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STATE OF NEW JERSEY
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December 7, 2021

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Joseph M. Wenzel, Esq.
Friend & Wenzel, LLC
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Re: *In the Matter of Jeffrey Barrett, et al., Irvington Housing Authority* (CSC Docket No. 2016-3370 and OAL Docket No. CSV 06051-16)

Dear Messrs. Cohen and Wenzel:

The appeals of Jeffrey Barrett, *et al.*, employees of the Irvington Housing Authority, of the good faith of their layoffs for reasons of economy and efficiency, was before Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on August 17, 2021, recommending upholding the layoffs.. Exceptions and reply exceptions were filed by the parties.

The matter came before the Civil Service Commission (Commission) at its December 1, 2021 meeting. Currently, only four members constitute the Commission. A motion was made to uphold the layoffs. Two Commission members voted for this motion while the remaining two members voted to reject the ALJ's recommendation. Since there was a tie vote, the motion was defeated and no decision was rendered by the Commission. Henry M. Robert, Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised*, Tenth Edition, October 2000, Da Capo Press, Perseus Book Group, Chapter 2, Section 4, p. 51. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter. *N.J.S.A.* 52:14B-10(c). Any further review should be pursued in a judicial forum.

Sincerely,

Allison Chris Myers
Allison Chris Myers
Director

Attachment

c: The Honorable Leslie Z. Celentano, ALJ
Jeffrey Barrett
Caleb Bryant
Gloria Canty
Antoine Corey
Kenneth Cozart
Quinn D. Ford
James Hart
Dawn Herron
Glenn Langs
Anthony Morabito
Anthony Szczerbinin
Rasheed Willis
David Brown
Division of Agency Services
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF JEFFREY BARRETT, ET AL., IRVINGTON HOUSING AUTHORITY.

OAL DKT. NO. CSV 06051-16
AGENCY DKT. NO. 2016-3370

IRVINGTON HOUSING AUTHORITY/BARRETT, JEFFREY ET AL.,
Petitioner,
v.
IRVINGTON HOUSING AUTHORITY/SEIU LOCAL 617,
Respondent.

OAL DKT. NO. PRC 03911-17
AGENCY DKT. NO. CO-2016-193

CONSOLIDATED

Arnold S. Cohen, Esq., for petitioners (Oxfeld Cohen, P.C., attorneys)

Joseph M. Wenzel, Esq., for respondent (Friend, LLC, attorneys)

Record Closed: July 7, 2021 Decided: August 17, 2021

BEFORE, **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this consolidated matter, Service Employees International Union Local 617 (Local 617) filed an unfair practice charge with the Public Employment Relations

Commission (PERC), alleging that respondent Irvington Housing authority (IHA) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -39, by laying off members of the local union due to anti-union animus. Individual employees who were laid off by the IHA have, pursuant to the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, appealed the good faith of their layoff with the Civil Service Commission (Commission).

FACTUAL DISCUSSISON AND SUMMARY OF TESTIMONY

This matter arises from IHA's July 2016 layoff of several employees.

On February 8, 2016, David Brown (Brown), who was then IHA's Executive Director, met with Local 617 representatives to inform them of IHA's intention to layoff certain Local 617 members from their jobs with the IHA. R-1.

On February 22, 2016, Brown submitted to the Commission a layoff plan under which the IHA would eliminate thirteen permanent employees from their positions – ten building maintenance workers, a plumber, a receptionist, and a tenant interviewer.[1] R-2. The stated reason for the proposed layoff was that IHA "funds currently supporting staff in the Maintenance Department . . . exceeds the available funding, as the [IHA] is currently operating at a deficit," and the federal Department of Housing & Urban Development (HUD), which funds and regulates the IHA, "concluded that the [IHA] must greatly reduce costs, in order to avoid a significant adverse impact on the [IHA's] financial performance." Ibid. Brown further asserted that there were no alternatives to prevent the proposed layoff, and that there were no other full-time positions to which the affected employees could be assigned or temporarily transferred to lessen the impact of the layoff. Ibid. The intended effective date of the layoff was April 20, 2016. Ibid.

