

P.E.R.C. NO. 2002-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF TRENTON,

Respondent,

-and-

Docket Nos. CO-H-99-331
CO-H-2000-105
CO-H-2000-184

TRENTON SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on unfair practice charges filed by the Trenton Superior Officers Association against the City of Trenton. The charges allege that the City violated the New Jersey Employer-Employee Relations Act when, despite his promise to promote Deputy Chief Joseph Constance to chief, the Mayor promoted another deputy chief and that irritation with Constance and the police unions as well as Constance's position as Mercer County Republican Chairman motivated that decision; it refused to "buy back" Constance's unused vacation days pursuant to the retirement process; and placed Constance on "leave without pay" during an approved vacation. The Commission concludes that some evidence, but not a preponderance of the evidence, indicated that protected activities figured in the City's decision not to promote Constance. The Commission also find that the TSOA did not prove that the City's rejection of Constance's request that it "buy back" his unused vacation or the decision to place him on leave without pay were retaliatory. Nor did the City change an established practice when it placed Constance on leave without pay.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Docket Nos. CO-H-99-331
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TRENTON SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Courter, Kobert, Laufer & Cohen,
attorneys (Stephen E. Trimboli, of counsel)

For the Charging Party, Wills, O'Neill & Mellk, attorneys
(G. Robert Wills, of counsel)

DECISION

On April 27, 1999, the Trenton Superior Officers Association (TSOA) filed an unfair practice charge (CO-99-331) against the City of Trenton. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3),^{1/} when its Mayor refused to promote Joseph Constance, a deputy chief and the TSOA's president, to the position of provisional chief. The charge

^{1/} This provision prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

alleges that despite his promise to promote Constance to chief, the Mayor promoted another deputy chief and that irritation with Constance and the police unions as well as Constance's position as Mercer County Republican Chairman motivated that decision.

On September 22, 1999, a Complaint and Notice of Hearing issued. On October 5, 1999 and March 3, 2000, the City filed an Answer and amended Answer denying that it engaged in an unfair practice and seeking a "severance" of allegations of "political retaliation."

On October 28, 1999, Constance and the TSOA filed another unfair practice charge (CO-2000-105) alleging that the City unlawfully refused to "buy back" Constance's unused vacation days pursuant to the "retirement process." This action allegedly violated 5.4a(1), (3) and (4).^{2/}

On January 12 and 19, 2000, the TSOA filed another charge and amended charge (CO-2000-184) alleging that the Acting Director of Police, Paul Meyer, placed Constance on "leave without pay" during an approved vacation. This action is alleged to be a "unilateral and unjustified departure from past practice without notice and collective negotiation" and in retaliation for

^{2/} N.J.S.A. 34:13A-5.4a(1) and (4) 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. (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."

Constance's union activity, allegedly in violation of 5.4a(1), (2), (4) and (5).^{3/}

On April 20, 2000, a Consolidated Complaint and Notice of Hearing was issued on all charges.

On May 1, 2000, Hearing Examiner Jonathon Roth granted the City's unopposed motion to dismiss allegations of political reprisal. Between May 8, 2000 and June 6, 2001, the Hearing Examiner conducted ten days of hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On December 3, 2001, the Hearing Examiner recommended dismissing the consolidated Complaint. H.E. No. 2002-9, 28 NJPER 103 (¶33037 2001). He found that the TSOA did not carry its burden of proving that anti-union animus was a substantial or motivating factor in the decision not to appoint Constance as provisional chief. Accordingly, he recommended dismissing CO-H-99-331. In the absence of any demonstrated unlawful motive for refusing to buy back Constance's unused vacation days or for placing Constance on leave without pay, he recommended dismissing CO-H-2000-105 and the 5.4a(1), (2) and (4) allegations in CO-H-2000-184. Absent evidence defining the practice from which

^{3/} N.J.S.A. 34:13A-5.4a(2) and (5) prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

the City allegedly deviated, he recommended dismissing the 5.4a(5) allegation.

On January 15, 2002, after extensions of time, the TSOA filed a brief in support of exceptions.^{4/} No factual exceptions were filed pursuant to N.J.A.C. 19:14-7.3. Four general disagreements with the Recommended Decision were raised. On February 22, after extensions of time, the City filed an answering brief and cross-exceptions. We will now summarize the exceptions, responses and cross-exceptions.

First, the TSOA argues that Hearing Examiner erred in not finding that protected activity was a substantial or motivating factor in the decisions not to approve Constance as chief or provisional chief. It contends that the Hearing Examiner failed to consider that Constance led a boycott of a promotional ceremony, which upset the Mayor and led the public debate and opposition to the Mayor's proposal to create a civilian police directorship to replace the civil service police chief. The TSOA argues that the boycott was protected activity -- it was entitled to express its displeasure with an alleged violation of the promotional process for sergeant. The TSOA also disagrees with the Hearing Examiner's finding that even if the boycott was

^{4/} The exceptions indicate that they were filed on Constance's behalf. Given the broad scope of the exceptions and the fact that Constance was a named charging party in only one of the three charges, we assume that the Consolidated Complaint is being litigated on behalf of the TSOA and that the exceptions were filed on its behalf. The TSOA also requested oral argument. We deny that request. The issues have been fully briefed.

protected conduct, the Mayor's anger was not a reaction to that conduct.

The TSOA also contends that the Hearing Examiner erred by focusing solely on the Mayor's state of mind, and not the motivation of others in the administration. For example, the TSOA notes that the City's Business Administrator took inappropriate action relative to Constance at the parties' first negotiations session and that the only reasonable conclusion to draw is that Constance's unwillingness to sell out to management would interfere with his promotion to chief. The TSOA argues that the Hearing Examiner appeared to assume that because the Mayor was not directly involved in negotiations, he was insulated from this alleged anti-union animus.

The TSOA also argues that the Business Administrator and the Director of Public Safety revealed significant anti-union animus. Both are asserted to have expressed and acted on the view that Constance could not become chief unless he relinquished his loyalty to the union and adopted a more management-oriented position. In particular, the TSOA argues that the Director of Public Safety, and not the Mayor, was the appointing authority, and that he indicated that for Constance to become chief, Constance would have to back away from his union duties because these duties were causing problems for the administration. Certain critical advisors and cabinet personnel all assertedly advised the Mayor not to promote Constance because he refused to "go along to get along."

The City responds that the Hearing Examiner correctly found that the boycott of the promotional ceremony was not protected activity. The City further contends that the boycott challenged a non-negotiable promotional decision and that actions protesting non-negotiable issues are not protected. Finally, the City argues that the Hearing Examiner correctly found that even if the boycott was protected, the Mayor's anger was directed at Constance's disloyalty and racial insensitivity, not his protected activity.

The City next responds that there was no finding that the Business Administrator's comments were inappropriate or unlawful; no evidence to suggest that the Business Administrator or any other official was hostile towards Constance because of his reaction to the alleged comments; and no nexus proven between the comments and the decision not to promote Constance. As for the Director of Public Safety, the City contends that there is no basis for rejecting the Hearing Examiner's credibility findings.

The second TSOA exception concerns Constance's political activity. The TSOA contends that the Hearing Examiner found that the primary reason for the refusal to promote Constance was politics and not anti-union animus. It challenges this finding by arguing that political considerations are illegal; the employer had no legitimate reasons for not promoting Constance; and therefore its anti-union reasons violated the Act.

The City responds that the TSOA is misrepresenting the Hearing Examiner's findings. First, the Hearing Examiner found that the TSOA had not proven that protected activity was a substantial or motivating factor in the decision not to promote Constance. Thus, under the tests for assessing allegations of retaliation for union activity, the City was not obligated to prove a legitimate reason for its action. Second, the Hearing Examiner found that the Mayor was motivated by a variety of factors, including Constance's alleged lack of commitment to community policing, and that the Mayor told Constance that to be appointed chief, he would have to: (1) reside in the City; (2) work on changing his public image; (3) commit to making substantial changes in the police department; and (4) devote his full attention and time to serving as chief.

The City also contends that the Hearing Examiner identified a "pay for promotion" practice as a concern the Mayor had about appointing Constance. Under that practice, a superior officer contemplating retirement was paid a sum of money to retire by a subordinate at the top of the promotion list to ensure a vacancy before the promotion list expired. The Hearing Examiner assertedly found that the Mayor strongly disapproved of the alleged practice and believed that Constance facilitated it.

The City also contends that the Hearing Examiner found that the Mayor was concerned that Constance was unpopular in the African-American community. As for Constance's leading the

opposition to the Mayor's plan to implement a civilian police directorship, the City argues that the Hearing Examiner correctly concluded that public loyalty to an articulated managerial policy is presumed of any managerial executive such as the police chief. As for the Mayor's political concerns, the City argues that the Hearing Examiner found that the Mayor was concerned that if Constance was promoted to chief, the Mayor's own popularity among Trenton voters would decline significantly. The City contends that this is a far cry from unlawful political retaliation.

In its third exception, the TSOA contends that because the City's other reasons were either political or pretextual, the preponderance of evidence establishes that protected activity figured in the promotion denial. It argues that there were no legitimate business reasons to bypass Constance because the political considerations were illegal and that the Hearing Examiner found that the interview process for the three eligible candidates for provisional chief was a sham.

The City responds that we need not consider any other factors that could have influenced the decision unless the charging party first proves anti-union animus and that the TSOA failed to meet that burden. The City nevertheless reiterates the legitimate reasons it asserts motivated the Mayor's decision. As for the alleged sham interview process, the City responds that by the time of the interview, the Mayor had already determined not to promote Constance for reasons unrelated to his union activities.

In its fourth exception, the TSOA argues that the Hearing Examiner erred in finding that by early March 1999, Constance had little chance of being promoted. The TSOA argues that Constance's lobbying on behalf of the TSOA in opposition to the City's establishing a police director position was protected by the Act, irritated the administration, and contributed to the advice of the Director of Public Safety not to promote Constance.

In response, the City submits that Constance's opposition to the directorship position did not constitute protected activity since that dispute concerned a non-negotiable issue of managerial policy. Assuming it was protected activity, the City argues that the Mayor and Director of Public Safety never cited Constance's opposition as a basis for not selecting him as chief. Finally, the City maintains that the City could legitimately reject a candidate who is unable to shed his representational role and implement the employer's supervisory duties.

Finally, the TSOA argues that there are inadequate findings of fact on which to base any analysis of CO-H-2000-105 and CO-H-2000-184.

The City responds that the Hearing Examiner's factual findings did address these charges; the TSOA does not cite any evidence to contradict the Hearing Examiner's conclusion that the City's alleged refusal to buy back Constance's unused vacation days was not motivated by anti-union animus; the City did not depart from any alleged past practice; and the City did not have an illegal motive for placing Constance on an unpaid leave.

The City has also filed two cross-exceptions. It argues that Constance and the other deputy chiefs were managerial executives not protected by the Act. It also argues that the City is entitled to a spoliation inference with respect to the surreptitious audiotapes of telephone calls made by Constance but not produced at hearing. It contends that the City is entitled to an inference that tapes that were made, but lost or destroyed by Constance, contained evidence favorable to the City's case.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-84) with these modifications.

We modify finding 21 on page 41. There is insufficient evidence in the record to support a finding that former TSOA Vice-President Golden suggested that there were police union demonstrations against the Mayor's plans for a police director or that Constance tried to stop such demonstrations. His testimony more likely was referring to successor contract negotiations and PBA demonstrations that Constance may have tried to stop.

We modify finding 21 on page 44 to indicate that when the Mayor said that he was expecting picketers and protesters, he was referring to citizen unrest if he appointed Constance. He was not referring to police union protests against a change to a civilian police director. We also modify finding 21 on page 45 because the record does not show that the police unions demonstrated against creating the director position.

We begin with the allegations in CO-H-99-331 that the Mayor refused to promote Constance to the position of provisional chief because of hostility to his TSOA activity.^{5/} In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved 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 employee was hostile toward the exercise of protected rights. Id. at 246.

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

^{5/} The TSOA is not now contesting the decision to have a civilian police director rather than a police chief. It challenges only the decision not to appoint Constance as provisional chief after the police chief retired and before the police director position was created.

that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The Hearing Examiner concluded that some evidence, but not a preponderance of the evidence, indicated that protected activities figured in the City's decision. We agree. Although there is some evidence that administration officials were hostile to Constance's role as TSOA president, the totality of the evidence indicates that reasons other than protected activity motivated the decision not to appoint Constance as provisional chief.

Throughout the summer of 1998, the Mayor suggested, with varying degrees of enthusiasm, that Constance was his choice for chief, in large part because he knew that the current chief would be retiring in the spring and because he believed that he had to choose a successor from among the three deputy chiefs. The Mayor nevertheless had strong reservations about appointing Constance.

The Mayor intended to call for a promotional examination for chief, in part to justify to an unenthusiastic constituency his decision to promote Constance. All along, the Mayor was concerned that he would lose support by appointing a Republican who was unpopular in the black community. He believed that Constance was not committed to community policing or to

cooperation with Trenton civic groups. All these concerns reflect that the Mayor was primarily concerned with his own political base and not Constance's union activities.

The Mayor was vehemently opposed to "pay for promotion." When, in mid-October 1998, he thought that the then-chief was involved with it, he told Constance that he might be chief earlier than expected. When the Mayor came to believe that Constance was involved with the practice, it added to his concern about making Constance chief.

In February 1999, when the Mayor found out that he had the option of instead appointing a civilian police director, he immediately started to seek to create such a position and to back away from a decision to appoint Constance. In March, Constance and the TSOA publicly opposed the establishment of a police director position and the Mayor admonished Constance to stop calling the City Council. The Hearing Examiner assumed that Constance's calls were protected by the Act. We agree. Employees have a right to oppose a change in department structure that would remove civil service protection from a promotional position. But the Mayor had decided not to appoint Constance even before the TSOA opposed the Mayor's plan. One strong reason for moving to a directorship was to avoid having to choose Constance or one of the other two deputies as chief. The Mayor wanted to broaden the search beyond those three candidates.

Once the decision was made to create a police director position, the decision that Constance was not going to be promoted

was not far behind. We agree with the Hearing Examiner that the decision had been made before the interviews for provisional chief. Constance was no longer a contender. Thus, Constance's activity opposing the referendum had no real impact on a process that had already been set in motion.

The TSOA argues that the boycott of the Ingram promotion ceremony was protected activity and a factor in the decision not to appoint Constance provisional chief. Even if we were to accept that argument, we would conclude that the City proved that it would not have appointed Constance, even absent that activity. See Bridgewater (if charging party proves that protected activity motivated adverse personnel action, complaint will nevertheless be dismissed if respondent proves that it would have taken same action even absent the protected activity). The evidence proves that the Mayor's other reasons for not appointing Constance as provisional chief predated and outweighed any hostility to the boycott. Accordingly, we dismiss the allegations in CO-H-99-331.^{6/}

We also need not decide whether the City is entitled to a spoliation inference with respect to audiotapes of telephone conversations made by Constance but not produced at hearing. We

^{6/} In light of this ruling, we need not decide on this record whether the deputy chief positions are managerial executives. A clarification of unit petition is the more appropriate mechanism for deciding that question. The City has filed such a petition.

assume, however, that if the tapes contained any evidence of anti-union animus, they would have been produced.

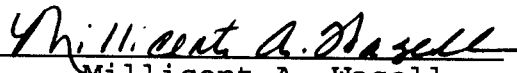
We also dismiss the allegations in CO-H-2000-105. The TSOA did not prove that the City's rejection of Constance's request that it "buy back" his unused vacation days was retaliatory.

We also dismiss the allegations in CO-H-2000-184. There is no evidence that the City changed an established practice when it placed Constance on leave without pay. Nor is there any evidence that the decision was motivated by anti-union animus.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, Muscato and Sandman voted in favor of this decision. Commissioner Ricci abstained from consideration. Commissioner McGlynn was not present.

DATED: May 30, 2002
Trenton, New Jersey
ISSUED: May 30, 2002

H.E. NO. 2002-9

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

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-and-

Docket Nos. CO-H-99-331
CO-H-2000-105
CO-H-2000-184

TRENTON SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Consolidated Complaint. Unfair practice charge docket no. CO-99-331 alleged that in March 1999, the City of Trenton unlawfully refused to promote a deputy police chief to the position of chief, in retaliation for activity protected by the Act. Unfair practice charge docket no. CO-2000-105 alleged that the City of Trenton unlawfully refused to "buy back" the deputy police chief's unused vacation time, pursuant to the "retirement" process, also in retaliation for protected activity, in violation of 5.4a(1), (3) and (4) of the Act. The Hearing Examiner recommended that the Charging Party failed to carry its burden of proof showing that protected activity was a substantial or motivating factor in the employment actions. Unfair practice charge docket no. CO-2000-184 alleged that the City had violated a practice by unilaterally placing Constance on an unpaid leave of absence at a time he was on authorized vacation or terminal leave. Finding no evidence of a "practice," the Hearing Examiner also recommended that this final portion of the Consolidated Complaint be dismissed.

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

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For the Respondent
Courter, Kobert, Laufer & Cohen, attorneys
(Stephen E. Trimboli, of counsel)

For the Charging Party
Wills, O'Neill & Mellk, attorneys
(G. Robert Wills, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On April 27, 1999, the Trenton Superior Officers Association (TSOA) filed an unfair practice charge (CO-99-331) against the City of Trenton. The charge alleges that in March 1999, the City, specifically Mayor Douglas Palmer, unlawfully refused to promote Deputy Police Chief Joseph Constance to the position of chief. The charge alleges that Constance is president of the TSOA, which [was] engaged in an "acrimonious [interest] arbitration with the City" and that he has "participated fully in the mediation/arbitration process." The charge further alleges that the Mayor reneged on a "public promise" to promote Constance and "has

allowed irritation with Constance and the police unions [the TSOA and PBA, representing rank and file officers] to inappropriately affect his choice for chief," resulting in his March 1999 selection of Deputy Chief [Paul] Meyer to provisionally fill the post. Finally, the charge alleges that Mayor Palmer demanded that Constance resign his position as Mercer County Republican Chairman "before he could be appointed chief." These actions allegedly violate 5.4a(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/}

On September 22, 1999, a Complaint and Notice of Hearing issued.

