

P.E.R.C. NO. 2003-4

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of.

MIDDLESEX COUNTY SHERIFF,

Respondent,

-and-

Docket No. CI-H-98-59

JOSEPH A. KASHA and STEVEN ECKEL,

Charging Parties.

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COUNTY OF MIDDLESEX,

Respondent,

v.

OAL Dkt. No. CSV 10229-98

STEVEN ECKEL,

Appellant.

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SYNOPSIS

The Public Employment Relations Commission finds that the Middlesex County Sheriff violated the New Jersey Employer-Employee Relations Act when it reassigned Steven Eckel, a sheriff's officer, from his courtroom post to a Probation Department post and when it suspended him for ten days. Eckel, the president of FOP Local 59, and Joseph Kasha, former FOP president, filed amended unfair practice charges against the Middlesex County Sheriff. The charges allege that the employer violated the Act by creating a hostile atmosphere towards members of the FOP, a minority labor organization, treating FOP members differently than members of the majority representative PBA, and reassigning Eckel and suspending him for 10 days. A Complaint was issued on the amended unfair practice charges. Eckel also filed an appeal of the suspension with the Merit System Board. The Complaint and MSB appeal were consolidated for hearing before a Special Administrative Law Judge. The Commission concludes the Eckel was reassigned and suspended for questioning unit members about drug testing. It orders that he be reassigned to a courtroom post and that his suspension be modified in conformance with the Final Action of the Merit System Board. The Commission dismisses allegations that the reassignments of the six other sheriff's officers were illegally motivated.

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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Appearances:

For the Respondents, Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys (Kevin Kovacs, of counsel)

For the Charging Parties-Appellant, Brian M. Cige, attorney

DECISION

On January 23 and October 6, 1998, February 18, 1999, and October 5 and 17, 2000, former FOP Local 59 president Joseph Kasha and current FOP Local 59 president Steven Eckel filed an unfair practice charge and amended charges against the Middlesex County Sheriff. The charges allege that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

specifically 5.4a(1), (2), (3), (4) and (7),<sup>1/</sup> by creating a hostile atmosphere toward members of FOP Local 59, a minority labor organization, treating FOP members differently from majority representative PBA members, and reassigning Eckel and suspending him for ten days.

On or about August 11, 1998, Eckel filed an appeal of his suspension with the Merit System Board.

On May 24, 1999, a Complaint issued on the unfair practice charge and first two amendments. A third amendment was incorporated on October 5, 2000. The allegations in the October 17, 2000 amendment were ruled untimely.

On November 28, 2000, the employer filed an Answer denying that it engaged in any unfair practice.

On May 30 and June 20, 2000, the Commission and Merit System Board issued a Joint Order consolidating the respective matters and determining how they would be heard and decided.

Middlesex Cty. Sheriff, P.E.R.C. No. 2000-102, 27 NJPER 23 (132001 2000). The Joint Order stated:

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

The above matters are consolidated for hearing before a Hearing Examiner of the Public Employment Relations Commission designated as a Special Administrative Law Judge. The Administrative Law Judge will first offer recommended findings of fact and conclusions of law to both the Public Employment Relations Commission and the Merit System Board, disposing of all issues in controversy through a single initial decision under N.J.S.A. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a); and

Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Commission to determine whether the employer violated the Employer-Employee Relations Act, including whether it did so in suspending Eckel for ten days. If the Commission finds that the suspension violated the Act, the decision and complete record will be sent to the Merit System Board for imposition of whatever specialized relief is warranted under Merit System law. If the Commission determines that Eckel would have been disciplined even absent his FOP activity, then its decision and the complete record will be sent to the Merit System Board which will determine whether Eckel's suspension was otherwise warranted under Merit System law.

Hearing Examiner Jonathon Roth was appointed as a temporary administrative law judge ("ALJ"). He conducted ten days of hearing between December 4, 2000 and May 16, 2001. On April 1, 2002, he issued his Initial Decision (copy attached).

