engaging in protected activity (A-2).

On or about November 28, 1994, appellant Rea filed an appeal of his layoff with the Merit System Board of the New Jersey Department of Personnel (A-1). On January 10, 1995, OAL granted a hearing (A-1).

On December 21, 1995, a Complaint issued on the unfair practice charge (A-2). On January 23, 1996, the Township filed an Answer admitting that Rea was laid off and that Caviness was issued a summons. The Township denied engaging in any unfair practice (A-3).

^{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. (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."

On June 5, 1996, AFSCME filed a motion with OAL seeking consolidation of the cases and a predominant interest determination. On November 7, 1997, Administrative Law Judge Jeffrey Gerson issued a decision (A-4) recommending consolidation and finding that the Commission has the predominant interest.

On December 3, 1997 and February 23, 1998, the Commission and Merit System Board, respectively, issued a Joint Order on Consolidation and Predominant Interest (A-5). Tp. of Teaneck, P.E.R.C. No. 98-116, 24 NJPER 177 (¶29088 1998).

On March 13, 1998, I was appointed as a temporary administrative law judge to conduct a hearing in the consolidated matters (A-6). On May 6, 1998, I conducted a prehearing telephone conference call with the parties. On May 15, I issued a Prehearing Order setting August 3, 4 and 5, 1998 as hearing dates.

After mutually agreed upon postponements, the hearing in these matters was conducted on March 2, 3 and 4, 1999. Post-hearing briefs and reply briefs were received by August 3, 1999.

Based upon the entire record, I make the following:

FINDINGS

1. Luciano Rea began his employment with the Township on July 12, 1982, when he was provisionally appointed as an "assessment analyst." He was advised that a permanent appointment would follow his successful completion of the "Civil Service testing and probationary requirements" (CP-3; 2T8).

2. Tax Assessor Joseph Krupinski assigned Rea to inspect Township residences, the owners of which had recently applied for and received building permits (2T10, 2T13-2T14). The purpose of the inspections was to determine each property's added assessed value, which in turn was used to calculate the property tax (2T11, 2T13, 2T17).

3. On an undetermined date, Rea was provisionally appointed as an "assessing aide" (2T42). On June 16, 1986, Assessor Krupinski wrote a memorandum to Township Manager Werner Schmid, recommending that Rea be permanently appointed to the position on June 24 (CP-6). I infer that Rea was permanently appointed as assessing aide on June 24, 1986.

4. Throughout his Township employment, Rea's primary duty from April through September of each year was to conduct residential added assessment inspections (2T19, 3T8-3T9, 3T56).

5. Rea inspected residences to assess the work described in the building permits and any other improvements he observed, measured against the property record cards (2T12, 3T11-3T14). (In the middle to late 1980s, during Rea's employment, the Township computerized its property record cards, which were periodically amended to reflect improvements to residences) (3T12).

6. After inspecting a residence, Rea drew a "schematic by scale" on the property record card(s). Upon returning to the office, Rea entered appropriate codes for the addition(s) into the computerized system (2T17, 3T11, 3T97-3T98). A formula developed by Krupinski, which considered the age, condition and depreciation of a house, together with any improvement(s), was used to derive a new assessed evaluation (2T13, 2T17).

7. From October through March in any given year until 1989, Rea investigated certain residential sales to determine if they were "arms-length" transactions (3T56-3T57). A "distress" sale, such as one that may occur in conjunction with a divorce proceeding, could skew the Township's market analysis of residential sales (3T56).

8. Rea also reviewed applications filed by seniors and veterans seeking property tax deductions (2T18, 2T147-2T148, 3T52). Each application review took about 10 minutes (3T54). Rea entered appropriate data into the computer about qualified applicants, subject to the assessor's approval (2T148-2T150). Rea discontinued the deductions when the properties were conveyed,

also subject to the assessor's approval (2T151-2T152). Until June 1989, Rea also compared every "line item" of new tax books against those of the previous year (2T19, 2T24-2T25).

9. From 1983 through 1994, Rea was a member of Local 820's negotiations committee of Council 52 AFSCME, which negotiated several collective agreements with the Township. Local 820 represents Township white collar employees (J-1; 2T89-2T90, 3T17). In 1990-91, Rea was an officer in the union (2T89). Peggy Clay was the local president throughout the 1980s and until 1993, when she was succeeded by Curtis Caviness (2T90-2T91, 2T95). In 1993, Clay was promoted to Township clerk, based on the recommendation of Township Manager Gary Saage (3T120-3T121).

10. From 1988 to May 1991, Jack Hadge was Township manager (3T166).

Tax Assessor Krupinski had three employees in his office in 1988 -- an assistant assessor, an assessing aide (Rea), and a clerk-typist (3T166, 3T167). The assistant assessor resigned in January 1989. Krupinski left in early 1990 and accrued vacation leave allowed him to retire in August 1990 (3T167, 3T169). Hadge appointed Bill Amundsen provisionally as assistant assessor in September 1989, with the intention of promoting him to assessor when Krupinski retired (3T167).