On October 5, 1999, and March 3, 2000, the City filed an Answer and amended Answer, denying that it engaged in an unfair practice seeking a "severance" of allegations of "political retaliation."

On October 28, 1999, the TSOA filed another unfair practice charge (CO-2000-105) against the City alleging that on October 18, the City unlawfully refused to "buy back" Constance's unused

^{1/} This provision prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

vacation days, pursuant to the "retirement process." This action allegedly violates 5.4a(1), (3) and (4) of the Act.^{2/}

On January 12 and 19, 2000, the TSOA filed another charge and amended charge (CO-2000-184) against the City. This charge, as amended, alleges that on December 28, 1999, the City, specifically Acting Director of Police Paul Meyer issued a letter to Constance during an approved vacation (beginning in November 1999 and extending to February 2000) advising that he has been placed on "leave without pay." The charge alleges that Constance had neither resigned nor retired but the City "has proceeded to stop [his] pay...." This action was alleged to be a "unilateral and unjustified departure from past practice without notice and collective negotiation" and is in retaliation for Constance engaging in protected conduct "on behalf of himself and other members of the [TSOA]," violating 5.4a(1), (2), (4) and (5) of the Act.^{3/}

On April 20, 2000, a Consolidated Complaint and Notice of Hearing was issued on all charges.

^{2/} Provisions a(1) and (4) 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. (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."

^{3/} Provisions a(2) and (5) prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

On May 2, 2000, the City filed an Answer to the latter-filed charges, denying that it engaged in any unfair practice. The City asserts that its actions were for "legitimate, non-discriminatory reasons" and that the charges are barred by the doctrines of waiver, estoppel and settlement and are moot or preempted by statute.

On July 31, 2000, the TSOA filed a "Notice of Motion to Invalidate Respondent's Imposition of a Leave of Absence on the Charging Party," together with a brief and several documents. On September 26, 2000, I advised the parties that I would rule on the Motion in my report and recommended decision.

On May 8, 22 and 23; July 17, 19, 20 and 27; September 28 and October 31, 2000; and June 6, 2001 I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed on August 20, 2001; reply briefs were filed on October 5, 2001.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Joseph Constance was employed by the City of Trenton as a police officer from October 1968 until the date of his retirement, May 1, 2000 (6T4).^{4/} Constance began his career as a patrol officer and was promoted to detective and then sergeant in the

^{4/} "6T" represents the sixth day of the transcripts, after which appears the page number. "1T" represents the first day of the transcripts, etc.

juvenile bureau; lieutenant in the homicide squad; captain in charge of the crime section of the criminal investigation bureau; and finally, deputy chief of the criminal investigation bureau for an unspecified number of years, probably more than 11 (6T6).

In 1977, Constance became a vice president of the TSOA and in 1986, he was elected president, a position he held until November 1999 (6T5). The TSOA represents and negotiates collectively on behalf of police superior officers in the rank of sergeant and above, excluding the chief (6T5; R-17).^{5/} Constance headed the TSOA's negotiations team and participated in interest arbitration proceedings over the years, including interest arbitration leading to an agreement for 1997-2000 (6T6).

In 1991, Constance, a Republican, was appointed to complete the unexpired term of Mercer County Executive. He has served as a Mercer County freeholder and in 1995, ran unsuccessfully in the 15th District Assembly election (6T8). Constance most recently was Chairman of the Republican Party of Mercer County until October 1999 (6T8-6T9).

2. Douglas H. Palmer has been the elected Democratic mayor of Trenton continuously since July 1, 1990 (5T4). Palmer has known Constance since 1990, their initial acquaintance made in politics (5T5). Constance supported the then-incumbent Republican mayor in the 1990 election. The TSOA backed Palmer in his successful 1994

^{5/} "R" refers to Respondent exhibits; "CP" refers to Charging Party exhibits; "J" refers to joint exhibits.

and 1998 campaigns, the latter garnering about 90 per cent popular support in the 1998 mayoral election (5T146; 6T10; 6T12). Constance acknowledges that his personal political loyalties have differed from his political choices as TSOA president (6T10). I infer that the TSOA did not support Palmer in his 1990 campaign (7T49).

3. Before 1999, Trenton's police and fire departments were regarded as "divisions" and each was headed by a chief, both of whom reported to the public safety director, an unclassified position whose occupant was appointed by the mayor (3T7). The director is the "appointing authority" for the position of chief and all other positions within the divisions (3T8).

The police department, now employing about 400 officers, is divided into three sections -- patrol, services, and criminal investigation -- and each is headed by a deputy chief (2T6-2T7).

In July 1990, Ernest Williams was a deputy chief commanding the services bureau. He agreed to be acting public safety director for a brief period in the newly-elected Palmer administration but continued in that capacity for almost two years (8T12-8T13). From April 1, 1992 to April 1, 1999, Williams was the appointed chief of the Trenton police department (2T6). Williams was not the most senior deputy chief at the time of his promotion; nor was he interviewed or examined before taking command (2T9; 2T20). George Courtney was the more senior deputy chief and TSOA president at the time of Williams' promotion (2T105-2T106).

4. "Pay for Promotion" evidence

Williams testified that sometime during his twenty-two months as acting public safety director, he was asked questions in mayoral staff meetings at City Hall about "promotional policies and practices" in the police department (8T15). Williams also testified that he spoke with Palmer on this topic in more than one of these meetings, which were also attended by City Attorney Rocky Peterson and the mayoral Chief of Staff, Bill Watson (8T15; 8T23; 8T34; 8T36).

Williams recounted that "they said they heard rumors there were officers that were paid to leave" and "they asked me if I saw anything improper with that practice" (8T17). Williams testified:

The Mayor asked me at the staff meetings and I informed him and Rocky Peterson and Bill Watson that yes, I heard that a policy like that went on.
[8T23]

Generally, a superior officer contemplating retirement is asked by an officer applicant at or near the top of the Department of Personnel promotional list (for the position held by that superior officer) to retire before the promotional list expires. As the scenario unfolds, the superior officer is induced to retire before the list expires by the promise of being paid a sum representing the difference in pay (usually, accumulated leave time) between the contemplated and "earlier" dates of retirement. The payee would then ascend to the vacated position (8T17; R-9).

Williams described "officers [being] paid to leave" as an "understanding" (8T17). Williams testified that he said that he had

heard about "it" but had "never been involved in it" (8T17). He also testified that his knowledge was based only on "rumor" and "innuendo" (8T35). According to Williams, Palmer, Peterson and Watson did not disapprove but were "mainly concerned [about] how I felt about it.... I had no problem with it, really" (8T22).

On the last day of the hearing, Williams disavowed his earlier testimony that "payment to leave" was discussed at "staff meetings," which he defined as bi-monthly meetings among "division heads" -- "all directors, including me as acting director [of public safety]" (10T7-10T8).

Williams explained that the issue was discussed privately with the Mayor and Rocky Peterson (10T8-10T9). He testified:

I was called to the Mayor's office and we discussed it on several different occasions in reference to people leaving early, being paid to leave early - but it never was at the staff meetings.

[10T7]

...Rocky was there. And I think that's because they were worried about the legality of it. So I know Rocky was there, but I don't know really [if anyone else attended in addition to the Mayor, Peterson and me] - it's been so long ago, and it wasn't that important to me.... We were called in[to] the office and we met on several different occasions.... As a matter of fact, I am quite sure - I don't remember which one did it, but I think one of the chiefs had asked the prosecutor's office about the legality of it.

[10T9]

Asked if the issue "seemed to be of high concern" to the Mayor and Peterson, Williams testified: "No, because they asked me about it, what was my opinion" (10T9). On cross-examination that day,

Williams was "not too sure" that Bill Watson attended the discussions; "I just can't remember if Bill Watson was there or not. He could have been" (10T15; 10T17). Williams testified on the last date of the hearing in response to Rocky Peterson's testimony, offered at the next-to-last date of the hearing (10T7).

Peterson was Trenton city attorney and "law director" from 1990-1998 and was counsel to all department directors and to City Council. Peterson is now "special counsel" to the City, for which he is compensated (9T9; 9T28). Peterson was a member of the Mayor's "cabinet," comprised of directors of all City departments, the press information officer and chief of staff (9T9-9T10). Peterson also participated in collective negotiations on behalf of the City, advised the Mayor on police and fire issues, and worked with Williams before and after his appointment as police chief (9T11; 9T14).

Peterson recalled attending meetings in 1991-1992 but did not recall any one meeting (9T14-9T15). He denied attending any meeting with the Mayor and Acting Public Safety Director Williams at which the "topic" of officers being paid to retire was discussed (9T16; 9T17). Peterson recalled that Watson normally attended meetings with the Mayor and Williams (9T36). In or around 1995, Peterson "heard" that sometime before Palmer was elected mayor, the Mercer County prosecutor had written a letter authorizing (or at least, not objecting to) "pay for retirement" but no document was found for his review (9T19-9T20).

In early January 1995, the then-Acting Director of Public Safety, James Waldron, spoke to Peterson about a "possible issue of a firefighter being paid to retire early" (9T20). On January 24, 1995, Waldron mailed a letter to the County prosecutor, describing alleged conduct by Deputy Fire Chief Robert Colletti and inquiring of its legality. Waldron wrote that he had recently spoken with Peterson and then-Fire Chief Dennis Keenan about "rumors" that Colletti was "being paid...to retire early," [i.e., in January or February 1995] which Colletti concededly denied. Waldron wrote that "aside from...rumors, I have no actual proof...of [an] arrangement" (CP-14). I infer that Peterson authorized or concurred with Waldron's inquiry.

Peterson testified that Waldron later advised him that the prosecutor did not respond in writing but told him that the alleged (or rumored) conduct was not or would not be illegal (9T21). He also testified that he did not inform Mayor Palmer of this matter because he "wasn't sure that anything was happening and Director Waldron wasn't sure that it was happening. At this point [it] was a rumor..." (9T23). Nothing in the record contradicts Peterson's testimony on this matter; I credit it.

Mayor Palmer testified that he first learned about "pay for promotion" (a more current term for "officers paid to leave") on October 22, 1998, while attending a local chamber of commerce dinner (5T36; 5T163). Police Sergeant Bernard Hill directly asked the Mayor about the feasibility of promoting Patrol Officer James Ingram

to sergeant, to which the Mayor replied; "If there are 3 openings and he is number 3 on the list, he should be sergeant" (5T36). Hill responded; "No, Jimmy wants to know if he has to pay" (5T37). Palmer continued listening, pretending to know what Hill meant, conceding under oath that he did not really understand (5T37). Palmer directly summoned another dinner attendee, mayoral Chief of Staff Gwendolyn Long, and Hill repeated and continued his remarks to both Palmer and Long, advising that Ingram preferred not having to pay (5T37-5T38).

The next day, October 23, Palmer met with his cabinet; chief of staff (Long), City attorney (Peterson), director of public safety (Dennis Keenan) and business administrator (Jacob Eapen) (5T38; 5T166). Palmer inquired about the circumstances of "pay for promotion" but his cabinet replied that it "had never heard of anything like that before" (5T38). Palmer did not testimonially attribute the professed ignorance to any particular cabinet member.

Peterson and Director of Public Safety Keenan both testified that they had at least "heard" of a possible "pay for promotion" issue in 1995 or earlier. Keenan specifically conceded that he first learned of the matter "several years before" the 1998 Ingram episode (3T50). Keenan testified that he did not have "any information of it occurring in the fire division" (3T51). I infer that Keenan was referring to the 1995 inquiry about Deputy Fire Chief Colletti's alleged solicitation of money. I also infer that both Peterson and Keenan chose not to speak of their familiarity

with the Colletti matter or the "pay for promotion" topic in the October 23 cabinet meeting.

Soon after the meeting, Keenan told Palmer that he had heard of "pay for promotion" and recounted to him the circumstances of Waldron's 1995 inquiry about Colletti's alleged conduct (5T40; 3T52). The Mayor told Keenan of his belief that "pay for promotion" was illegal and directed him to "send the matter to the Attorney General's office" (5T39; 3T52). Referring to the Mayor's conversation with Hill about Ingram, Keenan also said to Palmer; "That's why Joe Constance keeps asking me to break the tie, [of candidates for the final sergeant vacancy] because he wants to know who has to pay" (5T39; 5T47). The Mayor testified that Keenan's remark was as though "'a light went on' in his mind [and it explained] the pressure he was getting" (5T40). Keenan testified that Constance was pressuring him to "break the tie," and that he had also received imploring phone calls from a sergeant Schroeder, who was Williams' aide (2T72). The Mayor told Keenan that he was concerned about Constance's possible participation in the matter (3T52).

Constance acknowledged that the TSOA had asked Keenan to "break the tie." He testified:

For several weeks, we talked to [Keenan];
'Director, you need to break this tie. There are
3 people tied on the sergeant's list. Break the
tie. Time is running out [on the promotional
list's expiration date].
[6T52-6T53]

I infer that "we" refers to both Constance and one or more members of the TSOA, including Sergeant Schroeder. I also infer that "several weeks" refers generally to the period of October-November 1998. I find that Palmer's discussion with Keenan could reasonably arouse his concern about Constance's awareness of or possible participation (as facilitator) in the "pay for promotion" instance described at the October 22 dinner.

Constance testified that on an unspecified date in October 1998, Mayor Palmer phoned him and said, "Joe, you're going to be chief a lot sooner than you think" (6T51-6T52). Palmer was referring to a date before April 1, 1999, when Williams was scheduled to retire (R-6). Constance also testified about his understanding of the Mayor's remark:

Later, I find out he is talking about this 'pay for promotion' thing he just learned about. And his thinking if the chief is somehow corrupt and doing something illegal, he's going to topple chief [Williams] and appoint me.
[6T52]

Constance surreptitiously recorded a telephone conversation between he and the Mayor in June 1998 (5T13; 5T119; CP-10). The transcript of the conversation includes this exchange:

Mr. Palmer: That's not the thing. The other thing is between you and me --

Mr. Constance: Um-hum.

Mr. Palmer: -- you may be tak[ing] it -- taking office sooner than you thin[k].

Mr. Constance: -- That sounds mysterious.

Mr. Palmer: -- Much sooner.

Mr. Constance: Damn.

Mr. Palmer: Because it's time to make some moves.

Mr. Constance: Damn.

Mr. Palmer: I told you in my speech, the next four years ain't for the people [flain[t] of heart.

[CP-10, p. 30]

I credit the transcript; Palmer said, "you may be taking office sooner than you think" and not, "you're going to be chief a lot sooner than you think" (my emphasis). Nothing in the transcript of the conversation or in Palmer's or Williams' testimonies suggest a possible reason why in June 1998, Williams might retire, resign or be terminated before his anticipated retirement on April 1, 1999.

Williams testified that sometime between October and December 1998, he met with Palmer and Long at the Mayor's home (8T24). There, Williams was informed that an assistant public safety director was about to be hired to assist Keenan (8T25). In October 1998, George Clisby was hired as deputy director of public safety, and he relieved Keenan from overseeing numerous disciplinary hearings (2T4; 2T45). I find that Williams visited the Mayor and Chief of Staff Long in October 1998. At the meeting, Williams was asked if he would be willing to retire before April 1, 1999 (8T25). He was told that "they wanted to try to find a spot to promote detective Ingram" (8T26).^{6/}

Palmer knew in "late 1998 or early 1999" that Williams intended to retire on April 1 (5T31). He did not testify about

^{6/} Williams conceded under oath that a chief's retirement does not necessarily mean that promotions are forthcoming down the chain of command to a sergeant position (8T38).

meeting with Williams and Long in his home sometime in October 1998. I credit Williams' testimony about the October meeting. Palmer and Keenan testified that they did not together discuss who was to receive a promotion to sergeant (5T34; 3T55-3T56; 8T102-8T103). Keenan also testified that in November 1998, the Mayor advised him that while an opinion on the legality and ethics of "pay for promotion" was pending at the Attorney General's office, he should follow the same procedures applicable to other City departments in "breaking a tie" - interview the three candidates and select the best one (3T53; 3T54). Having credited Williams' testimony, I am also persuaded by the logic of the Mayor's directive to Keenan; that is, the City, having invited state criminal inquiry into its promotional practices (or practices occurring within its purview), would feel compelled to prospectively and rigorously enforce fair and regular procedures for appointments to vacancies. I have found no indication in the record that the Mayor expressed a preference for Ingram to Keenan. To the extent that the mere mention of Ingram's name in early to mid-October 1998 suggests that he might be favored in the appointment process, I find that before the interviews were conducted, the City intended to closely follow fair and regular appointment procedures.

Palmer could have told Constance in early to mid-October that he "may become chief soon," impliedly referring to the fleeting possibility of Williams' voluntary early retirement. I infer that Williams' expressed insistence on receiving compensation (in

advance) for all unused time-off through April 1, 1999 and the Mayor's or Long's rejection of that condition at their meeting ended the possibility of a strictly voluntary early retirement. I am not inclined to find that Palmer told Constance in late October 1998, that he may soon be promoted to Chief. By that time, Keenan had implicated Constance in "pay for promotion" (when he told the Mayor, "That's why Joe Constance keeps asking me to break the tie, because he wants to know who has to pay" (5T39)). Constance was mistaken in his testimony about another date on which Palmer purportedly "promised" that he would be the next chief of police (see finding no. 18). Under all the circumstances, I find that sometime in early to mid-October 1998 (before October 22), Palmer said to Constance, (essentially repeating his June 1998 recorded remark) "You may become chief sooner than you think."