The ALJ found two violations of the Act. The first involved the reassignment and ten-day suspension of then-FOP Trustee Eckel. The ALJ concluded that the Sheriff's decisions to reassign Eckel and to suspend him for ten days were motivated by Eckel's protected inquires, as an FOP representative, among fellow employees about drug testing that he believed was improper. He further concluded that the Sheriff did not prove that he would

have suspended Eckel absent those inquiries for ten days; as opposed to a shorter suspension for leaving his post. The ALJ then considered the Merit System Board appeal and determined that Eckel was not guilty of certain charges, but was guilty of others. He further concluded that absent Eckel's FOP support, the Sheriff would have applied progressive discipline standards and imposed a six-day suspension.

The second violation involved the reassignments of six FOP members. The ALJ found that the employer had offered no explanation for the reassignments and he concluded that the reassignments were intended to punish FOP members for a hallway meeting.

The ALJ recommended dismissing the remaining allegations. He concluded that the charging parties did not prove that the Sheriff treated FOP members disparately and recommended that the remaining allegations in the Complaint be dismissed.

By way of remedy, the ALJ recommended that Eckel be reassigned from the probation department post to a courtroom post, and that his suspension be reduced from ten to six days. He also recommended that Sheriff's Officers Allen, Filomeno, Castagna and Giordano be offered the opportunity to transfer to the posts they held immediately prior to their October 1997 reassignments.<sup>2/</sup>

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<sup>2/</sup> Sheriff's Officers Kasha and Kijula have retired.

On April 24, 2002, the employer filed exceptions. It argues that Eckel's ten-day suspension and reassignment should be upheld because he was insubordinate and disloyal. The employer further argues that even if the Sheriff did not prove these charges, Eckel's leaving his post, by itself, warranted reassignment and a ten-day suspension under progressive discipline standards.

The employer also excepts to the conclusion that the reassignments of the six FOP members were in retaliation for a meeting to discuss FOP business. The employer specifically contends that the ALJ erred in finding that it had not offered explanations for the reassignments. It further contends that two officers were transferred off the first floor and two were transferred to the first floor and that it was therefore contradictory for the ALJ to have found that the reassignments were intended to break up officers from meeting on the first floor. Finally, the employer contends that the recommendation that the reassignments were in retaliation for a meeting to discuss union business is not supported by the credible evidence; it argues that such a conclusion is undercut by inconsistencies and contradictions and based solely on hearsay.

On May 1, 2002, the charging parties filed untimely general exceptions that urge us to make additional findings. These exceptions do not identify that part of the Initial Decision to which objection is made or designate by precise page citation

the portions of the record relied on. See N.J.A.C. 19:14-7.3(b); 1:1-18.4(b). We do not consider them.

We have reviewed the record. We adopt and incorporate the ALJ's findings of fact (Initial Decision at 3-67) with the modifications specified later in our analysis.

The charging parties contend that Eckel's suspension and reassignment and the reassignments of six other officers were motivated by hostility towards the officers' protected activity and thus violated 5.4a(3). The standards for assessing such discrimination claims are set forth in In re Tp. of Bridgewater, 95 N.J. 235 (1984). Under Bridgewater, 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 employer was hostile toward the exercise of the 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. Conflicting proofs concerning the employer's motives are for us to resolve.

#### Eckel's Reassignment and Suspension

We begin with Eckel's reassignment and suspension. The relevant facts follow.

On June 30, 1998, Eckel was assigned to a courtroom post. Generally, a sheriff's officer assigned to a courtroom must be in that courtroom whenever the judge is on the bench. Investigator Rocco Bollaro was ordered to deliver a package to Eckel's judge personally. Bollaro walked down a security corridor looking for the judge's chambers. Seeing Bollaro, Eckel came out of the courtroom and said something to the effect, "You got to pee in a cup?" The reference was to the voluntary drug tests investigators had taken to squelch a rumor about use of illicit drugs. This conversation upset Bollaro because he believed that the drug tests were nobody's business. He reported the incident to Chief Angelo Falcone. His written report quoted Eckel as saying, "That's really fucked up. They can't do that to you guys."



