



STATE OF NEW JERSEY

In the Matter of Daniel Burke,
Jackson, Department of
Administration

**DECISION OF THE
CIVIL SERVICE COMMISSION**

CSC Docket Nos. 2020-600
OAL Docket Nos. CSV 12602-19 and
PRC 01885-24
(Consolidated)

ISSUED: MARCH 20, 2025

The appeal of Daniel Burke, Municipal Engineer with Jackson, Department of Administration, of the good faith of his layoff, effective August 30, 2019, was heard by Administrative Law Judge Tricia M. Caliguire (ALJ), who rendered her consolidated initial decision on October 24, 2024. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 19, 2025, accepted and adopted the ALJ's Findings of Fact and Conclusions as they related to Burke's appeal of his layoff as contained in the initial decision and the recommendation to reverse the layoff.

DISCUSSION

Initially, it is noted that this matter was a consolidated case with the Public Employment Relations Commission (PERC), where it had the predominant interest. As such, the ALJ's initial decision was first forwarded to PERC to allow it to make its final decision on the issue as to whether, as found by the ALJ, the layoff was motivated by anti-union animus and intended to interfere with protected union activity in violation of the New Jersey Employer-Employee Relations Act.

In its final decision, issued January 30, 2025, PERC considered the exceptions filed by the appointing authority and adopted the ALJ's findings and conclusions as they related to the unfair practice charge, namely, that the appointing authority violated *N.J.S.A. 34:13A-5.4a(3)* of the New Jersey Employer-Employee Relations

Act. It also provided its remedies under the Act. It then forwarded the matter to the Commission to allow it to make its final determination regarding the layoff under Civil Service law and rules. In this regard, the Commission notes that as PERC has exclusive jurisdiction over the New Jersey Employer-Employee Relations Act, it is bound by PERC's findings made therefrom.

The Commission has reviewed the ALJ's thorough and comprehensive initial decision and the exceptions filed by the appointing authority. In that regard, it finds nothing in the exceptions that persuasively refutes the ALJ's findings, especially, and as affirmed by PERC, that the layoff was in violation of the New Jersey Employer-Employee Relations Act, and that the layoff was thus, not substantially effected for the purposes of economy or efficiency. Of note, the Commission finds that the appointing authority's exceptions that the appellant had not satisfied his burden of proof under Civil Service law and rules that the layoff was not implemented in good faith is overborne by the ALJ's and PERC's findings that the layoff was based predominantly on anti-union animus in violation of the New Jersey Employer-Employee Relations Act.

Since the layoff has been reversed, the appellant is entitled to be reinstated to his position with mitigated back pay, benefits, seniority and reasonable counsel fees pursuant to *N.J.A.C. 4A:2-1.5*. See also, *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 2-2.12*.

This decision resolves the merits of the dispute between the parties concerning the layoff imposed by the appointing authority. However, per the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in laying off the appellant was not justified. Therefore, the Commission reverses that action and upholds the appeals of Daniel Burke. The Commission further orders that the appellant be reinstated to his position with back pay, benefits and seniority from the time of his improper layoff to his reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-1.5* and *N.J.A.C. 4A:2-2.10*. The Commission further awards reasonable counsel fees as provided for in *N.J.A.C. 4A:2-1.5* and *N.J.A.C. 4A:2-2.12*. Proof of income earned and an affidavit of mitigation in support of back pay and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. The Commission directs that the parties shall make a good faith effort to resolve any dispute as to the

amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending any back pay or counsel fees dispute,

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF MARCH, 2025



Allison Chris Myers
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED

**IN THE MATTER OF DANIEL J. BURKE,
JACKSON TOWNSHIP
DEPARTMENT OF ADMINISTRATION,**

OAL DKT. NO. CSV 12602-19
AGENCY DKT. NO. 2020-600 et al.

And

DANIEL J. BURKE,
Charging Party,
v.

OAL DKT. NO. PRC 01885-24
AGENCY DKT. NO. CI-2020-023

**JACKSON TOWNSHIP
DEPARTMENT OF ADMINISTRATION,**
Respondent.

F. Kevin Lynch, Esq., and Mildred Spiller, Esq., for appellant/charging party (The
Law Offices of F. Kevin Lynch, Esq., attorneys)

Kyle J. Trent, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy,
attorneys)

Record Closed: September 16, 2024

Decided: October 24, 2024

BEFORE TRICIA M. CALIGUIRE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 20, 2019, appellant/charging party Daniel J. Burke (Burke or appellant) filed an appeal with the Civil Service Commission (CSC) of the decision of respondent Jackson Township Department of Administration (Jackson Tsp.) to lay Burke off from his position of Municipal Engineer, claiming that the respondent failed to act in good faith in the development and implementation of the layoff plan and did not consider alternatives to the layoff of employees, in violation of N.J.A.C. 4A:8-1.2(c). Further, Burke contends that the respondent was motivated by Burke's involvement in union activities. The CSC transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23, where it was filed on September 12, 2019, and assigned OAL Docket Number CSV 12602-19.

On November 12, 2019, the parties appeared for a settlement conference before the Honorable Bernard Goldberg, ALJ, but the matter did not settle and was assigned to me. After a telephone prehearing conference on January 15, 2020, the hearing was scheduled for dates in August and September 2020, and a prehearing order was issued on January 24, 2020. The hearings were adjourned, and further proceedings were delayed while Burke retained new counsel.

On February 25, 2020, Burke filed an unfair practice charge with the Public Employment Relations Commission (PERC) alleging unfair labor practices as defined in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -64 (NJEERA). Specifically, Burke alleged that the subject layoff and other disciplinary action against him was motivated by anti-union animus and was intended to interfere with protected union activity, in violation of N.J.S.A. 34:13A-5.4(a)(2), (3), (4).

An amended prehearing order was issued on June 8, 2021. By joint request, the OAL proceedings were limited to status conferences until September 22, 2022, when PERC issued a Complaint, Docket No. CI-2020-023. The PERC Complaint was issued only as to the alleged violation of N.J.S.A. 34:13A-5.4(a)(3).

By joint motion dated December 8, 2022, the parties applied for consolidation of OAL Dkt. No. CSV 12602-19 with PERC Dkt. No. CI-2020-023, only the former of which had been filed with the OAL, and a determination that the CSC is the agency with the predominant interest in the conduct and outcome of the matter.¹ On January 9, 2023, I entered an order of consolidation with the CSC as having the predominant interest. By joint order of January 23, 2023, the chairs of the CSC and PERC modified this order, approving consolidation but with PERC having the predominant interest. On February 9, 2024, PERC formally transmitted the Complaint to the OAL.

On March 22, 2023, the second amended prehearing order was issued with specific dates for the completion of discovery, specific instructions regarding the marking, exchange, and submission of exhibits, and scheduling the hearing for June 26, 28 and 29, 2023. At the parties' request, the hearing was held by Zoom Communications, Inc., an audio-video platform licensed by the OAL. Appellant filed his exhibits after the close of business on June 23, 2023, in violation of the deadlines in the prehearing order and in the applicable regulations, and without complying with the instructions in the prehearing order regarding the organization of exhibits. At the beginning of the hearing on June 26, 2023, counsel offered an explanation and requested an adjournment to correct such deficiencies. This request was denied.

During the hearing on June 28, 2023, Burke moved to admit certain documents into evidence that were not included in his evidence binder and therefore as to which respondent had no prior notice. After a brief recess, respondent moved to bar all documentary evidence not marked, exchanged with counsel, and/or submitted to me on or before the twentieth day before the hearing. Both parties were heard, and I ruled that, despite counsel's failure to comply with my explicit order and the applicable regulations, a bar of all such documentary evidence was not warranted, but, in the interest of fairness, the proceedings were adjourned, and counsel was given thirty days to resubmit all

¹ The parties represented that PERC hearing officer Stephanie D'Amico recommended this filing and concurred with the parties' positions regarding the predominant interest of the CSC.

exhibits, properly organized and marked, and to provide a hard copy of such exhibits to his adversary. A letter detailing these instructions was sent to the parties on July 5, 2023.²

On July 28, 2023, Burke submitted two large binders with exhibits marked A-1 through A-171, far more documents than had been included in his pre-hearing submission. The new documents (other than those specifically requested) were not permitted, and counsel was directed to revise its July 28, 2023, submission.