Amundsen may not have had to take the civil service examination for assistant assessor, inasmuch as he was promoted to assessor, a non-competitive position requiring tax assessor certification (3T168). I infer that Amundsen was promoted to tax assessor sometime in the fall of 1990.

The assistant assessor position was never filled and was eliminated in the 1991 Township budget (3T17, 3T169-3T170).

11. When Amundsen was hired in September 1989, Rea "showed him all the operations functions...and didn't hold

anything back" (2T62). Rea summarized the transition:

Under Mr. Amundsen, the changeover from Mr. Krupinski to Mr. Amundsen, there was a period of time there where I ran the whole office. Mr. Amundsen would oversee everything but I did everything. He would also help out on various - he did a lot of commercial inspections while I was doing the added assessments.
[3T58].

Amundsen had apparently appreciated Rea's efforts, commenting to him on an unspecified date, "You know, you deserve a raise", to which Rea answered, "What do I have to do to get the raise?" Amundsen answered, "Well, according to Jack Hadge, you need to have your [State tax assessor] certification" (2T84).

12. In the fall of 1990, about the time Amundsen was officially promoted to assessor, he "started to take some of [Rea's] functions away from [him]...and he [Amundsen] would do it all" (3T53). Two duties which Amundsen took from Rea and performed in his place at that time were the senior citizen and veteran deductions (3T52-3T55). Rea conceded that the assessor ultimately determined whether an applicant was qualified for a deduction and whether a deduction was to be "removed" from a property (3T7, 3T8).

13. Two other duties which Rea performed under Krupinski -- sales investigations (see #7) and line-by-line comparisons (see #8) were essentially discontinued when Amundsen became assessor (2T19-2T20, 3T57-3T58). Amundsen personally reviewed with the clerk-typist "only those [line] items which were changed" (2T19-2T20). In late 1991 or early 1992, Amundsen "took away" two other duties Rea had performed under Krupinski -- "deeds" and "exempt properties" (3T74). These duties were not described in detail and the record does not indicate how much of Rea's work day was devoted to them and who in the assessor's office, if anyone, performed them instead (2T62).

14. Rea characterized his relationship with Amundsen in late 1990 and in 1991. He testified:

He kept himself very distant in the running of the department and the operations of the department and had no discussions with me regarding values within the area of Teaneck. It became very, very, very - the air was full of hostility.
[3T76].

I credit the final sentence of the quoted portion as Rea's sentiment about his professional relationship with Amundsen. I do not attribute any specialized meaning to "hostility."

15. On April 5, 1990, Township Assistant Manager Henry Ross sent the April 1990 N.J. Department of Personnel "job opportunities" bulletin to Amundsen, together with a cover memorandum. Ross wrote to Amundsen that interested candidates must apply by April 21, 1990 (CP-7; 2T80). Included in the bulletin was a listing for the position of Teaneck Township assistant assessor (CP-7).

Rea read the bulletin and mentioned his interest in the job to Ross. Ross said he would inform Township Manager Hadge (3T84, 3T185). Rea filed the application and later took and passed the examination (2T82).

The record is not clear about when Rea learned that he passed the job examination. Rea did, however, send a letter to Hadge, advising him that he had qualified for the assistant assessor title within five days of receiving notification, as required by DOP regulations (3T13). Rea also discussed the topic in the spring of 1991 with Township Manager Gary Saage, who, by June, had succeeded Hadge (2T83-2T84, 3T118). I infer that Rea became qualified to hold the assistant assessor position sometime before Hadge retired in May 1991.

16. On April 12, 1991, the N.J. Department of Treasury advised Rea that he had "successfully completed the examination for a tax assessor Certificate", based on the examination given on March 23rd (CP-4). Rea paid the fee required for the certificate (2T22).

Around the same date, the State Department of Treasury issued its March-April 1991 "Local Property Branch News", a copy of which was received by Hadge, who forwarded it to Amundsen (CP-5; 2T23). The newsletter had an article stating that 27 people "became qualified municipal tax assessors", having passed the March 23rd examination. The article also states that anyone taking office as a tax assessor must hold the assessor certification. Rea's name was listed among the 27 qualifiers (CP-5).

17. On an unspecified date, Amundsen, having learned of Rea's certification and appearing to Rea to be annoyed, said to him, "How come you didn't tell me you were taking that test?" Rea responded, "Why would I have to tell you I took this test and [received] my certification?" Amundsen did not respond and walked away (2T85).

18. In June 1991 or sometime that fall, Saage told Rea that he "had the qualifications for the job [assistant assessor]" and that he knew he had taken the examination for it. "But he [Saage] also said that [it] cost the Township \$2000 to eliminate this position from civil service. And he says 'I cannot give you that job', he says - he just said I cannot give you that title" (2T84). Rea further recalled, "I do remember that \$2000 was a fine which he had to pay" (2T183). Rea also acknowledged that neither Saage nor Amundsen told him that he would not be promoted because of his union activities (2T182).

Saage was unaware that the Legislature had authorized the Department of Personnel "to bill municipalities for the cost of conducting examinations when they weren't used, when the position

was not to be filled..." (3T170). As Township manager beginning in June 1991, Saage received invoices for the assistant assessor and a gardener position (an applicant had been appointed and shortly thereafter resigned, and the position was never filled) totalling \$5000. Saage dickered with the Department of Personnel and the bill was reduced to \$2000, which was paid (3T170-3T171).