On October 30, 1998, Keenan sent a letter to then-Attorney General Peter Verniero, narrating allegations and inquiring about the "issue":

(a) Uniformed members of the Trenton Police Division, of various ranks, when they find themselves ranked on a New Jersey Department of Personnel eligible list for promotion, are offering members of superior rank cash incentives to retire so that there will be a position available for them....

(b) Superior officers of the Division, after reaching retirement age and longevity, begin to let it be known that they might retire, but only if and when an incentive is provided....

(c) Members of the Police Administration are pressuring my office to immediately break any ties that may exist on a New Jersey Department of

Personnel list.... The premise behind this request is that members...should know exactly what [their] position on the list... so that they can then proceed to make arrangements with superior officers....
[R-7]

Keenan also wrote that "some notes" indicate that the "practice" was discussed "some years ago" with the Mercer County Prosecutor, and "it was indicated that the practice was most likely legal..."

(R-7). I infer that paragraph (c) of the letter alludes to Keenan's belief that Constance was in some way implicated in "pay for promotion."

On November 4, 1998, mayoral Chief of Staff Long sent a follow-up letter to the Attorney General, specifically requesting "an official opinion from your office as to both the legality and ethics" of the "situation" described in Keenan's letter (R-8). A copy was sent to Keenan.

On the disputed fact of when Mayor Palmer was first informed about the subject of "officers being paid to retire" (Chief Williams' term), I find that between July 1990 and April 1992, Williams discussed the issue with the Mayor and Rocky Peterson at least once. I do not credit Williams' testimony that the topic was discussed "several different occasions."

The reliability of Williams' testimony is questionable. His memory of the context of the discussions changed only in the wake of Peterson's testimony. Williams first testified assuredly that the Mayor, Peterson and Watson discussed the matter at staff

meetings; he later testified that his talks were with the Mayor and Peterson privately and he no longer had any memory of Chief of Staff Watson attending. I am concerned about the clarity of Williams' memory; he remembers "several" discussions but cannot recall if Watson ever attended (Watson normally attended any such meetings). My skepticism was corroborated by Williams' admission:

So I know Rocky [Peterson] was there, but I don't know [who else attended in addition to the Mayor and Peterson] - it's been so long ago, and it wasn't that important to me....
[10T9]

I also have a concern about his possible bias against the former City attorney. In his first day in the witness chair, Williams was asked to describe the circumstances of his testifying at a 1998 interest arbitration hearing on behalf of the Trenton PBA. He testified:

...And I asked if I would come and be the lead-off witness, as far as the PBA was concerned. And I said, 'Well, let me check.' I thought it was proper, but I called over to the legal department. And as per usual, when you call over to the legal department, you can always [be] guarantee[d] one thing - you're either going to get bad advice or no advice at all. So I never received a telephone call back (emphasis added).
[2T14-2T15]

Williams testified that minutes before he was sworn to testify at the arbitration hearing, he argued heatedly with City Attorney and Law Director Peterson and the business administrator over the propriety of his appearance (2T17). I infer that Williams' gratuitous testimony is aimed at Peterson's reputation.

Williams did not testify that any discussion concerned a specific superior officer or a particular set of facts. He acknowledged being asked his "opinion," which was benign. Considering the limited and abstract parameters of such purported discussions, and the absence of any expressed difference in opinion, I am doubtful of the reasons or topics that would engender more than one discussion or meeting.

I credit Williams' testimony that the topic was discussed during the first twenty months of the new Palmer administration. To the extent that any evidence indirectly corroborates Williams' testimony, I find that corroboration in Peterson's testimony that the topic of "pay for promotion" may have been discussed before Palmer was first elected mayor. I infer that a similar rumor or innuendo persisted into the 1990's. Accordingly, I find that in one meeting or possibly two meetings of Palmer, Peterson and Williams between July 1990 and April 1992, the topic of "officers being paid to retire early" was discussed, without expressed differences of opinion and without reference to particular facts or named officers.

By crediting a portion of Williams' testimony, I must necessarily not credit Peterson's testimony that such discussion(s) with Williams and the Mayor concerning officers being paid to retire never occurred between 1990 and 1992. I am persuaded that Peterson, legal advisor to the Mayor, would recall such a discussion, inasmuch as the lawfulness of the rumored conduct and perhaps the Mayor's

official reaction were considered. But I credit Peterson's testimony that in 1995, he decided not to inform the Mayor about the Colletti matter because it was merely a "rumor." Insulating an elected official from (more) rumors of possible illegality is understandable and reasonable, given Peterson's cabinet post. Although I am not entirely sanguine about Peterson's and Keenan's motives for their probable silence in direct response to the Mayor's inquiry about the subject at the October 23 cabinet meeting, I am assuaged by Keenan's complete divulgence to the Mayor soon after that meeting.

Williams was also the only witness to have contradicted Mayor Palmer on the disputed fact. Again, by crediting a portion of Williams' testimony, I must necessarily not rely on the Mayor's testimony that he had not heard of the subject before October 1998. Even if the Mayor was informed in the early 1990's about "pay for promotion" (or whatever term was spoken) the subject was predominantly hypothetical. That the Mayor failed to express his opinion that day to Williams does not mean he had no personal view or that he condoned it or approved of it. Nor does the April 1992 appointment of Williams to the position of police chief necessarily imply that Palmer had no qualms about the rumored conduct or even that he thought about it at that time. I do not draw such inferences.

By contrast, the Mayor's immediate and incredulous surprise at Sergeant Hill's anecdotal and contemporaneous solicitation at the

October 22, 1998 dinner is credible. Palmer promptly summoned his chief of staff to hear the same story from the same officer. I infer from the Mayor's unstudied reaction that evening and from his successive and delegated demonstrations of concern over the following week, that Mayor Palmer strongly disapproved of particular instances of "pay for promotion" in the Trenton Police Department.

5. In 1994 or 1995, Deputy Chief Constance, North Ward Council member Bo Robinson and Mayor Palmer met at the Roebling Pub in Trenton. Palmer and Robinson expressed disappointment in Williams' performance as chief (6T15). Robinson asked Constance if he wished to be the next appointed chief and Constance heartily agreed. Constance believed that he would be the next chief of police in Trenton (6T16).

6. On January 21, 1994, SOA President Constance sent a memorandum to Trenton Business Administrator Eric Maurer. Constance compiled a list of named superior officers who were "not permitted to use their allotted vacation and compensatory time [off]." The list specifies the accumulated number of "disallowed" vacation days for each affected superior officer in each year the days were accumulated, dating back, in most cases, to 1990. The list also specified each superior officer's gross accumulation of compensatory time off in hours. Deputy Chief Constance accumulated 91 vacation days over 1992-1994 and 80 hours compensatory time off (R-14; 7T29).

On June 21, 1994, Maurer sent a letter to Constance, advising that his January 1994 request "to carry over excess vacation and compensatory time" was conditionally approved (R-13). James Norton is the personnel officer employed by the City and for many years he administered employee benefits, including the "cashing-out" of accumulated vacation time off for employees, including police officers, upon retirement (8T45-8T46). Norton confirmed under oath that Constance had accumulated 91 vacation days from 1992-1994, which were payable "at the time of retirement," defined as the date when the City received notice from the Department of Personnel that the employee's retirement was approved (8T52; 8T62).

The "vacations" article of the applicable (1995-1997) collective agreement provides in pertinent sections:

Section 13.01

The officers of the Division of Police shall be entitled to the following vacation benefits:

	<u>1-15 Years</u>	<u>15-25 Years</u>	<u>25 + Years</u>
Sergeant	25	26	27
Lieutenant	27	28	29
Captain	29	30	31
Deputy Chief	31	32	33

Effective January 1, 1983, the vacation schedule outlined in the Agreement shall be reduced by one (1) day for all ranks. (This reduction is reflected in above vacation benefits schedule).

Section 13.03

Upon retirement in accordance with the provision of the New Jersey Police and Fire Retirement System, police officers shall receive either the number of

vacation days or equivalent compensation which he would have received or earned had he worked the entire calendar year, minus any vacation days taken during the year of retirement, the resulting number of vacation days, however, being reduced pro rata by the percentage of the employee's previous year of employment spent on sick time, not including the first fifteen days of sick time actually taken in said year. In the event of death of the employee after 25 years of service, benefits will go to the designated survivor of the employee.

[R-17]

7. Sometime during fall 1994, then-Fire Chief Dennis Keenan learned that an instance of "pay for promotion" was "going to happen" in the fire department (i.e., the "Colletti" matter). Keenan informed Acting Public Safety Director James Waldron that the facts "look like something is wrong." By an unspecified date, the "offer" to retire was withdrawn and the retirement "didn't take place" (8T109).

On January 24, 1995, Waldron wrote a three-page letter to the Mercer County prosecutor, describing particulars of the Colletti matter, and inquiring about its legality. Waldron noted that a previous public safety director had asked the prosecutor about the propriety of similar conduct in the police department and was informed that it was "immoral" but not "illegal" (CP-14; see also finding no. 4). Peterson acknowledged that he probably received a copy of Waldron's letter contemporaneous with its mailing (9T44). No one was ascribed to be a second recipient of Waldron's letter (CP-14). Peterson credibly testified that Mayor Palmer would be "very unlikely" to receive a copy of Waldron's letter because he was not "cc"-ed (9T42).

Waldron did not receive a written response from the prosecutor (9T45). An unattributed handwritten notation on Waldron's letter dated January 30, 1995 states: "Director Waldron said Pros[ecutor] Bielamowicz confirmed that this practice is not illegal." I infer that Waldron was so informed within a reasonable period of time after January 24, 1995.

8. Constance testified that Palmer told him on 40 to 50 occasions that "I'm his man; I'm going to be the [next] chief...he's going to stand by me through hell or high water" (6T18). The Mayor greeted Constance at one or more testimonial dinners or "affairs" and announced to any number of Association (SOA, PBA, etc.) officials seated at a table, "I can't wait to make Constance chief....You're my man, Joe" (3T154; 6T20). On other occasions, the Mayor described the other two deputy chiefs to Constance "in very derogatory terms" (6T65).

Mayor Palmer testified that Constance had "lobbied" him to become chief since 1992 (5T32; 5T96). He testified:

I wasn't telling people [that Constance would become chief]. Joe Constance continued to tell everybody...that [would have reason to] talk to me about '[what] a good guy [he is] and to make him chief.' As people are coming up to me, I am not going to say, 'No, he is not going to be chief.' I am saying 'I am considering him to be chief'....
[5T125]

Palmer also testified that he told Constance that he would appoint him chief if he; became a City resident; "did something about changing his image or reached out to all of the community;" would

make substantive changes in the department; and devoted his "full-time and attention to being chief," i.e., surrendered the County Republican chairmanship (5T21-5T22). The Mayor's testimony is corroborated by his remarks in telephone conversations surreptitiously recorded by Deputy Chief Constance.

Constance testified that the only "conditions" for the appointment which Palmer mentioned were his surrendering the TSOA presidency and the County Republican chairmanship (6T64).

I do not credit Constance's testimony that Palmer told him that he must surrender the TSOA presidency as a condition for his appointment as chief. In or around June 1998, Constance surreptitiously recorded his telephone conversation with the Mayor in which Palmer said, "But Joe, understand something - you can't be both. It - there's no way. It's bad enough on one side. I can't be fighting the democrats" (CP-10, p. 12). Palmer was referring to his political liabilities if he were to appoint Constance chief of police while serving a term as Mercer County Republican Chairman. In February or March 1999, Constance surreptitiously recorded another phone conversation with Palmer (CP-11). Constance compared the taped conversation with the transcript of it and testified that the writing was "accurate" (7T63). Constance was asked on cross-examination if the Mayor told him in the audiotaped conversation that he must quit the union [as a condition for the appointment as chief]. Constance testified:

A: Yes, he did.

Q: He did?

A: Yes, he did.

Q: Could you show us where?

A: In this transcript, maybe in some of the garbled part, but he did mention the union. He did mention the chairmanship, that I had to quit.

[7T74]

In the taped conversation, Palmer referred to the political liability of a mayor in one political party appointing someone to a position who is "chairman" of another political party (CP-11, p. 36). Palmer did not refer to Constance's TSOA presidency in the transcript. He referred to Constance's "boycott" of a swearing-in ceremony in December 1998, as an act of personal disloyalty (CP-11, pp. 20-22; see finding no. 25). I find that this portion of the Mayor's remarks in no way suggests that Constance must resign the TSOA presidency. Constance's final response in the quoted portion is equivocal, evasive and non-responsive.

Palmer never demanded that any appointed or designated chief or acting chief (including Paul Meyer) had to be a City resident (5T147). Accordingly, I find that City residency was Palmer's preference but not a prerequisite for a successor to Chief Williams.

Constance did not rebut the Mayor's testimony that he had issued "very harsh statements about criminals; that he was a member of the NRA (National Rifle Association);" that he was nicknamed, "No-nonsense Constance;" and that he had advised the deputy chief to improve his relationship with the City's black population (5T155; 1T174; 5T219). The Mayor further testified that Constance once

replied that he would sponsor an adult recreation basketball team (5T158). I credit the Mayor's testimony that he had so advised Constance on these matters.

I find that the Mayor was more or less equivocal or emphatic in his stated intentions to appoint Constance as the next chief (after Williams), depending on the occasion and the audience. I infer that a stated inclination to appoint Constance as the next police chief would sound similar to an expressed commitment to such an appointment; even the most strongly stated inclination does not preclude the possibility of change. I infer that most of the Mayor's endorsements of Constance were between 1994 and 1998. The more remote in time any endorsement was to the 1999 decision to appoint Meyer as Williams' successor, the less weight it carries, in my view.

9. On February 26, 1998, the TSOA filed a Petition to Initiate Compulsory Interest Arbitration with the Commission (IA-98-68). By that date, the parties had conducted several "business-like" negotiations sessions, according to former TSOA Vice President Joseph Golden (IA-98-68; 1T174).

Golden was a Trenton police officer from 1970 until March 2000 (1T140). He was vice president of the TSOA for 14 years and participated in collective negotiations and interest arbitration proceedings, including those leading to a 1997-2000 agreement (1T140-1T142). Golden testified that in a negotiations session or sessions sometime before February 26, 1998, Trenton Business

Administrator Joseph Eapen said in an argument with Constance, "[Deputy] Chief Constance, if you are going to be chief, that's part of management" (1T148; 1T177). Golden heard Eapen's remarks and once responded, "If you continue to do this, I will file an unfair practice charge. Please stop doing it" (1T149). Eapen denied that the parties had any confrontations in negotiations before the arbitration petition was filed (1T118).

Golden did not testify that Eapen repeated such remarks in any other session after he threatened the filing of the unfair practice charge. Nor did the TSOA file an unfair practice charge alleging that the business administrator had violated the Act by stating or repeating such remarks. I infer that Eapen did not repeat them and that his remarks (considering Golden's polite rejoinder and characterization of these sessions as "business-like"), were not said in an angry or provocative tone or manner.

10. In or around March 1998, Jenny Hightower, a civilian passenger in a stolen car, was shot and killed by a City of Trenton police officer. The shooting was notorious among Trenton residents (2T96; 5T160). Hightower was black; the police officer who fired the fatal shot was white (5T204). The officers involved in the shooting were members of the patrol division (2T99). Deputy Chief Paul Meyer had charge of the patrol division at the time of the shooting (3T68; 3T118).

11. Sometime between January and March 1998, Keenan and Mayor Palmer discussed "who was to be the next appointed chief of police" (2T29; 3T13). The Mayor believed that he was required to appoint one of three deputy chiefs and that Constance, the most senior of them, would receive the appointment (2T30; 5T9; 5T33; 5T85). He nevertheless asked Keenan if Constance must be appointed. Keenan replied that the only alternative was to "declare" that none of the deputies were competent and then ask the Department of Personnel to "open up an examination to the next lower rank." Palmer rejected that suggestion and disagreed that Constance was incompetent. He expressed concern that Constance was not committed to community policing and to cooperation with Trenton civic groups (2T30; 2T32; 3T21). Keenan advised Palmer that he could seek a DOP examination for the chief position, from which would yield a certified list of 3 or fewer eligible candidates (3T21). The Mayor suggested that the examination be given (3T24).

12. On April 14, 1998, Keenan sent a memorandum to Trenton Personnel Officer James Norton, asking him to "request that the Department of Personnel include Trenton in the next promotional examination for police chief, so that we will have a list of eligibles by April 1999" (R-6; 2T38; 3T13). The memorandum notes that "Williams will be retiring in April 1999, as he will turn 65 years old in March 1999." Norton requested DOP to provide a written "announcement" for a police chief examination (8T68).

13. On an unspecified date, perhaps in May 1998, City and TSOA representatives, including Vice President Joseph Golden, and Treasurer William Seaman, conducted a negotiations session at a Core States Bank branch in Trenton (6T36; IA-98-68). One subject of this negotiation session was work schedules (3T163). Business Administrator Eapen asked Constance to speak privately with him, away from both counsel and other representatives (3T152; 6T33). Eapen privately told Constance that the City, in its ongoing negotiations for a successor agreement with the PBA, wished to change patrol officer shifts. Constance testified that Eapen said:

Look-we're fighting the PBA-you're management.
You have to remember that you're management.
We're fighting the PBA. You want to be chief.
What I'm asking you to do is be management, go
along with whatever the result of that fight
[with the PBA] is.
[6T36]

Constance testified that he told Eapen that he could not comply and that he returned to the negotiations table and announced, "Do you believe what this man had the audacity to tell me?" Constance told those assembled what Eapen had told him privately (3T153; 6T37). Eapen said nothing (3T153). TSOA Vice President Joseph Golden corroborated that Constance reported that Eapen told him that "if he wanted to become chief, he had to remember that he was part of management" (1T143). He also testified that Eapen did not respond to Constance's recitation of his comments.

Eapen testified that he did not tell Constance that if he wished to be chief, he needed to recognize his obligations (1T80).

Eapen testified that he mentioned to Constance that "the role of a deputy chief tends to be the role in a management capacity" and that it would "conflict with a union" (1T80; 1T81). He conceded that he asked Constance at several negotiations sessions, "Who are you today, management or union?" (1T81). Eapen did not deny that Constance repeated his private remarks to the roomful of assembled negotiators and that he (Eapen) did not respond. I credit Constance's and Golden's testimonies.

14. In May 1998, a newly-elected City council member (Lartigue) told Chief Williams informally that Mayor Palmer told her that Constance would become the next chief of police (2T18-2T19). The record does not indicate when the Mayor told the City council member his intention. Lartigue did not testify. Nor was the Mayor asked to confirm or deny the purported statement. Accordingly, I do not credit Williams' testimony. Williams conceded that in 1998, Acting Director of Public Safety Keenan did not tell him that Constance would become the next chief (2T21). Nor did Williams participate in the selection process for his successor (2T21). Keenan did not tell anyone that Constance would become the next chief (3T15).

15. On June 1, 1998, Dennis Keenan was appointed as public safety director, after serving as acting director for the previous five months (2T25; 2T28). Keenan had been fire chief for six years, the position from which he retired in June 1998 (2T28; 3T12). The Director's duties are to "set policies for the police and fire

divisions;" hold disciplinary hearings; and appoint individuals to the divisions' vacancies, including chief of police (subject to the Mayor's approval) (2T26; 3T15).

16. On June 8, 1998, Chief Williams appeared at a designated room at City Hall as a witness for the Trenton PBA in an interest arbitration hearing against the City (IA-98-1; 2T14). Williams agreed to testify about the department's size; salaries, compared to other departments; working conditions, etc. (2T15). Williams had first sought the City's legal opinion and received no response (2T14-2T15; see finding no. 4). The arbitrator had not yet arrived and two employer representatives attending the proceeding, City Attorney Rocky Peterson and Business Administrator Joseph Eapen asked Williams why he was there (2T16; 1T118). Williams replied that he intended to testify for the PBA about the referenced subjects. Peterson and Eapen left the room briefly and returned, and asked Williams to accompany them to another room along the hallway (2T16). There, a loud argument ensued in which Peterson and Eapen "opined" that Williams should not testify (2T22; 2T24). Eapen told Williams that he was "part of management" and should not testify in a "PBA arbitration hearing" (1T82). Williams replied that the PBA president had asked him to testify and that he intended to testify (1T82; 2T17). I infer that Williams testified in the hearing that day.

Eapen informed Mayor Palmer and Chief of Staff Long about the incident (1T88). On an undetermined date soon after June 8,

Constance surreptitiously recorded a telephone conversation between he and the Mayor, the complete transcript of which was marked in evidence (CP-10; 5T73; 7T59). Mid-way through their conversation, this exchange ensued:

Mr. Palmer: There's going to have to be changes [in the police department] and I'm going to be right up front and doing it.

Mr. Constance: Um-hum.

Mr. Palmer: Ernie [Williams] has no leadership. [He's] the reason [there are] the problems they're having and he has no leadership.

Mr. Constance: Yup.

Mr. Palmer: He's a mouth. And when he testified for you guys the other day, that was totally fucked up.

Mr. Constance: Hmm.

Mr. Palmer: He's management. That's --

Mr. Constance: Yup.

Mr. Palmer: -- totally fucked up.

[CP-10, pp. 19-20]

I infer from Palmer's phrase, "...when he testified for you guys the other day,..." that no distinction was drawn between the PBA and the TSOA.

17. Sometime in June or July 1998, the City received and posted the DOP notice of a test for the position of chief of police (2T39). In another portion of his June 1998 surreptitiously-recorded phone conversation with the Mayor, Constance recorded this exchange:

Mr. Constance: Well, what's your plans for this test? Are you going to waive it or what are you going to do?

Mr. Palmer: I'll probably have it, but -- you ain't got to take number one, either. So, if you don't come out number one, that don't mean nothing.

[CP-10, p. 29]

A few pages earlier in the same transcript, Constance raised the subject of the announced examinations:

Mr. Constance: But -- but -- yeah, but see, Doug, you guys don't understand what you're doing over here.

Mr. Palmer: I -- believe me. You don't --

Mr. Constance: You call for tests and stuff like that.

Mr. Palmer: Hey, hey, hey.

Mr. Constance: What I'm saying is --

Mr. Palmer: Don't worry about that.

Mr. Constance: I ain't worried, but I'm just saying what these other guys are looking at. They're saying, hmm, maybe it's not Constance. You know what I'm saying?

Mr. Palmer: That means that when it finally is, it'll be better. I don't want to --

Mr. Constance: Yeah, you're right.

Mr. Palmer: -- rubber stamped stuff.

Mr. Constance: You're right. You're right.

Mr. Palmer: I got to go through a process and you know the way you do this is going to help you and me.

[CP-10, pp. 25-26]

During the summer, all three deputy chiefs, including Constance, applied to take the test. Sometime during September 1998, DOP representative Bonnie Farello advised Norton that the examination could not be conducted because no retirement application for "chief" was pending (3T28). She suggested that the City should withdraw its request for the examination and re-apply later that fall. Norton followed the suggestion; the test was "put on hold" (2T39; 3T27; 3T119-3T120; 8T68). The test was never administered.

18. Constance testified that in June 1998, Palmer "promised" that he would appoint him as the next chief of police and

that the promise was stated in the presence of John Ungrady, a Republican City councilman, at Sisters' Cafe in Trenton (6T19). Ungrady testified that Palmer made the promise in October 1998, at his council runoff re-election celebration at Sisters' Cafe (4T32; 4T34). Ungrady testified that Palmer said, "Joe's present will come in a couple of months" (4T34). Palmer testified that he attended the Ungrady re-election celebration on October 19, 1998 (5T164). I credit Palmer's and Ungrady's testimonies; I find that on October 19, 1998, Mayor Palmer said to Ungrady, with Constance present, "Joe's present will come in a couple of months," implying that a promotion was forthcoming. I consider this finding in the context on my remarks in finding no. 8.

In June 1998, one measure of the Mayor's state of mind about appointing Constance as the next chief was revealed in Constance's surreptitious audiotaped recording of their telephone conversation (CP-10). This exchange ensued:

Mr. Palmer: And -- and that -- and -- and I saw you in the -- in the paper. They're already calling you the top cop.

Mr. Constance: Yeah, I know. (Laughter). And I -- and I --

Mr. Palmer: I mean --

Mr. Constance: -- I don't know why they do that.

Mr. Palmer: -- people already think its a [fait accompli], like I don't have no choice in it no way.

Mr. Constance: Well, good. I'm glad to hear that. (Laughter).

Mr. Palmer: But I do have a choice.

Mr. Constance: Aw, man. What -- I thought you said you was -- it was me?

Mr. Palmer: You -- it is.

Mr. Constance: Oh, okay.

Mr. Palmer: You're just going to have to have some faith in me because the road that we take to get there may be a little curvy, but we'll get there.

[CP-10, pp. 24-25]

I find that Palmer's remarks indicate an intention but not a vow or "promise" to appoint Constance as the next chief of police.

19. Constance's June 1998 surreptitiously-recorded phone conversation with the Mayor reveals at least some of the Mayor's interests and concerns about appointing Constance as the next chief of police. The Mayor was primarily concerned about his political viability if he appointed Constance as chief while remaining Chairman of the Republican Party of Mercer County (CP-10, pp. 12-13). He also expressed concern about the effect of racial attitudes in the City, after his recent appearance at a local gathering, where "guys from D.C. [were] talking all kinds of racist shit" (CP-10, pp. 15-16). This exchange ensued:

Mr. Palmer: Yeah, but we go outside and people are talking about what the cops are doing. 'There ain't no white, there ain't no black cops and proactive. You should see the way they just roll up on us.' He says, just -- he says, 'one night, just ride around and just see what they -- what these cops do?' He says, 'We're in our own neighborhoods. We ain't got no where else to go,' but he said, 'this is a drug infested area so they got the right to just take us out, throw us up against the wall, pat us down.' I said, 'Well, 'I don't know, you know? I don't know about -- about all that.'

Mr. Constance: Hmm-hmm-hmm.

Mr. Palmer: And they said, 'And it's going to get worse if Joe Constance is the chief.' Every

--

Mr. Constance: Now, who said that?

Mr. Palmer: I don't even know these guys.

Mr. Constance: Can't put a name? Okay.
Mr. Palmer: I don't know these guys. They live around Fountain Avenue and --
Mr. Constance: Um-hmm.
Mr. Palmer: As soon as they say your name, because I'm -- we're waiting for Sharpton and them --
Mr. Constance: Right.
Mr. Palmer: -- so I go outside because it was too hot in there.
Mr. Constance: Um-hmm.
Mr. Palmer: And there's people just in groups, you know, just standing around --
Mr. Constance: Um-hmm.
Mr. Palmer: -- trying to get my ear. Your name's like a lightning rod. Oh, yeah. No, no, Constance will (indiscernible).
[CP-10, pp. 17-18]

Constance said to Palmer that he is aware of the City's policing problems but "cannot do anything about the problems in [the deputy chief] seat." This exchange ensued:

Mr. Palmer: The thing is -- the problem is -- and see, Joe, you -- you hear what you want to hear, but you don't want to hear what any -- I -- I got to say. You -- you got -- you got to understand what I'm saying.
Mr. Constance: Then make me understand.
Mr. Palmer: People think that you're already the chief. See -- and -- we can work -- we can work around this, but I'm telling you because Ernie is weak, and you're always in the paper, they think that it's you anyway that's why shit's so fucked up.
Mr. Constance: Um-hmm. Well --
Mr. Palmer: They don't understand that when leadership comes in there and got the same mind, that things will get better even for them.
[CP-10, pp. 21-22]

I infer from these segments of the conversation that Palmer was both critical of Constance's reputation among Trenton's black citizens and embracing of his "leadership" capacity (In the Mayor's opinion, Chief Williams had "no leadership").

Constance complained about the announced DOP examination for the chief position, saying that "nobody ever called for a test for chief in history" (CP-10, pp. 22-23). Palmer told Constance not to worry, adding, "You told me you wr[o]te the test," to which Constance answered, "Right." Palmer again reassured Constance about the testing process again, saying:

Mr. Palmer: Are you in politics?

Mr. Constance: Yeah.

Mr. Palmer: All right. Am I in politics?

Mr. Constance: Um-hmm.

Mr. Palmer: Just understand, I got to do some things for political reasons.

[CP-10, pp. 23-24]

Palmer advised Constance to "look at stuff that's going to appease people," and referenced his own efforts at "telling people...it's not going to be worse" if or when Constance is appointed chief (CP-10, p. 26). Constance again expressed concern over the upcoming DOP examination and Palmer again assuaged him. Near the end of the conversation, Palmer told Constance that he may become chief sooner than he thinks, reassuring him; "Believe me, when I name your ass, you'll see what I'm saying...because I already got people ready to picket but I don't care about that" (CP-10, p. 31).

I find that in June 1998, Palmer expressed to Constance an intention to appoint him as the next chief, despite his confessed, imagined scene of citizens protesting the appointment at City Hall. Palmer also expressed reservations to Constance about the appointment; Constance was chairman of the County Republican Party; his name was a racial "lightning rod" in the City; and the

department's current difficulties were reinforced by a public perception that he already was the chief. The Mayor had also reminded Constance that "politics" guided his decision to call for a DOP examination for the post.

20. From sometime in June 1998 through April 1999, Constance, Deputy Chiefs Meyer and Gabauer, Director Keenan and Business Administrator Eapen met each week to plan a "reorganization" of the police department (6T23; 7T81). The reorganization was intended to improve the department's relationship with Trenton communities by increasing (redeploying) the number of police officers on patrol, and relocating the department of internal affairs (2T92; 2T99; 3T157; 8T106). Newspaper headline-generating lawsuits against the department in 1998 reinforced a need for the Mayor's effort (2T93). Chief Williams attended only one or two meetings because he believed that the deputy chiefs, and not he, would implement any reorganization plan. Constance was a leading participant in these meetings, "setting police department objectives and the means to meet them" (6T23; 7T82-7T83).

A final reorganization plan was not approved because in early 1999, the Mayor favored the appointment of a civilian police director over a chief of police (2T94-2T95). Portions of the plan may have been approved by the City Council in late March 1999 (2T96).

21. During the summer and early fall of 1998, the Trenton PBA picketed at public gatherings and mayoral functions to protest

the City's collective negotiations stances on a successor agreement (1T28-1T29; 1T65; CP-1; CP-2; CP-6). The PBA had also advised its membership against "off-duty" work at public gatherings such as parades or festivals (CP-1). The City and PBA participated in interest arbitration proceedings, resulting in a written award, dated December 23, 1998 (IA-98-1). The PBA president testified, "[O]nce the award is delivered, you live with it" (1T42). I infer that the PBA did not protest over a successor agreement after December 23. The City and PBA have participated in interest arbitration proceedings for previous agreements; typically, a year would lapse between the expiration of the previous agreement and the award or execution of successor terms (1T58).

The TSOA and PBA have negotiated separately with the City for many years. Neither the TSOA nor any of its representatives participated in any PBA protest or demonstration in 1998 (1T30; 1T50-1T51; 7T83-7T84). TSOA representatives believed that picketing was "counterproductive" and so advised PBA leaders (1T154). TSOA Vice President Golden testified that, "Mayor Palmer felt he was being personally attacked [by the protests] and that Constance, 'the leader in the police department,' should be able to stop it" (1T154). On cross-examination, Golden admitted that he never heard the Mayor say that he felt that he was being attacked personally by the PBA demonstrations (1T180). He testified that the TSOA had received "indirect messages to see what we could do about [the demonstrations]" (1T156). Golden did not elaborate upon the timing

or content of any "indirect message." I do not consider this testimony as probative. Golden also testified that he met privately with the Mayor "a week or two after he announced [his support] for a [civilian] police director" (1T160; 1T157). Golden testified:

So at my meeting with Palmer, I said: Mr. Mayor, I know that you think we should have been able to stop what is going on. Chief Constance tried to stop it but he was unable to stop it....[Palmer] said, 'When a man wants to be chief he should be able to control things.'
[1T157]

Nothing in the record indicates that PBA members picketed for a successor agreement after their interest arbitration award was issued on December 23, 1998. Nor does the record suggest that Golden's conversation with the Mayor concerned those protests. I infer that Golden's reference to "what is going on" concerned a contemporaneous PBA demonstration (in February or March 1999) against the Mayor's proposal for a civilian police directorship. I also infer that if Constance tried to "stop it," as Golden testified, he preferred a tactic or strategy other than police demonstrations in his effort to defeat the Mayor's initiative.

Before February 1999, Constance "felt a growing rift" between he and the Mayor, "and it was animosity towards what was going on between the PBA, the picketing, the relationship between Jacob Eapen [business administrator] and myself..." (6T26). He testified that the PBA picketed because "they did not have a contract" (6T27). Constance testified:

The Mayor kept on me. And he's saying, 'Can't you control [the PBA president]? Can't you stop this nonsense? How are you going to be chief? You can't control the union. You're union or you're management; what are you going to do here?'
[6T28]

Constance's recitation of the Mayor's remarks to him almost matches Eapen's admitted remarks to Constance at the negotiations table (see finding no. 13). Constance was asked if "it was fair to say that the Mayor became increasingly frustrated as to your ability to control the PBA?" (6T30). Constance answered, "Yes and not only he -- the Mayor, Jacob Eapen became increasingly frustrated with that also" (6T30). Constance testified that Eapen told him "the same terms":

Why can't you stop this picketing? Why can't you - you're president of the union, why can't you talk to him [PBA President Smith]? Why can't you hammer sense into his head? Why can't you stop this kind of thing?
[6T31]

I am somewhat skeptical of the anomaly of Palmer expressing such strong disdain to Constance for his inability to "stop PBA nonsense" and never alluding to or mentioning that disappointment or failure of leadership in either audiotaped conversation. I find that if Palmer said the remarks attributed to him by Constance, he ceased caring about the matter by the date of the PBA interest arbitration award - December 23, 1998.

Palmer did not "closely follow" the City's negotiations with the police unions (5T116). Indirectly corroborating this

finding was the Mayor's comment to Constance in the June 1998 secretly-recorded phone call that Chief Williams had testified at an interest arbitration hearing "for you guys." Williams had testified for the PBA; the TSOA negotiations team did not have its first pre-arbitration mediation session until late August 1998 and its first scheduled arbitration hearing date was not until May 24, 1999, almost one year after Williams' appearance for the PBA.

Palmer was aware of the PBA demonstrations but denied that they played "any role" in his decision to seek a civilian police director (as opposed to a police chief) (5T179). In an early portion of Constance's second surreptitiously recorded phone conversation with the Mayor in February 1999, Constance was aggressively protesting Palmer's recently-announced interest in seeking a civilian police director instead of a police chief. In this particular portion, Constance admonished Palmer for "procrastinating" naming him the next chief and said that any negative public reaction to that selection would be "forgotten" in two months:

Mr. Constance: In two months, this would be over. Now how do you think this department is going to take this? They aren't going to stand still for that. They're not going to stand still for that, Doug.

