

H.E. No. 2005-14

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

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and-

Docket No. CO-2003-065

JACKSON TOWNSHIP PBA LOCAL 168,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Township of Jackson violated the New Jersey Employer-Employee Relations Act by removing certain duties and a take home vehicle from the PBA President for remarks he made on behalf of the PBA at a public meeting. The Hearing Examiner found that the Township's action violated protected speech principles established by the Commission in Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

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 which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Jamie L. Plosia, of counsel)

For the Charging Party,
Klatsky, Sciarrabone & DeFillippo, attorneys
(David J. DeFillippo, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 4, 2002 as amended on January 31, 2003, Jackson Township PBA Local 168 (PBA or Local 168) filed an unfair practice charge against the Township of Jackson (Township) (C-1)^{1/} alleging that the Township violated 5.4a(1), (2), (3), (4),

^{1/} "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the successive days of hearing is referred to as "1T", "2T" and "3T".

(5), (6) and (7)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq (Act). Count 1 alleges that the Township violated the Act when it relieved PBA President Joseph Olesky of his Range Master and Extra Duty Coordinator Designee duties, and further removed his take-home police-issued vehicle, in retaliation for comments made by him in his capacity as PBA President and in regard to PBA matters, at an August 12, 2002 Township Committee meeting.

Count 2 alleges that the Township also violated the Act when it failed to provide a police-issued take-home vehicle to PBA Vice President Frank Cipully upon his assignment to the Department's Service Division in November 2002, allegedly contrary to the parties' past practice and custom. According to

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

the PBA, the Township's actions, in denying only Cipully and Olesky police-issued take-home vehicles out of all Service Division officers, were taken in retaliation for the PBA's original September 4, 2002 charge, and for the PBA's May 2002 grievance on behalf of Cipully, over which the PBA filed a request for arbitration with the Commission on November 14, 2002.

On May 22, 2003, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the original and amended charge (C-1).

On July 1, 2003, the Township filed an Answer (C-2) denying it violated the Act. The Township denied that Olesky was the Extra Duty Coordinator and further denied that all Service Division officers were provided with department-owned take home cars. It claims that at all times it acted for legitimate business reasons, and also asserts that the complaint raises contract claims that must be processed pursuant to the parties' negotiated grievance procedure.

Hearings were held on October 29, 2003, and May 12 and 13, 2004.^{3/} The parties filed post-hearing briefs by August 30, 2004 and reply briefs by September 17, 2004. Based on the entire record, I make the following:

^{3/} At the October 29, 2003 hearing, the Township made a motion to dismiss the PBA's 5.4a(5), (6) and (7) allegations; I granted the motion as to the a(6) and (7) allegations; thus, the hearing took place as to the a(1), (2), (3), (4) and (5) allegations only (1T6-1T9).

FINDINGS OF FACTBACKGROUND

1. The Jackson Township Police Department has been in existence since 1946 (3T27). In 2002, the Department reorganized into 2 divisions - a Service Division and an Operations Division. The Service Division includes the Traffic Safety Bureau and Special Services, while the Operations Division includes the Detective Bureau and the Patrol Unit. Previously, there had been 4 Divisions - operations, patrol, traffic and special services. The Service Division now has approximately 12 staff - 3 supervisors - Captain Newman, Lt. Ferrarelli, Sgt. Scialpi, - 3 patrol officers and 4 school resource (D.A.R.E.) officers (1T142-1T143, 2T62, 2T83, 3T86).

2. The Jackson Township PBA represents all Department members below the rank of lieutenant; specifically, patrol officers and sergeants. At the time of the hearings, Officer Joseph Olesky served as PBA President, and Officer Frank Cipully served as the PBA Vice-President. They have served in that capacity since June 2002 (1T41-1T43, 2T6; C-1).

The Jackson Township Superior Officers Association (SOA) represents all members of the Department with the rank of lieutenant or captain. At the time of the hearings Captain Christopher Dunton served as its President (2T6, 2T90-2T91).

3. There is no chief of police heading the Department; rather, the Director of Public Safety serves as the Department head (1T31, 3T25-3T27; R-4). Samuel D. DePasquale served as Director of Public Safety at the time of the hearings and has served in that capacity since January 1, 1995. He was first hired by the Township in March 1971, as a police officer. He was eventually promoted through the ranks until he reached the Director position. During the course of his employment, DePasquale has been a PBA and SOA member, and has been an officer in both organizations (1T44, 3T3-3T6, 3T93).

Since there is no police chief, captain is the highest ranking uniformed position in the Department. Currently, there are two captains in the Department - Captain Newman and Captain Dunton (1T44, 2T78).

Dunton, who has been a captain since 2000, is the Operations Division Commander and, as such, is in charge of the Patrol Division and Detective Bureau (2T78-2T79, 2T118). Dunton has been with the Department since 1984, when he was hired as a patrol officer. Throughout almost all of his employment with the Township, Dunton has served in either the Patrol Division or the Detective Bureau. The only exception was a 3 month period in 1997, when he served as the day supervisor, that is, the sergeant in the Service Division (2T116-2T118, 2T164).

Captain Newman is the head of the Service Division. Captain Anderson previously was in charge of Service, until his September 2002 retirement. Newman was already in the rank of Captain at the time of Anderson's retirement. Lt. Ferrarelli is second in command of Service, while Sgt. Kovac is in charge of the Division's traffic safety unit (1T35-1T36, 1T89, 2T5-2T6, 2T118).

Joseph Olesky

4. PBA President Joseph Olesky has been employed by the Department as a police officer since 1989. At the time he was hired, Olesky was assigned to the Department's patrol division (1T30-1T31).

DePasquale is in charge of the extra duty assignment operation, that is, he is the Extra Duty Coordinator. Around 1993-1995, DePasquale designated Olesky the duties of extra duty assignment coordinator. In practice, Olesky became the contact officer for contractors who desired to hire off-duty uniformed Township officers for extra duty assignment details, such as traffic control, construction site detail, and security for sporting events (1T47-1T50, 2T25, 3T53, 3T102-3T103). Olesky was responsible for scheduling available officers for the assignments they chose to accept, and dealing with contractors. There is nothing in the parties' collective agreement concerning this Extra Duty Assignment Coordinator Designee position (1T47-1T50, 1T161, 2T25, 3T18-3T21, 3T53, 3T56-3T57, 3T66, 3T92, R-7).

5. In early 1999, DePasquale assigned Olesky the position of Department Range Master. In order to be Range Master, one has to be a certified firearms instructor and Olesky had been one since 1985-86. As Range Master, Olesky was responsible for scheduling, overseeing officers' firearms qualifications, forwarding paperwork to the County prosecutor, budgeting for ammunition and supplies, and weapons maintenance (1T47-1T48, 1T90-1T91, 1T109, 2T25, 3T34, 3T66, 3T102). Olesky did not receive any extra monetary compensation for serving as Range Master (3T56). During the time Olesky was Range Master, the Township had three other certified firearms instructors (2T172-2T173).

At the time he became Range Master, Olesky was also assigned to the Shooting Response Team (2T154-2T155). Police Departments were required to have a Shooting Response Team, pursuant to Attorney General Guidelines promulgated prior to 2001. As of 2001, the Township Shooting Response Team consisted of the Investigative Division Commander, the IA Division Commander, the Detective involved in the investigation, and Range Master Olesky (3T31-3T33).

6. There are differences in schedules and staffing between Service and Patrol Division employees. Patrol Division employees work a 4-day on/2-day off schedule, while Service Division employees work a 5-day on/2-day off schedule. Further, Service

Division officers work Monday through Friday from 8 a.m. - 4 p.m.; they are not scheduled to work night shifts or weekends, and are not subject to transfer (1T37-1T40, 2T60; R-1). Thus, they work an 8-hour shift, while patrol officers work an 8½ hour shift. According to the PBA, these scheduling differences result in Service Division employees working more days per year than the Patrol Division. However, Service Division employees work fewer hours per shift; and receive four additional regular days off a year, per the parties' agreement. Thus, Service Division employees actually work 15 hours less than officers in other Divisions (1T40, 1T150-1T153, 1T170, 1T221, 2T110-2T111, 3T11-3T13; R-1).

Additionally, there are minimum staffing levels in the Patrol Division, while there are none in the Service Division; this results in different overtime opportunities within the two divisions. For example, if a Patrol Division officer calls out, another Patrol Division officer on that shift or the following shift is asked, based on seniority, to replace that officer and work overtime. However, when a Service Division employee calls out, normally no other officer is asked to replace him or her and work overtime (1T219-1T220, 3T17, 3T131-3T132). Service Division officers, however, can earn overtime in certain situations. For example, Service Division detectives can sometimes be called in to work overtime on investigations and court appearances.

Moreover, if no patrol officer is available to work the overtime, then a Service Division employee would be asked to work overtime (2T10-2T11, 2T69-2T71, 3T17-3T18, 3T132).

Further, Service Division officers have less opportunity to work on a holiday and earn holiday pay because only officers outside of the Service Division, such as patrol officers, are routinely required to work holidays. Holiday pay is eight hours straight time, plus time and a half (1T146-1T150, 1T221, 2T10-2T11, 2T69-2T71, 3T8-3T10). In comparison, Service employees are usually given the day off with pay on holidays; they simply receive their eight hours straight time pay (1T146-1T149, 1T221, 3T8-3T10). Apart from holiday pay, however, Service Division officers earn the same pay as patrol officers (1T150-1T151).

7. In October 2000, DePasquale decided to transfer Olesky from the Patrol Division to the Service Division (1T30-1T31, 1T180, 1T219, 2T113, 3T58; R-2). Sgt. Gary Cruse informed Olesky of his imminent involuntary transfer. He told Olesky that he was being moved to the Service Division because of the time and training, particularly firearms training, that had been invested in him; this training made Olesky very valuable as a Service Division officer. Cruse further explained that Olesky was being transferred because his Extra-Duty Coordinator Designee duties often resulted in him being on the road (1T30-1T31, 1T38-1T40, 1T219, 3T58-3T60). Olesky was not initially happy about his

transfer, but he did not object to it or file a grievance over the transfer (1T151-1T152, 3T58).

Just prior to his transfer, Olesky spoke to DePasquale and Lieutenant Ferrarelli in the Service Division about whether he would be receiving a take home car upon his assignment to the Division (1T39-1T40). A take home car is a car assigned to an officer for the purpose of going to and from work for duty time (2T15). Its value to the employee is that it saves money, particularly the cost of gas and car insurance, and wear and tear on an officer's personal vehicle (2T58-2T60). The assignment of take home cars for department officers is generally a management right governed by Township policy. Under Township Ordinance, DePasquale has the authority to assign take home cars. The issue of take home cars has never been a subject of negotiations between the PBA and the Township, and is not covered in the parties' agreement (2T58-2T59, 1T175-1T176, 3T27-3T28).

Olesky did not have a take-home car assigned to him prior to going into the Service Division (1T155). After talking with Lt. Ferrarelli of the Service Division, however, Olesky believed he was getting a car when he transferred to that Division because of the loss of holiday pay and for working more days (1T40-1T41, 1T146, 1T152, 1T154). But it is less clear that DePasquale gave Olesky that same impression (1T153-1T154).

DePasquale testified that a take home car has never been awarded to an officer as a quid pro quo for a departmental transfer which may result in a loss of overtime (3T27-3T29). Captain Dunton provided similar testimony (2T85). Cipully testified there is nothing in writing between the Township and the PBA that establishes a quid pro quo between a take home car and a loss of holiday pay, and that he has not been involved in negotiations over that issue (2T58). I credit that testimony.

Township ordinance states that authorization for a take home car shall be given only where an employee is "on call" at all times to respond to emergency or other situations after normal business hours. Although this ordinance does not apply to police department employees, DePasquale, nevertheless, uses this rationale in deciding which police department employees should receive take home cars (3T34-3T35, 3T40, 3T123-3T126, 3T153-3T155; CP-14). Thus, according to DePasquale, it has always been understood that for an officer to be assigned a take home car, he or she must have a significant reason to be called out after hours to perform functions associated with their duties (3T29-3T30). For example, Division Commanders and detectives are often called out after hours to investigate crime; likewise traffic officers are often called out after hours to investigate fatal accidents. Thus, these individuals are assigned take home cars (2T84-2T88, 3T30-3T31). I credit DePasquale, Dunton and even

Cipully's above testimony that a take home car is not given in lieu of holiday pay or overtime.

8. From the outset of his assignment to the Service Division in October 2000, Olesky was, in fact, issued an unmarked police department vehicle for use during work hours and which he also used to go back and forth from work (1T32-1T33). Olesky was given a take home car at least partly because he was then on the Shooting Response Team which had call-out responsibilities. Olesky's receipt of a take home car helped him decide to accept the transfer to the Service Division (1T146, 1T151-1T152, 1T180).

Frank Cipully

9. PBA Vice-President Frank Cipully has been a police officer employed by the Township since 1995 (2T4-2T6). In 1997, he became a D.A.R.E. officer in the Patrol Division and served in that capacity until he sustained a work related injury on March 3, 2002. On May 5, 2002, Olesky filed a grievance on Cipully's behalf, asserting that the Township failed to compensate him for a Township ordered doctor visit related to his injury (1T209, 2T33-2T34; CP-9, CP-12).

He was thereafter scheduled to go on a July 3, 2002 medical leave related to the prior injury. In late June-early July 2002, DePasquale summoned Cipully to a meeting in his office; Captains Anderson and Dunton, Sergeant Scialpi and Lieutenant Ferrarelli were also there. At the time of this meeting the Township was

aware that Cipully had just become the PBA Vice-President (1T43, 2T68-2T69). DePasquale asked Cipully whether he would be interested, upon his return from medical leave, in transferring from the Patrol Division to the Service Division, and taking over as sole instructor of the D.A.R.E. program in the Township middle schools (1T43, 2T6-2T9, 2T16, 2T21, 2T66-2T68, 2T80-2T82, 3T45-3T46). It was also discussed how it made more sense for Cipully to be assigned to the Service Division, rather than the Patrol Division, because the injury he had sustained may affect his ability to return to Patrol (2T54-2T55, 2T81).

DePasquale had decided he wanted to make Cipully a full time D.A.R.E. officer and wanted to place Cipully in the position because he believed this would be in the Department's best interest. He had been impressed by the job Cipully had done with the D.A.R.E. Program and was concerned whether Cipully could return to the Patrol Division in light of the injury he had suffered (2T7-2T8, 2T16, 3T45-3T47).

The transfer opportunity was an offer, not an order, and made in part to benefit Cipully (2T81, 3T47). Cipully accepted the offer. He was happy about getting the new position (1T179-1T180, 2T47, 2T81). He believed he was being assigned to the Service Division because of his ability, not based on whether or not he was fit to return to Patrol (2T56).

10. As a result of going into the Service Division, Cipully's schedule would change. He realized the change would result in his working additional days and his opportunities to earn overtime and holiday pay would also be curtailed (2T11, 2T69, 2T71-2T81).

According to Cipully and Dunton, there was a specific discussion about his (Cipully's) loss of holiday pay (2T69, 2T81). Cipully also claims there was a discussion about his potential loss of overtime in his switch from the Patrol Division to the Service Division (2T69-2T70). Dunton did not recall a discussion on overtime (2T81), but I credit Cipully's testimony.

Cipully claims that at the July meeting, he specifically asked which take home car he would be assigned upon his transfer to Service. As far as he knew, it was past practice that all Service Division officers were assigned a take home car (2T11-2T13).

Cipully was then informed that there was no vehicle currently available for him, but that the Township was working on getting him one. Cipully assumed that meant that he would be getting a take home car upon his return to active duty (2T14, 2T48, 2T67-2T68, 2T70).

Ferrarelli suggested the possibility of assigning Cipully the D.A.R.E. vehicle since Cipully would be the D.A.R.E. instructor (2T14-2T16). As a result of this meeting, Cipully

assumed that he ultimately would be afforded a take home car in part because no one outwardly indicated he would not be receiving such a vehicle (2T15-2T16, 2T47-2T50, 2T69-2T71). DePasquale did not personally have any discussion with Cipully at that meeting about a take home car, but he acknowledged that some of his subordinates discussed a take home car with Cipully outside of his presence (3T47-3T48).

Although I credit Cipully's testimony about having discussions about a take home vehicle, I find that he assumed - rather than was guaranteed - that he would receive such a vehicle for going into the Service Division. He testified that no Township representative specifically told him that he would receive a take home car in lieu of working additional days and losing overtime (2T71), he never saw any document that established a quid pro quo between receipt of a take home car and the loss of holiday pay (2T58), and he never said he would not accept the transfer unless he received a car (2T47-2T48). Cipully acknowledged he was told no take home car was available for him at the time the transfer was offered (2T48-2T49), and he also acknowledged that his acceptance of the transfer offer was "not specifically contingent" upon getting a take home vehicle (2T72). I credit his testimony. Consequently, although Cipully believed that such a vehicle was "part of the package" for going

into the Service Division, I find that was his assumption and not based upon any promise or guarantee by the Township.

The July 2002 Meeting^{4/}

11. In July 2002, a meeting was held between PBA and Township Committee representatives, including Olesky, Cipully, the Police Commissioner, Mayor Michael Broderick and DePasquale to discuss PBA issues. The meeting was held around the time Olesky took over as PBA president, and was the result of ongoing conversations between the Township Committee and Olesky (1T112-1T117, 1T121, 2T98, 3T22-3T24, 3T73).

The issue of uniforms was discussed at this meeting. Earlier that year, some officers had expressed an interest in purchasing a "Class C" uniform. Based on Sgt. Seidler's recommendation, Ray's Uniform Shop (Ray's) was chosen as the vendor. The Township had no involvement in choosing the vendor (2T160-2T162), and officers were not obligated to purchase the uniforms; it was at their option (2T174).

Upon placing an order, each officer individually paid for the uniform. When the uniforms arrived, they were of poor quality and fit. DePasquale was displeased with their color; he

^{4/} There is testimony that this meeting may have taken place in June 2002. The exact date of the meeting is not relevant; what is relevant is that the meeting took place before the August 12, 2002 Township Committee meeting. Thus, for purposes of clarity throughout this decision, I will refer to this meeting as the July 2002 meeting.

ordered all officers not to wear them (1T76-1T77, 1T137, 2T161-2T162; CP-4).

Olesky attempted to seek reimbursement from Ray's for the problematic uniforms, but he was unsuccessful. Thereafter, upon the recommendation of Township Business Administrator Kennedy, Olesky received a list of officers who had not been reimbursed. He forwarded the list to Sgt. Seidler, so that he could try to resolve the matter. Seidler told Olesky that he would follow-up with Ray's (1T224-1T225, 2T158-2T163).

Although the Township had nothing to do with the uniform purchase, the PBA, nevertheless, asked at this July 2002 meeting if the Township could help resolve the problem. DePasquale told Olesky to give him the information regarding the problem; he would forward it to the Township Administrator and the Township Attorney, with a request that the Township Attorney write to Ray's on behalf of the affected officers (3T22-3T23, 3T73-3T74). It was left up to Olesky to provide the information to DePasquale (3T74). Olesky did not provide the information until September 30, 2002 (3T23).

12. At the same July 2002 meeting, DePasquale asked Olesky to meet with him and bike patrol officers so that they, together, could determine what bike uniforms, equipment and training was needed (3T116, 3T122-3T123). The PBA had had concerns regarding the bike patrol since the summer of 2001, when patrol officers

were abruptly and arbitrarily assigned to it without training. In 2001, Cipully raised concerns to his supervisor and eventually to then PBA Vice-President Olesky. As a result, and to the PBA's liking, bike patrol assignments were halted in summer 2001 (2T34-2T37, 2T44, 2T47).

After summer 2001, the PBA Executive Board met with Mayor Broderick and Police Commissioner Grisanti and expressed concerns over the lack of training for the bike patrol. Broderick and Grisanti assured them that the bike patrol would be up and running by January 2002. However, as of the July 2002 meeting, it was still under discussion (2T36-2T37). The meeting DePasquale had requested with Olesky over the bike patrol did not occur (3T116).

13. Another topic that was discussed between the PBA and the Township at this July 2002 meeting was a potential K-9 unit (2T38-2T41, 2T98). This issue was first discussed in summer 2001. Thereafter, in approximately January 2002, at a meeting in DePasquale's conference room, Mayor Broderick informed the PBA that the K-9 unit would not be addressed until after the November 2002 elections (3T92).

After that meeting, Olesky spoke to Officer Chesney, the officer in charge of obtaining the paperwork for the care, costs and training of the K-9 unit (1T131). Chesney informed Olesky that he had already submitted the information to the Township at

least twice and that he did not want to have to do it yet again (1T132-1T133, 1T223-1T227). Chesney also felt he could not go back to those he had already lined up to donate the dog yet a third time. As a result, Chesney's interest in becoming a K-9 officer ceased (1T227).

The issue of the Township radio system was also discussed at this July 2002 meeting. There had been problems with the system since 1989, specifically, there were "dead areas" in the Township in which the radio system did not work at all, as well as the potential for the entire system to "crash" (1T117-1T119).

14. Cipully doesn't recall being asked at this July 2002 meeting to provide information regarding the bike patrol to the Township administration; nor if he was asked to prepare and submit information regarding the K-9 unit and uniform issue to DePasquale (1T115-1T117, 1T130, 1T138-1T141). Since DePasquale had a clear recollection that he asked for the uniform information and asked for a meeting regarding the bike patrol, I credit his testimony.

The August 12, 2002 Township Committee Meeting

15. An Open Public Meeting of the Township Committee was scheduled for August 12, 2002 (1T50, 3T108: CP-1). The promotion of Lieutenant Newman to Captain was to take place at that meeting (2T89-2T90, 2T119, 3T70).

As PBA President Olesky decided to attend the meeting as did about 25 - 30 other PBA members, because the PBA was concerned about a change in the departmental promotion process that led to Newman's promotion. According to Olesky, the Township had previously simply followed the Civil Service list ranking in promoting officers.^{5/} However, the Department recently implemented a new policy of interviewing the top three candidates before making their decision (1T54-1T55, 1T198, 3T71). As a result, the Township chose to promote Newman over Lieutenant Matthew Kunz who ranked higher on the Civil Service list (1T53-1T55, 1T198, 2T90). Further, two weeks earlier in July, the Township had employed this new policy with regard to the promotion of officer Russ Scialpi to the position of sergeant, and ended up skipping the highest ranking candidate, Officer Regan (1T55-1T56, 3T111-3T112). I find, and the PBA stipulated, that in accordance with N.J. State Department of Personnel rules and regulations, the Township is not obligated to promote the highest ranked candidate; rather, the Township is entitled to pick one of the top three candidates, barring improper motives (3T112-3T113).

As PBA President, Olesky was concerned about these two promotions which did not follow the rankings on the list. For the past several years the Township had always promoted officers

^{5/} Jackson Township is a Civil Service town.

strictly by civil service rank. Olesky had previously discussed the Scialpi promotion with DePasquale; he had also discussed it with PBA members at two PBA meetings. He had privately expressed concerns to Captain Dunton and DePasquale about Regan being passed over in favor of Scialpi (1T55-1T56, 2T31, 2T120-2T123, 3T70). Dunton acknowledged that he wasn't aware of any officer being skipped over for promotion, like Regan was, in the prior 10 years. The PBA, however, did not publicly protest the Scialpi promotion (2T91-2T92, 2T120-2T123, 3T70).

After the Newman promotion, however, the PBA decided to express their concerns regarding the promotion process at the August 12, 2002 Township Committee meeting. Thus, about 25 to 30 PBA members carried picket signs both inside and outside of the building indicating that the promotions were unfair (1T56-1T57, 1T190-1T193). The PBA protested Newman's promotion to captain and, in particular, the Township's additional interview process. The PBA feared this could "trickle down" to PBA promotions (1T190-1T193). Olesky, however, never attacked Newman's credibility or qualifications (3T111). Even though Lieutenant Kunz was displeased he was passed over for promotion in favor of Newman, there was no SOA protest at the meeting (2T90-2T91, 2T122-2T124).

16. Mayor Michael Broderick; Township Committeemen Kafton, GIBLIN and Krakower; Police Commissioner Joseph Grisanti;

Township Administrator John Kennedy and DePasquale all attended the August meeting (1T45-1T46, 1T52, 1T87, 2T124, 2T140, 3T69, 3T77, 3T106, 3T147; CP-1).

DePasquale was not aware that there were any objections to the Newman promotion until he arrived for the meeting that night. In the parking lot he saw a group of individuals, some PBA members and at least one SOA member, holding signs protesting the decision to skip Kunz for promotion; he also saw signs regarding the radio system (1T57, 2T96, 2T122-2T124, 2T167, 3T70-3T71, 3T95).

17. Immediately prior to the start of the meeting, Capt. Dunton, in his capacity as SOA President, made two comments to Olesky. First, he indicated that the Township was working on fixing the problematic Township radio system, and, that it was being addressed immediately. In fact, the issue had been discussed by the Township Committee in private session earlier that night. Olesky was not sure what Dunton meant by his comment, specifically, whether Dunton meant the Township was going to fix the existing system or replace it with a new one (1T119-1T120, 2T91, 2T129-2T130). However, Olesky did not then ask Dunton for clarification (1T121).

Next, Dunton expressed his concerns to Olesky regarding his (Olesky's) and the PBA's protest at the meeting. Dunton told Olesky he thought the protest was inappropriate because the PBA

lacked standing since the promotion did not involve a PBA member. He stated that if anybody had standing, it would be the SOA and its president (2T123-2T124). Dunton essentially told Olesky that he was stepping on the SOA's toes by protesting the promotion (2T123-2T124). He further told Olesky that he had made a "big mistake" by attending the meeting but did not say why. Olesky interpreted Dunton's comment as meaning that he was upset that officers were picketing and that he did not agree with their actions (1T58-1T60, 1T191). Finally, Dunton expressed his concern to Olesky that the protest would create ill-will among Township Committee members and would risk making funding for the new radio system more difficult (2T149).

Just before the meeting started, Olesky approached Newman and shook his hand. He congratulated Newman on his promotion and informed him that he had the support of the PBA (1T61, 1T194-1T195). Olesky wanted Newman to know it was the process and not Newman that was being questioned (1T195).

18. During the meeting Olesky addressed the Committee as PBA President (1T51, 1T53, 1T62, 2T124-2T125, 3T71, 3T109; CP-2). He first inquired about the radio system, specifically, what Dunton meant when he told him earlier that evening that the system was being addressed immediately. A Committee person responded: . . . the system that was in need of repair has been repaired (CP-2 p. 50). Olesky then asked, "Is this just a

temporary, is this just a Band-Aid?" (CP-2 p. 50). He further informed the Committee that the system had failed recently. Olesky stated, "It's not good for my officers, and it's not good for the residents of Jackson." (1T63, 1T119-1T120, 2T94, 2T129-2T130, 3T114; CP-2 pp. 50-51). A Committee member acknowledged the recent system failure. Finally, Olesky ended his remarks regarding the radio system by stating, "As long as it is being looked at and addressed." (CP-2 p. 51).

According to the Township, through his comments, Olesky was taking the Committee to task that evening for its failure to address the radio system. Indeed, PBA members held signs protesting that the radio system difficulties were not being addressed (2T96, 3T70). However, during his address to the Township Committee that evening, Olesky did not say the Township had done nothing about the radio issue (1T63; CP-2).

Olesky made his remarks despite the fact he did not specifically know what had been discussed or decided regarding the radio system at the closed Committee meeting held earlier that evening (1T120-1T121, 2T95-2T96).

19. DePasquale acknowledged that the radio system malfunction presented a life threatening situation for police officers and the whole community. He further acknowledged that Olesky had the right as PBA President to address the Township

Committee on behalf of his officers regarding the status of the Township's efforts to repair the system (3T114).

Dunton, however, was concerned by Olesky's statements regarding the radio system - a safety issue for both officers and the public. He viewed Olesky as falsely making the specific representation that the PBA's concerns over the matter were being completely ignored by the Township (2T94-2T96, 3T72-3T73).

Prior to August 12, 2002, there had been many conversations between Dunton, DePasquale and the governing body, regarding the implementation of a new radio system. Dunton had spoken with Olesky during the prior month and informed him that the Township was trying to get information regarding a new system. He also told Olesky that the Township had scheduled a meeting with Motorola representatives (2T94-2T96). In fact, just prior to the start of the Township Committee meeting, Dunton and Township representatives had met in private session with Motorola representatives regarding the purchase and installation of a new radio system (2T95).

20. Olesky next addressed the Committee regarding the promotion process. He expressed his concerns about the new process and how the Township had not followed the Civil Service list rankings in Newman's promotion (CP-2 pp. 51, 52, 54-55).

21. Olesky then asked the Township Committee about the unresolved May 2002 grievance the PBA had filed on Cipully's

behalf, involving Cipully's March 3, 2002 on-duty injury and, particularly, compensation for a Township ordered doctor visit (1T64-1T67, 1T208, 2T33-2T34; CP-2 p. 57, CP-3, CP-9, CP-10, CP-13). As of the August 12, 2002 meeting, the grievance had been addressed by the Business Administrator and the PBA in a continued effort toward resolution (1T121-1T122, 1T208-1T210, 2T33-2T34; CP-3, CP-9, CP-10). Olesky raised it at the meeting in another attempt toward resolution (1T209-1T210, 2T33-2T34; CP-3, CP-10). He commented to the Mayor, "I have been waiting on an answer. I have asked for written clarification on a letter. I have yet to receive that. I have spoken to you numerous times about that." (CP-2 p. 58).

The Mayor replied that the grievance format takes precedent, and Olesky should move forward pursuant the grievance procedure (CP-2 p. 58). Olesky responded, "We will have to do it, I guess. If you are not going to work it out like a gentleman . . ." (CP-2 pp. 58-59). The Mayor indicated that this wasn't the forum to discuss it, and that he wouldn't discuss it now. He then said the Township would gladly sit down and discuss it with Olesky in the future (CP-2 p. 60).

Olesky then referenced how the parties had met over several issues a year ago and more recently, yet the issues remained unresolved. Broderick noted that he thought the parties were

going forward and that he believed that Olesky would provide DePasquale with information (CP-2 p. 60).

22. The Township, particularly DePasquale, then raised issues regarding the bike patrol, uniforms, and the K-9 unit that had been previously discussed at the parties' recent July meeting (1T67-1T71, 1T228, 2T135-2T138; CP-2 pp. 67-69, 71-72).

As to the bike patrol, Olesky and those officers with prior bike patrol training, were supposed to meet with DePasquale and together recommend training and equipment for the bike unit. However, that meeting never took place and DePasquale so commented that evening (3T115-3T116, 3T122-3T123; CP-2 p. 63). Olesky stated to the Committee that the Township should have moved on the issues a year ago (CP-2, pp. 62, 64).

Olesky acknowledged he had not met with or provided the Director with any information regarding the bike patrol, as of the August 12, 2002 meeting (1T136-1T137), and further acknowledged that he could not then blame the Township's failure to respond to the bike patrol issue on the Director (1T136-1T137).

23. Mayor Broderick then expressed to Olesky that he did not think it was appropriate for Olesky to bring all the PBA members to the meeting because they could have been spending time with their families (1T69-1T70; CP-2). He also raised the K-9 issue with Olesky, indicating that Olesky was supposed to compile

information about the K-9 program, specifically, details about the dog and training classes (1T73-1T75, 2T96-2T97; CP-2). Broderick believed he had told Olesky at their July 2002 meeting, to submit the K-9 information it had to DePasquale and work out details with him. He then asked Olesky why he had not provided the information (1T74-1T76, 1T133-1T135; CP-2 p. 67).

Olesky, however, did not think he was required to provide Broderick or the Township Committee with any information regarding the K-9 unit before the August 12, 2002 meeting. Rather, he believed he was simply being told at the July 2002 meeting that the K-9 unit would not be addressed until after the November 2002 election; that much was acknowledged at the July 2002 meeting (1T140-1T141, 2T133-2T134; CP-2 pp. 68, 69).

24. During his address to the Township Committee, Olesky observed that Broderick, Committeeman Kafton and Police Commissioner Grisanti appeared to be upset with him. In reply to Olesky's remarks, Broderick noted that the Township has always put the safety of officers and residents first and that's why the Township did so many hirings in the last two - three years. He also commented, "Maybe we should go back to purchasing three cars a year like we used to do, instead of the 6, 10, 18 . . . cars that have been purchased in the last couple of years. Maybe we should go backwards with the CAD system . . ." (1T81-1T84, 1T200; CP-2 p. 70). Olesky interpreted Broderick's comments as a

threat, and asked if they, in fact, were threats (1T81, 1T200; CP-2 p. 70).

25. Broderick then raised the uniform issue at the meeting (1T76, 1T80; CP-2). Olesky had forwarded the uniform information to Sgt. Seidler approximately six-seven weeks earlier, but the issue still had not been resolved (1T77, 1T80, 1T224, 2T158-2T159, 3T74-3T75; CP-4). While Olesky had given the information to Seidler, he had not given it to DePasquale. Olesky never asked Seidler if he had given the information to DePasquale and never told him to do so, although it was left up to Olesky, as of the July 2002 meeting, to provide DePasquale with the information (1T125-1T128, 3T73-3T75). At this point, Olesky did not know if DePasquale or the Township Committee had the uniform information and in fact, they did not have the information (1T128-1T129, 2T163, 3T23).

At the August 12 meeting, Olesky asked what happened to the uniform issue, noted he had spoken to Capt. Dunton and the Director and expressed concern the issue had not been addressed (CP-2 p. 72). Dunton interpreted the statement as blaming he and Lt. Seidler for failing to follow through on the issue (2T99, 2T135). He called that statement "Completely untrue. It was a bald-faced lie" (2T100), because neither he nor Seidler were at the July 2002 meeting where the issue was discussed and he had not been provided the information.

26. While Dunton claims that Olesky made false statements regarding the K-9 and uniform issues, he acknowledged that Olesky did not lie about the radio system at the August 12, 2002 meeting (2T129-2T130).

Although Dunton asserts Olesky made certain bald faced lies during the meeting, he did not then directly challenge Olesky's veracity. Dunton explained that he did not do so because it was the wrong place and the wrong time (2T125-2T126).

DePasquale participated in the colloquy between Olesky and the Township Committee and also had concerns regarding Olesky's statements (2T125-2T128; CP-2). While DePasquale had no problem with Olesky addressing the Committee as PBA President, he did, however, object to Olesky indicating that certain things had or had not happened because of the fault or failures of DePasquale and the Township Committee (3T72-3T73, 3T109). DePasquale said:

Yes. In his capacity as PBA president I don't have a problem with him getting up and talking about whatever he needs to talk about. I mean that was speech- there were times in my career when I was in his position when I was doing similar things (3T72).

What I did object to, for whatever reason, the items that Joe [Olesky] was speaking of that I certainly got the impression, and I assume if I did that maybe other people did, too, I got the impression that Joe was indicating that certain things that had or had not happened were the fault of myself or and of my administration and maybe even the Township Committee because we failed to follow up on certain items when in fact that was not true and Joe knew that wasn't true (3T73).

According to DePasquale, he had not failed to follow up and Olesky knew it (3T73). Further, Dunton believed that even though Olesky is the PBA President, that did not entitle him to utter what he (Dunton) called "bald-faced lies" to the Township Committee (2T139). The Department, however, never took any formal disciplinary action against Olesky, based on the remarks he made at the August 12, 2002 Township Committee meeting (1T107).

27. DePasquale was also embarrassed by what had transpired at the August 12, 2002 meeting. He had never seen a demonstration by a union in his 33 years in the Department which caused such embarrassment to an individual in front of that individual's family. He found the protest to be offensive to himself and to Capt. Newman the individual being promoted, and thought there was no place for it in public. He believed the PBA could have had the decency to inform Newman what was going to transpire so that he wouldn't be embarrassed in front of his family. DePasquale apologized to Newman after the meeting (3T76, 3T95, 3T111). DePasquale, however, said he recognized the right of the union to protest (3T96) and recalled the PBA appearing at a Council meeting in large numbers in the summer of 1998, to support his continued service as Director (3T96-3T98).

28. At the conclusion of the August 12, 2002 meeting, Olesky approached the Township Committee members in a further

attempt to resolve the issues that had been raised. Grisanti and other members became very upset and agitated with Olesky.

Grisanti grabbed his briefcase and began walking out. As he was leaving, he looked back at Olesky and stated, "See, this is all bullshit, Joe." Grisanti also made a comment to Olesky, with respect to pending negotiations between the PBA and the Township, that "everything that was on the table was off". The Township stipulated that Grisanti was very upset (1T80-1T81, 1T85-1T87).

The Removal of Olesky's Range Master and Extra Duty Coordinator Designee Duties

29. After the August 12, 2002 Township Committee meeting, DePasquale had some conversations with Committee members about Olesky. There were no overt discussions about retaliating against him for his actions at the meeting (3T76-3T77, 3T147-3T148). During the week following the meeting, Dunton and Broderick discussed Olesky. Dunton made clear his displeasure with Olesky's comments and conduct at the meeting; Broderick concurred (2T147-2T148).

Dunton and DePasquale also discussed their feelings about Olesky's actions at the meeting and the impression they derived from his remarks. DePasquale questioned Olesky's veracity based upon his remarks to the Committee (3T135). Both DePasquale and Dunton believed that Olesky had falsified his representations to the Township Committee that the PBA's concerns regarding the radio system, the promotion process, the grievance of May 2002,

the bike patrol, uniforms and K-9 issues were being ignored by the Township (2T94-2T97, 2T99-2T100, 3T73, 3T81). Based upon those alleged false representations DePasquale lost confidence in Olesky and viewed him as untrustworthy (3T78, 3T135, 3T147). He conferred with Dunton about removing Olesky from the Range Master position where he felt he needed to implicitly trust the assigned person (3T78, 3T135, 3T147).

DePasquale recalled the conversation between he and Dunton as follows:

As I recall, we just discussed the feelings that we had and especially myself how based on some of the discussions that Joe went into that evening and the impressions that I believe he was giving, that I felt he was untrustworthy, I didn't feel I could trust him based upon what we expect out of somebody in a position of Range-Master. This is an individual that I have to trust implicitly.

Q. Why?

A. Because he is in a position where he is in charge of and responsible for certain things that go on at the range as far as training, et cetera, in all likelihood if something goes bad and we end up in litigation Joe has to certainly testify as with other Range Instructors if they were involved as to what they had or had not done with people in their training.

What went on in my mind brought out a question over his veracity and that was very serious (3T78).

DePasquale tied Olesky's comments to the Committee in his role as PBA President to his (DePasquale's) decision removing Olesky as Range Master and Extra Duty Coordinator Designee. When asked if it was fair for Olesky to say: "I was actually the PBA

president on August 12, therefore you are retaliating against me", DePasquale responded:

A. I guess it is fair for him to say but it is not true that it was because he was the PBA president, I don't care what he said if he doesn't make distortions, but what he said was absolutely in my mind a distortion, maybe a deliberate untruth, trying to divert responsibility from himself or his group for what had failed to occur.

It would seem to me that based on what went on that evening at that meeting on the 12th in conjunction with other things that had been coming up and problems we had had with the range and the operation of the range, this was almost like the straw that broke the camel's back, if you will, and that's really all I can say about it. [3T81-3T82]

When asked "You would not have replaced him as range master but for the comments he made at the August 12, 2002 meeting, correct?" DePasquale responded:

Not all of the comments, maybe some of the comments, had it not been for some of the comments that were made that's a possibility. [3T135]

30. Even before Olesky's August 12, 2002 statements, Dunton had concerns about Olesky's performance as Range Master. He had verbally raised these concerns to DePasquale earlier in 2002 (2T103, 2T141-2T143).

Dunton was upset with Olesky's failure to fulfill his Range Master responsibilities to formulate a budget request package for the replacement of range equipment. Since 1999, Olesky had told Dunton that the shooting range equipment needed to be replaced. For three straight years, Dunton claims he asked Olesky to include information on the cost and justification for replacing

the equipment in the annual budget request package that Olesky was responsible for; Olesky, failed to submit that information. Dunton needed this information from Olesky because he was responsible for preparing the overall police budget (2T103-2T104, 2T142-2T144).

Olesky wasn't aware Dunton wanted the information to be included in his annual budget request that was submitted to the Committee (1T183-1T184). Dunton never sent a memo to Olesky specifically asking for the budget information on the new range equipment, but may have sent Olesky a form letter each year that had requested certain information (2T142-2T144).

Otherwise, Dunton only made informal verbal requests for the budget on the new range equipment, in the form of hallway conversations with Olesky that went on for over a year; no written instructions or deadlines to complete the proposed budget were ever given. Further, Dunton never told Olesky it was a priority that he obtain and submit this information (1T108, 1T182-1T184, 1T215). Dunton simply told him to find out what was available. Neither Dunton nor any other supervisor followed up in writing to Olesky (1T108, 1T181-1T183, 1T215).

Olesky looked into the matter for over a year (1T181-1T183). He made phone inquiries to some agencies, received information from different companies, and arranged for representatives from a

North Carolina company to come to the range and give a price quote (1T107-1T109, 1T181-1T183; CP-8).

Olesky explained he took so long to gather this budget information because he had other, more pressing, duties to perform and there was limited information available. However, he admits he was responsible for formulating the budget for the replacement system and that he could have given it more time (1T182-1T184).

Although Dunton did not receive the budget information from Olesky for three straight years, he (Dunton) did not seek any disciplinary action against Olesky or seek his removal as Range Master (2T143-2T144, 3T65, 3T134). DePasquale also did not feel disciplinary action was warranted against Olesky although he was concerned how Olesky got "bogged down" with regard to his administrative duties (3T65). Further, Olesky never received anything in writing indicating that he failed to prepare or submit a budget (1T109-1T111; CP-8).

As Range Master, Olesky was also required to prepare and submit a yearly proposed budget for ammunition, guns, cleaning supplies, and weapons maintenance. Olesky never failed to prepare and submit that particular budget (1T109-1T110).

Dunton also had concerns with Olesky regarding a weapons sighting problem at the range. One officer had difficulty qualifying with a new weapon. Olesky had recommended that this

officer's weapon be removed because of his failure to qualify. The officer never ultimately qualified with the firearm and thus he could no longer be a police officer; he then retired. However, within a year, the Township learned that many of the new weapons were sighted improperly, including that of the officer who had failed to qualify (2T102-2T106, 2T144-2T145, 2T165-2T166).

Dunton claims that, as Range Master, Olesky should have realized the sighting problem with the weapons which could have been detected if Olesky test fired the weapons. Olesky failed to do that (2T103-2T106, 2T166-2T167). Dunton admits, however, that any of the three other firearms instructors could have test fired the faulty weapons and discovered the problem, but didn't (2T173).

Dunton also spoke to DePasquale regarding Olesky's inability to get along with other certified range instructors in the Department (2T165, 2T174, 3T63-3T65). Olesky admits there were a couple of officers with whom he had personality conflicts (1T184-1T185, 1T188). Dunton was aware and critical of these conflicts and had spoken to Olesky about them. Olesky admits this amounted to negative feedback by Dunton about his job performance as Range Master. This is the only criticism Olesky received from a superior regarding his job performance (1T188-1T190). No disciplinary action, however, was taken against Olesky regarding

this matter. According to Dunton, none was warranted, as it involved a "personality" issue (2T174).

31. Prior to the decision to relieve Olesky as Range Master, no Township representative, including Dunton or DePasquale, ever made any follow up inquiries to Olesky regarding his progress on still outstanding budget information on the automated targeting system (1T109; CP-8). Just after the August 12th meeting, DePasquale decided to remove Olesky as Range Master. He asked Detective Vincent Rubio to assume those responsibilities (3T80-3T81,3T147).

When DePasquale returned to work on August 19, 2002, one of his first actions was to remove Olesky as Range Master and Extra Duty Coordinator Designee. Olesky was approached that morning by Captains Anderson and Newman, and told that he was being immediately relieved of those duties. Newman told Olesky that removing him from those duties was the hardest thing he ever had to do (1T87-1T88, 1T205-1T206, 3T107). Anderson and Newman then informed Olesky that DePasquale had made the decision to remove the duties, but they did not give Olesky DePasquale's reasons. Olesky asked if they had any problem with his training or his performance as Extra Duty Coordinator Designee; they replied "no" (1T87-1T89, 1T91, 1T206; CP-5).

32. Olesky asked to speak to Captain Dunton, the ranking captain (1T93), about losing the Range Master and Extra Duty

Coordinator Designee duties. They met in Dunton's office (1T93, 2T100). Dunton stated that it was DePasquale's prerogative to determine who would be his Extra Duty Coordinator Designee (2T101), and that he and DePasquale had significant concerns about maintaining Olesky in the Range Master position. Dunton explained to Olesky that his credibility was now in question based upon what Dunton thought were significant false statements made by Olesky at the August 12, 2002 Township Committee meeting (1T93-1T94, 2T100-2T103).

Olesky testified that Dunton said: "[D]idn't I [meaning Olesky] expect some type of reprisals for what took place?" (1T94). Olesky understood that to mean being relieved of the extra duties he had at that time (1T94, 1T203).

Dunton, however, claims he asked Olesky "Do you think you can get up at a public meeting and make statements in a public forum, make bald-faced lies attempting to embarrass and bully the Township Committee and expect it would not have repercussions on our ability to -?" (2T106-2T107). He explained that he made the statement because he was concerned that Olesky's false statements would negatively affect the Department's ability to receive funding for a new radio system, among other things (2T107). Dunton also admitted telling Olesky that he (Olesky) had single handedly done more damage to the Department in one night than anybody else had done (1T94, 2T108). I credit Olesky's

testimony. Had I only credited Dunton's testimony I would still find that even if he did not use the word "reprisals," as Olesky testified, that was the intent of his remarks to Olesky because even he (Dunton) referred to "repercussions" from Olesky's August 12th remarks.

Olesky also testified that Dunton said part of the action, presumably Olesky's removal from the extra duty assignments, was coming from Mayor Broderick who wanted him out of the range (1T94). Dunton confirmed that Broderick's name was mentioned.

Dunton said:

Yes, it [Broderick's name] came up concerning his concerns about the ability to maintain levels of trust and credibility in Officer Olesky based upon the fact he got up and told significant lies in that public forum (2T108).

I find Dunton's testimony corroborates Olesky's testimony on this point, thus I credit both remarks.

33. By memorandum of August 20, 2002 (CP-5), DePasquale assigned the Extra Duty Coordinator Designee duties to Sgt. Scialpi, and the Range Master duties to Detective Rubio, effectively removing Olesky from those responsibilities. DePasquale denied removing those duties from Olesky in retaliation for his actions as PBA President at the August 12 Township Committee meeting (3T62, 3T81, 3T106).

He explained that he did not take Olesky off of the Extra Duty Coordinator responsibilities because he couldn't do the job,

rather, he said that since he now had a sergeant in the Services Division, Sgt. Scialpi, who was promoted to the position on July 22, 2002, it made more sense for him to perform those duties (3T60-3T62, 3T103-3T104).

When asked whether Olesky's August 12th remarks motivated him to replace Olesky as Extra Duty Coordinator Designee DePasquale said, "No" (3T106). But moments earlier when asked if it was his (DePasquale's) testimony that Olesky's August 12 remarks played no part in motivating him to replace Olesky as Extra Duty Coordinator Designee, DePasquale said:

I didn't say that. I think I said that what went on there, and it was comments that were made that I took to be either misleading or untruths pertaining the [sp] myself and some of my administrators (3T106).

I credit the earlier testimony, not the denial. I find the earlier testimony demonstrated more accurately DePasquale's sentiment that the removal of Olesky's extra duty responsibilities was done at least in part in reaction to his remarks of August 12.

DePasquale also denied removing Olesky from the Range Master duties because he was the PBA president, but still tied the removal to Olesky's August 12 remarks. He said:

. . . it is not true that it was because he was the PBA president, I don't care what he said if he doesn't make distortions, but what he said was absolutely in my mind a distortion, maybe a deliberate untruth trying to divert responsibility from himself or his group for what had failed to occur.

It would seem to me that based on what went on that evening at that meeting on the 12th in conjunction with other things that had been coming up and problems we had had with the range and the operation of range, this was almost like the straw that broke the camel's back, if you will, and that's really all I can say about it (3T81-3T82).

Later, DePasquale was asked:

You indicated that part of your motivation to remove Olesky as the Range-Master was motivated by his comments and conduct at the August 12, 2002 meeting, is that correct, do you recall that testimony?

He responded:

Yes, I think what I was referring to or what I said was my understanding, it was my understanding I felt other people would have gotten the same impression of some of the comments he made, yes, technically you are correct (3T105).

When asked on cross-examination,

You would not have replaced him as Range-Master but for the comments he made at the August 12, 2002 meeting, correct?

He said,

Not all of the comments, maybe some of the comments, had it not been for some of the comments that were made that's a possibility (3T135).

I credit DePasquale's testimony on this issue and find it demonstrates he removed Olesky from the Range Master position in reaction to Olesky's remarks of August 12, 2002.

As a result of his loss of Range Master duties, Olesky does not perform firearms instruction. Olesky is still a range instructor and continues to perform training and administrative responsibilities at the range (1T201-1T202, 2T109-2T110, 3T85).

34. Olesky's loss of Range Master and Extra Duty Coordinator Designee duties did not result in any changes in his schedule, his salary, or his opportunities for extra duty assignments. However, he lost the one hour per month of compensatory time he had earned as Extra Duty Coordinator Designee, and some overtime he had earned as Range Master in setting up firearms schedules, but Olesky could not quantify that overtime (1T163-1T164, 1T225, 3T61-3T63, 3T85).

Besides Olesky's loss of compensatory time, the PBA has not suffered any other fiscal ramifications as a result of the August 12, 2002 meeting. Further, despite Broderick's statement regarding decreasing the Township's purchasing of cars, the Township has continued to purchase vehicles at the same rate and is still considering purchasing a new radio system (1T200-1T201).

The Removal of Olesky's Take Home Car

35. In June-July 2002, DePasquale met with Captain Anderson, Lieutenant Ferrarelli, and then Lieutenant Newman regarding the issue of take home cars. At that meeting, DePasquale explained that there must be a legitimate reason for an officer to have a take home car. He then specifically questioned whether Service Division officers Sergeant Scialpi, Olesky and Sergeant Kovac should continue to have take home cars. He asked Anderson, Ferrarelli, and Newman to discuss the issue and make their recommendations to him (DePasquale); they did so

prior to August 12, 2002. They recommended that Scialpi and Kovac keep their cars. Apparently, they made no recommendation - either way - regarding Olesky (3T41-3T43, 3T125-3T126; CP-14). On August 19, 2002, DePasquale spoke to Olesky's supervisor and explained that he had decided to remove Olesky's take home car (3T107-3T108, 3T128).

Prior to this June-July meeting on take home cars, Kovac did not have call out responsibilities. His Division Commander, however, decided that he would use Kovac in a different manner in the future, which would result in increased call-out responsibilities. It was further decided that since Kovac was a supervisor, he needed a car to ensure his presence at all fatal accidents. Thus, it was determined that his car was justified (3T43, 3T86-3T90).

It was also recommended that Scialpi retain his car because of his duties as domestic violence liaison officer. In this capacity, he attends meetings and conducts training with civilians after hours, and serves as a back-up for the Department's media officer. In light of these duties, his supervisor recommended that he keep his car; DePasquale agreed (3T88-3T90, 3T127-3T128, 3T149).

Thereafter, DePasquale informed the Division Commanders that Scialpi and Kovac would be keeping their cars. He claims he told them that Olesky would not keep his car and claims he arranged

for them to notify the affected officers and left it up to the Division Commanders as to when Olesky would be informed about the decision to remove his take home car (3T40-3T44, 3T126-3T129, 3T150). There was no testimony by Anderson, Newman or Ferrarelli to corroborate DePasquale's testimony about Olesky.

DePasquale denied removing Olesky's take home car because of his comments at the August 12, 2002 Township Committee meeting (3T44, 3T145). But he did not issue a memo taking away Olesky's take home car; rather, he claims he verbally instructed Olesky's supervisor to tell Olesky (3T108).

On direct examination, DePasquale testified that the decision to remove Olesky's take home car was based on recommendations made sometime prior to August (3T43). I do not credit that testimony nor DePasquale's denial that Olesky's August 12 remarks were a factor in the decision to remove his car. On cross-examination, DePasquale was asked:

When was the actual decision made by you to take the vehicle from Olesky, was it also on August 19, 2002.

DePasquale responded:

I don't recall (3T128).

While I credit DePasquale that Newman and Ferrarelli recommended that Scialpi and Kovac retain their cars, and that he asked Newman and/or Ferrarelli to tell Kovac and Scialpi, I do not believe he made the decision at that June/July meeting to remove Olesky's car. When asked directly when he made the

decision, he said he couldn't recall. Generally, I found DePasquale a very informed witness. His inability to recall such a critical fact was implausible. His earlier testimony that Olesky's remarks on August 12 ". . . was almost like the straw that broke the camel's back . . ." (3T82) demonstrated DePasquale's true feelings about why he took the actions on August 19 to strip Olesky of his take home car and Extra Duty and Range Master positions. I believe his "I don't recall" response to the above question was given to avoid answering, "yes". Consequently, I find that the decision was made after the August 12, 2002 Township Committee meeting.

36. On August 26, 2002, after Olesky returned to duty from a short vacation, Captain Newman informed him his take home car was being removed. He explained that since Olesky was no longer Range Master, he was no longer part of the Shooting Response Team; thus he no longer needed a take home car (1T95-1T98).

According to Olesky, he never had any call out responsibilities as Range Master or as Extra Duty Coordinator Designee. While Olesky did have call out responsibilities while serving on the Shooting Response Team, the Team was disbanded in early summer 2001, upon the Township discovering that it was no longer needed under Attorney General guidelines. In fact, as of November 2000, the Attorney General had determined that police departments no longer needed the Team. DePasquale claims the

Department should have then looked into removing Olesky's car. He, however, "screwed up" due to a reorganization in the Department and did not learn of the change in the guidelines until sometime in Summer 2002, but he still took no action to remove Olesky's car until after the August 12, 2002 meeting (1T98-1T99, 1T156, 2T154-T156, 3T38-3T40, 3T98-3T102; CP-13).

By late August 2002, Olesky's only possible call-out responsibilities involved his radiological response officer duties with the Office of Emergency Management (1T100, 1T156, 1T170). Olesky perceived the loss of his vehicle as a loss of a benefit. It saved the wear and tear on his car because of the 28 mile round trip to and from work (1T169).

37. Just after August 26, 2002, Olesky verbally grieved DePasquale's actions and challenged the Township's removal of his take home car, as well as his Range Master and Extra Duty Coordinator Designee positions. The Township denied the grievance, thus, on September 13, 2002, Cipully filed a formal written grievance on Olesky's behalf (2T22-2T25; CP-6). The grievance asserts that the Township violated Articles IV and XXVI of the parties' agreement by removing Olesky's Extra Duty Coordinator Designee and Range Master positions, and removing his take home car (1T100-1T101, 2T23; CP-6). The grievance claims that the Township took its adverse actions in retaliation for Olesky's actions and comments at the August 12, 2002 meeting, and

that the Township's removal of the take home car violated the parties' past practice and custom to provide such vehicles to all personnel assigned to the Department's Service Division (2T22-2T24; CP-6).

On September 20, 2002, Lieutenant Ferrarelli denied Olesky's grievance. He indicated that, under Township Ordinance and the parties' agreement, the Director has the authority and right to appoint the position of Range Master and to appoint a designee to coordinate outside employment. Ferrarelli also explained that Olesky's take home car was removed as a cost savings measure and because he would no longer be responding to shooting situations or be performing Range Master duties (3T137-3T138; R-6).

On October 2, 2002, DePasquale sent a memo to Business Administrator Kennedy addressing the grievance (CP-7). DePasquale acknowledged that Olesky and the other PBA members had the protected right to be at the August 12, 2002 Township Committee meeting to discuss issues of concern to the PBA. He further indicated that his decisions to remove Olesky as Range Master and Extra Duty Assignment Coordinator Designee were strictly management rights and were permissible under the agreement and Township Ordinance. DePasquale also explained that he changed his designee for extra duty assignments to Sergeant Rubio because he felt the rank "sergeant" was more commensurate with the responsibilities of the position. DePasquale did not

cite a reason for removing Olesky as Range Master; he simply explained it was within his authority to do so (2T30, 3T142-3T143; CP-7).

In addition, DePasquale noted that Olesky did not suffer financially; he continues to earn the same wages and have the same schedule. He also explained that he has the authority to determine who receives a take home car under the Township's vehicle use policy, and that he made the decision to revoke Olesky's vehicle based on input and recommendations, or the lack thereof, by the Service Division Commander and Deputy Commander (1T102-1T103, 3T137-3T145; CP-7). DePasquale did not specify that he decided to remove Olesky's car based on the fact that he no longer had call-out responsibilities (CP-7).

DePasquale did not cite in CP-7 any deficiencies in Olesky's performance as Range Master and Extra Duty Assignment Designee, in defense of his decision to remove these duties (2T30-2T31, 3T142-3T143). In fact, he thought Olesky performed his Extra Duty Coordinator Designee duties satisfactorily. As Designee, Olesky had resolved a situation involving a \$45,000 back payment owed to the Township; he convinced the contractor to finally pay (1T104-1T105). DePasquale had never made any effort to replace Olesky as Extra Duty Coordinator Designee, prior to August 19, 2002 (1T103-1T104, 3T133).

During his entire career with the Township, Olesky never received any disciplinary action, including reprimands or counseling, for failing to properly perform his duties. DePasquale admits he is "certainly satisfied" with the job Olesky has done and continues to do in Service. According to DePasquale, Olesky has done a "good job" (3T59-3T60, 3T133).

Cipully's November 2002 Return to Active Duty

38. On November 18, 2002, Cipully returned to active duty, now in the Service Division ®-5). Within the first hour of his return, Cipully was called into Sgt. Scialpi's office to discuss his new duties. Cipully immediately asked if he had been assigned a take home car. Scialpi replied no, that there had been a policy change and that Cipully would not be receiving one. Scialpi did not advise Cipully of the reason for the change; he indicated Captain Newman would explain it. Scialpi then explained that Cipully would be assigned a vehicle to use, but that he would have to report to Headquarters to pick it up (2T16-2T18).

Later that day, Newman and Cipully met regarding Cipully's duties. Newman reiterated that Cipully would not be receiving a take home car. Instead, he would be assigned a car that he would have to pick up to perform his duties and then drop off before he went home. Newman did not explain why the policy had been changed (2T18-2T20).

Cipully never spoke to DePasquale regarding the take home car issue. He was not the logical one to speak to first, under the Department's chain of command. Cipully, instead, spoke to the sergeant, lieutenant and captain in the Service Division about his failure to receive a car. He never asked any of them if he could speak to DePasquale directly about the issue (2T65-2T66).

Prior to Cipully's November 18, 2002 return to duty and start in the Service Division, the PBA had notified the Township on September 13, 2002, that it intended to proceed to arbitration with regard to his May 2002 grievance (CP-12). The PBA did, in fact, file for arbitration with the Commission on November 14, 2002 (1T210). That grievance was resolved on April 8, 2003 (1T211).

DePasquale testified Cipully's failure to get a take home car was not related to his PBA activity, his overtime grievance or his job performance (3T49-3T52). According to DePasquale, he never decided to deny Cipully a take home car. Rather, he never even considered assigning him one since Cipully, now a School Resource Officer performing D.A.R.E. responsibilities, had no need for a take home vehicle (3T49-3T50). None of the other School Resource Officers in the Service Division have call out responsibilities or have been assigned take home vehicles (3T51). I credit DePasquale's testimony on this point.

Cipully contacted Olesky about his failure to receive a take home car. Ultimately, the PBA filed the instant charge (2T73).

The Assignment of Take Home Cars Within the Department

39. Consistent with a Township Ordinance, the assignment/removal of take home vehicles is exclusively within the purview of the Director of Public Safety, with the exception that, under the agreement, the Director cannot retaliate for protected activity with respect to the issuance of take home cars (1T175-1T176). The School Resource Officers serve in the Service Division and none are assigned a take home vehicle.

The PBA has never sought take home cars for them nor filed a grievance concerning their failure to receive one (2T61-2T62, 2T74, 2T89, 3T50-3T52).

Neither Cipully nor the other prior D.A.R.E. instructors received a take home car when they were performing D.A.R.E. responsibilities in the Patrol Division prior to Cipully's medical leave and his start in the Services Division (2T57-2T58, 3T90).

I credit Dunton, DePasquale and Olesky that Officer Chris Kelly in the Services Division does not have a regular take home car, but only has one on a limited basis; that is, when he has call out responsibilities (1T145, 2T87, 2T153, 3T67-3T68). The four traffic safety officers have also not always been assigned take home cars. Specifically, upon his November 2002 transfer to

Service, Scialpi was not assigned one for a significant period of time; he only received one when he had on-call responsibilities (2T87-2T88, 2T170). Scialpi, however, later was assigned a full-time take home car (2T171-2T172).

40. The Township has previously removed take home cars from officers on numerous occasions (3T33-3T36). Specifically, in 1998-1999, three officers in the Service Division had their cars removed -- Division Commander Captain Brownlee, Officer John Cavone and Officer Kenny Christ. Christ was then the PBA President and State Delegate; he was also Range Master, and a member of the Shooting Response Team. He was never reassigned the car. Neither the PBA nor the SOA challenged the removal of the take home cars from these three individuals (1T173-1T175, 2T170-2T172, 3T34-3T36).

In the early 1990's captains also lost their take home vehicles. DePasquale was among them at that time (1T177-1T178).

DePasquale also had his take home car removed in 1978, while serving as Traffic Sergeant. Neither DePasquale nor the union challenged the removal (3T36-3T37). In 1985-1986, the Township Committee pulled take home cars from most officers; the Division Commanders and the Chief of Police were the only exceptions (3T37-3T38).

Individuals who do have take home cars have not always had them immediately assigned. For example, prior to 1998, Traffic

Officers Crowley and Mackin did not initially receive full time take home cars. Rather, they eventually received cars two years later, as a result of a request and recommendation from their Division Commander. The Township Committee reviewed the request and ultimately determined to assign them cars. The PBA never filed a grievance over the two year delay (2T169-2T172, 3T54).

Similarly, Range Masters have not automatically received take home cars. Prior Range Masters Tom Butler and Frank White did not receive cars. Normally, only individuals in the Range Master position with special response team responsibilities, such as being on the Shooting Response Team, receive cars. The PBA has never challenged or filed a grievance with regard to any Range Master not receiving a take home car (3T54-3T56).

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer

knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The Olesky Allegation

With respect to Olesky, I find that the Charging Party has proven all the Bridgewater elements. That is, Olesky engaged in protected activity, the Township knew of the activity, and the Township was hostile towards Olesky for engaging in the activity.

Over the Township's objection, I find that Olesky engaged in protected activity through his comments at the August 12, 2002

Township Committee meeting, which were made in his capacity as union president. Further, the Township obviously knew about this protected activity since several Township officials, including Director of Public Safety DePasquale, Mayor Broderick, Police Commissioner Grisanti, and Business Administrator Kennedy were at the meeting.

The Township, however, claims that Olesky's statements were not protected under the Act because they were false and misleading. It was possible to interpret Olesky's remarks at the August 12th Township meeting as critical of the Township, suggesting it had not responded to the PBA's concerns about the police radio, K-9 patrols, bike patrols, uniforms and more. The Township actually had responded, meetings were held on certain items, and the Township was, in fact, waiting for the PBA's response on certain matters. DePasquale, Dunton and Mayor Broderick, therefore, considered Olesky's remarks - at the very least - misleading. Even if they were misleading, or false as the Township claims, they would still be protected under the Act. Public employee speech made on behalf of a labor organization, particularly at a public meeting, is protected as long as it is not obscene, abusive, derogatory, threatening, or disruptive. See Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995) aff'ing H.E. No. 95-23, 21 NJPER 203 (¶26131 1995);

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

As the Hearing Examiner in Middletown Tp. Bd. of Ed explained.:

Some statements by association representatives are not protected by the Act. For example, obscenities and profanities may properly be regarded as insubordination. See N.J. Transit Bus Operation, Inc., P.E.R.C. No. 86-31, 11 NJPER 586 (¶16205 1985); Atlantic Cty. Util. Auth., P.E.R.C. No. 94-97, 20 NJPER 195 (¶25091 1994). Similarly, derogatory and disruptive comments by unit employees are not protected conduct. Atlantic Cty. Judiciary and Derek Hall, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994. [21 NJPER at 208]

But mere criticism of the public employer, even if misleading or exaggerated, may be protected. See Pickering v. Bd. of Ed., 391 U.S. 563 (1968); Middletown Tp. Bd. of Ed., 22 NJPER at 35, note 7; Black Horse Pike. A public employer may criticize a labor organization and/or its leadership in kind, as long as it does not convert that criticism into discipline or retaliation for protected speech. See Hopatcong Bd. of Ed., P.E.R.C. No. 81-51, 14 NJPER 694 (¶19296 1988; Black Horse Pike, 7 NJPER at 503. Olesky's comments do not fall within the realm of those not protected by the Act. He made no obscenities, profanities or threats. Rather, he simply made statements at an open Township Committee meeting in his capacity as union president, which expressed the concerns of his membership. He addressed issues between the PBA and the Township that had been

previously discussed, but were still unresolved. He was critical at times of the Township's actions; however, he did not scream, or make derogatory and disruptive statements which could become unprotected.

Indeed, some of his remarks pertained to an important safety issue involving his officers and the public - the problematic radio system. The system had been a topic of concern and discussion between the PBA and Township on many previous occasions. The system had just shut completely down a few days earlier placing the public and Township officers in jeopardy. Olesky had the right as union president to question safety issues affecting his membership. See Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987).

Olesky also raised the issue of promotions - another issue of importance to his membership. He wanted to clarify the process, in light of the fact that he perceived the last two police promotions as not following the Township's long time past practice.

Consequently, even if Olesky mislead the public into thinking that the Township had failed to timely address matters, as the Township claims, his comments were still protected by the Act.

Having found that Olesky's remarks were protected, I find that the PBA established that the Township was hostile towards

Olesky's protected activity, by denying him continued use of a take home car, and by removing his Range Master and Extra Duty Coordinator Designee duties.

Timing is an important factor in assessing motivation.

Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). The Township took its adverse actions almost immediately after Olesky's protected conduct at the August 12, 2002 Township Committee meeting. Indeed, DePasquale, Dunton and Broderick discussed Olesky's conduct several times throughout the week after the meeting. DePasquale had determined within days after the meeting that Olesky should be removed as Range Master because of his August 12, 2002 remarks. In fact, DePasquale admitted that those remarks were "the straw that broke the camel's back."

Consistent with the findings and credibility determinations made above, Olesky was adversely affected because of his August 12th remarks. DePasquale attempted to draw a distinction between Olesky's right as PBA president to address the Township Council, and his (DePasquale's) decision to remove Olesky's duties and car because he felt he could no longer trust Olesky due to his August 12th remarks. But there can be no distinction. Having found that Olesky's remarks were protected conduct, and made in his role as PBA president, DePasquale could not take action against Olesky because of those remarks. DePasquale failed to distinguish between Olesky's role as a union official and his

role as an employee. The Commission in Black Horse Pike held that:

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, . . . may be initiated to halt or remedy the other's actions. However, . . . where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment.
[7 NJPER at 503]

The Commission further explained in Black Horse Pike:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as 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 from engaging in organizational activity.
[7 NJPER at 504]

DePasquale's action against Olesky was the very type of action Black Horse Pike sought to prevent.

The Township, however, claims that it had legitimate business reasons for taking its actions and that it would have taken these actions, even absent Olesky's protected conduct. I disagree. The Township cited several faults in Olesky's job

performance as justification for its removal of his Range Master duties. It noted that Olesky had a problem getting along with others, and that he had failed to detect a "sighting" problem with new weapons at the range. It also cited his failure to timely compile and complete a budget proposal for a new automated targeting system, despite several requests by his superior. While Olesky had those problems, I find the Township's reliance on them now to be pretextual. The Township had not taken any action against Olesky due to those problems when it had many opportunities.

Olesky never received any type of discipline for this alleged inadequate performance of his Range Master duties. He was never advised that his failure to submit a budget for new equipment was a priority; nor was he ever provided written instructions or a deadline for completion. While there was a sighting problem at the range that Olesky might have detected, the other three range instructors should also have detected the problem. In any event, there is no evidence in the record that the Township intended to take any action to replace Olesky as Range Master until he made his August 12, 2002 comments. Thus, I find that although the Township may have had some legitimate business reasons for removing Olesky as Range Master, it did not prove it would have removed him for those reasons. I conclude the action was taken in retaliation for his protected activity.

The Township also unlawfully removed Olesky's Extra Duty Coordinator Designee duties. The Township claims that DePasquale simply exercised his managerial right to reassign the position to Scialpi because he believed Scialpi was a better fit. While assigning those duties to a sergeant may be more administratively appropriate, I find DePasquale would not have made the change when he did but for Olesky's August 12, 2002 comments. Scialpi was promoted to sergeant in July 2002. But DePasquale did not make the change at that time. Rather, he waited until shortly after Olesky's August 12, 2002 protected comments to make the change. The timing of his action is highly suspect and I conclude that the decision to remove Olesky's Extra Duty Coordinator Designee position at that time was in retaliation for Olesky's protected activity.

I further find that the removal of Olesky's take home car was in retaliation for his protected activity. DePasquale claims that he simply exercised his undisputed authority with regard to the assignment of take home cars, and removed Olesky's car based on legitimate business reasons. Specifically, DePasquale asserts he was not given any justification for Olesky's maintenance of a car from Olesky's superiors, Newman, Anderson and Ferrarelli, when he requested recommendations in July 2002, and that Olesky no longer had call out duties.

However, I find the Township's reasons for removing Olesky's take home car to be pretextual. DePasquale did not receive a recommendation to remove Olesky's car, and neither Newman, Anderson nor Ferrarelli testified at this hearing to explain that Olesky's car should have been removed. Having already found that DePasquale removed the Range Master and Extra Duty Coordinator Designee duty from Olesky because of the exercise of his protected activity, and noting the same timing with the car, I cannot credit DePasquale's explanation for the car's removal.

Moreover, the Township's claim that it removed Olesky's take home car because he no longer had call out duties because he was no longer a member of the Shooting Response Team is suspect. The Shooting Response Team had been disbanded since approximately Summer 2001, yet no attempt was made to remove Olesky's car until after his August 12, 2002 protected comments. If the Township had any thought of removing Olesky's take home car before his protected comments, it should have acted on those thoughts. By waiting until just after those comments, the Township has demonstrated the connection between the protected conduct and the removal. Thus, I conclude that the Township unlawfully removed Olesky's take home car in retaliation for his protected activity.

Based on the foregoing, I find that the Township violated 5.4a(3) and, derivatively, a(1) of the Act when it removed Olesky's Range Master and Extra Duty Coordinator Designee duties,

and his take home car, in retaliation for his protected activity on August 12, 2002.

The Cipully Allegation

Despite having found that he linked his loss of holiday pay and potential loss of overtime with getting a take home car if he transferred from the Patrol Division to the Service Division, the evidence conclusively shows that Cipully was told no take home vehicle was available for him and he was never guaranteed such a vehicle. While Cipully discussed the issue with Dunton, he acknowledged that no Township representative specifically told him he would receive a take home car in lieu of working more days or losing overtime.

Cipully was certainly involved in protected activity of which the Township was aware, but the Charging Party did not establish that the Township was hostile toward that activity. Cipully was both the subject of a grievance in mid 2002, and filed a grievance on behalf of Olesky later in 2002. But the Township's position regarding a car for Cipully was essentially the same before and after the August 12 Township Committee meeting, and before his grievance, and the grievance he filed for Olesky, moved forward. Cipully had been a D.A.R.E. officer in Patrol and did not receive a take home car prior to transferring to the Service Division, then continued with D.A.R.E. duties

without a take home car after his transfer. No other D.A.R.E. officers in the Service Division receive take home cars.

Cipully's own acknowledgment that his acceptance of the transfer was not specifically contingent on getting a take home car supported the Township's contention that no take home vehicle had been promised. While the refusal to give Cipully a car upon his return to work in November 2002 may have pleased the Township and coincided with its decision to remove Olesky's car because of Olesky's August 12th remarks, that is not evidence Cipully would have received a car had no protected activity occurred on August 12 with the subsequent grievance by Cipully on Olesky's behalf.

To prove hostility on this issue the Charging Party first had to prove Cipully would have received a car, and was denied receipt because his and/or Olesky's exercise of protected conduct. The Charging Party failed to meet that burden.

Consequently, I find the Township did not violate 5.4a(3) or, a(1) of the Act, by not providing Cipully with a take home car upon his November 2002 return to activate duty in the Service Division.

The Past Practice Allegation

The Commission has held that, where a collective agreement is silent or ambiguous on an issue, past practice controls. Thus, unless contrary to clear contract language, ". . . a past practice which defines terms and conditions of employment is

entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. . . ." County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); See also City of Atlantic City, P.E.R.C. No. 88-93, 14 NJPER 313 (¶19112 1988); In re Rutgers, the State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

Here, the parties agreement does not address the issue of take home cars. The PBA has not sought to negotiate the issue and admits there are no written documents in support of its claim that all employees in the Service Division receive take home cars as a quid pro quo for working additional days and giving up certain overtime opportunities. Further, the PBA acknowledges that the Director of Public Safety has the discretion with regard to the assignment of take home cars.

The PBA, nevertheless, claims that the assignment of take home cars to all Service Division employees is a clearly recognized past practice and thus a binding term and condition of employment. Accordingly, the PBA asserts the Township violated 5.4a(5) of the Act when it denied take home cars to Olesky and Cipully.

The facts do not support the Charging Party's contention. The record does not show a clear practice of the Township consistently assigning all Service Division employee take home cars. For example, Officer Kelly in the Service Division does

not have a full time take home car, the other School Resource Officers, besides Cipully, do not have take home cars, in fact, the Township has never provided take home cars to officers performing D.A.R.E. responsibilities. While Sergeant Scialpi in the Service Division now has a take home car, that was not always the case. Indeed, when he was assigned to the Division in 1998, he did not initially receive one; rather, he received one after a significant time period. Moreover, in the past, the Township has removed cars from some Service Division officers; specifically, Division Commander Captain Brownlee, Officer John Covone and Officer Kenny Christ. At the time Christ had his car removed, he was the PBA President and PBA State Delegate. However, neither the PBA nor SOA challenged the removal of their cars.

Also, in 1978, DePasquale had his take home car removed while serving as traffic sergeant. In 1985-1986, take home cars were removed from most officers, except for those assigned to Division Commanders and the Chief of Police. In addition, Olesky acknowledged that in the early 1990's, all captains, including Depasquale who was then a captain, had their cars removed.

Finally, Traffic Officers Crowley and Mackin did not initially receive take home cars. Rather, they eventually received them two years later, as a result of a request and recommendation by their Division Commander. The PBA never filed

a grievance over the two year delay in the assignment of their take home cars.

Based on the above, I do not find a practice existed of assigning all Service Division officers take home cars. At best, the record shows the practice was for the Township to exercise its discretion. Accordingly, the PBA's a(5) allegation, that the Township violated the parties' custom and practice by not providing Service Division Officer Cipully and Olesky take home cars, should be dismissed.

Finally, I find that the PBA failed to present any evidence in support of its 5.4a(2) and (4) allegations and, thus, I recommend they be dismissed.

CONCLUSIONS OF LAW

1. The Township violated 5.4a(3) and, derivatively, a(1) of the Act when it removed Olesky's Range Master and Extra Duty Assignment Coordinator Designee duties, as well as his take home car.

2. The Township did not violate 5.4a(3) or, a(1) of the Act when it refused to assign Cipully a take home car upon his November 2002 assignment to the Service Division.

3. The Township did not violate 5.4a(5) of the Act by failing or refusing to assign a take home car to Olesky or Cipully.

4. The Township did not violate 5.4a(2) and (4) of the Act.

RECOMMENDED ORDER

I recommend the Commission ORDER that:

A. The Township Cease and Desist from:

1. Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by removing Joseph Olesky's Range Master and Extra Duty Coordinator Designee duties, as well as his take home car, in retaliation for his protected activity at the August 12, 2002 Township Committee Meeting.

2. Discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by, removing Olesky's Range Master and Extra Duty Coordinator Designee duties, as well as his take home car, in retaliation for his protected activity at the August 12, 2002 Township Committee Meeting.

B. The Township Take the following affirmative actions:

1. Reinstate Olesky's Range Master and Extra Duty Coordinator Designee duties, as well as his take home car, upon demand, and make him whole for the one hour per month of compensatory time he lost having been removed from the Designee duties since August 2002, and for any other losses he suffered

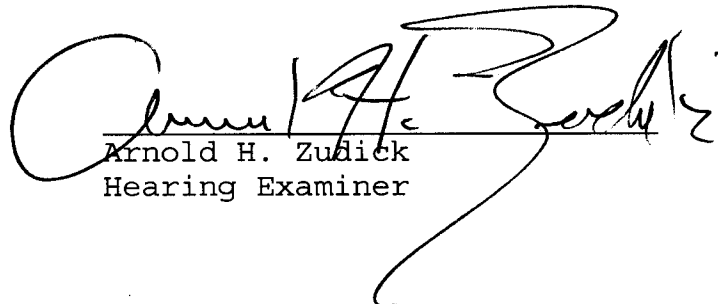
from the August 19, 2002 removal of his duties and from the August 26, 2002 removal of his take home car.^{6/}

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

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

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

C. The Commission dismiss the 5.4a(2), (4) and (5) allegations, and the Cipully a(3) allegations.



Arnold H. Zudick
Hearing Examiner

Dated: June 8, 2005
Trenton, New Jersey

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

Any exceptions are due by June 21, 2005.

^{6/} The Township may assign reasonable "on call" or call out duties to Olesky if he chooses to receive a take home car, but may not reevaluate the appropriateness of his use of a take home car in less than one year.



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by removing Joseph Olesky's Range Master and Extra Duty Coordinator Designee duties, as well as his take home car, in retaliation for his protected activity at the August 12, 2002 Township Committee Meeting.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by, removing Joseph Olesky's Range Master and Extra Duty Coordinator Designee duties, as well as his take home car, in retaliation for his protected activity at the August 12, 2002 Township Committee Meeting.

WE WILL reinstate Olesky's Range Master and Extra Duty Coordinator Designee duties and a take home car, upon demand, and make him whole for the one hour per month of compensatory time he lost for being removed from the Designee duties since August 2002, and for any other losses he suffered from the August 19, 2002 removal of his duties and from the August 26, 2002 removal of his take home car.

Docket No. CO-2003-065

Township of Jackson
(Public Employer)

Date: _____

By: _____

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

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