19. Sometime in the fall of 1991, when the 1992 budget was discussed and prepared, Amundsen suggested to Saage that the assessor aide position be eliminated (3T127, 3T189). Amundsen said that he was unhappy with Rea's performance and that the position "could be done by a part-time professional for a lot less money" (3T127).

Saage replied to Amundsen, "[L]et's not do it at this point because Mr. Rea was going to be, I think, 62 at the end of '94 or the beginning of '95 and I said then he could collect social security and a pension. Let's try and hold off on doing this" (3T128).

20. Amundsen's discontent with Rea's performance is corroborated by his handwritten, detailed three-page memorandum dated September 23 and 30, 1991 (R-9, R-10). The specificity of the memorandum diminishes the likelihood that it was written years later and predated (3T197-3T198). I credit the exhibit's date.

21. Rea was never disciplined for poor job performance and nothing in his employment record would justify his termination for cause (3T204).

22. In 1992 and 1993, Amundsen and Rea disagreed over three matters which may be known as "Glen Pointe", "cape cods" and "Winthrop Road". (2T44, 2T53, 2T56, 2T58).

Their disagreement over Glen Pointe, a commercial property, concerned Amundsen's decision to increase its assessment by 25% when other commercial assessments were being reduced by 15% (2T44,

2T49-2T50). Rea told Amundsen that the increase was not justifiable and Amundsen authorized the increase anyway (2T49).

One of their two conversations about Glen Pointe, which Rea characterizes as "an argument to some degree", was in early 1992, when Amundsen said he would "bite the bullet" by authorizing the increased assessment (2T167, 3T60, 3T62). The second conversation was in October 1992 and concerned the difference between Amundsen's projected tax and the actual tax reported in the tax books (3T62-3T64).

The owner of Glen Pointe filed a tax appeal of the rate ostensibly set by Amundsen and litigation ensued into 1994. The Township ultimately refunded "millions of dollars", which, together with other economic woes, resulted in a municipal budget deficit for the first time in at least 32 years (3T148-3T149).

23. "Cape cods" concerned Amundsen's 1992 decision to reassess cape cod style houses with the intention of reducing their assessed valuations (2T53, 2T55). (Perhaps Teaneck was experiencing a decline in property values (2T160)). Rea was directed to inspect the houses, pursuant to Amundsen's determination that the upper floors of them should be considered "finished attics" rather than "finished half-stories" (2T53-2T54).

Rea objected to the reassessment, advising Amundsen that his plan was contrary to formulas in "Real Property I and II", which are annually updated State manuals providing different multipliers for residential reevaluations (2T54-2T55, 3T100). Rea told Amundsen that the land should be devalued - not the houses (2T161-2T162).

Amundsen overruled Rea's objections and ordered the inspections, with which Rea complied (2T57, 2T166, 3T65, 3T68).

24. In early 1993, Rea performed an added assessment inspection on a new house on Winthrop Road, perhaps the largest house in the municipality (2T58-2T59). Rea assessed the house at

\$1.6 million (2T59).

Amundsen disagreed with Rea's determination and reevaluated the property, assessing it at \$2 million (2T59, 2T171).

The homeowner, in the course of appealing the higher assessment, mailed a series of letters to Amundsen, which were not answered. The matter was litigated and the assessment was lowered to about \$1.5 million (2T60-2T61, 2T173).

25. In the fall of 1992, during the preparation of the 1993 budget, Amundsen repeated to Saage his complaints about Rea's performance and his opinion that his position should be eliminated. Saage "told him to wait" (3T179).

26. In 1993, Rea's relationship with Amundsen deteriorated. Few words were exchanged, usually not even greetings (2T64).

On direct examination, Rea did not recall Amundsen ever criticizing his work (2T64). He denied the possibility on cross-examination (3T21). But ten days before testifying, Rea certified in a long, two-paragraph answer to an interrogatory that, "In the years 1993 and 1994, Mr. Amundsen complained several times about my work. Nevertheless, while at one of the PERC preliminary conferences related to this charge, it was stated that I had not been removed because there were complaints about my work" (R-4). When asked on cross-examination if his certification about the complaints was accurate, Rea testified, "Well, when I read this, I wasn't too sure of the accuracy of this" (3T23).

I find that Rea's testimony on this matter is equivocal and evasive, especially in light of the clarity and context of his certification completed just ten days beforehand. I find that Amundsen criticized Rea's work to Rea in 1993 and 1994.

27. In 1993, Amundsen tried to teach the office clerk-typist how to enter added assessment data into the computer

system (3T58-3T59).

Rea testified that "in the past", someone "should have some sort of title to do it, assessing clerk" (3T59). Rea knew of two employees who took a test for the position but he did not believe that either passed (3T59). Nothing in the record defines the duties of an assessing clerk.

