

H.E. NO. 2014-7

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

In the Matter of

OCEAN TOWNSHIP,

Respondent,

-and-

Docket No. CI-2006-017

KEVIN SHANOSKY,

Charging Party,

OCEAN TOWNSHIP,

Respondent,

-and-

Docket No. CO-2006-143

PBA LOCAL 57 AND BRENDAN BRUTHER,

Charging Parties.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Township of Ocean did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it did not promote two police officers. The Hearing Examiner found that although the police officers had extensive union activities, the Township was not hostile to the exercise of their protected rights and their union activities were not a substantial or motivating factor in the decisions to skip them for promotion. The Hearing Examiner also found that the Township's asserted business justification for its determinations was not pretextual. The Hearing Examiner, therefore, recommends that the Complaints be dismissed.

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 Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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,
Ruderman & Glickman, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Parties,
Detzky, Hunter and DeFillippo, attorneys
(David J. DeFillippo, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

INTRODUCTION

On December 2, 2005, Ocean Township PBA Local 57 ("PBA") and Officer Brendan Bruther ("Bruther") filed an unfair practice charge (hereinafter "Bruther charge") with the Public Employment Relations Commission ("PERC") against the Township of Ocean ("Township"). (C-1)^{1/}. Bruther alleges that the Township bypassed him for promotion to Sergeant in the spring and summer

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to the Charging Party's exhibits, those marked "J" refer to exhibits jointly submitted by the parties, and those marked "R" refer to the Respondent's exhibits. Using R. 2:6-8 as guidance, transcript citations are designated with a "T". There were 23 days of hearing spanning from 2008 to 2013, thus the transcripts are numbered sequentially. The number before a "T" corresponds to a particular hearing date: "1T" refers to the transcript for September 16, 2008; "2T" for October 7, 2008; "3T" for October 28, 2008; "4T" for December 16, 2008; "5T" for February 10, 2009; "6T" for June 16, 2009; "7T" for December 3, 2009; "8T" for January 14, 2010; "9T" for October 26, 2010; "10T" for July 20, 2010; "11T" for September 28, 2010; "12T" for June 14, 2011; "13T" for September 27, 2011; "14T" for May 11, 2011; "15T" for November 30, 2011; "16T" for December 8, 2011; "17T" for October 4, 2012; "18T" for October 16, 2012; "19T" for October 23, 2012; "20T" for November 27, 2012; "21T" for December 4, 2012; "22T" for January 8, 2013; and "23T" for March 26, 2013. The number after the "T" refers to the page number of the transcript.

of 2005 in violation of N.J.S.A. 34:13A-5.4(a) (1) and (3)^{2/} of the New Jersey Employer-Employee Relations Act ("Act").

On December 2, 2005, Kevin Shanosky ("Shanosky") filed an unfair practice charge with PERC against the Township. (C-5). On January 3, 2007, Shanosky filed an amended charge. (C-6). Shanosky alleges that the Township bypassed him for promotion to Lieutenant in June 2005 and August 2006 in violation of N.J.S.A. 34:13A-5.4(a) (1) and (3).

Approximately 42 paragraphs of the Bruther and Shanosky charges are identical. (C-2, C-5, C-6). Bruther was a candidate for a Sergeant position, and in his charge he also refers to the Lieutenant's promotion process. (C-2, ¶¶46-60). Shanosky was a candidate for a Lieutenant position, and in his charge he refers to the Sergeant's promotion process. (C-5 & C-6, ¶¶ 50-66). Both charging parties relied on the same witnesses and same exhibits. All exhibits were introduced into evidence during the first 22 days of hearing, none were introduced on the 23rd day. The matters are not consolidated, but were heard together with one of the witnesses returning on the 23rd day to be examined solely in

^{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.

regards to the Bruther matter. The charging parties' post-hearing briefs are similar to each other. The Township relies on the 23 days of hearing and post-hearing brief for the Shanosky and Bruther charges. (23T4-5; RbB5^{3/}). For these reasons, this report refers to facts and an analysis that applies to both matters. However, the recommendation regarding each of the parties are identified separately below. Based upon the entire record, I make the following:

FINDINGS OF FACT^{4/}

FORMAL PAPERS AND STIPULATIONS

1. The formal papers in evidence regarding the Bruther matter (CO-2006-143) are the following: "C-1" is the complaint and notice of hearing dated February 21, 2006, "C-2" is the unfair practice charge filed on December 2, 2005, and "C-3" is the Township's answer dated March 14, 2006.

2. The formal papers in evidence regarding the Shanosky matter (CI-2006-017) are the following: "C-4" is the complaint and notice of hearing dated February 21, 2006, "C-5" is the unfair practice charge filed on December 2, 2005, "C-6" is the

3/ "RbB5" is respondent's post-hearing brief, Bruther matter at p. 5.

4/ I refer to facts relating back to more than six months before the date of the charges in these matters and also after the personnel determinations at issue here. These facts are included for the sake of a full and complete record.

amended unfair practice charge filed on January 3, 2007, and "C-7" is the amended answer filed on September 11, 2008.

3. The parties stipulated that the Township is a public employer and the PBA is a public employee representative within the meaning of the Act. (1T14). The parties also stipulated that Bruther and Shanosky were employees of the Township within the meaning of the Act. (1T15).

4. Stuart Reichman, the original hearing examiner, retired in December 2011 after presiding over the first 16 days of hearing. In accordance with N.J.A.C. 19:14-6.4, the undersigned was thereafter designated as the hearing examiner to continue the matter. On July 13, 2012, the Township filed a Motion for a new hearing and on July 23, 2012, the charging parties filed their opposition to the motion. On August 6, 2012, I denied the Motion for a new hearing.

THE UNION AND THE EMPLOYER

PBA and SOA

The PBA is the exclusive representative of the Township's police officers below the rank of Sergeant. (C-2, C-5, C-6). The Superior Officers Association ("SOA") represents the Township's Sergeants, Lieutenants, and Captains. (C-2, C-5, C-6). The relevant collective negotiations agreement entered into by the PBA and the Township covers the period from January 1, 2004 to December 31, 2007. The relevant collective negotiations

agreement between the SOA and the Township covers the same period as the PBA contract. (CP-64).

TOWNSHIP OF OCEAN AND ITS POLICE DEPARTMENT

The Township operates under the Council-Manager form of government in which the Council is the governing body, which selects a Mayor and the Township Manager who serves as the chief executive officer. N.J.S.A. 40:69A-91; N.J.S.A. 40:69A-95; N.J.S.A. 40:79-2 (20T4-5). The Township Manager has the power to appoint and remove department heads and all other officers, subordinates, and assistants; negotiates contracts for the Township which are subject to the approval of the Council; and attends all Council meetings with the right to take part in the discussions but without the right to vote. N.J.S.A. 40:69A-95; CP-2, §I.A.5.b; CP-3, §§92-002.3.1.5.3 and 2.3.2.3.4). The Township Manager is authorized to hear complaints and disciplinary matters. (R-2 at §8.2.7). The Township is not a civil service municipality.

(<http://www.state.nj.us/csc/about/divisions/slo/jurisdictions.html>; Rb11).

A department head is the executive or administrative head of a subdivision, such as the Police Chief of the Department of Police. N.J.S.A. 40:79-2. The Chief of Police shall be directly responsible to the Township Manager for the "efficiency and routine day-to-day operations thereof." (20T7; R-2 at §I.F).

The Township's Police Department rules and regulations are also known as the "Police Manual." (R-2, p. i and §2.1.31). The Police Manual consists of directives binding employees regarding authority, responsibility and conduct, and was last amended in the early 1990s under then Chief Torchia. (18T12; R-2, §2.1.36). The Police Manual states that each successful police appointee for a position in the department "shall serve a [one year] probationary period pending his successful completion of a course at a State or county accredited police school." (R-2, § I.D; R-2, §2.1.35). There is also a six month promotional probationary period in an officer's next higher rank. (R-2 at §2.1.34). Performance evaluations of officers are conducted on a yearly basis. Officers are counseled at the beginning of the rating year to remind them of their general duties and at the end of the year are rated on police core and field operations traits. (CP-23 through CP-25). Each of these traits are broken down into subcategories and a rating is assigned by a superior officer which can range from outstanding to unsatisfactory. (CP-23 through CP-25).

WITNESSES FOR THE CHARGING PARTIES

Brendan Bruther: Bruther was hired by the Township police department in January 1996. (C-2). Bruther was skipped for promotion to Sergeant in 2005, but promoted to Sergeant in December 2006. (1T55). He was Treasurer of the PBA from July

1998 to December 2006, and President from June 2005 to December 2006. (1T55-56).

Gary D'Esposito: D'Esposito was hired by the police department in March 1979. He went on terminal leave on September 30, 2005 and retired as a captain on January 31, 2006. (CP-15 at p. 16).

Bruce Friend: Bruce Friend was hired by the police department in August 1989 and has been in the patrol division as a patrolman his entire career. (1T51-52). In 2008, he was the president of the PBA. (1T54).

John Green: Green was hired by Township Manager Kochel for the position of dispatcher in 1998 and then as a police officer in 2001. (2T62-63)

Shawn Murphy: Murphy was hired by the police department in May 1995 as a patrol officer and was a detective when he left the police department in 2006. (2T4-5). From 2004 to 2006, Murphy was the treasurer of the local PBA. (2T5). He started employment with the Monmouth County Prosecutors' office in October 2006. (2T4).

Kevin Shanosky: Shanosky was hired by the police department in August 1983 (5T119). He was skipped for promotion to Sergeant in 1997, but promoted to Sergeant in 1998. (17T71). He served a probationary period, but there are no documents memorializing it. (17T90-92). Shanosky was skipped for promotion to Lieutenant in

2005 and 2006. Shanosky was an active member of both the PBA and SOA, and served in leadership positions in both units. He filed grievances, represented members at disciplinary hearings, and was a member of the respective negotiations teams.

WITNESSES FOR THE TOWNSHIP

Antonio Amodio: Amodio was hired by the police department in November 1982. (17T64). He spent most of his career in the Detective Bureau. (17T64).

He was promoted to Chief in January 2005 and retired in 2012.

Kevin Faller: Faller was hired by the police department in December 1986, served as a patrol officer from 1986 to 2000. In his twentieth year with the Township, he was promoted to Sergeant in September 2005, transferred to the detective bureau, and currently serves as a Detective Lieutenant. (19T3-4; 19T129; 21T43). Prior to employment with the Township, he had law enforcement experience. (19T17; 19T129-131).

Faller was PBA vice president from 1989 to 1991, as well as 1994 and 1997, president from 1997 to 1998, and a PBA local delegate from 1998 to 2005. (3T23-24).

Neil Ingenito: Ingenito, who had a bachelor's degree, was hired by the police department in November 1982 (the same day as Amodio). (17T63; 18T97). He served as PBA president prior to his promotion to Sergeant in 1987. (17T65; 17T67). He obtained the highest scores in the Sergeant and Lieutenant promotional exams.

(18T96). By the time he was promoted to Lieutenant, he had earned a Masters in Public Administration. (18T96-97). In 1990, Ingenito began a friendship with Kochel. (17T67). Ingenito was promoted to Lieutenant in 1993 and was in the Patrol Division where he served for 12 years; he was Shanosky's immediate supervisor, and promoted to Captain in 2005 and assigned as Commander of the administrative division on June 2, 2006. (15T92; 17T63-64; 18T44; 18T49; 18T51; 189T96; 18T109).

He participated in the promotional process for Chief, but was not given the position, yet he developed a close working relationship with Amodio, who had competed against him for the Chief position. (17T67; 18T96-97). Amodio issued a written reprimand to Ingenito for two at-fault car accidents in his assigned departmental vehicle. (18T98).

David Kochel: Kochel was hired by the Township as Manager on June 1, 1987, and was employed by the Township for 20 years, retiring on June 1, 2007 (which was later changed to September 2007). (17T64; 20T3-4; 20T80). He had previously been employed in Pennsylvania and another municipality in New Jersey. (20T4).

During his tenure as Township Manager, Kochel promoted four police officers to Chief of Police. (20T5-6). Kochel's primary relationship with the Chiefs involved hiring and promoting officers, financial matters, and purchase orders. (20T7-8). In his 20 years with the Township, Kochel served as a hearing

officer in disciplinary matters involving Township police approximately five to six times. (20T102; 21T7).

CHRONOLOGY OF EVENTS

Events from 1980 through 1999:

When Kochel became Manager in June 1987, he held a voluntary meeting of the Police Department and remembered that Ingenito was the only person who spoke. (20T40). At the time, Ingenito was active in the PBA and SOA. (20T39-40; 20T51).

In 1989, Kochel joined Jersey Professional Management ("JPM"), as a consultant to municipalities regarding police assessment centers and promotions. (CP-64).

On March 8, 1989, Shanosky was counseled for reporting to work an hour late. (R-14). On April 2, 1989, Shanosky was counseled for reporting to work an hour late. (R-14).

In the 1980s, William Newman ("Newman") was hired by the police department. (3T17). He was president and vice president of the PBA as well as the lead contract negotiator. (3T17; 4T34). In 1993, he was promoted to Sergeant and thereafter Lieutenant. (3T18). He was a candidate for promotion to Chief, but Amodio was promoted to Chief. (4T35).

On June 4, 1990, Shanosky was issued a critical incident report for failing to report for duty on May 31, 1990. (R-15). On July 14, 1990, Shanosky was issued a critical incident report

for being late to work on December 9, 1989 and again on July 7, 1990. (R-16).

In 1991, Shanosky filed a civil action in Special Civil Part against the Township in which he sought to obtain credit for his pension contribution (5T129-130; 20T97-98; CP-29). Kochel testified that when the Township is named as a defendant, the Township Clerk accepts service and the Chief Financial Officer, a direct report to Kochel, was responsible for making sure that pension contributions were disseminated. (20T98-100). Kochel stated that he was not aware of any other police officer suing the Township. (20T100). I find that Kochel was not named as a defendant in the complaint nor was he responsible for calculating pension contributions be made. I thus do not find that an alleged miscalculation by the Chief Financial Officer is relevant to the allegations raised in the charges.

On March 22, 1992, Shanosky was issued a critical incident report for speaking car to car with their lights out with Friend. (R-17). "The two patrolm[e]n were both warned on previous occasions about their extended car to car discussions and the general disregard for the residents in their respective zones that they were assigned to protect." (R-17).

On February 22, 1993, Shanosky, as a PBA delegate, filed a grievance with Kochel appealing a decision made by then Chief Koch regarding attendance at PBA convention meetings. (5T139;

20T106; CP-30). Shanosky was granted the time that he requested. (20T107). I find that the matter was resolved by Kochel in Shanosky's favor.

On May 5, 1993, Shanosky wrote to Kochel regarding then Chief Koch's notice that the Township would not provide an officer a clothing allowance. (5T140; 20T108-109; CP-31). Since becoming a Delegate in 1992, Shanosky had filed two grievances, at a time when few grievances had been filed by the PBA compared to other towns. (20T94; 20T109-110). Kochel considered the second grievance to be another officer's grievance, not Shanosky's grievance. (20T109; 20T110). Kochel disagreed with that other officer's position and the PBA filed for arbitration. (20T110-111). On December 7, 1993, the PBA attorney wrote to the arbitrator to inform her that the matter had been resolved. (20T112; CP-31). I infer that the matter was resolved with Kochel in favor of the PBA.

On December 7, 1993, Shanosky received a counseling session from Sergeants Miller and Newman to "direct more attention toward traffic enforcement since his total number for summonses issued has decreased." (R-18). In the same document, his supervisors note that Shanosky has shown that he has the ability to lead since he had taken the position of PBA delegate. (R-18).

On August 13, 1995, Shanosky received an admonishment from then Sergeant Amodio for starting his duty at 11:45 p.m. instead of 11:00 p.m. (R-13).

On January 10, 1996, then president of the PBA Faller, and Shanosky, wrote to Kochel regarding the calculation of injury leave benefits. (CP-32). Shanosky testified that this was a grievance and that the PBA had filed for interest arbitration for the 1996-1997 contract wherein he was the lead negotiator for the union. (5T140-141). Kochel agreed with the union and took appropriate action. (20T113). I infer that Kochel worked cooperatively with Shanosky and Faller. I therefor find that Kochel found in favor of the PBA and do not infer any animus.

On January 24, 1996, Shanosky wrote to Kochel to initiate a grievance regarding Chief Koch's decision about an injured officer's time while on injury leave. (5T146-147; CP-36). Kochel agreed with the PBA and asked Koch to rethink his position and the matter was resolved on February 7, 1996. (5T147; 20T114-115).

On January 31, 1996, Faller and Shanosky wrote to Kochel to grieve time docked from officers who stayed home during a blizzard that occurred on January 8. (5T143; 20T115; CP-33). On February 7, 1996, Kochel found in favor of the PBA. (CP-33). I infer that Kochel worked cooperatively with the union and do not infer any animus.

On February 14, 1996, Shanosky received a counseling session for low motor vehicle enforcement. (R-19). Since January 1996, he had issued two summons, whereas in 1995 the Department's average was 125 written summons. (R-19). He responded that he was a low ticket writer and had been involved in several time consuming investigations. (R-19).

On February 29, 1996, Officer Resetar received a counseling session from then Sergeant Amodio about unfinished tasks and a sarcastic attitude. (CP-60).

In March 1996, Shanosky received a counseling session wherein he was informed that he had been repeatedly advised that his motor vehicle enforcement was very low. (R-20). His supervisor noted that although Shanosky was doing an outstanding job in criminal investigation, motor vehicle enforcement could not be ignored. (R-20).

On March 20, 1996, Kochel upheld disciplinary charges brought by D'Esposito against Patrolman Friend and imposed a two-day suspension. (20T102-103; 21T8; CP-78). In his disciplinary decision, Kochel noted that Shanosky was a witness who admitted having no familiarity with a certain handbook, who had a vague recollection of another officer who was in a similar situation, and who had suggested that Friend should be sent to a defensive driving school rather than punished. (21T9-10; CP-78, pp. 3, 4, 8). Kochel considered Shanosky's suggestion and found that the

taxpayers should not be burdened with the costs of the school while also losing the patrolman's services. (CP-78, p. 8). Friend appealed and while the court upheld the findings, the judge reduced the suspension to a written reprimand. (21T9; 20T104-106). I find that D'Esposito sought to discipline Friend and that Kochel issued a well considered determination finding that D'Esposito had proven his case against Friend. D'Esposito was a member of the SOA and he prosecuted the disciplinary action. I do not infer that Kochel had any animus towards any member of the union regarding D'Esposito's, a union member, discipline of Friend, also a union member.

On June 6, 1996, Shanosky received an admonishment for his serious deficit in motor vehicle enforcement which was far below the police department's average. (R-21). At that time, he had already been with the department for several years and had been approached by several supervisors "as to his attitude towards the area of motor vehicle enforcement." (R-21). His supervisor also stated that Shanosky "must recognize the fact that motor vehicle enforcement is part of his assigned duties.... No matter how insignificant he may personally feel, it is a duty that must be performed." (R-21). Furthermore, wrote his supervisor, if Shanosky's "enforcement continues to be significantly low[,] his upcoming evaluation can be [a]ffected in his inability to accept supervision...." (R-21).

On October 30, 1996, Shanosky called the police department to say he would be late for work and received an admonishment for reporting late for duty. (R-22).

On June 21, 1997, Shanosky received a counseling session for the manner in which he checked buildings in his assigned zone. (R-23). A burglary had occurred at a bank which was highly visible, but it was not discovered by Shanosky. (R-23).

In 1997, the Department conducted a promotional process for the rank of Sergeant in which 24 officers participated. (21T17-18; CP-17). Fallor and Pangaro dropped out of contention in the first round. (21T19; CP-17). During this time, Shanosky was PBA delegate. (1T57; 18T70). Shanosky had the highest score on his tests, but was not promoted. (5T48; 5T152; 13T110; 17T74; 18T70; 21T20; CP-17). At that time, William Koch was the Chief and Kochel was the Township Manager. (5T48).

Shanosky was upset that he was not promoted and Ingenito reminded him that ticket writing was part of his job, but that he had been below standards for ticket writing for a couple of years. (17T33-34). According to Ingenito, Shanosky's view was that "he didn't feel that just writing traffic tickets was as important as making criminal arrests." (17T34; 18T70). Bruther testified that there may not have been anti-union animus at this time. (5T49). Eventually, Shanosky conformed to standards and was promoted to Sergeant. (17T34; 18T71-72). I find that

Shanosky's performance was below standards and that this was the reason he was skipped for promotion. No evidence was presented regarding a grievance or unfair practice charge being filed by Shanosky. I also find that once Shanosky performed to standards, he was promoted. Thus, I find that being skipped for promotion was based on performance standards and do not infer that there was animus against Shanosky.

On March 16, 1997, an Arbitrator issued an Opinion and Award denying overtime pay to two officers for attending their disciplinary hearings. (5T143-144; 19T145-146; 20T116; 20T118-119; CP-34). Chief Koch, Captain D'Esposito, and Kochel appeared for the Township; Shanosky appeared for the PBA. (5T144-145; 20T116-117; CP-34). Faller was the PBA president. (19T146). I infer that both parties presented their cases as required by their respective positions. I therefore find that this is the usual course of business in labor relations matters.

On April 16, 1997, Shanosky and the PBA attorney had met with Chief Koch and Kochel regarding the Chief's restriction of overtime, and settled the issue. (20T121-122; CP-35). The PBA filed an unfair practice charge and on May 31, 1997, the Township entered into a settlement agreement regarding this overtime issue, and the charge was withdrawn. (5T146; 20T121-122; CP-35, pp. 4-5). I find that Chief Koch denied overtime. I infer that

Kochel was amenable to settling the matter. I also infer that the matter was settled by Shanosky to the PBA's satisfaction.

In the 1998 promotional process for Sergeant, Shanosky was the top ranking candidate. (5T153; 6T121; C-37). According to Shanosky, during the Manager's interview, Kochel told him that he (Shanosky) had "poured too much vinegar" into a pension issue. (5T154). On June 21, 1997, Kochel promoted Shanosky to Sergeant effective in 1998. (5T119; 5T148; 5T153; 6T121; 13T110-111; 17T74; R23-24). Shanosky had filed a lawsuit regarding his pension issue Shanosky in 1991, which had occurred seven years prior to the Manager's interview. It is not clear if Shanosky meant Kochel was referring to this issue. If this is what Shanosky is referring to, I find that the lawsuit did not name Kochel as a defendant and I therefore do not credit Shanosky's statement.

Due to the promotion, Shanosky became a member of the SOA. (1T152; 5T119; 5T148; 6T8). He testified that he focused his energies on his role as a supervisor rather than the union. (5T156). Nevertheless, D'Esposito had introduced him to the SOA members as a negotiator whose experience would benefit the members. (6T9). Shanosky testified that he had limited contact with Kochel. (5T156). I infer that there was no animus during the limited contacts between Shanosky and Kochel.

After Shanosky was promoted to Sergeant and a member of the SOA, Faller became state delegate. (19T19). Faller was sergeant-at-arms for the state PBA and co-chairman of its bylaws committee. (19T28). No other delegate from the local PBA had ever been appointed to the PBA's state executive board. (19T38-39). Faller's relationship with Shanosky was good until Faller took over the delegate position from Shanosky. (19T50; 21T43-44). Faller excelled in the PBA and testified that Shanosky did not. (19T50). When Faller was president of the PBA, McDermott^{5/} served as the treasurer until he was promoted to Sergeant. (19T51). Faller appointed Patrol Officer Todd Rue as the new treasurer. (19T51). However, Shanosky told Friend that he should be the new treasurer; Faller told Friend that he, not Shanosky, ran the local. (19T51; 19T154). I infer that both Shanosky and Faller took pride in their roles with the PBA. Despite the fact that Shanosky was not a member of the PBA, I infer that he tried to influence a PBA member.

On July 21, 1998, according to Shanosky, he sent an email to Faller, who succeeded him as the PBA delegate. (22T13; 22T124; CP-82). Faller testified that he did not recall who sent him the email or whether this email was sent to him during the midst of

^{5/} McDermott was hired by the police department on March 12, 1979, promoted to Lieutenant on April 25, 2005, and promoted to Captain and assigned as commander of the operations division on June 5, 2006. (R-10).

contract negotiations. (22T13-16). Shanosky testified that the email reflected a breakdown of a proposal that he sent to Faller; he ended his email with "glad [I]'m not the delegate to explain that one." (22T124-125). I infer that the reference to "that one" may be Kochel because negotiations would be with him. Shanosky was promoted in June 1997 thus becoming a member of the SOA and testified that he had little involvement with the SOA, yet he prepared a proposal for the PBA and decided to share it with Faller. I infer that it was important to Shanosky to maintain some control of the PBA even though Faller was in charge of the PBA.

Shanosky testified that at the Policeman's Ball in 1998, Kochel approached Shanosky and asked him how it felt to be in control of all the unions in town and "threatened" Shanosky for speaking to the other union heads. (5T154; 7T80). This testimony is not corroborated and I do not credit the inference to a threats.