The hearing was rescheduled and resumed on October 5, 2023. Appellant moved for reconsideration of my ruling limiting documents; following arguments by both parties, I directed the parties to—as had been requested multiple times—collaborate on joint stipulations of non-disputed facts and joint exhibits, particularly of public documents. A review of stipulations previously proposed by both parties was conducted on the record, and the parties were directed to complete these submissions by December 8, 2023.

The hearing reconvened on January 30, February 6 and 29, 2024. The parties were permitted to submit post-hearing briefs following receipt of the transcripts. After extensions were granted, the parties submitted post-hearing briefs on August 30 and September 16, 2024. On September 16, 2024, the record closed.

FACTUAL DISCUSSION AND FINDINGS

On December 13, 2023, the parties submitted the following joint stipulation; accordingly, I **FIND** the following as **FACTS**:

1. Burke was employed by Jackson Tsp. from November 13, 2002, until being laid off on August 30, 2019.
2. The layoff plan and layoff notice stated that the reasons for Burke's layoff were "economy and efficiency."

² I also asked Burke to submit the CSC job description of Municipal Engineer and gave Burke the option of submitting a deposition transcript from a related proceeding because his first witness had already given testimony regarding statements made at that deposition.

3. Burke worked in the permanent Civil Service title of Municipal Engineer (Civil Service code 02531), the position he continuously held from November 13, 2002, through August 30, 2019.
4. PERC certified the Jackson Tsp. Municipal Supervisors Association (JTMSA) on December 7, 2015, as the bargaining unit that represents supervisors employed by Jackson Tsp.
5. Jackson Tsp. and the JTMSA entered their first collective negotiations agreement on January 11, 2019.
6. Jackson Tsp. appointed Terence Wall to serve as its Business Administrator in 2019. Wall's appointment was authorized by Tsp. Council Resolution 082R-19, on January 22, 2019.
7. In March 2019, Wall presented his proposed Jackson Tsp. 2019 calendar year operating budget to the Council and the public during the regular Council meeting.
8. The Tsp.'s 2019 operating budget proposed by Wall included funding for the Engineering Division.
9. The 2019 Engineering budget included full-year salaries for the three then-current employees (two full-time and one part-time).
10. On April 23, 2019, the Tsp. Council adopted the budget as proposed under resolution R146R-19.
11. In May 2019, the Tsp. Administration informed the JTMSA that it was considering outsourcing the Engineering function for reasons of economy and efficiency.
12. On May 31, 2019, the Tsp. applied to the CSC to permit the layoff of Burke, full-time Engineering Aide Andrew Bogdan, and Lorie Ann Rao, a part-time administrative employee.
13. On June 28, 2019, the Tsp. amended the plan to remove the part-time administration position from the layoff.
14. On July 3, 2019, the CSC approved the layoff of Bogdan and Burke.
15. By written notice dated July 11, 2019, Jackson Tsp. informed Burke that he would be laid off from his position as Municipal Engineer.
16. By letter dated August 15, 2019, the CSC informed Burke that his layoff had been recorded, that he had no displacement rights, and his employment with Jackson Tsp. would be terminated.
17. Burke's employment with Jackson Tsp. ended on August 30, 2019.

18. The Jackson Tsp. administration engaged T&M Associates to fill the position and duties of the office of the Municipal Engineer during 2019.
19. T&M Associates was already performing engineering work for the Tsp. prior to pursuing the layoff plan.

Disputed Issues:

In both matters, Burke challenges the decision of Jackson Tsp. to develop and implement a layoff plan by which the Engineering Department and Burke's position of Municipal Engineer were eliminated. He contends that the administration (1) failed to comply with CSC rules in proposing the layoff plan; (2) did not act in good faith in the development and implementation of the layoff plan; (3) failed to consider alternatives to the layoff of employees, including Burke, as required under N.J.A.C. 4A:8-1.2(c); (4) was motivated in taking this action by Burke's involvement in union activities; and (5) committed an unfair labor practice.

Witnesses

The hearing took place over seven days, even though only three persons testified, and in many respects, the testimony was duplicative. For the sake of simplicity, the witnesses are listed below, and a description of their testimony follows. The summary of testimony is not meant to be a verbatim report of the testimony and evidence presented in this matter but is intended to summarize the portions of the testimony and evidence I found relevant to the above-listed issues.

Burke, testified on his own behalf. He graduated in 1979 from New Jersey College of Engineering with a Bachelor of Science degree in Civil Engineering. He is a licensed professional engineer and licensed planner (and holds additional environmental licenses).

Fred Rasiewicz testified for appellant. Rasiewicz is seventy-five years old and is no longer employed. From 2007 through 2020, he was employed by Jackson Tsp. as the

Director of the Department of Public Works (DPW). In this position, he supervised daily DPW operations throughout the township, an area of approximately 100,000 square miles. For approximately three years, he also handled Sewer Services and the Recreation Department, non-paid positions.

Terence M. Wall, Jackson Tsp. Business Administrator, testified on behalf of respondent. Wall was appointed to his current position in January 2019. He worked previously for the Township of Cranford as Township Administrator and Quality Purchasing Agent (five years); as Borough Administrator and Clerk for the Borough of North Arlington (six years); and Borough Manager for the Borough of Keansburg (two years, seven months). Wall has also served in local government in elected and volunteer positions.

Testimony

Burke was hired by Jackson Tsp. as Municipal Engineer in November 2002, a position he held for the next seventeen years, until laid off in August 2019.³ A-1; A-2. He was the first person to hold this position in the township, and his job responsibilities included generally those functions "that would be a cost to the taxpayer," leaving for outside consultants functions that were covered by developer fees and/or applicant escrow funds. Tr. of January 30, 2024 (Tr. 4), at 9.

Burke's formal job responsibilities as Municipal Engineer were essentially the same as found in the municipal code (a copy of which was not provided). When he started, Burke was the only employee in the department; he later hired aides and a part-time clerk. Though his essential duties remained the same, Burke took on additional responsibilities as needed. In 2003, he was appointed water systems operator (as he had been licensed in a prior job). A-4. In 2006, after taking on the duties of public works manager, Burke became certified in that position by the New Jersey Department of Community Affairs, but stepped down in 2007, when Rasiewicz was hired. Between 2006 and 2015, he served on the Planning Board as the Class II member (a non-paid, annual

³ After being laid off, Burke found a position with the City of New Brunswick but retired in 2023. He is now sixty-eight years old.

appointment).⁴ In 2007, he was appointed by the mayor to serve as the Director of the Department of Community Development, for which he received a stipend of \$12,000 annually. A-4 at 138. Over the years, Burke maintained his certifications through courses and licensing.

Burke described the work performed by the Engineering Department during his tenure and his personal accomplishments as Municipal Engineer, including “many dozens of projects,” and the following:

- Successful applications for NJ DOT roadway improvement grants
- Annual upgrades of approximately sixteen township roadways
- Turf field improvements for the Recreation Department
- Improvements to DPW fueling system
- Design and construction of DPW salt storage building
- Design and construction of DPW equipment storage building
- Improvements to water system
- Reconstruction of Department of Community Affairs Enforcement Office
- Multi-year oversight of response to gypsy moth outbreak
- Liaison to Department of Agriculture for pesticide spraying
- Maintenance of township maps
- Stormwater reporting

[Tr. of February 29, 2024 (Tr. 6), at 24, 26–27.]

When Burke was first appointed to the Planning Board, then-Councilman Michael Reina was Planning Board Chair. Burke described their relationship at that time as “cordial.” Tr. 4 at 12. In approximately 2007, Jackson Tsp. moved to the direct election of the mayor; Reina was appointed mid-term when the sitting mayor resigned, and then was elected on his own, and re-elected each time since.

⁴ During this period, Burke served on the executive board of the New Jersey Society of Municipal Engineers, including as president of the board in 2018.