James Tighe has been the Township tax assessor since March 1998. The only other full-time employee in the assessor's office is a clerk-typist (3T86-3T87). (But see finding #46). Tighe's duties include defending tax appeals, and performing added assessments, deductions, exempt applications (3T88). Tighe described specifically his responsibilities in entering added assessment data into the computer system, including his determinations on any improvements (3T93-3T99).

28. Tighe also described how deductions are processed; a clerk-typist reviews the completed application "to see if it is all in order" and checks that all necessary "items" accompanying it (such as a service record for a veterans deduction) (3T88-3T89). The clerk-typist passes all the documents to Tighe for his approval (3T89). Deductions are removed "almost solely [by] the clerk-typist." For example, when a house is sold, deductions are removed automatically, which the clerk-typist verifies (3T88-3T89).

In the occasional transfers of ownership to a trust, Tighe determines if the deduction holder is "still involved in the ownership of the property." Typically, additional documents are required for such determinations (3T90).

Tighe acknowledged on cross-examination that a hypothetical certified tax assessor should be able to answer questions which a clerk-typist could not (3T108). He also acknowledged that an assessor's aide could "remove deductions" (3T108-3T109).

The record shows that many of the functions associated with

adding or deleting deductions are ministerial. Nothing in the record indicates that the clerk-typist's performance of such functions violates any tax-assessing protocol or regulation(s).

29. In June 1993, Local 820 of Council 52 AFSCME conducted its regular meeting. The minutes state, "We will be going into negotiations by the end of this year...tell us what your needs are, be realistic. Many towns are asking for give-backs" (CP-1, 6/10/93).

The September 1993 minutes show members' discussion of a State early retirement plan. The minutes state:

[E]arly retirement - \$500 per month for 2 years...affects those over 50 with more than 25 years of service. Over 60 with 10-20 years of service. [Saage] recommended to Council not to opt for Early Retirement, since it is not cost effective.... Peggy [local president] said for State law to go into effect, a Municipal Council resolution must first be adopted. [CP-1, 9/14/93].

On September 29, 1993, Curtis Caviness was elected local president and Rea, vice president (CP-1, 9/29/93).

The October 1993 minutes state that Caviness said "...going into negotiations will be rough..." (CP-1, 10/19/93).

30. Sometime during the fall of 1993, the Township adopted a resolution offering the State-sponsored early retirement option to municipal employees (3T131). The options were explained to all employees at a meeting. Generally, retirement papers had to be filed by January 1994 for an April 1 retirement date. About ten employees opted for the plan (3T132). Saage was provided a list of eligible early retirement municipal employees. Saage testified:

There were a number of positions, two that I remember, park superintendent was one and assessing aide, that I knew we could eliminate, in other words, so there was a benefit...in me recommending to council to adopt the early

retirement program because we weren't just letting people retire early and replacing them, there was this issue of being able to eliminate some positions.
[3T129].

Saage's purported opposition to the plan, as memorialized in the union's September 14 minutes and his approval in the quoted testimony are reconcilable. Saage conceded that he "normally" recommends against early retirement options because of their "tremendous cost." But for this option, "there was a certain benefit to [the Township council] because the number of people that were on the list, we could eliminate those positions"
(3T130-3T131).

I infer that Saage received the list of eligibles after September 14. In any event, the author of the minutes, Angela McDermott, was not asked about Saage's purported recommendation against the early retirement option (see 1T36-1T37). Accordingly, I credit Saage's unchallenged testimony over a hearsay exhibit.

31. Article II ("Collective Negotiating Procedure") of the 1991-93 collective agreement between the Township and Local 820 states in a pertinent part:

C. In the event any negotiating meetings are scheduled during any part of the working day, employees of the Township may be designated by the Union to participate in such negotiating meetings. Up to a maximum of three (3), not more than one from each department will be excused from their Township work assignment by the Township provided their absence will not seriously interfere with the Township's operations.
[J-1].

32. In or around December 1993, when collective negotiations were about to begin, Saage called Caviness to his office to find out who would serve on the union's negotiating team

(1T46, 2T121). Saage became concerned that two of the three members, Caviness and Barbara DelVecchio, were employed in the same department (Health), thereby violating Article IIC of the agreement (1T46, 1T79, 2T121).

Saage also told Caviness that the presence of the third member, Rea, might be a problem because he was thinking of eliminating Rea's position by the end of 1994 (1T46, 1T79, 2T121). Saage was concerned about maintaining the "continuity of negotiations" (2T121).

Caviness replied that the membership had chosen the committee (1T47, 1T80).

33. On an unspecified date in late 1993, a municipal employee nearing retirement asked Rea at his workplace desk when he was going to retire. Rea answered that he believed he would not retire until age 65 or later (Rea was about 61 at the time). Amundsen happened to walk by and overhear the exchange. He said to Rea, "Not while I'm the assessor" (2T63-2T64).

34. In or around January 1994, Saage called Rea to his office and asked him if he knew that he was eligible for early retirement. Rea said that he knew about the option, "but it's not to my benefit for me to retire at this time" (2T97). Rea was eligible for the early retirement option and would have received an extra \$500 or \$1000 per month for two years (3T29, 3T183).