On June 16, 1999, Earl Gifford ("Gifford") received a personal performance notice regarding his mishandling of a manslaughter trial. (7T6-9; CP-55, p. 14). On February 15, 2000, Gifford received an overall rating of satisfactory in a performance evaluation prepared by Pembleton, and endorsed by D'Esposito and then Chief Swannack. (7T6-9; CP-55, p. 14).

EVENTS FROM 2000 THROUGH 2004

On May 18, 2000, Shanosky received an admonishment from D'Esposito for failing to replace the tape on a mobile video recorder despite being notified by one of his officers. (R-11).

On September 25, 2000, Shanosky received an overall rating of superior in a performance evaluation prepared by Pembleton and endorsed by D'Esposito. (CP-51, p. 8).

On January 26, 2001, Shanosky received a counseling session from D'Esposito regarding his lack of regular, formal counseling sessions of officers. (R-24). D'Esposito noted that the counseling sessions were an integral part of the performance evaluation system, especially if an officer's current performance, if continued, would result in a less than satisfactory rating. (R-24).

On September 10, 2001, Shanosky received an overall rating of superior in a performance evaluation prepared by Pembleton and endorsed by D'Esposito and Swannack. (CP-51, p. 8).

Once negotiations for the 2001-2003 contract started in 2001, Shanosky became involved with the SOA. The negotiating committee was comprised of D'Esposito, Pembleton, Layton, and Shanosky. (6T10). He testified that his relationship with Kochel remained adversarial and tense. (5T156; 6T9; 6T11). At the negotiations table, Kochel, according to Shanosky, ignored him and directed his comments to D'Esposito, who was the lead

negotiator at the time. (5T157; 6T11). The 2001-2003 contract was reached by D'Esposito and Pembleton. (5T157). I find that Shanosky's testimony is credible regarding his perception of his interactions with Kochel. I also find that because D'Esposito was the highest ranking person on the team, he was the lead negotiator. I therefore find that it was appropriate for Kochel to direct his comments to the leader of the union's negotiating team. I do not infer that Kochel was showing animus towards Shanosky in particular or the union in general.

Effective April 24, 2002, then Chief Swannack issued a Standard Operating Procedure ("SOP") #92-002c regarding Promotional Criteria for the positions of Sergeant, Lieutenant, and Captain. (CP-3). Candidates for promotions submitted to an interview with the Township Manager. (CP-3, §§92-002.3.1.5.3 and 2.3.2.3.4). In that process, the Chief submitted the names of the top three finalists to the Township Manager with a recommendation for the promotion. (CP-3, §§92-002.3.1.4, 2.3.1.5.2, 2.3.2.3).

On August 13, 2003, Shanosky obtained an overall rating of outstanding in the performance review prepared by Pembleton, reviewed by D'Esposito, and endorsed by then Chief Swannack. (6T131; CP-50, p. 6).

HEALTH BENEFITS TASK FORCE

On October 22, 2003, Kochel formed a committee to discuss potential post-retirement health benefits, which became known as the Health Benefits Task Force ("Task Force"). (1T81; 5T155; 5T157-158; 6T17; CP-39). Kochel organized the Task Force shortly after Shanosky dropped into his office to discuss a richer set of retiree health insurance benefits for police officers. (20T32-33). At the time, Kochel and sworn police officers had retiree health benefits. (21T22-23). Rather than limit the discussion to police officers, Kochel decided to include all representatives of Township employees and authored the agenda for this Task Force. (6T17; 21T23; 20T32; 20T34; CP-39). Kochel met with the heads of the Township's departments to seek their participation in the Task Force. (20T34). Representatives of all employees, including the PBA and SOA, were members of the Task Force. (1T83). Kochel did not choose the specific employees who represented the unionized and non-unionized employees. (21T24). Shanosky represented the SOA and Friend represented the PBA on the committee. (1T83; 5T155; 6T6; 21T24).

Kochel testified that at the kickoff meeting for the Task Force, he "said to the group that they may or may not be comfortable with me being there during the course of the subsequent meetings, and I walked out saying that they should discuss that and let me know if they would like me to be part of

future meetings or not." (20T35; 21T157; 21T167-168; CP-58).

Kochel testified that he voluntarily removed himself from the meeting in order to let the representatives discuss his participation on the committee. (21T26-28; 21T157; 21T167-168 CP-58 at p. 4). According to Shanosky, the Task Force members voted to remove Kochel from the committee and asked Shanosky to so inform Kochel. (5T159-161; 6T5; 6T18). Friend testified Kochel returned to the room where the committee was meeting and Shanosky told Kochel that he was not wanted on the Task Force and that Kochel was startled and left the room. (1T87; 20T35-36).

However, Shanosky testified that he went to Kochel's office, knocked on his door, and told him that the committee would prefer to meet without him present; Kochel testified that he not only expected that preference, but was also hoping that he would not have to participate. (20T35; 21T27-28). Kochel also testified that he would not have prepared such a detailed agenda if he was going to be present to direct things in subsequent meetings. (21T25).

Shanosky testified that he was the leader of the Task Force. (6T6). Shanosky described his involvement as "spearheading the [Task Force's] efforts." (6T6). Friend testified that Shanosky took the lead on the Task Force. (1T83). Shanosky testified that at the first meeting Kochel informed those present that the Township did not have to provide the same

health benefits to all employees Township-wide, that he could apply different levels of coverage for each independent group, and he would negotiate with each group separately. (5T158-159).

As the Township Manager, Kochel could organize all of the departments in the Township. I therefore infer that it was Kochel who initiated the Task Force. The purpose of the Task Force was to present their suggestions to Kochel. Having Kochel present would not permit the Task Force members to have free and open discussions about the benefits. I find that Kochel's testimony makes sense and is credible. I infer that Shanosky took the lead once Kochel left the Task Force meeting in order to allow the employees to discuss whether they wanted him present during their discussions. Kochel prepared the agenda for the Task Force and planned on meeting with each of the Township's department groups individually. I infer that Kochel was not upset about being asked not to return to the committee's discussions because it was his idea to have the Task Force decide if they wanted him present.

On November 5, 2003, Shanosky received a commendation from D'Esposito for doing a very good job on a search for a missing man. (8T32-33; CP-49).

On December 21, 2003, Shanosky received an admonishment for reporting late for work. (R-25).

In February 2004, Les Laffan ("Laffan") was the president of the PBA, Friend was the vice president, Bruther was a secretary, Murphy was a secretary, and Faller was the delegate. (1T71; 10T8).

On February 3, 2004, Ingenito gave Shanosky a commendation for his performance. (18T56). Ingenito characterized Shanosky as a "doer" rather than a complainer, that he should prepare for promotion to Lieutenant, and that he was an excellent supervisor. (18T57-58). In July 2004, he thought Shanosky could replace him as the training coordinator. (18T59-60).

POLICE STUDY

Robert Swannack ("Swannack") was promoted to Chief of the Township police department by Kochel in 2000.^{6/} (10T33). Swannack was promoted from Deputy Chief to Chief by Kochel without going through a promotional process. (10T18; 10T26-27; 10T35; 14T52). The decision to promote Swannack was based upon an agreement among five lieutenants to waive the promotional process in order to have him appointed as Chief. (10T18; 10T26-27; 10T35; 14T52). Friend testified that Swannack was not

^{6/} I take notice that Neil Tantum served as Chief of the Department of Police from 1972 through 1988, and that Kochel promoted the following police officers to rank of Chief: Joseph Torchia, who served as Chief from 1988 through 1991; William Koch was Chief from 1991 through 2000; Robert Swannack from 2000 through 2005; and, Antonio V. Amodio from 2005 through 2012.
(<http://www.oceantwp.org/content/5939/6163/6166.aspx>; see also, 19T46; 20T5-6).

subject to a probationary period. (1T70). Kochel testified that Swannack served a six-month probationary period. (20T24). Kochel appointed Swannack as Chief, therefore, I credit his testimony because he was in a better position to know.

Swannack had been Deputy Chief in Charge of Administration under former Chief Koch. (20T8). However, after Swannack's promotion to Chief, he never filled the Deputy Chief position he vacated nor the second Captain's position. (10T98). Kochel testified that Swannack "was not what I would characterize as an ideal manager of operations or people" and became disillusioned with his "lack of exercising strong management skills" within his department. (20T8; 21T46-47). Kochel knew there was a lot of dissatisfaction regarding the operation of the police department. (20T16).

Amodio testified that there were many complaints by the officers on how the police department was run, including criticism leveled by Shanosky. (10T10). Amodio testified that Swannack let the staff do as they pleased. (15T70-71). He was a laissez-faire type of manager who made knee-jerk or off-the-cuff decisions without thinking of the consequences of his decisions. (15T70-72; 17T132; 18T3). He was also lax in enforcing discipline. (17T159; 18T3). Amodio also testified that there was a lack of communication between management and members of the department, and the union. (10T115-116; 16T49). During

Swannack's tenure, he (Swannack) scheduled only one department meeting, which was shortly before he retired so that he could have a photograph taken with the department personnel. (10T116; 11T4; 16T49). Swannack had only budgeted \$6,000 for training for the department in 2005, the first year of Amodio's tenure as Chief. (10T103). I find that Swannack exercised very little managerial control over the police department.

In February 2004, the Township announced a plan to conduct a study of the police department ("Police Study"). (1T71-72; 10T7; 20T15-16). The Council wanted the Police Study because "the town has grown and we want to know if we have enough staff, enough police officers, etc." (R-27, p. 3).

In 2004, Kochel was an outside consultant with Jersey Professional Management ("JPM"). (20T12; CP-64). Kochel joined JPM in 1989 as a consultant to municipalities regarding police assessment centers and promotions. (20T81; CP-64). Each of the approximately six times he worked for JPM he obtained the prior approval of the Council. (20T12-13; 20T82-88). No ethical concerns were raised by the Council regarding his outside consulting. (20T13). His speciality was police assessment centers and promotions and he performed two police department assessment centers for the Township which was less than he did for other towns. (21T14-16). In 2010, Kochel assumed the title of Vice President/North Jersey of JPM. (20T83).

With the approval of the Township Council, Kochel retained Robert Casey ("Casey") and Thomas Michaud ("Michaud") from JPM to conduct the Police Study. (20T16; 20T84). The Council was aware that Kochel had known Michaud^{7/} for several years and no ethical considerations were raised about the selection of Casey and Michaud to conduct the Police Study. (20T18; 2T85). Michaud was the Princeton Police Chief and a former President of the State Chief's Association, and Casey had retired as a municipal manager. (10T8; 20T16-17; 20T84).

In March 2004, the PBA executive board asked former Chief Swannack if they could provide input to the consultants who were conducting the Police Study; the request was granted. (1T74). Michaud and Casey interviewed members of the PBA executive board. (19T69-70). They met with every supervisory member of the police, interviewed the executive board of the PBA and civilian personnel, toured the building, and reviewed all the rules and regulations, the standard operating procedures, the budget, training manuals, training records and some personnel files. (10T8; 10T11). The Police Study listed concerns about, among others, accountability, long-term tour switching, and the permanent midnight shift . (5T16; R-3 at pp. 10, 24).

^{7/} Michaud joined JPM in 2002 as a consultant for police management services. (CP-64). Casey also worked for JPM. (10T8; 20T16-17; 20T84).

Friend and Amodio testified that the midnight shift was an experiment started by former Chief Swannack in or about 2003. (1T99-100; 10T59). Swannack wanted an increased presence at the college and reminded the officers that his wife was an employee at the school. (13T77-78). The officers who are on duty at night deal with more serious situations such as intoxicated people and assaults. (16T46). Performing their duty at night in the dark can be quite dangerous. (16T46).

Friend testified that long-term tour switching had existed for years and permitted officers to have a regular shift of duty. (1T102-103). He stated that he had worked day shifts for a long time. (1T104; 10T55). Sergeant Resetar was the supervisor for the midnight shift during the first year of its existence (2003), but did not volunteer as the supervisor the second year and there was no supervisor the second year. (1T101; 6T62; 11T26; 12T12; 13T75; 15T62). As a result, there was no direct supervision nor continuity of supervision on the shift. (11T28; 13T75-76). This led to a lack of effort on curtailing unruly college student behavior. (12T12). Amodio believed that the midnight shift was not beneficial to the police department because it was not conducive to proper supervision and there were performance problems, which the Police Study confirmed. (10T59; 10T61; 11T33; 12T10). Ingenito agreed with Amodio's assessment and referred to the steady midnight shift as a "department within a department"

because the officers were isolated from the rest of the police department. (15T59). I find that Swannack started the midnight shift in 2003 and Amodio banned it in 2005; thus, I find that it had only existed for two years. I also find that the midnight shift was an experiment and thus there was no reasonable expectation that it would be permanent.

In 2004, there were three patrol Lieutenants: Ingenito, Newman, and Pembleton. (17T130). There were three tours of eight hours each, and the lieutenants were expected to rotate monthly among the tours. (17T130). Every three months, the lieutenants would be assigned to the midnight tour. (17T133). Swannack did not want the lieutenants to just work day shifts. (17T132; 17T147). Swannack did not enforce his own instructions and D'Esposito, who was the Captain of the patrol division, did not follow them, and the Lieutenants disregarded Swannack. (17T132; 17T147-148).

There were approximately 80 midnight shifts in 2004 that were assigned to Ingenito. (17T134). Ingenito testified that he had worked his midnight tours for the most part. (17T146). The March 2004 patrol schedule indicates that Ingenito worked on only a few midnight shifts. (17T135-138; CP-69). Ingenito did not work most of the midnight shifts in June 2004. (17T139-141; CP-70). He did not work midnight shifts during September 2004. (17T142-143; CP-71). Likewise, he worked one midnight shift

during December 2004. (17T143-145; CP-72). I find that Ingenito's testimony was inconsistent with the patrol schedules. I do not, however, infer that the inconsistency is a result of confusion rather than animus.

On July 25, 2004, JPM provided the Police Study to Kochel. (10T12; 10T32; 10T73; 17T79; 20T19; R-3). Friend testified that the Police Study was provided to the Township in September 2004. (1T74). I find that because the Police Study was provided directly to Kochel, his date of July 25, 2004 is the correct one. (R-3).

JPM reported in its Police Study that all of the concerns that the supervising officers had were justified. (15T101). These concerns included the elimination of long-term tour switching and steady midnight shifts. (15T101-102). One of the JPM recommendations was that the department be reorganized. (R-3 at p. 18). Another JPM recommendation was to use independent assessors to select the new Chief of Police. (R-3 at p. 20). JPM recommended that the new Chief develop and communicate a vision for the department of police. (R-3 at p. 9).

JPM made no specific mention of ethics problems occurring in the police department. (R-3). However, the Police Study was "not intended to be all encompassing. It was intentionally restricted to an overview of the department using the existing leadership as a primary information resource." (R-3 at p. 2).

The PBA, SOA, and a local attorney requested copies of the Police Study. (10T12; 10T16). The unions also wanted copies of the Police Study because they were requesting more police personnel. (10T13-14). The unions' other concern was whether a Chief or a civilian director would be appointed to direct the department. (10T14-15).

Kochel declined to release the Police Study to the PBA executive board because it was going to be used in the Chief promotional process. (10T30; 15T100; 16T15; 20T19). He testified that the candidates would have to critique the Police Study and "there would be no way of the assessors being able to determine if the information that was in the candidate's essay was generated by his own creativity or his own idea." (10T30). Friend said that Kochel refused to provide a copy of the Police Study to the PBA because it might be detrimental to the promotion process for Chief. (1T75). The PBA believed that the Police Study was not released by Kochel because it contained a recommendation that more officers be hired. (19T77).

An attorney who lives in the Township filed an Open Public Records Act ("OPRA") lawsuit seeking release of the Police Study. (3T25-26; 20T20). The court determined that the Township was justified in delaying the full release of the Police Study pending the completion of the Chief promotional process and was to be released immediately after a Chief was selected. (20T20).

I find that Kochel's determination to delay release of the full Police Study was justified under the circumstances, as found by the court, and do not infer anti-union animus in general or in particular towards Shanosky or Bruther. I find that the Police Study was in fact used as Kochel had testified and therefore his testimony regarding his rationale for delaying release of the Police Study is credible. I, therefore, do not infer animus.

On April 19, 2004, Bruther received a counseling session regarding the duties expected of squad members. (CP-22 at p. 6). On April 23, 2004, Bruther received a commendation certificate from Swannack and D'Esposito for his teamwork and tenacity in looking for a missing 78-year old man. (CP-20). On October 13, 2004, Chief Swannack received a letter of appreciation regarding Bruther. (CP-22 at p. 9). Admitted into evidence were five letters from citizens expressing their appreciation of Bruther. (CP-21 at pp. 5-6).

On July 13, 2004, Shanosky was the supervisor on duty who reported the inappropriate conduct of other officers which was captured on mobile video recorders. (9T69-70; CP-49). He received a commendation for reporting the incident. (9T71-72).

On July 22, 2004, Shanosky obtained an overall rating of superior in his performance review; Ingenito and D'Esposito signed the evaluation. (CP-14 at p. 11). He received the top score for "effectiveness under pressure." (6T124-125; CP-49).

Murphy filed a grievance in which Shanosky represented him, and Kochel and former Police Chief Koch represented management. (1T12; 2T14). No evidence was presented regarding the timing of the grievance or the disposition. I infer that the union and management representatives performed their respective duties. I do not infer animus.

On September 13, 2004, Shanosky admonished Patrolman Michael DeSimone for sleeping on duty during a midnight tour. (9T53; 9T62-63; 9T65-66; 12T10-11; R-7). There was no supervisor on the steady night shift. (9T54-55; R-8). According to the weekly patrol schedule for September 13 through 19, 2004, squad number two was on that rotation and the supervisors assigned were Ingenito, Shanosky, and Gifford. (9T56). On September 13, 2004, Shanosky and Gifford were on duty. (9T58). Resetar was on squad number three and had no supervisory responsibility for the midnight shift on that day. (9T58-59).

OCTOBER 2004 TOWNSHIP COUNCIL MEETINGS

In October 2004, the PBA executive board members began attending Township Council meetings because a contract had not been settled, the PBA believed that more officers were needed, they wanted it known that a new Chief be promoted from within the department, and they wanted a copy of the Police Study. (19T70). Faller was the designated spokesman for the PBA. (19T72). During

2004 and 2005, Faller had a good working relationship with then Mayor Larkin. (19T74; 19T156).

On October 6, 2004, the Township had a Council meeting, which Mayor Larkin and Kochel attended, during which it discussed the police department and Police Study. (16T7; R-27). Members of the PBA executive board also attended the Council meeting; PBA delegate Faller was the spokesperson for the union and Shanosky echoed Faller's statements. (20T22; 20T26; R-27; R-57). Faller confronted the Council members, including Kochel, about the process for hiring a new Chief, the PBA's desire for a copy of the Police Study, and staffing. (16T8; R-27). The PBA wanted the Police Study released in its entirety and were also against the proposal that the new Chief submit to a probationary period because they believed that he would be held hostage by Kochel. (20T23; 20T25).

Kochel wanted a one or two year probation for the new Chief, because the Chief would need that much time to implement changes in the department. (20T23-25). The Council minutes show that Mayor Larkin noted twice that if a person becomes Chief without a probationary period, the Township would not be able to get rid of him. (R-27). He wanted someone to have to prove that he could run the police department before becoming the Chief. (R-27). I infer that the Council was aware that Swannack had not undergone a probationary period and remained as Chief until he retired.

Faller asked the Council for an unredacted copy of the Police Study; the regular meeting minutes of the Council's meeting memorialize his request. (1T78; 14T29; 16T7-8; R-27). Mayor Larkin stated that an unredacted copy of the Study would be made available once the Chief was selected. (R-27). There was a promotional process for Chief underway at the time and the Council wanted the candidates to make independent assessments of the police department without being clouded by the Study. (R-27).

For the next October 2004 Council meeting, the PBA mailed out flyers to the townspeople requesting their attendance in support of the union; there was standing room only at the meeting. (19T78; 19T80). Faller was again designated the spokesman for the PBA. (19T77-78). The PBA sought the Council's commitment to increase the size of the police department and to promote a Chief without a probationary period. (19T79). Faller did not know at the time that there existed a six-month probationary period. (19T85).

On October 27, 2004, the Council had another meeting, attended by the Mayor and Kochel, to again discuss the police department and selection of a new Chief. (1T77; 6T44; 12T3; 16T3; 21T29; CP-57). Faller, Friend, and Shanosky also attended the meeting. (1T77; 16T4-5). Faller engaged in heated exchanges with members of the Council confronting them, in particular Kochel, about staffing and whether an officer or a civilian would be

heading the police department. (16T4-5; 16T12-13; CP-57). Amodio testified that he recalled that Faller spoke "at one of the [Council] meetings." (12T4-5). Ingenito testified that he attended the Council meetings to show his support for the PBA. (16T13). According to Ingenito, Kochel did not appear angry at the confrontations. (16T14-15).

Shanosky and Faller made statements to the Council criticizing the idea of a probation period for the new Chief. (1T79; 6T45-48; 7T87-88; 15T84; 15T94; 22T10; CP-57 at pp. 1-2). As he had been on October 6, 2014, Faller was the main spokesperson for the PBA at the Council meeting. (16T5; CP-57 at pp. 1-2, 4). Shanosky spoke about the probationary period for the new Chief, but he was not the designated spokesperson. (2T23; 2T25; 19T82; CP-57). He stated that the probationary period for Chief was not necessary because this was "the strongest field of contestants for this position in the history of the Police Department." (CP-57 at p.2). Shanosky spoke for about five minutes during the one hour meeting. (19T83-84). Shanosky testified that "his pleas obviously fell on deaf ears. [The Council] went and established a one year probationary period for the Chief of Police." (6T51). I find that neither Faller nor Shanosky were aware that previous Chiefs were subject to probationary periods. I also find the Township's rationale for a

probationary period to make sense and therefore do not infer animus.

Faller characterized his own demeanor at this Council meeting as aggressive and Shanosky's as cerebral. (19T82; 19T149). Shanosky was not the delegate for the SOA or on its executive board. (14T29; 15T96). Ingenito did not consider Shanosky to be the de facto SOA president, nor did he know who the lead negotiator was for the SOA. (15T96; 18T21; 18T42). Although Shanosky perceived himself as taking on a leadership position at the Council meetings, the record shows that Faller was the main spokesperson. I find that it was Faller who not only took the lead but also did so in a forceful manner.

Friend testified that an activist resident called for Kochel's resignation. (1T81; 6T49; 10T17). Amodio testified that he thought Faller called for Kochel's resignation because a newspaper article had a picture of Faller, but acknowledged that his testimony in this regard contradicted the minutes of the meeting. (10T17; 12T3-5; 13T48-49; 14T85-86). Bruther testified that the activist resident in the audience, publically called for Kochel's resignation (2T24; 4T62). Bruther applauded the demand for Kochel's resignation. (4T62). Kochel knows that Shanosky did not call for his resignation at the 2004 Council meeting, but knew that Faller applauded the call. (20T26-28). Faller thought the activist resident called for Kochel's resignation. (19T81).

The minutes of the Council meeting indicate that a Township citizen called for Kochel's resignation. (CP-57 at p. 4). Kochel testified that he attempted not to show any reaction to the call for his resignation, but admitted that it "stung a little bit." (20T27; 21T30). I find that a Township citizen called for Kochel's resignation. I infer that an applause of that call for was embarrassing yet Kochel maintained his composure. I do not infer animus.

The Police Study was ultimately provided to the PBA and SOA, but was 90-95% redacted. (1T76; 6T51). Amodio testified that Kochel's refusal to provide copies of the Police Study were not related to his opinion about the PBA because he provided an unredacted copy to the PBA, the candidates, and the Council once the promotion was made. (10T31-32; 20T30-32). The court upheld Kochel's determination to delay release of the Police Study. I therefore credit Amodio's testimony that there was no animus intended in delaying its release.

In or about November 2004, Kochel ran into Murphy in a stairwell. (20T35-36; 21T33). Kochel had hired Murphy and had a favorable impression of him, because he had honored his pledge to move into the Township. (20T38; 21T32-33). Kochel agreed that his memory of the call for resignation was still fresh in his mind. (21T34). Kochel remembers that Murphy had applauded the call for his resignation because Murphy was standing at the

center back of the room. (20T31-32). Kochel testified that Murphy asked him how he was doing and Kochel replied, kind of joking with him, that he was doing a lot better before he saw him clapping for his resignation. (20T38). Kochel's view was that he was just joking around. (21T35-36). He testified, contrary to Murphy's testimony, that he did not block Murphy's movement in the stairwell, nor did he tell Murphy that he was disappointed with that Council meeting or that he was not going to forget Murphy clapping for his resignation. (20T39; 21T34). According to Kochel, Murphy's memory of the stairwell conversation is inaccurate. (21T35).