Burke and Rasiewicz both stated that they know each other only from work. When Rasiewicz was hired, Burke was serving as Tsp. Engineer. He knew that Burke was licensed and certified appropriately, kept up with continuing education requirements, was instrumental in developing shared services agreements (with other municipalities) and in bringing outside funds into the township (through grants and awards), and was assigned by the mayor to other responsibilities (e.g., community services). Prior to the union activity, Rasiewicz said Mayor Reina praised Burke's service.⁵ Rasiewicz stated that Burke was competent, efficient, and a model employee.

Starting in late 2014, Burke and Rasiewicz began working on the formation of the supervisors' union; Rasiewicz stated that Burke took the lead. Both men described the series of events that led to their decision to form a union. The overriding issue was that, since the beginning of the Reina administration in 2008, the parity that non-union supervisory employees had enjoyed with the unionized workforce disappeared without explanation.⁶ Specific issues of concern to the supervisory employees included unpaid furloughs, payroll deductions based on full salaries (without consideration of lost wages due to furloughs), salary freezes, no cost-of-living increases, and higher payroll deductions due to changes in state law. Union employees, however, continued to receive pay increases (of up to 3.9%) and lower deductions for benefits pursuant to their contracts.

On February 10, 2014, Burke and Rasiewicz sent a three-page memo to Mayor Reina describing the issues of concern to the supervisors and managerial staff and asked to meet with him. A-11. (This letter was also signed by approximately twenty other employees, including all licensed professionals then employed by the township.) Eventually, after much difficulty, then-Business Administrator Joseph Torres organized a meeting including Mayor Reina, Burke, and Rasiewicz; according to Rasiewicz, the mayor appeared uninterested, saying he "didn't really care" about the concerns of supervisory employees. Tr. of June 26, 2023 (Tr. 1), at 30. Torres next suggested a town-hall-type

⁵ Rasiewicz stated that Burke served as acting mayor whenever Mayor Reina was away, though after the union was certified, Burke was not given this duty. See A-4.

⁶ Jackson Tsp.'s unionized workforce included the police, firemen, white collar clerical staff, and public works department staff. Tr. of June 28, 2023 (Tr. 2), at 26.

meeting with the mayor and supervisory employees; several weeks later, Mayor Reina and Torres met with all supervisory employees (department heads, managers, supervisors) in the Tsp. Meeting Room.⁷ According to Rasiewicz, Mayor Reina said:

I don't really care at this point about any concerns and how you're feeling[.] . . . You're kind of lucky to have a position with Jackson Tsp.

. . . Well, listen, you're talking about raises, your main objective is getting more money out of the township and I don't get raises, I haven't gotten a raise on my job [and] if I don't get raises, you don't get raises.

[Tr. 1 at 31.]

In response, the participating employees said that it was unfair for Mayor Reina to compare his pay (for a part-time, elected position) to salary freezes for full-time employees. He replied, "If you don't like what I'm saying, there's the back door and every one of you can leave . . . go. I hate to see you go, but I won't stop you." Tr. 1 at 34–35; Tr. 2 at 28.

Burke, Rasiewicz, and the other management employees considered their options, one of which was to organize as a union. Torres set up another meeting with Mayor Reina, this time with only Burke and Rasiewicz. Rasiewicz described this meeting as "really quick." Torres told them, "If you want to form a union . . . go ahead and do it, we're not going to stop you," and the mayor said, "you're probably not going to get it anyway but do what you have to do," and "stormed" out of the room. Tr. 1 at 38, 39.

Burke and Rasiewicz went back to the supervisory employees, and they all agreed to attempt to form a union. Burke did all the work over the next two years, 2014–2015; during this time, he said he lost titles and pay, see A-26 (letter confirming Burke's Department of Community Development title would be removed), and that grievances were filed by the administration against Burke, Rasiewicz, and other management

⁷ Burke recalled Jackson Tsp. Council President Kenneth Bressi also attending the second meeting. Tr. 2 at 27. Respondent called no witnesses who attended any employee meetings before 2019.

employees. A-105 (September 2016 employment action); A-115 (January 2018 employment action); and A-116 (grievance related to March 2018 incident).

After Burke "received confirmation" that the managerial employees could submit union paperwork, Rasiewicz and Burke, and new Tsp. Administrator Helene Schlegel and Tsp. Attorney Samantha Novak appeared before the CSC. Tr. 1 at 42. Both parties met privately with the CSC representatives to make their cases for and against the union. The CSC permitted union organization, and Burke spearheaded the next steps in the process, distributing and collecting certification cards. Mayor Reina claimed employees were coerced into signing by Burke and Rasiewicz's titles and put an article in the local paper with those claims.⁸ The PERC ruled otherwise, concluding:

The Township did not submit certifications or affidavits in support of its allegation that unit employees were coerced by Burke and Rasiewicz into signing authorization cards. We have not received any communication from unit employees indicating they were coerced, harassed, or misled into signing cards.

....

In lieu of certification based on JTMS's authorization cards, the Township urges us to conduct an election. Since the Township's challenge is not supported by competent evidence, we reject this position and certify JTMS, based on its authorization cards.

[A-163 at 7, 20.]

On December 7, 2015, the supervisors' union, formally called the "Jackson Tsp. Municipal Supervisors Association," was certified by PERC. A-27; A-163. Burke, the new union shop steward,⁹ and Rasiewicz, the union president, then met with Schlegel, Novak, and Tsp. Personnel Manager Kathleen Green to negotiate the union contract. The union was able to obtain a cessation of furloughs and salary freezes¹⁰ and negotiated the terms of a contract with the township. Approximately sixteen supervisory employees were part

⁸ A copy of this article was not provided, but respondent has not disputed the truth of the assertion.

⁹ Rasiewicz explained that the shop steward negotiates contracts and handles grievances for the union membership.

¹⁰ Rasiewicz later stated that these issues were resolved prior to the contract.

of the new union. The JTMSA contract with Jackson Tsp. was finalized on January 11, 2019.

Though he had trouble recalling the specifics, Rasiewicz stated that the administration filed numerous disciplinary actions against Burke and other union members, all of which were eventually withdrawn after the union filed grievances and all of which Rasiewicz characterized as harassment. Specifically, Rasiewicz identified a letter dated January 19, 2017, that he wrote on behalf of Robert Stauffer, the union vice president, to Wall regarding discipline that had been filed against Stauffer for violating the time clock procedure. A-112. Rasiewicz stated that many employees had problems with the fingerprint scanning device; the administration resolved the issue when other employees complained but imposed a disciplinary warning to Stauffer for the same problem. The grievance filed by the union was withdrawn when the warning was rescinded. See A-115.¹¹

Current Tsp. Business Administrator Terence Wall took office on January 22, 2019. With extensive government experience, Wall found Jackson Tsp. had a similar administrative structure as that of other municipalities, with approximately six unions covering employees. The Engineering Department was at that time staffed by Burke, the full-time engineer; Bogdan, the full-time aide; Lorie Ann Rao, a part-time secretary; and outside consultants. Wall first met Burke shortly after he started. Wall stated that he had no knowledge at that time of Burke's role in starting the supervisors' union.

As department heads, Burke and Rasiewicz were involved in the annual budget process, which was the same every year. Every department head proposed his own budget and participated in budget workshops with the Budget Committee, made up of the Tsp. Chief Financial Officer and her staff, and the Business Administrator. After the final budget was developed (with possible adjustments by the Budget Committee), it was submitted to the Tsp. Committee for approval.

¹¹ Both Rasiewicz's letter and a letter from Burke sent one day earlier, A-111, show dates in January 2017, but the administration response is dated March 2018. No party commented on either the errors or the lengthy time before the discipline was rescinded.

The budget for calendar year 2019 was approved in May 2019. Shortly afterward, the administration began the process of "outsourcing the engineering function" and layoffs of the department employees. Tr. 4 at 51. Wall explained that he found the Engineering Department to be "bureaucratically inefficient" and decided that "fully outsourcing [the department's functions] was in order." Tr. of February 6, 2024 (Tr. 5), at 16. He stated that he had had a similar experience in Cranford, giving him first-hand knowledge of the process of outsourcing and the economy and efficiency that results. "They were able to get much more done with less, they were able to scale up, be more efficient and more economical." Tr. 5 at 17. He also had experience with using outside engineering firms rather than government employees while working in Holmdel, North Arlington, and Keansburg, and stated that this system is used in many municipalities.

By contrast, Burke stated that while serving on the board of the New Jersey Society of Municipal Engineers, he learned that neighboring municipalities of similar population and land size, such as Howell Township, Freehold Township, Manchester, and Toms River Township, used in-house engineering departments, and smaller communities did not. He noted that Cranford, where Wall had worked previously, was "semi-urban, suburban," much smaller than Jackson Tsp., and would not have "enough work for a full-time in-house" engineer. Tr. 6 at 11. However, in Jackson Tsp., "90 to 95 percent of the work . . . that's charged to the municipal engineer" was within Burke's education and experience to handle, and "a very small amount" was outsourced. Tr. 6 at 25.

Wall stated that he had the authority as business administrator to pursue the layoff plan of the Engineering Department staff and to outsource their positions. Tr. 5 at 19. He worked with township staff to draft the layoff plan. R-1. To implement the plan, Wall said that he followed the CSC rules, starting with meeting with the affected unions. The purpose of these meetings, according to Wall, was to "discuss to what extent there are any alternatives [to layoffs] that would be proffered by either the union or administration[.]" Tr. 5 at 22. In his interoffice memorandum of May 15, 2019, to Rasiewicz and Union Vice President Stauffer, Wall stated:

[Y]ou are invited to a meeting . . . to discuss potential outsourcing of the Township's engineering function, [which] may result in the

elimination of 2 permanent positions[.] This meeting will include discussion of the budgetary and efficiency concerns underlying the potential layoff and provide an opportunity for you to propose any alternatives to this action.

[A-42.]

For his part, Rasiewicz was shocked when he received the emailed memo from Wall, as he had not been previously consulted, and to his knowledge, the township was financially solid, reporting a surplus each year. Burke stated that he, too, had no prior knowledge of the layoff plan, and was not invited to the meeting.

When Rasiewicz arrived at the meeting, also attended by Novak and the personnel director, Wall said they were laying off the Engineering Department and that he had already made up his mind. When Rasiewicz asked if notice had been given to the CSC and if a feasibility study had been done, Wall did not respond other than to say that the paperwork to eliminate the department had already been submitted to the CSC. Rasiewicz asked Wall for a copy of the notice to the CSC, but Wall refused. Rasiewicz asked to meet with the mayor, and Wall refused. Rasiewicz accused Wall of retaliation, and Wall responded that they "were taking minutes." Tr. 1 at 61.

Wall identified a document titled "Union Communication Summary/May 17, 2019," and said it is an accurate summary of the discussion at the meeting, including that township officials described the financial reasons for the outsourcing proposal, the CSC rules, anticipated timeframes, and that they "requested feedback from the union for alternatives to layoff actions." R-2. Wall stated that the administration had no alternatives to outsourcing, and to his recollection, the union did not offer any alternatives.¹² Tr. 5 at 27.

When shown the same summary of the May 17, 2019, meeting, Rasiewicz stated that the memo was "a lie," that he never saw the potential savings of \$150,000, knew

¹² Wall met separately with Bogdan and Rao to discuss alternatives to their layoffs, but with Bogdan, again Wall said the township had no alternatives, and Bogdan offered none. R-3. Only in his meeting with Rao were alternatives proposed and discussed (i.e., having her work in the same secretarial capacity for another department). R-4.

nothing about the plan for outsourcing, and that the CSC rules were not discussed. Tr. 1 at 180. Even though the memo Wall sent to Rasiewicz and Stauffer two days before the meeting described "potential outsourcing" as a topic for discussion, Rasiewicz stated that the topic was not "discussed" at the meeting, and Wall did not ask for proposed alternatives from the union, as Wall's mind was already made up. Tr. 1 at 63; A-42.

Wall insisted that he discussed alternatives to layoffs with Rasiewicz, but then stated that he told Rasiewicz that the township "had no alternative to a structural change," using outside consultants and layoffs of the Engineering Department staff. Tr. 5 at 81. After admitting that he worked with Rao's union to find an alternative to laying her off, see R-5, Wall stated that for Burke he did not consider a leave of absence without pay, a voluntary furlough or voluntary reduction of work hours, and/or the use of a temporary demotional title. He further stated that none of those alternatives was viable and the purpose of meeting with the union was to discuss viable alternatives. Tr. 5 at 81-84.

Specifically, Wall stated that there were no "viable alternatives to a layoff" to achieve the economy and efficiency that could be obtained by "eliminating bloat and bureaucracy and dealing with the subject matter professionals within [a firm] so you have better accountability[.]" Tr. 5 at 31-32. Economies include not paying benefits or sick time, paying only for the work actually produced, and using only the particular professionals needed for a specific job. Burke was earning approximately \$190,000/year when accounting for salary and benefits, and Bogdan was earning approximately \$80,000/year. R-11. Wall explained the method used to determine the anticipated financial savings as follows:

Pretty straight forward, added up the total package of compensation, salary, benefits, pension, vacation time, sick time, holiday time, all these things that [the township did not pay] consultants for. And, then offset that with having an outsourced solution and having some office time in the -- in Jackson at the rate of . . . \$150 to 165 an hour, so it netted out at around . . . \$150,000.

[Tr. 5 at 37.]

Burke stated that his "hourly rate," that being his salary plus the cost of his benefits divided by the hours he worked, was approximately \$105/hour in 2019. The outside engineer who replaced him billed at \$160/hour.

Prior to 2019, the township employed other independent engineers, including T&M Associates, the entity which eventually replaced the Department. Wall said that by using only an outside firm, more work would get done "with better accountability, eliminating levels of bureaucracy, direct connecting with a firm that has all the disciplines within one roof." Tr. 5 at 44. And, if the first firm did not have specific expertise, or was not working out, it would be easy to move on to another firm.

Wall stated that Mayor Reina had no role in the process or in the decision to pursue the layoff plan, though Wall notified the mayor before he submitted the plan to the CSC. The Tsp. Council was provided notice and had the option of acting to object to the plan, but they took no such action. When T&M Associates was recommended to head the Engineering Department, the Council took formal action to approve the appointment. Wall also stated that neither Burke's status as a union member nor his role in forming the union had any impact on the decision to eliminate the in-house Engineering Department. Tr. 5 at 44-45.

Rasiewicz never saw any correspondence from Jackson Tsp. to the CSC justifying the decision to outsource the work of the Engineering Department, despite asking for it. He identified an OPRA request he filed with township,¹³ by which he requested documents submitted to the CSC to support the layoff plan, including:

- Copies of all analysis [sic] of the cost savings anticipated from the engineering dept staff reduction and supportive of the \$150K cost savings claimed.
- Listing of all alternatives to layoff considered [and] a copy of the plan for alternatives to layoff.

¹³ Burke filed similar OPRA requests with the township and the CSC.

- Any notes or records of the consultation with the affected bargaining unit[.]
- All records of pre-layoff actions completed or contemplated[.]

[A-61.]

On June 25, 2019, the township denied the OPRA request as it was “vague and overly broad” and because it requested documents which were under review at the CSC. A-61 at 359. A similar request filed with the CSC was answered; by letter to Burke dated October 26, 2019, the CSC records custodian stated that only the layoff plan itself, with no supporting documents, was transmitted by Jackson Tsp. to the agency. A-61 (unnumbered page).

Rasiewicz has no recollection of discussing the potential monetary savings of eliminating the Engineering Department with Wall. He stated that Wall “sent the letter [to the CSC that Rasiewicz] had no objections” to the layoff plan as union president, which was a “big lie.” Tr. 1 at 70. Rasiewicz attempted to intervene on Burke's behalf by writing to the CSC that Wall had misrepresented the union position.

As for Burke, he said other than an introductory meeting with Wall shortly after Wall was hired, he did not meet with Wall again until August 2019, when Wall wanted to discuss the transition of engineering functions to the outside consultant. Wall “never engaged me at any time about the specifics of the work that we were conducting or the engineering department budget or finances,” said Burke. Tr. 6 at 13. During his tenure, Burke met at least once a month with the business administrator, but this did not happen with Wall. Burke does not know if Wall held department head meetings, as he was never invited to one.

Though Rasiewicz was never provided proof that the township achieved monetary savings by closing the Engineering Department, he also has no first-hand knowledge regarding such savings. He knows that Wall did not conduct an economic analysis before eliminating the department (based on Wall's answer in a deposition in Rasiewicz's lawsuit, described below).

In May 2020, Rasiewicz was laid off due to “budgetary inefficiencies.” Tr. 1 at 97–99. Specifically, Wall stated that Rasiewicz’s position was being eliminated. Prior to this time, Rasiewicz said he was never informed by the mayor or Wall that the DPW was operating inefficiently nor that there would be an economic benefit to removing him or his position. In all the years he headed the DPW, Rasiewicz was never told by any administration that the budgets he proposed were “overpriced or inappropriate.” Tr. 1 at 99. He does not know if Mayor Reina had spending priorities that impacted the DPW budget. He personally never proposed to eliminate DPW staff.

Besides Burke and himself, Rasiewicz knows of no other layoffs of Jackson Tsp. employees during the thirteen years he worked there, and to his knowledge, no department other than Engineering and DPW was considered for budgetary savings. By contrast, Wall stated that since he was hired, all Jackson Tsp. departments “had some degree of reorganization, efficiency added,” including different leadership and mergers. Tr. 5 at 45. He agreed, though, that no other Jackson Tsp. employee besides Burke, Rasiewicz, and Bogdan was fired or laid off. Tr. 5 at 78. With respect to the elimination of Rasiewicz’s job, Wall stated that the outside engineer handling the Engineering Department (after Burke was laid off) was a certified public works manager and, given the proximity of the departments in the building, it made sense and saved money to have that engineer head both departments.

DISCUSSION

Credibility Analysis

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey described the analysis of credibility as follows:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.

[In re Estate of Perrone, 5 N.J. 514, 522 (1950).]

See also Spagnuolo v. Bonnet, 16 N.J. 546 (1954); State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Perrone, 5 N.J. at 521–22; Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony).

Accordingly, assessing credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is "worthy of belief" based upon numerous factors, including the witness' demeanor, his or her ability to recall specific details, and the consistency of testimony under direct and cross-examination, "the significance of any inconsistent statements or evidence, and otherwise gathering a sense of the witness's candor." AT&T Commc'ns of N.J., Inc., et al. v. Verizon N.J., Inc., 2004 N.J. AGEN LEXIS 764, *63 (July 2, 2004).

The dispute here involves whether the 2019 decision of Jackson Tsp., as recommended by Wall, to outsource the services of a single department and to lay off two of the three employees in that department, was motivated by anti-union animus, specifically to retaliate against Burke for his role in the organization of the JTMSA. Burke and Rasiewicz testified based on their recollections and by reference to exhibits. Generally, those witness statements corroborated by documents (primarily email communications) that were created contemporaneously were given greater weight, especially considering the use by appellant of hearsay.¹⁴

¹⁴ While hearsay evidence is admissible in administrative proceedings, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability

Mayor Reina's role in this matter was central to appellant's case, but almost an afterthought in respondent's rebuttal. If Burke and Rasiewicz are to be believed, and respondent offered no evidence to counter them on this point, Mayor Reina was hostile to the prospect of a supervisors' union and acted to prevent the certification of the JTMSA. While again there was little evidence introduced as to the financial situation of the township in 2008, attempts were ubiquitous statewide to control costs, particularly costs generated by public workers' contracts. Appellant's description of respondent's reaction to union activities is not surprising given that the supervisory employees elected to start a new union at the very time Mayor Reina was attempting to control costs and, as Burke and Rasiewicz testified, the township was unable to reduce salaries and/or hours of those employees covered by union contracts.

Burke argues that Mayor Reina harbored anti-union animus, that such motivated the decision to pursue the layoff of Burke, and a negative inference should be drawn from the failure of respondent to call him to testify. Appellant's Post-Submission Br. (August 30, 2024) (App't Br.), at 34. In other words, I should infer that under oath, Mayor Reina would have been forced to admit that he ordered Wall to get rid of Burke (and eventually, to also get rid of Rasiewicz) in retaliation for their union activities.

This argument is not persuasive for two reasons. First, Mayor Reina gave sworn testimony in a deposition in the case brought by Rasiewicz, and there, he stated that Wall initiated the layoff plan. A-172 at 58. Reina also admitted that he was not in favor of the JTMSA because he did not want another union, believing that the supervisory employees could be folded into the existing unions. Post-Hearing Br. on behalf of Respondent (August 30, 2024) (Resp't Br.), at 29–30. The undisputed facts raise doubt as to the credibility of some of that testimony; Reina opposed the formation of the JTMSA and there was no evidence presented here that he offered or recommended expanding the membership of existing unions to cover supervisory employees (not to mention the practical difficulty of a union covering supervisors and their subordinates). But there is

and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1972).

no reason to believe Mayor Reina would have changed his deposition testimony in this proceeding. Second, and more significant, is that Burke could have called Mayor Reina to testify but did not.

The lengthy delay between the certification of the JTMSA in December 2015, and the execution of the collective bargaining agreement in January 2019, could be evidence of ongoing anti-union animus that filtered from Mayor Reina to his professional staff. Burke claims the delay was due to the "township's bad faith in negotiating." App't Br. at 38. The delay on its own, however, proves nothing. No one introduced evidence of: the typical course of negotiations between the township and the other public workers' unions; the issues that prevented speedy resolution¹⁵; and/or whether the union maintained a consistent push to finish the contract.¹⁶ The actual contract was a joint exhibit, and by its terms, the union members received "across-the-board increases to their base pay equal to 2%" starting on January 1, 2016, and each successive year through 2019. J-2 at 7. The pay raise for 2016 was paid in 2016, and each person employed or retired during years 2017 and 2018 was retroactively compensated. Id. at 8. All benefits under the contract were made retroactive to 2016. Id. at 22.

Wall was not employed by Jackson Tsp. until after the union was certified and the first contract with the administration had been negotiated. He too testified based on his recollection of events occurring after he was hired, and he corroborated his testimony using documents (also primarily email communications), most of which were introduced during his rebuttal testimony.

Wall was professional in demeanor, though he had some trouble masking his impatience with the proceedings, which appeared to take him away from other township duties. He is extremely self-assured, stating several times that his decision to outsource the Engineering Department was based on his personal experience in the other municipalities in which he worked. At the same time, Wall gave the strong impression

¹⁵ Rasiewicz stated that some issues were resolved outside the negotiating process, before the contract was signed.

¹⁶ Burke marked but did not introduce documents, including correspondence, regarding contract negotiations.

that he fully intended to take this action as quickly as possible, presumed that savings would result, and expected that using the buzz words “economy and efficiency” would be enough to justify the decision. He did not even try to cover his failure to observe the requirements of the regulations as far as conducting a feasibility study or considering alternatives to layoffs.

Wall said that the decision to outsource was his alone and that he did not need the approval of the mayor before taking any action.¹⁷ Tr. 5 at 20, 120. If, contrary to his testimony, he was directed by Mayor Reina to get rid of Burke, then inquiry into the mayor’s motivation would be necessary. But I accept Wall’s sworn testimony and accordingly, there is no reason to believe that Wall had any anti-union animus. As he said, he had been working with unions in other towns, he worked in Jackson Tsp. with five other unions, and the JTMSA was still an active union after Burke left, covering more than a dozen other supervisory employees. Burke’s employer was the township, led by Mayor Reina. See R-24. While the administrator is an employee of the township who answers to the mayor, Wall’s testimony supports, at the least, a dual motive defense (as discussed below).

Two statements of Wall, though, must be considered. First, by April 2019, he found “bureaucratic inefficiencies” in the Engineering Department. There was little evidence that Wall spent much time with Burke other than an introductory meeting,¹⁸ and he said nothing regarding his working relationship—if any—with Bogdan, so it is curious that in less than four months, he had identified enough bureaucratic inefficiencies to support closing the Department. Tr. 5 at 89. The inefficiencies Wall described included that he wanted to “contact folks directly,” and preferred using one firm which would designate an engineer to work at the township offices for “a few hours,” rather than an in-house staff and “a host of different outside firms.” Tr. 5 at 31, 38. Wall stated several times that the layoff plan removed a layer of bureaucracy, which seemed to be a formal way of saying

¹⁷ Respondent did not offer a job description or list of the duties of the business administrator and/or a description of the areas in which the administrator was authorized to act without the approval of the governing body.

¹⁸ There was disputing testimony regarding whether Wall invited Burke to meetings he held with department heads, but invited or not, Burke did not attend most of these meetings. Respondent introduced emails between Wall and Burke, which Burke stated was the extent of their communication. See R-19-R-23.

he found it more efficient to remove Burke from the communication chain between outside vendors and Wall. Wall was adamant that his “lived experience as a professional who was in the trenches . . . on this very topic” was critical to his decision-making. Id. at 90.

Second, Wall stated that once he had outsourced the engineering function, he found that the work of DPW—Rasiewicz’s job—could be folded into the Engineering Department. Wall said that this change “wasn’t originally contemplated, but as [his] understanding of the organization evolved,” he saw that DPW “needed frankly light oversight,” and he noted that there was some concern that Rasiewicz did not hold a public works certification. Tr. 5 at 46. But Burke was so certified¹⁹ and had previously served as head of DPW, so giving him the dual role of heading both departments would have been a logical step and would have resulted in savings. It appears that Wall did not inquire enough regarding the work of the two departments or the professional experiences of the department heads when he started looking for ways to save money. This is especially surprising because Wall stated that he combined other departments later in his tenure, though without further layoffs, and supports Burke’s argument that Wall conducted at best an incomplete analysis of the specific impact of the layoff decision and did not consider alternatives to the layoff.

The document submitted to the CSC regarding the layoff plan is further evidence that Wall did not conduct a financial analysis prior to making the decision to outsource the Engineering Department. In his letter to the CSC, Wall states that this plan will meet the State’s goal of “outsourcing those services which can be done at a lesser cost.” R-5. Burke’s salary and benefits cost the township approximately \$105/hour; an outside consultant charged approximately \$150–165/hour. Wall stated that an outside engineer is only being paid for the hours he actually works on township projects, not for “sitting at a desk answering phones,” and his benefits are covered by his private employer, not the township. Tr. 5 at 118. Again, if Wall determined that Burke had too much time in the office, he could have assigned him to handle other township matters, such as DPW (see above). Even so, Wall stated that the outside consultant has been tasked with office time, apparently less time than was spent by Burke, but at a higher cost/hour.

¹⁹ It is unclear whether Burke’s DPW certification was still valid, but he had routinely renewed his required licenses and certifications.

In 2019, the council-approved budget included approximately \$300,000 for the Engineering Department. Burke routinely applied for and obtained grants, averaging \$300,000/year.²⁰ In the amended layoff plan, Wall stated that the anticipated gross savings would be approximately \$220,000, which covered salaries and benefits of two full-time engineers and a part-time aide. "The net savings after appropriations for outsourcing engineering and unemployment benefits [for Burke and Bogdan] would be approximately \$85,992." R-5. Most important is that Wall did not support these projected savings with a financial analysis. See R-1, R-5; A-61 (letter from CSC stating that only the layoff plan itself was transmitted by Jackson Tsp. to the agency).

Respondent argues that the absence of proof of the financial analysis conducted by Wall is not evidence that such an analysis was not conducted, but is evidence that appellant failed to properly request such information, whether through OPRA or discovery. Reply Br. of Resp't (September 16, 2024), at 3. Here, respondent ignores that both Burke and Rasiewicz did file OPRA requests for this information, and their requests were denied, and respondent fails to recollect that its witness, Wall, clearly stated that he relied on his chief financial officer for information on the costs associated with Engineering Department staff, and he did not prepare a financial analysis or study to show that "it would be cheaper or more efficient to contract out engineering services." Tr. 5 at 93, 94.

Respondent did not present evidence, and Wall did not testify, regarding the financial position of the township in or about 2019, but appellant introduced a January 31, 2020, press release from Jackson Tsp. lauding its strong financial position (and AA+ bond rating) for several previous years. A-127. Appellant also introduced documents created by the township that showed budget surpluses in 2018 and 2019. There was no evidence regarding the financial concerns of the mayor and/or township council, or cost-cutting promises made by Wall to his new employer during his interview(s) for the administrator

²⁰ Wall refused to give Burke credit for successful grant applications, stating that typically, such work is done by outside consultants. Tr. 5 at 64. He did not, however, have any specific information to support these statements. Had he wished to challenge Burke's claim, Wall had plenty of notice, as Rasiewicz gave testimony on this topic on June 26, 2023, eight months before Wall testified. Tr. 1 at 63-64.

position. While economic reasons are routinely characterized by the CSC as a legitimate basis for a layoff of any type, respondent supplied no such evidence here.

The Jackson Tsp. 2019 municipal budget was more than \$47 million, and the township reported a surplus of \$11 million. Tr. 5 at 97. The projected savings from eliminating the Engineering Department was just \$85,000, yet Wall stated that saving money was a primary reason for the layoff.

Burke established that he was valuable to the township as Municipal Engineer for seventeen years. There was no evidence to rebut that Burke took initiative, saved the township thousands of dollars annually through grants, accepted additional responsibilities in paid and unpaid positions, and was asked by the governing body to serve as acting mayor on multiple occasions. There was also no evidence to rebut that these additional responsibilities stopped at or around the same time as Burke began to organize a union. In an apparent attempt to diminish Burke's value as an employee, Wall stated that the outside consultant would be tasked with grant applications, he had seen this process handled by consultants in other municipalities in which he had worked, and he questioned whether Burke was actually responsible for the grants obtained during his tenure. Wall gave no examples, however, of successful grant applications that have been filed by T&M Associates since Burke was laid off. Wall was also critical of the amount of road work completed in the five years prior to 2019, which would have been the responsibility of the Engineering Department. At the same time, he admitted that the primary reason for the drop off in road construction was that the governing body failed to fund construction projects. Tr. 5 at 114, 115.

FACTUAL FINDINGS

Based on the above testimony, a review of the exhibits, and having opportunity to observe the witnesses and judge their credibility, I **FIND as FACTS:**

1. Burke was an excellent employee. During the bulk of his tenure, he provided valuable service to the Jackson Tsp. administration, taking on additional

responsibilities (paid and unpaid), and by his initiatives, saved his employer thousands of dollars annually through grants.

2. The JTMSA was established over the objections and negative campaigning of Mayor Reina. There is no evidence to support respondent's claim that Mayor Reina merely wanted the supervisory employees to join other, already-established unions.
3. Burke and Rasiewicz actively participated in the organization of the JTMSA. Both were laid off to achieve "economy and efficiency." While Bogdan was technically laid off, Wall admitted that Bogdan had found another job and was planning to leave. The only employees of Jackson Tsp. to lose their jobs due to Wall's efforts to achieve economies and efficiencies were Burke and Rasiewicz.
4. The JTMSA was fully organized in December 2015. Negotiations over the first JTMSA contract with the Tsp. were not completed for three years. Wall was hired just after the JTMSA contract was finalized.
5. As the parties stipulated, Burke's employer was Jackson Tsp.; Wall served as an employee of Jackson Tsp. Mayor Reina was the top governing official in Jackson Tsp.
6. At the time Wall was hired, JTMSA was one of six unions covering Jackson Tsp. employees. Wall gave credible testimony that he worked in previous jobs with public workers' unions without issue. There was no evidence presented that Wall was motivated by anti-union animus to outsource the Engineering Department.
7. There was no evidence that Wall was motivated by personal animus to remove Burke from his position. The testimony and documentary evidence supports that they had little interaction before the layoff plan was developed.