Saage then told Rea that his position was to be eliminated in December 1994. Rea responded, "You're going to eliminate the job?", to which Saage replied, "Yes, we're going to go to an outside concern and go on a per diem basis" (2T97).

Rea testified on direct examination that he asked Saage, "Why wouldn't you hire me, then? I have all the credentials, I have the knowledge, I know the town like the palm of my hand" (2T97-2T98). Rea testified that Saage responded, "No, we're going

to the outside" and "at the end of the year you'll be 62 years old and you'll have a partial payment and you can collect social security" (2T98). On cross examination, Rea testified that he offered to perform the per-diem added assessment inspections at some other meeting but could not remember when or where the conversation occurred or what was said or who said it (3T36-3T37). When pressed, Rea only recalled that Caviness attended (3T36). Caviness corroborated that he had met with Saage and Rea, who offered his per-diem services (1T64-1T65).

Saage testified that Rea never said he was willing to be a part-time employee or that he was interested in an alternate arrangement so that he could continue to perform some assessing aide duties (3T133-3T134). Saage further testified that if Rea had said he was willing to take early retirement and then work on a "contract basis", he would have advised him that such an action would violate State pension laws (3T134-3T135).^{2/}

The union presented no evidence implicating the accuracy of Saage's opinion that a public employee retiree's benefits would be jeopardized by that retiree's continued per-diem or part-time public employment. If Rea had offered to perform per-diem assessment inspections, Saage would have had sound professional reasons and perhaps a duty to inform him about the risk, especially because he was soliciting Rea's early retirement. I do not believe that Saage would have kept silent, which is an inference that may be drawn from Rea's testimony. I do not draw such an inference; I find that if Rea offered his per diem services, Saage would have at least advised against it.

^{2/} Saage is Chairman of the Board of Trustees of the Public Employee Retirement System (3T134).

35. The parties negotiated a successor to the 1991-93 agreement from about January 1994 to September 1995 (1T29, 1T31, 1T51). (I take administrative notice that a Notice of Impasse was filed on September 27, 1994; that the matter proceeded to fact finding on November 30, 1994; and that the matter settled on September 21, 1995) (Docket Nos. I-95-78; FF-95-13).

36. In the first or second negotiations session (which Rea, Caviness and DelVecchio attended on behalf of Local 820)^{3/} Saage offered a 4% wage increase but warned that "a number of things were in the wind", including Governor Whitman's proposed elimination of State aid to municipalities, significant tax appeal losses, such as Glen Pointe (see #22), and the uncertainty of the views of a newly elected Township council in upcoming July 1994 (2T51, 3T124). The wage offer matched those presented to two DPW units (one of which agreed to the deal) (3T123). Saage urged Local 820 to accept the offer "because it could be withdrawn at some future date if these things that I was suspecting became reality" (3T124).

37. In a negotiations session in March 1994, Saage proposed eliminating the assessing aide title (R-2; 1T84-1T85). Local 820 rejected that proposal, arguing that no currently-staffed position should be eliminated (1T86, 2T99-2T100). It also rejected the 4% wage increase offer.

38. By the summer of 1994, Saage's concerns were realized; Teaneck lost more than \$1 million per year in State aid for four years; tax appeal losses were incurred; and the Township council and mayor changed the salary proposal in the first year of a successor contract to a \$1000 lump sum for each employee not added

^{3/} Saage never refused to conduct negotiations because he disapproved of any member or combination of members on the union's team (1T83).

to base salary (3T124-3T125, 3T149).

39. Sometime in 1994, Amundsen observed Caviness and Rea speaking about negotiations at Rea's desk. Amundsen approached and admonished, "You are to conduct your union activities not during business hours" (2T63, 2T174, 3T73).

40. In 1994, Amundsen performed the calculations after Rea completed his assessment inspection reports; Rea also gave Amundsen the proper computer codes so that he could calculate square footage and the approximate cost of home additions (3T20, 3T21).

In 1994, Amundsen dispatched Rea on what he described as "nonsense roof inspections." According to Rea, roof changes do not result in tax assessment changes. Amundsen sent Rea anyway, stating "maybe they're doing something else" (2T64-2T65). On cross-examination, Rea conceded that roof inspections were within the scope of his duties (2T180). Current Township Assessor Tighe will authorize a roof inspection if the property sells for 30% more than its assessed value - "I would want to take a look at the condition of that building and what would bring it to my attention is the fact of putting a new roof on" (3T115).

41. Sometime during the summer of 1994, late on a Tuesday afternoon, local president Caviness parked his own car in one of seven parking spaces reserved for Township council members in the municipal lot (1T71, 1T86, 3T157-3T158). Council meetings are held in the adjacent municipal building on Tuesday nights (3T158).

When Saage left the building at 5 p.m. that Tuesday afternoon, he observed a car in a reserved space (signs at the front of each of seven council spaces prohibit parking at the risk of a \$50 fine, citing a municipal ordinance code number) (3T158). Nothing identified the car as Caviness's.

Saage promptly returned to the building, telephoned the police department, identified himself and explained that a vehicle

was improperly parked in a council member's space. He asked that the police immediately issue a summons on the vehicle (3T158). Saage returned to the lot and waited in his own car for an officer to arrive and issue the ticket (3T159).

