

H.E. NO. 2007-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2003-120

PATERSON PBA, LOCAL 1,
SUPERIOR OFFICERS ASSOCIATION (SOA),

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the City of Paterson violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by demoting certain supervisory police officers in retaliation for the PBA/SOA persisting in its prosecution of a grievance seeking appropriate compensation increases for other supervisory officers. The Hearing Examiner concluded that the City's conduct violated 5.4a(3) and derivatively a(1) of the Act. The Hearing Examiner recommended that the City make whole the demoted officers for all salary and benefits due for the period of their demotions.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Dorf & Dorf, attorneys
(Gerald Dorf, of counsel)

For the Charging Party, Mark C. Rushfield, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 2, 2002, the Paterson PBA, Local 1, Superior Officers Association (SOA) filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission against the City of Paterson (City), alleging that the City violated sections 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act

^{1/} "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to the Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearing are referred to as "1T", "2T", etc.

(Act), N.J.S.A. 34:13A-1, et seq.^{2/} More specifically, the SOA alleges that the City discriminated against the SOA and supervisory police officers in its negotiations unit for engaging in protected activity when, as part of a City-wide layoff and demotion action, the City unlawfully demoted certain employees in the SOA unit, who had been promoted in July 2001, because the SOA had persisted in prosecuting a grievance seeking appropriate compensation increases for certain other unit members promoted in June 2002.

Pursuant to N.J.A.C. 19:14-2.1, the Director of Unfair Practices issued a Complaint and Notice of Hearing on February 25, 2003, with respect to the unfair practice charge (C-1). On April 8, 2003, the City filed an Answer denying that it demoted unit employees in retaliation for the SOA's engaging in protected activities and denying that it violated the Act. The City has contended that it demoted employees as part of its plan to balance the 2003 budget.

I conducted a hearing in this matter on October 2, 2003, January 29, February 19, June 29, and September 23, 2004, at

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

which the parties examined witnesses and presented exhibits. The parties filed post hearing briefs and reply briefs. Based upon the entire record in this case, I make the following:

Findings of Fact

1. The City of Paterson is a public employer within the meaning of the Act, is subject to its provisions and is the employer of certain supervisory and non-supervisory police employees involved in this matter.

2. The Paterson PBA, Local 1, SOA is an employee organization within the meaning of the Act, is subject to its provisions and is the statutory majority representative of a collective negotiations unit comprised of certain supervisory police employees, including sergeants, lieutenants, captains and deputy chiefs employed by the City (J-1).

3. The City and the SOA are parties to a collective negotiations agreement covering the period from August 1, 1998 through July 31, 2003 (J-1).

4. In 2000, as part of its work with the Distressed Cities Program, the New Jersey Department of Community Affairs (DCA) conducted a study of the Paterson Police Department and in May 2001, issued a report addressing the organizational structure of the department. Among other things, the report recommended that the City reorganize the police department to change its table of organization as follows:

-- from 2 deputy chiefs; 12 captains; 25 lieutenants; 54 sergeants - - a total of 93 supervisory officers - - and 344 non-supervisory officers.

-- to 1 deputy chief; 6 captains; 23 lieutenants; 63 sergeants -- a recommended total of 93 supervisory officers -- and 362 non-supervisory officers.

(5T6-5T8; 5T14-5T15; 5T17-5T20; R-19, pg. 31).

5. On June 30, 2002, at the end of his mayoral administration in Paterson, outgoing Mayor Martin Barnes approved several promotions of City employees, including 12 promotions of police officers into various superior officer ranks. Earlier in his administration, in July 2001, Mayor Barnes had approved 21 other police employee promotions (4T94-4T95).

6. Prior to the June 2002 promotions, there were 63 supervisory officers in the Paterson Police Department, far below the level recommended by the DCA report. After the June 2002 promotions, the police department's supervisory table of organization was approximately as follows: 2 deputy chiefs, 9 captains, 19 lieutenants and 45 sergeants, for a total of 75 supervisory officers -- still substantially below the number of supervisory personnel recommended in the May 2001 DCA report (R-20; 5T68; 5T71; 5T72).

7. Jose ("Joey") Torres was elected Paterson Mayor in May 2002 and took office on July 1, 2002 (4T4-4T6). During the time between the election in May 2002 and being sworn in on July 1, 2002, Mayor-elect Torres contacted Mayor Barnes to request a

meeting to discuss "transition" issues. Among other things, Torres requested that Barnes refrain from promoting any City employees during the transition period. Barnes did not abide by that request. Contrary to the general practice when changing mayoral administrations, neither Mayor Barnes nor his administration helped Mayor-elect Torres and his staff to effect a smooth transition of City government (3T7-3T8; 3T43-3T44; 4T4-4T7).^{3/}

8. Although the outgoing Barnes administration did not cooperate with the incoming mayoral team to effect a smooth transition, Mayor Torres retained several key people who had worked in the prior administration and had extensive experience working for the City. Eli Burgos, appointed as Business Administrator by Torres, had been employed by the City in various key positions for almost 25 years (Purchasing Agent and Deputy Director of Human Resources). Anthony Zambrano, appointed as City Comptroller by Torres, had previously been the Acting Director of Finance. Marge Cherone, a CPA, was appointed by Torres as Director of Finance; she had previously been the City's Director of Finance for over eight years, from 1989-1997. And Mayor Torres himself had been a Councilman prior to becoming mayor. Accordingly, while Torres's incoming administration

^{3/} Sometime prior to the transition period, outgoing Mayor Barnes had been charged with certain criminal conduct for which he was eventually incarcerated.

received little help from the outgoing Barnes administration, key members of the incoming Torres administration were very experienced in and familiar with Paterson City government (T34-T37; T40-T46; T48-T50).

9. When Mayor Torres took office, his administration found a \$6.7 million budget deficit which it needed to address fairly quickly (3T8-3T9). The Torres Administration -- among others, Mayor Torres, Business Administrator Eli Burgos, Director of Finance Marge Cherone, Comptroller Anthony Zambrano and other employees from the Finance Department and various other departments of City government -- began a series of meetings to try to formulate budget plans for presentation to the City Council (3T7-3T12; 3T51-3T53; R-8). By approximately mid-July 2002, the Torres Administration had formulated seven different budget plans. The various budgets featured a range of tax increases (from 0% - - no increase - - to 7%) and various cuts in expenses, some of which included employee layoffs and demotions (3T7-3T12; 3T53-3T60; R-8; R-9).

10. In the first week of July 2002, Mayor Torres met with SOA President Frank Petrelli and PBA President Robert Smith to tell them he was considering civilian layoffs and demotions of police and fire employees as part of a City-wide plan to cut expenses in order to balance the budget (2T10-2T12; 2T17; 4T6-4T10; 4T56-4T59). At that meeting, Torres requested that another

meeting be held at which the officers promoted in June 2002 be present (with Petrelli and Smith) so that he (Torres) could indicate to them the possibility of layoffs/demotions (4T58-4T59). Subsequently, also in early July 2002, another meeting was held with Torres, Petrelli, then-SOA Vice President Richard Reyes, Eli Burgos, and the twelve June 2002 police promotees (2T3-2T5; 2T11-2T13; 2T34-2T35). At that meeting, Mayor Torres discussed the possibility of layoffs/demotions due to the City's financial situation. He explained that he would be presenting several different budget packages to the City Council for its consideration and that the extent of any layoffs/demotions would be determined by the budget which the Council adopted (2T34-2T35). There was no discussion at that meeting of demotions of police department employees other than the 2002 promotees, and there was never a similar meeting with the 2001 promotees (2T35-2T36; 4T59-4T62; 4T75-4T76).

11. Both Petrelli and Reyes testified that at the early July 2002 meeting with Torres and the twelve 2002 promotees, Mayor Torres told the group that as long as they were "in rank" -- that is, as long as they were in the titles that they were promoted into, they would be paid accordingly until such time as they might be demoted (2T5; 2T34-2T37). The only other testimony on this point was from Torres; in answer to the question of whether he told the 2002 promotees at the early July 2002 meeting

that as long as they were in their promotional positions that they would be paid the salary of their promotional positions, he stated, "I don't recall" (4T63). Accordingly, I credit Petrelli's and Reyes's testimony on this matter and find that Torres told the 2002 promotees that as long as they remained in the promotional positions, they would receive the promotional rank pay. This is consistent with the parties' collective negotiations agreement (J-1).

12. At the same meeting with City representatives that was attended by the twelve 2002 promotees, Mayor Torres requested that everyone try to reach out to Council members and speak to them about approving a favorable budget option (2T15-2T16; 2T34-2T37). Neither Petrelli nor Reyes reached out to the Council on this issue as both thought it (the budget) was not an appropriate matter for them to address with the Council (2T12-2T16; 2T47-2T50).

13. Linda Scott is a senior payroll clerk who works in the City's payroll office. Among other duties, she enters pay changes into the payroll database. On July 17, 2002, SOA Vice President Reyes learned from Scott that the Mayor would not sign the "375" forms that were required for the 2002 promotees to receive their higher promotional position pay. Relying on this information, Reyes filed a grievance on July 17, 2002 on behalf

of the June 2002 promotees seeking the higher pay due to them in their promotional positions (2T37-2T40; CP-1, pg. 1).

14. The July 17, 2002 promotional pay rate grievance skipped the Step 2 level and went to the Chief of Police. On July 17, 2002, the Chief ruled that the matter could not be resolved at his level (Step 3) and sent the grievance to the Director of Public Safety (Step 4) -- in this instance, to Mayor Torres, who was then the Acting Director of Public Safety (4T31; 4T42-4T43; CP-1; J-1).

15. Mayor Torres did not recall when he received the July 2002 promotional pay rate grievance or if it was the first grievance filed during his administration. He recalled reading it, making a decision on the matter, and then issuing a written decision on July 26, 2002. Torres denied the grievance (CP-1, pgs. 1-2; 4T42-4T44; 4T65-4T66; 4T98).

16. The SOA immediately acted to move this matter to arbitration. The matter proceeded to an arbitration hearing on November 15, 2002, before Arbitrator David Stein who issued a decision (on January 16, 2003) granting the SOA's grievance claim (CP-2; 2T39-2T41).

17. Jean Canta worked for the City as a secretary for over 35 years, from 1967 until she retired in 2003. During that time, she was secretary to the Mayor for 18 years; for the last ten

years of her career with Paterson, she was the secretary to the Director of Public Safety (1T81-1T82).

18. When Torres became mayor, he assumed the position of Acting Director of Public Safety (4T19-4T20). From July 1, 2002 until April 1, 2003, Canta was his secretary in his role as Director of Public Safety. As secretary to the Director of Public Safety, Canta's office was in the Public Safety Complex on Broadway in Paterson. Torres' mayoral office was in City Hall on Market Street, a few blocks from the Public Safety Complex. Because Torres spent most of his work time at City Hall, Canta went to City Hall to work with Torres in the Acting Director role. Accordingly, she spent a majority of her work time there. She returned to the Public Safety Complex periodically to take care of work in that location (1T81-1T82; 1T92-1T96).

19. Although Canta knew many people in both buildings, she acknowledged that she preferred being in the Public Safety Complex, as her office there was more comfortable and convenient than was her City Hall office. Canta also acknowledged that she had a friendly relationship with various members of the PBA and SOA, and that previously, she had been married to three police officers -- one of whom was a Paterson officer (1T94-1T96).

20. Typically, Canta would go to the Public Safety office in the early morning, go to the City Hall office around 9 a.m. and then back to the Public Safety office sometime in the

afternoon. Torres was usually at his City Hall office (1T82-1T83; 1T102-1T104). During the afternoon of July 26, 2002, Canta was working at the Public Safety Complex office, having walked back from the City Hall office some time after lunch (1T100-1T105).

21. At approximately 3:00-3:30 p.m. on July 26, 2002, Torres telephoned Canta and asked her to communicate a message to the presidents of both the PBA and SOA. Canta wrote the message. Torres told Canta to tell Smith and Petrelli (the presidents of the PBA and the SOA, respectively) that if the officers (the 2002 promotees) didn't want to wait two weeks for their higher promotional pay raises, then he would go back to July 2001 to make demotions (1T82-1T83; 1T87).

22. Canta then went to the PBA office where she delivered this message to Robert Smith. Canta also called Frank Petrelli on his cell phone and relayed the message to him (1T81-1T84).

23. Either later on July 26 or the next day, July 27, Smith brought a document into Canta's office which restated the Mayor's message which Canta had conveyed to him. Canta reviewed the document and noted to Smith that there was an inaccurate word in it (she could not recall the word). Smith left, apparently corrected the document and returned with another version of the document with the word corrected. Smith had signed the document. Canta confirmed that the revised document accurately reflected

the message from the Mayor which Cantá was directed by the Mayor to convey to Smith. Cantá identified CP-45 as the document Smith showed to her on July 26 (or 27), 2002 (1T83-1T86; 1T91; CP-45).

24. When Petrelli received Cantá's call, he was about to leave home for work, as he was scheduled to begin work at 4 p.m. He told Cantá he would see her when he got into work. When Petrelli arrived at the Public Safety Complex for work, he went to see Cantá at her office. He again discussed with Cantá the message the Mayor had asked her to convey, asked her to repeat the message, and showed her a written statement reflecting the message Cantá had given him (CP-46); Cantá then confirmed to Petrelli that CP-46 stated what the Mayor told her to transmit. Petrelli signed CP-46 (1T91-1T93; 2T7-2T10).

25. SOA President Petrelli was away the day SOA Vice President Reyes filed the grievance (July 17, 2002) over promotional pay for the June 2002 promotees (2T9). Petrelli first learned of a problem with the June 2002 promotees getting their promotional pay when Cantá telephoned him on July 26, 2002 (2T5-2T6). Cantá related the Mayor's message to Petrelli - - that the Mayor would like for the SOA to "holdback" (i.e., agree to wait) two pay periods for the June 2002 promotees to receive their promotional pay and if they didn't agree to this delay, he would demote back to 2001 (2T6-2T7). Petrelli noted that would affect twenty more unit members (twenty employees had been

promoted in the SOA unit in July 2001) above the twelve promoted in June 2002 (2T6-2T7).

26. Torres recalled having a phone conversation with Canta on July 26, 2002. Initially, he recalled that the subject of the conversation was police department overtime - - that the phone conversation was about her submitting the overtime payroll. However, Torres further acknowledged that because the issue of layoffs had been in the news, their conversation included the possibility of layoffs and demotions as a way for the City to reduce costs (4T21-4T23; 4T28-4T30).

27. When Torres was first asked on direct examination whether he directed Canta to tell Smith and Petrelli he wanted them to "hold back" two pay periods for the June 2002 promotees to receive their promotional pay and if not, that he would demote back to 2001, Torres did not directly respond to that specific question; rather he spoke to his recollection of a conversation about overtime (4T22-4T23). He recalled that in processing the payroll, Canta sought his authorization for the overtime. Torres stated, ". . . there was an array of reasons why in the first payroll that I was faced with, which included . . . about \$27,000 worth of overtime . . . I was questioning . . . [the overtime] (4T23).

28. The second time Torres was asked (also on direct) about whether, during their July 26 phone conversation, he directed

Canta to call Smith and/or Petrelli, he stated he did not recall (4T23-4T24).

The next question to Torres was whether he made any comments (to Canta) about "what actions you (Torres) were taking" or "what actions you (Torres) expected" from Smith and Petrelli, or their respective organizations, regarding the June 2002 promotees? Torres responded that the City had received notification from the New Jersey Department of Personnel (DOP) regarding improper certifications of the 2002 promotions (4T24).

29. When asked about whether he was seeking anything (at that time) from the PBA and SOA regarding cooperation, delays, etc., concerning the promotions, he responded that ". . . after they (the SOA) grieved us, after they grieved the City or grieved me, that I needed more time to review the payroll documents because there was . . . numerous amounts of overtime not properly authorized. . . . So I advised her (Canta) that I was reviewing them" (4T24-4T25).

30. Torres was asked a third time about whether he had sought from the PBA or SOA any sort of delay in the implementation of payments of any kind. Torres answered that he recalled telling them (the PBA and SOA) that he needed more time ". . . to review the payroll documents and that in a timely manner I would then sign off on the payroll documents" (4T24-4T26).

31. When asked whether he made ". . . any threats to Cantá to relay to the PSOÁ representative that if they didn't do what you wanted you would demote people", Torres denied he made such threats (emphasis added) (4T28-4T30).

32. On cross examination, when asked whether he made reference during his July 26, 2002 telephone conversation with Cantá to demoting back to 2001, Torres stated that he ". . . recalls advising her that we had received notification from the DOP in reference to the promotions that occurred in May/June [02] that they weren't properly certified" (4T32-4T33).

33. When asked if he told Cantá to tell the PBA/SOÁ that he wanted them to wait two pay periods for the promotional pay owed to the June 2002 promotees, Torres stated he did not recall "actually asking two pay periods". He stated that he told them he was reviewing it in a timely manner and would forward it to payroll to pay (4T32-4T33). He indicated that he did not say a specific time. In his conversation with Cantá, he said that he was reviewing the documents (4T34-4T35); and that he told Cantá there was going to be a delay in the payment of overtime because it was being reviewed (4T34-4T38). However, in answer to the question of whether he asked Cantá to communicate with the PBA and SOÁ on July 26, 2002, he contended he did not and that if she did so, she did it of her own accord (4T38-4T39).

34. When again asked on cross whether ". . . you didn't tell her (Canta) that there was going to be any delay in the payment . . ." of promotional pay to the June 2002 promotees, Torres said he didn't know (4T38-4T40). Torres also didn't recall speaking to Canta on June 26, 2002 about going back to the 2001 promotions, but only that DOP had indicated a problem with the 2002 promotions (4T40-4T41).^{4/}

35. Torres acknowledged that he understood that the grievance presented to him and which he ruled upon on July 26, 2002 was about getting the June 2002 promotees their promotional pay (4T43-4T44; CP-1, pg. 1).

36. On its face, Torres's answer (CP-1, pg. 2) to the promotional pay grievance (CP-1, pg. 1) seems to not address the promotional pay issue, but rather seems to address possible overtime abuse due to a failure to adhere to overtime approval procedures. When asked about whether his decision (CP-1, pg. 2) regarding the June 2002 promotional pay grievance (CP-1, pg. 1) had anything to do with the promotional pay issue, Torres stated that it did. He said paragraph four of the six-paragraph answer related to the promotional pay grievance (4T43-4T46). However, when questioned further about the specifics of paragraph four, he

^{4/} There is no indication in the record of any document or procedure initiated by DOP which raised the validity of the June 2002 police promotions. Rather, the record indicates that it was the City that raised the issue of the validity of the June 2002 promotions.

acknowledged that it was about overtime (4T45). Nevertheless, he continued to refuse to acknowledge that paragraph four does not deal with the issue of paying the 2002 promotees their promotional pay (4T46).^{5/}

37. Torres also said the last paragraph of the grievance response (paragraph 6) addresses paying the promotees their promotional pay. That one-sentence paragraph states: "Be assured the delay will not go beyond two pay periods." Torres stated that "delay" referred to ". . . the delay of proper documentation and availability of funds" (4T46). When counsel noted (a) that the previous paragraph (paragraph 5) of the grievance answer states that ". . . it is my request that I be permitted to delay the overtime payments in question . . ." (emphasis added) and (b) then again asked whether, in the last paragraph (paragraph 6) of the grievance answer, "delay" refers to a delay in the payment of promotional pay referenced in the grievance (CP-1, pg. 1), Torres said it did (4T46-4T47).

38. The first and second sentences of paragraph four of the grievance answer (CP-1, pg. 2) state: "The City of Paterson is in a delicate fiscal situation. When a million dollar overtime

^{5/} At that point in time (July 2002), the hearing record does not indicate that excessive police overtime or police abuse of overtime was an issue between these parties. There is no indication that overtime was not being paid, was the subject of grievances or otherwise was the focus of a dispute between the parties.

line item is used without proper procedures . . . being carried out, it leads to possible abuse." When asked whether these were in response to the promotional pay grievance, Torres said they were (4T46-4T48; CP-1).

39. Torres also said that promotional pay was in the budget line item for overtime (4T48). He said that one of these categories^{6/} was considered out-of-title pay and that's why they fall within the overtime line item.

40. R-1 is a one-page letter dated September 13, 2002, with five attached pages; the letter is from the New Jersey Department of Personnel (DOP) Chief of Staff, Janet Share Zatz, to Mayor Torres and PBA/SOA Counsel Mark Rushfield. The last three of the five attached pages comprise a Settlement Agreement. That Agreement resolved a dispute then before the DOP regarding the validity of the June 2002 Paterson Police Department promotions. Page 1, paragraph three of the Settlement Agreement indicates that on August 26, 2002, the City sought to rescind the June 2002 police promotions; and that by correspondence dated August 27, 2002, the PBA/SOA challenged the requested rescission of the promotions.

The Agreement was separately executed by the parties on September 16, 2002 (City) and September 17, 2002 (PBA/SOA) and

^{6/} It is not clear from the testimony what exactly "one of these categories" references.

provides, inter alia, that: the June 2002 promotees shall continue in their promotional positions until September 28, 2002; that on September 29, 2002, the June 2002 promotees agreed to accept temporary demotions; that on November 1, 2002 (the anticipated effective date of the pending layoff/demotion of certain City employees), the June 2002 promotees shall retain all appropriate layoff and re-employment rights; that in recognition of the financial circumstances of the City, for the period from September 2, 2002 through September 28, 2002, the June 2002 promotees waived the higher salaries associated with their promotional positions; and that the City withdrew its objections to the validity of the June 2002 Police Department promotions (2T24-2T32; R-1).

41. CP-2 is an Arbitration Award dated January 16, 2003, resolving the issues then remaining in dispute in the PBA/SOA grievance dated July 17, 2002 (CP-1), regarding the promotional pay of the June 2002 promotees. Several of the disputed issues raised by the grievance were resolved in the related DOP Settlement Agreement (R-1 attachment, dated September 16 and 17, 2002) entered into by the parties. The arbitration hearing was conducted by Arbitrator David Stein on November 15, 2002. At that point, the Association was seeking a ruling that the City had violated the parties' collective negotiations agreement by its deliberate delay in paying certain promotional increases due

to twelve recently promoted employees (the June 28, 2002 promotees) and the issuance of a cease and desist order.

The Arbitration Award indicates that these officers (the 2002 promotees) had been designated in a letter dated July 28, 2002, from the City's Director of Public Safety to the DOP Certification Supervisor, questioning the validity of the promotions.^{2/} By the time of the arbitration hearing, the officers (2002 promotees) had been paid for work performed while in their promotional positions (for July and August 2002), in conjunction with other dispute resolution efforts by the parties.

The arbitrator ruled in favor of the Association, finding that the City had breached its obligation to pay, in a timely manner, wage increases arising from June 2002 promotions. The arbitrator found that the City had withheld promotional pay increases for some six weeks beyond the time when those increases were required to be paid and that it had ". . . *failed to provide any proof that it had a bona fide defense to the instant grievance*" (CP-2, pg. 7, emphasis added). The arbitrator

^{2/} There are two documented references in the record to challenges to the June 2002 police promotions - - one is a reference in the arbitrator's decision (CP-2) to a letter (dated July 28, 2002) from the City questioning the validity of the June 28, 2002 police promotions; the other is a reference to a request (dated August 28, 2002) submitted by the City to DOP seeking the rescission of the June 28, 2002 promotions. These challenges were both made by the City - - and at least one of which (the July 28 letter) specifically was made by Torres.

concluded that such a delay was an advantage unilaterally taken by the City to the disadvantage of the employee grievants; that a cease and desist order was warranted because the City had an incentive for delaying the increased salary payments to promoted employees due to its financial circumstances; and that, in the future, unit employees may not be used as an involuntary source of revenue (2T38-2T43; CP-2).

* * * *

In her testimony, Canta related that on July 26, 2002, she received a call from the Mayor, and during that call, he told her to tell Smith and Petrelli that if they did not wait two weeks for the higher pay (to the 2002 promotees) that he would demote back to 2001. She wrote the message, then relayed it to Smith in person at his office and telephoned Petrelli and related the message to him. Smith and Petrelli then each wrote and signed a statement of the message which Canta had relayed to each of them from the Mayor (CP-45 and CP-46).

Canta's testimony on this issue was short, clear and to the point. Her testimony was freely and easily given and her manner forthcoming. She admitted not recollecting the word which she suggested to Smith that he needed to correct in his statement; she initially testified that the Mayor said "wait two weeks", but later, after seeing the Smith and Petrelli statements, recollected that the Mayor had said wait two pay periods

("bi-weeklies").

When she received the Mayor's direction to transmit the message, she said she did not perceive it as a threat - - "it was a message" - - a function which she frequently performed. Canta was not a party to this matter and her testimony is clearly supported by Petrelli's testimony about the message and CP-45 and CP-46. I credit her testimony.

In evaluating Mayor Torres's testimony regarding the July 26, 2002 conversation with Canta, the specific context of these events is important - - occurring during the initial weeks of a new mayor's term, in the midst of an exigent budget situation. On July 26, Mayor Torres had a pivotal conversation with his secretary, Ms. Canta. On the same day, he received and ruled upon the SOA's promotional pay grievance (CP-1).

The answer which Torres issued to the grievance does not address the promotional pay issue; it addresses overtime. The record does not indicate that there were then any pending overtime issues between the parties - - and even if there were, the SOA's promotional pay grievance does not implicate overtime. Thus, the grievance answer is, at best, perplexing, and at worst, disingenuous. When questioned about the answer, Torres's testimony was inconsistent, was at odds with what the answer states and was confusing.

The grievance presented Torres with an uncomfortable choice. While not wanting to grant the grievance, there was no justifiable means to deny it. Nevertheless, he issued an answer which denied the grievance and had no relevance to the grievance issue. In the arbitrator's ruling on the grievance (CP-2), the arbitrator granted the SOA's grievance and stated that the City had provided no proof of a bona fide defense to the grievance.

Mayor Torres's testimony was sometimes difficult and strained. On the matter of the July 26 conversation, he was asked - - on both direct and cross-examination - - an array of questions, all critical to a determination regarding the conversations and what happened on July 26: (a) Did he instruct Canta to call Smith and Petrelli? At one point, he could not recall; at another, he said he did not and if she did so, she did it on her own. (b) When asked about whether the conversation with Canta included an indication that he wanted the PBA and SOA to wait to receive promotional pay for the 2002 promotees - - at one point, he said the City had received notice "regarding improper certifications of the 2002 promotees"; at another point, he said he needed more time to review payroll documents regarding the numerous instances of overtime; at another, that he did not recall "actually asking for two pay periods", that he did not ask for a specified amount of time. (c) When asked about whether he told Canta to tell Smith and Petrelli to wait for the promotional

pay or he would demote back to 2001 - - at one point, he did not answer the question asked and spoke about overtime; at another point, he denied making the statement.

In his testimony about the July 26 conversation, Torres generally attempted to avoid addressing the issue at hand through either providing answers that were non-responsive, a lack of clarity in his statements or not recalling certain critical information. His testimony on this issue was frequently inconsistent. Accordingly, I do not credit that testimony nor his denial about making the statement that Canta attributed to him.

* * * *

42. When Torres took office, the administration (Mayor, Business Administrator, Director of Finance, Comptroller, etc.) began evaluating the tax rates which might be needed to raise the revenue required to fund the budget -- which the incoming Torres Administration found was in a \$6.7 million deficit (3T7-3T12). Business Administrator Burgos noted that they also began considering reducing expenditures; the cost reduction items which were eventually incorporated into the budget included: eliminating the purchase of police cars, reducing the number of cell phones, bonding the costs of an ongoing sewer repair project, eliminating all vacant positions in the personnel table of organization, and layoffs and demotions affecting

approximately 60 employees of the City (3T8-3T13; 3T50-3T63; R-8; R-9).

43. There were no actual layoffs of police officers or firefighters because outside funding grants from certain State and Federal government sources required that the City maintain a certain number of active police and firefighters in order to continue receiving the grants. Accordingly, the planned personnel budget savings from the police and fire departments were realized through demotions (3T30-3T22).

44. Cherone first learned of the City's financial situation on July 1, 2002. She communicated the problem to Torres on July 2, 2002 and thereupon, prepared R-8, a memo (dated July 9, 2002) with several attachments, to City Council Members, conveying five different tax levy scenarios for addressing the deficit -- from a 0% increase to 9.37% increase. R-8 was discussed within the administration before its distribution to the Council on July 9, 2002 (3T50-3T55; 3T82-3T85; R-8). Between July 1 and July 9, 2002, general discussions within the Torres administration (Mayor, Business Administrator, Director of Finance, Comptroller) began about the need for layoffs/demotions. An on-going dialogue developed about the City's financial situation between the Torres administration and the City Council (3T60-3T65).

45. R-9 is a four-page budget document prepared by Cherone around July 9, 2002; on page 3 it sets forth five major budget

categories where proposed cuts are indicated. One of those categories is layoffs and demotions; the others were a General Appropriations Cut, cancelling the purchase of police vehicles, removal of cell phones and beepers and bonding the costs for sewer repairs. This document was discussed within the administration (Torres, Burgos, Cherone, Zambrano and other finance and budget people) and was later presented to and discussed with the City Council. R-9 does not identify which employees would be laid off/demoted or how the layoffs would be allocated over various departments of City government. It simply projects that to save \$1,000,000 of budgeted salary cost, approximately 60 employees would have to be laid off over an eight-month period.^{8/} R-9 was presented to the City Council on July 15, 2002, at a meeting between Council members and administration officials (Mayor Torres, Business Administrator Burgos, Director of Finance Cherone, Comptroller Zambrano and various Budget Office people). To this point, there had been no specific discussions regarding which employees would be laid off/demoted or how layoffs would be allocated over various City departments (3T55-3T60; 3T85-3T90; R-9).

^{8/} Since they were then two weeks into the new fiscal year, Cherone estimated it would be three to four months before all of the layoff/demotion procedures were completed. Accordingly, she projected the layoff/demotion over the remaining eight months of the fiscal year. Eventually, the layoff/demotion commenced on November 1, 2002, four months into the fiscal year.

46. Cherone prepared R-10, a memo to the City Council dated July 23, 2002, with an attachment detailing eight different budget/tax levy scenarios - - ranging from a budget requiring a 0% tax levy increase up to a budget requiring a 9.37% tax levy increase. Generally, the City Council was disinclined to agree to a budget that would require a tax increase. Accordingly, the Council passed a resolution on July 23, 2002 adopting a budget that required no tax increase (3T60-3T70; R-10; R-11).

47. The adoption of the budget resolution on July 23, 2002 by the Council triggered the Torres Administration's planning for and effectuation of the budget cuts and layoffs/demotions necessitated thereby. Cherone was an integral part of the planning for the layoff. In fact, she had primary responsibility for planning the layoff/demotions (3T76). Cherone indicated that Torres did not say anything to her about retaliatory motives for demotions (3T67-3T73; 3T82-3T85; 3T96-3T99).

48. Subsequent to July 23, 2002, the first step in the layoff/demotion process was to remove all temporary employees and non-essential provisional employees from the City's complement of employees and to remove all vacant positions from the City's table of organization. Non-essential provisionals were terminated in order of seniority (3T70-3T74).

49. Cherone prepared, on Burgos' behalf, R-2, a letter dated August 28, 2002, with supporting attachments, to the DOP,

proposing a layoff for reasons of economy and efficiency. Subsequently, the City submitted a corrective letter (R-5), dated September 24, 2002, in response to DOP's conditional approval correspondence, dated September 13, 2002 (R-3). Among other things, the attachments to R-2 and R-5 included: the individual notices of layoff served on each impacted (laid-off or demoted) employee; and the lists of the laid off/demoted employees, broken down by department. The City's final submission to DOP of layoffs/demotions (dated September 24, 2002) included 60 layoffs of civilian employees from various departments of City government; 7 demotions of fire superior officers to be levied over an eight-month period to save an estimated \$32,000 - - an average of \$4,570 per employee; and 32 demotions of police superior officers to be levied over an eight-month period to save an estimated \$176,400 - - an average of \$5,500 per employee (and later revised to \$362,500 - - an average of \$11,300 per employee) (3T10-3T13; 3T16-3T18; 3T102-3T103; R-2; R-5).

50. At one point in her testimony, Director of Finance Cherone indicates that as the reduction-in-force (RIF) process went from general to specific, the question of how many and which employees would be demoted in the various departments were questions that would be determined by department heads; in the police department, those questions would be determined by the (Acting) Director of Public Safety. When pressed further about

who formulated the specific lists of police employees that were attached to R-2 and R-5 (the City's RIF submissions to DOP), she said she did not know (3T97-3T103).

51. In mid-August 2002, in compliance with DOP procedural requirements for RIFs, Torres scheduled and conducted a general meeting about the possibility of RIFs. A general, open, public invitation was issued to this meeting; however, the Administration specifically invited the leaders of each of the City's unions to attend. Burgos also testified concerning this "consultation meeting" about layoffs/demotions with union representatives, held in August 2002 - - by which time the administration was indicating that the layoffs/demotions might include the 2001 police promotees.

In early July 2002, when the Administration began to realize there was some likelihood of layoffs and demotions, Torres had specifically requested and held a meeting with the June 2002 police promotees to personally indicate to them that because of the City's financial circumstances, there might be layoffs/demotions. Torres never sought or conducted a similar meeting to personally indicate to the 2001 police promotees that they too might be subjected to a layoff/demotion (2T3-2T7; 2T34-2T37; 3T25-3T35; 4T8-4T12; 4T55-4T65; 4T68-4T76).

52. On November 1, 2002, the City effected layoffs and demotions of 100 employees; demotions were implemented for 32

police supervisory officers (twenty 2001 promotees and twelve 2002 promotees) and 7 fire supervisory officers; layoffs were implemented for 60 civilian employees that included approximately 20 temporary employees and 40 permanent employees (1T22-1T24; 3T78-3T81; 3T91-3T94; 3T106-3T107; R-9; R-10; R-13).

53. R. Richardella is a public safety improvement specialist working for the DCA. In 2000, he was part of a team assigned to Paterson and participated in the preparation of a report regarding the organization and structure of the police department. The report issued in May 2001 and made recommendations about the department's table of organization (5T13-5T16; see finding number 4 supra).

54. Richardella was assigned back to Paterson in February 2003 when Mayor Torres requested assistance due to the City's financial situation. Among other things, the Mayor wanted to implement the recommendations in the May 2001 report. Around the time of this hearing, Richardella had been assisting the City in the then on-going negotiations with the PBA and SOA for successor collective negotiations agreements (5T26-5T29; 5T62-5T63).

55. Referring to two departmental "detail sheets" - - monthly police personnel assignment charts (from just before and just after the implementation of the layoff/demotion) - - Richardella concluded that the Chief could have juggled personnel and assignments so as to have avoided making out-of-title

assignments, and therefore, also avoided paying out-of-title pay. Among other things, Richardella indicated that the department had not implemented the DCA-recommended table of organization (5T28-5T29; 5T34-5T40; 5T42; 5T45-5T48; R-20; R-21).

56. The May 2001 DCA report recommended a table of organization that included a total of 93 supervisory officers - - including 63 sergeants and 23 lieutenants. Prior to demotions, the department had a total of 75 supervisory officers, including 45 sergeants and 19 lieutenants; post-demotions, the department had a total of 59 supervisory officers, including 36 sergeants and 14 lieutenants - - almost 40% less than the DCA recommendation (5T65-5T75).

Richardella did not know (and apparently, did not realize until questioned about it) just how many fewer supervisory officers there were in the department after the layoffs/demotions - - as compared to before the demotions and as compared to the recommendations in the May 2001 DCA report - - a level he acknowledged to be substantially lower than what had been recommended by DCA. Richardella stated that, in his opinion, the number of supervisory officers post-demotion was inadequate to properly operate the department and prevented implementation of the report's recommendations. Nonetheless, Richardella's general opinion was that even with the substantially reduced numbers of supervisory officers, the Chief could have reassigned supervisory

personnel to avoid at least some out-of-title assignments. However, he concluded that some number of out-of-title assignments would have been required and that beyond what can be learned from the detail sheets (assignment sheets) and the table of organization, in actually running the department during the time of the demotions, out-of-title assignments might well have been unavoidable (5T75-5T90; CP-37; CP-39; CP-41; CP-42; CP-43).

57. After the November 2002 demotions, some of the 2001 promotion group that had been demoted had their duties changed; however, many continued performing the duties of their pre-demotion positions in an out-of-title assignment capacity. Police Chief Spagnola had continued making those assignments to the demotees because there was no one else available to perform those jobs (4T169-4T173).

58. On January 16, 2003, PBA/SOA Counsel Rushfield wrote to the DOP to request a classification review of the duties being performed by recently demoted police officers. The request contended that the named officers previously held the promotional position above their current rank until their November 2002 demotion and that since that time, the officers had been regularly assigned to perform duties of a higher rank - - the very rank from which they had been demoted. The PBA/SOA application concluded with a request that the named employees be

reclassified to their previously held, higher ranked positions (4T87-4T94; CP-39; CP-36; CP-37; CP-41; CP-42; CP-43).

59. DOP Human Resource Consultant Larice wrote to Paterson Assistant Personnel Director DiPasquale on January 30, 2003, indicating that police employees demoted to a lower rank may not continue to be assigned duties of the higher rank (4T86-4T87; CP-37).

60. Shortly thereafter, Mayor Torres issued a memo to Chief Spagnola advising him of the DOP letter and that the demoted employees may not be assigned to perform duties of a higher rank (4T88-4T91; 4T169-4T170; CP-39; CP-41).

61. Chief Spagnola then issued CP-42, dated February 7, 2003, an order to ensure that demoted employees would not be assigned acting out-of-title duties (4T168-4T171; CP-42; CP-43).

In his testimony, the Chief noted that, subsequent to the November 2002 demotions, it had grown increasingly difficult to properly run (staff) the department, and particularly so after the January 30, 2003 DOP directive indicating that demoted employees could not be used in acting-in-higher-title assignments (4T170-4T174; CP-41; CP-42; CP-43; CP-44).

62. Shortly after issuing CP-42, on February 10, 2003, Chief Spagnola issued a memo to Mayor Torres (CP-44) to inform him that ". . . a critical situation exists in the . . . department with regard to supervision . . . as a result of . . .

demotions and retirements. . . . The only solution is to bring . . . supervisors . . . in on an overtime basis. . . . The cost factor can no longer be the priority, as it has now become a public safety issue . . ." (4T170-4T175; CP-44).

63. Linda Scott, a senior payroll clerk, calculated out-of-title payments (i.e., pay for employees who were assigned to perform work in a higher title) for certain police employees during the period from November 1, 2002 through April 11, 2003. The record is unclear as to whether or not this calculation includes all of the police employees who earned out-of-title pay during that period; it appears that she had not done a calculation of all of the police out-of-title pay for that period. Her tally included seventeen employees - - eleven of the seventeen were demotees; six were not. She calculated two figures: \$20,597.91 and \$967.67, for a total of \$21,566. Scott was also uncertain about whether the payment figures in CP-36 - - the grievance arbitration settlement agreement which resolved the parties' dispute concerning out-of-title pay for twelve police employees during the period from November 1, 2002 through April 11, 2003 - - were encompassed within her \$21,566 figure or were in addition to it (3T111-3T127; CP-36; CP-47).

64. On December 9, 2002, Lt. Richard Reyes, then the vice-president of the SOA and later the president, attended a meeting with Mayor Torres, Business Administrator Burgos, Comptroller

Zambrano, Finance Department Official Russ Ferenza, and Presidents Petrelli and Smith. Torres informed the police union leaders that earlier that morning, he had re-promoted the fire department personnel who had been demoted on November 1, 2002. Torres told them that the fire department had found money in their budget to allow for the re-promotions and that because firefighters performing out-of-title assignments are paid at the highest contractual pay rate for the title, it was not cost-efficient to continue them in their demoted positions.

Petrelli then told Torres that the police contracts had pay provisions similar to those in the fire contracts that governed acting-out-of-title assignments (4T110-4T112; 4T115-4T116).

65. Burgos stated that he thought the demoted firefighters were re-promoted around December 2002 and that the demoted police were not then re-promoted. He said that a prime reason for the fire re-promotions was that firefighters were paid at the highest pay rate for performing acting assignments (3T39-3T41).

66. Torres stated that, although he knew the firefighters had been re-promoted, he did not recall when that occurred. He stated that they were re-promoted because the fire department found money in its Operations and Expense Budget to pay for the re-promotions, not because of out-of-title assignment costs - - although he conceded that out-of-title pay had affected the amount of savings realized from the demotions. At first, Torres

said the police department had not then found enough money to promote any demotees; however, he amended that and said the police department had found around \$300,000 which could be used for re-promotions - - but apparently, that was still not enough to re-promote the police demotees (4T97-4T109).

* * * *

Reyes testified that, at the December 9, 2002 meeting, the reasons given to the police unions for the fire re-promotions were that the fire department had found budget money to fund the re-promotions and that, because of the contractual out-of-title pay provisions, it was not cost efficient to keep them demoted. Reyes also testified that Petrelli then noted to Torres that the police contracts had similar pay provisions. Business Administrator Burgos also testified that the reason the City effected the fire re-promotions was the costly, contractual out-of-title pay provisions in the fire contracts.

In his testimony, Torres said the fire re-promotions were made only because the department had found budget money to cover them rather than the high out-of-title pay costs.

Regarding this issue, as both Burgos (who testified before Torres did) and Reyes testified clearly that one of the reasons for the fire re-promotions was the costly-out-of-title pay provisions in the fire contracts, I credit their testimony on this issue.

* * * *

67. At the December 9, 2002 meeting, Torres told the police representatives that if they could find sufficient money in the police department budget, he would work to have *the 2001 police demotees re-promoted, but not the 2002 demotees*. Also at that meeting, Reyes said one of the City representatives had distributed a handwritten sheet (CP-48) to all of those attending, showing calculations of how much money was being saved by the police demotions and by the police retirements and, how much money had to be found in the police department budget to allow for the re-promotions of all the demoted police employees - - 33 employees (4T111-4T116; CP-48). Reyes stated that CP-48 had been calculated on October 26, 2002, before all of the police retirements had been finalized (4T111-4T116; 4T122-4T124; CP-48).

68. CP-48 indicates that the total which would be realized from 33 police department demotions (and retirements) is \$362,685, approximately the savings amount estimated for police demotions (and retirements) by Director of Finance Cherone in the memo she sent to the City Council on November 6, 2002 (\$363,000) (R-13). CP-48 also reflects savings from three police retirements known at that point - - \$197,514 - - leaving the net amount which then needed to be found, in order to allow police re-promotions, as \$165,171 (3T105-3T107; 4T112-4T116; CP-48; R-13).

69. Reyes, Smith and Petrelli then attended a meeting on December 19, 2002, with Cherone, Zambrano, Ferenza and Vincent Foti, an accountant retained by the PBA and SOA to assist them with analyzing the budget and other financial documents. Smith presented a spreadsheet to the City representatives; the document had been prepared by Reyes, Smith and Petrelli, showing the savings calculated from the police demotions and six retirements. The document is divided into three major segments which delineate the following: (a) the savings calculation for the police department done by the City as of August 28, 2002 (and September 24, 2002), based upon figures submitted to DOP, showing the original total savings target of \$176,400 from demotions (Attachments to R-2 and R-5, the City's formal RIF submissions to DOP, showing the police department demotions; CP-49); (b) the savings recalculated by the City as of October 26, 2002, showing sub-totals of \$165,200 from demotions and \$197,500 from retirements, for a new overall savings total of \$362,700; and (c) the savings calculation done by the PBA, as of December 11, 2002, indicating a demotion savings of \$148,515 (projected over 8 months - - or approximately \$18,600 per month) and a recalculated retirement savings of \$395,107 (over 8 months).^{2/}

^{2/} During Voir Dire examination of Reyes regarding CP-49, it appears that there was some confusion about the savings calculation for the employees who retired.

(continued...)

Taking the amounts shown on CP-49 - - which appears to be

2/ (...continued)

Reyes notes that all that was done by the spreadsheet (CP-49) was to set forth in the first two segments the savings calculations *previously produced by the City* for both the demoted police employees and retired police employees; Reyes then carried over into the third segment the same demotion savings figures calculated by the City for demotees and the retirement figures calculated by the City for three retirees; Reyes then added a savings calculation for three more retirees which were not noted in the City's earlier calculations (probably because those retirements were not known when the City's calculations had been made). Further, he utilized the same methodology employed by the City in calculating the savings that would be realized from the demotions and retirements.

The Voir Dire questioning suggests that the savings calculation for the retirees seems high - - it was noted, in the questioning, that the savings on Lieutenant Brightman's retirement (demoted to Sergeant) appears as if calculated on an annual salary of approximately \$100,000, far more than his salary really was. Reyes ceded that appeared to be correct and counsel conceded that, inasmuch as these were the City's own calculations, perhaps the City's figures were inaccurate, too. However, that is not the case - - in fact, the City's calculations of retirement savings, as reflected in the first two segments of CP-49, appear quite accurate.

First, note that the savings calculated for Brightman's retirement were made on his lieutenant's salary (\$87,784), the cost projected in the Department's salary budget for fiscal year 2003 (from July 1, 2002 through June 30, 2003). Brightman received his lieutenant's salary (approximately \$7,315 per month) for three months - - July, August and September 2002 - - and then retired on October 1, 2002. So, on Brightman, the City saved nine months of salary, originally projected at \$7,315 per month, for a total savings of \$65,838 - - the amount projected on CP-49. (Note that the last column on CP-49, where the \$65,838 figure appears, across from Brightman's name, says "Retirement Savings (8-months)". Clearly, since Brightman retired on October 1, 2002, the City realized a *9-month savings* of salary for him - - the \$65,838 amount). The calculations for the other retirees are similarly accurate.

accurate - - it appears that at the outset of or early in the layoff/demotion period (certainly, by late December 2002), the City had at least realized its originally targeted savings amount (\$176,421) and its revised target payroll savings amount (\$362,685) through just the demotions to that point (\$37,100 for two months of demotions) and the retirements (\$395,100) in the police department (4T120-4T133; CP-48; CP-49).^{10/}

70. After receiving and discussing CP-49 at the December 19, 2002 meeting, Comptroller Zambrano acknowledged that they saw the savings indicated by the PBA/SOA and stated to Reyes, Petrelli and Smith that they (City representatives) would review the document and bring it to the Mayor - - and that the problem (reversing the demotions) might then be resolved (4T132-4T133).

71. Laurence Spagnola had been Chief of Police in Paterson for six years. On December 19, 2002, he attended a meeting at

^{10/} The City's original savings projection, purely from demotions in the police department, was \$176,400. At some point (before October 26, 2002), several unit employees announced their retirement. The City then realized that retirements greatly increased the amount of payroll savings which it could reap from the layoff/demotion circumstances. Thus, on October 26, 2002, a new calculation by the City showed an eight-month savings of \$165,170 on demotions and a nine-month savings of \$197,500 on (three) retirements, for a total of \$362,670, essentially its revised target amount of \$362,500. The SOA's December 2002 calculations reflect three additional retirements (six in all). The December 2002 savings totals were \$148,500 on demotions and \$395,100 on retirements. Even allowing for terminal leave payments (approximately \$70,000), the City had by then achieved its revised target savings amount.

City Hall with Mayor Torres, Business Administrator Burgos, Director of Finance Cherone, Comptroller Zambrano, and Finance Department Official Ferenza. Spagnola brought Detective George Jadlos with him; Jadlos worked in the Department's Administrative Section. The purpose of the meeting was to review the police budget to see if any money could be culled from the department's Operations and Expense Budget and be applied to the re-promotion of demoted supervisory officers. Torres left the meeting after a short time. Since the City was then six months through the fiscal year, available money had begun to appear in certain budget accounts. By the end of the meeting, the group had clearly identified \$150,000 that was available to be applied to re-promote demoted police employees (4T158-4T165).^{11/}

72. After returning from the meeting to his office, Spagnola (and Jadlos) spoke with Smith, Petrelli and Reyes regarding the money found available in the Operations and Expense Budget to be applied to re-promote the demoted employees (4T133-4T137; 4T158-4T161; 4T164-4T167).

73. Shortly after speaking with Jadlos on December 19, Reyes spoke to Burgos and informed him of the information which Jadlos had given to Reyes, Petrelli and Smith about the money

^{11/} This \$150,000 amount found available in the department's Operations and Expense Budget was in addition to the \$433,000 savings amount, found by the PBA/SOA, deriving from savings on demotions and retirements through December 2002.

(\$150,000) found available in the Police Department's Operations and Expense budget for re-promotions. Reyes pressed Burgos about when the police unions would hear about re-promotions. Burgos's response was that he would talk to the Mayor about it (4T134-4T138).

74. The following day, December 20, 2002, Reyes and Petrelli met with Torres and indicated to him that the police unions knew that the City now had the money available to re-promote the demoted police employees - - and that the Mayor knew about it; Reyes then asked about when the police re-promotions would be made. Mayor Torres responded that he first had to present the matter of re-promotions to the City Council, and that he also needed to look at the money that was going to be available for next fiscal year (2004), essentially because he said he did not want to re-promote officers in December 2002 and then have to demote them again in July 2003 (4T136-4T141).

75. Petrelli then responded to Torres that as SOA President, he (Petrelli) could guarantee to the Mayor that his members would understand that in December 2002, the Mayor could not control what the City's finances would be like in the next fiscal year; but, as long as the money was presently available (in December 2002) for re-promotions, the SOA would like to have its members re-promoted at that point (and essentially take their chances in July 2003 regarding whether or not they would remain

in their promotional positions). Petrelli indicated that he could explain the situation to his members and that his members would understand that the Mayor could not guarantee that monies would be available in the new fiscal year to maintain the re-promoted employees in their promotional ranks. Petrelli then said he could provide the Mayor with a letter that would clearly reflect this understanding. Torres responded that yes, he would like to see each affected officer's acknowledgment of the circumstances regarding re-promotions (4T140-4T143).

76. CP-50 is a letter, dated January 14, 2003, signed by Smith, Petrelli and 26 of the demoted officers (all of the non-retired demotees). It indicates that as long as monies were presently available to re-promote them, they would seek to be re-promoted at that time and that they understood that there was no guarantee that they might not be demoted again in the new fiscal year (4T140-4T144; CP-50).

Subsequent to the mid-December 2002 meetings where City representatives and police union representatives discussed and identified sources of budget money that could be utilized to re-promote the demoted police supervisors, the issue was revisited - - by the Chief and union representatives with various representatives of the Administration - - over and over again during the ensuing months (4T165-4T167).

77. In formulating the budget, several large purchases were removed as part of the plan to balance the budget. Among those purchase items deleted were several new police cars (approximately \$350,000). However, later in the budget process, those items were restored to the budget (4T28).

On April 11, 2003, all of the police employees demoted on November 1, 2002 were re-promoted. Through the date of the hearing in this case, there had been no further demotions of police employees (3T103-3T106; 4T99-4T102; 4T153-4T156). Director of Finance Cherone was not specifically aware of any new revenue sources that would have allowed for the re-promotions in April 2003. She had only indirectly become aware of the re-promotions (3T102-3T107).

78. After all of the police demotees were re-promoted in April 2003, the parties discussed possibilities for the resolution of the remaining disputes. One of the main issues in contention was the back-pay amount which the union sought for the 2001 demotees for the period of their demotion (November 2002 - mid-April 2003), because the union contended they had been wrongfully demoted. To provide a basis for these discussions, then-SOA Vice-President Reyes prepared a spreadsheet entitled "Pay Differential Summary" (CP-47), which showed the pay differential between what each of the non-retired 2001 demotees would have earned in their promotional rank and the amount they

actually received in their demoted rank, less the amount they earned in out-of-title pay (during the demotion period). For the 2001 demotees, the total sought by the SOA was \$66,706 (2T41-2T47; CP-47; CP-49).

ANALYSIS

Public employees and their representative organizations have a statutory right to engage in collective negotiations activities. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3).

The SOA contends that the City discriminated against the SOA and SOA unit employees because they engaged in protected activity. More specifically, the SOA contends that the City, as part of a City-wide layoff/demotion action, unlawfully demoted 2001 promotees because the SOA persisted in prosecuting a pay grievance on behalf of 2002 promotees.

In re Bridgewater Tp., 95 N.J. 253 (1994), sets forth the standards for determining whether a personnel action was discriminatorily motivated in violation of subsections 5.4a(1) and (3). To establish such a violation, the Charging Party must prove, by preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, that the employer knew of this activity, and

that the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place even absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial factor in the adverse personnel action.

In this matter, the SOA has demonstrated by a preponderance of the evidence that certain unit employees (2001 promotees) were demoted as a result of the SOA's protected activities on behalf of other unit employees. Utilizing both direct and circumstantial evidence, the SOA established that it had engaged in protected activities - - grievance prosecution - - that the City was aware of those activities and that the City was hostile toward those activities - - here, that the employer's hostility (specifically, Mayor Torres) to Charging Party's protected

conduct was a substantial factor in the City's decision to include the 2001 promotees in the layoff/demotion. And finally, the City has failed to demonstrate by a preponderance of the evidence that the adverse action - - its demotion of the 2001 promotees - - would have taken place even absent the protected conduct.

Layoffs and demotions, though normally actions considered non-negotiable managerial determinations, are not accorded such a protected status when undertaken for unlawful reasons. In Township of Mantua, P.E.R.C. No. 84-51, 10 NJPER 433 (¶15194 1984), the Commission concluded that the Township violated subsection 5.4a(3) when it laid off an employee in retaliation for his protected activities. Road Department employee Mercer was active and instrumental in a union organizing election won by Teamsters Local 676. Four days after the election, the Township laid off Mercer. Further, in laying off Mercer immediately, the Township departed from its past practice of providing two weeks notice to employees designated for layoff. The Township also declined to offer Mercer re-employment in a position that opened in another department, in violation of the Township's Personnel Manual. The Commission rejected the Township's alleged business justification for laying off Mercer - - that the Road Department lacked sufficient work and therefore, the layoff was effected to save the Township money. The Commission noted that this layoff

was effected from the top down - - by the Township Committeeman/Director of the Road Department John Lindsay - - instead of following the procedure of all previous layoffs, which emanated from the Department Supervisor up to the Township Committee. Finally, the record showed that after Mercer's layoff, the regular work which the Road Department had previously been able to accomplish had to be cut back, a work backlog developed, and the Department fell behind on completing its normal work. Accordingly, this belied the Township's alleged basis for the layoff.

Similarly, in Rutgers University, P.E.R.C. No. 2001-38, 27 NJPER 91 (¶32034 2001), the Commission found that the employer violated subsections 5.4a(1) and (3) of the Act when the employer demoted an employee (Walton) in retaliation for the employee having prosecuted a grievance contending that the employer violated the contract when it failed to promote the most senior employee qualified for the position (Walton). See also, Borough of Sayreville, P.E.R.C. No. 91-53, 16 NJPER 542 (¶21244 1990), (employer violated subsections 5.4a(1) and (3) of the Act when it demoted an employee [newly promoted to sergeant] after the PBA grieved the employee's subsequent transfer to a new location as having violated contractual procedures); University of Medicine & Dentistry of New Jersey, P.E.R.C. No. 2001-65, 27 NJPER 247, (¶32088 2001); and Ebasco Services, Inc., 181 NLRB 768, 73 LRRM

1518 (1970); (employer violated the National Labor Relations Act when it demoted six employees after they testified on behalf of a grievant at a grievance arbitration hearing).

* * * *

As he came into office on July 1, 2002, Mayor Torres was confronted with a budget deficit created by the prior Barnes Administration and had been through a transition period marked by what the Torres Administration described as a lack of cooperation from the Barnes Administration. Particularly pointed in this regard was Barnes's June 28, 2002 promotion of twelve police officers - - a promotion of supervisors in which Torres had no input and which served to increase the City's payroll at an inauspicious time.

During the first weeks of July 2002, the Torres Administration focused much of its attention on formulating a budget that would address the \$6.7 million deficit which it inherited. That meant cutting expenses, possibly including layoffs and demotions. The Administration formulated several alternative budgets which it presented to the City Council.

In the projections for the lowest expenditure budgets, the Torres Administration estimated the need to implement approximately 60 layoffs/demotions. As late as July 23, 2002, when the City Council selected a budget that would require layoffs/demotions, there was no indication that the police

demotions would go beyond the twelve July 2002 promotees. In early July 2002, Torres had met with the 2002 police promotees to indicate that a layoff might be necessary. In contrast, he never met with the 2001 promotees. Prior to late July, there is nothing in the record which indicates that the 2001 promotees were being considered for inclusion in any layoff/demotion.

On July 17, 2002, after learning that Mayor Torres had refused to approve the authorization to pay the July 2002 promotees their promotional pay, the SOA filed a grievance. The grievance proceeded and reached Torres (in his role as Acting Director of Public Safety) on July 26, 2002, at which time Torres answered the grievance.

This matter was a source of some annoyance to Torres. The previous mayor, in addition to extending no cooperation to the incoming Torres Administration, had left the City with a budget deficit and had made a number of last-minute promotions which were only going to make that budget problem worse. On the other hand, the twelve 2002 police promotees were performing their new jobs and under the parties' collective negotiations agreement, were entitled to promotional pay increases. On July 26, I believe Torres realized there was no viable defense to the grievance and so he wrote an answer that both denied the grievance and was unrelated to the issue in dispute. The SOA immediately filed for arbitration. In a decision (in January

2003) granting the SOA's grievance, the arbitrator said the City had provided no proof that it had any bona fide defense to the grievance.

Also on July 26, Torres instructed his secretary, Jane Canta, to tell Smith and Petrelli that he wanted the PBA/SOA to wait two pay periods for the 2002 promotees to receive their promotional pay, and if they did not agree to this delay that he would demote back to 2001.

It was after July 26, 2002 that the City - - through Torres - - undertook a series of actions that were unfavorable to the PBA/SOA, that were seemingly illogical, and for which there was little justification in this record, factual or legal. The July 26 statement about waiting for the promotional pay was a threat and it was only after that date that it appeared the layoff/demotion plan would include the 2001 promotees. The first time the PBA/SOA was given any actual notice that the layoff/demotion was going to encompass more than the twelve 2002 promotees and extend to the twenty 2001 promotees was during the DOP-required, public notice-about-RIFS meeting (approximately mid-August, 2002) to which all City union representatives were specifically invited. R-2, dated August 28, 2002, the City's initial RIF submission to DOP, contains an attachment listing the employees to be included in the layoff/demotion; that listing includes the 2001 promotees. Notably, that list does not include

the 2002 lower-seniority promotees; they were included in the second submission to DOP (R-5), dated September 24, 2002.

In July and August 2002, the City twice went to DOP seeking rescission of the July 2002 promotions. Eventually, in September 2002, the City entered into a settlement agreement with the SOA (R-1) in which it agreed, inter alia, to drop the challenge to the July 2002 promotions and to provide the twelve 2002 promotees all rights pursuant to DOP laws and regulations.

The layoff/demotion encompassed many City government departments. In July, the City had projected 60 layoffs/demotions (probably including the twelve 2002 police promotees). By August, layoffs/demotions were increased to 100 employees (and then included 32 police demotions).

It is not clear in the record exactly how the City determined the allocation of layoffs and demotions to its various departments, although it appears that each department head determined the layoff for their department. While Cherone prepared the formal DOP submissions for Burgos's signature (R-2 and R-5), it was never indicated how it was determined that, for example, Human Resources absorbed five layoffs; the Office of the Mayor, none; the Office of the City Council, none; the Fire Department, seven demotions; and the Police Department, thirty-two demotions.

The Police Department was allocated those thirty-two demotions at a point in time when the supervisory structure of the Department was already very lean. The May 2001 DCA report on department structure had recommended that the Department run with 93 supervisory officers. Before the November 2002 demotions, the Department had 75 supervisory officers, 20% lower than the DCA's recommendation. After the demotions, the Department was at 59 supervisory officers, almost 40% lower than the DCA's recommendation. Given the fact that several departments appear to have escaped layoffs altogether and that the Fire Department was allocated just seven demotions, the allocation of 32 demotions to a department already operating with a considerable deficit in its supervisory structure seems high under the circumstances. In the context of this case, the allocation of layoffs/demotions appears counterintuitive - - and the record provides no explanation of how such seemingly unlikely allocations were determined.

The SOA demonstrated that it engaged in protected activity - - the filing and prosecution of the promotional pay grievance - - that the City knew of the activity and that the City, through Torres, was hostile toward that activity. Thus, the SOA demonstrated that the filing and prosecution of the grievance was the motivating factor for the inclusion of the 2001 promotees in the demotions.

Proof of hostility was established through both direct and circumstantial evidence. The direct evidence is Torres's July 26, 2002 statement to Canta to tell the PBA and the SOA that if they would not wait for the promotional pay increases to the 2002 promotees, that he would demote back to 2001.

The circumstantial case is evidenced by several elements. The record indicates that through late July 2002, only the 2002 promotees were to be included in the November 2002 demotion, and that it was only after the events of July 26, 2002 and shortly thereafter - - the SOA's continued pushing of the promotional pay grievance - - that it became apparent that the 2001 promotees were also going to be included in the demotions. The inordinate, disparate treatment of the SOA in the RIF action was unexplained, illogical and unjustified in this record. The demotion of 32 supervisory police officers pushed the supervisory staffing of the Police Department to a level 40% below the recommendation made by the DCA in its study of the Paterson Police Department. It created a circumstance which the Chief termed a critical situation and a public safety issue. Yet, 32 supervisory police officers were demoted while but seven supervisory firefighters were demoted and some departments escaped the RIF entirely. Thus, it has been demonstrated - - through the Torres July 26 statement to Canta, through the timing of the inclusion of the 2001 promotees in the RIF and the unexplained disparate treatment

of supervisory police officers in the RIF - - that the City was hostile toward the SOA's protected activities (the grievance prosecution) and that the employer's inclusion of the 2001 promotees in the RIF was motivated by the SOA's protected activity.

* * * *

The City has maintained that the reason for the RIF was to address the City's budget deficit - - ostensibly, to save money. The central issue of this case is whether the City expanded the coverage of the RIF to include the 2001 promotees for a discriminatory reason; I have concluded above that it did. The issue remaining is whether the City would have done so anyway, even absent the discriminatory reason. On that issue, I conclude that the City would not have done so absent the discriminatory reason.

There was a huge disparity in the treatment of re-promotions for fire department demotees and police department demotees. By December 9, 2002, the City had re-promoted the demoted firefighter supervisory officers and the Mayor informed the PBA/SOA of that action. The City indicated to the PBA/SOA that it had re-promoted the firefighter demotees because the Fire Department had found money in its budget to fund the re-promotions and because it was not cost efficient to utilize out-of-title assignments to cover the Fire Department's supervisory

structure, because of the contractual, out-of-title pay provisions.

Petrelli immediately informed Torres (at the December 9, 2002 meeting) that the police union contracts contained the same out-of-title pay provisions and so would have the same effect of making the staffing of the police department's supervisory structure by out-of-title assignments cost inefficient.

By the time of the meeting on December 19, 2002, the SOA had demonstrated to the City that the savings amount achieved by the police demotions (to that point) and police retirements had met or exceeded the City's revised target savings amount (\$362,500) for the police department. Zambrano acknowledged this and indicated he would speak to the Mayor about using the money to effect police re-promotions.

Also on December 19, 2002, Chief Spagnola and Detective Jadlos met with Torres, Burgos, Cherone, Zambrano and Ferenza to review the Police Department budget to see if any available money could be found to use for re-promotions. The group identified that \$150,000 was available to be used for re-promotions.

Subsequently, Jadlos conveyed this information to Smith, Petrelli and Reyes. Reyes then spoke to Burgos about this additional money and pressed him about re-promoting the demoted police officers.

On December 20, 2002, Petrelli and Reyes met with Torres and discussed with him that the money for police re-promotions was available - - from demotions, retirements and available money in the Department's budget - - and they asked Torres when their unit employees would be re-promoted.

Torres's response to this inquiry was telling. Torres indicated that he first had to present the matter of re-promotions to the City Council and that he needed to look at the money that was going to be available for the next fiscal year because he said he did not want to re-promote officers in December 2002 and then have to demote them again in July 2003.

Petrelli responded to Torres that, as SOA President, he could guarantee to the Mayor that his members would understand that the Mayor could not control what the City's finances would be like in the next fiscal year and that re-promotion now could not guarantee the availability of money in the next fiscal year to maintain the employees in their promotional positions. Petrelli further offered to provide the Mayor with a letter that would reflect that understanding. Torres replied that he wanted the letter from each affected officer. On January 14, 2003, Petrelli submitted the requested letter to Torres, signed by himself, Reyes and each demoted officer.

The record does not indicate that Torres or other City officials imposed such conditions on the firefighter re-

promotions - - there was no requirement of a City Council presentation; no requirement that there had to be a determination that money to maintain the re-promoted firefighters be available in the next fiscal year; and no requirement that each affected firefighter sign a letter stating that they recognized that their re-promotions in December 2002 did not guarantee that the City would have the money to keep them in their promotional rank in the next fiscal year. Rather, the firefighter re-promotions were promptly effected in early December 2002. No reason was proffered for this difference in treatment. It was not until April 11, 2003 that the City finally re-promoted all of the demoted police officers - - four months after the firefighter re-promotions, four months after finding sufficient money for the police re-promotions, and three months after SOA President Petrelli provided Mayor Torres with a letter signed by each demoted officer acknowledging that their re-promotion in January 2003 would not guarantee that the City would have money to maintain them in their re-promoted ranks in fiscal year 2004 (no police officer has been demoted since that time).

The City had good reason to act promptly to re-promote the demoted police officers, as it knew that the Department was operating with a significantly understaffed supervisory structure. That understaffing had triggered a significant number of out-of-title assignments and created difficult staffing issues

for the Department. So difficult were these issues that on February 10, 2003, Chief Spagnola sent Mayor Torres a memo which asserted the Police Department was in a critical situation, that public safety was implicated and that achieving adequate supervisory staffing had become of paramount importance.

Just as no reason was proffered in the record for the difference in treatment between the re-promotions of supervisory firefighters and the re-promotions of supervisory police officers, no reason was proffered for the considerable delay in re-promoting the police officers.

If, as the City argued, the reason for the RIF - - and particularly the expansion of the RIF to include the 2001 promotees - - was to save money, when the money had been saved, the police demotees should have been re-promoted (as were the firefighter demotees). Instead, Mayor Torres imposed conditions precedent on the SOA re-promotions that had not been imposed on the firefighter re-promotions and took such other action as would ensure the delay of the re-promotions for four months beyond when they could have been made. Based upon the foregoing, I conclude that the City expanded the RIF to include the 2001 promotees not for the money but because of its hostility to the SOA and that, in the circumstances of this case, would not have otherwise expanded the RIF to encompass the 2001 promotees absent the hostility toward the SOA. So here is the core - - it was never

the money, nor the increased amount of money the inclusion of the 2001 promotees brought to the City. Had it been the money, when the money was found, the demotions would have been promptly undone; but they were not. The demotions were left in place to continue the discrimination that caused them in the first place. There was never a business reason for the expansion of the RIF's net to include the 2001 promotees, and therefore, without the discriminatory genesis for this action, it would not have occurred. Accordingly, the employer has not demonstrated, by a preponderance of the evidence, that it would have included the 2001 promotees in the demotion, even absent the SOA's protected conduct.

CONCLUSIONS OF LAW

The City violated section 5.4a(3) and derivatively a(1) of the Act when it demoted those police officers (unit employees) promoted in July 2001 in retaliation for the PBA/SOA persisting in its prosecution of a grievance seeking appropriate compensation increases for other police officers (unit employees) promoted in June 2002.

RECOMMENDATION

I recommend that the Commission ORDER:

A. That the Respondent City cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the

Act, particularly by demoting those police officers promoted in July 2001 in retaliation for the PBA/SOA's prosecution of a grievance on behalf of police officers promoted in June 2002.

2. Discriminating in regard to the hire or tenure of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by demoting those police officers promoted in July 2001 in retaliation for the PBA/SOA's prosecution of a grievance on behalf of police officers promoted in June 2002.

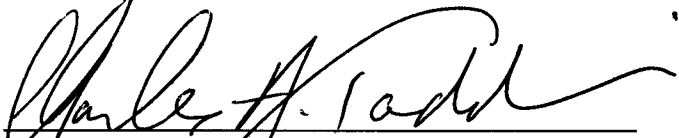
B. That the Respondent City take the following affirmative action:

1. Make whole those police officers that were promoted in July 2001 and subsequently demoted in November 2002 and re-promoted in April 2003, for all salary and benefits due for the period of their demotion, less any interim earnings derived from out-of-title assignments during that period, plus interest at the rate set by the Court pursuant to R 4:42-11(a).

2. Post in all places where notices to employees are customarily posted, copies of the attached notices marked as Appendix "A". Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Board has taken to comply herewith.



Charles A. Padduni
Hearing Examiner

DATED: November 3, 2006
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 13, 2006.



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by demoting those police officers promoted in July 2001 in retaliation for the PBA/SOA's prosecution of a grievance on behalf of police officers promoted in June 2002.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by demoting those police officers promoted in July 2001 in retaliation for the PBA/SOA's prosecution of a grievance on behalf of police officers promoted in June 2002.

WE WILL make whole those police officers that were promoted in July 2001 and subsequently demoted in November 2002 and re-promoted in April 2003, for all salary and benefits due for the period of their demotion, less any interim earnings derived from out-of-title assignments during that period, plus interest at the rate set by the Court pursuant to R 4:42-11(a).

Docket No. CO-2003-120

City of Paterson
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372