According to Murphy, he encountered Kochel in a stairwell three weeks after the October 2004 meeting and Kochel told him he was disappointed in Murphy for clapping when someone called for his resignation and that he would not forget it. (2T26). Murphy reported this conversation to former Sergeant McDermott and then to Lieutenant Amodio, because he felt threatened. (2T30-31). Amodio testified that he spoke with Murphy and told him that Kochel was just joking and that Murphy agreed that it was nothing more than a joke. (14T35-36; 14T88; 14T90). Amodio transferred Murphy to the juvenile section because he was the only one qualified to do the job. (14T37). Murphy did not speak to Amodio for several months after that. (14T37). I credit Murphy's testimony that he felt that Kochel was not joking with him.

However, I do not infer that either Kochel or Amodio discriminated against Murphy because there is no record of adverse action taken against him nor did Murphy file a grievance or charge regarding the incident.

In his performance review for the period ending in 2004, Shanosky received an overall superior rating by Ingenito, approved by D'Esposito, for effectiveness under pressure, initiative, and training. (6T124-125; 18T54; CP-49). Some of the categories in which Shanosky received a superior rating were compliance with rules, accepts supervision, accepts responsibility, implementation of departmental policy, and maintaining records and counseling sessions. (18T102-104). Shanosky also received an admonishment on December 21, 2003, which was included in his performance review. (18T104).

Faller was the county conference chairman for the PBA from 2002 through 2004. (19T30; 19T39). Shanosky had also served as co-chairman for the county conference. (19T143). Faller attended meetings, which were authorized by his then immediate supervisor Shanosky, as well as Layton, Amodio, and former Chief Swannack. (19T31-32; 19T37). He was on the PBA's executive board for 18 years. (19T23).

Faller testified that in 2004 he ran for local delegate of the state PBA, a position that he needed to go forward for election as state vice president, but Friend decided to run

against him. (19T39; 19T52; 19T117). According to Shanosky, he spoke with Faller to convince him (Faller) to step down as local delegate; Faller denies that the conversation occurred. (19T52). According to Faller, if Shanosky thinks that he had "the privilege to consult with me and ask me to step down is a figment of ... Shanosky's imagination[;] that never took place." (19T53). As noted earlier, when Shanosky joined the SOA, he wanted Friend to be part of the state PBA. I infer that Shanosky wanted Friend to be the local delegate of the state PBA.

Shanosky and Friend had a mutual friend who was on the executive board of the state PBA who called officers in the PBA to vote against Faller in his run for vice president of the state PBA. (19T52; 19T118). Faller strongly suspects that Shanosky was the "mastermind behind the whole charade" which resulted in hard feelings against Shanosky. (19T52; 19T117-119). Shanosky never ran for a state PBA position. (19T42). Faller did not win the election, which began the demise of his career with the PBA. (19T40-41). Faller testified that he no longer harbored strong feelings towards Shanosky and has no interest in the outcome of Shanosky's charge. (19T120-122). I infer that Shanosky, who had wanted Friend to be on the state PBA, decided to campaign against Faller. I infer that Faller was not pleased with Shanosky.

In an undated, unsigned letter that Shanosky testified he authored in late 2004 and sent to Faller, Shanosky provided a

proposal for his consideration on behalf of the PBA. (22T125; 22T127; CP-81). Shanosky testified that he provided the document to the PBA in an effort to secure health care benefits upon retirement for the SOA members; at the time the SOA contract had not been finalized. (22T126). I infer that the SOA relied on the PBA to take the lead on this issue.

PROMOTION OF A CHIEF OF POLICE

(October - December 2004)

In February 2004, Swannack announced that he would retire in December 2004. (1T70; 10T33; 10T27; 13T119; 19T69). He went on terminal leave in October 2004, and his retirement was effective in December 2004. (6T50; 10T33; 10T111-112; 10T27; 13T119; 14T42-43). I find that Swannack did not serve as Chief for the last three months of his tenure. A new Chief of Police needed to be promoted.

On September 13, 2005, Captain D'Esposito informed the department that effective September 30, 2005 he was taking terminal leave until his retirement on January 31, 2006. (10T111-112; CP-15, p. 16; R-9).

The candidates for the position of Chief, who was to be installed in January 2005, were Captain D'Esposito and Lieutenants Amodio, Ingenito, Pembleton, Templeton, Quinn, and Newman. (8T7). D'Esposito was a member of the SOA. (6T51-52;

17T110). Pembleton had been a PBA delegate in 1988 and Newman a PBA president in 1989. (6T52-53).

Up until this point, Amodio rarely had contact with Kochel, which may have amounted to five times. (10T20-22; 12T18). He never socialized with Kochel. (10T93). The first time Amodio had contact with Kochel was for his promotion to Sergeant in 1993, the second his promotion to Lieutenant in 1997, three meetings regarding a take-home car, at the end of the fourth time he walked out saying uncomplimentary things toward Kochel, and the fifth was in August or September 2004 when former Chief Swannack asked Amodio to attend a Council meeting as his representative. (10T20-22; 10T93; 14T63-64). At the Council meeting, the mayor or deputy mayor asked Amodio for his input regarding the handling of an issue. (10T22-23). Kochel disagreed with Amodio's approach, but the Council overruled him. (10T23). Amodio had not been involved in the PBA or SOA. (6T52).

Ingenito was PBA president prior to Kochel being hired, but was not involved with the SOA. (6T52-53). Ingenito was promoted to Sergeant in 1983 and to Lieutenant in 1993; Kochel was not employed by the Township in 1983 and did not recuse himself from the 1993 promotional process. (20T53-54). Shanosky testified that Kochel and Ingenito were close friends who had vacationed together in Europe. (6T53). Kochel testified that he developed a friendship with Ingenito because they had mutual friends in

common, they had children of the same age, and their wives developed a strong friendship and bond. (20T51-52). Kochel was not involved in the day-to-day operations of the police department and Ingenito was in the patrol division rotating around the clock which meant that for two-thirds of the time he was not on duty at the same time as Kochel. (20T53). Additionally, they mutually agreed not to discuss work when they were socializing. (20T53).

In October or November 2004, Kochel met with each of the candidates for Chief to explain the promotional process and to discuss whether he should remove himself from the process due to his friendship with Ingenito; all the candidates felt comfortable with Kochel's involvement in the process. (17T110; 20T9-10). Despite the candidates' lack of concern about Kochel's friendship with Ingenito, Kochel told the candidates that he decided to hire outside assessors to evaluate and determine who would be the next Chief. (10T18-19; 10T35; 14T48-49). Amodio and Ingenito testified that Kochel wanted to avoid any suspicion of bias in favor of Ingenito. (14T49; 14T51; 17T109-110). Up until 2004, Kochel had not recused himself from any promotional process. (20T9). Kochel hired three assessors for the Chief promotional process: two police chiefs and a municipal manager; none of the three were from Monmouth County or worked for JPM. (10T34; 20T14; 20T86). Kochel testified that he "designed the entire assessment

center, came up with all of the exercises, [and] was involved in the administration of all of the phases of the promotional process." (20T10; 21T58-59). Kochel limited his role to that of a facilitator of the assessment center. (10T19). He was not involved in the final selection process. (20T10).

Kochel contacted every Lieutenant and Captain individually in writing and verbally to explain the promotional process for Chief, which included the running of an assessment center similar to the one used for the Lieutenant and Captain promotional processes. (10T18). The promotion process for Chief involved a written test, then verbal and written exercises, and the last was a take home exercise which required the candidate to write an essay about the Police Study. (10T28-29; 10T76-77; 16T15; R-5). Ingenito testified that he was provided a copy of the Police Study during the promotional process for Chief, as were the other candidates, and was asked to compare his thoughts with those in the report. (15T99-100).

Amodio submitted an 18-page essay for the Chief promotional process. (R-5). In that essay, Amodio wrote that the greatest weaknesses of the department were supervision, leadership, and planning. (R-5, pp. 2-3). Like the Police Study consultants, he recommended that the Department be reorganized from three to two divisions. (R-5, pp. 5-9). Although Amodio agreed with the problems identified by JPM, he did not agree with all of the

recommended solutions. (10T50; 10T88-90). He based his opinion on his observations and his 30 years of experience in the police department. (10T42).

Amodio believed that a Chief had to provide clear parameters as to what is expected from staff and that staff would "accept what is required, regardless if they are in agreement..." (R-5, p. 11). He recognized that while a Chief had full control over the Department's daily operations, "since the Manager is the Chief[']s direct supervisor, there must be an acceptable degree of loyalty." (R-5, p. 17). He also wrote that he would explore mutual interests and goals with the PBA President and Delegate. (R-5, p. 18). Amodio agreed with Police Study's assessment of scheduling, supervision, long-term planning, training, and accountability. (10T38; 10T42-44; 10T50; 10T87). Ingenito likewise had serious concerns about how the police department was operated under the previous Chief. (16T18-20).

The assessors evaluated the written exercises and observed the oral phase of the process, and made a recommendation for promotion of a Chief. (20T10-11; 20T15). The assessors unanimously recommended that Amodio be promoted to Chief, which Kochel adopted.^{8/} (10T36; 17T121; 20T14-15; 20T54; 21T58-59). In

^{8/} One of the assessors for the Chief promotional process was Chief Dan Livack from Franklin Township. (10T34). At the end of 2005 or beginning of 2006, Amodio saw Livack at a Chiefs' meeting. (10T36). Livack told Amodio that the three
(continued...)

December 2004, it is announced that Amodio was the new Chief of Police and that he was subject to a probationary period. (1T88-89; 6T50-51; 8T7; R-28).

Ingenito was promoted to Captain and assigned as Commander of the administrative division and also oversaw the patrol division and internal affairs. (17T158; 20T54; 21T58-59). D'Esposito testified that he was not disappointed about being skipped for promotion to Chief because he had decided in 2003 that his last year in the police department would be 2006. (8T46). Nevertheless, he told Amodio that he was thinking of filing a lawsuit about the promotion process, but did not institute litigation. (8T47-48; 10T111-112; 14T102). I do not infer animus because D'Esposito had announced his retirement prior to the promotional process and he did not proceed with a lawsuit when he was not selected Chief.

Swannack and D'Esposito were no longer involved with the department, and at the end of 2004 only five Lieutenants were in the department, including Amodio and Ingenito. (6T50; 10T112; 14T42-43). Ingenito testified that he and Amodio had a good working relationship, had adjoining offices, and ran the department together once the promotion to Chief was announced.

8/ (...continued)
assessors unanimously selected him Chief by because he exhibited an enormous amount of command presence. (10T36).

(17T125). Ingenito described Amodio as fair and level headed.

(17T125). I credit Ingenito's testimony because he worked with Amodio.

2004 ANNUAL REPORT

The 2004 Annual Report was signed by Amodio even though he did not take office as Chief until January 2005. (10T74; 16T27-28; R-4). The Annual Report reflects Chief Swannack's administration, but Amodio signed it because Swannack left prior to his actual retirement date. (10T74-76; 10T114; 16T27-28; 16T29-30). Each of the officers in charge of a bureau prepared his section of the report. (16T27). Amodio prepared the investigations portion of the report, Ingenito wrote the training portion, and D'Esposito and Swannack had prepared the remainder of the report. (16T30). D'Esposito and Swannack reported that the midnight shift was working fine. (4T31; R-4). Ingenito testified that the information in the 2004 Annual Report is statistical rather evaluative in nature. (16T31). I find that the 2004 Annual Report regarding Swannack's administration was not prepared by Amodio.

In December 2004, Amodio stayed late at work and noticed that monitors that were to be used to watch prisoners were used to watch ESPN with the knowledge of a Lieutenant and several supervisors. (10T130-131). This incident further motivated him

to finalize plans about getting lieutenants back on the night shift. (10T131).

In his comments in the report, Amodio introduced himself as the new Chief and spoke about his vision for the future of the police department. (16T28). His comments appear in the closing remarks section of the 2004 Annual Report, which are set forth here in their entirety:

The end of 2004 marks the end of the tenure of Chief Robert E. Swannack and the **beginning of a time of change** within the Ocean Township Police Department. Within the coming year, this department will see **changes** in structure and implementation of **new programs** as we prepare ourselves to deal with issues posed in today's society. Though there are **changes** on the horizon for the Ocean Township Police Department, the mission and tradition of service to our community will not change. (R-2 at p. 27; emphasis added).

I find that Chief Amodio intended to bring changes to the police department sooner rather than later, as reflected in his essay for the Chief promotional process. Given that Amodio wrote that the police department needed to be reorganized, he had a conversation to the same effect with Kochel before he accepted the promotion to Chief, and his similar comments in the 2004 Annual Report, I do not infer that the reorganization of the department was due to animus.

EVENTS DURING 2005

On January 1, 2005, Amodio officially took office as the new Chief of Police. (1T88). During his first year as Chief, Amodio

made many changes to the police department which had a financial impact on the Township's budget. (16T65-66). In addition to new hires and promotions, the training budget was significantly increased. (16T65). Amodio also added supervisors and implemented a special assignment unit. (19T87). Ingenito testified that Kochel was very frugal and demanded justification for all expenditures. (16T67). Under Amodio, police officers were made accountable to their supervisors and more discipline was meted than under prior Chiefs. (14T9). The Township had not had as much change in its police department as it did between 2005 through 2008. (13T112).

AMODIO'S PROBATIONARY PERIOD

There had only been one person who had not made probation and that was before Kochel started as Township Manager. (15T87). When Kochel commenced his tenure as manager in 1987, he stated at a police department meeting that he would never allow a promotion without a probationary period. (15T87-88). During Kochel's tenure, all officers passed their probationary period. (15T88).

On January 12, 2005, Ordinance number 2006, which amended and supplemented the Ordinances of 1965, was introduced; it was adopted in February 2005. (1T63; CP-2). The Ordinance established the Township's reorganization of the police department. (1T63; CP-2 at pp. 1-2). Kochel then directed the newly appointed Chief Amodio to provide him with a restructuring

plan of the police department. (11T16). In restructuring the department, Amodio changed the number of shifts from three to two. (12T14). The Ordinance also set forth a one-year probationary period for newly promoted individuals, including the Chief. (1T63; CP-2 at p.4) .

Ingenito testified that Amodio's performance as Chief was not hindered by the probationary period and that Kochel did not put pressure on him about his actions. (15T86).

In Faller's opinion, the one year probationary period for Chief did not stifle Amodio's ability to lead the police department. (19T87). According to Faller, Amodio "was like a bull in a [c]hina shop, and he did what he thought was best for the police department regardless of what anyone else thought." (19T87). According to Amodio, Shanosky did not say that the probationary period would handcuff the Chief or that the Chief would be giving control to the Township Manager. (14T96-97).

In January and February 2005, Laffan was PBA president. (19T154; 22T51). Unbeknownst to Amodio, his restructuring plan for the police department was presented to the Township Council on January 21, 2005. (11T17; CP-4). On the same day, the Asbury Park Press newspaper reported that PBA president Laffan said, that because of Ordinance 2006, the Chief would be handcuffed and the Manager would be running the police department. (1T90; 1T94; 6T56-57; 11T9-11; 14T96; CP-4; R-6).

Faller could not recall if Amodio had summoned him and Friend to his office to discuss the press article. (22T54). He did recall speaking with Amodio about the article and that the Chief was upset. (22T54; 22T56). Faller was unhappy that Laffan had gone to the press despite the PBA's commitment to speak with the Chief first about issues. (22T55).

On February 2, 2005, Laffan told the Asbury Park Press that the restructuring plan proposed in a Township ordinance, similar to the plan recommended in the Police Study, "handcuffs the Chief of police" because of the probationary period. (22T53; CP-4; R-6). The Asbury Park Press also called Amodio seeking his comments about his probationary period. (11T17). The newspaper quoted Amodio as saying that he was "confident that he will pass the probation." (R-6).

Ingenito and Amodio thought Laffan had ambushed them by going to the press rather than speaking directly with them. (17T129). Amodio asked Friend and PBA delegate Faller to come to his office to tell them he had been trying to get in touch with PBA president Laffan. (1T94). According to Friend, Amodio appeared upset and said that he ran the police department, not the Manager. (1T94-95). He wanted to schedule another meeting with Laffan in order to discuss the statements that appeared in the newspaper article. (11T13-15; 14T100). He also wanted to let him know that if the union had concerns about the police

department, they could come to Amodio rather than the newspaper. (11T19; 14T98). He also wanted to discuss the recently scheduled contract regarding compensatory time. (11T13-15; 14T100).

Amodio testified that he was disappointed that the union had ignored his effort to start a relationship with the union and instead complained to the press. (10T125-126; 11T12; 14T98; 14T101). Ingenito testified that the union had the opportunity to mention their concern about who was running the department at their upcoming January 28 meeting, but chose instead to talk to the newspaper. (16T90). Amodio had wanted to schedule a meeting with the union well before January 28, but their schedules did not synchronize with his; however on the day of the department meeting, Amodio was able to meet in advance with members of the PBA executive board. (1T96; 6T57; 10T127; 11T5). Present at the January pre-departmental meeting were Amodio and Ingenito, as well as Laffan, Faller, Bruther, and Friend. (11T20; 16T91-92). Amodio testified:

[T]he first thing I brought up was [Laffan's] comments to the Asbury Park Press, that I was disappointed that if he had that concern that the manager was going to run the police department and not the chief, the purpose of me calling that first meeting was to express those type[s] of concerns and give me an opportunity to address or at least respond to them, maybe eliminating any concerns that he had. (11T20).

According to Amodio, Laffan admitted that he should not have made the comments. (11T20-21). Amodio agreed with Laffan that the reporter was very tenacious. (11T21; 16T94).

On December 31, 2006, Amodio successfully completed his probationary period. (6T117).

LONG-TERM TOUR SWITCHING AND MIDNIGHT SHIFT

On or about January 7, 2005, Amodio initiated a meeting with the PBA executive board. (1T89; 4T29; 4T65; 10T119-120; 14T102; 16T51). Present at the meeting were Amodio and Ingenito, and on behalf of the PBA there was Laffan, Friend, Murphy, Bruther, and Faller. (10T119-120; 16T51). Amodio and Ingenito testified that the purpose of the meeting was for the Chief to start a relationship with the union so that the PBA could raise any issues to the new administration. (10T120; 16T50). Amodio and Ingenito also testified that the PBA only raised three issues at the meeting. (10T121; 10T128; 16T50-51). The three issues were: an unresolved disciplinary matter, Hepatitis B shots for officers, and a jacket that would accommodate weapons. (10T121; 11T24). Amodio was amenable to looking into the three issues raised. (10T121).

According to Friend and Bruther, Amodio informed them that he would not be making major changes in the near future. (1T89; 4T29; 4T65; 10T119-120; 14T102; 16T51). According to Amodio and Ingenito, the Chief never said that there were not going to be

any major changes, nor did the union even mention it. (10T122-124; 10T127; 16T52-53). He did not tell the PBA the specifics of the changes he wanted to make because he was still discussing the issues with his two Captains, he did not want to provide the information in a piecemeal fashion, and he had not officially formalized his position. (10T124; 10T134; 11T37-38; 16T51-52). Additionally, he wanted to give the entire police department an opportunity to ask him questions at the January 28 meeting where he would provide the "total picture" to the staff himself. (10T133-134). He wanted all the officers in the police department to hear directly from him what he had planned for the department. (10T134; 11T16). He testified that he did not discuss his plan with the union, but his motivation was not due to anti-union animus. (10T125; 14T105-106).

Amodio knew that Faller had read the Police Study and anticipated that the PBA executive board members would ask him questions about the recommendations in the Study. (10T128-129). JPM interviewed all of the supervisory personnel and the PBA representatives for the Police Study, and by this time the PBA executive board had an unredacted copy of the Police Study; thus the PBA was aware of issues in the police department. (16T56). Ingenito thought that the PBA would raise their concerns about midnight shift and long-term tour switching because of the Police Study. (16T55). However, the PBA did not raise those two shift

issues. (16T55). Amodio did not negotiate with the union regarding these two issues because the Police Study highlighted these as points of examination, the shifts were detrimental to the department, he had discussions regarding these issues prior to becoming Chief, and did not think it would be productive to discuss the issues with the union. (13T71). I credit Amodio's and Ingenito's testimony. Amodio had made it known in the 2004 Annual Report that he would be making changes. I also credit Amodio's and Ingenito's testimony that the PBA did not raise the shift issues with them even though they were aware that the issues had been addressed in the Police Study and had the opportunity to discuss them with Amodio.

On January 28, 2005, an hour before Amodio met with the entire police department, he informed the PBA executive board that he was eliminating the permanent midnight shift and long-term tour switching. (1T95-97; 11T20-21). He believed that Faller appreciated that one of the first tasks he performed was meeting with the union despite his full plate of duties. (11T22-23). Faller denied that Amodio's actions were the result of the press article. (22T56-57). However, he thought Amodio should wait until January 2006 to implement the ban of the steady midnight shift in order to give officers and their families time to adjust. (22T75-76; 22T80).

Amodio held a departmental meeting to announce that he was eliminating the midnight shift and long-term tour switching effective March 5, 2005. (1T95-96; 1T104; 10T127). Amodio told the officers that he was going to form a committee of volunteers, who would be paid, to analyze the available police schedules which existed elsewhere, but that in the interim he would find a schedule that would be beneficial for the staff's personal lives. (10T133-134; 12T15-16; 13T72; 13T79). The PBA would select the members of the schedule committee, which consisted of officers from the patrol bureau and the PBA president and an SOA representative. (13T80). The committee did not meet until 2008, because the PBA had filed an unfair practice charge about the elimination of the steady night shift. (12T16; 13T81-82). Amodio decided it would be more appropriate to wait for a determination on the union's charge before investing time in looking at other possible schedules. (13T82). There were also other unfair practice charges that involved time to resolve. (13T83). Once the committee met, they worked on the scheduling issue for almost a year and entered into a memorandum of agreement for an experimental 12-hour schedule which was in its third year as of 2011. (13T87-88). Friend testified that the officers were "very shocked" by Amodio's announcement. (1T104). Amodio testified that he cannot believe that the staff was in "stunned disbelief" about his announcements given that the Police Study had been

released which made the recommendations and his conversations with Shanosky and Newman who knew that he would make these changes. (10T135-136). At the police department meeting, an officer asked him why he was changing the switching of the shifts. (10T136). Amodio responded that there were people who were caught sleeping on the midnight shift. (10T136). Amodio also stated his concern that the steady night shift was not addressing a variety of issues. (13T75). One of the most prominent issues was the behavior of the Monmouth University students. (13T75).

Amodio eliminated the steady midnight shift and in its place instituted a new schedule of 12-hour steady shifts with the first one from 7:00 a.m. to 7:00 p.m. and the second one from 7:00 p.m. to 7:00 a.m. (16T43-45). With this new schedule there are four squads and the same supervisors with the same officers every day thus providing continuity of supervision. (16T44-45). Amodio testified that long-term tour switching allowed officers to work whenever they wanted to work. (10T57). He eliminated long-term tour switching and with the 12-hour shifts very few officers have asked to switch because they got the shift they wanted and have more time off. (16T47). This also solved the uncontrolled switching and the lack of supervision that officers received. (16T47). However, Amodio did not want to violate the union contract, sought advise from the Township's labor counsel, and

decided not to eliminate the midnight shift; rather, he reduced its use. (10T62-63). In seeking advice from counsel, I find that Amodio was sensitive to the needs of the union and do not infer animus.

Shanosky had previously voiced his concerns about the midnight shift. (11T33-35). Shanosky testified that he knew that Amodio "had every intention at some point of disbanding, making these reforms," but that it would happen after a committee had been formed to investigate the new schedules. (6T59; 6T61). He testified: "In fact [,] I believe some of his decision making was based on some of my input." (6T59). Prior to Amodio becoming Chief, he and Shanosky had discussed these two issues. (6T60; 7T51-53). Shanosky supported the Chief's decision to disband the midnight shift. (12T99). I find that Shanosky supported Amodio and therefore do not infer animus.

Amodio did not eliminate all shift switches, rather he just limited the switches so that staff did not end up working steady shifts; he wanted all staff to rotate through the shifts. (16T101-102). He limited long-term tour switching because it was in the best interests of the department and was also the recommendation in the Police Study. (10T52-53). There were 300 requests by more than 40 officers to switch shifts, but only one request was denied. (14T24).

Friend was denied a shift change one time because every time he worked the 3:00 to 11:00 shift, he wanted to switch shifts. (10T68-70; 15T69; 23T55). With the exception of that one time, all of Friend's other requests were granted. (15T69). In February 2005, Friend requested "a days off switch for when [he] was on 3:00 to 11:00 for four days a month" in May 2005, but not after that month because he considered it a long-term tour switch. (1T105-107). Amodio granted Friend's request for a switch for May 2005. (1T106). Three PBA executive board members were granted shift changes. (14T25). Amodio testified that he did not make his decisions on requests based on the individual or his position with the PBA. (10T52-53). I do not infer animus in these decisions because Friend was granted the majority of his requests shift changes and PBA executive board members.

Faller was not personally affected by the ban on long-term tour switching or midnight tour because he was assigned to the detective bureau; it affected PBA president Laffan and the patrol division. (22T59; 22T73-74; CP-9). Laffan was on permanent midnight shifts and Friend was on permanent day shifts. (1T104; 6T58-59; 10T126-127).