A police officer arrived and began writing the ticket. Caviness emerged from the municipal building and approached his car and the attending officer (1T72, 3T159).

Caviness testified that Saage was seated behind the steering wheel of his car and pointed to the police officer and then to himself, suggesting that "he was the one who instructed [the police officer] to write me a ticket" (1T72-1T74).

Saage testified that he made no gestures and did not point his finger anywhere. After the police officer issued the ticket, Saage drove away (3T159-3T160). Saage had informed the police of similar infractions on other Tuesdays in the past (3T160, 3T163).

No evidence suggests that Saage knew before seeing Caviness approach the police officer in the lot that the car belonged to him. Even if Saage "pointed", as Caviness testified, it proves only that Saage indicated that he had initiated a call to the police for the purpose of having an apparently illegally parked car ticketed and merely waited to see the result.

42. In August or September 1994, the newly elected Township council and mayor instructed Saage to "bring in the appropriations for 1995 no higher than they were in 1994." The impact on the taxpayer was "the significant loss of over one million dollars in State aid" (3T152, 3T176). Among Saage's recommendations was the elimination of 11 positions, including Rea's assessor aide title. The council discussed "positions, not personalities" and Saage did not hear any council member refer to Rea's union activities (3T152). In September, the Township council approved Saage's recommendation, voting to eliminate the positions by

December 31, 1994 (3T132, 3T139, 3T176).

A social case worker in the Health Department retired in November 1994 (3T139). The positions eliminated had all been budgeted in 1994; in 1995, none received allocation (3T140-3T141). By December, Rea was the only employee whose position was eliminated.

43. On September 15, 1994, Rea sent a letter to the Township mayor and council, urging them not to eliminate his assessor aide position (CP-9; 2T119). The letter charts revenues garnered from his added assessments in 1992-94. Rea wrote that his abilities had been "undermined" and his duties, "curtailed" (CP-9). The letter does not refer to Rea's role in collective negotiations.

44. On September 22, 1994, Saage wrote a letter to the Department of Personnel, advising of the Township's plan to layoff the assessing aide for reasons of "economy and efficiency, since we intend to provide the needed professional services...by outside professional contract" (R-6).

On October 3, the Department of Personnel approved the layoff plan (R-6).

45. On October 18, 1994, Saage wrote a letter to Rea, formally advising him of a December 30 layoff: "It is our intention", Saage wrote, "to provide the services on an as needed basis by outside professional contract." The letter advised of possible bumping rights under Department of Personnel auspices (A-1). On the same date, a general notice of the layoff was posted to Township employees (A-1). The layoff plan was approved by the Department of Personnel (3T137-3T138).

46. Amundsen had recommended that the added assessment inspections could be done "on a contract basis at so much per inspection and that it would certainly not exceed \$10,000 per year" (3T142).

Between 1990 and 1994, Rea performed between 250 and 300 residential added assessment inspections annually (3T80-3T81). From 1995 to the date of hearing, Jeff Glazer has performed the inspections and submitted vouchers for payment. At \$23 per inspection, Glazer performed about 200 inspections in 1997 and about 180 inspections in 1998 (3T91, 3T93). Glazer's annual voucher cap is \$7000 (3T91). Between 1995 and 1998, Glazer was paid between \$3700 and \$6200 annually (3T145; R-5). He receives no other benefits. Nor is he asked to perform special projects, or assess new homes and commercial properties; these tasks are reserved for the assessor (3T91, 3T110). The Township assessor does not need a full-time employee to perform added assessment inspections (3T94).

47. Rea testified that in December 1994, the Township had a vacant position in the Collections Department (2T109). Caviness testified that an assistant health officer position remained budgeted and unstaffed in 1995 (1T55, 1T57). Rea did not apply for any position and did not tell Saage that he wished to be considered for the health officer position (3T42-3T43).

Saage denied that Caviness or Rea told him that Rea was interested in another Township position (3T136). In late November 1994, AFSCME sent Saage a letter, advising that Rea was qualified to fill a vacant position in the Health Department (R-7). On December 8, the Department of Personnel wrote a letter to AFSCME advising that a position may exist but "this office cannot require the Township to fill a vacant position" (R-8).

Saage denied that a position was available in the Health Department in October 1994 (3T164). Later, a vacancy occurred there when the employee resigned. The social services coordinator position was not filled and it was eliminated (3T164-3T165). Saage denied that any position was available when Rea was laid off (3T166, 3T182). In the absence of documents or more persuasive testimony by charging party witnesses, I credit Saage's testimony.

ANALYSIS

A. THE COMPLAINT

In re Bridgewater Tp., 95 N.J. 235 (1994), sets forth the standards for determining whether a personnel action was discriminatorily motivated in violation of subsections 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. To establish such a violation, the charging party must prove by preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

Local 820 has not proved that Rea's termination was in retaliation for his exercise of the right to negotiate collectively on behalf of Township white collar employees. The charging party's case rests on Rea's relationships with two employer representatives -- Assessor Amundsen and Township Manager Saage. Excepting Amundsen's late 1993 admonition to Rea and local president Caviness not to discuss union business on work time, the record is bereft of evidence that Amundsen acknowledged or cared in any way about Rea's protected activities. All sources of friction between Amundsen and Rea concerned tax assessing responsibilities and judgments, and perhaps, professional distrust. Even Amundsen's derisive aside to Rea (see finding #33) originated in his view that Rea's position was unnecessary that and his performance was deficient (see finding #19).