8. The meeting Wall held with union leadership, including Rasiewicz, to discuss the layoff plan was not a bona fide "consultation" with the union. Wall did not present, nor did he consider, any alternatives to the layoff of Burke.
9. Wall did pursue an alternative to the layoff of Rao, the part-time clerk, who was a member of a different union than Burke.
10. There was no evidence presented that Jackson Tsp. was experiencing financial difficulties in 2019, or that such difficulties were projected for 2020. All the evidence presented shows that the township was healthy financially, much more so than in 2008, when cost-saving measures were first instituted.
11. In or about 2008, and continuing until at least 2014 or 2015, during a time of fiscal distress for Jackson Tsp., supervisory employees who did not have contractual protections were subject to cost-saving measures, including furloughs and salary freezes. There is no evidence that in 2019, similar measures were considered by the township or offered to Burke or his union representatives as a means to prevent Burke's layoff.
12. Wall did not conduct a feasibility study and/or a cost-benefit analysis and had no objective basis to conclude that the plan to outsource the Engineering Department would result in the projected savings. By its terms, Wall's "lived experience" is a subjective standard.
13. Despite the union's request, Wall did not share financial information with the union to support his claim that economies and efficiencies would result from outsourcing the work of the Engineering Department.
14. At the hearing, Wall stated several times that his belief that economies and efficiencies would result was grounded in his personal experience in taking similar action in other municipalities. Wall agreed that none of those municipalities had a population or a land mass close in size to that of Jackson Tsp., but were smaller.

15. On behalf of Jackson Tsp., Wall submitted a three-page layoff plan to the CSC on May 31, 2019, which was amended and resubmitted to the CSC on June 28, 2019. The amended plan reduced the overall savings to be expected by the layoffs.
16. On July 3, 2019, the CSC approved the amended layoff plan as "in compliance with N.J.A.C. 4A:8-1.4." R-6.

LEGAL ANALYSIS AND CONCLUSIONS

As is typical of union members subject to layoff, Burke appealed the action of his employer with the CSC and filed an unfair practice complaint with PERC pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -64 (NJEER Act), and N.J.A.C. 19:10-1.1 to 19:18-3.15. As the agencies have determined that PERC has the predominant interest in this matter, that claim is considered first.

The Unfair Labor Practice Claim

Under the NJEER Act, "if an employer fires an employee for having engaged in union activities, with no other basis for the discharge, the employer commits an unfair labor practice." In re Bridgewater, 95 N.J. 235, 241 (1984). A public employee may file with the PERC a charge that a public employer has engaged in an unfair labor practice. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-1.1 to -1.2. Here, Burke filed a complaint with PERC alleging that the layoff plan was motivated by anti-union animus and was intended to interfere with protected union activity in violation of N.J.S.A. 34:13A-5.4(a)(3), which provides:

Public employers, their representatives or agents are prohibited from:

(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.

“Generally, however, an employer will assert that he has fired the employee for legitimate business reasons.” Bridgewater, 95 N.J. at 241. That happened here; Wall claims that the layoff plan was intended to achieve economies and efficiencies. The question is whether Jackson Tsp. relied on the “asserted justification” or if the achievement of economies and efficiencies was pretextual, or a sham. Ibid. If the employer’s business reason for taking the disputed action “has at least some merit, a dual motive may exist and the issue becomes of the sufficiency of proof necessary for the employer’s affirmative defense to be sustained.” Id. at 244 (quoting Wright Line, 251 NLRB 1083, 1084 n. 5 (1980)).

Under the Wright Line test, Burke “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.” 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.

As stated above, there is no direct evidence of anti-union motivation. Wall testified credibly that the layoff plan was his idea and that he had implemented similar proposals in other municipalities; he was not involved with and little knowledge of the formation of the JTMSA, and he presented the proposal to outsource the Engineering Department to the township council. I **FIND** that Burke did, however, establish a *prima facie* case: he was one of two employees primarily responsible for the establishment of the JTMSA (protected activity), the employer—Jackson Tsp. and Mayor Reina—knew of his activity, and Mayor Reina was openly hostile to the exercise by Burke and Rasiewicz of their right

to engage in the protected activity.²¹ Under Bridgewater, the burden is on Jackson Tsp. to demonstrate that the layoff plan was for a legitimate business reason.

Jackson Tsp. claims that it had a legitimate business reason to lay off Burke and Bogdan and to outsource the work of the Engineering Department, that being the economies and efficiencies that would result from this action. The record, however, is not flush with objective facts that support the layoff plan. Jackson Tsp. operated with an annual budget of \$47 million; the layoff plan saved \$85,000/year using, as Wall termed it, basic math. But, Wall did not conduct or obtain a feasibility study; there was no financial analysis to support layoffs. Respondent did not attempt to argue that the township was having economic problems, though it “has the burden of linking the timing of the [layoffs] closely with economic decline.” In re Bd. of Fire Comm’rs, 443 N.J. Super. 158, 176 (App. Div. 2015) (quoting Comite Organizador de Trabajadores Agricolas (COTA) v. Molinelli, 114 N.J. 87, 102 (1989)).

Jackson Tsp. was already using outside engineering firms; Wall stated that “multiple layers of bureaucracy” caused “delay, complications, and cost inefficiencies” but did not explain how removing just one layer—Burke²²—would “allow the township to scale up on projects and redirect funds to particular needs.” Resp’t Br. at 15. There was no evidence that Burke’s performance was subpar, or that as he neared retirement, he was less productive than earlier in his career. Wall admitted that the failure of the governing body to approve funding was the reason more “engineering” work was not performed. Further, despite the talk of reviewing the work of all the township departments and combining departments and services to find savings, the reorganization that Wall spearheaded resulted in only two persons losing their jobs,²³ and both were instrumental in the organization of the JTMSA.

²¹ Burke also engaged in a second protected activity; he filed grievances on behalf of union members to challenge allegedly unfair discipline. The evidence shows, however, that these grievances were all withdrawn when the disciplinary charges were rescinded.

²² There was no testimony regarding the day-to-day role of Bogdan or his impact on the bureaucracy.

²³ Again, I note that although Bogdan was also technically laid off, respondent was aware he had found other employment prior to the layoff.

I **CONCLUDE** that respondent committed an unfair labor practice in laying off an employee who had been instrumental in the formation of a union without adequate objective reasons supporting that without this employee/position, the employer would experience monetary savings and/or increased efficiencies.

Appeal of the Layoff

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 public employer may institute layoffs "for reasons of economy, efficiency, or other related reasons." N.J.S.A. 11A:8-1(a); N.J.A.C. 4A:8-1.1(a). However, prior to a layoff action, the employer "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 CSC. N.J.A.C. 4A:8-1.4(a); Borough 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); DiMaria 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." Acchitelli v. Dep't of Env't 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)).

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. Civ. 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.

The Civil Service Act permits the layoff of a permanent employee "for economy, efficiency or other related reason" once certain steps are taken by the public employer. N.J.S.A. 11A:8-1(a). First, the employer is required to consider alternatives to layoffs, such as "[g]ranting voluntary furloughs," "[a]llowing voluntary reduction of work hours by employees," "[p]roviding employees with optional temporary demotional title changes," and other actions. N.J.A.C. 4A:8-1.2. The regulations also require that the employer take certain actions pre-layoff, including reassigning employees, "assisting potentially affected employees in securing transfers or other employment,"²⁴ and consulting with the union representatives of affected employees before the layoff is implemented. N.J.A.C. 4A:8-1.3(a), (c).

²⁴ This action was taken with Rao, and may have been taken with Bogdan, who did find employment elsewhere.

As stated above, Jackson Tsp. did not consult with the JTMSA before implementing a layoff plan; as Wall stated, he saw no viable alternatives to outsourcing the department. In Keyport, the municipal employer did not negotiate with the union before implementing a layoff plan, and as here, the plan was approved by the CSC “as compliant with all civil service requirements for a layoff action.” Keyport, 222 N.J. at 319. A significant difference in Keyport is that at the time of the proposed layoffs, the municipality was in severe financial distress “in light of a pervading and lingering economic downturn. Keyport faced increased healthcare, pension, and labor costs without an increase in tax revenues; in 2008, it had a budget surplus of less than \$6,000.” Id. at 321.

Evidence of financial distress is a common theme in cases in which public employees’ appeals of layoffs are unsuccessful. In re Newark School District Layoffs 2012, 2014 N.J. CSC LEXIS 405 (May 7, 2014), involved the layoff of eighty-two school district employees to help close a \$36 million budget deficit, or for reasons of economy and efficiency. The affected employees were unable to prove that the employer’s motive was to replace permanent employees with permanent per diem employees.

In re Passaic County Civilian Employees 2008 Layoffs, 2011 N.J. CSC LEXIS 1098 (Sept. 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 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.

Here, it is undisputed that in 2008, when Jackson Tsp. first adopted cost-saving measures, a financial crisis occurred statewide, and that by 2019, when Wall found economic reasons to close the Engineering Department, that crisis had abated and the township was in good financial shape. The failure of respondent to follow CSC rules prior to implementing the layoff plan is strong evidence of bad faith.

For the above reasons, I **CONCLUDE** that the appellant has met the burden of showing bad faith on the part of Jackson Tsp. in carrying out its layoff plan. I **CONCLUDE** that had the employer taken the steps required by the Act, including those discussed at length above, the layoff would have been permissible.

ORDER

I **ORDER** that the appeals of appellant Daniel J. Burke to the action taken by respondent Jackson Township are **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** 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 **PUBLIC**

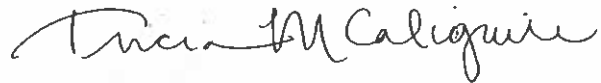
EMPLOYMENT RELATIONS COMMISSION, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

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

October 24, 2024

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at PERC:

October 24, 2024

Date Mailed to Parties:

October 24, 2024

TMC/kl

APPENDIX

Witnesses

For appellant

Daniel J. Burke
Fred Rasiewicz

For respondent

Terence Wall

Exhibits

Joint

- J-1 Burke's Civil Service CAMPS Job History
- J-2 CAN Between Jackson Twp and JTMSA executed January 11, 2019

For appellant

- A-1 October 31, 2002 Appointment to Municipal Engineer Letter
- A-2 November 12, 2002 Resolution Appointing Burke to Municipal Engineer
- A-3 Not Admitted
- A-4 Mr. Burke's Appointments to various positions
- A-5 – A-8 Not Admitted
- A-9 June 29, 2011 Sign-in Sheet for non-union employee meeting
- A-10 Not Admitted
- A-11 February 10, 2014 Letter to Mayor Reina from non-union personnel
- A-12 April 4, 2013 email from Burke to Reina re meeting about equal treatment
for non-union workers
- A-13 June 14, 2013 memo Burke to Torres re non-union compensation
- A-14 – A-17 Not Admitted
- A-18 May 15, 2015 Amended Representation Petition
- A-19 – A-25 Not Admitted

- A-26 September 11, 2015 letter to Reina from Burke re: removal of title Director of Community Affairs
- A-27 January 5, 2016 approval of petition to form a bargaining unit
- A-28 – A-41 Not Admitted
- A-42 May 17, 2019 memo from Wall to Rasiewicz re outsourcing engineering department
- A-43 May 17, 2019 Summary of Union Communications
- A-44 Not Admitted
- A-45 May 22, 2019 letter from Rasiewicz to Wall re: timeframe for outsourcing engineering department
- A-46 May 31, 2019 letter to Glenn of CSC from Wall re: lay off plan
- A-47 June 28, 2019 email and amended lay off notice
- A-48 July 1, 2019 memo from Wall re: lay off
- A-49 July 3, 2019 letter from CSC to Wall re layoff plan
- A-50 July 11, 2019 letter from Wall to Burke Notice of Lay off
- A-51 July 17, 2019 letter to Omeni of CSC from Rasiewicz re Layoff
- A-52 July 23, 2019 letter to Wall from Rasiewicz re accrued sick and personal time
- A-53 July 26, 2019 memo to Rasiewicz from Wall re Lay off and sick and personal day payments
- A-54 August 6, 2019 letter to Wall from Rasiewicz re accrued time payout
- A-55 August 12, 2019 letter to Jackson Township Council from Burke re layoff plan
- A-56 August 15, 2019 letter to Burke from CSC re layoff
- A-57 August 20, 2019 Burke's appeal of layoff notice
- A-58 August 21, 2019 Revised letter from CSC to Burke re layoff
- A-59 – A-60 Not Admitted
- A-61 OPRA Requests
- A-62 Not Admitted
- A-63 Proposed Agreement
- A-64 August 29, 2019 emails re agreement of sick time pay
- A-65 Not Admitted
- A-66 August 30, 2019 letter from Wall to Burke re payment upon layoff

- A-67 September 20, 2019 letter to Burke from Wall re payout
- A-68 September 21, 2019 letter from Burke to Wall re payment of accrued benefits
- A-69 – A-95 Not Admitted
- A-96 September 18, 2015 Schlegel denying Burke request to enroll in Certified Public Manager program
- A-97 September 23, 2015 memo re removal as Director and payroll change
- A-98 – A-101 Not Admitted
- A-102 February 21, 2016 Employment Action memo
- A-103 February 28, 2016 Employment Action memo
- A-104 Not Admitted
- A-105 October 4, 2016 memo to Green from Rasiewicz re Employment
- A-106 – A-111 Not Admitted
- A-112 January 19, 2017 letter from Rasiewicz to Schlegel
- A-113 May 31, 2017 emails
- A-114 July 31, 2017 Memo from Schlegel to Reina re engineering division staffing
- A-115 March 5, 2018 memo rescinding discipline for Stauffer
- A-116 March 8, 2018 Employee Grievance
- A-117 – A-118 Not Admitted
- A-119 Memo re: Engineering Staffing
- A-120 – A-126 Not Admitted
- A-127 January 31, 2020, Press Release
- A-128 – A-129 Not Admitted
- A-130 2019–2020 Budget Expenses Charts
- A-131 2020 proposed Municipal Budget Chart
- A-132 – A-133 Not Admitted
- A-134 Jackson Press Release March 23, 2020
- A-135 Budget imbalance Sheet
- A-136 2020 Proposed Municipal Budget Summary
- A-137 Jackson Township Municipal Tax Rate
- A-138 – A-143 Not Admitted
- A-144 2019 Hourly Rate for T & M

A-145 Council Agenda October 15, 2019
A-146 Resolution T & M October 15, 2019 Pavement project
A-147 Resolution T & M October 15, 2019 HVAC project
A-148 September 27, 2019, T & M proposal HVAC
A-149 Resolution October 15, 2019, Drainage project
A-150 Certificate of Availability of Funds for T & M October 15, 2019
A-151 October 4, 2019, T & M proposal
A-152 – A-157 Not Admitted
A-158 March 2, 2020, Unfair Practice Charge
A-159 Not Admitted
A-160 August 1, 2014, Representation Petition
A-161 September 8, 2014, Revised Representation Petition
A-162 August 18, 2014, Memo and documents re individuals who wish to form a bargaining unit
A-163 PERC Decision December 7, 2015
A-164 Certification of Representation Based on Authorization Cards, December 7, 2015
A-165 PERC decision Refusal to Issue Complaint April 4, 2022
A-166 PERC Decision granting appeal and remanding unfair practice charge, June 30, 2022
A-167 PERC Decision, March 1, 2018
A-168 PERC Joint Decision of consolidation, January 23, 2023
A-169 Not Admitted
A-170 Agenda, January 22, 2019, Appointing Wall
A-171 Deposition Transcript of Terence Wall
A-172 Deposition Transcript of Mayor Michael Reina
A-173 Engineering Dept. Road Improvement List
A-174 Engineering Dept. Non-Roadway Resurfacing List
A-175 Asset Mgt. Pavement Surfaces Report
A-176 Map (exhibit to A 175)

For respondent

R-1 May 31, 2019 Layoff Plan

- R-2 May 17, 2019 Union Meeting Memo
- R-3 May 21, 2019 Union Meeting Memo
- R-4 May 30, 2019 Union Meeting Memo
- R-5 June 28, 2019 Amended Layoff Plan
- R-6 July 3, 2019 CSC Approval Letter
- R-7 July 11, 2019 Layoff Notice to Burke
- R-8 August 15, 2019 CSC Notice to Burke
- R-9 August 19, 2019 Jackson Letter to CSC
- R-10 August 21, 2019 CSC Layoff Notice
- R-11 Burke and Bogdan Compensation Spreadsheet