Mayor Palmer: Hey, Joe, that department is not going to stand still for anything.

Mr. Constance: No. But you'll have suits, you'll have all that kind of stuff. You don't need that aggravation.

Mayor Palmer: At this point, I'm prepared for the wors[t] anyway --

Mr. Constance: Why -- why --

Mayor Palmer: -- because I'm getting pulled so many fucking ways, I'll tell you, I have never had -- there's nine years almost (inaudible) -- I ain't never had no sleepless night before. I had three in a row -- three in a row over this shit.

Mr. Constance: I thought you said you was going to -- you said you was going to get aggravation. You're getting aggravation --

Mayor Palmer: I expected --

Mr. Constance: -- you said you still --

Mayor Palmer: -- aggravation --

Mr. Constance: -- you said you could take it --

Mayor Palmer: -- though. I --

Mr. Constance: -- and you're going to --

Mayor Palmer: Joe, I expected aggravation

Mr. Constance: And I --

Mayor Palmer: -- I expected people picketing and protesting --

Mr. Constance: That's not --

Mayor Palmer: -- I expected --

Mr. Constance: -- that's not going to happen.

Mayor Palmer: I expected all of that.

Mr. Constance: That won't happen. Picketing and protesting won't happen. Doug, you've got to be with me on this. I'm telling you --

[CP-11, pp. 11-13]

I infer that police officers "picketed and protested" the Mayor's announced intention to seek a civilian director before Constance recorded the telephone call (3T73). The evidence does not indicate if the protesters were members of either or both police unions. I also infer that Palmer's having "expected people picketing and protesting" shows that he was unruffled by the demonstrations. Nor was Palmer provoked by Constance's threat of "[law]suits and all that kind of stuff" if a civilian directorship was advocated. It is my view that if Palmer was angry or concerned about such demonstrations, he would have responded in kind to Constance's threat; that is, he would have candidly expressed an opinion that,

by his announced interest in seeking a civilian director, he was defying or would continue to defy all police protests. Instead, Palmer was composed and unperturbed. I do not infer animus. Accordingly, I find that Palmer was not angered by police officer demonstrations against the creation of a civilian police director title.

22. In or around August 1998, the City anticipated that four police sergeant positions would be vacated by November 1 (2T71). About 11 candidates were competing for the positions (2T73). The City had requested a certified list of eligible candidates from the New Jersey Department of Personnel, which it received on October 7 (2T71; 2T74). Meanwhile, Director of Public Safety Keenan was also aware that three patrol officers - DeHardt (a white male); Ingram (a black male); and Klawitter (a white female) - were tied at a competitive score (probably tied for sixth) on the promotional examination for a sergeant position (2T72; 8T100).

For several weeks, Constance and other TSOA representatives urged Keenan to "break the tie" before the promotional list expired (6T52-6T53; 2T72). Keenan resisted because he had not yet received a DOP certification and the City's confirmation that a fifth "vacancy" existed (2T73). Constance characterized Keenan's inaction as "dragging his feet" (6T54).

See finding no. 4, pages 10-16, about events from October 22 to October 30, 1998.

After November 1, a just-retired sergeant expressed interest in rescinding his retirement and returning to work. The sergeant was initially advised that he could return to work (2T75; 6T54). Keenan or his representative soon advised him that his return would prompt a demotion of one of the four recently installed sergeants (2T74). The retired sergeant rescinded his request to return (3T33). In the same time period, a lieutenant had expressed his intention to retire on December 1, which would create a fifth sergeant vacancy, provided that a current sergeant would be promoted to fill that lieutenant's position (2T74). When Keenan was informed that the lieutenant position would be filled (premised on the lieutenant's confirmation of this December 1 retirement), he decided to "break the tie" by conducting interviews of DeHardt, Klawitter and Ingram (2T74). The interviews were conducted between late November and early December 1998 (2T77; 4T8).

23. Detective Jeanne Klawitter testified that around the date of her interview, the "rumor" in the department was that "Jimmy Ingram was going to be made; that they were going to hire the black man" (4T6-4T7). Klawitter conceded that Ingram was the most senior of the candidates. She testified:

Seniority is only allowed to come into play one time - that is my understanding, anyway - that's what brought him up to [a tie]; once he was tied with us...they cannot use seniority again [i.e., for the purpose of awarding him a promotion].
[4T11]

City Personnel Officer James Norton testified that he was unaware of any DOP rule or regulation limiting seniority in the manner Klawitter described (8T70). I credit Norton's testimony. Klawitter's interview with Keenan lasted no more than 20 minutes, during which they discussed her police experience (4T8-4T9). She told Keenan that "she was probably wasting her time." She testified that Keenan replied, "We are under a lot of pressure to hire Jimmy Ingram" (4T7). Klawitter has filed a civil action, seeking a promotion to sergeant, naming the City and Keenan as defendants (4T13-4T14).

Keenan testified that he "did not recall making and had no reason to make such a statement" (8T100). He testified:

When [she] came into the office for the interview and suggested she may be wasting her time and my time since it was a 'done deal,' she [actually] asked, "Are we wasting our time being here?" And I told her, 'No, that she understood that I was under a lot of pressure to break this tie.'
[8T100]

Keenan testified that he would not have referred to either of the other candidates in the interview (8T101). He concurred that the Klawitter interview was "a little bit shorter" than the other interviews,

based on my initial impression that she...start[ed] off the interview by asking me if she was wasting her time. I certainly felt that was not a professional way to conduct a job interview.
[8T102]

Keenan also testified that interviewing was a "small part" of the process of "breaking the tie." Keenan did not possess a "background in police practices and was not about to ask the candidates about specific practices" (8T101). Keenan also testified that he chose Ingram over the other candidates and had not been "pressured" on the selection (8T101-8T103). Keenan informed Business Administrator Eapen of his choice (2T80).

If Klawitter's testimony was accurate, then Keenan admitted to her in the interview that he was being pressured to promote Ingram. Although Palmer or Long had expressed interest in promoting Ingram in their conversation with Williams in October, no evidence shows that Keenan had been directed to select Ingram. I have found that the City had an interest in ensuring the fairness of the appointment process (see finding no. 4 at p. 15). Nor would Keenan derive a benefit from telling Klawitter that he was pressured to promote Ingram.

Keenan's testimony about the interview is substantially similar to Klawitter's except for the representation about pressure to promote Ingram. Keenan conceded to Klawitter a pressure to break the tie. I was impressed that Keenan, the former Fire Chief, forthrightly admitted his ignorance about "specific police practices" and his reluctance to ask the interviewees about them. Similarly, I find it reasonable that Keenan would be negatively impressed by Klawitter's pessimistic demeanor and that the interview would consequently be of shorter duration than the others. I credit Keenan's version of his interview with Patrol Officer Klawitter.

24. In November 1998, Mayor Palmer asked Chief of Staff Long and Business Administrator Eapen if there were "any other options" regarding "leadership in the police department" (5T162). Palmer's concern about "pay for promotion," including the possibility of Constance's knowledge or "involvement," and the recent (October 30) inquiry to the Attorney General prompted his interest (5T132; 5T161-5T162). Around this period, Palmer asked Public Safety Director Keenan about "bring[ing] in a civilian as a police director" (2T41; 3T59). Keenan testified:

Although it was not my choice, I said, 'Well, I guess you can. It has been done in some other cities in New Jersey. He instructed me, the business administrator and the chief of staff to look into it to see whether it could be done.
[2T42]

The Mayor also expressed concern over the excessively high number (22) of "administrative days off" awarded to the chief (3T61; 7T8). I note from Palmer's and Keenan's testimonies a telling consistency; Palmer first asked Long and Eapen about "options" and asked Keenan about a civilian directorship, specifically. I infer that Palmer first learned about the director position from Long and/or Eapen and then asked Keenan about its viability. That a civilian in charge of uniformed services would not be Keenan's "choice" is natural - he is a career firefighter. Nor would I have expected him to voluntarily suggest that option.

Between November 1998 and January 1999, the three cabinet members and perhaps someone from the law department met two or three

times to discuss the possibility of hiring a civilian police director (3T60; 3T62). Names of possible candidates were not mentioned; nor were individuals excluded from consideration. Keenan testified: "There [were] specific discussions on how that person would be selected and there was the idea advanced that there would be, as was termed in the papers, a nationwide search" (3T62-3T63). Keenan inquired about the directorship at the Department of Personnel and was informed that "it could be done" (2T44). In late January or early February 1999, Long, Eapen and Keenan reported to the Mayor that a civilian police directorship was possible (2T43).

Palmer preferred a civilian director over a police chief. A director would be a mayoral cabinet member and accountable to the mayor; a director would also "make changes [which the Mayor] believed were necessary"; a director could be required to live in the City. Palmer was most appreciative of having a "choice": "...I mean that was the big thing. I realized that I didn't have to go through who's next on the list" (5T175-5T176; 2T51-2T52). Most of these preferences were in counterpoint to his disappointments with Chief Williams (5T29; 2T51).

25. By mid-December 1998, Keenan had interviewed the three candidates for a sergeant vacancy who were tied at the same competitive score on the DOP promotional list. After the interviews, he determined that James Ingram would be promoted (2T77; 3T55).

Former Deputy Chief Constance testified that Ingram's selection was a "deal"; that he was a friend of and campaign volunteer for Mayor Palmer; that he was selected because he is an African-American; and that he was chosen from an "expired" DOP list after "bogus interviews" (6T55). On cross-examination, Constance testified that Ingram had been a campaign volunteer for Palmer in 1990 but conceded that he did not know of similar efforts in 1994 or 1998 (7T91). The evidence on this record does not sustain Constance's other allegations about the promotion. Nor did the TSOA proffer a copy of any filing, *i.e.*, grievance, charge or DOP appeal, contending that the City had improperly promoted Ingram.

Keenan testified that his decision was based upon the interviews and his review of the three candidates' records. He denied that he was "pressured" to select or that he had received any "suggestion" that he should select Ingram, a black candidate, over the two other (white) candidates (2T77; 3T56). He specifically denied that anyone from the Mayor's office asked him to "step in and assure Ingram's promotion" (2T77). I have not credited Detective Klawitter's testimony that Keenan admitted during her interview that he was being pressured to select Ingram (see finding no. 23). Mayor Palmer testified that if Keenan had mentioned "pressure" in the Klawitter interview, the source of it was not his office (5T44). Although I am concerned that the Mayor or Chief of Staff Long mentioned an interest in Ingram's promotion to Williams in October 1998, I have also found that the City would have had a heightened

interest in a fair appointment process, pursuant to its October 30 and November 4 letters to the Attorney General (see finding no. 4, p. 15). Accordingly, I credit Keenan's testimony.

On the morning of December 22 or 23, 1998, Mayor Palmer, Dennis Keenan, PBA President Robert Smith and a relatively small number of officers witnessed James Ingram's swearing-in ceremony for his promotion to sergeant (5T48-5T49; 3T82). Swearing-in ceremonies are attended by the promoted officer's family, and typically, by many officers of all ethnic backgrounds and by the presidents of both the PBA and TSOA (5T48). TSOA President Constance did not attend. I infer that only a few superior officers, if any, attended the ceremony. Palmer asked Keenan, "Where's Constance?" (2T79; 3T82).

Later that day, Keenan and Constance were patronizing Freddie's Restaurant in Trenton, when the Mayor telephoned the deputy chief. Responding to his pager, Constance returned the Mayor's call on the restaurant's public phone and invited Keenan to listen to his remarks (2T78; 3T83). Constance testified that this conversation ensued:

Mr. Palmer: Joe, you better be in the hospital or out of town. You were not at Jimmy Ingram's. Now, all these people are telling me that 'I can't trust you; you're not loyal; don't make you chief' and here you are, you did this. What am I supposed to do?

Mr. Constance: Doug, wait a minute, this is a union thing. I told you I had to do this for --

Mr. Palmer: Fuck the union. You know, you're going to be chief or you're going to be union. This doesn't look good. I don't like it. And what's this stuff about 'pay for promotion'?

[6T56-6T57]

Constance testified that he explained "the process" and explained that Ingram's promotion was a "back room deal off an expired list" (6T57). I infer that "the process" means the circumstances of "pay for promotion." He testified that the Mayor "ordered" him to come to his home, where he "continued his tirade" (6T58). Constance testified that he attended a reception for Ingram before proceeding to the Mayor's home (6T59). I infer that the Mayor or Constance mentioned the reception in this phone conversation and that Constance attended it as a conciliatory gesture. Constance testified that when he arrived at the Mayor's home, Palmer said:

'This union thing is killing you.' His community -- and his community always meant to me, the black community. And he always meant the black community because he kept constantly telling me, 'the black community doesn't trust [you]. The black community doesn't want [you] to be chief.'
[6T59]

I credit Constance's testimony. I infer that Palmer's first sentence followed Constance's remark that the boycott was a "union thing." It was intended to alert Constance that his absence from the swearing-in ceremony, rather than the reason for the absence, was "killing" him because it created an appearance of racial insensitivity. I infer that the remainder of Constance's testimony corroborates (and anticipates) the Mayor's audiotaped remarks in the February 1999 conversation with Constance which linked the Deputy Chief's absence from the ceremony to "unfair" problems that would

arise if a "black kid was shot" while Constance was chief of police (see p. 56). I also find that this testimony undermines Constance's other testimony that the only "conditions" to his ascension to police chief which Palmer ever mentioned were surrendering the chairmanship of the County Republican Party and the presidency of the TSOA. (I have also not credited a portion of that testimony for other reasons; see finding no. 8). Finally, I find that the palpable anger in Constance's testimony is in reaction to the Mayor's statement in their phone conversation (and the Mayor's opinion) that Constance was "disloyal"; that he "could not be trusted" and that his absence "didn't look good."

Mayor Palmer felt "hurt for Sergeant Ingram" because the ceremony was poorly attended and angry at Constance for his absence (5T48-5T49). Constance had attended "every other" swearing-in ceremony (5T49). On direct examination, TSOA counsel asked Palmer:

Q: You [had], and perhaps rightfully so, express[ed] your upset and irritation with Deputy Chief Constance for why his people, him and his union people weren't there at the swearing-in, right?

A: Correct.

I find that the question is artfully worded, simultaneously asking if the Mayor was irritated by Deputy Chief Constance's absence (and "his" absent superior officers) and TSOA President Constance's absence (and "his" absent TSOA members). I cannot know which question(s) the Mayor answered.

Mayor Palmer testified that he told Constance that his absence was "disrespectful" to Ingram, his family and other officers. The conversation continued:

Mr. Constance: I couldn't show up; it was a union thing.

Mr. Palmer: What does the union have to do with this?

Mr. Constance: We decided we were going to boycott it.

Mr. Palmer: Why?

Mr. Constance: Because [Ingram] didn't get promoted the right way.

Mr. Palmer: What do you mean, 'the right way'?

Mr. Constance: Not the right way.

Mr. Palmer: What, he didn't pay to be promoted, that's the right way because he didn't have to pay you guys? Are you upset about it?

Mr. Constance: No, no no. It may look like that, but that's not it. It's because you guys -- hired off of an [expired] list.

[5T51]

Palmer also testified that he said to Constance:

You go around here telling everybody you're a team player, that you can be trusted. And that [you're] loyal and here you have a person that gets promoted and you don't even show up!

[5T52]

Both versions of the conversation confirm that Palmer was angered by Constance's absence from the ceremony because he believed it created an appearance of disloyalty to him, as Mayor, and appeared racially insensitive. I also find that if the Mayor said, "fuck the union," he was summarily dismissing Constance's asserted rationale for his absence as an unacceptable excuse.

In February 1999, Constance recorded a telephone conversation with Mayor Palmer soon after announcing his plan to

implement a civilian police directorship (and eliminate the chief position). In the transcript of the conversation, Constance aggressively confronted Palmer about his decision and implored the Mayor to "stand up" with him (CP-11, p. 15). The Mayor occasionally responded defensively, once remarking, "Well, let me look at it. Look Joe, I know you're disappointed" (CP-11, p. 17). Constance referred to the Mayor's decision as an attack on the "credibility" of the relationship between the Mayor and the police department:

...Now come on, come on. Now, we've been out here together all this time --
Mr. Palmer: Joe, I don't even - going with all this stuff. But I'm going to tell you, talk about credibility - and this is a big thing and I knew it was going to happen. People threw in my face that you boycotted Jimmy Ingram's [swearing-in ceremony].
Mr. Constance: I did not.
Mr. Palmer: You did. You didn't go. You said you guys were boycotting it.
Mr. Constance: I was at his reception --
Mr. Palmer: I know, but you - come on, Joe, you told me you boycotted it.
Mr. Constance: And you know why I --
Mr. Palmer: Yeah, yeah --
Mr. Constance: -- know why we did that.
Mr. Palmer: -- Yo, hey, Joe -- Joe...but you know what happens with that? They say this is a guy who wants to be your chief of police, that whether they like a decision or not (indiscernible) - what you wanted, and here he don't even show up....Let me ask you a question. No one should have brought that issue up and threw it in my face when I'm saying, 'Joe's loyal'? And that's not an issue that somebody could say --
Mr. Constance: No. That was -...that was a union thing. Not just me, Doug --
Mr. Palmer: Well --
Mr. Constance: - wasn't anybody --
Mr. Palmer: But see, you had to do what you had to do, right?
[CP-11, pp. 20-22]

I infer from Palmer's final remark in this segment that he was appreciative of Constance's role as TSOA president and (impliedly) mindful of his own interests as Mayor; he may as well have said, "And I have to do what I have to do." Their interests were not identical and their actions could not coincide for political (appearance) purposes. Constance asked Palmer why others believed that he could not be trusted:

Mr. Palmer: ...-well, one of them was that thing with Jimmy Ingram's.

Mr. Constance: Well, that's not --

Mr. Palmer: - 'He's not loyal'

Mr. Constance: - loss of trust

Mr. Palmer: - 'He's not loyal'

Mr. Constance: That's not a question of trust.

Mr. Palmer: 'He won't be loyal. Once he gets in there, he'll do what he wants to.'

Mr. Constance: You know better.

Mr. Palmer: Once any black kid gets shot in this city, they're going to blame you because they hate --

Mr. Constance: You know better.

Mr. Palmer: I mean - well, they will do that. I mean you can't help that. If a kid gets hurt or shot or --

Mr. Constance: And then that's going to happen.

Mr. Palmer: I mean --

Mr. Constance: And then --

Mr. Palmer: That's going to happen. I don't want to go through all of that stuff. All I'm saying is there's a current here that you just are oblivious to. That I have no idea why you are because, man - and I'm just - I just got to think this thing through.

[CP-11, pp. 29-20]

I infer from this portion of the transcript that the Mayor has linked (or defined) the issue of Constance's "loyalty" (at least insofar as his absence from the Ingram ceremony was seen as disloyalty) with a perceived likelihood that Constance would be

"blamed" (and by extension, so would the Mayor because he would have appointed Constance as chief) for any police shooting of a "black kid." The Mayor also remarked upon his inability to control a chief of police, in light of that position's (statutory) independence. I also infer that Constance was grasping Palmer's meaning of "loyalty" during their conversation as something other than related to union activities because he interrupted and disagreed with the Mayor's opinion, saying, "No. That was a union thing" and "That's not a question of trust."

26. In or around early February 1999, Mayor Palmer publicly announced (or it was reported in newspapers that he had) an interest in appointing a police director (5T142; 3T63; 3T93; 6T60). The Mayor had received favorable responses to the idea from his cabinet and from friend and former cabinet member, Rocky Peterson (2T58-2T60; 5T160). Former Chief of Staff Bill Watson advised against naming Constance as the next chief of police (5T123). Business Administrator Eapen supported the decision to seek a police director (1T97). Mayor Palmer testified that Eapen counseled against naming Constance as Williams' successor:

The reasons he gave were that [Constance] cannot be trusted, and [that] Eapen knew that I wanted structural, systematic, wholesale changes in the police department. And he didn't believe that Constance, being a part of the system, would have the leadership, courage or guts to do it.
[5T114]

Considering the sweeping and even dramatic tone of these remarks, I infer that the sentiments Palmer attributed to Eapen were really the

Mayor's and not Eapen's. I also infer that "part of the system" substantially refers to Palmer's suspicion of or belief in Constance's participation in "pay for promotion" in late 1998. Constance had otherwise promoted reorganization efforts in the department (see finding no. 20). Both the PBA and TSOA immediately announced their opposition to the concept of an appointed police director (2T58-2T60).

27. Around this date, Deputy Chief Constance read a newspaper article reporting the Mayor's intention to seek the appointment of a police director (6T60). He telephoned the Mayor and surreptitiously recorded their conversation, the "accurate" 42-page transcript of which was marked in evidence (CP-11; 7T63; 7T65). Constance audiotaped the conversation because he "could not trust [the mayor] anymore" (6T63). Constance's first remark to the Mayor was, "What the fuck are you doing to me now?" (CP-11, p. 3).

The conversation largely consists of Constance's questions, complaints and accusations of betrayal (regarding the likely decision not to name him the next chief) and of Palmer's replies. Palmer does not mention the TSOA, Constance's TSOA presidency, his (alleged) inability to "control" PBA conduct, or collective negotiations with any organization. (See finding no. 25, regarding Palmer's remarks in the conversation about the Ingram matter).

Early in the conversation, Constance said, "You told me a long time ago that I was going to be chief..." to which the Mayor replied, "And, you know, I'll tell you something that's not even on

my part. I didn't believe really I had a choice. I thought it was just you three guys" (CP-11, p. 5). I infer that the "three guys" were the City's three deputy police chiefs, including Constance.

The Mayor told Constance of his need to "look at other stuff" in deciding upon a leader for the police department after Williams' upcoming April 1, 1999 retirement (CP-11, pp. 9, 16, 18, 19, 24, 25). The Mayor said:

Joe, all I'm telling you is I've got to look at some other stuff. I can't tell you the shit that happened to me this weekend. People brought me into a room - people that I had no idea wouldn't be with me on this....And I'm telling you man, that - you tell me all the time, people in the black community, they don't have a problem with it --

Mr. Constance: Right.

Mr. Palmer: I'm here to tell you, they're lying to you.

Mr. Constance: Show them to me - or name them.

Mr. Palmer: They don't want to be seen because they're fucking scared.

[CP-11, p. 6]

The Mayor also said later in that conversation, "Joe, this weekend, all right, I got visited by about 15 people, from different sections of this City....They said, 'Under no circumstances put that man [i.e., Constance] in.'" (CP-11, p. 27).

In direct examination by TSOA counsel, Mayor Palmer admitted that people had not "sat [him] down" and that those who warned or advised not to promote Constance were "primarily people within his cabinet" (5T85; 5T83). Palmer also testified that about 20 or 30 Trenton citizens had separately remarked to him that Constance should not be selected as chief of police (5T83). I credit that testimony.

In another early portion of the conversation, Constance told the Mayor that he "couldn't believe" he was not going to be the next chief:

Mr. Constance: And you told everybody in the world you were going to do this.

Mr. Palmer: And I was prepared to take some shit.

Mr. Constance: Right. So -

Mr. Palmer: - And then -

Mr. Constance: Here it is -

Mr. Palmer: - That I could weather -

Mr. Constance: - Here it is.

Mr. Palmer: I ain't talking - the shit I was prepared for was like shit with the cops, you know -

Mr. Constance: There ain't going to be no protest.

Mr. Palmer: The shit with when that guy got killed - Filiciano. And I was prepared for that kind of shit.

Mr. Constance: No, there ain't going to be nothing of that kind of stuff....

[CP-11, pp. 15-16]

I infer from this portion of the conversation that the Mayor was concerned with (or more precisely, not deterred by) the reaction of Trenton's citizens to police conduct in the line of duty. Constance interrupted the Mayor's remark about being "prepared for shit with the cops," and quickly dismissed the possibility of protests by police officers against the Mayor. I infer that Constance mistakenly believed that the Mayor was about to express a tolerance of police officer protests. Knowing that he was recording the conversation and not wanting such a remark audiotaped, Constance interrupted the Mayor and disarmed him of a concern he was neither thinking nor expressing.

Several pages later in the transcript, Palmer said to Constance that if Republican Carmen Armenti had won the [1990] mayoralty, he (Constance) would have been promoted to chief. Palmer added, "He didn't win, all right? He didn't win. I won" (CP-11, p. 23). This exchange ensued:

Mr. Constance: That's right.
Mr. Palmer: I put Ernie [Williams] in.
Mr. Constance: Right.
Mr. Palmer: Okay?
Mr. Constance: And you told me you wished it was me.
Mr. Palmer: I wish it was anybody but him because you know what he's doing.
[CP-11, pp. 23-24]

Constance then threatened Palmer ("If you try to [put] somebody else in, there's going to be some craziness") and enticed him ("If you put me in, it'll be nice and smooth and easy") (CP-11, p. 24).

Palmer replied:

It's not going to be easy. Joe, if - man, you just have a mental - you just don't listen sometimes when I'm saying stuff to you. I told you when you were running [in 1995 for the New Jersey Assembly in the 15th District] about what's going to happen when you ran; 'Oh no. I got a lot of black friends.' Man, those people go to the polls and they just vote Democrat.
[CP-11, p. 25]

I infer that Palmer was concerned that Constance's election loss would harm his own political fortune if the deputy chief was promoted to chief of police. Palmer had already directly expressed that sentiment to Constance; "If it comes down to me or you, I ain't, that's not even -" (CP-11, p. 18); and, "But, Joe, I told

you. If it's between me and you, there's not even a choice with me" (CP-11, p. 24). A few pages later in the transcript, the same notion was again articulated:

Mr. Constance: Well, Doug, you're trying to destroy me here.

Mr. Palmer: I'm not trying to destroy you. But I ain't going to destroy me in the process.

[CP-11, p. 30]

I infer that if Palmer opposed Constance's promotion for reason(s) other than his own political success, i.e., that Constance's promotion to chief would be more notorious than popular, he would have mentioned it (or those) at that time.

Deputy Chief Constance remarked to the Mayor that he had received 20 phone calls that same day, inquiring if Palmer was "double-crossing" him [by announcing interest in an appointed civilian police director]. The Mayor replied:

I had 20 phone calls today, too. And you know what they were saying? I hope this means that Constance ain't going to be chief. And I mean I'm telling you, you -- that's why people are going to be pissed no matter what happens. All I'm saying is this, I've got to do what I think is right. And I appreciate everything you've done. But I mean, Joe, I'm trying to do the -- let's look at some reality. Okay? You're a Republican, I'm a Democrat. You (indiscernible) -- for Carmen -- I mean it's not like, you know, I owe Joe Constance. Why do I owe Joe Constance to be chief of police? I don't owe -- you know, I don't have no -- for what? But against all of those things, I said, 'Joe, I believe you can do the job.' I mean it's not like, you know, it was your turn. I just felt because of the relationship, you could do it. You ain't going to move into Trenton. You know you're not.
[CP-11, pp. 30-31]

Constance replied that he believed that they "were going to be together on this." Palmer answered, "I was telling people what was going to be happening to get it out of the way instead of (indiscernible) - but let me just - look, man, let me just" (CP-11, p. 32). I infer that "what was going to be happening" means that Palmer had told others of his intention to appoint Constance as the next chief of police. I infer that, "to get it out of the way" means that the Mayor was confessing that those stated intentions were merely expedient. I infer that "instead of..." was completed by words approximately meaning "...admitting that I did not like the options." I infer that meaning because on the next page of the transcript, the Mayor said to Constance:

And quite frankly, when I told you that you were going to be chief, I thought that I didn't have a choice. It was either one of you three. I mean - and quite frankly, if I had a choice, I might have thought something different. I might have looked out at somewhere else to get it because I knew it was always going to be a problem if I put you in there - and my comfort level was look, I had to take one of three. You know, X definitely; -- you know (indiscernible) - know this person. You or Meyer, that was it. And then so when I told you that, I thought I only had, you know - of three. But now people are introducing, 'you could have a police commissioner,' 'you're going to do this, this or this.' So, 'you have no excuse,' they're telling me - 'that shit don't fly no more about you don't have a choice of Constance because you do.'

[CP-11, pp. 33-34]

I find that the "problem" with Constance's appointment to chief of police to which the Mayor alluded, was political; that is, the Mayor's belief (stated often in this audiotaped conversation) that

his own popularity and support among Trenton voters would decline significantly. Corroboration for this finding lies in Mayor Palmer's "reverse" hypothetical. Palmer asked Constance to imagine himself as a Republican mayor; that the population of Trenton "was 55% Italian"; that he - Palmer - was chairman of the Democratic party and "coming up to be police chief"; and that the "Italian community expressed the feeling that "[Palmer is] racist toward them." Palmer rhetorically asked Constance: "What would you do?" (CP-11, p. 36; 5T92-5T93).

I also find that despite the Mayor's unspecified derisive remarks about Meyer, he considered the deputy chief a candidate to succeed Williams as chief (see finding no. 8).

Late in the audiotaped conversation, after Constance had repeatedly implored Palmer to "stay with him" and the Mayor had not relented, (once remarking, "I know what you want to hear. I can't tell you that."), Palmer empathized: "You're mad at me now...disappointed" (CP-11, p. 35). A few pages later, this exchange ensued:

Mr. Palmer: I feel agony about what I told you. I feel bad about it.

Mr. Constance: That's right. Now understand the pressures that I'm under because you did tell everybody --

Mr. Palmer: Well, I didn't tell --

Mr. Constance: -- And everybody --

Mr. Palmer: -- everybody.

Mr. Constance: Well, most --

Mr. Palmer: It wasn't in the paper.

Mr. Constance: -- mostly everybody.

Mr. Palmer: I didn't tell everybody. I told some people.

[CP-11, p. 39]

I infer that the Mayor's expressed guilt and contrition was for having told Constance before the fall of 1998 (when Palmer first learned that he could "choose" a civilian director) that he intended to appoint him as the next chief of police. That intention was revealed in June 1998 (the audiotape), despite the Mayor's simultaneously-expressed misgivings or concerns that Constance was a racial "lightning rod"; that he was Chairman of the Mercer County Republican Party, etc. (see finding no. 19). I also infer, consistent with those misgivings, that the Mayor told only "some people" of his intention and was careful that "it" (i.e., his own words) did not appear in local press accounts. This segment corroborates the Mayor's testimony that he "wasn't telling people" that Constance would become chief (see finding no. 8). I infer that "not telling people" means, in political parlance, not divulging an intention to more than a select number of trusted confidants. Finally, I find that the Mayor's two remarks at the end of the conversation, "Well, let me see" and "We'll get back to each other, man," offered no real assurance to Constance and were either prevarications or a way to end the call.

28. On March 4, 1999, negotiations representatives for the City and the TSOA conducted a pre-arbitration mediation session under the auspices of a selected interest arbitrator (IA-98-68; 1T89; 6T42). The parties had met under the same circumstance on August 26, 1998 and on January 13 and February 11, 1999 (IA-98-68). Constance testified that the parties had been "getting closer and

closer to a settlement" (6T39). Eapen and Constance met privately before the session began (1T90; 6T39). Constance believed that the parties had "hammered out a deal."

When the mediation session began at City Hall, the City's team of negotiators left the room and Constance informed the interest arbitrator "what the deal was" (6T39). The City's team returned. Constance testified that Business Administrator Eapen disavowed any deal, stating that every team must "get back to square one and [the City would] ignore all the work that had transpired before this" (6T40). I infer that Constance's testimony after "get back to square one" was a characterization of the meaning of Eapen's purported statement. Eapen testified that he told Constance that a deal was not possible until he "worked out the numbers" (1T119; 1T137). Constance became angry and started yelling, accusing Eapen of bargaining in bad faith and lying. Eapen in turn angrily replied and "it became very, very loud" (6T41; 1T91; 1T167; 1T169). Security officers assigned to City Hall were paged to investigate the confrontation (1T92; 6T41).

The phrases "getting back to square one" and "no deal until I work out the numbers" imply different states of collective negotiations. Although the parties did not commence a formal hearing or meet again with the interest arbitrator before signing their June 1999 "settlement," I cannot know which description more accurately defines the City's negotiation position three months earlier. Similarly, expressed anger, name calling, etc., may be a

spontaneous reaction to a dashed expectation or may be strategically purposeful or perhaps, both. Vice President Golden conceded that Constance may have first accused Eapen of "lying" before they yelled at each other.

Later that day, Eapen informed the Mayor and Chief of Staff Long about his loud argument with TSOA President Constance. He also advised them of his belief that the parties could reach a negotiated "settlement," despite the harsh exchange (1T93). Eapen thought that he and Constance lost their tempers; he believed that Constance failed to demonstrate a necessary "management stature" (1T93). Eapen defined that term to mean that a deputy chief "has to make some management decisions."

Eapen and Constance did not speak to each other after March 4 (1T136; 7T88).

29. On or about March 5, 1999, police Sergeant Schroeder spoke with Public Safety Director Keenan (3T95; 3T172). Schroeder said, "I heard there was a little carrying-on over at City Hall," referring to Constance's and Eapen's loud verbal confrontation at the previous day's mediation/arbitration session and the ensuing "security" response. Schroeder testified:

Keenan laughingly replied, 'I think Joe [Constance] really shot himself in the foot this time' or 'shot himself in the foot this time' [3T173]

Schroeder reported Keenan's remark to TSOA Vice President Joseph Golden (1T142). Schroeder testified that he believed that Keenan's

remark meant that Constance would not be promoted to chief if he "keeps causing problems" (3T174).

Keenan did not deny stating either remark (3T95). I find that Keenan said either version of the remark to Schroeder. Keenan testified:

My thinking was that the Mayor has decided to go with a police director. I mean, he's making that public. If Constance would oppose that and would mount an effort to have that defeated and a chief appointed, it seemed to me that getting into loud arguments with the business administrator would not be in your best interest.
[3T96]

The Mayor had informed his cabinet, including Keenan, in late January or early February 1999 of his interest in seeking a civilian police director (2T58). The Mayor had publicly announced that interest and it had been reported in the press before March 5. Similarly, Constance had voiced his and the TSOA's opposition to the creation of such a post. No evidence suggests that Keenan attended the session in City Hall at which Constance and Eapen yelled at each other (1T144; also see 1T88-1T89). Keenan testified:

I do know that when I talked to Sergeant Schroeder, and this was following the altercation between Deputy Chief Constance and the business administrator in negotiation; I did not hear that from the business administrator; I basically heard that there was a loud ruckus between the normal rumor scuttlebutt in City Hall. And I called Sergeant Schroeder to ask him about what had happened.
[2T107]

I credit Keenan's testimony. I find that his offhanded and amused reply to Schroeder's narrative meant that Constance's argument with the business administrator diminished the likelihood of defeating the incipient civilian police directorship and that in turn, Constance would be promoted to the position, chief of police.

30. Sometime between March 15 and 20, 1999, Trenton citizen Carole Nalbone attended a Trenton City Council meeting at which she heard Keenan remark about Constance. Nalbone is a former neighbor of Constance and she believed that he should have been promoted to chief of police (4T23-4T24; 4T26). She did not know "who Keenan was" and conceded under oath that she could not repeat his remark "verbatim" because "she was engaged in a conversation with somebody else" (4T25). She testified that she heard Keenan say: "As long as Joe's president of the union, he will never become chief." She then testified that Keenan said (presumably to a third party in a "private" conversation), "he would have to give up one thing to become something else."

Cheryl Worth is also a Trenton citizen who attended a City Council meeting in March 1999. Worth is a self-described "Republican activist" and has known Constance for many years, volunteering her efforts in his various political campaigns (4T18; 4T20; 4T21). Worth heard Keenan speak to Art Frank in a circle of other citizen-attendees during a break in or at the conclusion of the City Council meeting (4T18; 4T21). Worth testified that Keenan said: "Well, Art, you know if Joe wants to be chief, he is going to

have to resign as president of the union." When Keenan and Frank "discuss[ed] appointing someone outside of the police force," Worth testified that Keenan said, "As long as he is the head of the union, he'll never be chief" (4T18).

Art Frank is a Trenton citizen, Republican Committee member, and a neighbor of Keenan. He testified that he attended a City Council meeting in February or March 1999. He testified that he spoke with Keenan about Constance:

Dennis [Keenan] made the remark, 'if you wanted the position, you shouldn't be president of the union.'
[3T179]

Nothing in the record suggests that Keenan ever said such a remark to Constance. I infer that Frank's testimony would be most understandable if "Constance" or "he" (meaning, Constance) was substituted for "you." Frank testified that the remark was made "in the middle of conversation about other things" and that Cheryl Worth also witnessed the scene (3T179).

Keenan testified that he did not say to Frank that Constance must surrender his union affiliations if he wanted to become chief of police (2T113; 8T103). Keenan testified that he may have expressed reservations about "the president of the union being the acting chief of police" (2T113; 8T103). From his position as public safety director, Keenan appreciated a "difficult situation" if the "president of the union [was] the acting chief at the same time" (2T113).

By mid-March 1999, Keenan and others on the mayoral staff were weighing options and deciding upon strategies to implement a civilian police directorship. For example, they believed that a municipal ordinance authorizing the change was unlikely because Williams was scheduled to retire on April 1 and several Council members were opposed to the directorship (2T62; 2T64). Other mayoral staff discussions concerned the advantages and disadvantages of designating "rotating acting chiefs" or one "provisional police chief" after April 1 (2T62). I find that Keenan reasonably would be concerned about an "acting" or "provisional" chief at the date of the March 1999 Trenton City Council meeting.

I am not inclined to credit Nalbone's testimony because she conceded that she could not repeat Keenan's remark and may have been distracted by her own, separate conversation with an unnamed person. She then described two differing versions of the remark, or more precisely, one version and a characterization of that version that does not share the same meaning of the purported remark. I am not confident of the reliability of Nalbone's testimony and do not credit it.

Worth also testified about two different versions of Keenan's remark. The difference is important; the first describes the incompatibility of a police chief simultaneously holding the presidency of a police majority representative; the second version suggests that Constance's resignation from the presidency was a condition for consideration as acting or provisional chief. I do

not find that Worth's testimony is more than marginally inconsistent with Keenan's testimony about his remark or its meaning.

Frank spoke directly with Constance and was in the presumably best position to hear and understand Keenan's remark in its context. Frank did not provide specific context, leaving the possibility, for example, that Keenan said "couldn't" and not "shouldn't" which would change the remark's meaning in much the same way that Nalbone's and Worth's testimonies were internally inconsistent. I credit Frank's testimony about what Keenan said but do not give it greater weight than Keenan's testimony about the meaning of his remarks to Frank.

31. In early to mid-March 1999, Keenan informed Mayor Palmer that the City had a "system" of "rotating acting chiefs" whenever the chief of police was out sick or on vacation (2T62). Keenan opined to the Mayor that if he decided to appoint an (one) "acting chief" after Williams' April 1 retirement, the TSOA would probably file a contractual grievance (2T63). Keenan recommended the appointment of a "provisional police chief" for two reasons; (1) the appointee would receive the same benefits as a chief of police (i.e., salary and pension benefits) and (2) the appointee could serve indefinitely (2T63; 3T64-3T65). The Mayor agreed with the recommendation (3T65).

Interviews of all three deputy chiefs were conducted in the last week of March 1999 (3T65). The Mayor testified that before the interview process was decided upon, he "had really done the other

two deputy chiefs a grave injustice, by not even allowing them the opportunity to see if they're interested in being [provisional] chief" (5T124). I infer that the Mayor tacitly acknowledged his uncritical predisposition to assume that a deputy chief would have to be selected as chief and that Constance was the presumed successor to Chief Williams. The Mayor and/or Keenan determined that the selection of the provisional chief of police was to be based on the interviews (2T64). Palmer directed Keenan to produce his own list of questions (around 10) that would be asked of all three candidates and said that he would also prepare a list. Keenan gave Palmer his list of questions:

We interviewed toward the end of March, shortly before the retirement of Chief Williams. At that time, [Mayor Palmer] presented me with a list of questions on which we would ask all three individuals. And I did recognize several of my questions - [a] 50/50 mix or whatever.
[2T64]

An unspecified number of the questions concerned "patrol issues" (3T117). Keenan testified that he and the Mayor developed these particular questions "because of the visibility and interaction [of] the public with patrol [officers]" (3T117). I credit this unrebutted testimony.

Palmer and Keenan conducted the interviews (5T127; 2T64). Palmer testified that he "believed" that Eapen and Long attended, but neither Keenan nor Constance testified that the business administrator or the chief of staff were included (5T127; 2T64; 6T80; 7T94). Noting the Mayor's tentativeness, I find that Long and Eapen did not attend or participate in the interviews.

Constance rhetorically asked the Mayor during his interview, "Are you serious about this?" (6T80). Constance believed that Palmer had "already selected him over the two other [deputy chiefs]." Constance did not ask Keenan about his remark to Art Frank at the City Council meeting (7T94-7T95). Keenan thought that Constance was "professional" during the interview but appeared "a bit disturbed on being interviewed for the position" (3T72). By the date of his interview, Constance was publicly opposing the Mayor's proposal to create a civilian police director position (7T94). His efforts included lobbying City council members to vote against a proposed ordinance creating the police director position (7T93). The TSOA president argued that a directorship would be costly; that it would bestow too much power upon the Mayor, etc. (6T71).

Deputy Chief Meyer was not asked in his interview about the Hightower shooting (3T118). Meyer expressed opposition to the proposed civilian police director position to both Keenan and Palmer (3T97-3T98). The record does not clarify if he voiced his opinion during the interview.

Keenan and Mayor Palmer discussed their opinions of the candidates' performances on the same day each deputy chief was interviewed (3T66). Keenan expressed his opinion to Palmer that Deputy Chief Meyer had the "best working knowledge" of the patrol division and testified that "a lot" of his answers were most closely aligned with "the Mayor's vision or outlook on how the police department should function" (5T183; 3T67; 2T64). Keenan defended

that "outlook" as a wish to see "more interaction [of] the police department with the public in the area of civic associations" (3T71). Keenan also testified that Meyer offered a "well-rounded knowledge of all three sections of the department" (3T71).

Palmer agreed with Keenan's opinion that Meyer was "most qualified" for the provisional police chief position (5T183). Palmer defined the patrol division as the "lifeblood" of the police department. Palmer conceded in direct examination by TSOA counsel:

Quite frankly, all [3 deputy chiefs] were tainted, they all knew about the 'pay for promotions.' They all knew about it and just let it go. And I had a serious problem with it.
[5T133]

Palmer testified that he "named Meyer because [he] had to name someone..." (5T132).

Keenan phoned all the deputy chiefs and advised them that Meyer had been selected. Constance told Keenan of his disappointment (3T73). On or around April 1, 1999, Meyer was appointed as provisional police chief (1T112). Constance was more senior than Meyer in the deputy chief position (1T113).

32. On an unspecified date, Deputy Chief Constance attended an "affair" at Maxine's Restaurant in Trenton. The purpose of the gathering was to unveil a portrait of the Mayor (6T74). Constance testified that Mayor Palmer approached him and said, "Stop calling City Councilmen" (6T75). Constance recounted his response and their exchange:

Mr. Constance: Wait a minute, Mr. Mayor. I am calling City Council as the union president. We are against it. We don't want it.

Mr. Palmer: Stop calling City Council. I am telling you if you want to be chief. Why are you doing this kind of stuff to me?

Mr. Constance: It is unfortunate.

Mr. Palmer: Just stop it.

[6T75]

Constance also testified that he asked attendee and former mayoral Chief of Staff Bill Watson on that occasion, "What the hell is going on here? What are you doing?" (6T75). Constance testified that Watson replied: "'They're pissed off,' meaning the City administration. 'They're pissed off with what you're doing. You're not going to be chief'" (6T75).

I must infer that the gathering at Maxine's at which the deputy chief spoke with the Mayor and Bill Watson was sometime before the interviews and decision on the selection of provisional police chief. Although I am concerned that Constance never specifically referred to the "provisional" status of the post in his narration, I credit his unrebutted testimony.

Constance "led the fight" in "lobbying City council" against an ordinance creating a civilian police directorship (6T70; 6T71). Other City majority representatives were also opposed to the directorship (6T70). Constance believed that "[he] personally got the council to not vote for this" (6T71). Constance testified that he told City council:

We predicted it would cost more money. We predicted it puts too much power in one person's hands. And the man would be a political puppet

of the administration; that he is not going to be responsive, not only to the community. He is not going to be responsive to anyone but the Mayor.
[6T71]

I infer that Constance had so argued to City council before (and probably after) his discussion with the Mayor at Maxine's Restaurant. I credit Constance's testimony.

33. On April 14, 1999, Mayor Palmer issued a press statement advising that he directed Keenan to establish a policy prohibiting retiring police officers from "accepting monetary payoffs or incentives from lower ranking officers seeking promotions." The statement acknowledged a pending investigation of the practice by the Attorney General (R-19).

34. In or around the beginning of May 1999, Trenton City Council voted to approve an ordinance requiring a City-wide referendum on the Mayor's proposal to hire a civilian police director (3T100). The Council determined to hold the election in the third week of June 1999 (3T100).

35. On June 15, 1999, the City of Trenton and the TSOA executed a memorandum of "settlement" of wages, benefits and duration of successor terms to their 1995-97 collective agreement (R-2; R-17; 1T122; 8T50). The interest arbitrator assisted the parties (IA-98-68). One provision states that beginning on July 1, 1999, "sick leave payment at retirement increased from \$18,000 to \$20,000."

36. By an unspecified majority of votes, the City-wide referendum on hiring civilian police and fire directors was approved. On or about July 12, 1999, provisional Police Chief Meyer's title was converted to provisional or acting police director (3T75). Meyer was paid an annual salary of about \$104,000, about 15% more than a deputy chief's salary (1T112).

37. On August 26, 1999, the Attorney General mailed a letter to the Mayor regarding "incentive payments to superior officers to retire" (R-9). The Attorney General recommended that a criminal inquiry was unwarranted and that the Department of Personnel should promulgate a rule banning the practice.

The Attorney General wrote that interviews were conducted of past and present Trenton police officers and firefighters, City officials and the County prosecutor. The investigation showed that "the practice, known as 'buying the lamp,' exists in both police and fire departments and is especially common when a promotional list is about to expire..." (R-9). The "incentives" were reported to begin at \$15,000. The investigation was "unable to identify the historical origin of the practice." The Attorney General recommended that "the practice in the City of Trenton should be stopped immediately...."

38. On September 29, 1999, Mayor Palmer issued Executive Order 99-2, prohibiting all City of Trenton employees from paying (or offering to pay) or accepting (or soliciting) compensation "in order to gain a promotion or the opportunity for a promotion" (R-20).

39. Article V, "Pay Treatment for Extended Illness"

Section 5.05 of the TSOA agreement provides in pertinent portion:

A permanent employee who enters retirement pursuant to the provisions of a State administered or approved retirement system and has to his credit any earned and unused accumulated sick leave, shall be entitled to receive supplemental compensation for such earned and unused accumulated sick leave.

The supplemental compensation to be paid shall be computed at the rate of one-half of the eligible employee's daily rate or [sic] pay for each day of earned or unused accumulated sick leave, based upon the average annual compensation received during the last year of his employment prior to the effective date of his retirement, provided, however, that no such supplemental compensation payment shall exceed \$12,000.00. For employees retiring in 1993, or \$15,000 for employees retiring in 1994 and increasing to \$18,000, effective January 1, 1996.

This supplemental compensation shall be paid in a lump sum after the effective date of retirement or death, or as may be elected by the employee deferred for one (1) year.

Article XVI, "Grievance Procedure" provides a multi-step grievance procedure ending in binding arbitration.

40. On December 3, 1999, Constance sent a memorandum to Acting Police Director Paul Meyer, advising, "As per your prior approval, I will be starting my extended vacation effective December 5, 1999" (R-15; 7T12).

On December 6, 1999, Constance began full-time employment as one of eleven members of the Board of Trustees of the New Jersey State Parole Board, pursuant to a gubernatorial appointment. The salaried position pays \$88,000 per year (7T44-7T45).

On December 27, 1999, John Gabauer, a designated acting police director, sent Constance a letter, advising that "any municipal police officer who accepts a gubernatorial appointment is to be given an unpaid leave of absence." Citing N.J.S.A. 52:14-6.2; N.J.S.A. 40A-136; and N.J.S.A. 4A6-1.12, Gabauer wrote that a police officer may remain on unpaid leave for one year and that the City has determined to "place you on an unpaid leave for the duration of your gubernatorial appointment, not to exceed one year." Placement on unpaid leave was to commence on December 31, 1999 (CP-12).

On December 29, 1999, an attorney for Constance sent a letter to Gabauer, advising that his client had not requested a leave of absence. "Chief Constance is presently an employee of the City of Trenton who requested and was granted vacation leave." The letter advised that the "statutory and code references" in the City's December 27 letter concerned the right of State employees receiving gubernatorial appointment to other State office to request leave; they did not empower an employer "to act unilaterally to cancel a vacation leave and impose a leave without pay status." The attorney wrote that the referenced statutes did not permit "the employer to ignore the requirements of the Merit System Board and of the Public Employment Relations Commission...."

The attorney also wrote that N.J.S.A. 40A:14-136 permitted the City "to make payment to a retiring officer to compensate the officer for unused, earned vacation leave. When this opportunity was first presented to the City, it was rejected." The rejection in

turn, left Constance to decide "whether to forfeit his earned benefits or to follow established tradition and past practice of postponing his retirement until a time when no earned vacation time is required to be forfeited." The City's purported action would "waste considerable money by adding a full year onto the projected retirement date." Finally, the attorney wrote that unless the City was willing to "reduce the earned vacation benefits to a realistic sum of money, it will not be permitted to deny Constance that which it has extended and is currently extending to many other officers who elect to utilize vacation prior to retirement" (CP-13).

On April 20, 2000, Constance sent a memorandum to James Golden, Police Director for the City of Trenton, advising that it was "being written to officially notify you of my retirement, effective April 1, 2000." The memorandum notes that "appropriate documentation" was sent to the "fiscal management unit" (CP-12).

On June 12, 2000, the State Department of the Treasury (Division of Pensions and Benefits) notified Constance that his retirement application was approved and effective on May 1 (R-18).

41. City Personnel Officer James Norton administers payments of benefits to City employees, including prospective retirees seeking a payout for vacation pay set forth in collective agreements (8T45-8T46; 8T47). Employees are normally entitled to "cash out" their last two years of accumulated vacation time (8T89). Traditionally, covered employees retired on February 1 so as to be eligible to receive that calendar year's allotted vacation

time; they also received the unused vacation time from the preceding calendar year (8T47; 7T25). Constance had accumulated 65 vacation days for 1998 and 1999 (8T91). He was also entitled to receive compensation for 91 vacation days which had been accumulated from 1992-94 (see finding no. 6; 7T32; 8T59).

Norton established that accumulated vacation benefits are paid to a retiree when the City receives written notice from the Department of Personnel that that employee's retirement has been approved (8T52). Norton testified that no contractual provision or "practice" entitles a police officer to receive accumulated vacation benefits before his or her retirement application is filed or approved (8T56; 8T58).

Constance testified that "it was not [his] understanding that the City's practice is to make vacation [benefits] payments after it receives confirmation of retirement from the [State Division of Pensions and Benefits]" (7T38). Constance did not explain his understanding of any practice governing the timing of payments of accumulated vacation benefits to retirees or prospective retirees. In October 1999, Constance had requested a City "allotted" of his unused vacation benefits through 1999 (6T91). He testified that if he was not "bought out," he would remain "employed" through February 1, 2000, and so receive 32 vacation days (6T91). Norton testified that if Constance had "qualified" for vacation benefits in 2000, he would have acquired 32 vacation days (8T92). Constance's 1998 accumulated vacation benefit would have been voided, pursuant to the formula (8T49; 8T63; 8T93).

Norton explained that Constance had not requested unpaid leave (8T85). He testified:

We [the City] did that by referring to a regulation in Title 4....He was on another job at that point in time and we [placed] him on an unpaid leave of absence because of that. He wasn't working for the City at that time.
[8T85]

Norton testified that except for his unpaid leave of absence, Constance would have been "cashed out" for the 2000 allotment of vacation days (32) on February 1 (8T89). An employee could choose to use the vacation benefit (instead of "cashing out"), i.e., take time off, provided that the leave was approved before the retirement date (8T90).

ANALYSIS

In re Bridgewater Tp., 95 N.J. 235 (1984) articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved 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 employee was hostile toward the exercise of protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as

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

Considering the entire record as a whole, including the weight of evidence, inherent probabilities and reasonable inferences, I recommend that the TSOA has not proved by a preponderance of the evidence that protected conduct was a motivating or substantial factor in the decisions not to appoint Deputy Chief Joseph Constance as Trenton chief of police or provisional chief of police. I find that only some evidence, much less than a preponderance, indicates that protected activities figured in the adverse personnel action(s). I was especially persuaded by evidence of the Mayor's state of mind revealed in two phone conversations - one in June 1998 and the other in February 1999 - surreptitiously recorded by Constance. The complete transcripts of these two calls and other evidence show and corroborate Mayor Douglas Palmer's testimony that he was initially

ambivalent about appointing Constance as chief for reasons unrelated to union activities, despite a revealed intention to promote him as Chief Ernest Williams' successor; and that later, he opposed the promotion when he learned that a civilian police director could be appointed to the top post, instead of one of the deputy chiefs. I also find that Constance was denied the provisional position for the same reasons he was denied the chief position and for the reason of his outright opposition to a civilian directorship, conduct which, in this case, was only partially protected by the Act.

The TSOA has proved the first two parts of the three-part test set out in In re Bridgewater Tp. Deputy Chief Constance was TSOA president and led his negotiations team through the collective negotiations process during the period of time preceding the contested employment decision(s). Representatives of the City, including Business Administrator Joseph Eapen, sat opposite Constance at the negotiations table for many months and were aware of his protected role on behalf of the superior officers. The issue in this case, as in most a(3) cases, is whether the public employer was hostile to the exercise of protected activity.

The most reliable and persuasive evidence of the Mayor's state of mind in June 1998 is the transcript of Constance's first secretly-recorded phone conversation with the Mayor. In that conversation, Palmer told Constance that he was appointing him as the next police chief, perhaps even sooner than the anticipated April 1, 1999 retirement of Chief Williams. Palmer also expressed

some concerns about the appointment; he told Constance that he could not retain his chairmanship of the Mercer County Republican Party if he was appointed chief; that his name, mentioned among City residents in one instance, was a "lightning rod"; and that citizens mistakenly believed that he was the chief, when Williams was chief, in fact. The latter concern arose from Constance's frequent statements on policing reported in the local press and from "antagonism," which citizens harbored against the department, said the Mayor.

A substantial portion of their conversation was a joking political banter, with sarcastic barbs directed at each other and at local political figures. The Mayor said that "politics" dictated his decision to call for a State Department of Personnel competitive examination for the position of chief of police. Constance expressed suspicion of Palmer's motives for the test, but was assured that the decision on who was to succeed Williams should not appear to be "rubber-stamped" and that he (Constance) need not be ranked number one on the certified list to receive the promotion, anyway. I surmise that Constance's suspicion about the examination, together with the Mayor's public silence on who was to be appointed as the next chief, prompted his surreptitious recording of the conversation.

Constance was unaware that in early 1998, Mayor Palmer directed that the examination be given because he was concerned that Constance was not committed to community policing and to improving

cooperation between the department and Trenton civic organizations. I infer that the Mayor's concern was heightened by the March 1998 Hightower shooting. Believing that he had to select one of the deputy chiefs, Palmer assumed that Constance, the most senior deputy chief and the ablest leader among them, would probably have to be promoted. The Mayor also expressed concerns or misgivings and was noncommittal, evidenced by his calling for the DOP examination. The June 1998 recorded conversation shows the Mayor's ambivalence. If Palmer had to appoint Constance, he was to be embraced with the hope that he would aggressively promote stronger departmental ties with Trenton's neighborhoods. To the extent that Constance's ascension remained a question of the Mayor's prospective "choice," (if only because he was dissatisfied in choosing him) Constance would have to listen and yield to his concerns.

The only portion of the conversation which concerned conduct protected by the Act was the Mayor's disparaging remark about Chief Williams' voluntary appearance on behalf of the PBA at a recent interest arbitration hearing (see finding no. 16). Police chiefs are "irrebutably certain" managerial executives. City of Jersey City, P.E.R.C. No. 86-12, 11 NJPER 459 (¶16163 1985). The Mayor legitimately expected Williams' loyalty to "management." I find no animus in his comments. I have also found that the Mayor's incorrect remark that Williams had "testified for you guys" (lumping together the PBA and TSOA) indirectly corroborated his testimony that he did not closely follow the City's collective negotiations

with the PBA (see findings nos. 16 and 21). Nor did the Mayor say anything in the phone conversation about Constance's argument with Business Administrator Eapen during a TSOA negotiations session at a Core States Bank branch in Trenton, about one month earlier (see finding no. 13).

The TSOA contends that Constance's (and other TSOA members') "boycott" of the December 1998 Ingram swearing-in ceremony was protected conduct under the Act and that Mayor Palmer's anger at Constance for his absence demonstrates anti-union animus. I disagree.

In Bergen Comm. College, P.E.R.C. No. 87-153, 13 NJPER 575 (¶18210 1987), the Chairman, acting on behalf of the Commission, found that a college faculty's decision not to attend a graduation ceremony in protest of certain contract negotiations was not activity protected by the Act. A provision requiring faculty attendance at graduation was printed in faculty handbooks, but not in any collective agreement. The hearing examiner found a "past practice" of mandatory attendance, pursuant to a 95% attendance rate, year after year. See also Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981).

The TSOA presented little evidence of strictly voluntary attendance at swearing-in ceremonies. The record shows that the ceremonies were held during normal business hours and were well-attended by all ethnic groups in the department. Nor had Constance missed any previous ceremonies. Mayor Palmer acknowledged

that "both union presidents" (the TSOA and PBA) attended the swearing-in ceremonies. Even assuming that Constance's "boycott" of the Ingram ceremony was protected conduct and not an unlawful job action, I find that the Mayor's anger was not a reaction to the exercise of protected rights. The Mayor was angry at the appearance of "disloyalty" which he imputed from Constance's absence. By "disloyalty," I mean a conspicuous indifference to the promotion of a black officer and by extension, a personal snubbing of the Mayor (see finding no. 25). Any of Palmer's seemingly disparaging remarks to Constance that day about the TSOA were in direct and immediate response to Constance's representations that his absence from the ceremony was "a union thing." Palmer was concerned only with the fact and appearance of that absence, and not with the reason for it. In the transcript of their February 1999 recorded phone conversation, Constance even disagreed with Palmer that his boycott of the Ingram ceremony was an indication of disloyalty; the deputy chief reiterated that his absence was a "union thing." I infer from that exchange that Constance knew that Mayor Palmer's anger at him was unconnected to "protected" conduct.

A prelude to the Ingram promotion and ceremony was the matter of "pay for promotion," about which the Mayor was solicited on October 22, 1998 (see finding no. 4). I heard extensive testimonies about this illicit conduct and the Mayor's "knowledge" about it was contended to be a barometer of his credibility. The City contends that before October 22, the Mayor did not know about

officers being paid by other officers to retire earlier than they otherwise intended. The TSOA contends that the Mayor knew of it for years and did nothing to stop it. Williams, Keenan and Meyer were all promoted to the highest positions, despite their knowledge of the "practice."

I have found that in the early 1990's, Chief Williams informed the Mayor one time or perhaps twice, about the contours of "officers being paid to leave," his remarks based exclusively on "rumor" or "innuendo." Williams did not testify that any named officers were discussed. In early 1995, Acting Public Safety Director Waldron wrote a letter to the County prosecutor, inquiring about the legality of a specific "rumored" (and aborted) instance of "pay for promotion," pursuant to his discussions with then-Fire Chief Keenan, and Law Director Rocky Peterson. Mayor Palmer was not informed about the instance or the inquiry (see findings nos. 4 and 7).

I have also found that Mayor Palmer was surprised and concerned by the October 22 solicitation on behalf of Officer Ingram. His immediate inquiry of staff, including Keenan, and prompt directive that the Attorney General be formally apprised corroborate his provocation. Keenan presumed that Constance's repeated proddings of him to "break the tie" on the promotional list for the remaining sergeant vacancy implicated the deputy chief in "pay for promotion." His letter to the Attorney General implies that belief. The Mayor adopted that presumption and two months

later, on the day of Ingram's swearing-in ceremony, he accusatorily questioned Constance about "pay for promotion."

Williams' cursory description of the "practice" was remote in time. The Mayor had not been informed of any specific "pay for promotion" incidents. On October 22, 1998, he was abruptly solicited at a social event to fend off a payment from one named officer to another. That Palmer mistakenly or prematurely relied upon Keenan's stated presumption of Constance's participation in that alleged instance of "pay for promotion" (while the inquiry of the Attorney General was pending) in no way undermines the sincerity of the Mayor's belief. It was another concern he had about appointing Constance as chief.

In November 1998, Mayor Palmer was discontented enough (with Constance's candidacy for reasons unrelated to protected activity) to ask his staff about other "options" for a successor to Chief Williams. A civilian police directorship was suggested and its viability was confirmed over the next two months (see finding no. 24). Palmer liked the idea and said so publicly in early February 1999. Constance was incensed by a newspaper article reporting the Mayor's interest and he surreptitiously recorded another phone conversation with the Mayor.

The transcript of the February 1999 phone conversation is the most reliable evidence in the record of the Mayor's state of mind about Deputy Chief Constance's (possible) promotion to chief. Alternatively questioned, cajoled and implored, the Mayor was

essentially forced to state his reasons for rejecting Constance's candidacy for the position. Except for an admitted exaggeration that 15 people had "sat him down" that weekend to disabuse him of any intention to promote Constance, the Mayor's remarks in the transcript were candid and unimpeached. He repeated two concerns which he expressed in the June 1998 audiotaped conversation; he would lose Democratic support by appointing a Republican; and Constance was unpopular in Trenton's black communities. Palmer reiterated his apprehensiveness for his own elective political future if Constance was appointed. None of these reasons concerned activity protected by the Act. The Mayor also said that he knew "it was always going to be a problem if I put you in there" and that the reason he told the deputy chief of his intention to appoint him was, "I thought that I didn't have a choice." The Mayor even expressed his rejection of Constance diplomatically: "All I'm saying is this, I've got to do what I think is right. And I appreciate everything you've done" (see finding no. 27). I am persuaded that by the date of this February 1999 conversation, Mayor Palmer had decided that Joseph Constance would not be appointed chief of police. Nor do I believe that his rationale for that decision was attenuated in any way by the prospect that Constance might be appointed provisionally, or for some finite, temporary period of time.

The events of March 1999 were largely irrelevant to the Mayor's decision or reinforced it for reasons not protected by the Act. On March 4, Constance and Business Administrator Eapen yelled

loudly enough at each other at the start of a pre-arbitration mediation session in City Hall that security personnel were called to investigate the disturbance. In previous negotiations sessions, Eapen appealed to Constance to consider his "management" title and interest in being appointed chief as inducements for him (on behalf of the TSOA) to accede to City negotiations demands (see finding no. 13). Eapen had been warned that an unfair practice charge would be filed against the City if he failed to curb such remarks (see finding no. 12). No separate charge highlighting Eapen's conduct was filed. By March 1999, the parties were nevertheless "getting closer and closer to a settlement," according to Constance. Although the March 4 altercation is notable for the personal invective among the two principal negotiators, later that day, Eapen assured the Mayor that a negotiated settlement was possible. No evidence suggests that the Mayor thought otherwise or was angry at Constance for the altercation.

The next day, Public Safety Director Keenan remarked to Sergeant Schroeder, after asking the officer for his account of the altercation, "I think Joe [Constance] really shot himself in the foot this time." I infer that Keenan's off-handed comment meant that he thought the argument had hurt Constance's chances for promotion. Keenan did not participate in collective negotiations and no evidence suggests that he had any need or interest in keeping abreast of its progress. Nor does the record indicate that Keenan knew that Mayor Palmer had essentially informed Constance a month

earlier (in the taped phone conversation) that he was not going to be promoted. In other words, before March 4, and for reasons unrelated to protected activity, Constance's chances for promotion were almost nil.

Also in March 1999, Mayor Palmer publicly endorsed the creation of a civilian police directorship (and abolition of the police chief title), while Deputy Chief Constance, acting on behalf of the TSOA and other uniformed City employees, publicly opposed it. Constance "lobbied City Council" to vote against a proposed ordinance authorizing the hiring of a civilian police director. Mayor Palmer told Constance to "stop calling City Council" (see finding no. 32).

In West Windsor Tp. v. PERC, 78 N.J. 98, 111 (1978), our Supreme Court wrote that under Article 1, para. 18 of the New Jersey Constitution, public employees "possess the right to seek to influence governmental decision-making to the same extent and through the same means as all other citizens...." The Court also wrote:

...[W]e believe that N.J.S.A. 34:13A-5.3 reflects a legislative determination to deal with grievance presentation only in regard to the aspect of the employment relationship most vital to public employees - the terms and conditions of their employment.
[78 N.J. 110]

One could argue that Constance's warnings to City Council about high financial costs and dangerous patronage implicated managerial concerns rather than employee terms and conditions of employment

(see finding no. 32). I assume that Constance's remarks to City Council were protected by the Act.

The TSOA argues that an appointing authority cannot refuse to promote an employee, based upon a concern that a union leader cannot "switch hats," citing Willingboro Tp. Bd. of Ed. and Employees Ass'n of the Willingboro Schools and JoAnn Phelps, P.E.R.C. No. 98-113, 24 NJPER 171 (¶29085, 1998), aff'd and rem'd on remedy 25 NJPER 322 (¶30138 App. Div. 1999). In Willingboro, the Commission found a "strong showing of animus" when an Association vice president was not promoted to a supervisory position. The Commission wrote that, "the mere fact that a person has held a union position is not a legal reason by itself to believe that the person, if promoted, would not be able to perform supervisory duties effectively." 24 NJPER 173.

I have found only slight evidence of animus in this case and none revealed by Mayor Palmer. Willingboro concerned the promotion of a union leader to a supervisory position, and not to a managerial executive position, such as chief of police. N.J.S.A. 34:13A-6(d) excludes managerial executives from the definition of "public employee." The Act specifically permits supervisors to organize, unless an exclusion applies. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d).

An employee will be found to be a managerial executive if he or she either formulates managerial policies and practices or is charged with the responsibility of directing the effectuation of

such management policies and practices. N.J.S.A. 34:13A-3(f); New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997); Ocean Cty. Util. Auth., P.E.R.C. No. 98-120, 24 NJPER 212 (129100 1998).

A City mayor is charged with creating management policy and retains managerial executives to "formulate" and/or "direct their effectuation." Public loyalty to an articulated managerial policy is presumed of any managerial executive employee. In March 1999, Deputy Chief Constance was Mayor Palmer's most vocal and effective opponent of his plan to implement a civilian police directorship. The Mayor could reasonably expect Constance's continued pronounced antipathy to that plan if he was promoted to provisional police chief or director. No evidence in the record indicated that the "provisional" designation would erode any of the "irrebutably certain" managerial responsibilities of a chief of police. See City of Jersey City.

It appears anomalous and self-defeating for a mayor to be lawfully required to promote a publicly acknowledged, outspoken and outright opponent of a proposed and lawful managerial plan to a managerial executive position. This seems especially true if the position is inextricably connected to the plan. Although Deputy Chief Meyer also opposed a civilian police directorship, no evidence shows that he publicly advocated its demise.

I agree with the TSOA that the late March 1999 interviews for provisional chief were a "sham," if that word means that

Constance had already been eliminated from consideration. I have found that by early February 1999, the Mayor had decided not to promote Constance for reasons unrelated to conduct protected by the Act. I have also found that the weight of evidence about the Mayor's motives for naming a provisional chief in March 1999, compels the same conclusion. Perhaps the interviews enabled Palmer and Keenan to more confidently choose Deputy Chief Meyer over Deputy Chief Gabauer. In any event, I find that the interview process was not tainted by anti-union animus.

Alternatively, if the Mayor had not decided against appointing Constance as chief by February 1999, I find that the TSOA did not carry its burden of proving that the City's (i.e., the Mayor's) "anti-union animus" in March 1999, was a substantial or motivating factor in the decision not to appoint Constance as provisional chief. I rely on the facts and upon my review of the evidence in this section. I would also find that the TSOA did not prove that the interview process for provisional chief was tainted by anti-union animus.

Accordingly, I recommend that the Commission dismiss charge docket no. CO-H-99-331 of the Consolidated Complaint.

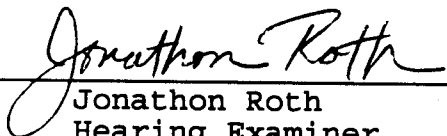
In the absence of any demonstrated unlawful motive for the City "refusing" to "buy back" Deputy Chief Constance's unused vacation days on October 18, 1999, I recommend that the Commission dismiss charge docket no. CO-H-2000-105 of the Consolidated Complaint (see finding no. 41).

The final charge of the Consolidated Complaint alleged that on December 28, 1999, the City of Trenton "unilaterally departed" from a "past practice" by placing Constance on "leave without pay" during an approved vacation. The City's action allegedly violated 5.4a(1), (2), (4) and (5) of the Act.

In the absence of any demonstrated unlawful motive for its decision to place Deputy Chief Constance on "leave without pay," I recommend that the Commission dismiss the 5.4a(1) and (2) and (4) allegations. The TSOA presented no evidence defining the "practice" from which the City allegedly deviated. Accordingly, I recommend that the 5.4a(5) allegation also be dismissed. I do not need to determine if the City violated N.J.S.A. 40A:14-136.

RECOMMENDATION

I recommend that the Commission dismiss the Consolidated Complaint.



Jonathon Roth
Hearing Examiner

DATED: December 3, 2001
Trenton, New Jersey