Rea's relationship with Saage included their periodic

meetings at the negotiations table over eleven years. Only the last year of that relationship is the subject of the charge. In December 1993, Saage remarked to local president Caviness that Rea's presence on the union negotiating team could be a problem because the assessing aide title would probably be eliminated. Rea remained on the team and no evidence suggests that he was ever excluded from a session or prohibited from full participation. Nor did his presence interfere with the negotiations process. Under these circumstances, I decline to find that Saage's comment demonstrates animus.^{4/} I am also not persuaded that Saage's remarks to Caviness about his negotiations session(s) attendance with DelVecchio show animus. Although Saage's interpretation of Article IIC of the agreement may be mistaken, nothing in his words or in his actions during the negotiations reveal an intention to disrupt the process or punish the negotiators.

Local 820 has not proved that Saage's proposal to eliminate the assessing aide title was in retaliation for Rea's participation in negotiations. Viewed in the harshest light, this proposal reflected the Township's unwillingness to negotiate a wage increase for a title it intended to eliminate in less than one year. Nothing indicates that the parties would have reached an agreement without the Township's position on the assessing aide title. In fact, negotiations continued for nine months after the title was eliminated and agreement was reached after intervention of a neutral third party.

^{4/} A union has the right to select its negotiations representatives. See Bogota Bd. of Ed. and Bogota Custodial and Maintenance Workers Ass'n, P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991). I do not have to decide if Saage's remark independently violated 5.4a(1) of the Act. N.J. Sports & Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

That Rea was employed in December 1994, when his position was eliminated, was fortuitous and not evidence of disparate treatment. By January 1994, Rea had rejected the early retirement option, which ten other municipal employees accepted, and whose retirements were effective April 1. By March 1994, Saage had apprised the union in negotiations of impending and substantial economic pressures, which were realized that summer. Both the early retirement offers and the Township's rescission of the 4% wage increase offer corroborate pressures felt from the loss of State aid, tax appeal losses and a newly elected mayor and Township council. Even allowing that Rea was the only "employee" whose position was eliminated, I heard no evidence establishing a nexus between Rea's role in collective negotiations and either the 1991 recommendation to eliminate his position or the 1994 filing with the Department of Personnel.

Finally, Local 820 has not shown that the parking lot incident involving Caviness and Saage demonstrates animus. No words were exchanged between them and any gestures would have only ambiguous meaning (see finding #41).

Considering the entire record, I find that Local 820 has not shown that Rea's protected activities were a substantial or motivating factor in the Township's decision to eliminate the assessing aide title and terminate Rea's employment.

B. THE MERIT SYSTEM BOARD APPEAL

Classified civil servants may be discharged or have their positions abolished when the municipality's intention is a "good faith effort to achieve governmental economy or efficiency and the action is taken in the public interest." Pros., Det. Essex Cty. v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 43 (App. Div.

1974), cert. den. 66 N.J. 330 (1974); See N.J.S.A. 11A:8-1. Good faith is presumed and the employee must prove the contrary. Id.

The test of "good faith" is not whether the layoff accomplished the efficiency or economy but rather that the aim was to accomplish that result. Schnipper v. Tp. of North Bergen, 13 N.J. Super. 11, 15 (App. Div. 1951). "If the presumption [of good faith] is not overcome by sufficient proofs, it is of no consequence that there is proof showing that considerations other than economy underlay or played some part in that action." Id. at 15. See also Hunziker v. Kent, 111 N.J.L. 565 (Sup. Ct. 1933); Greco v. Smith, 40 N.J. Super. 182 (App. Div. 1956). The appellant must show by a preponderance of evidence that bad faith and not true considerations of economy and municipal efficiency motivated his discharge. Hunziker; Greco; Schnipper.

Rea contends that his termination was motivated by Amundsen's animosity toward him, his view that Rea was a poor performer, Rea's age and Saage's knowledge that he would "soon" be eligible for retirement. The Township contends that Rea's position was abolished and Rea was laid off because of reductions in State aid, tax appeal payouts and "budget problems" resulting in a "financial crisis." The Township also maintains that a full-time assessing aide position was not needed.

The preponderance of evidence does not prove that personal or "professional" animus motivated Rea's termination. In the fall of 1991, the assistant assessor title was eliminated and Amundsen recommended eliminating Rea's assessing aide title. These facts suggest a Township effort to shrink the tax assessing department.

Amundsen simultaneously criticized Rea's performance. Initially appreciative of Rea's acumen while awaiting his fall, 1990 elevation to assessor, Amundsen told Rea that the best way to get a pay raise was to obtain tax assessor certification. I cannot

reconcile that advice with his apparent resentment of Rea's obtaining certification by the spring of 1991. Even before Rea obtained certification, his relationship with Amundsen chilled, the air being "full of hostility." The only facts informing this change of heart are Amundsen's promotion to assessor and his taking "deduction" responsibilities from Rea.