On March 4, 2016, the Commission notified the IHA that it had approved the plan to lay off the thirteen employees. R-3. In the approval letter, the Commission reminded the IHA of the proper layoff procedures, including the affected employees' notice,

[1] Eleven of the affected employees were Local 617 members; Jeffrey Barrett, a building maintenance worker, and the tenant interviewer were not union members.

seniority, displacement, and special reemployment rights. Ibid. In letters also dated March 4, 2016, the IHA notified the affected employees of the impending layoff, and informed them that the Commission would later determine any seniority, special reemployment, or other employment rights they possessed.

On March 21, 2016, Local 617 filed an unfair practice charge with PERC in response to the layoff plan. According to the charge, "[t]hese layoffs are not for economic reasons, but are in retaliation for Local 617 members seeking payment for accumulated paid time off and for the vigorous enforcement by [Local 617] of the [Collective Negotiation Agreement] within the last six months."

On March 22, 2016, twelve of the affected employees filed a good faith appeal with the Commission, alleging that the layoffs were not for reasons of economy and efficiency, but were instead done in bad faith. On April 20, 2016, the Commission transmitted the appeal to the OAL for determination as a contested case.

On June 21, 2016, the IHA's Board of Commissioners (Board) passed a resolution approving the layoff plan, effective July 3, 2016.[2] R-7. In adopting the resolution, the Board recognized that the IHA "will only be funded at 84% of the required funds" from HUD and that, due to this economic reason and in the absence of viable layoff alternatives, a layoff of certain employees was necessary. Ibid. Ultimately, six building maintenance workers, a receptionist, and a plumber were laid off.[3]

The same day, the Board passed a resolution approving a shared services agreement with the Township of Irvington for the provision of maintenance services for the period of July 5, 2016, to June 30, 2017, and at a cost not to exceed $450,000. R-9; R-10. According to the resolution, the agreement was intended "to save [a]pproximately 200,000.00 for the next fiscal year," the IHA "is in need of skilled and unskilled labor union

[2] Thus, the original layoff date of April 20, 2016, was changed. However, there is conflicting information about the actual effective date of the layoff. The resolution states July 3rd, while the notices sent to individual employees state July 1st. July 3, 2016, was a Sunday, so the effective date was likely July 1, 2016, a Friday.

[3] Gloria Canty, Quinn Ford, and Anthony Szczerbinin were originally targeted for layoff, and are among the appellants listed in the good faith appeal, but they were not actually laid off.

workers," and "the Township has skilled and unskilled labor union workers." R-9. The resolution included an addendum proposing a staff of ten laborers with salaries totaling $354,099.20, plus other costs for a grand total of $431,804.16 (excluding costs of materials, tools, and other supplies). Ibid.

On June 28, 2016, Local 617 amended its unfair practice charge to allege that, "[i]n an attempt to further undermine the bargaining unit, [the IHA] has issued bogus disciplinary actions against bargaining unit members . . . since the notices of layoffs have been sent." After the IHA filed with PERC an answer denying any wrongdoing, PERC transmitted the unfair practice charge to the OAL for determination as a contested case.

On February 15, 2017, pursuant to the rules governing consolidation and predominant interest, N.J.A.C. 1:1-17.1 to -17.8, an Order was issued consolidating the good faith appeal and unfair practice charge due to common questions of fact and law, and finding that PERC has the predominant interest in the conduct and outcome of the matter. Thus, "[u]pon issuance of the Initial Decision, the matter will be sent first to [PERC] to decide whether the [IHA] laid off appellants as retaliation for protected union activities," and PERC "will then forward the matter to the Civil Service Commission to determine whether the employer acted in bad faith and grant any warranted relief."

On March 10, 2017, HUD issued a report of an audit of the IHA's public housing program. P-2. The audit covered the period between January 1, 2014, and March 31, 2016, and arose from "a complaint from the union representing its maintenance and clerical employees." Ibid. As a result of the audit, HUD found "serious financial and operational mismanagement" by the IHA, such that "officials spent program funds for unsupported and ineligible costs, excessive compensation was provided to the former executive director, HUD was not notified about litigations, deficiencies were noted in rent collection, program income was spent for ineligible and unsupported costs, and controls over procurement were inadequate." Ibid. As such, "HUD had no assurance that $1.2 million in expenditures charged by the [IHA] was eligible and adequately supported." Ibid.

HUD also concluded in the report that the IHA laid off employees without first getting the approval of the Board. Ibid. However, HUD also noted that, in determining

how to staff the building maintenance department after the layoff, the IHA did not issue a "request for proposal and bidding . . . because they planned to outsource the maintenance function to Irvington Township." Ibid. HUD further noted that "[o]n April 27, 2016, the [IHA's] attorney provided financial analysis and savings projection information to [Local 617]." Ibid.

The consolidated matters were scheduled and rescheduled for hearing on multiple dates, which were adjourned either due to discovery issues, changes in counsel or to continue settlement efforts, however the matters did not resolve. Accordingly, a hearing was scheduled and proceeded remotely in this matter, via Zoom, on June 3, 2021. On the day of hearing, the parties requested that the matter be decided based upon on the papers submitted, and indicated they would offer the testimony of only one witness each. Caleb Bryant testified for appellants/Local 617 and Renee Burgess testified for the IHA. Following the hearing the parties submitted post-hearing briefs in support of their respective positions and thereafter the record was closed.

TESTIMONY

Caleb Bryant

Caleb Bryant was a building maintenance worker at the IHA for 14 years. He was part of the layoff. He was a member of Local 617 and served as shop steward. His responsibilities included filing grievances.

He testified that when the layoffs occurred, there was an outstanding grievance. Sick time had been taken away. Employees had accrued sick leave and vacation time over the years, and then one year they were told they needed to take it all that year or lose it. The working staff lost 80% of their accumulated sick and vacation time they had saved. This was the only grievance outstanding at the time of the layoffs.

Petitioners' Exhibit 2 is an audit report done by HUD. He was one of the people who met with HUD, and he provided them with a list of concerns including the layoffs, and how the IHA was operating, spending its money, etc. HUD informed Local 617 that an

investigation would be undertaken and following an extensive audit that took 4 or 5 months, the report was issued identifying "lots of problems."

Bryant testified Brown was terminated because his [Bryant's] allegations were "found to be true."

Before the layoffs there was a receptionist named Dawn Herron. She was not part of the initial layoff proposed, but two months later she was added to the layoff list. She had been the receptionist at the executive offices in the reception area of the IHA. Bryant testified he has been back to that building and has seen someone sitting in the receptionist's seat. He indicates that Wanda Downing did the job for a while, then was transferred about two years later to the maintenance department, but until then did Dawn's job.

On another occasion a demoted employee was doing the job, and another time there was a temp there. He stated the position was filled as needed – people were shifted around – but they never eliminated the position.

On cross-examination Bryant testified he was always a maintenance worker and was never in an executive position at the IHA. He never was involved with the budget process, or with requesting funding in any manner. Thus, his observations of the functioning of the IHA were personal observations as a maintenance worker. He was shop steward for 5 years prior to the layoff, and so for his entire time there was a member of the union (after his initial provisional period ended).

The grievance regarding sick and vacation time was filed prior to February 2016. The IHA had allowed employees to accrue sick and vacation leave so that there wouldn't be staffing shortages, and people did accrue their leave time. Then one year the IHA said they had to use it all that year or they'd lose it.

He believes Dawn's title was clerk/typist. He has seen people in her seat. Someone answers the phone when you call there.

The HUD representative clearly told him their work would have no impact on the pending layoffs.

He has worked for FedEx for 4 years, full time for the last 3, as a dock worker. He testified his FedEx salary is less than the salary he earned at the Authority.

Renee Burgess

Ms. Burgess is employed at the IHA and handles payroll and HR. She was there in 2016 as well, handling payroll, accounts receivable and accounts payable. She is aware of the June 2016 layoffs. She remembers Dawn Herron and that she was a clerk/typist for the authority. Her job duties included assisting where needed and answering the phones. Dawn was at 624 Nye Avenue so not at the Executive offices of the Authority, as Caleb had testified.

After the layoffs Wanda was at 624 Nye Avenue and sat by the office of the housing manager. She is not sure what Wanda's duties were, other than she answered the phone for the housing manager. Burgess did not know whether Wanda answered the phone for the Authority.

She is aware of a temp who was there for a short time answering the phone. Then someone else was hired to assist the executive director – not just do Dawn's job. The person had more responsibilities and was not a replacement for Dawn.

There are union members remaining at the IHA both at the time of the layoffs and now. All were/are building maintenance workers. After the layoffs, the Township of Irvington provided services to cover those jobs. No one has been hired as a full-time building maintenance worker since the layoffs. Only per diem services clean the building now. They are assigned tasks when they report for work. The two remaining maintenance workers from before the layoffs are Gloria Canty and Clint Ford. There was another, Anthony Szczerbinin, but he retired in August 2020. Wanda has been at all times a housing aide for the Section 8 Department.

Burgess testified that the township started providing services a short time after the layoffs. Now there are only per diem workers, on an as-needed basis, aside from the three workers in the union who remained after the layoffs.

She is familiar with what Dawn's job was, because she did payroll back then as well. Dawn answered the phone at times, but she was primarily the executive director's assistant. The current assistant to the executive director answers the director's phone. Burgess was not aware whether she answers the main phones. There is currently a temp in that job, Ms. Smith, who has been there about 30 days. Burgess does not know if anyone took over Dawn's duties, per se.

DISCUSSION

The appellants submit that the IHA acted in bad faith in laying them off for several reasons. First, after the layoff, the IHA used Township of Irvington employees and per diem employees to perform the same work as the laid off employees, and the duties of the receptionist who was laid off were performed by temporary workers. Second, the IHA did not have "any rational spending plan" given that "$1.2 million in IHA expenditures were found by the federal government to be questionable." Third, the IHA "did not utilize any type of cost-benefit analysis to determine whether the layoffs were fiscally sound," the layoff did not result in any actual savings due to the use of township and per diem workers, and the layoff plan was submitted to the Commission prior to approval by the Board. Finally, the IHA rejected an offer from the union to switch healthcare plans at a savings of $66,179. In sum, according to the appellants/charging party the IHA "illegally replace[d] employees with Civil Service and contractual protections under the guise of cost cutting." That is, "[t]he duties of the appellants' replacements, through either work sharing or through per diem workers, were identical" and "the only inference that can be drawn is that the IHA was attempting to show it did something to rectify the financial mess by weeding out Civil Service employees."

Local 617 also argues that the layoffs were the result of anti-union animus because "Local 617 was a very active union that had numerous meetings with the IHA with regards

to its members" and "[o]bviously, this bothered the IHA," and the layoffs were instituted to "retaliate against Local 617 for its vigorous union advocacy of a benefit time grievance."

In its post-hearing brief, the IHA maintains that the layoff was done in good faith, as the appointing authority "anticipated financial savings," first through the shared services agreement with the Township of Irvington to "eliminate the costs experienced by the [IHA] in insurance, pension, health care, and other benefits," and then through temporary workers to carry out the building maintenance duties. Originally, the IHA planned to lay off thirteen employees, but ultimately only six building maintenance workers, a receptionist, and a plumber were laid off, and the three most senior building maintenance workers kept their jobs.

The IHA also denies any anti-union animus and, while the IHA admits that it did not have a great relationship with Local 617, the housing authority notes that Local 617 has failed to provide any documentation of the existence of a grievance over sick time, the supposed basis of the unfair practice charge against the IHA.

The IHA further questions the probity of the HUD audit in this matter. First, the audit postdated the Commission's approval of the layoff plan. Second, although the IHA admits that HUD found that the IHA "failed to administer public housing programs correctly and consequently expenditures were made for ineligible costs," the argument that the IHA "could have administered better and thereby the layoffs would be unnecessary is unavailing" and "the audit did not find that the layoffs failed to achieve the cost savings anticipated by" the IHA.

Layoff Procedures and Employee Layoff Rights

The Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2, are designed "to establish a personnel system that provides a fair balance between managerial needs and employee protections for the effective delivery of public services." N.J.A.C. 4A:1-1.1. The balance between managerial needs and employee protections is particularly evident in the statutory and regulatory provisions

governing layoff procedures and employee layoff rights. N.J.S.A. 11A:8-1 to -4; N.J.A.C. 4A:8-1.1 to -2.6.

A local appointing authority may institute layoffs "for reasons of economy, efficiency, or other related reasons."[4] N.J.S.A. 11A:8-1(a); N.J.A.C. 4A:8-1.1(a). However, prior to a layoff action, the appointing authority "should lessen the possibility of layoffs by considering voluntary alternatives," such as furloughs and reduced hours, and the employer "should consult with affected negotiations representatives prior to offering alternatives to layoff." N.J.A.C. 4A:8-1.2; N.J.S.A. 11A:8-2 and -3. If, after exploring other options, the appointing authority decides to institute a layoff, it must submit a layoff plan for approval by the Commission. N.J.A.C. 4A:8-1.4(a); Bor. of Keyport v. Int'l Union of Operating Eng'rs, 222 N.J. 314 (2015).

If a layoff plan is approved and implemented, affected employees have certain rights, including "a right to appeal the good faith of such layoff." N.J.S.A. 11A:8-4; N.J.A.C. 4A:8-2.6. However, "[t]he power of a [public employer] to abolish a position in the classified civil service, or to dispense with the services of one holding such position, cannot be questioned where such action is motivated by a *bona fide* desire to effect economies and increase . . . efficiency." Greco v. Smith, 40 N.J. Super. 182, 189 (App.Div.1956). Thus, "[t]he presumption of good faith arises, and the burden is on [the employee] to show bad faith." Hunziker v. Kent, 111 N.J.L. 565, 567 (Sup. Ct. 1933).

Specifically, an employee must prove by a preponderance of the evidence that the layoff was not instituted for economy, efficiency, or other related reason. N.J.S.A. 11A:8-4; N.J.A.C. 4A:8-2.6(a)(1); DiMarie v. Dep't of Human Servs., 92 N.J.A.R.2d (CSV) 238, 239. To meet this burden, "[p]roofs must be presented that demonstrate that the layoff resulted from personal animus and hostility or improper political motives, or otherwise, or that the design in adopting the plan which resulted in the employee's layoff was to remove her in violation of her civil service protections rather than to accomplish economy."

[4] An appointing authority is "a person or group of persons having power of appointment or removal" at either the state or local level of government. N.J.A.C. 4A:1-1.3.

Acchitelli v. Dep't of Envtl. Prot., 93 N.J.A.R.2d (CSV) 716 (citing Schnipper v. Twp. of N. Bergen, 13 N.J. Super. 11, 15 (App.Div.1951)).

In other words, the employee "carrie[s] the burden of proving bad faith, spelled out from words, conduct and all the surrounding circumstances and facts." Greco, 40 N.J. Super. at 193. An employee may be a valuable cog in the civil service machine, but sometimes an appointing authority must make "a substantive policy determination about whether and how to deliver public services when delivery is affected by serious and pressing economic decisions." Keyport, 222 N.J. at 343.

Importantly, "[t]he question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal." Greco, 40 N.J. Super. at 190 (citing City of Newark v. Civil Serv. Comm'n, 112 N.J.L. 571, 574 (Sup. Ct. 1934)). If a layoff action was done in bad faith, an employee may be restored to his position, and seniority credit, back pay, benefits, and counsel fees may be awarded. N.J.A.C. 4A:2-1.5.

A good faith appeal by laid off employees was unsuccessful in In re Newark Sch. Dist. Layoffs 2012, 2014 N.J. CSC LEXIS 405 (May 7, 2014), in which a school district laid off eighty-two employees to help close a $36 million budget deficit, or for reasons of economy and efficiency, and not, as the affected employees alleged, to replace permanent employees with permanent per diem employees.

In In re Passaic Cnty. Civilian Emps. 2008 Layoffs, 2011 N.J. CSC LEXIS 1098 (Sep. 7, 2011), the appellants also failed to meet their burden of showing that they were laid off in bad faith from their jobs with a county sheriff's office. The Commission concluded that the layoffs were for reasons of economy and efficiency, i.e., budget issues, and rejected the appellants' argument that "there was actually no financial crisis since [some] layoffs were rescinded." Id. at **10-11. According to the Commission, "an appointing authority has the discretion to decide how savings are achieved" and "[t]he

mere rescission of layoffs does not demonstrate that the Sheriff's Office is financially secure." Id. at *11.

And, in In re Blackson, 2008 N.J. Super. Unpub. LEXIS 300 (App.Div. Aug. 12, 2008), an appellate panel affirmed the Commission's decision upholding the layoffs of Camden Housing Authority employees for reasons of economy and efficiency. As the court noted, "it [was] undisputed that at the time of the layoffs, the operations of the [housing authority]," which is funded and regulated by HUD, "were marked by serious fiscal and management deficiencies that resulted in its takeover by HUD." Id. at *10.

Unfair Practice Charges

As in this case, employees affected by a layoff oftentimes not only file a good faith appeal with the Commission, but also file an unfair practice complaint with PERC pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -39 ("NJEER Act"), and the regulations promulgated thereunder, N.J.A.C. 19:10-1.1 to -19-5.2. The NJEER Act "makes unlawful a discharge or otherwise adverse public employer action against a worker because of his or her union activity." In re Bridgewater, 95 N.J. 235, 237 (1984) (citing N.J.S.A. 34:13A-5.4). However, "[p]ublic employers still retain the right . . . to discharge a worker for a legitimate business reason, unrelated to the employee's union activities." Any public employee or his or her representatives may file with the PERC a charge that a public employer has engaged in an unfair practice. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-1.1 to -1.2.

On an unfair practice charge, an employee or union "must make a *prima facie* showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision." In re Bridgewater, 95 N.J. at 242. To do so "[i]n the absence of any direct evidence of anti-union motivation for disciplinary action, a *prima facie* case must be established by showing that the employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected rights." Id. at 246 (citation omitted). If a *prima facie* case is made, "the burden shifts to the employer to demonstrate

by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity." Id. at 242 (citation omitted).

In In re Skilled Trades Association, 2015 NJ PERC LEXIS 109 (Oct. 29, 2015), in which employees laid off by the Newark Housing Authority (NHA) filed both a good faith appeal with the Commission and an unfair practice charge with PERC, PERC concluded that the employees' union, Skilled Trades Association (STA), failed to make a *prima facie* showing of anti-union motivation for the layoffs. Under the facts of that case, the STA members were "assigned to Central Maintenance and . . . when a site needed certain maintenance repairs, the site had to make a referral to Central Maintenance for the work to be done by an STA member" and "[t]he site was then charged for the work done by the STA member in response to the referral[.]" Id. at *7. However, "the payments from referrals did not cover the costs of the STA members in Central Maintenance," due to a reduction in funding from HUD and "because payments from referrals were not covering costs, there was a deficit in the Central Maintenance cost center which prompted [the] decision to lay off employees." Ibid. This "decision was based on the NHA's staffing needs and that the layoff resulted in savings of more than $1 million annually." Ibid. And although STA members testified about anti-union remarks by their supervisors, it was clear that the real motivation for the layoffs was not anti-union animus, but legitimate business reasons such as reduced funding and staffing needs.[5]

In In re Monmouth Cnty. Layoffs, 2013 N.J. Super. Unpub. LEXIS 2367 (App.Div. June 6, 2013), although a local union made a *prima facie* showing that Monmouth County "unilaterally demanded that all negotiating members accept a wage freeze for 2009 or face immediate layoffs," and that the county laid off the workers in retaliation for rejecting the wage freeze, the county successfully proved that it did not single out the union, but instead instituted county-wide layoffs due to the financial impact of a global recession,

[5] In the consolidated good faith appeal, In re Costella, 2015 N.J. CSC LEXIS 48 (Nov. 20, 2015), the Commission concluded that "the action of the appointing authority in laying off the appellants for reasons of economy and efficiency was justified." Id. at *1.

and that because of financial reasons the county would have laid off the union members even in the absence of protected union activity.[6]

However, in Warren Hills Reg'l Bd. of Educ. v. Warren Hills Reg'l High Sch. Educ. Ass'n, 2005 N.J. Super. Unpub. LEXIS 78 (App.Div. Dec. 22, 2005), an appellate panel held that a school board committed an unfair labor practice in violation of the NJEER Act "by terminating bus drivers and subcontracting their work to a private company in retaliation for their decision to join a labor union." Id. at *1. In that case, the record revealed the school board's "hostility toward the drivers' decision to organize," and the school board "failed to prove it would have subcontracted the school bus service in the absence of that hostility." Id. at **2-3. Several factors led to a finding of anti-union animus, including the fact that "the decision to subcontract was made immediately following the employees' vote for representation, the past practice of the school district not to subcontract, even during periods of economic hardship, and remarks of the superintendent of schools that exhibited a hostility to drivers becoming unionized." Id. at *3.

I. The IHA did not commit an unfair practice in laying off union employees.

I **FIND** that a preponderance of the evidence does not exist to support Local 617's unfair practice charge. I specifically **FIND** that the union has failed to make a *prima facie* showing that protected union conduct motivated the IHA's decision to lay off union employees. Although in filing the charge, Local 617 alleged that the layoffs were in retaliation for a leave time grievance lodged by the union and "vigorous enforcement" of the parties' CNA, and that the IHA had improperly disciplined union members after the layoff notices were issued, Local 617 failed to produce sufficient evidence for a *prima facie* showing of anti-union animus by the IHA in instituting the layoffs. That is, Local 617 has not provided any direct evidence of anti-union animus, or evidence that Local 617 engaged in protected activity, that the IHA knew of this activity, and that the IHA was hostile toward the exercise of the protected rights.

[6] Several individual employees also filed a good faith layoff appeal with the Commission, which concluded that the layoffs were not done in bad faith, but because of reasons of economy. In re Monmouth Cnty. Layoffs, 2012 N.J. CSC LEXIS 417 (May 2, 2012).

First, although Caleb Bryant testified about an outstanding leave time grievance at the time of the layoffs, which would qualify as protected union activity, Local 617 otherwise failed to show that the IHA knew about the grievance or that the IHA was hostile toward Local 617 because of the grievance. In this regard, in its unfair practice filing, Local 617 stated that the layoffs were "in retaliation for Local 617 member seeking payment for accumulated paid time off," but did not specifically mention a grievance in the filing, and the IHA notes in its post-hearing brief that there is no documentation regarding the grievance referenced by Caleb Bryant in his testimony, and the IHA denies any knowledge of the grievance.

Even assuming that Local 617 filed such a grievance and that the IHA knew about the grievance, Local 617 has not shown that the IHA was hostile toward the union for filing a grievance regarding leave time. Unlike in Warren Hills, in which the employer made remarks that exhibited "hostility toward the drivers' decision to organize," Local 617 has not pointed to any remarks or other actions reflecting any such hostility by the IHA. Importantly, not all of the thirteen employees originally identified under the layoff plan or the eight employees who were ultimately laid off were members of Local 617.

Moreover, even if Local 617 had made a *prima facie* case, such that there was sufficient evidence to support the inference that the union filed a grievance, the IHA knew about the grievance, and the IHA was hostile toward this protected union activity, and the grievance motivated the IHA's layoff plan, there is a preponderance of evidence showing that "the same action would have taken place even in the absence of the protected activity." As in Skilled Trades Association, the layoff plan and the IHA Board of Commissioner's resolution approving the layoff plan both indicate that the layoffs were necessary because the IHA was operating at a deficit and was advised by HUD to reduce its costs. And as in Monmouth Cnty. Layoffs, not all of the employees who were laid off were members of Local 617.

Thus, even if Local 617 made a *prima facie* case to support the inference that the grievance was a motivating factor or a substantial factor in the IHA's layoff decision, there

is a preponderance of evidence showing that the IHA would have instituted the layoffs despite the grievance.[7]

II. The IHA's layoff plan was done in good faith.

I **FIND** that the appellants have also failed to meet their burden of showing that the IHA acted in bad faith in laying them off. Instead, I specifically **FIND** the preponderance of the evidence shows that the IHA effected the layoff in 2016 for reasons of economy.

First, although neither party presented any witnesses with direct knowledge of the IHA's layoff plan, the papers reflect that the IHA's design in crafting its layoff plan was to save money. As Brown stated in the layoff plan, IHA "funds currently supporting staff in the Maintenance Department . . . exceeds the available funding, as the [IHA] is currently operating at a deficit," and HUD "concluded that the [IHA] must greatly reduce costs, in order to avoid a significant adverse impact on the [IHA's] financial performance." The Board, in adopting the layoff plan, similarly noted that the IHA "will only be funded at 84% of the required funds" from HUD. Ibid. Moreover, the Board stated that the agreement with the Township of Irvington was intended "to save [a]pproximately 200,000.00 for the next fiscal year[.]" And as the IHA clarified in its post-hearing brief, the shared services agreement allowed the IHA to "eliminate the costs experienced by the [IHA] in insurance, pension, health care, and other benefits" by using township workers after the layoff. Thus, like the housing authorities in In re Blackson and Skilled Trade Association, the IHA devised the layoff plan in order to cut costs in response to reduce funding from HUD.

The appellants' argument that the IHA did not conduct a cost-benefit analysis is factually inaccurate, and their argument that the layoff plan did not actually achieve savings is irrelevant under the law. The resolutions adopting the layoff plan and adopting the shared services agreement reflect that the Board anticipated saving $200,000 through these arrangements, and thus considered the costs and benefits of the layoff. And although there is an absence of testimony about the HUD audit report, HUD stated in the

[7] Local 617's unfair practice filing also alleges retaliatory disciplinary action against union members after the layoff notices were issued. However, Local 617 has not presented any evidence regarding this allegation, and thus the allegation does not warrant consideration.

report that the IHA provided Local 617 with a cost-benefit analysis in April 2016, and appellants presented neither any testimony to the contrary nor any documents to refute that information. Moreover, whether the IHA, in fact, realized savings as a result of the layoff is immaterial because, in a good faith appeal, "[t]he question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal." The design of the IHA's layoff plan was to accomplish economy, and there is no evidence that the IHA's plan was a guise for removing public employees without following civil service rules for removal.

In regard to the latter, the appellants contend that, after the layoff, the IHA improperly used township and per diem employees to perform the work of the permanent employees who were laid off. However, appellants have failed to provide sufficient evidence to suggest that the IHA intended to replace the laid off workers in violation of their civil service rights, and not to reduce payroll costs as outlined above. As such, like in In re Newark Sch. Dist. Layoffs 2012, the appellants have failed to show that the IHA's layoff plan was not for financial reasons.

The appellants also take issue with the IHA's financial and management problems that HUD highlighted in its audit report. In essence, the appellants contend that, if the IHA had not spent the $1.2 million in questionable funds discovered by HUD, then the IHA would not have had to institute the layoff. However, as the IHA correctly argues, even though the housing authority suffered from mismanagement issues prior to the layoff, this fact is not relevant to a good faith analysis. Even if mismanagement contributed to the need for the layoff, the fact remains that the IHA effected the layoffs for reasons of economy and not in bad faith.

The appellants also maintain that the layoffs were done in bad faith because the IHA rejected the union's offer to switch to a healthcare plan that would have saved the IHA over $66,000. The design of the layoff plan and subsequent shared services agreement however, was to save $200,000.

Finally, the appellants argue that the IHA improperly submitted the layoff plan to the Commission before getting approval from the Board. The appellants have not submitted any legal authority that suggests the order of these events was prohibited. In addition, the record shows that the effective date of the layoff was delayed from April 2016 to July 2016, after the Board approved the layoff in June 2016. Thus, the layoff did not go into effect until the Board approved it.

Based upon all of the foregoing, I **CONCLUDE** that the appellants have failed to meet their burden of showing bad faith on the part of the IHA in carrying out its layoff plan. I **CONCLUDE** that the IHA laid off employees due to budget issues, or for reasons of economy, as allowed by the Civil Service Act. As such, it is **ORDERED** that the appeals in this matter are **DISMISSED**.

I hereby **FILE** this Initial Decision with **PUBLIC EMPLOYMENT RELATIONS COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, who/which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the (title of the agency head with the predominant interest) does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIR OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, 495 West State Street, PO Box 429, Trenton, New Jersey 08625-0429**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall forward the record, including this

recommended decision and its final decision, to **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

August 17, 2021
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at **PUBLIC EMPLOYMENT RELATIONS COMMISSION**: August 17, 2021

Date Mailed to Parties: August 17, 2021

dr

APPENDIX

Witnesses

For Petitioner:

Caleb Bryant

For Respondent:

Renee Burgess

Exhibits

For Petitioner:

- P-1 CBA, dated April 1, 2010 thru March 31, 2013
- P-2 HUD Audit Report, dated March 10, 2017
- P-3 Union Healthcare Proposal
- P-4 Discovery Request, dated March 8, 2017
- P-5 Discovery Answers
- P-6 Letter from Kenneth Connolly, Director, Division of Agency Services, Civil Service Commission, dated March 4, 2016
- P-7 Resolution of the Housing Authority of the Township of Irvington, Resolution #2016-27, dated June 21, 2016

For Respondent:

- R-1 Letter from SEIU Local 617 to IHA dated February 10, 2016
- R-2 Letter from David A. Brown, IHA Executive Director re: Layoff Plan dated February 22, 2016
- R-3 Letter from Kenneth Connolly, Director, Division of Agency Services, CSC, dated March 4, 2016
- R-4 Letter from SEIU Local 617 to IHA dated March 14, 2016
- R-5 NJ Civil Service Commission Confirmation of Layoff Report dated April 20, 2016
- R-6 Letter from IHA to HUD dated May 6, 2016

R-7 Resolution #2016-26 of the Housing Authority of the Township of Irvington

R-8 Letters dated June 22, 2016, from IHA re: Employment Status with the Irvington Housing Authority

R-9 Resolution #2016-27 of the Housing Authority of the Township of Irvington

R-10 Resolution #2016-27 of the Housing Authority of the Township of Irvington