In February 2005, Friend and PBA president Laffan met with Amodio to try to come to a compromise regarding the elimination of the midnight shift and long-term tour switching; a compromise was not reached. (1T105). At Faller's and Bruther's request,

Amodio attended a PBA meeting in February 2005 to explain the criteria for switching shifts and to reiterate that he wanted to start his scheduling committee. (16T103; 19T108-109). None of the members asked Amodio any questions. (16T106).

After Amodio left, Faller talked to the members about the unfair practice charge on switching shifts. (16T107; 19T109). Friend "gave an impassioned plea to move ahead" with the charge. (19T109). Bruther did not agree with Amodio's decision to eliminate the midnight shift. (19T108). The membership voted to continue with the charge. (16T107). As a delegate, Faller spoke with the PBA attorney about Amodio's bans; the attorney opined that the cases were not winners and Faller so informed the members. (22T63-64; 22T75). Faller disagreed with the PBA's decision to file the charge based on the PBA attorney's advice that the union would not be successful. (19T105; 22T76-77; 22T79). Faller testified that Amodio was trying to change the culture of the police department, but the PBA was "fighting him at every turn," both of which contributed to a very turbulent time in the department. (19T104-105).

In April or May 2005, Friend requested a switch for four days for the month of August 2005, which was denied. (1T107). On May 19, 2005, the PBA filed a grievance regarding the long-term tour switching. (1T105; 22T57-58; CP-5). The PBA contended that its collective negotiations agreement was violated when Friend's

request for a shift change for August 2005 was denied. (CP-5). The decision to file a grievance is a collective decision of the PBA, which is why both Faller's and Shanosky's signatures appear on documents. (19T49; 19T144-145; 22T62; CP-32, CP-33).

On April 8, 2005, the PBA had a regular meeting, as reflected in its minutes. (22T65; CP-84). Faller is identified as the delegate. (22T65; CP-84). The minutes are comprised of three pages; the first page and a half has handwriting in upper and lower case letters, the last page and a half has handwriting in all upper case letters and appear to have been written by a different person judging by the differing forms of the upper case letters, e.g., the letter "B" is different in the two halves of the document. (CP-84). The minutes, under "new business," attribute this statement to Faller regarding Friend's grievance: "K. Faller advises that this is a test case and it affects all of us and we should support the grievance. Faller has spoken to labor attorney & he agrees that it should be challenged." (22T67; CP-84, p. 2). The handwriting in the "new business" section is different from the rest of the document, as is the type of pen used to write the different sections. (22T105). Faller testified that the handwriting in the "new business" section of the minutes "looks a lot like... Shanosky over the times I've seen his handwriting through documents with the PBA." (22T105-106). Shanosky was a Sergeant in 2005 and was not on the PBA Executive

Board; however, he was allowed to attend PBA meetings. (22T105-106). The authors of the handwritten minutes are not identified on the document, nor is it known when the minutes were prepared. The authors did not testify and could not be examined to determine whether the notes are accurate and contemporaneously prepared. (22T71; 22T128). Faller testified that he did not recognize the handwriting on the minutes, but also testified that he recognized some of the handwriting as Shanosky's. (22T104). I find the minutes are not reliable due to these shortcomings and because they are not corroborated, and therefore give no credit to the statements contained therein.

On May 20, 2005, the PBA filed an unfair practice charge regarding the elimination of long-term tour switching. (1T105; 1T110; 1T112; 10T53; 15T69; 21T47; 22T59; 23T51-52; CP-7). Amodio, Kochel, Bruther, and Friend attended the exploratory conference regarding the charge. (1T112; 10T58; 21T48; 23T53-54). This charge was ultimately withdrawn. (10T58).

On June 23, 2005, the Township filed a petition for scope of negotiations determination. (CP-6). The Township questioned whether the PBA could submit to arbitration the issue of shift changes. (CP-6).

Two weeks after the exploratory conference of July 2005, at Bruther's request and Faller's agreement that it was a good idea, Amodio attended a PBA meeting to discuss long-term tour switching

and elimination of the steady midnight shift tour. (1T123-124; 14T109; 23T49-50; 23T56). According to Bruther, Amodio spoke to the PBA members and told them that Friend should not have filed a grievance and that the PBA should not support his grievance nor the unfair practice charge regarding the long-term tour switching. (1T124; 14T107). Amodio testified that he wanted to give the members a clear understanding of the facts so that they could make an informed decision about whether or not to proceed with the unfair practice charges. (14T109-110). Amodio said that the purpose for attending the PBA meeting was to explain that he did not ban long-term tour switching and wanted to explain the parameters for obtaining approval for tour switching. (23T50). Amodio testified that he went there to give the members facts "so the leadership of the PBA could persuade them" to withdraw the charge and the grievance arbitration. (23T56; CP-5, CP-7). I find that Amodio attended the PBA meeting to clarify that he would consider requests for tour switching based on criteria he had developed. I infer from the several meetings he had with the PBA that Amodio was trying to establish a working relationship with the union.

On August 22, 2005, the union filed an unfair practice charge regarding the elimination of the midnight shift. (1T127; 10T66; 14T110; 21T47; 22T74-75; 23T57; CP-9). Thus, seven and a

half months into Amodio's tenure as Chief, two charges had been filed against the Township. (21T47).

NEGOTIATIONS WITH KOCHHEL

During the time he was the lead negotiator for the SOA, D'Esposito described his relationship with Kochel as professional. (8T7; 8T9). He also said the relationship was still professional but quite curt once interest arbitration was filed by the SOA. (8T9).

Ingenito was a member of the PBA for 32 years. (17T60-61; 17T70). When Ingenito was president of the PBA, he sat at the negotiations table with Kochel. (15T88-89). Ingenito also filed a grievance regarding the limitation of opportunities for officers to work at a police substation instituted by former Chief Koch. (19T43-44). Kochel interceded, which resulted in a determination in the PBA's favor. (19T44-45; 18T48). When he became involved in the SOA, he sat at negotiations with Kochel. (15T92; 18T99; 21T60). Negotiations between the SOA and Township were acrimonious and for the 1991 to 1993 negotiations, the parties went to interest arbitration; on May 21, 1992 an arbitrator issued an award in favor of the Township. (18T100-102; 21T62; R-29). Kochel testified that the proceedings were contentious between the two attorneys, not between him and the SOA. (21T59-60). The SOA did not appeal. (21T64). Kochel's

testimony is not disputed and I thus infer that there was no animus between management and labor.

Ingenito testified that while Kochel would forcefully state management's position he never personally attacked the union; it was always business. (15T90-91). At the end of 1993, Ingenito was promoted to Lieutenant. (18T102).

To qualify as a member of the PBA, Faller had to complete his 12-month probationary period as an officer; he became a member in late 1987 or early 1988. (19T14-15). He was a PBA State Delegate for a two-year term. (19T16). In 1994, he became the PBA Vice President. (19T17). In 1996, Faller became the PBA President. (19T18).

On behalf of the PBA, Faller brought several issues to Kochel's attention. (19T18-19; CP-32, CP-33). He also negotiated labor contracts with Kochel. (19T25; 19T53). Faller testified that Kochel was a very good and difficult negotiator who did not like to lose, something he considered a personality defect. (19T53-54). Faller testified that if a person was on the "outs" with Kochel, he would know it, but Kochel was professional and did not hold grudges or retaliate. (19T56-58; 22T86). Issues with Kochel usually involved the Township's finances. (19T57).

Shanosky and Faller sat at the negotiations table with Kochel; Faller testified that Shanosky was as tenacious as Kochel at negotiating. (19T54). Shanosky's approach to negotiations was

to be inflexible. (19T54). Faller's approach was to "foster a relationship with the Mayor and Council to kind of humanize us" and used that relationship to put pressure on Kochel. (19T54). For example, Faller was able to get a more favorable contract offer from then Mayor Weldon than the offer Kochel had made. (19T59). The political pressure did not make Kochel happy. (19T55).

One of the Mayors was a fireman in another municipality and Faller suspected that Kochel did not like a fireman to usurp his authority because he (Kochel) held himself to another standard. (19T55). During another contract period Faller engaged in a ticket writing campaign in a wealthier section of the Township, the citizens complained, and shortly thereafter the contract was settled. (19T61-62; 19T66; 22T17-18). Faller testified that he used his authority as a "police officer to do my job as a police officer." (22T19). Amodio had heard about the ticket blitz, but was not aware of it at the time it happened nor was he aware of it during September 2005. (23T60-61). Kochel was not aware that there had been such a ticket writing campaign, nor having residents complain about a single incident. (21T55-56). Kochel testified that such a campaign would be unprofessional, but not unethical. (21T57).

Faller testified that Kochel was sometimes less than forthright during negotiations. (22T88). An example of the lack

of forthrightness was Kochel would tell Faller one thing and Mayor Weldon would tell Faller another. (22T89). He had cultivated a personal relationship with the Mayor and Council, e.g., Mayor Weldon in 1997 and Mayor Larkin in 2004. (22T88-89). Faller testified that during his negotiations with Kochel, he (Faller) did not give his best number and acknowledged that the negotiations process involves being less than forthcoming with information. (22T114). Faller conceded that the things he told Kochel over the years in negotiations were not all 100% correct. (22T114).

Faller was also involved with filing grievances and unfair practice charges. (19T42). For example, he assisted an officer who was activated from the Army Reserve and the Township discontinued his benefits while he was in a combat zone. (19T42-43). Kochel was adamantly opposed to reinstating the officer's benefits. (19T46). Faller had cultivated personal relationship with members of the Township's governing body while he was PBA delegate. (21T51; 22T16-17). Faller went to the Asbury Park Press and then Mayor Larkin resolved the matter by reinstating the benefits. (19T46; 19T56). Faller testified that Kochel was not pleased about Faller going to the press. (19T47-48). Faller used "whatever means at my disposal to represent the men and women of my local to the best of my ability" which included going above Kochel to the Mayor to get a more favorable settlement for

the members. (22T17). Yet another example of Faller working on behalf of the PBA involved an officer who had suffered an on-duty injury who was not successful in getting a disability pension. (19T47). He brokered a deal with then Chief Torchia (this was in the 1990s) and Kochel to return the officer to full-time work with benefits. (19T47).

A contract between the Township and PBA was ratified in December 2004 for the period January 1, 2004 to December 31, 2007. (1T57). Friend testified that the terms of the contract had been resolved through interest arbitration. (1T59). There was no testimony regarding the award and opinion. I do not infer anti-union animus in particular towards Shanosky and Bruther, nor towards the union in general from the fact that the 2004-2007 agreement had to be resolved through interest arbitration.

Faller did not file any charges against Kochel while he was serving as the PBA delegate. (19T148-149). Faller did not file any charges against Amodio while he served under him in the detective bureau. (19T147-149). Following Amodio's promotion to Chief, Faller did not file for any grievance arbitrations. (19T150).

Kochel characterized negotiations as role playing with him being the strong advocate trying to contain costs for the Township and Shanosky, for example, advocating for an increase in salary and benefits for the union members. (20T46). The SOA

filed for interest arbitration regarding the 2004 to 2007 negotiations; the parties voluntarily reached a settlement. (18T99). In May 2005, long after the predecessor contract expired, the PBA filed for interest arbitration and the proceeding was exceedingly contentious. (18T99; 20T42; 21T158-159; R-29). The arbitrator ruled in the Township's favor. (20T43; 21T160). Kochel testified that there had been other filings for interest arbitration, but they settled in the mediation phase and the proceedings were not contentious; for example, the memorandum of agreement on a contract settlement for the period 2004 through 2007 in which Shanosky was involved. (20T43-44; CP-45). Kochel testified that interest arbitration was matter of course in business. (20T44).

As of January 2005, Shanosky testified that he and Amodio had almost daily dialogue and a good working relationship. (6T54). Shanosky described his relationship with Kochel as "professional adversaries" who had a "a degree of respect for each other's abilities across the table from one another [and] to some degree, contempt for one another." (5T121; 7T26). However, Shanosky also testified that he was "bypassed" for promotion because he and Kochel had been adversaries for two decades. (7T42; 7T79). Kochel described his relationship with Shanosky as cordial and professional. (20T46; 20T90). He believed that strong advocacy on behalf of the union showed strong and

effective leadership skills which were a positive for promotional opportunities; for example, Ingenito's, Faller's, Bruther's and Layton's union activities were a positive. (20T46-47; 20T50-51). I credit Shanosky's statement that he and Kochel were professional adversaries simply because one represented labor and the other management. It should go without saying that traditional negotiations sessions sometimes involve each side having opposing interest. No evidence was presented about threats of retaliation or other animus being made by management during negotiations sessions. The evidence shows that Kochel acted professionally during negotiations. The evidence also shows that Amodio was not involved in negotiations. I do not infer animus.

THE LIEUTENANT AND SERGEANT PROMOTIONAL PROCESSES

Ingenito testified that prior to Amodio's tenure, the hiring process for officers was haphazard. (16T21). When Amodio became Chief, the police department was short-staffed due, in part, to retirements. (16T57). Thus, there were several promotions that had to be made in 2005, including Lieutenants and Sergeants. (16T58). Kochel informed Amodio and Ingenito that the promotions were more theirs than his because he planned on retiring in the middle of 2006. (9T37; 12T16; 16T35-36).

When Amodio and Ingenito started as the new Chief and Captain, they had a very sharp learning curve. (16T20). They had

no experience in administrative issues such as budgeting, hiring, or conducting and overseeing a promotional process. (16T20-21; 18T61). The only guide for the promotional process was a Standard Operating Procedure ("SOP") #92-002c which was first issued in 1992 and amended on April 24, 2002; it set forth promotional criteria for the ranks of Sergeant, Lieutenant, and Captain. (6T64; 11T41-42; CP-3, CP-15). Section 2.3.2 of the SOP provides that the process was composed of a departmental assessment and Chief's interview which account for 50% of the overall score. (6T64-65; CP-3, §92-002.3.2). Finalists from the assessment and Chief's interview are submitted to the Township Manager with a recommendation regarding promotion. (6T64-65; CP-3, §§92-002.3.1.4, 2.3.1.5.2, 2.3.1.5.3, 2.3.2.3, 2.3.2.3.4; CP-46).

Amodio and Ingenito developed a promotional and hiring process. (16T26). Ingenito testified that the Chief and he would take their time and "put a lot of effort into promotions" because the police department would have to live with it for years. (17T12).

Ingenito was the custodian of the assessment scores that he, Amodio, and the other Captains had conducted. (16T38). The candidates would be given their scores, but not their rankings, and informed in writing whether they obtained a passing score on the assessments and would be proceeding to the Manger's

interview. (16T41; 23T6; 23T43-44). The process is designed to narrow the number of candidates to the three strongest applicants. (23T45-46). The rankings were not given to Kochel and the candidates are then on an even playing field for the Manager's interview. (6T66; 12T19-20; 17T7-9; 23T46; CP-46A, CP-46B). Prior to Kochel's interview of the candidates, he was provided copies of their take home exams. (12T22). Kochel did not want to know each candidate's scores, ranking or Amodio's recommendation prior to his interview with the candidates. (16T34-36; 16T41; 20T63-64; 21T10). Amodio testified that he made recommendations about who to promote. (12T32; 20T66-67). Kochel testified that he was the final arbiter in the selection process. (20T65). Kochel deliberated with Amodio and always concurred with Amodio's recommendation. (9T38; 12T17; 20T67). Kochel testified that the candidates' union activities were never a part of the deliberations. (20T65-67).

For the Lieutenant and Sergeant Promotional Processes, Amodio and Ingenito developed the questions to be asked for the interviews. (16T37-38). For each interview, Kochel asked most of the questions which he prepared in advance. (16T32). Kochel posed a series of standard interview questions and Amodio was free to ask follow-up questions. (20T64). One of Kochel's standard questions was how would the candidate respond if he was a patrol officer and the Sergeant ordered him to write the

Township Manager a summons. (16T32). Kochel never used any Sergeant's name in the scenarios he posed to the candidates. (16T33).

The processes for the ranks of Lieutenant and Sergeant were different, with the exception of a couple of areas. (23T6). Amodio testified that the Lieutenant's process has two parts (each rated 50% for a total of 100%), and the sergeants process has four parts (each rated 25% for a total of 100%). (23T6). Ingenito testified that the Promotional Process for Lieutenant involved tests and Amodio's interview which together was worth 50% of the candidate's score, and then Kochel's interview which comprised the other 50% of the score. (16T31; 16T39).

Testing was done through an assessment center consisting of take-home exams, exercises, evaluations, merit, and an interview with Amodio at which his two captains would also be present. (16T39; 17T7). Kochel was an observer for at least one of assessments for all of the candidates, which was uncommon. (16T39; 21T11-12). The Chief and Captains would discuss the strengths and weaknesses of each candidate, their personnel files, evaluations, their work ethic, dedication, problem solving, command presence, and experience with the candidates. (17T10-11).

Ordinance Number 2006 states that to be promoted to Lieutenant, an individual must have served as a Sergeant for a

minimum of one year. (15T14; CP-2). Another factor considered for promotion to Lieutenant is an individual's disciplinary record. (15T15; CP-2). The promotional process for Sergeant has four parts worth 25% each: written exam, oral exam, interview with Chief and two Captains, and a score derived from seniority and three previous performance reviews. (23T6-8; 23T43-45).

Amodio and Kochel conducted approximately 100 interviews between January 2005 and the middle of 2007 and hired approximately 22 officers. (14T33-34). Kochel asked the same questions of each interviewee. (14T34). From 2005 to 2006, Amodio promoted approximately 20 people following recommendations he made to Kochel. (9T35; 16T31). These included patrolmen, dispatchers, and SLEOs [Special Law Enforcement Officers]. (16T58). Amodio took every promotion seriously because each was an investment in the police department and affected an officer's career. (9T21).

At the January 28, 2005 department meeting, Amodio announced that there would be two more promotions to Sergeant, that he was creating a special assignment unit, and that there would be a three-officer traffic bureau. (10T133).

On February 14, 2005, a general order was sent to eligible candidates regarding the Lieutenant and Sergeant promotional processes and that their letter of intent to apply for the positions was due on February 16, 2005. (11T43).

FIRST PROMOTIONAL PROCESS FOR LIEUTENANT^{9/}***(January - April 2005)***

On January 26, 2005, the Amodio announced a promotional process for two Lieutenant positions. (6T62-63; 11T39; CP-15, p. 2). On February 18, 2005, Amodio sent letters to the candidates setting forth details of the promotional process. (6T65-67; 17T4; CP-46A, CP-46B). Shanosky testified that the candidates worked on their take home exams throughout March 2005 and the process concluded in April 2005. (6T63). However, documents show that the candidates, including Shanosky, had until March 18, 2005 to complete their take-home exams. (CP-46A).

In April 2005, the top four finalists in the promotion process for Lieutenant were Peters, McDermott, Layton, and Shanosky; Peters and McDermott obtained the highest scores, and Shanosky scored the fourth highest. (6T68 17T5-6; CP-47). McDermott had served on the executive board of the union. (17T6). Peters had never prosecuted a PBA grievance. (21T21). Both Amodio and Ingenito believed that candidates Peters and McDermott had separated themselves from the others. (17T13).

^{9/} The Charging Party refers to this process as the "Spring Promotional Process." (CPb27, i.e., Charging Party's brief, p. 27). The Respondent refers to it as the "1st Promotional Process (April 2005)." (Rb28, i.e., Respondent's brief, p. 28).

GOLF

Kochel was informed by Friend in mid-2004, before Amodio became Chief, that Shanosky played golf at the Hollywood Golf Club. (12T108-109; 21T107-108; 21T111; CP-58, p. 8). Ingenito testified that neither he nor Amodio were aware that Shanosky had played golf for free. (17T18; 21T107-108). Kochel was not clear that Shanosky had in fact accepted free golf, which is what prompted him to broach the topic during the First Promotional Process for Lieutenant because he believed that it was an appropriate time to ask him about it. (18T79-80; 20T68; 21T108-109). Until the interview he did not know if Friend's information regarding golf was correct. (21T110; 21T112; CP-58, CP-59).

Kochel asked Shanosky at the Manager's interview if he had taken free food or anything worth thousands of dollars. (6T73-74; 7T98). Shanosky testified that he knew what Kochel was talking about and asked him if it was about a "little white ball." (6T74; 7T98; 7T100; 7T111). Kochel responded that it was and then asked how much a membership cost at the golf course. (6T74; 17T18; 21T106). According to Kochel, Shanosky was stunned that he was asked about playing golf and volunteered that he had played there as a guest of the superintendent of the Hollywood Golf Club. (20T67-68). He then asked Shanosky how he could justify taking free golfing privileges at an exclusive private

country club^{10/} and not consider it an ethical violation. (20T68-69). Kochel said that Shanosky believed it was not an ethical violation because he had been a guest of the golf superintendent. (20T69).

Shanosky's reply was that he had played golf at the invitation of the superintendent and that the Mayor and Council had done so as well. (6T74). Shanosky had known the golf club's superintendent for 12 years and had played there as a guest five times in five years, the most recent time had been in 2004. (6T75; 6T92; 6T106).

Shanosky testified that he told Kochel and Amodio that he may play golf again because the ethics procedures did not specifically prohibit it, that there was "not a chapter on golf." (6T91; 7T59; 7T61-63; 7T65). Shanosky stated that Amodio told him that his administration was going to avoid any appearance of impropriety. (6T93). He also told Shanosky that he was not to play golf. (6T93). Shanosky stopped golfing for free at Hollywood. (6T94; 7T61; 7T102). Amodio testified that he believes Shanosky intentionally said he would play golf at Hollywood again even though he knew the administration was not endorsing it. (12T127).

10/ I take notice that Hollywood Golf Club is a private club located in Ocean Township.
(<http://www.hollywoodgolfclub.org>).

Shanosky testified that other officers continued to play golf. (7T102). D'Esposito was aware that Shanosky and others played golf; interestingly, he was the internal affairs officer. (8T38; 18T4). Under Chief Swannack, during whose administration Shanosky golfed for free, officers regularly accepted gifts from private citizens. (18T4). In fact, Swannack accepted gratuities himself. (18T6; 18T8).

Shanosky testified that neither Kochel nor Amodio had warned officers against playing golf at Hollywood as invited guests. (6T76-77; 6T108; 7T100). Amodio did not clarify the police department's position regarding gratuities because police officers were given a Police Manual with that information when they commenced employment. (18T11-12). When Shanosky commenced employment, he, on August 31, 1990, acknowledged receipt of the Police Manual. (R-12). On September 29, 1990, Shanosky certified that he had "read and underst[oo]d the [Police Manual] effective October 1, 1990." (R-12). The Police Manual addressed gratuities and had last been amended in the early 1990's under Chief Torchia's tenure. (18T12). The Police Manual contains the Law Enforcement Code of Ethics and provisions regarding gratuities. (R-12). Amodio did not think it was necessary to issue a memorandum to the officers specifically about golfing. (15T12). I find that Shanosky was aware of the ethical standards from the time that he was hired by the Township. I find that the manual

had addressed gratuities for many years. Based on Shanosky's testimony, I also find that he accepted free golfing from the superintendent of the Hollywood Golf Club during his employment of the Township as a police officer.

On cross-examination, Ingenito was given an example of a retired police officer who owned a coffee shop and gave active police officers free coffee. (18T8-10). Ingenito opined that if there is no quid pro quo, then he believed that it was ethical to accept the free coffee. (18T10). Ingenito believed that accepting a free golf game is unethical if the relationship is between an on-duty police officer and a civilian. (18T8-9). Regarding Shanosky, Ingenito believed that he played golf for free because he was a police officer, not because he had a personal relationship with the golfing superintendent. (18T10).

Amodio and Ingenito considered disciplining Shanosky for accepting free golf, but decided against it because the infraction occurred under former Chief Swannack's tenure. (18T11). Internal Affairs did not investigate Shanosky regarding golfing, nor did Amodio issue any written disciplinary charges. (15T11; 16T19-20; 21T170). Rather, Amodio spoke directly with Shanosky about the golfing issue and his dismay about his (Shanosky's) statements at the interview. (17T21-22).

When asked if the fact that Shanosky had self-reported his lateness exhibited a high level of integrity, Kochel said that

would not be consistent with a high level of integrity because it is very unlikely that someone would try to conceal their lateness because they have to sign in for work. (21T80-81). Kochel conceded that self-reporting enhances someone's integrity rather than detract from it. (21T80-82).

The most recent performance evaluations of Shanosky used in the First and Second Lieutenant Promotional Processes were conducted in 2004 by then Lieutenant Ingenito. (21T79; 21T90; CP-49). Ingenito rated Shanosky as outstanding for effectiveness under pressure based on his and D'Esposito's issuance of a commendations to Shanosky for his handling of a search and a double-homicide. (21T91-93; CP-49). Kochel signed off on the evaluation, one of approximately 200 per year that he signed. (21T92; 21T127; CP-49). Kochel's main contact with Shanosky had been on union related matters. (21T77). Kochel testified that it is unethical for a police officer to knowingly use his position for personal gain as opposed to collective good of the PBA membership. (21T53-54). He also agreed that Shanosky's supervisors were better equipped to judge Shanosky's integrity and character than he. (21T78). I find that Shanosky generally has integrity, but that he refuses to accept that receiving gratuities contravenes ethical standards and Amodio's decision to ensure that officers in the police department he was overseeing follow those standards.

PBA TATTOO ON YOUR ASS

Kochel routinely asked candidates about their ability to transition from rank-and-file to supervisor and the candidates consistently explained how they would make the transition. (21T155). At this interview, Kochel asked Shanosky about his willingness to transition from being a Sergeant to Lieutenant. (20T70). According to Kochel, Shanosky was the only one who added "do you have any reason to believe that I hadn't been able to do that successfully"? (21T155-156). Kochel's response was that it had come to his attention that he was still playing a role within the PBA as opposed to the SOA. (21T156). According to Kochel, he relayed a story of events that occurred prior to his position as Township Manager, about a former Director of Public Works who was frustrated with the positions of the Chief and testified that as "legend has it, the Public Works Director said to the Police Chief, something to the effect do you have PBA tattooed on your ass." (20T70; 21T94). Kochel testified that his purpose in relaying the story was to underscore the perception of others that even though the person was in management, he had not made the transition from rank-and-file to supervisory. (20T71; 21T94-95). Kochel testified that he would refer to the story from time to time in interviews; it was not unique to Shanosky. (20T70-72; 21T152). Kochel denies that he was referring to Shanosky's ass or that he had doubts about Shanosky's ability to

make the transition. (20T72; 21T95-96). I find that Shanosky was a member of the SOA and that Kochel told the PBA tattoo story. Kochel and Shanosky had a history of labor-management issues between them and Shanosky had testified that they were "professional adversaries." Kochel testified that he respected Shanosky. There is also credible testimony that it was Amodio, not Kochel, who made the decisions regarding promotion. Based on these facts, I find that the tattoo story was about events prior to Kochel's employment with the Township and was not intended to be anti-union towards Shanosky in particular or the PBA in general.

On April 19, 2005, the promotions of Peters^{11/} and McDermott to the rank of Lieutenant were memorialized in a personnel order and became effective April 25, 2005. (6T69; 6T71-73; 21T70; CP-15, p.4; CP-47).

SECOND PROMOTIONAL PROCESS FOR LIEUTENANT^{12/}

(May - June 2005)

Two Lieutenants retired in May 2005, which precipitated a Second Promotional Process for Lieutenant. (6T71; 17T23-24). On May 31, 2005, Amodio sent a letter to sergeants, including

^{11/} Peters is now the Chief of Police and McDermott is now a Captain. (17T6; R-10).

^{12/} The Charging Party refers to this process as the "June Promotional Process." (CPb29). The Respondent refers to it as the "2nd Promotional Process (June 2005)." (Rb28).

Shanosky, regarding their participation in the lieutenant promotional process. (CP-46B). The same candidates from the First Promotional Process for Lieutenant participated, so Amodio and Ingenito did not think it was necessary to undergo the same scenarios as in the First Promotional Process. (6T78; 17T24-25; 20T72).

As of the spring of 2005, Shanosky had spent 21 years in the patrol division with the exception of a six month period. (1T133; 6T78). Shanosky testified that his relationship with Amodio was "quite good" as of May 2005. (6T79). He described his relationship with Kochel as "somewhat venomous" as of May 2005. (6T80). Kochel testified that the president, vice president and delegate of the PBA executive board would have active roles in dealing with him and the Chief. (20T91). Kochel would reach out to either the president or delegate when he needed to speak with the PBA. (20T92). He knew that Shanosky and Faller were delegates, and that Shanosky had filed grievances. (20T93-94). Ingenito testified that Shanosky was passionate about collective negotiations as well as preserving the rights of officers throughout his career. (17T152). Amodio testified that activity or inactivity on behalf of the PBA or SOA had no part in the promotion process. (9T8; 9T20).

Kochel observed Shanosky and other candidates in June 2005 during one exercise of the assessment process. (12T26-29; CP-59,

pp. 7-8, CP-58, p. 5). From his observation of Shanosky in the assessment center, Kochel believed that he was sub-par in making split-second decisions. (21T88-89). Shanosky testified that Kochel had never observed him perform his duties as a patrol sergeant. (7T26). Their only interaction occurred during grievances, contract, negotiations, arbitration, litigation, various other labor-related issues. (7T26).

Shanosky obtained the highest overall score in the assessment portion of the promotional process; Layton was second, and Resetar was third. (6T81-82; 18T67-70; CP-48). Layton had been on the negotiations committee for the SOA and had never prosecuted a PBA grievance. (17T25-26; 21T21). Resetar had not been in a leadership position with the PBA. (1T149). Shanosky testified that in the four promotion processes in which he had participated, he scored higher than Resetar all four times. (6T123). Resetar had three months experience as a supervisor in the patrol division. (6T105). This division was the largest one in the department; fifty per cent of the officers are in Patrol. (18T43). The Sergeants in the patrol division supervise more subordinates than other Sergeants in the police department. (18T43-44). Patrol officers, unlike those in the detective and traffic bureaus, are not handpicked to be in the patrol division. (18T45).

Shanosky testified that on the afternoon of June 24, 2005, he was interviewed by Kochel and Amodio for three hours. (6T83). According to Shanosky, Kochel told him that viable candidates underwent a grueling interview whereas others received a milque toast one. (7T97-98). According to Shanosky, Kochel's first question to him was whether he internalized his anger because at the Task Force meeting he had seen a side of Shanosky he did not know existed. (6T7; 6T84-85). Shanosky said that Kochel asked him about his position on the then-ongoing PBA grievance. (6T85). Shanosky opined that management's prerogative would prevail. (6T85).

It had been brought to Kochel's attention by PBA members that Shanosky, an SOA member, was assisting them, but Kochel did not know if it was true. (21T97). Kochel testified that there "is a difference between believing something and having something come to your attention." (21T104). Kochel acknowledged that he asked Shanosky if he was assisting the PBA with their proposals and positions, and also advising them to obtain legal counsel for a PBA member. (21T102-103; CP-58, CP-59). Shanosky's response, according to Kochel, was that he was not having any significant role with regard to the PBA. (21T104).

According to Shanosky, Kochel also asked him at the interview if he was the one who pushed the Township to represent Henriques, an officer who was a member of the PBA, in a recent

harassment matter. (6T86; 7T87). Kochel testified that Shanosky told him directly that he had encouraged the PBA to hire an attorney for one of its members, but he does not recall whether he asked him about it during the promotional interview. (21T98-100). With respect to the retention of legal counsel for a PBA member, Kochel thought that Shanosky was trying to influence the PBA even though he was an SOA member. (21T104). I infer that Shanosky assisted PBA members even though he was a supervisor.

GOLF

Shanosky was also asked if he had played golf for free since the First Promotional Process for Lieutenant, to which Shanosky answered no. (7T100; 17T30; 20T74; CP-58, p. 4). Kochel "went into the golf situation to see if now that some time had passed, what his position was with having reflected on the prior interview." (20T73). According to Kochel, Shanosky said that he had not played golf since the first promotional process, but he would not hesitate to play there again if he had the opportunity, but that if Kochel and Amodio wanted him to say he would not play again, he would say that. (20T73-75; 21T154-155). Kochel and Amodio were taken aback by Shanosky's response and had hoped that Shanosky would have said that it was inappropriate and it will never happen again. (20T73-75; 21T154). Kochel testified that he was surprised by Shanosky's stubbornness in not being able to reflect on the inappropriateness of accepting a gratuity.

(21T154; 21T170). Amodio testified that he was taken aback by Shanosky's comments at the interview and agreed with Kochel to discuss with Shanosky the issue prior to making his recommendation to Kochel. (9T9-10). According to Ingenito, Shanosky qualified his answer by stating that he (Shanosky) "didn't think there was anything wrong with it, that if he had the opportunity he would play again, but if... the Chief and the Manager wanted him to say he wouldn't play, he would say it." (17T31). Ingenito was shocked by Shanosky's response because it was disrespectful and insubordinate. (17T31-32; 18T81-83). Neither Kochel, Amodio's or Ingenito's testimony regarding Shanosky's attitude about gratuities. I infer that Shanosky resisted management's view about following the Chief's leadership.

Shanosky introduced Faller to Solomon Dweck^{13/}, who was a financial supporter of the PBA local and became an honorary member with a silver life card. (22T111). Shanosky testified that he did not accept free Yankee tickets from Dweck.^{14/} (7T103).

^{13/} "On October 20, 2009, Dwek pled guilty to federal bank fraud charges in the United States District Court in Newark, New Jersey and also pled guilty to 'misconduct by a corporate official' in New Jersey Superior Court, Monmouth Vicinage in Freehold, New Jersey."

http://en.wikipedia.org/wiki/Orthodox_Rabbi I find that this event occurred years after the promotions at issue here and are not relevant to the allegations in the charges.

^{14/} Approximately five times, Faller received free Yankee
(continued...)

Amodio testified that in every one of the interviews conducted by Kochel the candidates were asked to provide an example of a strength and weakness. (9T3-4). Shanosky was the only candidate who claimed he had no weakness, but that if he did it would be his stubbornness. (9T4). This confirmed in Amodio's mind that his stubbornness would make Shanosky incapable of embracing management positions. (9T4-5). Amodio told Ingenito that Shanosky was one of the most stubborn people he had ever met and that it was of great concern to him that this could affect his ability to deploy the wishes of management. (8T27; 9T18; 9T20; 12T89-90). He never had that concern with Layton, Gifford, or McDermott. (9T31). I infer that it was important for Amodio to have Lieutenants who would follow his lead.

On cross-examination, Amodio agreed with the charging parties' counsel that stubbornness and ethics are not mentioned in his answers to interrogatories. (12T91-92). Amodio testified that he would have corrected the response to the interrogatory.

14/ (...continued)

tickets from Dweck while he was assigned to then Lieutenant Amodio. (6T95-96; 7T65-67; 14T19; 22T20-21; 22T112). Layton and Murphy also received free tickets. (22T112). At the time, no one told Faller that it was wrong to receive free tickets from Dweck. (22T112-113). Faller also testified that the Township had no knowledge of Dweck providing free tickets. (22T22-26). I find that Dweck's involvement with the police officers and the PBA occurred during former Chief Swannack's tenure, years before the promotional processes at issue, and are not relevant to the allegations in the charges.

(12T92). In fact, however, Amodio did state in his answers that he had serious concerns about Shanosky's "ethics and ability to support the administration." (CP-58, p. 4). I find that Amodio had concerns about Shanosky's attitude and that his answer to an interrogatory posed by the charging party confirms those concerns.

Kochel testified that he did not respect Shanosky's decision regarding free golfing because it is unethical to accept free golfing privileges. (21T75-76). In an answer to an interrogatory, Kochel certified that Shanosky had a "low level of integrity" regarding the golfing issue. (21T76; CP-58). Kochel denied that he asked Shanosky about golf to unnerve him during the interview. (21T112-113). Kochel testified that Shanosky's golfing did not preclude him from advancing in the police department because that could be overcome so long as he had recognized that it was inappropriate and was willing to follow ethical standards. (21T52-53; 21T169-170).

After the Manager's interviews, Amodio decided that Layton deserved one of the promotions but delayed his decision for a weekend regarding the second promotion. (17T36-38; 20T76). Amodio testified that the clear first choice for promotion was Layton based on the totality of everything, i.e., promotional process, his work history, observing firsthand his abilities.

(9T7-8). He believed that Shanosky, Gifford, and Resetar were all qualified and could either win or lose the job. (9T8).

Shanosky's June 2005 interview ended at 4:00 p.m. (6T101). At 6:00 p.m. on Friday, Amodio told him that Layton had been promoted to lieutenant. (6T102). Ingenito said that Amodio called Shanosky, with Ingenito in the room with him, to let Shanosky know that he had decided on Layton and the second promotion would be decided shortly. (9T13-14; 17T39-40). Shanosky told Amodio that he did not like what he was hearing, and Amodio told Shanosky that he did not like what he heard during the Manager's interview. (17T39-40). He also told him that Kochel was also dissatisfied with his answer regarding the golf issue and that he should apologize for his answer. (6T102-103; 7T106-107). Shanosky interpreted this as coaching from Amodio. (7T106-107). Amodio called Shanosky on Monday to inform him that he was giving Resetar the second Lieutenant position. (6T104).

According to Shanosky, the interviews were conducted and the decision to promote were made on the same day. (6T70). Shanosky testified that Amodio told him that he and Layton would be promoted to Lieutenant. (6T79-80). Shanosky testified that Amodio recommended to Kochel that he be promoted. (7T50; 7T69). He claims that Amodio said that he would be promoted because he had "been doing a lieutenant's job for years." (7T70). Amodio

testified that he did not recommend Shanosky for promotion. (9T48; 12T31; 13T125-126). He also testified that he never coached Shanosky as he (Shanosky) alleges, he never told him that there would be additional interviews as he also alleges, he did not tell him that it was his position to lose, and he did not recommend him for a promotion. (9T13-14; 9T22-23; 9T33-34). I credit Amodio's testimony. Amodio wanted to change the police department and abide by the Police Manual and move away from former Chief Swannack's laissez faire administration. He invested time in the assessments and interviews in order to get the best possible individuals for his administration. It would not make sense for him to tell Shanosky before a decision has been made that he was practically guaranteed a promotion.

Ingenito testified that he and Amodio discussed Shanosky over the weekend; the main focus was Shanosky's responses about golfing. (17T41). Ingenito testified that he "didn't think we could promote him." (17T41-42). "The big negative was his inability to realize that... he has to follow what his boss' opinions are. We had no problem with him giving his opinion... [The] big issue was his failure to be able to support an issue or support an opinion he didn't agree with... that was the game breaker." (17T42). Prior to the interview in the Second Promotional Process for Lieutenant, Ingenito had not personally observed an attitude or mind set from Shanosky that would prevent

him from being a good patrol Lieutenant. (18T83). Ingenito testified that the concern was that Shanosky would just refuse to follow the Chief's commands. (17T42-44). Golf was an illustration of that issue. (17T42-43).

Amodio testified that in every one of the interviews conducted by Kochel the candidates were asked to provide an example of a strength and weakness. (9T3-4). Shanosky was the only candidate who claimed he had no weakness, but that if he did it would be his stubbornness. (9T4). This confirmed in Amodio's mind that his stubbornness would make Shanosky incapable of embracing management positions. (9T4-5). Amodio did not recommend Shanosky for promotion because of his handling of a robbery, his stubbornness, and his statement that he was going to continue to play golf despite Kochel's concerns. (9T6; 9T48; 9T52). Amodio told Ingenito that Shanosky was one of the most stubborn people he had ever met and that it was of great concern to him that this could affect his ability to implement the wishes of management. (8T27; 9T18; 9T20; 12T89-90). He never had that concern with Layton, Gifford or McDermott. (9T31).

After thinking about the candidates over the weekend, Amodio called Shanosky to let him know the second position would go to Resetar. (17T44). Amodio did not recommend Shanosky for promotion because of his handling of a robbery, his stubbornness, and his statement that he was going to continue to play golf

despite Kochel's concerns. (9T6; 9T48; 9T52). For Amodio, ethics was not the reason he did not recommend Shanosky for promotion. (12T91-94). Rather, it was Shanosky's attitude regarding his unwillingness to follow a Chief's requests and directives that were of concern to Amodio. (13T125-126; CP-58, p. 4).

Kochel testified that Amodio knew which candidates had performed well "throughout the different phases including the interview." (20T76). Amodio informed Kochel of his choice, and Kochel concurred in the Chief's judgment that Shanosky could not be promoted. (20T76). Based on the foregoing, I find that Amodio, not Kochel, effectively made the determination to skip Shanosky for promotion.

According to Ingenito, Shanosky went to his office to vent about not being promoted. (17T45). Ingenito told Shanosky that "it was his promotion to lose, and he los[t] it, that his attitude, what he said.... [B]asically thumbed his nose at the Manager and the Chief." (17T45). Ingenito testified that Shanosky was upset that there were consequences to what he did, but he did not understand that there was anything wrong with what he did or said. (17T45-46).

On June 26, 2005, Amodio announced that Layton and Resetar were promoted to Lieutenant. (1T149; 17T25; CP-15, p. 8).

On or about June 2005, Layton began his six-month probationary period as Lieutenant. (6T36; CP-44). Shanosky

testified that the SOA had not agreed to a probationary period for newly promoted officers. (6T37). On January 5, 2006, Layton completed his six month probationary period. (CP-44). On August 31, 2006, Layton retired. (6T143).

On August 4, 2005, shortly after the Second Promotional Process for Lieutenant, Shanosky received an overall rating of superior in a performance evaluation for the period July 2004 through August 2005 prepared by D'Esposito and endorsed by Amodio. (8T34-35; CP-53, p. 8). D'Esposito noted that Shanosky "is at his absolute best under the most stressful and complicated situations." (CP-53, p. 2). Shanosky received a high rating for work judgment and effectiveness under pressure. (8T36).

SHANOSKY'S TRANSFER

Recommendations for assignments were made by a division or unit commander, who would interview candidates. (16T59). Amodio would make changes to assignments based on who the division or unit commander recommended. (13T115-122;16T59; R-26). With respect to the records assignment in the administrative division, Amodio and Ingenito discussed whether to assign Spanarkel to the job because he had just earned his master's degree and seemed a good fit for the job. (16T60). Spanarkel had been in the Traffic Bureau. (18T46). However, since Spanarkel had just been promoted to sergeant he had no supervisory experience, Ingenito, who was in command of the administrative division, recommended Shanosky

because he was good with details and very organized. (16T61; 18T46). The Lieutenants in the administrative division unanimously agreed with Ingenito's recommendation. (12T94-96; 14T15; 16T61; 18T77). The records assignment would put Shanosky in charge of evidence and other property. (6T116).

Amodio agreed with the recommendation and approved the transfer because Shanosky was the most viable candidate and he was not concerned with his integrity. (12T94-96; 14T15; 18T77). However, he was concerned that Shanosky would view the assignment as punishment and decided to speak with him personally about it. (15T24-25; 16T61-62). He also did not want Shanosky to think there was any type of motivation other than operational efficiency. (14T15). Shanosky was not happy about the transfer but appreciated that Amodio spoke to him personally about it. (16T64-65). I credit Amodio's testimony. Amodio relied on the Lieutenants' recommendation to put the best person in the job. The best person for the job was Shanosky. This determination is consistent with Amodio's goal to have the best police department possible.

On September 10, 2005, a personnel order was issued to Shanosky transferring him to the administrative division, records bureau as supervisor. (1T134; 1T139; 6T114; 8T74-76; 18T45; CP-10; CP-15). Shanosky performed well in the records bureau

despite the fact that he had not wanted the assignment. (15T25; 16T99; 18T75-76).

"I WILL MAKE PROBATION"

On September 26, 2005, Shanosky overheard Amodio say to Resetar that if the PBA prevailed in the ongoing unfair practice charge regarding disbanding the midnight shift a Lieutenant would have to be assigned to midnights. (6T117-118). Shanosky understood that to mean that if he had been promoted to Lieutenant he would have been assigned that shift. (6T118; 7T75). Amodio testified that he was explaining to Resetar what he wanted to accomplish in 2006, Shanosky interrupted the conversation by sarcastically stating "'That's if you make probation' [and] I sarcastically responded back to him by saying 'I will make probation because I didn't recommend you for promotion.'" (9T48-51). Amodio testified that his intent in making the comment was to emphasize that the new administration would have ethical standards. (9T50-52; 14T92-95). He testified that the old police administration had no ethical standards. (9T52). He also said that he "never put [Shanosky's] name on the table" for promotion. (9T48). I credit Amodio's testimony that he never recommended Shanosky for promotion because of his (Shanosky's) views about following ethical standards. Amodio candidly admitted that he met Shanosky's sarcasm with his own sarcasm. I surmise that when

one sarcastic comment is met with another sarcastic comment it is merely office banter.

THIRD PROMOTIONAL PROCESS FOR LIEUTENANT^{15/}

(June - August 2006)

Upon D'Esposito's official retirement date of January 31, 2006, his position of Captain in charge of operations became available. (6T137-138; 17T52; 17T54; CP-15, p. 16). At that time only one Lieutenant was eligible to compete for the position. (17T52). Rather than handing the job over to the one eligible Lieutenant, Amodio decided to wait until other Lieutenants became eligible to compete. (9T43-44; 9T47; 17T52). It was Amodio's plan to have the new Captain participate as an assessor in the Third Promotional Process for Lieutenant. (17T54). The new Captain would be in charge of operations and the Lieutenants selected in the Third Promotional Process for Lieutenant would be working for the new Captain. (17T54).

Lieutenant Newman was the one person who was eligible for rank of Captain and he decided to file a grievance about the delay, did not prevail on the grievance, and then declined to participate in the promotional process. (8T41-42; 17T53). Amodio testified that Shanosky questioned the delay, to which the Chief

^{15/} The Charging Party refers to this promotional process as the "August 2006 Promotional Process." (CPb37). The Respondent refers to it is the "3rd Promotional Process (August 2006)." (Rb31).

responded that he had the authority to delay the process in order to have two new Lieutenants become eligible for this position. (6T138; 7T91-92; 9T43-45; 9T47; 17T54-55). According to Shanosky, he asked Amodio at a supervisors meeting in June if he was intentionally waiting for people to become eligible as candidates and Amodio's response was "no comment" and that it was management's prerogative to delay the process. (6T141-142). Amodio testified that he did not say "no comment" to him. (9T46). Rather, Amodio explained that there was an ongoing litigation for the promotional process and that it was management's prerogative to delay the process. (9T46-47). He chose to promote a Lieutenant to Captain first so that the new Captain could participate in the promotional process as an assessor. (9T43-44; 9T47). D'Esposito testified that Amodio decided that the best course of action would be to wait to have more eligible candidates compete so he could compare the abilities of several candidates and did not want to take such an important position and hand it to someone by default. (8T39-40). I credit Amodio's and D'Esposito's testimony. It makes sense to have more than one candidate participate in a competitive promotional process for Captain, rather than handing it over to only one candidate which would reduce the process to a non-competitive one. I do not infer animus.

On June 2, 2006, McDermott's promotion to the rank of Captain was announced; he filled D'Esposito's position. (6T139; 12T138; R-10). He was put in charge of operations which consists of patrol, traffic, and the criminal investigations bureau. (16T57).

On June 21, 2006, the Third Promotional Process for Lieutenant was announced for two positions in the patrol division; Sergeants Shanosky, Gifford, Weinkofsky, and Pangaro were candidates. (6T135-136; 17T47; 18T85; 21T113; CP-15, p. 19). The promotional process was administered in the same way as the first two promotional processes for Lieutenant. (17T48; 17T59-60; CP46A).

Shanosky was the most senior eligible candidate. (6T136). Of the candidates, Shanosky obtained the highest score. (6T82; CP-48). Pangaro had served as a Sergeant for approximately 13 months, of which six included a probation period ending January 2006, whereas Shanosky had served for eight years. (21T118-119; 21T124-125). Shanosky and Friend testified that Pangaro was hired in 1986 and had served as Sergeant for a little more than a year in the detective bureau. (1T143; 6T151; 7T9). According to Shanosky, Pangaro had no supervisory experience in the patrol division. (7T10). Shanosky said that Pangaro had not been in a leadership position with the PBA or SOA and was a vocal opponent of unfair practice charges filed by the union. (1T147; 7T12).

Amodio testified that Shanosky claimed he was more qualified than Pangaro. (14T11).

In January 2006, Pangaro completed his six months probation period as Sergeant. (21T121). Shanosky testified that Pangaro was appointed to the safety committee in January 2006. (7T18). On January 13, 2006, Pangaro accidentally discharged a firearm; on February 28, 2006 Amodio issued a written reprimand. (7T16-17; 12T114; 14T17; 15T7-8; 21T121; CP-56). Amodio stated that the accidental discharge of the gun was a serious mistake. (15T9-10). The matter was investigated by internal affairs and Amodio issued departmental charges. (15T10). Pangaro reported the incident himself which was a mitigating factor according to Amodio. (15T7-8).

For the rating cycle of January through December 2006, Pangaro received from Captain McDermott an overall rating of outstanding, which is the highest that one can receive, in his performance evaluation dated January 13, 2007. (15T15-17; CP-61, p. 8). Two factors in the evaluation are safety, and operation and care of equipment; Pangaro received superior ratings in these areas. (15T17-18). On January 18, 2007, Amodio endorsed the evaluation. (15T18; CP-61, p. 8). The written reprimand was not included in Pangaro's yearly evaluation that was prepared by McDermott. (13T111-114). Amodio did not notice that it was not attached, explaining that during the first three years of his

administration he was busy hiring, promoting, and reassigning staff. (13T112; 13T123; CP-61). Amodio testified that he would not have given a superior rating on safety to Pangaro. (15T19). With regard to operation and care of equipment, Amodio testified that he said that Pangaro took care of the equipment but that he would have looked at the totality of everything else that went into the evaluation of the area. (15T19-20). Amodio would not have changed the overall rating of outstanding because Pangaro received many high scores on the evaluation. (15T19-20). Kochel was not involved in Pangaro's disciplinary matter and could not recall if he was aware if disciplinary action had been taken. (21T123; 21T160-161).

From 1999 through 2006 when Gifford was promoted to Lieutenant, there were no negative incidents. (9T66). In June 1999, Gifford was a witness in a criminal matter; his testimony contradicted his written report. (21T129). On cross-examination, Kochel agreed that this was troubling in terms of Gifford's credibility or integrity. (21T130). Gifford received a minor discipline for poorly preparing for his testimony in a homicide that took place on June 16, 1999 which resulted in a manslaughter charge being dismissed. (7T9; 7T14; 7T29; 7T78; 7T109-110; 12T87-88; CP-55). Amodio testified that Gifford's conduct was out of character and unintentional. (15T21-22). Kochel did not recall if he was aware of Gifford's conduct prior to signing off on the

evaluation. (21T131). Gifford had served as a recording secretary for the PBA approximately seven years by 2006, but had no leadership role in the union. (1T147; 6T151-152; 7T11).

Kochel acknowledged that Gifford did not have an active role in the PBA or SOA as of August 2006. (21T125). Gifford had been a sergeant for 15 months. (15T14).

Amodio testified that Shanosky's mobile video recorder commendation had no bearing on whether or not to promote because it was one incident in a career of over 20 years. (9T71-73). Amodio also testified that Gifford's conduct regarding his lack of preparation for a trial in 1999 was out of character and unintentional. (15T21-22; CP-55). Just as Gifford's one incident was not a game changer, Amodio testified that Shanosky's incident was not a game changer. (9T73). Gifford's negative incident occurred seven years prior to the Third Promotional Process for Lieutenant.

Three of the four candidates had been counseled or disciplined. (12T88-89). Counseling sessions and admonishments are not discipline; rather they are evaluative tools. (14T60; 15T21). Other than Pangaro, none of the candidates had disciplinary records. (17T56-57). An admonishment or discipline would not have changed Amodio's opinion about Pangaro's qualification to be a Lieutenant. (13T123-124; 14T17-18).

In mid-August 2006, during Shanosky's interview conducted by Amodio, Ingenito and McDermott, i.e., the Chief's interview, Amodio asked him about staff attendance at promotional ceremonies. (6T143-145). Shanosky stated that staff felt threatened because Amodio was pushing people too hard to attend and that he (Shanosky) had not attended those functions. (6T145). At this interview, Shanosky was given an opportunity to discuss the golf issue; Shanosky chose not to address it. (17T48-50). Amodio or Ingenito did not ask about the golf issue because they thought "the situation had been taken care of." (7T113; 17T26; 17T28-29; 17T50-51; 18T90; 20T77).

At the Chief's interview, the candidates were asked to identify their strengths and weaknesses. (17T27; 17T51). According to Ingenito, Shanosky initially stated that he did not have any weaknesses, but then at some point said that he was stubborn which could be a positive. (17T27-28). Ingenito testified that Shanosky "would not accept other people's criticisms and ideas." (17T28; 18T85). Ingenito provided as examples of Shanosky's stubbornness were his early unwillingness to write traffic tickets, obsessing for months over the purchasing of boots, and his unwillingness to understand free golf as an ethics issue, and his attitude or thought process about the Chief's stance on gratuities. (17T24-27; 18T71-73; 18T89).

Amodio did not conduct an investigation about the golf issue nor did he issue a general order clarifying that officers were prohibited from golfing for free. (18T86-87). Ingenito continued to have concerns about Shanosky's inability to conform to expected behavior with which he (Shanosky) personally disagreed. (18T89). Prior to the Manager's interview, Amodio and Ingenito discussed Shanosky's attitude relative to the golf issue. (17T48).

Kochel testified that at the Manager's interview free golfing was not discussed even though he gave Shanosky the opportunity to do so when he presented him with a newspaper article about an ethical violation concerning a public official involved in a similar situation. (20T77; 20T79). Kochel testified that the fact that golfing had occurred would not have been an impediment to promotion if the person recognized that it had been an ethical violation. (20T78-79; 21T132; 21T154). Kochel had shown the newspaper article to the other candidates and they saw the ethical problem. (20T80).

On August 16, 2006, Shanosky received a superior rating in his performance review for the period August 2005 through August 2006 from Lieutenant Peters for excellent work judgement in evidence and general records bureau operations. (6T154; 18T88; 18T91; 21T114-115; CP-54). His overall rating was superior. (CP-54, p. 6). In some of the categories, Shanosky received a

satisfactory rating; these included compliance with rules, safety practices, accepts responsibility and accepts supervision.

(18T104-105; CP-54). Ingenito agreed with Peters' rating of Shanosky. (18T93-94; CP-54). Kochel agreed that Shanosky's ability to maintain this level of work spoke well of "his integrity, professionalism, and ethics." (21T115-116).

On cross-examination, Kochel conceded that Pangaro's lack of proper case preparation paled in comparison to Shanosky's acceptance of free golf. (21T132). As of August 2006, Shanosky's attitude did not result in dismissal of any criminal charges.

(15T23). During 2005-2006, Amodio issued 18 disciplinary actions, including one to Pangaro in 2006, six months before he (Pangaro) was promoted to Lieutenant. (14T11-12; 17T159-162; CP-56). In August 2006, Ingenito was not only the internal affairs officer and training coordinator, he was also overseeing the patrol division. (18T93).

Amodio did not recommend that Shanosky be promoted on this or the previous two promotions. (17T56). On August 29, 2006, it was announced that Gifford and Pangaro were promoted to Lieutenant effective September 4, 2006 and were assigned to the patrol division. (1T142; 1T145; 6T149; 7T9; 9T66; 15T14; 17T48; 18T85; 21T114; CP-12, CP15, p. 21).

On October 13, 2006, it was announced that Shanosky was returning to the patrol division on January 1, 2007, from the

records assignment because the records position had been civilianized. (1T140; 7T20-22; 18T46; 18T77-78; CP-11). He asked Captains McDermott and Ingenito that he not be assigned to either Pangaro or Gifford. (7T23; 7T31; 16T95-96). McDermott and Ingenito presented the request to Amodio. (16T97). Shanosky testified that there was no response to his request; however, Amodio testified that the request was denied. (7T24; 15T25-26). Amodio testified that most of the time he placed no weight on an individual's personal preference as to whom they work with (12T127). He also testified that he did not want to entertain requests based on whether an individual liked the supervisor or not because everybody has to work together. (15T26; 16T98). Amodio had confidence in his supervisors and Shanosky to make sure that any issues would be dealt with in a professional manner. (15T26-28; CP-62, p. 4, CP-63, pp. 4-5).

McDermott decided to place Shanosky with Pangaro. (16T96). The determination was made to ensure that every squad had people with experience. (16T97-98; 18T78). Pangaro had little experience with patrol; placing Shanosky, who had patrol experience, with Pangaro balanced the experience levels in the patrol division. (18T78). The composition of the squads was put together by Amodio, Ingenito and McDermott. (16T98-99). I credit Amodio's testimony because it is consistent with his goal to select the best persons for assignments.

During 2005, Shanosky was the SOA president and was negotiating the SOA contract with Kochel. (1T62; 6T63; 6T69). Between February 8, 2005 to April 25, 2006, Shanosky sent several interoffice emails to officers, including Amodio and Ingenito, the majority of which were about the SOA negotiations. (CP-74). In one of the emails, dated February 22, 2006, Shanosky wrote to Ingenito, and other officers, informing them that the salary ordinance would not be introduced that day due to Kochel's confusion regarding the educational incentive and that he would have to work it out with him upon his return. (CP-74, p. 8). On March 7, 2006, Shanosky wrote an email to officers, excluding Ingenito this time, that "Dave's memory has been refreshed." (CP-74, p. 9). On April 24, 2006, Shanosky wrote an email to Amodio, Ingenito, and other officers, reminding them about the tax free ICMA vehicle or the tax free deferred health costs program. (CP-74, p. 12).

Shanosky and Kochel had met one-on-one to discuss the contract for the SOA. (6T18). According to Shanosky, Kochel accused him of "mucking up the contract negotiations" and asked him to pare down the contract to important items. (6T18-20). At the same meeting, Shanosky said Kochel "blew up" at him regarding another proposal, but later calmed down. (6T18-20).

On March 28, 2005, Kochel and Shanosky reached a tentative settlement of the contract, subject to Council approval, which

Kochel hand wrote. (6T21-22; 6T25; CP-40). Shanosky testified that he prepared notes for his committee members memorializing the tentative settlement, which included a six-month probationary period for Sergeants, Lieutenants, and Captains. (6T25; 6T34; CP-40, CP-41). There are no signatures on the handwritten note. (6T24; CP-40).

On March 31, 2005, Kochel called Shanosky to ask him to meet again to discuss some nuances of the tentative settlement; they met on April 4, 2005. (6T26). Kochel informed Shanosky that the Council would not authorize the tentative settlement and had tasked Kochel to shave a couple of pennies off. (6T26).

On April 11, 2005, Shanosky informed Kochel that the SOA was remaining firm on its offer of a tentative settlement. (6T30). Kochel told Shanosky that he (Shanosky) was not presenting his nuanced proposal accurately and sought to present the Township's position to the committee himself. (6T30). Shanosky's response to Kochel was that the SOA's position was not being presented in an unbiased way and asked that he present to the Council directly. (6T31). Kochel twice requested to meet with the SOA's full committee and thought that Shanosky was resistant because it had not occurred. (21T72). Kochel also believed that Shanosky was a key element in the parties' impasse. (21T74). Kochel testified that he wanted to meet with the full committee because

he thought the members would have a different perspective from Shanosky's and might get a different outcome. (21T71-72).

Also on April 11, 2005, Kochel sent a letter to the SOA committee asking to meet with them to discuss the tentative settlement. (21T70; CP-42). In this letter, Kochel starts by stating: "In somewhat of a break from tradition, I have engaged in one on one negotiations with... Shanosky representing your Negotiating Committee" and that he had been advised that the parties had reached a point of impasse. (CP-42). Kochel did not believe he "went around Shanosky"; rather, he testified, he "wanted to get back to our historical type of negotiations where I was dealing with a representative committee." (21T72). Shanosky had requested that he be able to meet with the full governing body, which did not occur. (21T73).

On May 2, 2005, the SOA committee, comprised of Shanosky, Pembleton, and Layton, met with Kochel, but he was not successful in persuading them to accept the Township's terms. (6T32-33; 21T73). On May 16, 2005, Kochel wrote to the SOA committee to inform the members that he presented SOA's request that the tentative settlement be approved, but that the Council's position remained unchanged. (6T33-34; 21T73-74; CP-43).

On May 23, 2005, the SOA filed a Petition to Initiate Compulsory Interest Arbitration, which identified six meetings. (1T60; 21T67; 21T69; 21T74; CP-1). According to Shanosky, the

petition to initiate compulsory interest arbitration filed on May 23, 2005 refers to a meeting on March 27, 2005. (6T18; CP-1). However, the petition does not make such a reference. (CP-1). The petition was filed approximately one month after Kochel had conducted the interviews in the Second Promotional Process for Lieutenant of Shanosky, Layton, and Resetar. (21T68). On cross-examination, Kochel did not recall how often he had met with the SOA prior to this petition nor whether there were one-on-one meetings with Shanosky. (21T68). Kochel acknowledged there were meetings, but does not recall how many one-on-one meetings had occurred. (21T69). Kochel's letter of April 11, 2005 to the SOA negotiating committee reflects that he had two one-on-one meetings with Shanosky. (21T69-70; CP-42). On June 2, 2005, the Township submitted its contract proposals to the Arbitrator. (CP-66).

On February 8, 2006, the SOA settled the terms for a new contract, which were memorialized on February 9, 2006 in a Memorandum of Agreement ("MOA") resolving negotiations for 2004 through 2007; Shanosky and Layton were to be the signatories on behalf of the SOA. (6T40; 17T93; 21T65; CP-45, CP-65, p. 35). This MOA is not signed. (18T37-38; CP-45, p. 5). Kochel recognized his hand-written initials on Schedules A and B of the MOA, but did not recognize the other initials. (21T66; CP-45, pp. 6-7). Kochel recognized the MOA as the one ultimately reached

for the 2004 to 2007 SOA contract. (21T66). On March 22, 2006, the Council passed a resolution adopting the wages the SOA negotiated for its collective negotiations agreement. (5T126; CP-28). The resolution refers to Shanosky as the president of the SOA. (5T125; CP-28). The contract provided for a six-month probationary period. (17T94; CP-65, p. 10). The predecessor contract expired on December 31, 2003, thus it took two years for the parties to settle the terms of this contract. (21T67). I surmise that finalizing the contract involved financial issues, which is the normal course of business in negotiations. No evidence of animus was presented and thus I do not infer animus.

Shanosky believes that having Kochel make the final determination for promotion, while also negotiating the SOA successor agreement with him, was a conflict. (6T69; 7T94-95). Kochel denied that Shanosky had no chance of being promoted. (21T113-114). Kochel did not recuse himself from the Third Promotional Process for Lieutenant in which Shanosky was a candidate, because he did not want to send out a message that the Township Manager could be removed as a result of the filing of a charge. (17T117; 20T77-78; 21T113; C-2, C-5, C-6). I find that Shanosky believed that Kochel should have recused himself from the 2005 Promotional Processes for Lieutenant because he was on the SOA negotiations committee. I also find that Shanosky

presented no legal basis for his assertions and therefore do not infer animus.

SERGEANT PROMOTIONAL PROCESSES

FIRST PROMOTIONAL PROCESS FOR SERGEANT

(January - May 2005)

The First Promotional Process Sergeant was announced on January 26, 2005. (23T38; CP-15). Originally, two positions were available (which required four candidates), but due to promotions and retirements, four openings became available (which required six candidates). (23T10; 23T38-39). The addition of two openings occurred before the final Manager's interview, but Amodio does not recall if the names of the four initial candidates had been forwarded to Kochel. (23T39). There were 30 individuals eligible to participate in the promotion process for the four Sergeant positions, including Bruther and Faller. (22T110; CP-15). When there were only two positions available, Bruther and Faller were not among the initial four candidates; however, when the two additional positions opened they became two of the six candidates. (23T11; 23T38-39).

On January 16, 2005, Bruther received his evaluation which was conducted by Shanosky. (CP-22). Of 32 categories, Bruther was rated outstanding in 18 of them, he was rated superior in ten of them, needs improvement in two, and unsatisfactory in one. (CP-22). His overall rating was superior. (CP-22, p. 11).

On April 13, 2005, a Personnel Order was issued appointing Bruther as advisor to the OTPD Explorer Post. (CP-19). On July 16, 2005, Bruther received a certificate for participating in the New Jersey Law Enforcement Explorer Academy. (CP-19, p. 2).

The written exam for the promotion was scheduled for April 16, 2005. (22T49; CP-15). The promotional scores for rank of Sergeant indicate that Pangaro received a total score of 98.5 points, the highest score. (CP-16). Bruther received a score of 92, the fifth highest score. (CP-16, p. 5).

In the Manager's interview of the candidates, Kochel asked the bulk of the questions. (23T11-12). The questions asked of each candidate were the same, but depending on the answer follow-up questions would be tailored to the response. (23T13). Kochel asked every candidate to give examples that would demonstrate his leadership. (23T13). According to Amodio, Bruther's examples were that "he was a long standing field training officer [FTO] with the department." (23T13). Kochel also asked each candidate how he would react if he were not chosen for the position. (23T14). According to Amodio, Bruther said that "he didn't expect to get promoted" because "it wasn't his time, he wasn't ready, that the other candidates were more qualified, had more experience, and he ended with saying that they have much more seniority than he does." (23T14-15). Amodio testified that he was surprised by Bruther's response because he "never thought

that he wasn't ready" and also that "he used the example of seniority." (23T15; 23T41). Amodio testified that although he thought Bruther was ready to be promoted, he did not "think he was the right person at that particular time and seniority had no role in [his] decision." (23T18). Seniority is valued as only part of the 25% of the score to qualify for the Manager's interview, and once qualified for the interview the scores are not used. (23T15). I find that Amodio believed Bruther was a qualified candidate who he believed was not yet the right person for the job.

Amodio said that he had a "very well known track record that seniority in and of itself has never been a game breaker for me as a Lieutenant or as Chief in assignments or promotions." (23T15; 23T18). Amodio did not rely on seniority when selecting staff for assignments or promotions. (23T64). When Amodio was a Detective Lieutenant, he had been on the job approximately four years and chose Michael Clancy to become a Detective even though he had just two years in the police department. (23T16; 23T65). Other officers with less than five years with the police department had become detectives, including Amodio. (23T17). The PBA took issue with Amodio about Clancy, posted a detailed letter on its bulletin board regarding Clancy's lack of seniority, and met with the Chief. (23T17). The Chief at the time met with Amodio, and after Amodio's explanation that Clancy was the right

person for the job, refused to veto Amodio's decision. (23T17). Amodio later promoted Clancy to Sergeant. (23T17).

In January 2005, Faller separated from his wife, moved out of the marital home, and had child visitation with his children then aged 14 and 12. (19T102; 22T8). The divorce was contentious; it was a difficult time in Faller's life. (19T102; 22T8). Eventually, Faller moved out of the Township. (19T102). He had visitation with his children who were still in the Township schools and was not available for union or police activities. (19T102-104). He was still a Detective so was on call. (19T103). He was also coaching his daughter's recreational soccer team. (19T103). All of these reasons contributed to his decision to resign from his position as Delegate and he also did not agree with the Executive Board's decisions regarding the unfair practice charges it decided to file. (19T104).

PBA President Bruther asked Faller to rescind his resignation as Delegate because he had just become the President. (19T105-106). Despite the fact that he was exhausted, he rescinded his resignation because he had been a union guy for years and it was in the best interest of the union and for Bruther. (19T106). Faller remained as Delegate for another year. (19T108). Faller testified that his resignation was not motivated by the prospect of a promotion, but he had wanted to be a supervisor. (19T106-107).

Prior to 2005, Faller had been a candidate for promotion to Sergeant twice. (19T132). He decided to take the 2005 promotional exams because he was nearing the end of his career and he wanted a boost in salary and pension, and it was the next step in his career. (19T107-108). Faller took the Sergeant promotional exams in 2005 and was successful in the second round exams in the fall of 2005. (19T107; 19T109; 19T112; 19T131-132). For this promotional process, Faller finished with the sixth highest score. (22T91; CP-16). The candidates with the four highest scores were promoted. (22T92).

On May 5, 2005, it was announced that Pangaro, Weinkofsky, Spanarkel, and Burke were promoted to sergeant in the Detective Bureau effective July 4, 2005. (1T143; 1T145; 19T109; 21T118-119; 22T49-50; 23T52; CP-13, CP-14, CP-15, p. 6). All four of these officers were senior to Bruther. (23T19). On June 27, 2005, the effective dates of the promotions were announced; Pangaro's effective date was July 4, 2005. (CP-14, CP-15, p. 6).

Faller consulted with an attorney when he was skipped for promotion in the First Promotional Process for Sergeant in 2005. (19T11; 22T90). The attorney opined that it would be very expensive and also "would be very difficult" to prove anti-union animus. (19T110; 22T90; 22T98-99). Faller was not in a financial position to pay the attorney himself and "would not have asked the local to fund my private fight." (19T110). Faller believed

that he deserved to be promoted, but denied that he was skipped due to anti-union animus. (22T97-101). He testified that Kochel never showed anti-union animus towards anyone. (22T115). I credit Faller's testimony. Faller had previously relied on an attorney's advice regarding the PBA's charges on shift changes. It is consistent behavior for him to again follow an attorney's advice regarding the likelihood of success on a charge.

SECOND PROMOTIONAL PROCESS FOR SERGEANT

(July - September 2005)

Two supervisors left the police department which precipitated the Second Promotional Process for Sergeant. (19T112). There was a large turnover, assignment changes, and restructuring of the police department which required the promotion of three new Sergeants. (23T19; 23T38; 23T41; 23T48-49).

On July 12, 2005, the Second Promotional Process for Sergeant was announced; Faller and Bruther were candidates for this round. (22T77). The written scores from the First Promotional Process for Sergeant were retained, but the three other parts of the test were readministered. (19T112). There were seven candidates, including Bruther, Clancy, Segarra, Faller, and Murphy. (23T49; CP-18). Clancy received a total score of 90.08, the highest score. (23T66; CP-18). Bruther received a score of 89.25, the second highest score. (23T66; CP-18, p. 2). Faller

received the third highest score, Murphy the fourth, and Segarra the fifth. (23T67).

The final part of the Second Promotional Process for Sergeant included an interview with Kochel with Amodio. (19T112-113). Amodio testified that five candidates were selected for the Manager's interview; including Murphy, Bruther, and Faller. (23T19).

Murphy testified that Kochel mentioned at his interview that it was ironic that they were talking about Murphy's promotional opportunities when "not so long ago you were clapping for my resignation." (2T33-34). Murphy admits that Kochel told him "to lighten up [,] that he was just kidding." (2T43). He testified that he did not file an unfair practice charge because he was advised by his attorney that he would not get another position if he did so. (2T39). According to Amodio, during Murphy's interview Kochel reiterated to him that the conversation in the stairwell was done in jest and that it would have no bearing on the decision making process in the Second Promotional Process for Sergeant. (14T36). I find that the stairwell incident occurred in or about November 2004. (20T35-36; 21T33). I infer that Kochel's interview occurred in or about September 2005 because the Manager's interview occurs at the end of the second promotional process for sergeant. I therefore infer that approximately nine months had passed between the stairwell

incident and Murphy's interview. I credit Murphy's and Amodio's testimony that Kochel's comment was intended to bring levity to the situation.

Amodio estimates that Bruther's interview lasted one and a half hours, and the question regarding leadership examples lasted 45 seconds to one minute. (23T26). Kochel asked Bruther to provide examples to demonstrate his leadership, as he did of all candidates. (12T34; 23T22). Bruther's response was the PBA, added that attendance at the meetings "were minimal at best." (12T35). Amodio questioned whether this was an example of leadership abilities given that so few attended PBA meetings. (12T34-35). Contrary to Bruther's testimony, Amodio testified that Bruther's answer regarding his role as PBA president was in direct response to scripted questions from Kochel. (23T26). According to Amodio, Bruther's response to the leadership example question was simply that he was PBA President; he did not expound on his answer. (23T23).

Amodio followed-up Bruther's response by asking "how do you view the response of PBA President as an example of leadership when you have expressed to myself and the Captain the frustration of not agreeing with what's going on, but not getting enough people to support you." (23T24). According to Amodio, Bruther said "I can only get a few people to come to the meetings." (23T24-25). Amodio and Ingenito had also had separate

conversations with Bruther in which he expressed, according to Amodio, "frustration to us about not getting the membership to support him in terms of the ongoing litigation." (23T23-24).

Amodio testified that he asked Bruther how many members attended and Bruther replied six. (23T25). He also asked Bruther if supervisors were allowed to vote, to which Bruther answered no. (23T25; 23T71). Amodio asked the question because he knew that supervisors attended the meetings, but did not know if the bylaws allowed them to vote. (23T25; 23T71-72). Amodio, as a supervisor, had voted for a delegate but was not permitted to vote for President. (23T72).

Amodio denies that he asked for the names of the people who voted. (23T25; 23T73). Amodio testified that Bruther's testimony that he asked for the names of people was incorrect. (23T74-75). Amodio denies saying to Bruther "doesn't the fact that only six members attended the union meeting... show that you are a failure as a leader?" (23T75). Amodio believed that Bruther's leadership example was not the best one he could use to promote positive leadership. (23T73). Amodio believes that Bruther could have used as leadership examples his role as FTO, advisor of the police explorer post, and traffic rotator. (23T27). On cross-examination, Amodio testified that Bruther asking Faller to rescind his resignation as Delegate as a leadership skill. (23T69-70).

Amodio denies that Kochel had to cut him off during the interview. (23T26; 23T75). He testified that the dialogue about leadership ended and Kochel moved on to the next question.

(23T26). Contrary to Bruther's testimony, Amodio testified that he did not ask Bruther to identify the officers who voted in favor of the unfair practice charge filed in August 2005.

(12T35). Also contrary to Bruther's testimony, Amodio testified that Kochel did not stop him from asking questions of Bruther.

(12T36).

Amodio testified that he asked Bruther whether he thought he would be promoted. (23T21). According to Amodio, Bruther's answer was completely opposite from his answer during the First Promotional Process for Sergeant interview. According to Amodio, Bruther said that he "expected to get promoted" and that "it was his time." (23T21). Amodio did not recommend Bruther for promotion to Sergeant. (23T19-20). Amodio testified that the promotions were highly competitive, the other candidates "showed much better [, t]hey were more articulate, their communications skills were much better [, and] they were more creative with their answers." (23T21-22; 23T70).

I find that approximately five months passed from May 2005 when Bruther told Amodio he was not ready to be promoted to September 2005 when Bruther declared that it was his time to be promoted. I also find that at the time of this interview,

Bruther had been PBA president for approximately five months. I credit Amodio's testimony. As he had determined in the First Promotional Process for Sergeant, he believed that Bruther was qualified but was not yet the right person for the job. This consistency in approach supports Amodio's testimony.

Prior to coming to the Township, Faller had law enforcement experience. (19T17; 19T129-131). When Faller was a patrol officer he volunteered to be on the emergency response and the underwater dive teams, which required specialized training, and a field training officer. (19T5-6; 19T136-138). Kochel had no input on the selection of the team members. (19T138). In 1991, Faller was assigned to the narcotics strike force for one year. (19T9). Faller considered himself to be a very proactive and aggressive patrol officer. (19T9). In 1997, Faller participated in the promotional process for Sergeant but dropped out of consideration after the written portion of the process, which was the first phase. (22T93-95; 22T110; CP-17). In 1998, Faller again participated in the promotional process for Sergeant and achieved the sixth highest score. (22T95; 22T110; CP-37). Faller received numerous awards and citations. (19T14).

On July 12, 2005, Faller also participated in the Second Promotional Process for Sergeant. (20T28; 22T50). Kochel and Amodio conducted the Manager's interviews. (20T28-29).

In July 2005, Faller submitted his resignation as PBA delegate. (1T117; 4T34; 14T108; 16T108; 22T78; 22T80). He posted his letter of resignation on the PBA bulletin board. (1T117). However, PBA President Bruther asked Faller to remain as delegate which he agreed to do. (1T118; 14T108; 16T108). Faller had been president and vice-president of the PBA and had the most experience with unfair practices. (14T108). On August 10, 2005, PBA President Bruther sent a letter to the union members informing them that he had prevailed upon Faller to rescind his resignation as State delegate in light of the two charges and a grievance the PBA had filed; he posted the letter on the PBA bulletin board. (1T119; 22T78-79; 22T118; 23T59; CP-8). Amodio found out that Faller had rescinded his resignation when he saw Bruther's letter on the bulletin board. (23T59; 23T69). Kochel was not aware that Faller had attempted to resign, nor did he look at the PBA bulletin board. (21T48-49).

In remaining as delegate, Faller testified that he was not attempting to curry the favor of the police department. (22T118). Amodio did not ask Faller why he resigned as delegate, and he does not believe that it reflected poorly on his leadership ability. (23T68). Faller served under Amodio's command for two years during which time he was the delegate. (23T59). Faller agreed with Amodio about long-term tour switching, but denies

that it was because he was pursuing a promotion to Sergeant. (22T61-62; 22T77).

Up until Faller was promoted in 2005 he was still a member of the PBA. (16T109). He eventually resigned because he was running for statewide office with the PBA which took time and effort and he was going through a divorce. (16T111; 22T45-46). He lost the statewide office election in 2004 and was placed in "PBA Siberia." (22T115-116). The statewide PBA would not return his calls, he was removed from committees, and was just a lame duck delegate at the state level. (22T115).

Faller denies that once he was no longer able to advance in the PBA, he turned his efforts towards advancing within the police department. (22T47). Faller also denies that his decision to back away from the PBA coincided with the announcement of the new promotional process for Sergeant on January 26, 2005, then stated that it was within the same time frame. (22T48-49). I credit Faller's testimony because it is consistent with his testimony regarding the demise of his aspirations to become vice president of the state PBA and also coincides with his difficult personal life.

Kochel asked Faller a standard interview question about his leadership skills. (19T113; 20T29). Kochel recalls that Faller volunteered an explanation of his PBA leadership such as running the union, filing grievances, contract negotiations, and

orchestrating a large turnout at the Council meetings. (20T29-30). At this point in time, Faller had been the longest serving PBA executive board member and a very vocal union advocate.

(19T115). Amodio testified that the ticket blitz that Faller orchestrated is a demonstration of leadership because Faller took "some initiative and came up with something." (23T62). While Amodio would not endorse such a tactic, he testified that part of Faller's job as Delegate "is to try to get contractual advantage, and I know a lot of [d]elegates and [p]residents have used that. Just like filling the Township... meetings three times in a row to get the contracts moving." (23T63). Kochel testified that he did not ask any questions about which PBA members were in favor of the unfair practice charges. (20T31). Amodio said that neither he nor Kochel initiated dialogue regarding any type of union activity; the topic was brought up by the candidates. (23T29). Faller testified that he broached the topic of union activities himself and that he was not asked by either Kochel or Amodio about the unfair practice charges or who voted in favor of them. (19T114). Faller's, Amodio's, and Kochel's testimony are the same on this point and I find them credible. I find that neither Kochel nor Amodio initiated questions about union activity.

Kochel had no doubts that Faller could transition from rank and file to a supervisor and also believed that he was a strong

advocate for his membership. (21T49-50). Amodio testified that Faller was also asked to provide leadership examples, but no follow-up questions were needed because "we couldn't shut him up[; he] went on and on about his many years as President and Delegate. (23T28). Faller testified that he was long-winded and took five minutes to tell him about his union activities such as his time as delegate, vice president and president, and that through his efforts he filled a meeting hall to overflowing proved his leadership abilities. (19T113). Amodio testified that at that time Bruther had only been PBA president for about one year^{16/} he could not recall anything that would have demonstrated leadership like Faller had as president and delegate, and Faller had a long track record with the PBA. (23T23).

On September 21, 2005, Faller was promoted to Sergeant. (16T10-11; 20T31-32; 22T80-82; CP-15). By this time, he had been employed with the Township for 20 years. (21T43). Bruther and Murphy, two of the candidates, were not promoted; Bruther was president of the PBA local and Murphy was the treasurer, and Faller was still active in the PBA. (22T82; 22T84-85). Clancy obtained the highest score, Bruther the second highest score, and Faller had obtained the third highest score. (22T83-84; CP-18). Two of the three candidates promoted were not involved with the

^{16/} Sometime between April 2005 and September 2005, Bruther became PBA president. (23T47-48).

PBA. (23T67). Faller, Clancy and Segarra were promoted; Faller was a PBA delegate and had more seniority than Bruther, and Clancy and Segarra did not hold leadership positions in the PBA and had less seniority than Bruther. (23T20-21; 22T50).

Faller thought that his activities as president and delegate of the PBA were not going to enhance his chances of getting promoted, but Kochel nevertheless promoted him. (19T66-67). Friend testified that Faller had extensive union activity with the PBA and was promoted to Sergeant and then Lieutenant. (3T24). Unlike Shanosky, Faller had never sued the Township in court. (21T45). I infer that Faller initially believed his union activities would undermine his promotional opportunities, but I find that his beliefs were baseless because Kochel agreed with Amodio to promote him.

Faller was a detective from December 2000 until his promotion to Sergeant in October 2005. (19T10; 19T139). Kochel had no input in Faller's assignment to the detective bureau. (19T138). During Ingenito's time as detective, Layton was Faller's immediate supervisor and Amodio was the Commander of the detective bureau. (19T11). When assignments became available in the detective bureau, officers would submit a request and a resume for consideration, and would be interviewed by Amodio and Layton. (19T13; 19T136). Amodio was in charge of the detectives, he picked other officers other than Faller to go into the

detective bureau. (19T12; 19T135). He ultimately served in the detective bureau under Amodio for several years. (21T45-46).

Due to his promotion to Sergeant, Faller became a member of the SOA. (19T140). He did not participate in SOA contract negotiations because the contract was for the period 2004 through 2007; it provides that the probationary period was six months. (19T140-141; CP-65). Once he was promoted, he had no role in the SOA. (22T8).

Amodio and Ingenito informed Bruther that he had not been selected for promotion to Sergeant and asked him if he had any questions. (23T29-30; 23T41). According to Amodio, this meeting lasted five minutes, and Bruther did not ask questions nor express displeasure with how the process was conducted. (23T30-31).

About a week later, Bruther met with Amodio and Ingenito and said, according to Amodio, that "he was highly insulted regarding the follow-questions that I asked him in the... interview with the Manager regarding his example of leadership." (23T31; 23T76-77). Amodio said that he did not know what Bruther was referring to and Bruther informed him that he was contemplating litigation for anti-union animus. (23T31-32; 23T76-77). When he said that, Amodio pulled out a 2006 table of organization for the reorganized Department and showed Bruther his new assignment as full-time traffic officer. (23T32). Amodio testified that he

told Bruther "if I had any anti-union animus against you and not promoting you because of your position with the union, why would I put you in this position, which is something I know you want." (23T32-34). I credit Amodio's testimony because it is consistent with his stewardship of the police department. I find that Bruther responded to an interview question regarding his leadership skills and I infer that his response was not as good as the other competitors for the position. I do not infer animus.

On September 30, 2005, Bruther posted a letter on the PBA bulletin board requesting support for the filing of his unfair practice charge. (4T114; CP-26). In his letter, Bruther alleged that during his promotional interview Amodio had asked which members had voted to file the charge regarding the midnight squad. (CP-26). He also alleged in his letter that Amodio stated that Bruther's inability to get more than six PBA members to attend his meeting demonstrated that he was a failure as a leader. (CP-26). Amodio testified that Bruther's September 30 letter was

much more detailed than what he expressed to us." (23T77). He also testified that "CP-26 is not accurate, so that being the case, this didn't happen, a lot of this didn't happen. So why he posted it with this in here, it's not accurate. If it's misleading people, then it's misleading people. I didn't do that. (23T60; 23T78).

I find that Bruther waited a week before expressing dissatisfaction to Amodio about being skipped over and more than a week had passed when he posted his letter on the PBA bulletin board. I also find that Bruther's expectation that he be promoted solely because of having been PBA president for a few months to be unrealistic and that his letter to the union members was self-serving. I therefore find Amodio's testimony to be credible regarding his rationale for skipping Bruther for promotion at this time.

THIRD PROMOTIONAL PROCESS FOR SERGEANT

There were four candidates for the Third Promotional Process for Sergeant in 2006; Bruther had obtained the highest total score. (23T82; CP-27). He was the only candidate who was a PBA board member. (23T36). By this time, Bruther had been PBA president for approximately one year. (5T70-71). Bruther testified that there was no anti-union animus during this promotional process. (5T70-71). Bruther had testified that there was no animus during the First Promotional Process for Sergeant, but there was animus during the Second Promotional Process for Sergeant, and yet there was no animus during the Third Promotional Process for Sergeant. Bruther did not want to be promoted in the First Promotional Process for Sergeant, yet a few months later thought he should be promoted in the Second Promotional Process for Sergeant. It strains reasoning to

believe that either Kochel or Amodio would harbor animus only during the Second Promotional Process for Sergeant. I therefore do not credit Bruther's testimony that there was animus during the Second Promotional Process.

In December 2006, upon Amodio's recommendation, Bruther was promoted to Sergeant. (4T115; 23T35-38; 23T41; 23T80-81; CP-27). Amodio testified that the reason for recommending him for promotion was because he was the best person for the position at that particular time. (23T36; 23T82-83). He denied that he promoted Bruther in the hopes that his (Bruther's) charge would be withdrawn. (23T36). Amodio testified that if his motivation had been to promote people in exchange for a withdrawal of a charge, he would have promoted Shanosky. (23T36). Amodio also denied that Kochel tried to sway his recommendation or demonstrate any anti-union animus. (23T37).

I find that one year after being skipped for promotion to Sergeant in the Second Promotional Process for Sergeant and the filing of the instant charge, Bruther was promoted. I also find that Amodio's promotion of Bruther was not motivated by a desire to have Bruther withdraw his one-year old charge.

SUMMARY OF PROMOTIONS

The Township submitted into evidence R-28, which are spreadsheets prepared by Ingenito showing all of the participants in the promotional processes beginning on October 4, 2004.

(16T70; R-28). The spreadsheets also indicate who was affiliated with the PBA, but it does not show the dates the individuals were involved with the PBA. (16T84; R-28). However, Ingenito explained, and the legend on the document indicates, that if the person's name appeared in blue, he was a member of the SOA negotiations committee at the time of the promotional process for Chief, and if the name was in red, he was a former PBA executive board member. (16T70; R-28). Ingenito had almost 30 years with the police department and with the PBA. I find that Ingenito was intimately familiar with the information he presented in the spreadsheets and that they accurately indicate the participants involved in the promotional processes and their affiliations. The spreadsheet shows that of the six participants, two were then current SOA negotiators, three were PBA Executive Board Members, and one held neither position; that one person was Amodio. (R-28).

Ingenito prepared a spreadsheet listing of all promotions that occurred between December 2004 and April 2008. (16T69-70; R-28). Based on Ingenito's memory, the spreadsheet shows that fifty per cent of the people active in the PBA, two of them being executive board members, were promoted. (16T72; 16T74; 16T84). The document does not show the dates the individuals were involved in the union (16T84). Kochel promoted several individuals who were in the union, including former Chief Koch.

(16T85-86; R-28). Several years before Koch was promoted to Chief, he was on the SOA negotiations committee. (16T86). Koch had challenged Kochel about health benefit contributions that were set forth in the collective negotiations agreement but not required by law. (16T87). Kochel stopped taking the contributions but refused to remove the language from the contract. (16T87). Kochel promoted Koch to chief. (16T89).

2006

In October 2006, a little more than a year after Murphy interviewed for promotion, he left the police department to go to the prosecutor's office. (2T37).

On November 16, 2006, there was a blog entry in The Coaster regarding the then new Interlaken Mayor's opinion that Kochel had threatened the village. (CP-68).

In December 2006, Friend became PBA president. (1T146). He had been a member of the PBA for approximately 18 years. (1T146).

2007

Kochel testified that he intended to retire after reaching 55 years of age on February 26, 2006. (20T59). However, Mayor Larkin asked him to reconsider and stay until the Council election in 2007, which Kochel agreed to do. (20T59). He formally announced his retirement in December 2006 setting his retirement date of June 1, 2007. (20T60; 20T81; 20T137; 21T3; 21T133; CP-79). There was testimony regarding whether or not

Kochel had properly retired and the effect on his pension. (See generally, 20T and 21T). These pension issues occurred approximately one to five years after the Promotional Processes for Lieutenant that Shanosky participated in. Kochel's pension issues are under appeal and there is thus no finality on the issues. I find that the pension issues are not relevant with respect to the allegations raised in the unfair practice charges.

On September 24, 2007, Ingenito and McDermott sent a memo to the SOA membership and requested their support for their (Ingenito's and McDermott's) petition to be removed from the negotiations unit. (17T62; 17T148; CP-73). Their rationale was that under the restructured department the Chief should have advisors who were loyal to him and did not have divided interests and loyalties. (17T149-151; 17T157-158; CP-73).

On October 13, 2007, a Personnel Order was issued assigning Shanosky to the patrol bureau reporting to Pangaro. (CP-11).

2008

In March 2008, Faller was promoted to Lieutenant and returned to the patrol division; he served a probationary period. (19T133-134; 19T139; 22T38). During his probation, Faller was disciplined. (22T38-39). In March 2012, he returned as the detective bureau Lieutenant. (19T134-135).

A 2008 blog entry for a newspaper was written about Kochel's interactions with the Village of Loch Arbour which resulted in a

three-year contract for the Township to provide police services to the Village. (20T53-54; CP-68). Then Township Mayor Weldon obtained the assistance of Senator Palaia to obtain Legislation to reduce the Village's school taxes in return for a ten-year police services contract between the Township and Village with an option to cancel after the seventh year. (20T56-57). However, there was ten-year oral commitment from the Village's then Mayor. (20T57). In year eight of the contract the Village elected a new Mayor who wanted to cancel the contract and enter into a less expensive contract with a competing municipality. (20T57). Kochel let the Village Mayor know that a 10-year commitment had been made and if the commitment was not honored Kochel would seek to have the tax-reducing Legislation undone. (20T57-58). At the Village's Board of Trustees meetings, one of the Mayor's who was trying to get the police services contract referred to Kochel's statement about undoing the Legislation as political extortion. (20T58; CP-68). In the end, the Village honored their oral commitment. (20T58). The blog entry occurred a couple of years after the Promotional Processes for Lieutenant that Shanosky participated in. I find that this blog entry is not relevant with respect to the allegations raised in the unfair practice charges.

ANALYSIS**Discrimination, N.J.S.A. 34:13A-5.4(a)(3)**

Public employees and their representative organizations have a statutory right to engage in collective negotiations activities. See, The New Jersey Employer-Employee Relations Act ("Act") at N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates N.J.S.A. 34:13A-5.4(a)(3), which prohibits employers from: "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." No violation of N.J.S.A. 34:13A-5.4(a)(3) will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. In re Bridgewater Township, 95 N.J. 235 (1984). This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both

motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). The issue in an anti-union animus charge such as Shanosky's and Bruther's is "not whether the employee promoted was qualified, but whether another qualified employee was passed over, due, at least in part, to his engaging in protected union activities." Twp. of Clark, P.E.R.C. No. 80-117 6 NJPER 186, 188 (¶11089 1980).

The Act requires that a charge be filed within six months after the alleged unfair practice occurred, unless the charging

party was prevent from filing such charge. N.J.S.A. 34:13A-5.4(c).

CONTENTIONS

The issue is whether Kochel and Amodio had any anti-union animus towards Shanosky or Bruther and, if so, whether that animus was the substantial or motivating factor in not promoting them. With the above standards in mind, I consider the parties' contentions.

SHANOSKY

In his charge, Shanosky alleges that the following are activities that have resulted in anti-union animus:

- SOA contract negotiations,
- the Study,
- the PBA charges in 2005,
- PBA Vice-President Friend's grievance,
- the Sergeant promotional processes, and
- the Lieutenant promotional processes of 2005 and 2006. (C-6).

The original and amended charges set forth N.J.S.A. 34:13A-5.4(a)(3) factual allegations, but do not specifically set forth N.J.S.A. 34:13A-5.4(a)(1) factual allegations.

In his post-hearing brief, Shanosky contends that he was discriminated against because of the following:

- a 1991 complaint against the Township,
- two grievances in 1993,
- his testimony at a 1996 disciplinary hearing,
- a challenge to the calculation of injury leave benefits in 1996,
- a grievance in 1996,

- a letter to Kochel regarding holiday entitlement in 1996,
- a disciplinary hearing in 1997,
- being skipped for promotion to Sergeant in 1997,
- comments made by Kochel during his 1998 promotion,
- the SOA contract negotiations for the years 2001-2003 and 2004-2007;
- his participation in a health benefits committee in 2003,
- Kochel not releasing the Study of 2004,
- his participation at a Township Committee meeting on October 27, 2004
- Kochel's attempt to intimidate Detective Murphy in the fall of 2004,
- stance taken by Amodio and Kochel regarding leave donation to Patrolman Henriquez ,
- the 2005 Lieutenant promotion processes,

- his assignment to the Administrative Division on September 10, 2005,
- the SOA contract settlement of 2006,
- his assignment to the Patrol Division in August 29, 2006.
- the Township's rationale for its actions are pretextual,
- and Kochel's and Faller's lack of personal ethics.
(CPbS 4-27).^{17/}

In accordance with N.J.A.C. 19:14-1.3(a)(3), a charge must contain a clear and concise statement of the facts, time and place of occurrence, and names of actors. Although the amended charge contains 89 paragraphs of allegations, none of those allegations, during the hearing and in his brief, are in his original or amended charge. These are: a 1991 complaint against

^{17/} "CPbS 4-27" refers to charging party's brief in the Shanosky matter at pp. 4-27;

the Township, two grievances in 1993, his testimony at a 1996 disciplinary hearing, a challenge to the calculation of injury leave benefits in 1996, a grievance in 1996, a letter to Kochel regarding holiday entitlement in 1996, a disciplinary hearing in 1997, being skipped for promotion to Sergeant in 1997, comments made by Kochel during his 1998 promotion, stance taken by Amodio and Kochel regarding leave donation to Patrolman Henriquez on an unknown date, and Kochel's and Faller's lack of personal ethics. Consequently, these factual allegations are beyond the scope of the charge and cannot be considered. Additionally, many of these allegations are either untimely or lack temporal proximity^{18/} to the issue at hand. Moreover, as more fully discussed below, Shanosky only alleges an (a) (3) violation in his post-hearing brief; no mention is made of an (a) (1) violation. (CPbS 63-64).

BRUTHER

In his unfair practice charge, Bruther alleges that the following constitutes anti-union animus:

- the 2004 Study,
- the PBA charges in 2005,
- PBA Vice President Friend's grievance,
- the Sergeant promotional processes, and
- the Lieutenant promotional process of 2005. (C-2).

^{18/} I discuss temporal proximity more fully below.

The charge specifically sets forth N.J.S.A. 34:13A-5.4(a)(3) allegations, but does not specifically set forth N.J.S.A. 34:13A-5.4(a)(1) allegations.

In his post-hearing brief, Bruther contends that the following constitutes anti-union animus:

- Shanosky's promotion to Sergeant in 1998,
- the PBA contract negotiations for 2004-2007,
- the 2004 Study,
- Kochel's attempt to intimidate Detective Murphy,
- the 2005 Sergeant promotion processes,
- the 2005 Lieutenant promotion process,
- Shanosky's assignment to the Administrative Division,
- the Township's rationale for its actions are pretextual,
- and Kochel's and
- Faller's lack of personal ethics. (CPbB 4-32).

In accordance with N.J.A.C. 19:14-1.3(a)(3), a charge must contain a clear and concise statement of the facts, time and place of occurrence, and names of actors. Bruther's charge contains 61 paragraphs of allegations. These include: Shanosky's promotion to Sergeant in 1998, Kochel's attempt to intimidate Detective Murphy, the PBA contract negotiations for 2004-2007, Shanosky's assignment to the Administrative Division, and Kochel's and Faller's lack of personal ethics. Consequently, these factual allegations are beyond the scope of the charge and should not be considered. Additionally, many of these allegations are either untimely or lack temporal proximity to the

issue at hand. Moreover, as more fully discussed below, Bruther only alleges an (a) (3) violation in his post-hearing brief; no mention is made of an (a) (1) violation. (CPbS 63-64).

PROTECTED ACTIVITY

The record shows that Shanosky engaged in extensive and aggressive PBA and SOA activity. The record shows that Bruther also engaged in PBA activity. Township Manager Kochel knew about the union activities. He negotiated with Shanosky and dealt with him concerning grievances and personnel matters. He also negotiated with Bruther. Chief Amodio was also aware of the parties' union activities. Thus, Shanosky and Bruther engaged in protected activity and Kochel and Amodio knew of this activity. This element of anti-union animus has been met by both Shanosky and Bruther.

TIMELINESS

Shanosky was skipped for promotion in the First Promotional Process for Lieutenant on April 25, 2005 and filed his charge on December 2, 2005 (C-6), which is more than six months after the alleged unfair practice occurred. N.J.S.A. 34:13A-5.4(c). The allegations of Shanosky's complaint dealing with the First Promotional Process for Lieutenant are beyond the statutory limit and consequently, Shanosky cannot seek relief regarding this process and these allegations should be dismissed. N.J.S.A. 34:13A-5.4(c). Shanosky was skipped for promotion in the Second

Promotional Process for Lieutenant on July 4, 2005 and filed his charge on December 2, 2005 (C-6), which is within six months after the alleged unfair practice occurred. N.J.S.A. 34:13A-5.4(c). Shanosky's charge dealing with the Second Promotional Process for Sergeant may thus be considered. Shanosky was skipped for promotion in the Third Promotional Process for Lieutenant on September 4, 2006 and filed an amended charge on January 3, 2007 (C-6), which is within six months after the alleged unfair practice occurred. N.J.S.A. 34:13A-5.4(c). Shanosky's charge dealing with the Third Promotional Process for Sergeant may thus be considered.

Bruther was skipped for promotion in the First and Second Promotional Processes for Sergeant and filed his charge on December 2, 2005 (C-2) regarding the Second Promotional Process for Sergeant which ended September 21, 2005, which is within six months after the alleged unfair practice occurred. N.J.S.A. 34:13A-5.4(c). Bruther's charge dealing with the Second Promotional Process for Sergeant may thus be considered.