Amundsen may have been a less painstaking assessor than his predecessor, Krupinski, by discontinuing sales investigations and line-by-line comparisons. This trait connotes an exercise of managerial discretion rather than personal ill will. The computerization of the tax assessor's office in the late 1980's permitted relatively easy access to added assessment and deduction records. This fact is also consistent with a reduction in force - or at least, a recommendation to that effect.

Local 820 has suggested (rather than demonstrated) that Amundsen was threatened by Rea's spring 1991 State certification as an assessor, despite Amundsen's official appointment as Township assessor about seven months earlier. Just how much that anxiety prompted Amundsen's fall 1991 criticism of Rea's performance and his recommendation to eliminate the assessing aide title is speculation.

No evidence has rebutted Saage's hearsay testimony that in 1991 Amundsen also recommended to him that Rea's principal duty as assessing aide - performing added assessment inspections - could be done for less than \$10,000 per year by an independent contractor. Local 820 asserts that this recommendation is "completely unsupported", meaning that "no concrete plans regarding cost savings were produced" (post-hearing brief at 12).

Saage immediately deferred Amundsen's 1991 recommendation until Rea was eligible for retirement. A "concrete plan" would not reasonably exist in 1991. Viewing Amundsen's recommendation

retroactively, that is, its implementation from 1995-98, the Township had a significant cost savings in contracting-out added assessment inspections. The record shows that another task which Rea had performed, the senior citizen and veteran deductions, were absorbed in 1995-98 by the assessor and the clerk-typist, the only remaining full-time employees in the assessor's office. No evidence suggests that Rea's work has been performed by anyone outside the assessor's office.

Beyond Amundsen's 1991 recommendations, the record shows that Saage deferred the layoff for three years to allow Rea to reach a retirement age. During the interim, Amundsen and Rea had their disagreements over Glen Pointe, cape code style house assessments and the Winthrop Road mansion. If the decision to eliminate the assessing aide title was reached in 1991, and its implementation was deferred, then all evidence of their disagreements is irrelevant. If the decision was first reached in 1994, then I must examine Rea's professional disagreements with Amundsen as a source of personal ill will.

The record shows that Rea's points of view on two of the three disagreements were eventually vindicated in the courts. That Amundsen never solicited Rea's opinions on these matters may have added anger to his probable embarrassment. But the record does not show that Amundsen responded angrily or threateningly to Rea's unsolicited opinions.

In January 1994, Saage told Rea and Local 820 that the assessing aide position would be eliminated by the year's end. Consistent with his 1991 instruction to Amundsen, Saage asked Rea to consider retiring under the State-sponsored incentive. Rea declined and his continued employment coincided with the Township's first budget deficit in more than 30 years. In the summer of 1994, the newly elected mayor and council refused to authorize a tax increase

to offset losses in State aid and in property tax appeals. Among cost cutting measures, Saage proposed to eliminate 11 municipal positions, including the assessing aide title, by December 30. In August or September 1994, the mayor and council approved the measure.

These uncontested facts undermine Rea's argument that ill will rather than economy and efficiency motivated the Township's decision to eliminate the assessing aide title. Although Rea and Caviness testified that certain other municipal positions were available in late 1994, Township manager Saage denied that possibility. The asserted fact was not proven by a preponderance of evidence.

Accordingly, I find that appellant Rea has not proved by a preponderance of evidence that the elimination of the assessing aide title and his layoff were in bad faith. The record shows that the Township had a good faith intention to achieve governmental economy and efficiency. I recommend that the Appeal be dismissed.

CONCLUSIONS

1. The Township did not discriminate against Luciano Rea in retaliation for his protected conduct or otherwise violate the Act by eliminating the assessing aide title and terminating Rea's employment.

2. The Township did not act in bad faith by eliminating the assessing aide title and laying off Luciano Rea.

RECOMMENDATION

I recommend that the Complaint and Appeal be dismissed.

I hereby FILE my Initial Decision with the PUBLIC

EMPLOYMENT RELATIONS COMMISSION, and the DEPARTMENT OF PERSONNEL, MERIT SYSTEM BOARD for consideration based upon their respective jurisdictions.

This recommended decision may be adopted, modified or rejected by the PUBLIC EMPLOYMENT RELATIONS COMMISSION, and/or the DEPARTMENT OF PERSONNEL, MERIT SYSTEM BOARD pursuant to their respective jurisdictions. If the Public Employment Relations Commission and/or the Department of Personnel does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties any party may file written exceptions with the PUBLIC EMPLOYMENT RELATIONS COMMISSION, P.O. 429, Trenton, New Jersey 08625-0429; or with the OFFICE OF ADMINISTRATIVE LAW, CLERK'S OFFICE, 185 Washington Street, Newark, New Jersey 07102, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/15/99
Date

Jonathan Roth
JONATHON ROTH, ALJ t/a

Receipt Acknowledged:

9/15/99
Date

Thellicent A. Nasell
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Date

DEPARTMENT OF PERSONNEL

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW