

H.E. No. 2022-2

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

In the Matter of

CITY OF OCEAN CITY,
Respondent,

-and-

Docket No. CI-99-77

EDWIN YUST,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Respondent violated section 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by eliminating the title of unit employee/Association representative in retaliation for conduct protected by the Act.

The Hearing Examiner determined that the employee engaged in protected conduct by acting as an Association representative to the Respondent's Lifeguard Pension Commission, that the Respondent knew of the employee's determination not to approve a requested waiver of a municipal Pension Commission regulation and was hostile to the exercise of the employee's conduct by removing job duties, moving the work location, eliminating the employee's title, unilaterally demoting the employee and reducing the employee's wages violating the standard set forth in Bridgewater Tp. v. Bridgewater Public Works Assn. , 95 N.J. 235 (1984). The Hearing Examiner determined that the Respondent's defense, that it acted to eliminate the title because it was economically efficient, wasn't demonstrated by a preponderance of evidence on the record. The Hearing Examiner recommended that the employee receive back pay, a lifeguard pension adjustment and other contractual emoluments to which the employee would have been entitled in the absence of discrimination. A posting was also recommended.

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 Thomas G. Smith, attorney

For the Charging Party Joseph C. Ruddy, Jr., attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 7, 1999, September 5, 2000 and March 28, 2001, Edwin Yust filed unfair practice charges and amended charges against the Ocean City Beach Patrol Administrative Association (Association) (CI-99-76) and the City of Ocean City (City) (CI-99-77) including its Director of Public Safety. The charge against the Association, as amended, alleges that on specified dates from late December, 1998 through May, 1999, Mark Baum, Association President, removed Yust from the Association's negotiations team and with other named team members colluded with the City to eliminate Yust's title of assistant captain of the City of Ocean City Beach Patrol (OCBP) while, ". . . gain[ing] administrative promotions." Those actions allegedly breached the

Association's "fiduciary duty," violating section 5.4b(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The charge against the City, as amended, alleges that it colluded with members of the Association negotiations team to eliminate Yust's position of assistant captain; barred Yust from participating in collective negotiations, resulting in immediate monetary benefits to certain Association negotiations team members; and retaliated against him for his service as a representative of the Association on the Ocean City Beach Patrol Pension Commission (Pension Commission). The charge also alleges that on March 20, 1999, the City Director of Public Safety, Dominick Longo, unlawfully denied Yust's ". . . right to a grievance hearing at step 3 of the [collective negotiations agreement] between the Association and the City." These actions allegedly violate section 5.4a(1), (3), (4) and (5)^{2/} of the Act.

1/ These provisions prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

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
(continued...)"

On September 13, 2001, a Complaint and Order Consolidating Cases issued. On September 28, 2001, the City filed an Answer denying the allegations and asserting that the elimination of Yust's position was a managerial prerogative; the City acted in good faith; that the respondents' collective negotiations agreement provides for one "assistant captain for operations," and eliminates the "assistant captain for administration," thereby depriving Yust of any right to "grieve" the issue. On October 1, 2001, the Association filed an Answer, denying the allegations and asserting that it acted in good faith and in the best interests of the collective negotiations unit.

On February 2, 2002, Yust filed a complaint in Federal District Court of New Jersey, alleging that the City, its Mayor and Public Safety Director violated the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 8 (CEPA) and other state and federal laws by imposing adverse and retaliatory employment actions against him. The District Court granted the City's Motion for Summary Judgment on all claims except Yust's

2/ (...continued)

condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

CEPA claims regarding adverse employment actions occurring after 1999. Yust v. City of Ocean City, et al., Civ. Action No. 02-3117 (RBK) (D.N.J. May 30, 2008).

On March 17 and 18, 2010, Hearing Examiner Stuart Reichman conducted a Hearing at which the parties examined witnesses and presented exhibits.

On May 10, 2010, Yust filed a complaint in the Law Division of the New Jersey Superior Court against the City and several named persons employed by the City. The complaint alleges that the defendants implemented adverse employment actions against Yust that violated CEPA and the New Jersey Law Against Discrimination.

On May 27 and October 7, 2010 and April 27, 2011, June 29 and 30, 2011 and September 1, 2011, the Hearing Examiner conducted additional days of Hearing.

On June 7, 2012, the Director of Unfair Practices reassigned the case to me, following the assigned Hearing Examiner's retirement from the Commission.

On December 21, 2012, the parties signed a settlement agreement and general release disposing of the Law Division complaint and releasing the City from any and all claims arising on or after January 1, 2008. The agreement provided that the above-captioned unfair practice charges "will continue" and are not waived.

On May 8, 2014, I issued a letter decision denying the City's Motion to Dismiss or Limit Claims, based upon an asserted waiver by Yust under New Jersey CEPA, specifically N.J.S.A. 34:19-8. I also disagreed that the federal district court decision addressed Yust's rights and remedies under the Act.

Following scheduling efforts, I conducted additional days of Hearing on July 11, 13 and 14, 2016. On July 11, 2016, Charging Party Counsel represented on the record that the Association was no longer a Respondent in this matter, resulting in a withdrawal of unfair practice charge docket no. CI-99-76. Briefs and replies were filed by September 29, 2017. Upon the record, I make the following:

FINDINGS OF FACT

1. Edwin Yust was hired by the City as a lifeguard in its Beach Patrol (OCBP) in 1957 and remained employed there during the summers through 2008 (1T38, 2T16, 3T18)^{3/}. Earning both undergraduate and graduate degrees, Yust was also employed as a high school teacher for more than 30 years (1T11-14). In 1972, he was promoted to lieutenant in the OCBP (1T38, 3T26). In 1959, Alfred McKinley was hired by the City as a lifeguard; on an unspecified date before 1972, he was promoted to lieutenant in

^{3/} "T" represents the transcript, preceded by the chronologically numbered day of hearing and followed by the page number; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits.

the OCBP (1T38, 40, 41, 3T26). In 1984, OCBP Captain Oliver Muzsly promoted Yust to "administrative lieutenant," acknowledging his proficiency in administering lifeguard and officer payroll and personnel matters, including personnel files, lifeguard test scores, hours worked, scheduling, staffing, workers compensation, salaries, clothing inventory, etc. (2T88-90). Yust was initially paid a \$300 stipend over his lieutenant's compensation for performing those administrative tasks, which increased \$100 annually in several successive years (1T43).

Like other lieutenants, Yust was also responsible for "working a zone," that is, overseeing a designated and numbered quadrant or "zone" of the City's beach, including the twenty or more lifeguards regularly assigned to that zone (1T41-42, 3T31). The "first" and "second" zones experienced the greatest number of rescues and medical emergencies, followed by the "third" and "fourth" zones, respectively (2T15-16). Sometime in or after 1985, lifeguard Thomas Mullineaux was promoted to lieutenant in the OCBP (7T7, 15). He was later promoted to OCBP "Chief of Operations" (finding no. 49).

2. For an unspecified period of time before 1988, all OCBP lifeguards, senior lifeguards, lieutenants and an assistant captain were represented by the Ocean City Lifeguard Association (1T52-54). In unspecified periods of time, McKinley was the

elected President of that association (1T54). I infer that that organization represented those employees for purposes of collective negotiations. On unspecified dates, beginning in or around 1988, and continuing thereafter, rank-and-file lifeguards were represented in collective negotiations by the Ocean City Beach Patrol Lifeguard Association. Senior lifeguards, lieutenants and assistant captains were represented by the Ocean City Beach Patrol Administrative Association (Association) (1T53-54). Yust testified that he believed that McKinley was the Association's first President (1T55). I credit that testimony, in the absence of any contrary evidence.

3. For certain specified and unspecified periods of time throughout the period relevant to this case, the OCBP alternately fell under the auspices of the City police and fire departments, overseen by the City's Public Safety Director, Dominick Longo, appointed to the title in 1985 or 1986 (1T44, 6T4, 9T71). In 1984, then-Police Chief Longo approved Muzslay's appointment of Yust to the newly created title, administrative lieutenant (3T29-30). In or around 1988, Longo promoted Yust and fellow lieutenant McKinley to "assistant captain(s)" of the OCBP, each receiving annual salaries of between \$10,000 to \$12,000 (1T43, 2T90-92, 6T8). Yust's annual stipend for performing administrative duties ceased at that time, as did his just-vacated title, "administrative lieutenant" (6T8). Muzslay

credibly testified that he did not participate in Longo's decision, opining that it was organizationally unnecessary to appoint two assistant captains and conceding that he favored Yust over McKinley (2T91-92, 6T6). It was also the first time Longo promoted employees in the OCBP (6T10). Muzslay admitted that he and McKinley had "competed" for the captaincy in 1983. When then-City Mayor Bittner awarded Muzslay the title (based on the predecessor captain's recommendation), McKinley commenced a public writing campaign against the appointment, including critical letters published in a local newspaper and a petition drive advocating Muzslay's removal (1T47, 2T87, 2T90, 7T23, 9T16). Mullineaux admitted that McKinley had contemporaneously called him and confided that he was "upset" by the Mayor's selection of Muzslay over him (7T15). Muzslay testified without contradiction that Longo had expressed approval of his promotion to the Mayor (2T90).

Muzslay also testified without contradiction that from 1988 until about 2000, Yust was a "loyal" officer performing the role expected of him (2T94). He characterized McKinley as disloyal and "undermining" in unspecified OCBP "operations" (2T94-95, 3T106, finding no. 8).

Yust's duties as assistant captain included his charge of all personnel files, record-keeping, payroll (for at least 130 lifeguards), and participating in the supervising and training of

"rookie" lifeguards. He created a computerized "spread sheet," transferring to it lifeguard personal and statistical facts from 5" x 8" note cards (3T55, 73). He also possessed "line authority;" he could direct subordinate officers, including the three lieutenants, in daily operations (1T49, 52, 2T92-93, 6T64).

McKinley's duties as assistant captain included his charge of "rookie" testing and training; requalifying lifeguards; and CPR training and in-service training (rowing, rescue and testing). He also possessed "line authority" (1T48, 2T93, 6T54).

4. In or around January 1, 1988, the City formally adopted a "Lifeguard Pension Plan" pursuant to a City Council resolution, implementing N.J.S.A. 43:13-23, et seq.^{4/} (CP-1; 3T111).

4/ N.J.S.A. 43:13-24 provides that an "officer or a guard" employed, ". . . for a period of twenty years and shall have attained the age of forty-five years and for a period of ten years preceding his application has been continuously in such service, may . . . be retired upon half pay."

Section 27 authorizes means for raising a "pension fund," including contributory salary deductions, taxes and fines.

Section 28, "Pension commission" provides that the mayor, with consent of the municipal governing body, shall create a "lifeguard pension commission of four members;" one member shall be a "superior officer" of the lifeguard force; another shall be a lifeguard and, ". . . two citizens who are not members of the force." Members ". . . serve for a term of four years and until their successors are appointed."

Section 29 provides that the pension commission ". . . shall have management and control of the fund and may make all necessary rules and regulations not inconsistent with this article."

The purpose of the adopted "Pension Plan" as set forth in its "introduction" is, ". . . to provide retirement, disability and survivor pension benefits for individuals employed by the City of Ocean City in the lifeguard force" (CP-1). Any member of the City's "lifeguard force" employed as an "officer" or a "guard" after January 1, 1987 is a "member" of the Pension Plan. Under Section 6 of the Pension Plan, members employed by the City before January 1, 1987 may participate in a "buyback" arrangement under specified terms.

Section 11 of the Pension Plan, "Pension Commission," provides in pertinent parts:

- A. The Mayor shall appoint, with the advice and consent of the Governing Body, a Lifeguard Pension Commission of four members. One member shall be a superior officer of the lifeguard force, one a lifeguard and two citizens who are not members of the force. They shall serve a term of four years and until their successors are appointed, and have qualified, and shall not receive any compensation for their services . . .
- B. The Mayor may remove a member of the Commission, for good cause shown by giving written notice to the member. A member may resign from the Pension Commission by giving written notice to the Mayor.
- C. The Commission shall be responsible for the administration of this plan in accordance with the terms and provisions herein contained. It shall possess such general authority and powers as are necessary for the discharge of its

duties including, but not limited to the powers to:

(1) Construe, interpret and apply the Plan, and in so doing to correct any defect, omission or inconsistency . . . ;

(2) To decide all claims and questions with respect to plan membership, benefits and amount and commencement date thereof;

(4) To relax adherence to the terms and conditions of this Plan, consistent with N.J.S.A. 43:13-21, et seq., and grant waivers or exemptions where the Commission in its discretion deems such waivers or exemptions warranted. [CP-1]

5. On February 1, 1989, four mayoral-appointed members of the "Ocean City Lifeguard Pension Commission" (Pension Commission) including Association President McKinley (the "superior officer" representative), issued a memorandum to all OCBP personnel on City letterhead (CP-11; 2T78). The other Pension Commission members were John Hansen (the City's Chief Financial Officer, appointed as a "citizen" representative), John Pfister (another "citizen" representative not employed by the City) and Chuck Dunn (a "red shirt" or lifeguard unit representative) (2T80, 3T113-115, 11T122; CP-1). I infer that the selection of representatives was intended to implement Section 28 of N.J.S.A. 43:13. The memorandum reiterates a statutory requirement for pension eligibility; lifeguards and "officers" must work 20 years, the last 10 of which must be

consecutive; and adds a requirement that each lifeguard and officer must work 40 days in each pensionable year (CP-11). The memorandum cautions:

The Commission's responsibility is to protect the fund and it will not be liberal in its granting of waivers. Therefore, you, the individual guard, must assume the responsibility of working the required number of days [CP-11]

The memorandum acknowledges that the four members of the Pension Commission have been working since fall, 1988, ". . . to fine tune" the pension fund plan (CP-11). Attached to the memorandum was a form to be signed by each lifeguard and officer (and returned to the Pension Commission) acknowledging their obligation, ". . . to work forty (40) days or the equivalent number of hours per season to receive credit for a year's service toward my pension" (CP-11).

6. Eight years later, in February, 1997, then-Association Treasurer Yust succeeded McKinley as the mayoral-appointed (statutory) "superior officer" member of the Pension Commission, following the completion of the latter's service in two consecutive four-year terms (1T55, 3T111-112). Yust sought the position, received the Association's approval and was appointed by then-Mayor Henry Knight (1T55). Mullineaux admitted that, "Mr. Yust was put on the Pension Commission as basically a representative of the [Association] . . ." (7T27). Similarly, Gary Hink, the City's Tax Collector from 1984 through 2014,

succeeded Hansen in 1997 as a Pension Commission "citizen" representative (9T13, 11T121-122). Paul Gallagher succeeded Dunn as the "red shirt" or "lifeguard" (unit) representative on the Pension Commission in 1997^{5/} (9T12, 11T123). Roy Zehner succeeded Pfister as the other "citizen" member of the Pension Commission^{6/} (3T112, 9T13, 11T123).

7. Sometime between May 28, 1997 and June 23, 1997,^{7/} Kathleen Bourbeau, a "senior medic" of the OCBP included in the Association's unit, typed a letter to McKinley, identifying him,

5/ When Gallagher was asked on direct examination when he served on the Pension Commission, he testified: "Late 90's, '98; '99" (9T12). He admitted his membership on the Pension Commission when it first voted on the matter of granting a waiver of the consecutive-year service requirement for unit employee Kathy Bourbeau in 1997 (9T14, 11T123). I find that Gallagher became a member of the Pension Commission in 1997.

6/ Zehner was a member of the Pension Commission during a relevant period of this case, i.e., 1997-1998. No witness testified about the date he first became a commissioner, though a letter written in October, 1998 by then-City Mayor Henry Knight sets Zehner's start date in November, 1992 (R-37).

7/ A copy of Bourbeau's letter to McKinley, R-2, sets forth her apparently handwritten signature and a handwritten date, "June 19, 1997" at the top, near-center of the exhibit. No witness authenticated the latter inscription. Yust testified that when he first read the document in late August, 1997, no handwritten date was inscribed (5T98). An undated copy of the same letter was also marked in evidence (CP-16; 5T98-99). I credit his unrebutted testimony, though I infer from the letter's final sentence (and in the absence of conflicting evidence), that the letter was written before June 23, 1997. I also infer that it was written after May 28, 1997, when Public Safety Director Longo designated McKinley as "operations captain" in a memorandum to Captain Oliver Muzslay (finding no. 9).

the addressee, as "[OCBP] Director of Operations." The salutation is: "Dear Bud." (Bourbeau and McKinley were "very friendly;" they worked in the same beach area for an unspecified period of time (8T14)). She wrote in a pertinent part:

As per our conversation in March of this year,^{8/} I would love to return to work for the Beach Patrol for my 13th season in the position of senior medic. However, due to the birth of our daughter, I will be unable to return on a full-time basis. I am continuing to nurse our daughter until she is six months of age, as per the recommendation of our pediatrician. She will be ready to wean in September. Thus, I have arranged for part-time care for her on Mondays and Tuesdays, as we had previously discussed . . .

My family and I thank you for your continued support and cooperation. As arranged, I will return on Monday June 23 and 24 for CPR instruction and to begin organizing our plans and work schedules for the medic staff. [R-2; CP-16]

8. Yust testified on cross-examination that on the Sunday of Memorial Day weekend, 1997 [May 25th], in an in-person discussion among Muzslay, McKinley and he about "beach patrol matters," McKinley mentioned that Bourbeau will be returning to work for a short period of time (less than 40 days) and will be

8/ I infer that Bourbeau, as an employee seeking or confirming a dispensation from a superior, accurately represented to that superior - McKinley - the month of their conversation about her, ". . . be[ing] that unable to return on a full-time basis." At the time of the conversation, McKinley was no longer a member of the Pension Commission (finding nos. 5, 6, and 47).

claiming or taking maternity leave, to which Muzslay replied or opined that or questioned whether part-time or seasonal employees are not entitled to maternity leave (3T135, 4T113, 5T107, 6T62, 11T169, 174, 218). Yust testified that McKinley said that Bourbeau, “. . . was going to take a waiver and use maternity leave as her reason for her waiver” (3T136). Captain Muzslay told McKinley to verify that maternity leave is or is not available to her before she seeks a waiver (3T136). Yust testified that Muzslay said to McKinley: “Bud, you better check with the booklet for part-time employees - I don’t believe it’s in there” (3T136). I credit Yust’s testimony.

In further cross-examination on the next hearing date (almost five months later), Yust essentially repeated his earlier cross-examination testimony regarding Bourbeau’s reported circumstances in the May 25th meeting, adding that he did not see or read Bourbeau’s letter to McKinley [CP-16] until late August, 1997 (1T59, 4T23-26). I credit that testimony. Yust credibly testified that he wasn’t “acting” as a [sitting] pension commissioner while listening to McKinley’s remarks about Bourbeau, explaining that at that time, McKinley had recently completed eight years as a pension commissioner and presumably would have known, “. . . the proper protocol” (4T29-31, 45). Yust denied that McKinley was suggesting to him, as a new member of the Pension Commission, that Bourbeau should automatically be

granted a waiver (3T137). Muzslay testified that in the meeting, Yust opined that he didn't believe that maternity leave (for a part-time employee) was an "acceptable" justification for granting a "waiver" (6T63). Called in direct examination for the Respondent, Yust agreed that he was not aware of any statement during the meeting that would have led McKinley to believe that he (Yust) would not have granted Bourbeau a "waiver" if she applied for one (11T34). I credit Muzslay's testimony over Yust's blanket disavowal. I infer Yust's testimony to mean that he would not have said anything in the meeting indicating a personal prejudice against Bourbeau. Yust did not report the substance of the discussion about Bourbeau to other Pension Commission members following the meeting (4T31).

During the meeting among the three superior officers, Muzslay engaged McKinley in a brief discussion of his "loyalty" (5T146). Yust did not recall the context of that exchange (5T146-147). Muzslay testified that he asked McKinley if he was loyal [to him], to which McKinley replied, "What kind of question is that?" Muzslay rejoined: "It's a question that a captain asks of an assistant captain. We have a chain of command; are you loyal?" McKinley responded: "I can't answer that; it depends" (2T94, 5T107, 6T61). In crediting Muzslay's testimony, I infer that his questioning of McKinley alluded to his continuing suspicions of McKinley's actual and perceived

interactions with Public Safety Director Longo, the sole "superior officer" to Muzslay. Muzslay testified that McKinley sought to "undermine [him in OCBP] operations" by "circumventing" him - going directly to Longo, instead (2T95, 6T71). In the absence of conflicting evidence and indirectly corroborated by other evidence cited in this report (finding nos. 19, 41, 44) showing that Longo and McKinley communicated directly about OCBP management, bypassing Muzslay, I credit Muzslay's testimony.

Soon after that meeting, Longo told Muzslay to "separate" Yust and McKinley (6T70-71). Yust was voluntarily reassigned from OCBP headquarters to the distant "boathouse" (6T70). Muzslay credibly testified that Longo's directive to separate Yust and McKinley occurred at about the same time that Yust's "line duties" were reassigned to McKinley (6T71). Yust's duties following his reassignment to the boathouse included payroll, record keeping and issuing equipment (8T15). Yust's reassignment demonstrated an ". . . obvious fall into disfavor with Director Longo," according to City witness and OCBP representative, Thomas Mullineaux (7T36).

9. On Wednesday, May 28, 1997, Director of Public Safety Dominick Longo signed and issued a memorandum to Captain Muzslay regarding, "changes for assistant captain/operations captain." The memo provides:

You are hereby ordered to implement changes for the assistant captain and operations captain contained herein.

In addition, you are on notice that the Operations Manual will be amended to reflect this change.

As of this date, the Chain of Command is as follows:

Beach Patrol Captain

Assistant Captain
Operations

Assistant Captain
Administrative

Administrative Staff
Medics
Lifeguards

An attached page, "job description - assistant captain OCBP" provides, "The assistant captain is the Chief Operations Officer of the Patrol and as such is responsible for the day to day direction of the Patrol." Ten "duties" are listed:

1. Act in place of the Captain when necessary;
2. Ensure that operations manual, State and City statutes regarding beach areas are complied with on a day to day basis;
3. In consultation with the City Medical Director and Senior Medic, supervise the hiring and training of medics;
4. Assign responsibilities and placement for all beach, administrative and medical personnel;
5. Organize and facilitate management work groups;

6. Gather information and prepare recommendations for hiring and promotions for the Captain and Director of Public Safety;
7. Provide information and assistance to the Captain on budget preparation and the annual reports;
8. Coordinate on matters of mutual interest with other Public Safety areas including OCFD's surf rescue unit and OCPD's boardwalk and marine units;
9. Conduct annual evaluations for administrative unit;
10. Keep City abreast of any developments in professional lifeguarding or directives from certifying agencies. [R-8]

Muzslay was not specifically asked to identify this exhibit, though he acknowledged,

A notice came from Director Longo limit[ing] Yust's duties; that he did not want him out checking beaches or monitoring the staff on the beach. [6T16]

Muzslay agreed that in the beginning of summer, 1997, Longo, ". . . believed Assistant Captain Yust was no longer second in command" (6T35). In both his re-direct and re-cross examinations, Muzslay opined that after nine years as an assistant captain with "line authority," Yust was divested of that authority as a consequence of his disagreement with McKinley in the Memorial Day weekend meeting over Bourbeau's eligibility for a maternity pension eligibility "waiver" (6T60-61, 73-75).

Yust admitted that he first saw Longo's memorandum the weekend after it issued (i.e., May 31 or June 1, 1997),

acknowledging that he's, ". . . on the right-hand side of the flow chart [with] no chain of command beneath [him]" (4T61-62). He also admitted that in the past, ". . . [he] had duties of supervising 'administrative staff, medics and lifeguards,'" as set forth below "assistant Captain Operations" on Longo's May 28 memorandum.

Yust also admitted that the change in his duties preceded discussion of Bourbeau's request for a "waiver," and that no one at that time [late May or early June, 1997] knew that she was going to seek a waiver (4T62-63). Although Yust had previously and credibly testified that during the Memorial Day holiday weekend meeting, McKinley mentioned to Muzsly that Bourbeau will seek a "waiver," owing to a maternity leave of absence, I find that Yust in his latter testimony was referring to official discussion among Pension Commission members prompted by Bourbeau's written request for a waiver first submitted to the Pension Commission in late August, 1997 (R-7; 3T133, 137). This finding is corroborated by Yust's testimony that he was "just there listening" to McKinley in the Memorial Day holiday weekend meeting with Muzsly and was not "acting" as a Pension Commissioner there. (McKinley had recently completed his second consecutive four-year term as a Pension Commissioner and Yust had recently succeeded him). Also, Bourbeau's earlier letter (June, 1997, perhaps) to McKinley confirmed their March, 1997 conversation, in which she advised him of her inability to return

to the OCBP as a full-time senior medic; that letter does not seek a waiver (R-2).

10. On June 26, 1997, Yust and another Association representative, together with the City Mayor and Clerk, signed a collective negotiations agreement extending from January 1, 1997 through December 31, 1998 (R-11). Yust was Association Treasurer when he signed the agreement, though he admittedly did not participate in the collective negotiations leading to it (4T79-81).

The titles included in the recognition provision (Article I) are assistant captains, lifeguard lieutenants, senior lifeguards and senior medic. Excluded are the lifeguard captain and all other City employees (R-11). In the agreement (Article XVII), assistant captains were paid \$12,154 for each contractual year and were the only salaried titles in the unit. In each of the ten years that McKinley and Yust were assistant captains, they were paid the same salary (finding no. 3; 11T164). The agreement included a three-step grievance procedure ending in an appeal to the City Business Administrator. The second of three steps was an appeal to the Public Safety Director with time limits specified for his receipt of a response to the grievance. The first step required the "aggrieved" or the Association to "institute action" with the OCBP captain within seven calendar days of "the event giving rise to the grievance" (Article XV).

11. On or around August 26, 1997, Bourbeau wrote a note to Yust, requesting both a "waiver to the continuous service agreement of the contract due to family/maternity leave" and his ". . . support as [her] representative"^{9/} (CP-17). Bourbeau also wrote that she had earlier forwarded a copy of an attached letter to the Pension Commission. Yust did not know why Bourbeau wrote to him, specifically (5T149). Her undated letter to the OCBP Pension Commi[ssion], requesting a "waiver for continuous service for [her] 13th year in 1998 [sic] (emphasis added) as per the lifeguard pension agreement" was attached. Bourbeau wrote:

. . . I have served the Ocean City Beach Patrol in good faith for the past twelve consecutive summer seasons.

This year, 1997, after having a child in March, I returned to work on a part-time basis as per agreement with Asst. Capt. McKinley. I returned to work on a part-time basis thus enabling me to continue nursing my daughter through her first six months of life as per the recommendation of our pediatrician.

I am requesting a waiver to the contract which states an employee must serve the last ten years consecutively. I wish to continue my status as Senior Medic on the [OCBP] in the upcoming years. However, I hope to have my previous service count towards the last ten years of service without interruption,

^{9/} By "representative," I infer that Bourbeau, a senior medic included in the collective negotiations unit represented by the Association (i.e., OCBPAA; see finding nos. 2 and 10), is calling upon Yust as that Association's representative on the Pension Commission.

knowing I will be unable to complete a full forty day season in 1997.

I am hoping this waiver will also help other Beach Patrol personnel with similar family leave concerns. Thank you for your consideration of this matter. [CP-18; R-7^{10/}]

12. On behalf of fellow Pension commissioners, Yust inquired of Bourbeau's other (full-time) employer whether she returned to work as a teacher after childbirth (1T68, 4T7). On November 17, 1997, Carol Faust, a "payroll" employee of the Egg Harbor Township Board of Education, sent a letter to Yust on Board letterhead advising, in the pertinent part: "In response to your inquiry of 11/11/97, I re-checked our records with the Superintendent's office and did indeed verify that Kathy Bourbeau returned to work on May 19, 1997" (CP-24). Yust acknowledged that other Pension Commission members "authorized" his inquiry, though he hadn't sought nor received Bourbeau's permission (4T4-7). Yust believed that he didn't act inappropriately, despite acknowledging that Bourbeau hadn't given her permission (4T6). I credit Yust's belief.

^{10/} R-7 is identical to CP-18 except for the former's handwritten date, "August 31, 1997," appearing at its top. Yust credibly testified that he first read CP-18 at the end of August, 1997 and did not receive R-7. Bourbeau's earlier correspondence (finding no. 7) requested maternity leave; this letter seeks a waiver of the Pension Commission's consecutive years of service requirement. Also, Bourbeau's thirteenth year would have been in the summer of 1997, as she wrote in R-2 and CP-16 (see finding no. 7) and not 1998, as written in R-7 and CP-18.

13. On November 26, 1997, Yust typed a one-page "decision" on OCBP Lifeguard Pension Commission letterhead regarding Bourbeau's request for a waiver. Yust admitted that the document sets forth his "opinion" (4T63). The document provides these five verbatim and enumerated reasons for denying her request:

1. There is no Federal or State regulation in regards to maternity leave for seasonal employment;
2. Out of 105 seasonal summer days, K. Bourbeau could have mapped out forty days of work starting Memorial Weekend to September 7, the weekend after Labor Day, to meet the required 40 days needed for retirement;
3. On Monday, May 19, 1997, Bourbeau returned to her teaching position full-time until the end of the school year. If Bourbeau could return to her regular teaching position full-time, why could she not return to her seasonal summer position full-time?
4. There are guards that are presently working on Beach Patrol who have either missed forty days in a summer season or have missed a complete summer season. They all may have or may not have a justifiable reason for why they missed the forty days needed for retirement. Need not open a can of worms;
5. The Statute [N.J.S.A. 43:13-24] of the pension plan should and must be adhered to with little exception. Bourbeau's situation was not extreme. The forty days for her retirement was attainable.

Decision: Kathleen S. Bourbeau will return to the OCBP at 11 years for the summer season 1998. [R-9]

Yust typed the document for distribution to the members of the Pension Commission at its next scheduled meeting on or about

December 7, 1997^{11/} (4T63-64). It was not provided to Bourbeau before the meeting (4T64). Nor was she invited to attend the meeting (11T52).

14. In the early December, 1997 Pension Commission meeting, all four commissioners, including Yust, voted to deny Bourbeau's requested "waiver" (1T67, 9T14, 28, 11T123). On an unspecified date and time period, Director Longo sought the Pension Commission's approval of Bourbeau's request (3T121). The Pension commissioners were aware that McKinley had assured Bourbeau of a "waiver" (9T15).

The commissioners also considered the pension eligibility of James Kirk, who was deemed to have been a member of the City's "lifeguard force," as set forth in the Lifeguard Pension Plan, despite his hiring as a "pool lifeguard" or a "surfing guard," neither of which was technically integrated with the "Ocean City Beach Patrol" (1T72-75, 2T100-101; CP-1). Kirk's unbroken tenure in summer employment was undisputed. Longo had advocated the commissioners' approval of Kirk's eligibility for a lifeguard pension (2T100, 3T121). Muzslay later advocated Kirk's eligibility, also (see finding no. 18).

15. On December 12, 1997, Carol Faust (see finding no. 12) sent a memorandum to Bourbeau, advising her that Yust had filed a

^{11/} The Pension Commission did not meet monthly or regularly; it convened, ". . . as needed" (3T131).

written request for the date she had ". . . returned to work from maternity leave." Faust wrote that she advised him of her May 19, 1997 return date (R-2).

16. On December 31, 1997, Joseph Grimes, Esq., attorney for Bourbeau, sent a letter to the Pension Commission members, writing of his appearance on her behalf, disputing her ability to have worked "a full forty-day summer during the 1997 season," and contending that for the Pension Commission, ". . . to hold otherwise would constitute a discriminatory interpretation of the 'pension agreement' against pregnant women." He wrote that his client had not received a "formal" response to her request for the waiver (R-31).

On January 2, 1998, City Tax Collector and contemporaneous Pension Commission member Gary Hink wrote a letter to his co-commissioners and attached Grimes's December 31 letter. Hink opined in his letter that the Pension Commission should meet again to provide Bourbeau an opportunity, ". . . to present her case" and to consider a (soon-to-be) requested opinion from the City Solicitor "on this matter as well as receive guidance on the Family Leave Act." The letter also suggests that the Commissioners consider the pension status of James Kirk (R-32; 11T125-126). Copies of Hink's letter were also sent to the City Mayor (Knight) and Business Administrator (Deaney).

Yust testified on cross-examination that in January or February, 1998, the Pension Commission met with Bourbeau and her attorney. In that meeting, she was asked if she could have worked forty days [in the summer of 1997], “. . . and she said she could have, that was her response” (4T38, 39). In fact, that exchange occurred on March 26, 1998 (see finding no. 20). Except for the purported and approximated date(s), I credit Yust’s testimony.

On an unspecified date in Winter, 1997-1998, Yust attended an Association meeting at which the matter of Bourbeau’s requested waiver of the pension eligibility regulation was discussed. Yust testified that only one of an unspecified number of attending members - Paul McCracken - opined that the waiver should be granted (4T53). I credit his unrebutted testimony.

17. Sometime in or around February, 1998, Director Longo scheduled a meeting of OCBP “administrators” with him, intentionally omitting Yust, for Sunday, March 1, 1998 at a local publicly-owned estate known as “Wheaton’s” (1T86-87). Yust wrote to Longo in advance of the meeting, inquiring about his omission from the group of invitees and expressing interest in attending, but received no reply (1T87). Yust, along with other ranking lifeguard personnel, attended the meeting that concerned plans for the upcoming summer season (1T87).

18. On February 10, 1998, Captain Muzslay wrote a letter to the Pension Commission, expressing his support for lifeguard James Kirk's, ". . . request for credit towards his pension time for his years of service while working as a surfing lifeguard for the Ocean City Recreation Department." (R-24, R-30; 11T35-36). Muzslay noted the 1989 OCBP "takeover" of guarding the "surfing beach" and Kirk's continuing in that role.

19. On March 4, 1998, Director Longo issued a two-page memorandum to OCBP Captain Muzslay regarding personnel matters and Yust, specifically (CP-2). In the memo, Longo initially reiterated both his authority over all "public safety" operations and a directive that McKinley, not Yust, was "second in command" of the OCBP. He wrote that Yust is an "administrative officer" and ". . . is not part of the line command." Longo next wrote:

I have firmly conveyed to you that all administrative and personnel matters within the patrol must meet the highest professional standards regardless of personalities, friendship, animosities, etc. [CP-2]

I infer from Longo's admonition an implicit acknowledgment that Muzslay and McKinley weren't friends, and were of differing personalities and mutual "animosities." Former City Assistant Business Administrator David Breeden credibly corroborated that Muzslay and McKinley ". . . did not see eye-to-eye" (9T73). Paul Gallagher, an OCBP lifeguard for years, including 1997-1998 and a contemporaneous member of the Pension Commission, credibly

characterized Muzslay's and McKinley's conflict as ". . . visible. They couldn't even be in the same room with each other" (9T17). Similarly, Longo implicitly acknowledged that Muzslay and Yust were friends and that McKinley and Yust weren't, again implicating his characterization of differing personalities and mutual "animosities." I also infer that Longo wrote this admonition to Muzslay, personally (as well as professionally); by empowering McKinley at Yust's occupational expense, elevating the former to "second in command," he was knowingly superseding Muzslay's hierarchical preference.

Longo next wrote of his support of "two personnel matters;" the approval of Bourbeau's request for "part-time" status and of Kirk's request for ". . . pension years for the years of service to the City on the surfing beach." He wrote that the two employees, ". . . deserve the support of your organization." By "your organization," I infer that Longo was likely referring to the OCBP under Muzslay's auspices, though he had earlier in the same memorandum cautioned Muzslay that he (Longo) had authority over all "public safety" operations.^{12/}

The remainder of the memorandum directs Muzslay's attention to Yust:

Asst. Capt. Yust's treatment and representation of these individuals [i.e.,

^{12/} Implicit is Longo's directive to Muzslay on how he should manage "his" organization.

Bourbeau and Kirk] outside and within the Pension [Commission] was in my view unprofessional.^{13/} His unprofessional actions included:

He contacted an employer without permission and without notice.

He brought cases before the Pension [Commission] without notifying the individuals involved, inviting them to attend or send representation.

To my knowledge, he never sought the input of past Pension [Commission] members to ascertain past practice o[r] usage.

He did not seek the advice of of [sic] this office, the Personnel office or the resources of the City Solicitor, creating legal problems we now have to deal with.

He did not notify the individuals involved or provide a rationale for the decision.

Clearly as the patrol's 'expert' on personnel matters,^{14/} his behavior is beyond comprehension.

Until Asst. Capt. Yust's professionalism and conduct is discussed in his presence in mid-May with you in attendance, he is

13/ No evidence was proffered indicating Yust's "treatment and representation" of lifeguard Kirk.

14/ Yust testified without contradiction that he did not hold himself out to be an "expert" in personnel matters (4T56). I credit his testimony. I also infer Longo's sarcasm in his characterization. I infer that Longo was unaware that Yust had provided "a rationale for the decision" to deny Bourbaeau's waiver request to his fellow Pension commissioners (finding no. 13).

NOT to attend any meetings to plan this season's operations. [Emphasis supplied]. He should not have been permitted to attend last Sunday's meeting. I had informed Asst. Capt. McKinley I wanted to approve all participants. McKinley should have asked him to leave if he had followed my orders precisely. He knew I would not have approved Yust's attendance. Again Yust faxed me information and without a reply took it upon himself to attend as 'Second in Command.' Such behavior will not be tolerated. As mentioned above, this is the second occasion where he acted without a reply from me.

Captain Muzslay, I am ordering you to meet with Asst. Capt. Yust and convey to him my strong feelings on these matters. Contact me in late April to set up the meeting for mid-May. [CP-2]

The memorandum informed Muzslay explicitly for the first time that Yust was stripped of his "line authority" (2T10). Longo also apparently bypassed Muzslay in the chain of command by directing McKinley to keep him apprised of "all [meeting] participants" and to have expected McKinley to expel Yust from the meeting. On or around the same date, Longo also told Muzslay to direct Yust to approve both matters then-pending before the Pension Commission (2T101, 6T32-33). Muzslay replied that the Pension Commission was "independent" and that "outside agencies" shouldn't tell the commissioners how to vote. Muzslay testified that Longo, ". . . was not happy" with his reply (2T101). I

credit Muzslay's un rebutted testimony. Muzslay also suggested to Longo that he speak directly with Yust about the Bourbeau matter and Longo apparently didn't reply (6T65). Muzslay gave Yust Longo's memorandum to read but declined to instruct him as Longo directed, despite his recognition of or belief in the strength of Longo's sentiment revealed in the last paragraph of his memorandum (1T89, 2T102, 104, 4T44, 6T34, 6T66). Muzslay testified that he understood the first sentence of the memorandum's last paragraph as an order to direct Yust to approve Bourbeau's and Kirk's requests of the Pension Commission (6T25, 29). I credit his belief and infer from the text of the memorandum that Longo had so directed him.

Muzslay also testified credibly under a relatively strenuous cross-examination portion that Longo instructed him to tell Yust to change his vote to favor Bourbeau's request for a waiver and that he declined that instruction, ". . . because it was not under an [OCBP] umbrella, so to speak" (6T31-34). I also find that Muzslay informed Yust of Longo's instruction for informational purposes (1T79, 89).

Yust admitted the correctness of several of Longo's written criticisms; that he contacted an employer without permission or notice; that he "brought" cases before the Pension Commission without providing notice to the individuals effected; and that he

didn't seek advice from previous Commission members, Longo's office, the personnel office and City Solicitor (4T54-55).

20. On March 26, 1998, the Pension Commission met. Yust took notes and wrote the meeting minutes (R-33; 11T60-61). No evidence rebuts his recollection that no Pension Commission members ever disapproved the minutes he recorded from 1997-1999 (11T61). I credit the minutes (with a footnoted caveat - no. 15) as an accurate report of events at the March 26, 1998 Pension Commission meeting. Kathy Bourbeau and her attorney, Joseph Grimes, Esq., attended the meeting (R-33).

The two-page meeting minutes provides in pertinent parts:

. . . [Grimes] stated that [Bourbeau] was told by Director of Public Safety, D. Longo, Captain O. Muzsly and Assistant Captain A. McKinley that if she came back for 20 days on the O.C.B.P. for the summer of 1997, she would not lose any years that she has worked after her 10th year.^{15/} That there would be no break in her service in her last 10 years. Meaning her service would stay continuous. [Grimes] felt that [Bourbeau] by no fault of her own, accepted the administrative promise of no change in her pension status. Therefore, she should not be penalized and the Pension [Commission] should grant her a waiver to section 4 of the Pension Plan.

15/ I specifically decline to credit the hearsay reference to Muzsly because he was called as a witness and did not testify about nor admit uttering such a statement. He testified that Longo wanted Bourbeau, ". . . to maintain her continuous service" (2T100). He also testified without contradiction that he didn't recall ". . . anyone except Captain McKinley telling Bourbeau that she would not be penalized for failing to meet the 40-day requirement that year" (6T18).

Pension [Commission] members expressed their concern that no Administrators of the O.C.B.P. have the right to grant anyone any exception to the Lifeguard Pension Plan. The Pension Commissioners are the only body to grant a waiver

[Bourbeau] was asked by the [Commission] why she worked 20 days instead of 40 days. The [Commission] was curious how she was able to work the 20 days. She said she put her milk in bottles, but she really did not want to do that more than 2 days.

She was asked by the board if she could have worked 40 days. She replied she could have if it were really necessary, but she preferred not to be away from the baby that long

[Grimes] stated that if the waiver is not granted by the Pension [Commission] the City could possibly be sued because [Bourbeau] was led to believe by the Administration that she would not be penalized. . . .

The Pension [Commissioners] felt perplex[ed] that she was promised there would be no problem from an authority that has no power to grant anything in the pension plan, that it was not her fault, the problem of how are we to write a waiver that would eliminate this from happening again and what are the repercussion[s] from members that are still working on the O.C.B.P.

All the pension members felt we should go home, think about what we heard, write down our thoughts, communicate by phone and in general digest all the information before we make a decision or take a vote. Come back before the summer begins to discuss and possibly vote on the situation.

[Grimes] and [Bourbeau] were told of our decision to wait and [Grime's] response was 'Does the original vote still stand then?'

and the response was 'yes.' He expressed concern on when this vote would be taken. We responded that it would be before the beginning of the summer. [R-33]

21. On April 24, 1998, Yust or Hink, on behalf of the Pension Commission, sent a letter to Bourbeau on Pension Commission letterhead (11T69-70). The letter, signed by the "Pension Board [sic]," provides:

On 4/23/98, the Pension Board had a meeting and reviewed your request for a waiver. After a great deal of discussion, the Pension Board stands by the original vote on 12/4/97 based on the interpretation of the guidelines of the Ocean City Lifeguard Pension Plan that you did not meet the consecutive years under Section 4. [R-34]

The vote to deny Bourbeau a "waiver" was again, unanimous (4-0) (9T17-18, 11T70, finding no. 14).

22. On July 16, 1998, the Pension Commission members met with Ocean City Mayor Henry Knight in City Hall. Yust wrote notes and produced accurate minutes of the meeting (11T71; R-35). The Mayor said that he ". . . was pleased with the James Kirk decision but had a problem with our decision not granting Bourbeau a waiver on the last ten-year consecutive clause of the pension plan" (R-35; 1T92, 9T19). Yust wrote in the minutes:

. . . The Mayor stated that he was disappointed that we did not follow the advice [City Solicitor] Corcoran gave us in his letter of February 26, 1998^{16/} that gave us the opportunity

^{16/} This purported document was neither marked for

to grant [Bourbeau] a waiver. We stated that Corcoran said that as a group we can do anything we wanted but we could be opening a can of worms.

The Mayor was given a copy of the four areas that the Pension Commissioners are required to consider when granting a lifeguard a pension. The Mayor was told that we have spent many hours on the Kathy Bourbeau situation and our decision was not easy.

The Mayor again stated that [Solicitor] Corcoran's letter gave us the ability to grant Kathy Bourbeau a waiver. The Mayor said she was promised by the administration that she would not be penalized . . .

We stated that Bourbeau's original premise for a waiver on 8/26/98 [sic] was the Family Leave Act, which does not pertain to seasonal employment. Then when that premise was not applicable to granting a waiver, she informs the Commission at our 3/26/98 meeting, with her lawyer present, that Director Longo, Captain Muzslay^{17/} and Assistant Captain McKinley assured her that if she came back to work 20 days on the beach patrol she would not be effected by Section 4 of the Lifeguard Pension Plan. . .

The Mayor was informed that there has been a lot of outside pressure directed at us personally about our group decisions.

The Mayor assured us that [Solicitor] Corcoran is a very fine attorney and that he could come up with a waiver acceptable to all of us on the Pension Commission.

We expressed to the Mayor that any written waiver could open up a Pandora's box that could

16/ (...continued)
identification, nor introduced as evidence.

17/ See footnote no. 15.

be used later to create even more liberal waivers.

The Mayor and Pension Commissioner agreed to meet at a later date.

[R-35]

23. On July 22, 1998, Bourbeau's attorney, Grimes, sent a letter to Pension Commissioner Hink, with copies to the Mayor, Longo, City Solicitor Corcoran and the three other commissioners, including Yust (R-36; 11T132).

Grimes wrote that after receiving the April 23rd notice of the Pension Commission's rejection of Bourbeau's waiver request, he learned of "other evidence" the Pension Commission received supporting the request, ". . . in the form of oral testimony from [McKinley] and a written letter from [Longo]." ^{18/} Grimes wrote that the City intended to extend "family leave type benefits" to OCBP employees, ". . . on an equal basis to those of all full-time City employees" and that that fact, ". . . was made known to the Pension [Commission] before its original vote of December 4, 1997." Grimes identified other legal arguments in his letter and noted that he was providing "a tort claims notice." He suggested that the Pension Commission should call a "special meeting" to consider his client's concerns (R-36).

18/ The record does not establish the fact or gist of McKinley's "testimony," nor the identification or contents of Longo's "letter." Hink did not believe that McKinley "testified" before the Pension Commission to support Bourbeau's waiver request (11T134). I credit Hink's testimony.

24. On or about August 6, 1998, the Pension Commission members - Hink, Zehner, Gallagher and Yust - met with City Solicitor Corcoran in his law office (1T93-94, 11T129). Corcoran explained to them that they, ". . . could grant [Bourbeau] a waiver if they chose to do so" (11T130). Hink believed by the meeting's end that the Pension Commission would approve Bourbeau's waiver request to avoid the threatened lawsuit (11T131). On August 14th, Corcoran sent a proposed Pension Commission resolution authorizing a waiver for Bourbeau to Pension Commission member Hink with an attached cover letter requesting that the members "execute it and keep it for your records," if acceptable (R-4).

Later that month, on or about August 26th, the Pension Commission again met and voted on Bourbeau's requested waiver, resulting in a 2-2 tied vote, with Gallagher and Yust opposing the waiver and Hink and Zehner favoring it (1T95-96, 4T11, 9T29, 11T130). Yust believed that the rationale for approving the waiver was, ". . . too watered [down], too loose, it's too easy and it's just going to make it easier for everyone in that situation" (1T96). Gallagher thought that the proposed waiver, ". . . didn't cover what I felt the criteria was to grant anybody a pension or a continuance of their consecutive ten years" (9T34). The tied vote left intact the Pension Commission's

previous (unanimous) decision denying the requested waiver (see finding nos. 21 and 18).

25. On the evening of the following day, August 27, 1998, Pension Commission member Paul Gallagher phoned Yust at his home and left a voicemail message for him that, “. . . he’s resigning from the [Pension] Commission” (1T96-97). Yust spoke with Gallagher the next day (1T97).

Gallagher (a then-rank-and-file lifeguard) testified that OCBP then-lieutenant Thomas Mullineaux, who supervised him and worked in the same beach “zone” as he that summer, called him (Gallagher) soon after the Pension Commission meeting at which the tied vote was cast and said, “Get out [of the Pension Commission], they’re trying to bury you” (7T49-50, 9T20, 29, 35). Gallagher testified that Mullineaux didn’t specify who “they” were and he didn’t ask, instead assuming that “they” were the individuals helping Bourbeau, “. . . to get the waiver passed” (9T20, 35). Gallagher candidly testified about his reaction to Mullineaux’s warning:

Part of me just wanted to see this to the end and make sure the right thing was done. But I had a new baby and I just thought that maybe I need to tuck tail. So I wrote a letter of resignation. Went down to the Mayor’s office the next morning. Waited for him to show up. And handed [it] to him myself. Told him I didn’t feel that you’re right or wrong and I didn’t want my name signed to any of it . . . [He said,] ‘Thank you very much.’ That was it. [9T21]

He admitted that he resigned because, "I couldn't justify voting for this thing" (9T51-52). Gallagher also believed that Mullineaux, ". . . was looking out for [him]" (9T40). I credit his testimony.

Yust corroborated that on August 28th, Gallagher told him of Mullineaux's phone call and warning about "burying" him for his recent Pension Commission vote to deny Bourbeau's waiver request (1T97). I credit his testimony.

Mullineaux was asked on (Charging Party's) direct examination if he didn't call Gallagher to warn him to "get off the [Pension] Commission because the City fathers were going to 'bury you guys.'" He testified:

I called him sometime; I don't know if it was August 27th. I did speak with him and told him the same thing, basically - if the City was in favor of it, why are you going to fight the thing, Paul?

Paul said to me that he had enough with all this bickering back and forth and carrying on, that he was going to get out of the Pension Commission. [7T42]

Mullineaux admitted knowing that Gallagher had voted against Bourbeau's waiver request before phoning him. He testified that they had previously spoken of it during a work shift (7T43). He also told Gallagher to ". . . think about [changing your vote]" (7T43, 44). Gallagher testified that he hadn't previously spoken with Mullineaux about the Bourbeau waiver matter because he

". . . kept all that separate" (9T35). Mullineaux initially testified: "I never suggested to him [Gallagher] to get off the Pension Commi[ssion]" (7T42). A short time later in the same examination, he was asked, "You did not say, 'they'll bury you guys' or anything similar that implied sanctions if he [Gallagher] didn't change his vote?" Mullineaux testified: "I don't recollect that at all" (7T53).

I credit Gallagher's testimony and Yust's coroboration of it that Mullineaux warned Gallagher to "get out" of the Pension Commission so as not to be "buried" by those acting on behalf of Bourbeau. I don't infer "they" to mean other Pension Commission members because Hink and Zehner first voted for the Bourbeau waiver on the previous day and they aren't authorized by regulation to seek removal of other Pension Commission members. I infer that to be "buried" means suffering an adverse employment action, up to and including termination. I don't infer that the threat of burial meant removal from the Pension Commission by the Mayor "for cause" (finding no. 4; section 11B) because that option was never raised to or about Yust, whose opposition to the Bourbeau waiver was more assertive and renown than Gallagher's; because voting "no" at that time would not have provided "just cause," and because removal from a volunteer unpaid position falls short of Mullineaux's characterization of what would happen to Gallagher. I also infer that two individuals ("they," as

Gallagher testified in Mullineaux's warning and the "City," as Mullineaux admitted) seeking to assist Bourbeau who exercised direct or significant control over Gallagher's employment in the OCBP were Public Safety Director Longo and Mayor Knight. I also infer, in consequence of Longo's realignment of OCBP "line authority" in favor of McKinley (finding no. 19), who also sought to assist Bourbeau, that Mullineaux likely and implicitly identified him as having significant control over Gallagher's employment. I do not infer that Mullineaux implicitly identified OCBP Captain Muzsly because no evidence suggests that he supported Bourbeau's request. City Solicitor Corcoran recommended an employment action (i.e., granting Bourbeau a waiver) but the extent of his control over Gallagher (or any OCBP employee) was not established on the record. To the extent that Mullineaux's attested version of his phone conversation with Gallagher is not an admission of his explicit warning and advice to him, I find that his testimony is equivocal, evasive, deflective or incomplete and I don't credit it. To credit Mullineaux's version of the phone conversation is to find that Gallagher coincidentally decided (i.e., at or about the time of Mullineaux's phone call) in his unfettered initiative to resign from an unpaid position he sought (and that consumed only sporadic time and effort) because of "bickering back and forth and carrying on" at the Pension Commission meeting(s). Such a

version of Gallagher's impetus is contrary to both his stated interest in ". . . see[ing the matter] to the end and mak[ing] sure the right thing was done" and his admission that he resigned from the Pension Commission because he ". . . couldn't justify voting [in favor of granting Bourbeau a waiver]." Mullineaux's version is also a highly improbable driver of Gallagher's cogently-phrased and admitted

". . . need to tuck tail" because ". . . he had a new baby." It is more likely and credible that Gallagher's perceived and actual need to keep his paid job as a lifeguard to provide for his "new baby" dictated his decision to promptly and without notice quit the Pension Commission. I find that such a decision was generated by a sudden, unanticipated and consequential event, most likely the explicit threat conveyed by Mullineaux. Nor do I credit Mullineaux's denial of having warned Gallagher to leave the Pension Commission because he soon after deflected in answering a substantially similar question as not, ". . . recollect[ing] that at all."

Mullineaux wasn't asked how he learned of the "City's" interest in approving Bourbeau's requested waiver. I infer from the record that a likely source was fellow unit member McKinley, with whom Mullineaux maintained a friendship (see finding nos. 3, and 41).

26. Yust testified that Pension Commission member Roy Zehner received a letter from City Mayor Knight in September, 1998 requesting his resignation from that Commission because he was not a City resident^{19/} (1T99, 11T79). Hink testified that Zehner's resignation was prompted by his change of address to a residence not in the City (11T137). I credit Yust's and Hink's testimonies. Hink did not testify (and the record does not indicate) when Zehner may have moved his domicile from Ocean City to Beesley's Point. On October 27, 1998, Mayor Knight sent a letter to Zehner at an address in Beesley's Point, N.J. The Mayor wrote of his regretful acceptance of Zehner's resignation from the Pension Commission (R-37). It is undisputed that Beesley's Point is not located in Ocean City.

27. In August, 1994, the City hired Benjamin ("Max") Hurst as a police officer (10T170). In 1996 and 1997, he was employed as the computer systems administrator in the police department. In October, 1998, City Chief Financial Officer John Hansen spoke with Hurst about "streamlining" the City's payroll system, including that of the OCBP, in conjunction with technology advances purchased by the City (10T153-154). Hurst admitted that

^{19/} Section 11A of the Pension Plan provides that in addition to a "superior officer" member and a "lifeguard," member, the Pension Commission shall be comprised of ". . . two citizens who are not members of the [lifeguard] force." (See finding no. 4). Then-Mayor Knight apparently interpreted "citizen" to mean "City resident" (and City representative).

his discussion with Hansen in October, 1998 did not include the subject of eliminating Yust's assistant captain title (10T154). From November, 1998 through November, 2000, Hurst worked under Longo's direction, ". . . to assist with an audit, or an oversight of all seven divisions within [the Department of] Public Safety;"

My job was to document, basically, manpower, budgets, processes, try to find efficiencies. And then report back for open dialogue how things could be more efficient. [10T75]

Regarding the matter of "finding efficiencies," Hurst credibly testified that "Public Safety" (in its approximate seven divisions, including police, fire, emergency management, fleet maintenance, mercantile licensing and OCBP) consumed about one-third of the municipal budget (10T76, 79). On direct examination by City Counsel, Hurst was asked if the City intended, ". . . to reduce the percentage, either one, of the budgetary aspect that went to public safety [sic]?" Hurst testified:

Yes. But there wasn't an exact goal in mind for the percentage versus what the pie chart looked like. It was simply trying to reduce operational costs of public safety while still being efficient in our efforts. [10T118]

He testified that "City Hall" directed that departments should be, ". . . less top-heavy. To examine how to get more people in the field" (10T77, 81).

Hurst admitted not to have personally diagnosed "efficiencies" for the police department and to have performed only an "overview" of the fire department; ". . . it wasn't in-depth like the [OCBP] became for me" (10T100-101). Longo directed him, ". . . to look at mercantile licensing, traffic control, [OCBP], fire department, but don't involve yourself with police matters" (10T169). Hurst did not testify about any contemporaneous "efficiencies" achievable in or derived from the mercantile licensing, traffic control (possibly, "fleet maintenance") or fire divisions. Hurst did not report directly to City Business Administrator Richard Deaney. He reported directly to Longo (10T79).

Hurst testified in a relevant portion that he did not perform an evaluation of OCBP staffing in 1998 (10T82). On direct examination by City Counsel, he admitted that that process was "already ongoing" when he was first assigned to Longo:

One of the initial issues [with which] I was confronted with the Director of Public Safety was the elimination of an assistant captain position within the beach patrol. I believe right when I came on board with Mr. Longo in November, I believe that was one of the first issues that I was involved with the beach patrol. [10T83]

On cross-examination, however, Hurst testified that the first time he "heard" about the elimination of the administrative assistant captain title was during his review of Longo's December 10, 1998 letter to Yust (10T154, finding no. 29). I find that

Hurst learned of the title's elimination in November or December, 1998. (A typed organizational "draft" chart of the OCBP dated "Sunday, October 18, 1998" shows a singular "Assistant Captain" graphed below "Captain" and above "lieutenants" and "Sr. Medic" (CP-25). No evidence indicates that Hurst saw this document). Also in December, 1998, Hurst was given a copy of Longo's memorandum to Muzsly dated May 28, 1997 that expanded the scope of McKinley's duties. Hurst recalled having seen Longo's revised organizational chart providing the "assistant captain operations" (McKinley) control over, ". . . administrative staff, medics [and] lifeguards," and giving the title "responsibility for the day-to-day direction of the OCBP" (R-8, finding no. 9; 10T84). Longo asked Hurst if the role of the "administrative captain [Yust], specifically payroll, could be done by others . . . and how that could be accomplished" (10T85). Hurst admitted in cross-examination that when he began reporting to Longo in November, 1998, the Public Safety Director had already decided to eliminate the administrative assistant captain title (10T151). Hurst admitted that he didn't recommend that the title be eliminated; that that decision was Longo's (10T92, 93). Such "streamlining" had ". . . a cost impact to it. And that I [Hurst] was to find a way to make it all work" (10T90).

Hurst spoke with City CFO John Hansen and City Business Administrator Richard Deaney about eliminating the "assistant

captain, administrative" title. Both reportedly concurred that the title's "critical functions," i.e., payroll, could be "spread out" among other OCBP employees once the City's computerized payroll function became "centralized" (10T85-86, 90-91). Hurst concluded: "The duties of payroll within the [OCBP] could be performed by anyone that could have been trained with the electronic version of the program" (10T87). In the absence of specific dates when Hurst discussed the elimination of the title with Hansen and Deaney and in the context of other evidence in this finding of fact and in finding no. 29, I find that Hurst's discussion with Hansen and Deaney wasn't earlier than December 10, 1998.

Asked if he knew in November and December, 1998 if the administrative assistant captain did anything other than payroll duties, Hurst admitted: "I don't believe I ever discussed the exact duties and nature of the position outside of a payroll focus at the time" (10T90). Hurst never spoke with Yust about his duties; Hurst's understanding was based upon a "description" Longo told him (10T219-220).

28. Sometime in October, 1998, Pension Commission members Zehner and Gallagher were replaced by Fred Miller and Michael Jekogain (a "red shirt" or lifeguard unit employee) respectively, pursuant to the City Mayor's designation (1T98, 9T21; R-15).

On December 9, 1998, the Pension Commission, including new members Miller and Jekogain, met. Yust wrote and produced minutes of the meeting, the accuracy of which wasn't contested (except for a minor typographical error noted) on the record (11T80-81; R-38). In the meeting, as set forth in the minutes, Commissioners Miller and Jekogain sought clarification ". . . about Kathy Bourbeau's status." Yust wrote a chronological summary of events, particularly the Pension Commission's votes on the requested waiver through the August 26, 1998 meeting at which a 2-2 tied vote was recorded, leaving the previous denials intact (R-38). Yust also wrote of a suggestion that the consecutive ten-year employment requirement for pension eligibility be rescinded and replaced with a requirement of twenty years of service attained by an OCBP lifeguard and/or officer by age 45 (R-38; 11T80-81).

29. On December 10, 1998, Director of Public Safety Longo issued a letter to Yust, referencing an ostensibly attached, related memorandum to Mark Baum, then-Association President, both on City letterhead (CP-10, finding no. 31). In his letter to Yust, Longo wrote of his meeting with Muzslay, ". . . several weeks ago" from which he inferred that he (Yust) now knew, ". . . that the City will no longer fund an Assistant Captain for Administration position for the Beach Patrol in 1999." Writing that he had notified the Association, also (purportedly attaching

a copy of his memorandum of the same date to Baum), Longo "advised" Yust to call him for an appointment ". . . after the first of the year to explore your options for 1999." Longo concluded by writing, "I look forward to hearing from you in the new year." Longo's letter indicates that copies were sent to Solicitor Corcoran, Muzslay, McKinley and Baum (CP-10).

Longo's December 10, 1998 memorandum to Baum initially acknowledges Baum's "aware[ness]" of the City's effort to "streamline operations and put more of its resources into 'line' functions to better serve the public."^{20/} Longo wrote:

. . . [W]e have [recently] made several decisions regarding the [OCBP] which will impact operations for the 1999 season;

First, there will be no permanent employee^{21/} assigned to the 'Boat Shop' as in the past. We believe that considerable efficiency and increased quality of work can be gained by the primary use of guard personnel for this function and by adding Public Works personnel for 'crunch time' as needed. We welcome your input on fine tuning this system.

Second, in 1999 there will be no position of Assistant Captain for administration. The City is firm that it will not fund the second highest level of the patrol for doing

^{20/} Baum did not testify in the hearing and no other hearsay (or direct) evidence indicates his earlier "awareness" of the City's purported effort to "streamline operations." I don't find such "awareness" as a fact.

^{21/} Yust denied that he was "the permanent employee assigned to the boat shop." He testified without contradiction that that employee was Bob Adams, later assigned to the "carpentry shop" (4T96).

essentially a clerk's position. We plan to use existing personnel, including the Senior Medic and representatives of my office to accomplish this task.

Our hope is that we can reallocate the resources saved in these and other areas to line operations, such as increasing the number of guards and improving equipment as we have already done by funding the AED's and new 'mules.' We look forward to the input of your unit when we begin discussion that will result in a new contract in 1999.

We are in the process of notifying Mr. Yust that he will have to explore other options for 1999 since his previous post will no longer exist. As a long standing [sic] employee, Mr. Yust is entitled to explore where his experience and talent will fit in. I will be happy to meet with him to address his status for the coming year. [CP-10, pages 2 & 3]

Hurst admitted his "direct input in creating Longo's December 10, 1998 memo to Baum" (10T100). He testified:

I remember specifically speaking with Director Longo with the intent of what he wanted to write to the [Association], when he was drafting this with his secretary, Betty Brady. [10T100]

Mullineaux testified that sometime in December, 1998, Baum and Longo talked about "why the position ["Assistant Captain for Administration"] was dropped" (10T66). He admitted that Baum "felt" that the title was being eliminated because of the "Kathy Bourbeau waiver" (10T65). Mullineaux also admitted that McKinley was a "good friend" of Longo's and told him [Mullineaux] that Longo, ". . . was upset with Ed [Yust] with the pension scenario

as to why - he couldn't figure out why he wouldn't - considering this person was on the beach patrol, why he wouldn't just pass the thing" (10T70).

On cross-examination by City Counsel, Muzslay credibly testified that he first learned of the intended elimination of the "administrative assistant captain" title in December, 1998 (6T49). He wasn't asked if he had learned of Longo's intention in November, 1998, as averred in Longo's December 10, 1998 letter to Yust (CP-10). In the absence of conflicting testimony or other conflicting or chronologically inconsistent documents, I credit Muzslay's testimony over Longo's written reference to discussion of the topic with Muzslay in November, 1998. At or around this time, Muzslay spoke with Yust about the change. I infer that Muzslay showed Yust the letter or spoke of the contents of Longo's letter with him. Yust asked Muzslay if he could do anything about it. Muzslay replied that he couldn't, that it wasn't his decision (6T50). He also told Yust to await his upcoming meeting with Longo (4T104).

30. At or around this time, David Breeden, then-City Assistant Business Administrator reporting to Business Administrator Deaney (as did Longo), "mediated" his boss's unspecified "disagreements" with Longo (9T73-74). Breeden also became aware that Muzslay and McKinley, ". . . did not see eye-to-eye." He credibly testified that Longo was "old school,"

believing that personal loyalty was a matter of "great emphasis" and "value" to him (9T94). Breeden testified that Longo mistakenly believed that Muzsly had displayed a sign on his front lawn boosting the political opponent of the then-City Mayor (who promoted Longo), much to his disapproval (9T92-93). Breeden credibly testified that he was a friend of Longo and Longo's son, Joseph, who confided to him his concern for his father's "physical state pertaining to prescription and/or alcohol use" (9T62). Breeden was concerned that Hurst, ". . . interjected himself into municipal matters that weren't under his area of responsibility." He testified:

When it came to computers and IT [Information Technology], I deferred to his judgment. But when it came to other issues regarding public safety, I was troubled with some of his positions. [9T77]

Hurst admitted that Breeden told him that he was "delving into problems" of the fire department and OCBP for which he had no background (10T167). I credit Breeden's testimony.

Deaney told Breeden to look at "various departments and examine and analyze them with respect to whether they were operating effectively and efficiently," though Breeden didn't become aware that the OCBP assistant captain of administration title was abolished and that two senior lieutenant positions were created, ". . . until well after the fact" (9T85-86).

Breeden admitted knowing the elder Longo since 1992, retrospectively characterizing him then as a "sharp man . . . on his game and a good manager" (9T78). By late 1998 and early 1999, Breedan credibly continued, Longo had become "indecisive, forgetful and paranoid," occasionally requiring physical assistance when leaving City premises, causally and ultimately leading to his admission to a "substance abuse facility" in Spring, 1999 (9T79). During periods of his absence, Hurst relocated to Longo's office and parked his car in Longo's designated parking space, creating a false impression that he was "running the show" (9T80-81).

31. Yust testified that he personally received Longo's letter on December 23, 1998, a date he recalled because its arrival coincided with the date of his wedding anniversary (1T100). He testified that the memorandum from Longo to Baum was not included in the envelope and that Longo eventually sent it to him, upon his request (1T102, 4T85). I credit Yust's testimony.

After receiving Longo's December 10 letter, Yust called OCBP President Baum, who also received Longo's correspondence. Yust credibly testified that Baum told him, "Don't worry, we are going to take care of this" and "You will not lose the position. We are going to fight for you" (1T104, 4T103, 5T109). On January 5, 1999, Baum issued an announcement on Association letterhead providing, "There will be a meeting of all members of the

[Association] on Saturday, 12 p.m., January 23, 1999 at the Impala Island Inn, 10th and Ocean Ave" (CP-3). No such meeting was convened, nor was a meeting conducted until late February or early March, 1999 among "selected" Association members (1T105-106, finding no. 35). Yust testified that on an unspecified date, Baum remarked that the initial scheduled meeting, if held, would have been a "donnybrook," for unspecified reasons (1T105). I credit that testimony, inferring that Baum cancelled the scheduled January 23rd meeting.

32. Also on January 5, 1999, Yust sent a memorandum to Longo, acknowledging receipt of the December 10th letter (on December 23rd) without the "attached" [memorandum to Baum] and requesting that a copy be mailed or faxed to him. Yust also wrote that meeting in January, 1999 on mid-Friday afternoons would be the only convenient days and times for him. He also wrote that if those proposed dates and times are inconvenient for Longo, the Director could perhaps select, ". . . a more suitable date and let [him] know" (R-12; 4T88).

On January 6, 1999, Longo sent a reply to Yust, together with a copy of the memorandum he wrote to Baum [CP-10; finding no. 28]. Longo wrote that he would "be happy" to meet to, ". . . discuss your status for the coming year but with my schedule it is impossible to predict when I will be free." Longo recommended that Yust call him on Thursday for advice on his availability on

Friday (R-13). Yust phoned Longo's office on an unspecified number of Thursdays, as suggested in Longo's reply. On those occasions, he spoke with Longo's secretary, who more than one time advised Yust of Longo's unspecified medical problems (4T91-92).

33. On February 22, 1999, Longo wrote a memorandum to Yust on City letterhead regarding "employment with the City of Ocean City" (R-14; 4T106). He admonished Yust for not responding to his "previous correspondence and [failing] to set up a meeting, as requested, to discuss your plans for continuing employment with the City, if indeed that is your desire" (R-14). Longo wrote that his offer of December 10, 1998 to meet with [Yust] "still stands," [see finding no. 28], though, ". . . any position you obtain in the reorganization of the patrol will be approved by me and will take effect only after my consultation with the Captain and the Operations Officer [McKinley]." Longo wrote, "Please contact my office soon so your status can be resolved . . ." (R-14). Yust did not recall the date he received Longo's memorandum (4T106).

Yust testified that he wrote a letter to Longo that essentially crossed in the mail with Longo's February 22nd letter but couldn't recall its contents (4T108-109). In the absence of conflicting testimony or documents, I credit Yust's testimony.

34. On February 23, 1999, Yust wrote a letter to the then-State Attorney General, Peter Verniero, on OCBP letterhead, inquiring if, ". . . an ethics committee exists that oversees pension plans at the local level" (R-15). In the letter (and writing without other Commissioners' knowledge), Yust recounted selected circumstances of the Pension Commission's initial unanimous vote not to grant a waiver; the reaction by "certain public officials" to ". . . try to persuade the commissioners to change our vote;" their compelling two commissioners to resign from the Pension Commission [under questionable circumstances; finding nos. 25 and 26]; and his receipt of a December, 1998 letter advising that the position he held for ten years (assistant captain) would not "be available" in summer, 1999. Yust wrote of his appreciation for any assistance that could be provided, including the Attorney General's "confidentiality" (R-15; 4T110, 126).

Yust admitted that the "public officials" to whom he referred in his letter to the Attorney General were Mayor Knight and Public Safety Director Longo (4T114, 117). In cross-examination, Yust conceded that one Pension Commission member who was asked to resign - Zehner - had voted in favor of a waiver for Bourbeau in August, 1998 and that he omitted that fact from his letter to the Attorney General (4T119).

On March 3, 1999, John Chernatti, a State Deputy Attorney General, wrote a letter to Yust, advising that the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., governs local officials' ethical conduct and is administered, ". . . by the appropriate local ethics board or State Local Finance Board." The Deputy wrote that if the City has not established such an ethics board, Yust could file a complaint with the Department of Community Affairs in Trenton (R-16).

35. Yust testified that in January, 1999, he was one of four members of the Association's negotiations team. As Association Treasurer, Yust served on the team with Craig Peters, Association Vice-President; Mark Baum, Association President and Brian Booth, Association Secretary (1T106-107; CP-3). He testified that it was "normal practice" for Association officers to comprise its negotiations team (1T107). On or about February 23, 1999, Yust called Baum to discuss the upcoming negotiations session. He testified that, ". . . it wasn't much because he said he didn't want me there" (5T19). I credit his testimony.

On February 24, 1999, Baum, Peters and Booth sent a signed letter to Yust on Association letterhead, providing:

In reference to your calls 23
February 1999 concerning contract
negotiations, the Executive
Committee does not feel it is in
our best interest for you to be on
the Negotiation Committee at this
time.

We are and will be interested in any and all input that you have to offer. [R-19]

Yust's testimony that Association officers normally comprised the Association's negotiations team wasn't credibly contradicted^{22/} and is indirectly corroborated by the Association's Executive Committee February 24th letter to Yust. I credit Yust's

22/ Thomas Mullineaux, now Chief of Operations of OCBP, testified that the Association President, ". . . pretty much [decided] who was going to be on the negotiating committee; . . . just because you're a vice president or secretary or treasurer doesn't make you a good negotiator as to what goes on right now at beach patrol" (7T20; 10T40). I infer that Mullineaux's hearsay testimony about unspecified contingencies that figured in Baum's selection is conveniently focused upon collective negotiations in March, 1999, exclusively. In a later cross-examination colloquy, Mullineaux answered, "not necessarily" to the question of whether it was common practice for Association officers to serve on the negotiations committee (10T40). When asked to name any Association officer(s) who didn't serve on its negotiations committee, Mullineaux replied that Association Secretary Booth didn't participate in the March, 1999 negotiations. Mullineaux's response doesn't rebut Yust's testimony that it was "normal practice" for Association officers to comprise its negotiations committee because negotiations in March, 1999 were not "normal," as evidenced by the February 24th Association Executive Board letter to Yust and by the contemporaneous but undated and relatively lengthy list of (non-officer) negotiators promulgated by Baum (R-19, R-25).

Also and to the extent that Baum and Executive Board members selected the Association's negotiations committee "in the past," no evidence indicates that they - the officers - (historically) didn't comprise the committee. Finally, Baum's ascribed criteria ("experience, skill and dedication") for selecting members of the negotiations committee didn't preclude Yust (see R-25).

testimony, notwithstanding his admission that he didn't participate in negotiations for the predecessor agreement (finding no. 10). Yust testified that Baum's February 24th letter to him meant, ". . . they didn't want me there because they thought I probably would cause a distraction trying to push for my position" (5T20, 110). He also testified that Association Vice President Peters told him that, ". . . we are not going to try to save your position because we want this contract" (5T22). I credit Yust's testimony.

On an unspecified date before March 4, 1999, Association President Baum issued a memorandum to Association members advising that negotiations, ". . . will begin soon" and that, ". . . as in the past, I, with the advice and consent of the officers, have selected the negotiating committee. This selection was based upon experience, skill and dedication." The memo continued:

The following members have been selected to represent you:

Mark T. Baum
Alfred "Bud" McKinley
Thomas A. Mullineaux
Angelo Psaltis
John McShane
Mark McElivee
Kristie Brown
[R-25]

Mullineaux admitted on direct examination that before negotiations began, ". . . there was obviously a conflict between

[Yust] and [Director] Longo" and that Association President Baum, ". . . to my knowledge, felt it was best not having somebody on there - I mean it was going to be adversarial enough in the negotiations and he didn't want to make it any more [adversarial]^{23/}" (10T10-11). Asked for the source of the conflict, Mullineaux testified: "Well, they dropped his position as assistant captain in, I guess, December or January" (10T11). Mullineaux also acknowledged that everyone in the Association's leadership was aware that Longo wanted ". . . to do away with the assistant captain position" (10T40). Mullineaux conceded that not all seven "selected members" attended the March 4, 1999 negotiations session (10T8). Mullineaux also admitted that an Association meeting - but not a general membership meeting - was convened before the March 4th negotiations session at which "getting the position back" was discussed. He conceded that in the past, issues pertaining to positions were discussed with the entire membership before or during negotiations (7T77, 10T20, 22). No facts indicate if the matter of Baum's "selection" of

23/ No facts adduced on the record indicate circumstances of "adversarial" collective negotiations in 1999, if that adjective's meaning connotes contentious and/or sustained disagreement(s) among employer and union representatives. I find the opposite to have been the case (see finding nos. 37, 38 and 39). I don't credit Mullineaux's characterization of the March, 1999 collective negotiations process.

the Association's negotiations team was the subject of discussion at an Association meeting.

On an unspecified date before March 4, 1999, Hurst expressed concern to Longo about the number of Association representatives listed to attend the upcoming negotiations session (10T108). Longo told Hurst that Yust wanted to sit at the negotiations table on behalf of the Association but the Association hadn't included him on its committee. Hurst testified that Longo believed that ". . . if you weren't designated by the union, you don't sit at the collective bargaining table" (10T109).

36. On March 3, 1999, Yust and Longo met in Longo's office, pursuant to Longo's December 10, 1998 letter to him (finding nos. 28-30). Max Hurst accompanied Longo (1T114-115, 10T104). Soon after the thirty-minute meeting, Yust wrote a two-page memorandum recounting the discussion and provided it to Longo and Hurst promptly (5T26, 10T111). Hurst essentially corroborated the contents of Yust's memorandum and acknowledged a "definite feel of tension" between Yust and Longo in the meeting (10T111-121; 184).

The memorandum provides in pertinent parts:

Director Longo informed me that they were streamlining the various departments within the City and that they were doing the same thing to the [OCBP]. The streamlining was approved by senior staff [i.e., Mayor, Business Administrator, Departments of Law, Public Safety]. The Director asked me what I wanted to do if I came back to the [OCBP]. I

informed him that I wanted to return to the [OCBP] as an Assistant Captain. Both the Director and [Hurst] informed me that was not a choice.

. . .

The Director informed me that they were going to try to make a Senior Lieutenant position, but first they must clear that position with the senior staff. I responded that I would probably fill that position because I was originally an Administrative Lieutenant when Oliver Muzslay became Captain fifteen years ago. A position I held before I became Assistant Captain ten years ago. The Director responded that the position was not formally recognized. I informed the Director that my salary reflected that I did have the position of Administrative Lieutenant. The Director responded that there were a number of variables to be considered before making a Senior Lieutenant.

The Director informed me that two lawyers . . . informed him that the City was in their [sic] right to eliminate the position of Assistant Captain. He also informed me that my Association was in agreement with what management was doing in regards to streamlining and doing away with my position. I responded that according to the members that I have spoken to, and there are a good number of them, they are not at all pleased with the position of Assistant Captain being eliminated.

. . .

I informed the Director that I am a member of the [Association] executive board, holding the position of treasurer and have the opportunity to talk to many members. The Director seem surprised and responded that my name does not appear on the negotiation team. I informed the Director that [as a] member of executive board, [I] have a right to represent members of my Association.

. . .

[Hurst] informed me that I must make a decision whether I want to return as a lieutenant or not return to the [OCBP]. He informed me that I could return as a lieutenant and legally fight the elimination of my position.

The Director informed me that I could grieve my situation and of course he would hear the grievance. I responded that I was well aware of the contract and will probably file a grievance.

. . .

The Director asked me what my decision was, return as a lieutenant or do not return at all to the [OCBP]. I responded that I'd rather come back as an Assistant Captain, but if my only choice is to return as a Lieutenant, then I will return as a Lieutenant. The Director asked me to put that in writing. I explained that I would have to check with my legal counsel . . .
[R20]

The veracity of Yust's memorandum was unshaken in a rigorous cross-examination of Yust (5T25-38). I credit the document.

37. On March 4, 1999, the Association's negotiations team was comprised of President Baum and (non-officer) members McKinley, Mullineaux, Angelo Psaltis and John McShane (1T112, 120-121, 10T12). Mullineaux admitted that Psaltis later became Longo's "driver" and that McShane and McKinley were "good buddies" (finding no. 30; 7T88, 91). Yust appeared at the time and place of the scheduled negotiations session. Baum and McKinley were "shocked" to see him there. Yust was surprised to

see non-officer members on the Association's negotiating committee (5T111). Baum and McKinley told Yust that he could, ". . . be here but you can't vote or talk," to which he objected but agreed to abide their directive (1T113). City representatives Longo and Deaney (Business Administrator), accompanied by Hurst, then arrived. Longo said to Yust: "Get out" or "You're not a member of the negotiating team. You weren't invited and you have to leave" (1T119, 7T24). Yust replied: "I'm a member of the Association. I have a right to be here for negotiations. I'm on the negotiations team - it's only fair that I sit here and listen to what is going on" (1T120).

Yust testified that Longo turned to others attending on behalf of the Association, and asked: "Anybody on this negotiating team want him [to stay]?" They all answered, "No." Yust responded: "I think I have a right," to which Longo retorted: "If you don't get out of here now, I'll have an officer come up and remove you" (1T120-121, 7T23). Yust testified that as he arose from his chair, Deaney approached him and said, "Ed, it's not worth it, getting taken out by an officer." Yust replied "Thank you, Mr. Deaney" and left the room (1T121). Mullineaux admitted that Yust left the negotiations meeting under Longo's threat of removal (7T19, 10T43). I credit Yust's testimony.

Mullineaux admitted that in the negotiations session, the Association's team asked that the administrative assistant captain title be "reopened," to which Longo replied: "It's no longer on the table" (7T13, 8T94, 10T44). Hurst and Mullineaux corroborated that Longo's reply didn't elicit, ". . . anything from the Association in disagreement" (7T13; 10T127). I infer from such a brief exchange that the raising of this subject by the Association's team was merely perfunctory or rehearsed, inasmuch as Longo on the previous day told Yust that the Association had approved the elimination of Yust's administrative assistant captain title (finding no. 36, 10T126). In all of his employment with OCBP (more than 40 years), Mullineaux was unaware of another instance in collective negotiations when an OCBP employee, ". . . lost their position" (7T75, 76). I infer from this testimony that the loss of an OCBP unit title had never before been discussed in negotiations. No evidence in the record establishes the loss of any other unit title.

Hurst recalled that establishing the title, senior lieutenant, was discussed in the meeting (10T123, 125; finding no 34). While agreeing that the City created a senior lieutenant title and two senior lieutenant positions soon after eliminating the administrative assistant captain title, Hurst disagreed that, ". . . every duty and aspect of the then administrative assistant captain position [was] clearly identified and distributed just to

two senior lieutenants" (10T156-157). He testified that the "intent" was, ". . . to have an operational lieutenant but one that also had extra duties . . . say, for example, inventory" (10T 120-121).

38. Yust testified without contradiction that the Association's 1999-2000 successor collective negotiations agreement with the City was entirely negotiated at the March 4, 1999 session, in comparison with all previous agreements that required two or more negotiations sessions (1T121). He also testified without contradiction (and as corroborated by uncontested, signed and dated (2/25/2000; 2/28/2000) hearsay affidavits of M. Robert Amsley and William O. Stull, lieutenants included in the Association's unit in 1999 and 2000) that the 1999-2000 agreement, though signed by Baum and Psaltis on behalf of the Association on June 4, 1999, was not ratified by a membership vote, unlike previous agreements (1T129-134; R-10; CP-5, CP-6, 5T114).

Article XVII A (Wages and Salary Scale) of the successor agreement charts Association unit titles, years (of experience) and pay scales for 1999 and 2000. For the first time in any Association collective agreement, "senior lieutenants"^{24/} appears

24/ "Senior Lieutenants" is also included in the "Association Recognition" (Article I) for the first time, together with lifeguard lieutenants, senior lifeguards, senior medic and assistant captain.

on the chart between "lieutenants" and "assistant captain," with its hourly rate of pay identical to "lieutenants" in their second year of service (\$17.24 and \$17.75 for 1999 and 2000, respectively). "Assistant captain" is paid \$15,000 and \$15,500, respectively. Appearing between "senior lieutenants" and "assistant captain" on the chart is "stipend," payable to the former title in the amounts of \$2,250 and \$2,500 in 1999 and 2000, respectively (R-10).

39. McKinley, the remaining assistant captain following negotiations, received a negotiated 30% wage increase for the upcoming 1999 summer. He was paid more than \$15,000 (finding no. 10; 11T9). Similarly, Mullineaux and Psaltis were soon promoted to the newly established senior lieutenant title, each receiving a wage increase of about thirty cents per hour, plus a \$2,250 stipend. Baum was promoted to lieutenant from senior guard, receiving a wage increase of close to \$5 per hour, or about a 30% increase in pay. Baum's promotion, formally approved closer to the summer of 1999, coincided with the City's creation of an unprecedented ninth or tenth lieutenant position (1T124-128, 2T11, 5T112-113, CP-4; R-10; 11T12). Yust was demoted to lieutenant, becoming an hourly paid employee, earning about \$8,500 during the summer of 1999, a 30% reduction from his immediately previous assistant captain's salary of \$12,150 (CP-4; R-10; 5T55, 61, 10T50, 11T14). The record does not indicate that

Association negotiations committee member McShane's summer, 1999 compensation changed significantly (i.e., more than a 3.5-4% wage increase contractually negotiated for most unit members).

A side-by-side comparison of the 1997-98 and 1999-2000 Association/City collective negotiations agreements - all twenty-six articles - shows that they are identical, except for Article I (Association Recognition) (adding "senior lieutenants" and changing "assistant captains" to "assistant captain"); Article XVII (Wages and Salary Scale) (changes noted above, plus hourly wage increases for senior guards, senior medic and lieutenants); and Article XXVI (Duration) (1997-98 versus 1999-2000) (R-10, R-11).

40. On or about March 4th, Yust verbally grieved to Muzslay his ". . . change of title from Assistant Captain to Lieutenant," pursuant to the contractual grievance procedure (5T7-8; R-17). Muzslay later replied to Yust that he couldn't grant his request at step one and that the grievance would have to be filed at step two (5T16). On March 12, 1999, Muzslay issued a memorandum to Longo, advising of Yust's grievance and requesting a meeting with him to discuss it on any of three specified dates and times in the following week (R-17). On an unspecified date sometime between December, 1998 and March, 1999, Muzslay asked Longo why he was eliminating Yust's title (or demoting him). Muzslay testified:

He [Longo] told me that he wasn't supporting Ed Yust because Ed Yust did not support him, meaning the pension issue, the two pension issues . . . and he had told me that at one time Ed Yust in the voting for the local mayoralty, there was a person running [Jan Glen] that said if they got in, they would do away with the position of Director of Public Safety and that Edwin Yust had voted for that person. [2T109-110]

Muzslay's request of Longo to reinstate Yust or "reinstate the position because I thought he was a loyal, dedicated employee of the City" was unavailing (2T110). In the absence of any conflicting testimony or document(s), I credit Muzslay's testimony. Mullineaux admitted that "later on," he came to believe that the City and Longo had wanted Yust to approve the Bourbeau waiver and when he wouldn't, ". . . it raised the ire of the City" (10T35).

On March 15, 1999, Yust sent a letter to Association President Baum, identifying as enclosed his grievance to Longo contesting his demotion from assistant captain to lieutenant. Yust also wrote of his request for Association support, ". . . by providing [him] a professional representative." Yust wrote that, "a [unnamed] professional representative is familiar with the situation" (R-18).

41. On the morning of March 17, 1999, McKinley handwrote a five-page summary and chronology of "[his] thoughts/argumentation for the City's side in any grievance with Yust" to "Chief/Max," from which I infer that the addressees were Longo and Hurst (R-

23, 6T47-49). The advisement was written on letterhead of "Machon, McKinley, Malloy, Valasek and Associates, Educational Consultants," with McKinley identified as "Dr. Alfred W. McKinley, Jr." No other document was attached to this exhibit. No facts indicate how or why McKinley volunteered or was solicited or directed to write this document. I infer that the entitled document (apart from its content) corroborates Longo's estrangement from Muzslay, despite the latter's captaincy (and exclusion from the Association's negotiations unit, pursuant to the recognition provisions of both the 1997-98 and 1999-2000 collective negotiations agreements) and McKinley's familiarity with and suggestions for OCBP management objectives, despite his title's inclusion in the Association's negotiations unit. Mullineaux admitted that McKinley and Longo were "good friends" and that he and McKinley "talk[ed] at times" (10T70).

McKinley's written prefatory note informs of his intention to meet with Hurst early the next day to be "available" to attend that day's scheduled 11:15 a.m. meeting with Muzslay. The attached "draft" is a chronological "timeline" commencing in 1997, noting that, ". . . from spring of 1997 onward, the City, led by the Mayor, the Administrator and Director of Public Safety, was contemplating the reorganization of the beach patrol. The Director was firm that the emphasis for beach patrol senior staff should be on-line functions" (R-23). He wrote that he was

"directed to ensure" that all "administrative level of the patrol" must "officially requalify [sic] in both running and swimming." McKinley next wrote:

In addition, the patrol was put on notice in the summer of 1997 that all non-line functions were subject to review including the position of Asst. Capt. for Administration. The City expressed its concern that the second highest salary was dedicated to essentially a job that was a clerk's position in many other organizations. These sentiments were conveyed at that time to the Captain [Muzslay] The Director after meeting with Mr. Yust, permitted him to retain [the payroll function] but warned him in June of 1997 the position was under review. [R-23]

No evidence in the record (except evidence set forth in finding no. 9) corroborates McKinley's written summary of events in 1997. For example, the record doesn't corroborate that in 1997, the Mayor or Business Administrator "contemplated" a reorganization of the OCBP or that the OCBP was "put on notice" that all "non-line functions were subject to review." On this record, the earliest specific reference to "on-line function" appears in Longo's March 4, 1998 memorandum to Muzslay in which he wrote that Yust, ". . . is not part of the line command" (finding no. 19). Nor do the facts in finding no. 9 corroborate a reorganization of OCBP; they reveal only Longo's decision to assign McKinley the "day to day direction" of OCBP and impliedly strip Yust of beach monitoring responsibilities. McKinley's pejorative reference to Yust's job as a "clerk's position" didn't

initially appear in the chronology of record events until Longo wrote that precise description in his December 10, 1998 letter to Association President Baum (finding no. 29). I don't credit McKinley's written chronology of 1997.

Recapping events in 1998, McKinley wrote that Longo, ". . . made clear that line functions were to be a priority with the patrol" and that he (McKinley) was directed to ensure that all patrol members, including its "highest officers" were capable of effecting rescue and should "requalify" regularly. McKinley wrote that he was given responsibility for "direct day-to-day operations" and to "select lieutenants to assist him with key operation functions."^{25/} He then wrote:

At no time did Mr. Yust ask to be considered for line functions or to be considered for these line support operations functions. The operations officer [McKinley] did ask Mr. Yust to act as 'relief lieutenant' normally for two days per week to cover zone lieutenants who were off. At no time did he state his administrative duties were so pressing he could not accept these assignments. [R-23]

McKinley wrote that in "fall, 1998," Longo, after consulting with "the Mayor, Administrator and Solicitor" decided that the patrol

^{25/} No facts in the record corroborate that Longo directed McKinley to select lieutenants, specifically, to assist him with "key operations functions." Also, no facts establish that Longo "made clear" a priority on "line functions" to anyone except McKinley and perhaps, Hurst before he sent his December 10, 1998 letter and memo to Yust and Baum, respectively (finding no. 29).

could function without a full-time employee in the beach patrol boat shop and without the Administrative Asst. Captain's position." He wrote that, ". . . these streamlining measures are in keeping with similar economies achieved in other divisions and are ongoing throughout the City"^{26/} (R-23). The remainder of the chronology summarizes events on December 10, 1998 (finding no. 29) and March 3, 1999 (finding no. 36). Finally and regarding Yust's grievance, McKinley wrote:

Mr. Yust's grievance is neither timely nor factual. Far from retaliation or harassment, the elimination of the Asst. Capt's position for administration is part of an ongoing process to put more of the patrol's resources into line functions.

In short, although both himself and his bargaining unit were notified in a timely fashion, Mr. Yust chose not to act while the previous contract was in force. Nor did he avail himself of the two invitations by the Director to discuss his future . . . Mr. Yust made no attempt to explore the option of retirement with the City using his 1998 salary as a basis [R-23]

Later in the day on March 17, 1999, Hurst met with Assistant Business Administrator Breeden and Charles Zimmerman, City Human Resources Director, for the "sole topic," as written in Hurst's "memorandum of record to file" on that date, of ". . . the reorganization of the OCBP and a grievance filed by Mr. Edward

^{26/} The record does not demonstrate contemporaneous other "economies achieved" in 1998 (see finding no. 27).

[sic] Yust" (R-27; 10T136). Longo's directive to Hurst for the meeting was to "pursue it and document it" (10T137).

Hurst wrote ten enumerated "factual conclusions" in his memorandum; among them are that Yust, a "seasonal employee, was terminated on October 3, 1998, [as] conducted yearly at the close of the summer season;" that ". . . in late November or early December, the City elected to reorganize OCBP by eliminating the Administrative Assistant Captain position. Emphasis was placed on creating a more 'in line organization';"^{27/} that ". . . at no time during the process of eliminating the position of Administrative Assistant Captain did the terms demotion, discipline or retaliation [sic] rise or become an element;^{28/} that more than seven days had passed (since December 10, 1998) until Yust filed a grievance (March 4, 1999), "reordering the grievance

27/ Hurst admitted that he made this "factual determination" (10T139). From this memorandum, ostensibly reporting on the "reorganization" of the OCBP, one would have to somehow surmise that "creating a more in-line organization" meant establishing a new title, senior lieutenant and two positions in that title. Also, Hurst's finding that Yust was "terminated" as a "seasonal employee" is inconsistent with Article XVIII (Eligibility To Return) of the parties' 1997-1998 CNA.

28/ Hurst testified that ". . . at no time" refers only to the March 17th meeting; ". . . my narrative, based on the conclusion of the meeting, what transpired and what I presented at the meeting" (10T141). He also admitted that ". . . arise or become an element" was based on "his knowledge and conversation" (10T142). I infer that Hurst is implicitly admitting that he has no "knowledge" of "demotion, discipline or retaliation" before December 10, 1998 (see finding no. 27).

[untimely] without merits and that Muzslay filed a letter supportive of Yust and disapproving of the decision to eliminate his title (R-27, 10T136-143). The tenth and final "factual conclusion" is that a meeting with Captain Muzslay is scheduled for (the next day) March 18, 1999 at 11:15 a.m. (R-27, 10T143).

42. On March 18, 1999, Longo, Hurst and Muzslay met and discussed "Yust's grievance" and "OCBP Issues," as briefly enumerated in Hurst's notes (one-half page, typewritten) of the meeting (R-28, 10T144-149). Under "Yust Grievance," the five enumerated items included questions of whether Yust's grievance and Muzslay's response were, "in writing" (they weren't; see finding no. 40); that "the position of Captain, expectations and role in management" were reviewed. This was essentially an admonition to Muzslay that as OCBP Captain, he was obligated, ". . . to carry out management responsibilities and direction, based on the supervision of Dominick Longo" (10T145). Hurst then wrote an acknowledgment of Muzslay's "letter of support" for Yust (R-28, 6T50). Hurst's last item was that Yust's grievance was "without merit."

In the meeting, as memorialized under Hurst's written topic of "OCBP Issues," criteria for selection of "senior lieutenant" were discussed (though Muzslay opposed any change to the structure of the OCBP) (10T147, R-28). These criteria were identified in Hurst's notes:

- a. chosen from applicants from rank of lieutenant;
- b. not entirely based on seniority;
- c. duties and responsibilities to be defined; and
- d. purpose and work flow

[R-28]

On cross-examination, Hurst recalled that senior lieutenant duties included keeping inventories of uniforms, lifeguard stands and boats; maintaining records of budgets, radio communications, vehicles, capital needs and payroll; in short-term and long-term planning and procedures (10T183). I infer that such duties became apparent or were assigned to the title after March 18, 1999. Hurst testified that the "concept" was to shift administrative functions, not only from the administrative assistant captain title and to ". . . pair them with people's skill set and make it so it's not overwhelming" (10T229). He testified that the "savings" would accrue "over time . . . it's got to start someplace and then it's got to filter through the organization" (10T228-229). I credit Hurst's testimony about "the concept" as hearsay and as ad hoc rationale because Longo had determined to eliminate Yust's title before Hurst reported to him in late, 1998 without any revelation (at that time) or apparent consideration about the consequential distribution of administrative tasks.

Hurst also wrote as enumerated items that OCBP "Rules and Regulations" required updating of "charges and discipline;" that "all functions and positions will be evaluated;" that "clear [sic] and define OCBP chain of command. Role of Captain and the Director's office" and that the "46th Street location keys, office, personnel [required review]" (R-28).

43. On March 20, 1999, Longo sent a letter to Yust on City letterhead, writing that his grievance had been "abandoned." Longo wrote that Yust had initiated the grievance with Muzsly on March 4th; that the event "giving rise" to the grievance occurred on December 10, 1998 "(reorganization of OCBP);" and, citing the grievance procedure, - highlighting the passage of time between the "initiation" and "giving rise" dates - represented the contractual ". . . failure to act within seven calendar days [that] shall be deemed to constitute an abandonment of the grievance" (R-41).

On March 30, 1999, Yust wrote a letter to City Business Administrator Deaney, seeking ". . . a grievance hearing at the third step relating to [my] demotion from Assistant Captain to Lieutenant for the year 1999." Disputing Longo's determination of "abandonment" at step two, Yust wrote a detailed chronology of events (see finding nos. 29, 31, 32, 33) leading to his March 3, 1999 meeting with Longo (wherein he was advised that he could return in 1999 as a lieutenant or not return). Yust wrote, "How

can an individual grieve in December 1998 when they [sic] have not been made aware of their [sic] options until March 3, 1999" (R-42, 11T97).

44. On April 1, 1999, Longo issued a "revised" OCBP "Organizational Chart," the revision comprised chiefly of two aspects. The first depicts (by vertical downward-pointed and upward-pointed oppositional "arrows") that "operations and legal briefings" duties are to be administered by the "Director of Public Safety" (top of chart) and "Assistant Captain McKinley" (third from top), anomalously bypassing "Captain Muzslay" (second from top).^{29/} The second shows "senior lieutenants" on the chart beneath "Assistant Captain McKinley" and parallel with the "Senior Medic." The one-page chart provided spaces for the signatures of Longo, McKinley, Hurst and Muzslay; all but Muzslay signed the document (CP-12; 2T97-98). Sometime in 1999 or earlier, Yust came into possession of a "draft OCBP organizational chart" dated "Sunday, October 18, 1998" showing the Director of Public Safety at the top, beneath which was "captain", and "assistant captain" [singular] in descending

29/ This is another example of Longo bypassing a supervisory/managerial non-unit title - captain - to share with or refer to a negotiations unit title - assistant captain - the performance of an apparently managerial function (see finding no. 41). Mullineaux admitted that in the summer of 1999, he saw an OCBP organizational chart [perhaps CP-12] showing that operational authority went directly from Longo to McKinley, bypassing Muzslay (10T51).

order, followed by "lieutenants" and the "senior medic" on one and the same horizontal line. Those titles were followed, in order, by "senior guards" and "medics" (on the same horizontal line) and "guards" at the bottom (CP-25; 11T239-244). Nothing in the record defines "legal briefings" on this organizational chart. I infer that the term references McKinley's role in advocating Longo's then-recent positions on Yust's grievance (finding no. 41) and dovetails with the exclusion of Muzslay from "legal briefings," as set forth in this chart.

Muzslay testified that until this version of the OCBP organizational chart issued, he had charge of all day-to-day operations and legal briefings and that the removal of that authority violated a specified municipal ordinance that vested varied authorities in the OCBP Captain (2T98, 105-106, 6T66). He also testified that on April 1, 1999, when he was scheduled to meet a named person hired, ". . . to do maintenance on lifesaving equipment" at the City's boathouse, he saw that his office furniture there (desk, chairs, etc.) had been removed from his office and that later in the day, after leaving for an unspecified period of time and returning, those items were thrown into a dumpster. Several days later, the lock on Muzslay's office door was changed without explanation (2T118-119). In the absence of conflicting testimony or documents, I credit Muzslay's testimony.

Muzslay unsuccessfully challenged Longo's reallocation of his authority to McKinley as violating a municipal ordinance (2T105-106). On an unspecified date after the Summer 1999 season, the City mayor fired Muzslay, claiming ". . . he wanted a younger man" (2T107). McKinley was subsequently awarded the promotional title, "Chief of Operations" at OCBP, replacing the former title, captain (2T108). Muzslay, with the assistance of legal counsel, was reinstated to OCBP in the summer of 2000 without his previous day-to-day operations authority (2T107, 122). His salary was about \$21,000 (6T36). By 2001, Muzslay's title - captain - was eliminated (2T108).

On April 25, 1999, Yust submitted his resume in applying for a "senior lieutenant" position. Five of its six pages summarize his "lifeguard profile," including volunteering assistance to and proctoring of swim and boat races; administering the pension plan, payroll, equipment distribution, personnel files, testing, etc. (CP-14). He also maintained beach patrol vehicles at various times (11T23-24).

45. On May 5, 1999, Yust wrote a letter to City Business Administrator Deaney, expressing the Association's "desire" [based on his status as Treasurer] to appeal Longo's grievance determination (R-43). Yust did not recall receiving a reply from Deaney (11T98).

46. In the summer of 1999, Yust wasn't permitted to begin employment (as a lieutenant) on Memorial Day weekend; wasn't provided a parking permit, nor keys to the boat shop and unspecified "tents," contrary to previous emoluments (2T10). McKinley designated Yust a "roving" lieutenant that summer, requiring him to substitute for other lieutenants as needed; such tasks were typically delegated to those OCBP staff initially promoted to lieutenant^{30/} (2T11, 14, 7T108). Yust's position was inferior (by seniority or rank) to several OCBP staffers who previously had been his subordinates, including Mullineaux, Psaltis, Willaim Stall and Joe Schmidt (2T11-13). Yust was a hourly-paid employee in 1999, as were all lieutenants (5T55, 61). He remained a hourly-paid lieutenant through 2008, his final summer of employment with OCBP (5T60-61).

During Summer, 1999, Kristie Chisolm, an OCBP senior lifeguard, assumed "payroll" and other administrative tasks formerly performed by Yust. Such duties sometimes consumed her entire workday; when they didn't, she was directed to duties "on the beach" (3T40-41, 7T94-96). She didn't receive supplemental

30/ Mullineaux admitted and recalled that McKinley had filed "a grievance [or] complaint" with the Commission alleging that Muzslay had retaliated against him for assigning him to be a "roving lieutenant" after he had worked as a "zone" lieutenant (10T56). I infer that any such or similar filing would have occurred between 1984 and 1987 (see finding no. 3). I was unable to administratively confirm a filing with the Commission to that effect.

compensation for performing any payroll or administrative duties (7T97). Muzsly testified that during that summer, the OCBP experienced "numerous issues with payroll" and lifeguards, in particular, ". . . were not getting paid for days they actually worked" (2T124). In the absence of conflicting evidence, I credit that testimony. I infer that neither Bourbeau, nor any "representatives" in Longo's office performed any of Yust's former duties in Summer, 1999, as Longo prognosticated in writing in December, 1998.

47. On August 12, 1999, the Pension Commission met and approved Bourbeau's requested waiver by a 3-1 majority vote, with Hink, Jekagain and Miller voting in favor and Yust, opposing (1T135, 4T13; R-39). Yust again recorded the meeting minutes. In the meeting, Yust read aloud a statement he prepared, the text of which is set forth in the minutes, recapitulating a Bourbeau waiver request history, including his understanding that the Commissioners are not an "independent body" because the Mayor and Public Safety Director had expressed their desire for the waiver to be approved and "influenced" Commission voting. Yust also wrote of Mullineaux's phone call to Gallagher about one year ago, advising of retribution for his and Gallagher's opposition to the waiver for Bourbeau, and of Gallagher's resignation from the Pension Commission the next day (see finding no. 25). Yust wrote

(and stated) that the continuing efforts to gain approval are "illegal" and "unethical." (R-39).

Yust also recorded Hink's comments that he wasn't "pressured to make any decisions" and that ". . . someone had promised [Bourbeau] something that they could not do and that she was a victim" (R-39).^{31/} Yust wrote that Bourbeau's attorney, Grimes, was personally informed that the waiver was approved.

On August 13, 1999, Hink wrote a "memorandum for the record" summarizing his understanding of events at the previous day's Pension Commission meeting (11T141; R-45). In a pertinent part, he wrote that in the August, 1998 Pension Commission meeting, ". . . some members thought we had an agreement in Corcoran's office to grant a waiver." Hink wrote that he ". . . wanted to

^{31/} On August 26, 1999, Hink sent a brief letter to Bourbeau and her attorney, Grimes, confirming approval of her requested waiver, together with an August 12, 1999 "Resolution" to that effect (R-6). The resolution in part specifies that Bourbeau, ". . .relied upon statements by a member of the [OCBP] and/or [City] that she would receive a waiver during the 1997 season by working part time." Hink testified that he learned that Longo and McKinley told Bourbeau that she was entitled to a "waiver" and (he believed) that she was entitled to rely on their representations as management representatives (11T161-162). I infer that Hink is more specifically and in part referring to then-OCBP Assistant Captain McKinley, whose apparent "statements" upon which Bourbeau relied are acknowledged in her written confirmation to McKinley (finding no. 7) at a time when he was no longer a member of the Pension Commission and had been replaced by Yust (finding nos. 6 and 7). Accordingly, Hink's testimony (notwithstanding his belief in the legitimacy of Bourbeau's reliance) is corroborated by other facts in evidence; I credit it. All Pension Commissioners except Yust signed the resolution.

have his thought and comments written in the event I am not reappointed or elect not to continue for another term" (R-45). I infer from Hink's writing an apprehensiveness about reappointment derived from his contemporaneous criticism of McKinley's, Longo's, and the Mayor's overreach into Pension Commission business or independence. Hink served on the Pension Commission from 1996-2004 and he considered it to be "independent" from political officials (11T144). On cross-examination, he agreed that, ". . . in retrospect," Mayor Knight should have written to the Commission rather than have directly met with its members (11T145; finding no. 22). On re-cross examination, Hink distinguished a superior rank employee from a superior rank employee authorized to give a permission or instruction, specifically alluding to the Pension Commission (only) as having authority to grant a waiver of the "40 day" requirement for pensionable lifeguard service (11T162-163).

48. On or around Labor Day, 1999, following Yust's demotion and Pension Commission approval of Bourbeau's waiver request, Yust was openly disparaged by another lieutenant (McShane); two unit employee witnesses signed and dated two brief statements to that effect (2T18-19, 5T41-42; CP-7. CP-8). On October 18, 1999, Yust wrote a memorandum to McKinley (who, by then was Chief of Operations of OCBP), requesting responses to questions he had posed to him more than a month earlier, including whether McShane

(the lieutenant who had disparaged him) was disciplined for that behavior (CP-22; 8T89, 11T200). He also wrote of a late August, 1999 incident in which Mullineaux screamed vulgarities in "the tent" that was open to the public and inquiring if McKinley had investigated the incident. Mullineaux testified that McKinley didn't speak to him about the incident (8T85). I credit that testimony. The record does not indicate that McKinley replied to Yust or that any action was taken. Yust testified that McKinley, ". . . didn't do anything about [the disparagements]" (2T22). In the absence of any evidence to the contrary, I credit his testimony.

In 2000, Yust filed a grievance contesting his "roving" lieutenant assignment. The grievance was denied (2T16). Also in the summer of 2000, McKinley, Mullineaux and Psaltis together filed a grievance against Muzslay, contesting his orders that apparently conflicted with McKinley's "orders" in the same subject areas. McKinley wrote the grievance (7T66-69). Mullineaux testified that the grievance was processed to either Deaney or Longo and that, ". . . nothing was really much done with it" (7T68-69).

In November or December, 2000, Hurst voluntarily accepted a "temporary assignment" in some capacity at "City Hall," declaring a "leave of absence" from his police officer duties that in his attested view, "effectively eliminated" the title (10T202). I

don't find as a fact the "elimination" of the police officer position Hurst filled until November or December, 2000. The most that may be gleaned is that the position was temporarily vacated. Until that time, Hurst had reported directly to Longo (10T203).

49. In May, 2001, McKinley died (10T25). By that time, Muzsley was no longer employed by the City (2T25, 5T50, 6T67). Thomas Mullineaux was promoted by Longo to the title, Chief of Operations, vacating his former title, senior lieutenant (2T26, 2T69, 7T108). The title, captain, was abolished (5T57). Yust unsuccessfully applied for both promotional titles, the latter one awarded to McShane by Longo (2T26-27, 10T27).

Mullineaux testified about why he was chosen over Yust:

I think, to be honest, Dominick Longo, he wanted [sic] I was a senior lieutenant. Angelo [Psaltis] was a senior lieutenant and he picked me. I mean, we were the next two ranking officers after Bud McKinley died and so I got the job. [7T106]

In 2002, Yust again unsuccessfully sought a promotion to senior lieutenant upon the retirement of Angelo Psaltis (see finding no. 39). Mark Baum received the promotion after serving as a lieutenant for the previous three summers (2T28); finding no. 39). Although Yust had provided his resume' to Mullineaux, he wasn't interviewed for any promotional title (2T29).

On direct examination by Charging Party Counsel, Mullineaux admitted that he chose Baum over Yust, eschewing (without explaining) the latter's "seniority" (or many years of service as

a lieutenant) as a factor (7T103). He testified of his belief that Baum, “. . . showed better ability in ‘the boat shop’” than Yust, though conceding never to have evaluated nor known of Yust’s performance when he was assigned there (7T104-105, finding no. 8). When pressed to justify his “comparison” of them, Mullineaux testified: “Just my opinion.” Asked what his “opinion” was based on, Mullineaux testified: “Based on my opinion, my knowledge of both individuals” (7T105). On direct examination by Respondent Counsel, Mullineaux extolled Baum’s performance in the boat shop (painting stands, preparing boats and equipment) and service as a lifeguard and in the military (10T29). While crediting Mullineaux’s description of Baum’s performance, I find, in light of his admissions, that Mullineaux neither knowledgeably compared Baum with Yust, nor sought to be informed of Yust’s relevant experience for a possible promotion.

50. In or around 2000, Baum complained to Muzsly that Yust mimicked a “gay” manner of speech in the presence of lifeguards, a schtick he had performed previously and for which he wasn’t disciplined (3T46-51).

Yust testified that on an unspecified date when Mullineaux was OCBP Chief of Operations, he approached him on the beach and said “I can give you a nice buyout if you want to make this your last year.” Yust testified that he replied: “No, thank you” (2T29). Mullineaux testified that although he was of the opinion

that Yust should have retired, he didn't suggest to him in 2002 that he could get him "a good package to retire," adding that he didn't suggest that at any time; "No. I don't remember that at all" (7T105, 10T61). On several previous occasions, I haven't credited Mullineaux's testimony about his remarks or recollection of events. I have generally found Yust's testimony to be credible. In this instance, I credit Yust's recollection (and the strong likelihood that such a statement would be remembered) over Mullineaux's initial denial and subsequent deflection.

51. Throughout the years of Yust's OCBP employment, returning officers and lifeguards were generally required to "re-qualify" in physical proficiency each season (2T44). More specifically, test standards seldom changed, but they did, notably, under OCBP Captain George Lafferty. From about 1964 to 1974, Lafferty required staff each season to run a mile on a track or the boardwalk under eight minutes and to swim an unspecified distance in about ten minutes, though the latter allotted period varied, depending on ocean conditions (3T22-23). On the recommendation of OCBP officers, Lafferty changed the test in about 1975 to a timed one-half mile run, followed by a two-hundred meter swim, the first hundred of which was timed. When added to the timed run, both performances were required to be completed within seven minutes. This test, with some time dispensations given to aging guards and officers (approved in

later years by Association unit employees, including Mullineaux and Yust), endured through 2008 (3T23-26, 82). Yust met those annual requirements to "re-qualify," admitting that he recorded his own test results from about 1972 until 1999 (2T44-45, 3T71). Mullineaux admitted that one could fairly state that Yust was regularly in "good shape" (8T30). From 1988, when Yust was promoted to administrative captain, until 1999, when he was demoted to lieutenant, he maintained records of the staff's re-qualification testing on individual index cards and in a data base (R-1; 3T63-68, 77-78).

Yust failed to "re-qualify" in 2009 (2T46-47, 3T18). In that season, the test changed (notice of the change was sent to staff in March, 2009); staff was required to complete a one-half mile run in three minutes, forty-five seconds and swim 200 yards in three minutes, thirty seconds. Each staff member was provided four opportunities to successfully complete each portion (3T86). Yust elected not to retake both portions after failing to meet the time requirements on his initial, respective efforts (3T88-90). Yust testified that Fire Chief Foglio, Deputy Chief Bowman, and OCBP Chief of Operations Mullineaux changed the test requirements for the 2009 season (3T93). I credit that testimony.

52. Mullineaux prepared a document in anticipation of litigation, principally showing "zone" assignments of lieutenants

from 2001 through 2007, when he was Chief of Operations and McShane was one of two senior lieutenants. The other senior lieutenant from 2002 through 2007 was Baum, who was preceded by Psaltis in 2001. In 2001, Yust was one of three "roving" lieutenants. From 2002 through 2004, he was the assigned lieutenant in the "first" zone and from 2005 through 2007, he was the "fourth" zone lieutenant (R-26; 10T23-25). Mullineaux made all zone assignments in those years (10T30-32). He testified that in 2005, almost all zone assignments were changed, prompted by a "change in the number of people" and that Chief Foglio imparted to him a stated preference for "moving the staff around a little bit" (10T32). In the absence of evidence specifically contradicting Mullineaux's testimony, I credit it.

53. On July 14, 2006, Fire Chief Joseph Foglio issued an "investigative report" initiated by a "verbal complaint" about Yust's conduct regarding the use of a "surf chair" (a type of wheelchair used on beach sand) during a wedding ceremony on the beach on June 30, 2006 (R-21). Finding that Yust insisted that an elderly, handicapped wedding participant, ". . . be removed from the chair so that he could secure the chair in the Beach Patrol Station and leave [for the day]," Foglio determined that Yust should serve a four-day suspension without pay (R-21; 5T69).

On August 3, 2006, four officers of the Association signed a memorandum addressed to Business Administrator Richard Deaney,

concurring with Foglio's determination that Yust's conduct on June 30, 2006 was "an inappropriate course of action." They contended, however, that in the absence of "codified procedural steps" in the CNA, a policy or manual, Yust retained "the right to make decisions based upon his own ethical standards even if they conflict with our own personal principles." The officers submitted unspecified "attached documents" for Deaney's review (R-22). I infer that the Association was contesting Yust's discipline.

Also in 2006, Yust received a written reprimand from Mullineaux for admittedly collecting radios (from OCBP staff) before 4:45 p.m. on July 7th (5T79-80). He received another written reprimand that summer for omitting to inform a named lifeguard of his rule infraction of sleeping while on duty (5T83-84).

ANALYSIS

Counsel for Yust contends that a preponderance of evidence proves that Yust's demotion in rank; the failure to promote him and failure to process his grievance, ". . . constituted unfair labor practices" (brief at 2).

The standard for evaluating a section 5.4a(3) charge is well-established. Under Bridgewater Tp. v. Bridgewater Public Works Assn, 95 N.J. 235 (1984), the charging party must prove, by a preponderance of the evidence, that protected conduct was a

substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employer does not present any evidence of another motive or of 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 evidence on the entire record, that the adverse action would have taken place absent the protected conduct. This affirmative defense however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The parties have analyzed this case as a "dual motive" case (Yust brief at 15-26; City brief at 100-104). In such cases, the charging party must prove that an invalid reason motivated the adverse action; if it sustains that burden, the respondent or employer must prove, as an affirmative defense, that it would have taken the adverse action in the absence of the invalid reason. In other words, this analysis determines what the employer's

conduct would have been if the improper motivation had not been present. Holo-Krome v. NLRB, 954 F.2d 108, 139 LRRM 2353 (2nd Cir. 1992).

The first question is whether Yust's participation in the City's Pension Commission is conduct protected by the Act. The Commission has found that, "[p]ensions are benefits which directly and intimately affect employees" and that the Act protects collective action to enforce statutory pension rights. City of Margate (Gallagher, Boothby), P.E.R.C. No. 87-145, 13 NJPER 498, 499 (¶18183 1987). The Commission has also found, in a context analogous to this case, that a teacher's voluntary participation in and advocacy on (behalf of fellow teachers) a school leadership council - comprised of parents, teachers and administrators - concerning employment conditions, is protected by the Act. Irvington Bd. of Ed., P.E.R.C. No. 2009-48, 35 NJPER 67 (¶26 2009); Camden Bd. of Ed., P.E.R.C. No. 2007-19, 32 NJPER 328 (¶136 2006).

The 1988 City Council resolution establishing the Pension Commission reserved two of the four seats comprising its volunteer and unpaid membership to a "superior officer" and a "lifeguard" of the lifeguard force. Then-Association President McKinley was the first "superior officer" Pension Commission representative (1989-1997), immediately followed by Yust in February, 1997, who was Association Treasurer at the time of his

appointment. City OCBP representative Mullineaux admitted that Yust was appointed to the Pension Commission, “. . . as basically a representative of the Association.” Similarly, lifeguard unit employees served recurrently on the Pension Commission; Gallagher immediately succeeded Dunn in 1997 and Jekogain succeeded Gallagher in October, 1998 (findings nos. 5, 6 and 28). The two other seats on the Pension Commission are reserved for “citizens” who aren’t in the OCBP. In practice, the City awarded one seat to a high-ranking civilian employee not included in a negotiations unit; the other member(s) were either non-unit City employees or not employed by the City.

City Pension Commission members administer the pension plan and apply its terms to employees of both units, “. . . to decide all claims and questions with respect to plan membership benefits and amount and commencement date.” They are also obligated to “relax adherence” to plan terms and “grant waivers or exemptions where the [Pension] Commission in its discretion deems such waivers or exemptions warranted” (finding no. 4). Complicating this duty was the self-imposed restraint, “. . . to protect the fund and [the Pension Commission] will not be liberal in its granting of waivers” (finding no. 5). These governances are inextricably entwined with determinations on unit(s) employees’ terms and conditions of employment. I find that Yust, the Association’s representative on the City Pension Commission from

February, 1997 through 1999 or later, was engaged in protected conduct within the Act's meaning. As Association Treasurer and as a unit employee who filed contractual grievances during that period, Yust also engaged in other protected conduct. See, e.g., Union Cty. Bd. of Social Services, P.E.R.C. No. 89-35, 14 NJPER 651 (¶19273 1988); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 435 (¶17161 1986) ("Filing a grievance is a fundamental example of protected activity.")

Association representative/Pension commissioner Yust's statements and decisions pertaining to Association unit employee/senior medic Kathleen Bourbeau's eligibility for a waiver of the 40-day work requirement each summer (as set forth in the Pension Commission's February 1, 1989 memorandum to the OCBP) were known to Public Safety Director Longo and Mayor Knight before the most severe adverse action - demotion and concomitant pay reduction - was taken against Yust in 1999. This fact is uncontested.

In or around 1988, Longo promoted both Yust and McKinley to assistant captain(s) of the OCBP. They performed mostly differing and some overlapping responsibilities for about the next nine years. Among the latter were training and supervising rookie lifeguards and administering "line authority," i.e., directing subordinate officers in daily operations. McKinley presided over rookie testing and training and trained lifeguards

in rowing and rescue operations. Yust continued his expertise (for which he was paid a stipend as a lieutenant) in maintaining personnel files, record-keeping and payroll for OCBP staff. The record is bereft of document(s) delineating their responsibilities in this period.

On Wednesday, May 28, 1997, Director Longo issued a memorandum to Captain Muzslay setting forth the earliest adverse action against Yust; the implicit rescission of Yust's training and "operations" oversight duties he had previously performed and shared with McKinley. The memo coincided with Longo's directive to Muzslay to separate McKinley's and Yust's designated work areas. Longo wrote that the duty "changes" were to be memorialized in the "Operations Manual" and that McKinley was now vested with the "responsibil[ity] for the day to day direction of the [OCBP]." This previously unannounced change occurred three days after a Memorial Day weekend meeting in which McKinley told Muzslay in Yust's presence that Bourbeau, ". . . was going to take a [pension] waiver and use maternity leave as her reason for the waiver," to which Muzslay and Yust expressed doubt that such leave was available to "part-time" employees (I infer that Muzslay intended to identify Bourbeau as a "seasonal" or "summer" employee). Muzslay and Yust were unaware that two months earlier, in March, 1997, when McKinley was no longer a member of the Pension Commission, he had communicated to Bourbeau his

consent to her request to work "part-time" in the upcoming summer of 1997, (owing to her nursing of a newborn child), also agreeing to a waiver of the Pension Commission's 40 workday requirement. Just how McKinley, in March 1997, without Captain Muzslay's apparent knowledge or consent, legitimately approved Bourbeau's request to work "part-time" in summer, 1997, while qualifying for a waiver, isn't established on the record.^{32/}

I infer that in the May 25th meeting or as a consequence of it, McKinley was frustrated by his loss of Pension Commission authority to Yust to anticipatorily or representatively approve (a minimum of three Pension Commission members would normally need to approve a waiver) what he'd represented to Bourbeau and that he promptly informed Longo of a version of that 1997 Memorial Day weekend conversation (see finding no. 8). I infer that communication as the only causal justification on this record for Longo to have issued his May 28th memorandum to Muzslay, implicitly stripping Yust of all "line authority" and to have ordered his work location separated from McKinley's, after nine years (of them performing overlapping "line authority" responsibilities and sharing a common work area). Rhetorically speaking, if Longo had decided to rescind some of Yust's duties

^{32/} One possible scenario, consistent with other testimony and circumstances on this record, was that McKinley directly sought and received approval from Longo of Bourbeau's request in advance of his confirming conversation with her in March, 1997.

and (transactionally) broaden McKinley's after so many years, why wouldn't he have communicated that decision (or enshrined it in the "operations manual") before the start of the 1997 summer season? If the specific timing of Longo's decision in these regards was merely coincidental to the 1997 Memorial Day weekend discussion among Muzslay, McKinley and Yust or related to other causes, the City hasn't proffered credible evidence of that timing or those causes. Timing is a factor in assessing employer motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). It is ironic that the 1997 Memorial Day weekend discussion among the three leaders of OCBP pointedly included McKinley's frank and equivocal response to Muzslay's questioning of his "loyalty" to the chain of command and to him, as Captain, specifically. Considering Muzslay's and McKinley's distrust and dislike of each other, I infer that their dispute on May 25th provided incentive for McKinley to seek support from Longo.

I also infer that Longo's May 28, 1997 memorialized decision to broaden McKinley's authority, enabling him to "act in place of the Captain, when necessary;" giving him "day to day responsibility for direction of the [OCBP]," with specific authority (after consulting with the Medical Director and senior medic [Bourbeau]) over the "hiring and training of medics," was intended to bolster, post-hoc, McKinley's authority to have

approved Bourbeau's maternity leave request, if not his authority to (at least, partially) approve a pension eligibility waiver.

About ten days before the end of the 1997 summer season (August 26th), Bourbeau first requested of the Pension Commission (Yust, specifically) a waiver of the pension eligibility requirement that the last ten years of employment must be served consecutively (while meeting the 40-day requirement), pursuant to McKinley's March, 1997 consent to her request work "part-time" in the upcoming summer season (finding no. 11). In November, 1997, Yust learned from Bourbeau's full-time employer, a nearby board of education, that Bourbeau had worked full-time from May 19, 1997 through the end of the school year, about one month. Later that November, Yust wrote five reasons for denying Bourbeau's requested waiver and distributed that document to the other Pension Commission members at a December 7, 1997 meeting (finding no. 13). The Pension Commission unanimously voted to deny the requested waiver. On December 31, 1997, Bourbeau's attorney wrote a letter to the Pension Commission, opposing its determination that Bourbeau could have worked 40 days that past summer and opining that its decision may constitute gender discrimination. In early January, 1998, City Tax Collector and Pension Commissioner Gary Hink wrote a letter to the other commissioners and attached Bourbeau's attorney's letter. In his letter, Hink asked his peers to meet again so that Bourbeau's

attorney could present her case and to consider the City Solicitor's legal opinion.

During this period, Longo intentionally (though not explicitly) omitted Yust from his invitation to OCBP superiors to meet to discuss plans for the upcoming (1998) summer season. Yust soon learned of the oversight and wrote to Longo, expressing interest in attending, but Longo elected not to reply. Yust attended the scheduled meeting in Ocean City on March 1, 1998.

Three days later, Longo, admittedly angered in part by Yust's uninvited attendance at the meeting, wrote a memo to Muzslay initially reiterating his own authority over municipal public safety operations; specifying that McKinley, not Yust, was "second in command;" and admonishing that "all administrative and personnel matters" must conform to the "highest professional standards regardless of personalities, friendship, animosities, etc." (See finding no. 19). I have found that this admonition to Muzslay not only corroborates Longo's knowledge of the tainted personal relationships of Muzslay and Yust with McKinley but in the larger context of the memorandum reveals his support of McKinley in the organizational hierarchy of the OCBP.

Most of this memorandum and the remainder of it is a litany of criticism of Yust's performance on the Pension Commission - particularly, his "unprofessional actions" regarding the Bourbeau waiver that Longo characterized as "beyond comprehension." Longo

summarily directed Muzslay to meet with and inform Yust of his "strong feelings on these matters" (including disabusing Yust of any notion that he is "second in command"). On or around the same date, Longo personally instructed Muzslay to direct Yust to approve the matters then-pending before the Pension Commission, specifically including Bourbeau's request for a waiver of the Pension Commission's regulations. Muzslay suggested to Longo that he speak directly to Yust about the Bourbeau waiver; Longo evidently (by omission) declined. Longo had also omitted to communicate directly with Yust on May 28, 1997, when, in that earlier memorandum to Muzslay, he rescinded some of Yust's duties.

In Black Horse Pike Reg Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission explained:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as an employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees engaging in organizational activity. [7 NJPER at 504]

Longo's March 4th memorandum to Muzslay draws no distinction between Yust's protected conduct as an Association representative on the Pension Commission and his performance as an OCBP employee under the authority of the City Public Safety Director. His

written instruction to Muzslay to convey to Yust his "strong feelings on these matters" implicitly conveys a threat for Yust's non-compliance. The memorandum is direct evidence of Longo's intent to discourage Yust from engaging in organizational activity. And by concurrently and explicitly advising that Yust was not "second in command" and that (for at least two months) he was prohibited from attending meetings, ". . . to plan this season's operations" it discriminated against Yust in his exercise of protected rights.

Also, the timing of this document bears a close resemblance to the timing of Longo's earlier memo to Muzslay (three days after Muzslay and Yust disputed with McKinley Bourbeau's eligibility for maternity leave and a waiver) implicitly rescinding some of Yust's duties and his directive to Muzslay to separate Yust's and McKinley's designated work areas.

Later in March, 1998, the Pension Commission met to listen to Bourbeau's attorney argue in favor of the requested waiver; he added a detrimental reliance argument originating in McKinley's, ". . . administrative promise of no change in her pension status." Pension Commission members expressed their concern that, ". . . no administrators of the OCBP have the right to grant anyone exception to the Lifeguard Pension Plan" (finding no. 20). About one month later, on April 23, 1998, the Pension Commission again voted to unanimously deny the requested waiver.

The City persisted by next having the Pension Commission meet with City Mayor Knight on July 16, 1998. In the meeting, the Mayor expressed his disappointment that Bourbeau's waiver request was denied, particularly after the City Solicitor had ostensibly recommended approval in a February, 1998 letter (finding no. 22). One or more members (Yust, likely) told the Mayor that, ". . . any written waiver could open up a 'Pandora's box' that could be used later to create even more liberal waivers." About one week later, Bourbeau's attorney wrote a letter to the Pension Commission members, with copies to Knight, Longo and the City Solicitor. The attorney's letter set forth several arguments supporting the waiver and advised of his filing of a "tort claims notice." On August 6, 2018, the Pension Commission members met with the City Solicitor in his law office. The Solicitor (again) recommended the waiver, sending to the members under separate cover a proposed resolution approving it. On August 26, 1998, the Pension Commission met and again voted, resulting in a 2-2 tied vote (with Yust and Gallagher opposing the waiver) that left intact the previous denial.

The next day, August 27th, then-lieutenant Mullineaux, included in the Association's unit, phoned lifeguard unit employee and Pension Commission member Gallagher, conveying the threat to "get out" of the Pension Commission, adding, "they're trying to bury you." I have inferred that "they" could have been

Mayor Knight, Director Longo and, in light of his ascendant (and ascending) duties, Assistant Captain McKinley (finding no. 25). Mullineaux admittedly advocated that Gallagher change his vote on the Bourbeau waiver.

A relevant question is whether, Mullineaux, an employee included in the supervisory unit, who made the threatening statement to a subordinate employee in the rank-and-file-unit, had actual authority to make that statement on behalf of management or was reasonably viewed by his listening employee - Gallagher - as speaking on behalf of management. NLRB v. National Apt. Leasing Co., 726 F.2nd 967, 115 LRRM 2549 (3rd Cir.1984); Cf. State of New Jersey (Glassboro State College), P.E.R.C. No. 90-67, 16 NJPER 133 (¶21051 1990) (Although employer is responsible for supervisors' actions that are impliedly authorized or within their apparent authority, such acts need not be actually authorized or subsequently ratified; NLRB will not impute the conduct of low level supervisors who are also bargaining unit members (emphasis added) to the employer unless the employer encouraged, authorized or ratified the conduct or led employee(s) to believe the conduct was authorized. A.T.K. Enterprises, 264 NLRB 1278, 111 LRRM 1371 (1982)).

I find that the facts demonstrate that Gallagher reasonably believed that Mullineaux spoke on behalf of management when he phoned him and conveyed the threat. By the time of Mullineaux's

phone call to Gallagher, several high level City representatives, over several months, sought to persuade the Pension Commission to approve Bourbeau's requested waiver - to no avail. Perhaps Mullineaux initially sought to persuade Gallagher not to oppose the waiver and encouraged him to change his vote, as he testified, but in the absence of Gallagher's assent, he conveyed the threat. Compared with Yust, Gallagher, a lifeguard unit employee with substantially less OCBP employment history, would be vulnerable and more likely to accede to a threat. That Mullineaux and Gallagher were friends or not less than friendly, reasonably tends to make a conveyed threat from the superior to the subordinate appear trustworthy or credible, especially in a context of Mullineaux having learned confidences directly from McKinley, dating to 1983, when McKinley told him of his upset that Muzslay was appointed captain, instead of he. Gallagher's subjective belief in the threat can't reasonably be denied because he immediately phoned Yust, leaving him a voicemail message advising of his intended resignation from the Pension Commission and then personally delivered his letter to that effect to the Mayor the next morning, simultaneously announcing its contents to him. The Mayor, in turn, gave no apparent indication of surprise or curiosity. Rather than change his vote, Gallagher elected to resign from the Pension Commission. Coupled with Pension Commission member Zehner's solicited

resignation within the next month, it became apparent that new members would have to be appointed in advance of further reconsideration of the Bourbeau waiver.

This episode doesn't prove the City's animus against Yust for his organizational activity. It corroborates a contemporaneous showing of the City's steadfast intent to get the Bourbeau waiver approved and more relevantly, of its threatened retaliation against another (and other) negotiations unit employee for his engagement in protected conduct in service to the Pension Commission.

In fall, 1998, the Mayor appointed two new members to the Pension Commission; another lifeguard unit employee to replace Gallagher and another named "citizen" to replace Zehner, who was apparently disqualified for moving his residence outside of Ocean City. In their first appearance at a Pension Commission meeting on December 9, 1998, the new members sought clarification of Bourbeau's "status."

In late December, 1998, Yust received a letter from Longo, dated December 10th, referencing an ostensibly enclosed memorandum of the same date sent to Association President Mark Baum, specifying that the City will not "fund" an "assistant captain for administration" title in 1999. Writing to Baum of the City's "firm" intention, ". . . not [to] fund the second highest level of the patrol for doing essentially a clerk's

position," Longo instead proposed, ". . . to use existing personnel, including the senior medic [Bourbeau] and representatives of my office to accomplish this task." He wrote of a "hoped [for]" reallocation of resources to ". . . line operations, such as increasing the number of guards and improving equipment" (finding nos. 29, 31). Longo's memorandum to Baum, the second instance of his writing derisively about Yust to a third party, reveals an arbitrary and consciously ironic partial transference of Yust's (soon-to-be) former duties to the employee he refused to favor with a pension eligibility waiver. By this date, Baum likely understood and noted Longo's inferences and exercise of authority (finding no. 29). Although Baum initially assured Yust that the Association would contest the elimination of his title and promptly invited all Association members to a January 23, 1999 meeting, he later cancelled it for fear it would be a "donnybrook." I infer that sometime during the month between Baum's pledge to resist the elimination of Yust's title and his cancellation of the Association meeting scheduled at least in part to address it, he became more fully apprised of contrary opinions of other unit members, including McKinley and perhaps, Mullineaux, who likely favored the elimination of the title or wanted not to oppose it.

In and around this period, Yust and Longo exchanged letters seeking to fix a mutually agreeable date to meet in Ocean City to

discuss, as Longo wrote, “. . . your plans for continuing employment with the City, if indeed that is your desire.” Longo less sarcastically cautioned, “. . . any position you obtain in the reorganization of the patrol will be approved by me and will take effect only after my consultation with the Captain [Muzsly] and the Operations Officer [McKinley].”

In late February, 1999, President Baum, together with the Association's vice-president and secretary sent a signed letter to (Association Treasurer) Yust advising that he wasn't included on the negotiations committee. I've found that Association officers normally comprised the negotiations team (finding no. 35). On March 4, 1999, the City, represented by Longo and his assistant, Max Hurst, met for collective negotiations on a successor agreement with the Association's team of Baum and non-officer unit employees McKinley, Mullineaux, Psaltis and McShane.

On the previous day, March 3, 1999, Yust met with Longo and his assistant, Hurst, in Longo's office. Yust was told of “streamlining” throughout the City's public safety departments (without any specific examples), including the OCBP. He was also informed of an anticipated new unit title, “senior lieutenant.” Longo asked Yust what he wanted to do if he returned to the OCBP for the 1999 summer season. Yust's request to remain an assistant captain was summarily denied over his protest. He was told that his current title can lawfully be eliminated and that

the Association had agreed to its elimination. Longo's response to Yust's request to be appointed to the new title, senior lieutenant, was equivocal or evasive, at best. Finally, Yust was told that he could elect to return as a lieutenant or not to return. He elected to return as a lieutenant.

Longo's and Hurst's conduct in the meeting, culminating in the coercive "choice" provided to Yust, likely violates the exclusivity principle in section 5.3 of the Act. D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990); Lullo v. Int'l Ass'n of Firefighters, Local 1066, 55 N.J. 409 (1970). Direct dealing by employers with employees who are represented by unions can violate the Act. Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005).

The next day, March 4, 1999, Yust appeared at the time and place of the scheduled negotiations session for a successor agreement. The Association's reconstituted team initially permitted Yust to remain for the session if he agreed not to speak, though he wasn't invited to attend and his name didn't appear on the list of team members provided to the City in advance of the meeting. Yust was soon forced to vacate the meeting room under Longo's threat of a police escort, and with the Association team's immediate acquiescence. I've also found that any "negotiations" that day about maintaining Yust's title

was gestural and cosmetic and that the parties had never before considered the elimination of an OCBP title (finding no. 37).

In the negotiations, anomalously completed that day, four of the five members of the Association's team (Baum, Mullineaux, Psaltis and McKinley) were promoted in rank and received 30% wage increases. Yust was demoted to lieutenant and his pay was reduced 30% (finding nos. 37-39). In light of the record history of events in this case, I find that these terms, negotiated by Longo on behalf of the City and by the Association's team, were intended at least in part to reward and compensate Association representatives for their acquiescence to and continuing support of the elimination of Yust's title. The chronology of events shows that the City, particularly Public Safety Director Longo, intended to punish Yust for his participation in the Pension Commission, specifically, his opposition to the Bourbeau pension "waiver." Longo may or may not have initially intended to eliminate Yust's title in May, 1997; regardless, he began discriminating against him by rescinding some of his duties, decreasing his authority, and changing his work location after learning from McKinley that Muzsly and Yust doubted Bourbeau's eligibility for maternity leave and a pension regulation waiver. I have also inferred that Longo, by this time, wanted McKinley to have a superior position in the OCBP. Yust's leadership role in the Pension Commission's opposition to Bourbeau's waiver request

fueled Longo's anger, resulting in his March 4, 1998 memo to Muzslay, revealing both discriminatory intent and retaliation against Yust that didn't wane and was reinforced by subsequent failed efforts to secure a majority of Pension Commission votes in favor of the waiver. The latter includes the late August, 1998 threat against lifeguard unit employee and Pension Commission member Gallagher, who elected to resign, rather than yield.

Events after negotiations concluded for the 1999-2000 successor agreement reinforce previous trends. The March, 1999 processing of Yust's grievance contesting his demotion shows that McKinley was an advisor to and advocate for the City in denying the grievance of his fellow unit employee. Muzslay's support of Yust's grievance was noted in a March 18, 1999 meeting among Longo, Hurst and Muzslay, where he was admonished in writing, ". . . to carry out management responsibilities and direction, based on the supervision of Dominick Longo" (finding no 42). I infer that such "direction" included Longo's March 4, 1998 unheeded "order" to Muzslay to instruct Yust to approve Bourdeau's waiver request. Some of Muzslay's authority was soon involuntarily ceded to McKinley, as memorialized in Longo's April 1, 1999 "revised" OCBP organizational chart. Also on that date, Muzslay personally observed that his office furniture had been

removed and thrown away, presaging his firing soon after the 1999 summer season ended (finding nos. 40-44).

Yust submitted his resume and applications for promotion to senior lieutenant in April, 1999 and again in 2001 and 2002, as vacancies occurred. His requests were all denied; I've found in the latter instance that his candidacy wasn't fairly considered (finding no. 49). In the 1999 summer season, Yust was a "roving" lieutenant, an assignment historically given to newly-promoted lieutenants. Yust unsuccessfully grieved that assignment in 2000.

Yust remained employed and paid as a lieutenant through 2008, long after Longo's and McKinley's deaths. In 2009, Yust failed to "re-qualify" in physical proficiency, pursuant to modified, upgraded testing requirements. The facts do not show that the tests were changed for the purpose of discriminating against Yust for his protected conduct (finding no. 51).

The City contends that Longo's change of Yust's "management position" in Spring, 1997 pre-dated by five months, ". . . the initial waiver vote" [of the Pension Commission]. It also avers that Yust's, ". . . own failure to intervene" on Bourbeau's ". . . decision on how to work in 1997 by not seeking an advisory opinion" contributed significantly to the problem that later developed (brief at 102).

The City's proffered business justification for eliminating Yust's title is that it was "primarily clerical" and that the advent and availability of a "centralized payroll system" enabled it, ". . . [to] spread out certain other work done by Yust to others of a lesser pay grade and put more lifeguards on the beach" (brief at 101).

The City's initial contention would relegate to mere coincidence the close timing of the May 25, 1997 dispute among McKinley and Muzslay and Yust and Longo's May 28th decision to rescind all of Yust's operational duties (after his performance of them for about nine years) and order that his work location be separated from McKinley's. I disagree. The City hasn't proffered any credible factual foundation or predicate for Longo's decision. (I've not credited McKinley's unsupported post hoc rationale set forth in his March 17, 1999 memorandum; finding no. 41). I primarily disagree for the reasons I've written, specifically, McKinley's frustration (followed soon after by Longo's) with Muzslay's and Yust's expressed doubts on May 25th about Bourbeau's eligibility for a waiver in the wake of his conveyed commitment to her of that eligibility; and the comparable timing between Yust's uninvited attendance at a superior officer meeting and Longo's subsequent (March 4, 1998) written decision criticizing Yust for his attendance and further punishing him for his opposition to the proposed waiver.

The City's business justification for eliminating Yust's title is rooted in Hurst's testimony that the City wanted to "streamline" operational costs throughout the divisions of the Department of Public Safety (finding no. 27). His testimony exaggerates the narrower factual circumstance that computerization of the payroll system reduced the time and effort needed to produce regular paychecks and concomitantly track other administrative markers (e.g., time off, sick days, hours) in the OCBP. The City did not produce evidence of "efficiencies" or a reduction in the number of any titles in any other division of the Department of Public Safety. Within the OCBP, the number of titles and employees in the Association's unit actually increased as a consequence of successor negotiations for the 1999-2000 agreement, and a senior lifeguard ineptly performed payroll duties in Summer, 1999, undermining claims of needed "efficiency."

Hurst has admitted that in November, 1998, when he was initially assigned to work for Longo, the Public Safety Director had already decided to eliminate Yust's title. Anything he learned about Yust's duties was sourced directly from Longo; Hurst never spoke with Yust before March, 1999. Under this circumstance, it isn't surprising that City CFO Hansen and Business Administrator Deaney agreed with Hurst that the "assistant captain, administrative's" primary functions could be

reassigned when the "payroll function" became centralized. By the fall of 1998, Longo had already acted against Yust, narrowing his job duties to administrative tasks and isolating his work location in retaliation for his conduct on the Pension Commission and was turning his attention to enlisting the Association's approval of his decision to eliminate the title. For its part, the Association never contested Longo's unilateral decision to demote Yust to lieutenant, its omission likely eased or occasioned by the promotions and wage increases awarded to four of the five negotiations team members. For all of these reasons, I find that the City did not prove by a preponderance of evidence that Yust's title would have been eliminated and that he would have been demoted to lieutenant in the absence of protected conduct.

RECOMMENDATION

I recommend that the Charging Party has proved by a preponderance of evidence on the entire record that Edwin Yust was unlawfully demoted from assistant captain in the OCBP to lieutenant in 1999 and that his wages were concomitantly and unlawfully reduced in retaliation for protected conduct, violating section 5.4a(1) and (3) of the Act.

REMEDY

I recommend that Yust be made whole for losses in compensation, lifeguard pension benefits and other contractual

emoluments, plus interest, that would have otherwise accrued to him from 1999 through 2008, his last year of employment with the City.

RECOMMENDED ORDER

I recommend that the City of Ocean City:

A. Cease and Desist from:

1. Interfering with, resisting or coercing employees in the exercise of the rights guaranteed to the by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by reprimanding then OCBPAA representative Edwin Yust, removing some of his duties and changing his work location for opposing a proposed waiver of an Ocean City Lifeguard Pension Plan regulation requested by a pension-eligible employee; and dealing directly with OCBPAA representative Yust regarding salary and other terms and conditions of employment.

2. Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding OCBPAA representative Yust, removing some of his duties, changing his work location, eliminating his title of assistant captain, demoting him to lieutenant and reducing his pay for opposing a proposed waiver of an Ocean City Lifeguard Pension Plan regulation requested by a pension-eligible employee.

B. Take the following affirmative action:

1. Make Yust whole for losses in compensation, lifeguard pension benefits and other contractual emoluments, plus interest, that would have otherwise accrued to him from 1999 through 2008.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days what steps the Respondent has taken to comply with this order.

/s/ Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: October 15, 2021
Trenton, New Jersey

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

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119.

Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 25, 2021.



NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations act, N.J.S.A. 34:13A-1 et seq. Particularly by reprimanding then OCBPAA representative Edwin Yust, removing some of his duties and changing his work location for opposing a proposed waiver of an Ocean City Lifeguard Pension Plan regulation requested by a pension-eligible employee; and dealing directly with OCBPAA representative Yust regarding salary and other terms and conditions of employment.

WE WILL cease and desist 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 the Act, particularly by reprimanding OCBPAA representative Yust, removing some of his duties, changing his work location, eliminating his title of assistant captain, demoting him to lieutenant and reducing his pay for opposing a proposed waiver of an Ocean City Lifeguard Pension Plan regulation requested by a pension-eligible employees.

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City of Ocean City
(Public Employer)

Date: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830