HOSTILITY TOWARDS PROTECTED ACTIVITIES

TEMPORAL PROXIMITY

"Timing is an important factor in assessing motivation and understanding the context of events." Warren Hill Reg. Bd. of Ed., 30 NJPER 439, (¶145 2004), aff'd 32 NJPER 8 (¶2 2006). A review of case law shows that there is no bright line test

regarding temporal proximity of representation activities, anti-union animus, and adverse employment action. See, e.g., State of NJ(State Police) 36 NJPER 89, 97-98 (¶39 2010) (Where there was a two to three year gap regarding statement made by Captain to Sergeant, who was a union representative, that he was "a pain in the ass " was "too remote in time and unconnected to any personnel actions within the statutory period.... The remote timing of the Sergeant's representation activities to the timely allegation of negative personnel actions did not bolster the claimed animus."); State of NJ (Dept. of Human Services), 13 NJPER 117, 118 (¶18051 1987) (decision to explore subcontracting made immediately after drivers' explored organizing and decision to subcontract made immediately after organizing were important factors for determination of causal link to adverse employment action); Tenneco Automotive, Inc. V. NLRB, ___ F. __ (D.C. Cir. 2013) (2013 U.S. App. Lexis 10635; 195 L.R.R.M. 2861) (Citations omitted.) (A temporal factor is weighty if it involves a matter of days or weeks; however, "a lapse of months fails to support, and typically weighs against, a finding of close temporal proximity."); Murphy Bros. Inc. and CWA, 267 N.L.R.B. 718, (1983) (Employer's actions were not pretextual given temporal proximity of complaints of employee's inappropriate conduct two months prior to employment action); Industrial Materials Clearance, Inc. 341 N.L.R.B. 622, 628 (2004) (Immediate temporal

proximity); Wyatt Field Service Co., ___ N.L.R.B. ___ (Case 16-CA-26346 2009) (Temporal proximity or the timing between protected concerted activity and layoff was 48 hours). Compare, LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n 503 F.3d 217, 233 (3d Cir 2007), cert. denied, 553 U.S. 1004 (2008) (Regarding religious discrimination: a "gap of three months between the protected activity and adverse action, without more, cannot create an inference of causation...."); Harley v. McCoach, 928 F. Supp. 533, 542 (E.D. Pa. 1996) (Regarding racially and sexually hostile environment: "[O]ther courts generally hold that if at least four months pass after the protected action without employer reprisal, no inference of causation is created.")

SHANOSKY

A review of the chronology of the events reveals the temporal relationship to the alleged anti-union animus and adverse personnel action. In his charge, Shanosky contends that events regarding the 2004 Study indicate anti-union animus. In his brief, Shanosky contends that events from 1993 through 2005 indicate anti-union animus. These events are discussed in the chronology of the findings of fact, above: a 1991 complaint against the Township, two grievances in 1993, his testimony at a 1996 disciplinary hearing, a challenge to the calculation of injury leave benefits in 1996, a grievance in 1996, a letter to Kochel regarding holiday entitlement in 1996, a disciplinary

hearing in 1997, being skipped for promotion to Sergeant in 1997, comments made by Kochel during his 1998 promotion, the SOA contract negotiations for the years 2001-2003, his participation in a health benefits committee in 2003, Kochel not releasing the Study of 2004, his participation at a Township Committee meeting on October 27, 2004, Kochel's attempt to intimidate Detective Murphy in the fall of 2004, and stance taken by Amodio and Kochel regarding leave donation to Patrolman Henriquez (no date is provided regarding Henriquez and this is a different event than one regarding an officer named Henriques who filed a harassment complaint). The timing of these union activities - ranging from 14 years to eight months prior to the adverse action - and the alleged animus are too remote from the adverse actions of June 26, 2005 and August 29, 2006, when he was skipped for promotion. Consequently, I cannot infer that these events were the cause of these alleged adverse actions. However, other activities closer in time to the alleged adverse actions are relevant to the anti-union analysis.

BRUTHER

Bruther was skipped for promotion on July 4, 2005 and filed his charge on December 2, 2005. In his charge, Bruther contends that events regarding the 2004 Study indicate anti-union animus. In his brief, Bruther contends that events from 1998 through 2005 indicate anti-union animus. The timing of these union activities

- ranging from 7 years to eight months prior to the alleged adverse action - and the alleged animus are too remote from the alleged adverse actions of September 21, 2005 when he was skipped for promotion. Consequently, I cannot infer that these events were the cause of these alleged adverse actions. However, other activities closer in time to the adverse actions are relevant to the anti-union analysis.

PBA VICE PRESIDENT FRIEND'S GRIEVANCE OF 2005

The charging parties contend that Friend's grievance of 2005 regarding Amodio's denial of his request to switch his tour with another officer supports a finding of anti-union animus. The Township filed a scope of negotiations petition. These allegations of anti-union animus is not proven just because they have been leveled against the Township. An analysis of the totality of the circumstances is necessary to determine whether there is a violation of the Act. Here, there is no allegation that a timely unfair practice charge alleging union discrimination regarding this denial was filed on behalf of Friend. There are no facts from which to infer that the action regarding Friend was motivated by anti-union animus and no facts from which to determine that Friend's denial was the cause of the actions taken by the Township in the promotion discussions of Bruther or Shanosky.

SOA AND PBA CONTRACT NEGOTIATIONS AND PBA CHARGES

Shanosky contends that the SOA contract negotiations events from March 28, 2005 through May 16, 2005, constituted the motivating factors for his being skipped for promotion on July 4, 2005 and September 4, 2006. However, these negotiations merely reflect that the union and the Township aggressively supported their respective positions, which are inherent responsibilities of each side in negotiations. Negotiations between Shanosky and Kochel may have been heated, but they were businesslike. I find that these discussions are not evidence of hostility by Kochel towards Shanosky. Amodio was not involved in negotiations and accordingly I do not find evidence of hostility.

Bruther contends in his brief that the PBA contract negotiations for 2004-2007 show hostility on the part of Kochel. As noted, he failed to make this allegation in his charge and I should not consider it. Nevertheless, his brief simply makes note of the contract negotiations with a conclusory statement that there was "unprecedented litigation and animosity between the PBA and the Township." (CPbB 6-7). I do not find from this conclusory statement that these negotiations are evidence of hostility by Kochel towards Bruther.

Shanosky and Bruther both contend that the PBA charges of 2005 regarding long-term switching of shifts and the midnight shift indicate that, but for Amodio's anti-union animus, the

charges would not have been filed. Notably, in these charges, the PBA asserted that the Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5), not N.J.S.A. 34:13A-5.4(a)(3). Additionally, these charges were resolved and cannot support a finding of anti-union animus in the new charges at issue.

Based on the totality of the circumstances, I find that there was no animus during negotiations or in the Township's handling of the PBA's grievances and charges.

THE PROMOTIONAL PROCESSES OF 2005 AND 2006

Shanosky contends that he was wrongfully denied promotions in the Second and Third Promotional Processes for Lieutenant in 2005 and 2006. This contention is based on his argument that he was entitled to be promoted because he was the highest scoring candidate, yet that he was denied the promotion because of anti-union animus as reflected in his history with Kochel and Amodio and the tattoo story relayed by Kochel in the First Promotional Process for Lieutenant.

Bruther contends that he too was wrongfully denied a promotion in the Second Promotional Process for Sergeant even though he was the highest scoring candidate. Bruther relies on the Lieutenant process of 2005 as it affected Shanosky and the comments allegedly made by Amodio during the Bruther's Promotional interview regarding attendance at union meetings.

HIGHEST SCORING CANDIDATE

Shanosky and Bruther both use the term "bypassed" in reference to not being chosen for promotion and argue that they had to be promoted because they were the highest scoring candidates. The Township argues that the term "bypass" is used in Civil Service jurisdictions in which system the "rule of three" applies and cannot be used in the promotions at issue because the Township is not in a Civil Service jurisdiction. I agree with the Township that the term bypass implies a Civil Service process. Even in Civil Service jurisdictions, the purpose of the "rule of three" is to narrow hiring discretion, not to eliminate it. CWA v. Dept. of Personnel, 154 N.J. 121, 129 (1998) (citation omitted). An appointing authority in Civil Service jurisdictions has the selection discretion to appoint a lower ranked eligible candidate absent any unlawful motive. Thus, charging parties' argument that they had a vested right to the promotions is incorrect even if the Township were a Civil Service jurisdiction.

Their argument is equally incorrect under the Township's promotional process. Both parties misapprehend the promotional processes used by the Township in arguing that the top scoring candidate is entitled to a promotion. The ranking of the candidates was done after initial testing, but before the Manager's interview. The scores merely determine the candidate's

ranking and, thus, which candidates will be interviewed by Kochel and Amodio. The purpose of the interview is to assess which of the qualified candidates is the best candidate for the promotion. To adopt the charging parties' views of the scores would mean that the interview is unnecessary and that the Township would mechanistically promote the highest scorers without the Township using any discretion in selecting the best candidate for a promotion.

Nevertheless, the charging parties allege that the highest ranking candidates were always promoted. The facts do not support this allegation. There has been a history of not promoting the candidate who scored the highest, e.g., Shanosky in 1998 as well as Faller and Bruther were skipped even though they were top candidates prior to the Manager's interview. Thus, there is no established practice requiring that the highest ranking candidates be automatically promoted.

The Township did not waive its discretion to select the best qualified candidate nor do the candidates have a vested right to a promotion. When promoting his officers, Amodio considered the fitness and merit of each candidate. He weighed factors such as competence, character, attitude, and demeanor. These factors are sound ones to weigh in making a determination on the best qualified candidate. See, e.g., In re Ocean County College, 204 N.J. Super. 24, 29 (App. Div. 1985) (an employer can choose a person less qualified because of personal attributes); Gaskill v.

Mayor and Comm'rs of Borough of Avalon, 143 N.J. Super. 391, 395 (App. Div. 1976) (less seniority is of no significance in itself; officer promoted based on merit and was best qualified), aff'd 149 N.J. Super. 364 (App. Div. 1977) (seniority is not a mechanical rule which guarantees promotion to the senior employee); Franklin Twp. Bd. of Ed., P.E.R.C. No. 90-82 16 NJPER 181 (¶21077 1990) (employer has right to determine what weight to place on seniority as criterion for promotion). Indeed, an "employer can choose a person less qualified because of personal attributes" Ocean County College, 204 N.J. Super. 24, 29 (App. Div. 1985), citing Kearny Generating Systems v. Roper, 184 N.J. Super. 253, 261 (App. Div. 1982).

Notably, the "Act protects employees against adverse personnel actions taken by their employers in retaliation for exercising protected rights. This Act does not protect employees against employers making what might arguably be considered the wrong decision based on misinformation." Mendham Borough Bd. of Ed., H.E. No. 97-4 22 NJPER 301, 317 (¶27160 1996). Compare Keller v. Orix Credit Alliance, 130 F.3d 1101, 1109 (3d Cir. 1997), citing Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994), accord Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc), cert. denied 521 U.S. 1129 (1997) (In a racial discrimination case: "To discredit the employer's proffered reason... the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the

factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the... plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence.")

The Township did not waive or eliminate its discretion in promoting officers. It does not mechanistically rely on testing scores nor are the scores the terminal step in the promotion process. The Manager's interview is not simply a pro forma exercise in which he is bound by testing scores. The Township has demonstrated legitimate reasons for the promotions made by Amodio, which were adopted by Kochel. The overarching goal of the promotional processes is the selection of the best candidate for the job. Amodio was keenly aware that all of the candidates were qualified for promotions. Kochel deferred to Amodio's recommendations because they were well thought out and he (Kochel) was going to retire. It was Amodio who would have to work with the persons he promoted. Even if Amodio did not pick the "best" candidate in terms of seniority or highest test score or views on ethics, such a mistake is not protected by the Act. Mendham Borough Bd. of Ed., *ibid.*

"DO YOU HAVE PBA TATTOOED ON YOUR ASS?"

Kochel relayed a story to Shanosky during his interview in the First Promotional Process for Lieutenant in which included the question "Do you have PBA tattooed on your ass?" Kochel's story was designed to determine Shanosky's attitude about supporting management if he was promoted to a management position.

While a "public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services [it] must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. (citations omitted). " (Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-197 NJPER 502, 503 (¶12223 1981). Willingboro Twp. Bd. of Ed., P.E.R.C. No. 98-113 24 NJPER 171, 173 (¶29085 1998), citing Hackensack v. Winner, 82 N.J. 1, 20 (1980) ("The mere fact that a person has held a union position is not a legal reason by itself to believe that the person, if promoted, would not be able to perform supervisory duties effectively.") Compare In Monroe Twp. Fire District No. 2, H.E. No. 98-12, 24 NJPER 45, 49 (¶29030 1997) (the employer believed that the employee's poor performance as a supervisor or manager was due to a conflict of interest that

the employee experienced due to his title being included within the collective negotiations unit. The employer also believed that it could not rely on the unit employee to advise it concerning daily operational matters and issues arising during the course of collective negotiations with the union. The employer therefore created a non-unit supervisor and manager position whose loyalty ran solely to the employer. Anti-union animus was not found under these facts.)

Kochel's intent in telling the tattoo story was to show that Shanosky's role in the union and his role as a Lieutenant acting on behalf of management had to be separated. Shanosky was a member of the SOA; however, he advised the PBA. Despite Kochel's intent otherwise, the tattoo story can arguably be interpreted as tending to interfere with the exercise of a member's rights. However, N.J.S.A. 34:13A-5.4(a)(1) was not specifically alleged nor included in the post-hearing brief, and thus should not be considered.

Additionally, the tattoo story occurred during the First Promotional Process for Lieutenant that ended on April 19, 2005, and the allegation in the charge was filed beyond the six-month statutory limit dictated by N.J.S.A. 34:13A-5.4(c). The tattoo story was not repeated in the Second or Third Promotional Process for Lieutenant.

Kochel did not make the decision as to who was to be promoted - Amodio made that decision. Amodio did not promote

Shanosky then because of Shanosky's stance regarding free golf. Therefore, Kochel's story, while perhaps inappropriate, is not proof that Amodio was anti-union. There is also no evidence that Kochel expressed anti-union views to Amodio, nor that Amodio relayed, supported, or participated in the tattoo story to Shanosky. Consequently, the tattoo story made by Kochel cannot be used to support the theory that Amodio discriminated against Shanosky when he decided to skip him for promotion. Likewise, Bruther cannot rely on the tattoo story to support an allegation of discrimination. This allegation should therefore be dismissed.

"I WILL MAKE PROBATION."

Amodio made this statement in September 26, 2005, approximately three months before his probationary period ended. By this time, the First and Second Promotional Processes for Lieutenant were completed, and the Third Promotional Process for Lieutenant would end approximately a year later. Shanosky interrupted a conversation Amodio was having with another officer and made a sarcastic remark to the Chief about his probationary period. Amodio did not ignore the sarcasm, but replied to Shanosky's sarcastic comment with his own sarcastic comment. The probationary period for Chief had been an issue for the PBA who was against the probation, which had even commented to the press about the Chief being impeded by the probation. Amodio intended his sarcastic remark to emphasize that he did not recommend

Shanosky for promotion because of his (Shanosky's) stance regarding gratuities and his inability to accept the Chief's new ethical administration. This view is pro-ethics. I do not believe that these sarcastic barbs were intended to be anti-union, but rather a mere interchange of banter. This isolated incident of sarcasm does not appear to have been made in earnest and is not so unusually suggestive of a causal link to the alleged adverse action. I do not believe it supports an allegation of anti-union animus, and therefore this allegation should be dismissed.

PATROLMAN HENRIQUES

Shanosky contends that the dispute between the SOA, and Amodio and Kochel regarding donating holiday time to Patrolman Henriques while the officer was recuperating from an injury is evidence of anti-union animus. (CPbS 15-16). No time frame of this event was provided by Shanosky to determine the temporal proximity, and therefore relevance to, the allegation of anti-union animus in regards to the promotions at issue. Additionally, this issue was resolved in the SOA's favor and no adverse action was taken. Moreover, this allegation was not contained in Shanosky's original or amended charge, and should not be considered. Therefore, this allegation should be dismissed.

BUSINESS JUSTIFICATION

Even though Amodio believed that Bruther was an excellent candidate, he did not recommend Bruther for promotion in the second promotional process for sergeant because of his lack of leadership experience and his inability to articulate his leadership qualities. Amodio thus believed that it was not the right time to promote Bruther. This evaluative judgment is appropriate in making promotional determinations and does not reflect anti-union animus. See, Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-54, 18 NJPER 32, 34 (¶23010 1991) (Commission determined that the quality of a school principal's leadership and managerial abilities is an evaluative judgment related to his performance).

The charging parties contend that Kochel denied Shanosky his deserved promotion because he (Shanosky) had "golfed at a local golf club, upon invitation" and that this purported business justification is pretextual. (CPbS43; CPbB32). The charging parties also contend that Kochel and Faller have been unethical and it is absurd and hypocritical for the Township to deny Shanosky his promotion for his lack of ethics. (CPbS 40-45; CPbB 30-34). The Township contends that it promoted the best person for Sergeant and Lieutenant for its police department and that Shanosky's inability to understand the ethical issue of free

golfing supported Amodio's decision that he was not the best person for the Lieutenant position.

Our Legislature has stated that a Chief of Police "shall be the head of the police force and... shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and... he shall...: (a) administer and enforce rules and regulations... for the disposition and discipline of the force and its officers and personnel;... [and] (c) Prescribe the duties and assignments of all subordinates and other personnel. N.J.S.A. 40A:14-118. (R-2, §1.1.2; R-2, §1.1.2.F).

Our courts have stated that police "officers are members of quasi-military organizations...." Jordan v. Harvey, 381 N.J. Super. 112, 116 (App. Div. 2005), citing to PBA of NJ v. Washington Township, 850 F.2d 133, 141 (3d Cir. 1988). In fact, many "New Jersey cases indicate the importance of maintaining discipline with the paramilitary organization to a police department. Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Service Commission, 115 N.J. Super. 64, 72 (App. Div. 1971) (citations omitted). "A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law.... He represents law and order to the citizenry and must present an image of personal integrity and dependability in order

to have the respect of the public...." In re Phillips, 117 N.J. 567, 576-77 (1990) (citations omitted). An officer does not have an unbridled right to determine whether an order or assignment to duty should or should not be obeyed. In re Gioglio, 104 N.J. Super. 88, 96 (Cty. Ct. 1968).

The Legislature has also determined the public policy regarding the ethical conduct of government employees. Township employees are subject to the Local Government Ethics Laws. N.J.S.A. 40A:9-22.1, et seq. The Legislature has declared in this ethics law that "Public office and employment are a public trust." N.J.S.A. 40A:9-22.2(a). This ethics law also states that local government employees cannot "use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others." N.J.S.A. 40A:9-22.2(a). Additionally, this ethics law states: "No local government... employee... shall solicit or accept any gift, favor,... or other thing of value based upon an understanding that the gift, favor,... or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties." N.J.S.A. 40A:9-22.2(f). The Police Department's rules and regulations are consistent with the Local Government Ethics Laws and prohibits officers from soliciting or accepting gifts. (R-2, §§ 3.1.20-21, 3.1.25). N.J.S.A. 40A:9-22.5(f). Additionally, officers are required to report

violations of laws and rules of fellow officers to the Chief. (R-2, §3.1.30).

The Township has also specifically addressed ethics. For example, the preface of the Police Manual states in relevant part: "all police officers have the responsibility to acquaint themselves with the contents of this manual and refamiliarize themselves from time to time so that they may effectively fulfill their obligation to the Township of Ocean Police Department." (R-2, at p. i). Also within the Police Manual is the Law Enforcement Code of Ethics, which requires, in relevant part, a law enforcement officer to promise to guard against disorder, be honest in his personal and official life, and be exemplary in obeying the law of the land and regulations of the Police Department. (R-2, at p. ii). Significantly, a law enforcement officer recognizes that his badge is a symbol of public faith which he accepts as the public trust as long as he is true to the ethics of police services. (R-2, at p. ii). On August 31, 1990, Shanosky acknowledged receipt of the Police Manual. (R-12). On September 29, 1990, Shanosky certified that he had "read and underst[oo]d the [Police Manual] effective October 1, 1990." (R-12).

Police officers are required to familiarize themselves with administrative policy and procedures. (R-2, at §6.8E). The Police Manual states that officers are required to conduct themselves in accordance with high ethical standards and are

prohibited from accepting gifts, gratuities, rewards, and free admissions and passes. (R-2, at §§3.1.21, 23, 25; 6.8F). Thus, there are sections specifically stating that officers are prohibited from soliciting or accepting gifts. (R-2, at §§ 3.1.20-21, 3.1.25). This prohibition is consistent with N.J.S.A. 40A:9-22.5(f) of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1, et seq. Officers are required to report violations of laws and rules of fellow officers to the Chief. (R-2, at §3.1.30). Finally, Ordinance 2006, which was originally adopted in 1965 and amended in February 2005, requires the police department to enforce laws and police officers to be of good moral character. (CP-2).

Law enforcement officers work in a chain of hierarchy. The ability to accept orders and tasks from superiors is essential in a quasi-military organization such as the Township's police department. It is equally important that personal integrity be maintained and that good judgment be exhibited, especially in a leadership position such as the rank of Lieutenant. The State statute, and the police rules and regulations, requires police officers to maintain standards of conduct that are above that which is expected of the average citizen in order for the public to maintain confidence and trust in them. Honesty and integrity in the performance of his duties is incumbent on each police officer. Given the higher standard of conduct required of police officers in general and leaders in particular, it was reasonable

for Kochel to confirm a rumor that Shanosky may have committed an ethics violation by accepting free golfing at a private country club. Shanosky confirmed that he accepted free golf, but argued that it was not an ethics violation. I make no finding on whether or not Shanosky violated any ethics standard. The Township did not make such finding. However, a police officer's lack of appreciation of a possible ethics violation is contrary to the public concern of the efficient running of a police department -- this was Amodio's concern about Shanosky and constituted the basis for his decision not to promote Shanosky.

The events regarding Kochel's pension issues were resolved by the appropriate authority under its statutory scheme set forth at N.J.S.A. 43:15A-1, et seq. These pension issues are on appeal and not final. Also, the pension issues arose after the promotions and were not related to the timing of the promotions. Finally, there is no evidence that Kochel violated ethics laws or rules. One of the events referred to by the charging parties regarding Faller was a union issue which involved a bookkeeping matter that was resolved, was not an ethics issue, occurred significantly before the promotions at issue and, therefore, cannot be said to be related to the promotions. Similarly, Faller's acceptance free of baseball tickets occurred significantly before the promotions at issue, Amodio was not aware of the free tickets when he was a Lieutenant, and this issue occurred before Amodio's tenure as Chief. Additionally,

there is no evidence that Faller's ticket blitz was illegal or violated ethics laws or rules. Accordingly, any argument that Kochel's and Faller's ethics are questionable and, therefore, undermine the promotional processes at issue are without merit. Moreover, these issues are not relevant to the allegations in the charges.

Kochel asked questions at the interviews, but he did not make the decision to promote; rather, he simply approved Amodio's decision. Amodio articulated his reasons for not promoting Shanosky and Bruther. In each case, he did not determine that they were unqualified, but in a field of several qualified candidates, other candidates were better qualified to serve in the positions. However, Shanosky and Bruther focus on the alleged ethical shortcomings of Kochel and Faller, and argue that these trump Amodio's business justification. This approach ignores the reality of how the promotion process works and important considerations such as Shanosky's own lack of appreciation of ethical standards. These were the clear motivating facts, not anti-union animus. There was a rational basis for not promoting Shanosky. There was also a rational basis for not promoting Bruther during the Second Promotional Process for Sergeant.

INTERFERING, RESTRAINING OR COERCING, N.J.S.A. 34:13A-5.4(A) (1)

Public employers are also prohibited from "Interfering with,

restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4(a)(1). The Commission has determined that: “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978); New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 2 550, 551 note 1 (¶10285 1979). In Commercial Tp. Bd. Ed. and Commercial Tp. Support Staff Ass’n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff’d 10 NJPER 78 (¶15043 App. Div. 1983), the Commission held that where an employer’s conduct deliberately attempts to restrain employee participation in protected activity, it independently violates N.J.S.A. 34:13A-5.4(a)(1). It further reiterated that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent subsection (a)(1) violation. The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). The charging parties must specifically allege facts regarding who interfered, restrained, or coerced the employees in the exercise of the rights guaranteed

to them by our Act. State of NJ (Dept. of Personnel), D.U.P. No. 88-18, 14 NJPER 430 (¶19176 1988).

The original and amended charges set forth N.J.S.A. 34:13A-5.4(a)(3) factual allegations, but do not specifically set forth N.J.S.A. 34:13A-5.4(a)(1) factual allegations. In their post-hearing briefs, the charging parties only allege an (a)(3) violation; no mention is made of an (a)(1) violation. (CPbS 63-64). Thus, Shanosky and Bruther fail to make specific allegations of particular acts by specific individuals. Instead, the charges merely state conclusions without specific facts relating to an (a)(1) violation. Consequently, the (a)(1) charges should be dismissed.

CONCLUSION OF LAW

The charging parties alleged facts regarding N.J.S.A. 34:13A-5.4(a)(3), presented the testimony of several witnesses, submitted evidence, thoroughly cross-examined the Township's witnesses, and submitted post-hearing briefs. However, the charges, witnesses, evidence, and briefs do not establish by a preponderance of the credible evidence on the entire record, that protected conduct was a substantial or motivating factor in not promoting either Shanosky or Bruther. The evidence, taken as a whole, does not disclose anti-union animus. Even if the charging parties had established a prima facie case of anti-union animus, the Township proved by a preponderance of the evidence on the entire record, that the adverse actions would have taken place absent the protected conduct.

RECOMMENDATION

The Complaints should be dismissed.

/s/ Daisy B. Barreto
Daisy B. Barreto
Hearing Examiner

DATED: February 21, 2014
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by March 6, 2014.