Eckel had also asked two or three other employees about the drug tests. The ALJ found that Eckel was interested in learning about details of the testing. The Sheriff was informed about Eckel's conversations and told that Eckel had tried to insinuate that the Sheriff was acting illegally and that the FOP would never have let it happen.

Eckel was summoned to a meeting with then-FOP president Randall Kijula, Chief Falcone and the Sheriff. The Sheriff was angry. He stated that Eckel would have to learn how to keep his mouth shut and threatened a transfer and suspension.

On or about July 6, 1998, Eckel was reassigned from the courthouse in New Brunswick to a probation department post in Piscataway. The ALJ found that the reassignment to the isolated probation post was to keep Eckel away from as many sheriff's officers and investigators as possible. Eckel was also issued a Preliminary Notice of Disciplinary Action charging him with violations of six department rules and regulations. At the department hearing, another charge was added.

On July 28, 1998, the Sheriff issued a Final Notice of Disciplinary Action sustaining all the charges and suspending Eckel for ten days.

These facts show that the Sheriff knew about Eckel's inquiries about the drug tests and that the Sheriff's hostility towards those inquiries motivated Eckel's reassignment and suspension. Under Bridgewater, the key remaining question is

whether, as Eckel contends, his inquiries constituted protected activity or whether, as the employer contends, they lost their protection because they were insubordinate or disloyal.

N.J.S.A. 34:13A-5.3 protects employees' rights to assist employee organizations, including minority organizations. Ibid. Employee drug testing directly affects employee rights and we conclude that Eckel had a right, protected by the Act, to inquire of his fellow employees about the employer's drug testing practices. The United States Supreme Court has also recognized the great importance of employees' freedom of communication to the free exercise of organizational rights. Central Hardware Co. v. NLRB, 407 U.S. 539, 542-543 (1972). Interference with employee communication, whether directly by prohibition, or indirectly by intimidation or reassignment, may therefore violate the Act. See Sussex Cty., P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994); see also Phoenix Transit System, 337 NLRB No. 78, 170 LRRM 1001 (2002) (employer violated National Labor Relations Act by prohibiting employees from discussing their sexual harassment complaints among themselves); contrast Caesar's Palace, 336 NLRB No. 19, 168 LRRM 1287 (2001) (employer did not violate act by enforcing confidentiality rule during ongoing investigation of illegal drug activity where rule was necessary to ensure that witnesses were not put in danger, evidence was not destroyed, and testimony not fabricated).

An employee's right to discuss terms and conditions of employment may be limited by his or her ability to interact with other employees. In this case, Eckel confronted Bollaro only after leaving his work site. If that were the only conversation that motivated Eckel's reassignment and suspension, we would have to consider the argument that Eckel's conversation with Bollaro was not protected because Eckel had no authority to leave his work site. The record indicates, however, that Bollaro was only one of a number of employees questioned by Eckel and that the Sheriff was responding to all of Eckel's conversations, and not just the one resulting from his leaving his post.

The employer argues that a law enforcement employer has a significant and special interest in limiting a public employee's speech to maintain discipline, preserve confidentiality, avoid disrupting employee performance, and promote a close relationship with superiors. The cited case law, however, measures individual employee conduct against constitutional standards. None of those cases addresses the right of employees under a labor relations statute to question department actions that affect employees' terms and conditions of employment.

The ALJ concluded that Eckel's inquiries and statements were protected by the Act and we agree. The right of law enforcement employees to organize into unions and grieve employer actions implicitly recognizes that employees will, at times, disagree with employer actions and seek to organize other

employees to challenge those actions. There are certainly limits to such employee speech, especially in the law enforcement context, but those limits were not reached in this case. Compare State of New Jersey, P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001) (exploring limits of union representative's protected conduct). Eckel's questioning of fellow employees about the drug testing that he, as an FOP representative, believed was improper may have been viewed as intrusive or obnoxious. Nevertheless, it concerned employee rights, was within the department, and did not so threaten workplace discipline, order or respect that it lost its protection. Contrast State of New Jersey, 27 NJPER at 176, 176 n.7; see also Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. dism., 149 N.J. 35 (1997) (strongly worded criticisms leveled by employee can be protected by Act and First Amendment).

Eckel proved that his suspension and reassignment were motivated by the Sheriff's hostility towards his protected activities and intended to restrict his protected speech. We must therefore consider whether the employer proved that, absent those inquiries, it would still have reassigned Eckel and suspended him for ten days. As for the reassignment, no argument or evidence suggests another motive for that personnel action. As for the suspension, the ALJ found that it was motivated in part by Eckel's leaving his post, but that the employer did not prove that it

would have suspended Eckel for ten days absent his inquiries about the drug testing. He found that, absent those inquiries, the Sheriff would have applied the principle of progressive discipline. The ALJ then applied that principle as part of his analysis of the appeal to the Merit System Board and found that a six-day suspension was appropriate. Under these circumstances, we will accept the ALJ's recommendation concerning a six-day suspension, but defer to the judgment of the Merit System Board if it decides a different penalty is more appropriate under the progressive discipline principle.

#### The Reassignments of the Other Officers

We next address the reassignments of the six FOP members. These are the relevant facts.

Sheriff's Officer Kasha left Sheriff's Officer and PBA member Villegas alone in a courtroom with a prisoner. Villegas then observed Kasha speaking in the first floor security corridor with one or two other officers. When Kasha returned, Villegas told him that he did not appreciate what he had done. Villegas thought Kasha's response was sarcastic and Villegas eventually reported the incident to Chief Falcone. Villegas did not know the subject of Kasha's conversation and did not tell Falcone that it concerned the PBA or the Sheriff. Villegas and Falcone together spoke with the Sheriff about the incident. Within a short period of time, six FOP members were reassigned.

Eckel and Kasha assert that the employer knew that a group of FOP officers met in the first floor corridor and that hostility towards that meeting prompted the employer to reassign six FOP members to prevent further meetings. We will assume that the employer did know that it was a group of FOP officers meeting, even though we have doubts about that aspect of the case.<sup>3/</sup> Nevertheless, under all the circumstances, we are not persuaded that hostility towards that meeting motivated the reassignments.

We agree with the employer that it did give valid explanations for the reassignments. Kasha was reassigned because of the Villegas incident where he improperly left an officer alone with a prisoner. He was offered, but declined the bank run assignment so that assignment was given to Castagna. Kijula was reassigned at a judge's request to fill an opening in his courtroom. Filomeno was also reassigned at a judge's request. Allen was briefly reassigned from a fifth floor courtroom post to a juvenile holding cell post on the first floor, but returned to the courtroom post after one day. Giordano was reassigned from

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<sup>3/</sup> Based on a perceived conflict between the Sheriff's deposition testimony and his hearing testimony, the ALJ concluded that Falcone had told the Sheriff that a group of FOP officers were seen meeting in the security corridor. We question that finding because it goes beyond any possible conflict in the Sheriff's testimony. The deposition testimony does not suggest that the Sheriff was informed that it was FOP officers who were meeting in the corridor. Both the deposition testimony and the hearing testimony consistently suggest that the Sheriff knew that officers were talking in the corridor, but not that they were FOP officers.

the adult holding cell in the courthouse basement to a first floor courtroom. We see no reason on this record for doubting or displacing these reasons. Further, the theory that the employer was seeking to prevent future meetings is undercut by the fact that some of the reassignments were to first floor locations. We also see no proven correlation between the officers who talked with each other in the hallway and the officers who were reassigned. For all of these reasons, we dismiss the allegations that the reassignments were illegally motivated.

The ALJ credited Kijula's testimony that Chief Falcone said that Villegas complained about a group of FOP officers meeting on the first floor. Falcone was unavailable to testify at the hearing due to illness. Falcone's alleged statement contradicts Villegas's testimony that he did not know who was in the corridor. Nevertheless, even if we accept that Falcone made the statement, given our findings about the nature of and reasons for the reassignments, we simply cannot conclude that this single statement by an unavailable witness proves that these reassignments were intended to punish FOP members for meeting in a courtroom hallway.

In the absence of specific exceptions, we adopt the ALJ's recommendation to dismiss the remaining unfair practice allegations.

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In the absence of specific exceptions, we adopt the ALJ's recommendation to dismiss the remaining unfair practice allegations.



ORDER

The Middlesex County Sheriff is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing sheriff's officers in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by reassigning and suspending Steven Eckel for questioning unit members about drug testing.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reassigning and suspending Steven Eckel for questioning unit members about drug testing.

B. Take this action:

1. Reassign Sheriff's Officer Eckel from the Probation department post to a courtroom post.

2. Modify the Final Notice of Disciplinary Action issued to Sheriff's Officer Eckel on or about July 28, 1998 in conformance with the Final Action of the Merit System Board.


3. Compensate or credit the time records of Sheriff's Officer Eckel in conformance with the Final Action of the Merit System Board.

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

5. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed. The remaining aspects of the case are transferred to the Merit System Board.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002  
Trenton, New Jersey  
ISSUED: July 26, 2002



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

**We hereby notify our employees that:**

WE WILL cease and desist from interfering with, restraining or coercing sheriff's officers in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 *et seq.*, particularly by reassigning and suspending Steven Eckel for questioning unit members about drug testing.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reassigning and suspending Steven Eckel for questioning unit members about drug testing.

WE WILL reassign Sheriff's Officer Eckel from the Probation Department post to a courtroom post.

WE WILL modify the Final Notice of Disciplinary Action issued to Sheriff's Officer Eckel on or about July 28, 1998 in conformance with the Final Action of the Merit System Board.

WE WILL compensate or credit the time records of Sheriff's Officer Eckel in conformance with the Final Action of the Merit System Board.

CI-H-98-59

Docket No.

MIDDLESEX COUNTY SHERIFF

(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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

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

APPENDIX "A"



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

Jonathon Roth
Administrative Law Judge T/A
c/o Public Employment Relations Commission
PO Box 429
495 West State St.
Trenton, NJ 08625-0429
(609) 292-6780

INITIAL DECISION

PERC DKT. NO. CI-H-98-59
OAL DKT. NO. CSV 10229-98
CONSOLIDATED

MIDDLESEX COUNTY SHERIFF,
Respondent,

-and-

JOSEPH A. KASHA & STEVEN ECKEL,
Charging Parties.

COUNTY OF MIDDLESEX,
Respondent,

v.

STEVEN ECKEL,
Appellant.

Brian Cige, Esq., for Charging Parties and Appellant

Kevin Kovacs, Esq., Purcell, Ries, Shannon, Mulcahy & O'Neill,
for Respondent

Record Closed: November 16, 2001

Decided: April 1, 2002

BEFORE JONATHON L. ROTH, ALJ t/a

STATEMENT OF THE CASE

The appellant was suspended 10 days by the County of Middlesex. He appealed to Merit System Board, claiming that the suspension was not for legitimate business reasons. The matter was sent to OAL for hearing. The charging parties filed an unfair practice charge and amended charges with the Public Employment Relations Commission, alleging that an employee's suspension was in retaliation for engaging in protected activity and that the

Employer engaged in a pattern and practice of unlawful disparate treatment of members of the Fraternal Order of Police. A Complaint issued.

PROCEDURAL HISTORY

On January 23 and October 26, 1998, February 18, 1999 and October 5 and 17, 2000, Joseph Kasha and Steven Eckel filed an unfair practice charge and amended charges, alleging that the Middlesex County Sheriff violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4) and (7).<sup>1/</sup> The charge, as amended, alleges numerous instances in which the Sheriff caused and encouraged "an antagonistic relationship with" and "a hostile atmosphere toward" the membership of "FOP 59" [a minority employee organization]. It alleges that FOP members are treated disparately than members of the PBA in matters of hearings, job bids, training opportunities, punishments, and other terms or conditions of employment. The charge, as amended, also alleges that in July and August 1998, Steven Eckel was reassigned and suspended for 10 days in violation of 5.4a(1) and (3) of the Act (A-2; A-3; CP-2).

On or about August 11, 1998, appellant Eckel filed an appeal of his suspension with the Merit System Board of the New

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

Jersey Department of Personnel (A-1). On October 22, 1998, OAL granted a hearing (A-1).

On May 24, 1999, a Complaint issued on the unfair practice charge and two amended charges (A-2). A third amendment was incorporated on October 5, 2000 (A-3). On November 28, 2000, the Sheriff filed an Answer, incorporating a previously filed statement of position, denying that it engaged in any unfair practice.

On March 14, 2000, the Sheriff filed a motion with OAL seeking consolidation of the cases and a predominant interest determination. On May 9, 2000, Administrative Law Judge M. Kathleen Duncan issued a decision recommending consolidation and finding that the Commission has the predominant interest (A-4).

On May 30 and June 20, 2000, the Commission and Merit System Board, respectively, issued a Joint Order on Consolidation and Predominant Interest (A-5). Middlesex County Sheriff, P.E.R.C. No. 2000-102, 27 NJPER 23 (132001 2000).

On July 14, 2000, I was appointed as a temporary administrative law judge to conduct a hearing in the consolidated matters (A-6). On September 7 and November 2, 2000, I conducted a prehearing telephone conference call with the parties. On November 6, 2000, I issued a Prehearing Order setting December 4, 5, 6, 7, 11, 12 and 14, 2000, as hearing dates (A-7). The hearing was conducted on the prescribed dates. It was also conducted on February 9, March 30 and May 16, 2001. Post-hearing briefs and reply briefs were received by November 16, 2001. I requested and was granted two extensions of time to issue this Initial Decision.

Based upon the entire record, I make the following:

**FINDINGS**

1. In October 1997, sheriff's officers Joseph Kasha and Adrian Villegas were assigned to Judge Roger Daley's Family courtroom in the Middlesex County Courthouse in New Brunswick (7T50). Kasha had been a sheriff's officer for about 25 years and

Villegas had been an officer for less than 2 years (4T15; 7T62). Kasha had been PBA president; in his later disaffection with that organization, he joined the FOP in 1987 (4T17; 4T19). (On February 25, 1988, the FOP was certified as the majority representative of sheriff's officers and investigators, succeeding the PBA (Docket No. RO-88-121)). By 1987, Kasha had been disciplined "a number of times" (4T22). From 1987 to 1995 Kasha served as an FOP delegate and as a representative of FOP members in disciplinary hearings before Sheriff Joseph Spicuzzo (4T21; 4T26-4T27). (On January 13, 1993 and again on December 7, 1994, the PBA was certified as majority representative, pursuant to elections conducted by the Commission (RO-93-96; RO-95-43)).

Kasha and Villegas were guarding a prisoner in the otherwise empty courtroom, awaiting Judge Daley's return to the bench (7T51). Kasha said that he needed to use the restroom. Villegas said: "No problem. You should find another officer to come in here, since I'm in here with an incarcerated individual" (7T51). Kasha said, "okay" and left the courtroom. Villegas saw Kasha walk by the courtroom's windowed door two or three minutes later. Villegas walked away from the prisoner and peered through the door window. He saw Kasha at a distance down the hallway, apparently speaking with sheriff's officer and FOP president Randall Kijula and at least one other unidentified sheriff's officer (7T52; 7T67). Kasha soon returned to the courtroom. Later that day, Villegas remarked to Kasha, "I didn't appreciate what you did in the courtroom" (7T53). Kasha replied, "I'll make a note of that" or "Point well taken." Villegas believed that Kasha's reply was sarcastic (7T54).

Villegas felt increasingly piqued by Kasha's response and one or two weeks later, he mentioned the incident to Chief Sheriff's Officer Anthony Falcone. Villegas did not know the subject(s) of Kasha's hallway conversation and did not tell Falcone that it concerned the PBA or Sheriff Joseph Spicuzzo (7T57; 7T61; 7T69). Villegas is a PBA member (7T76).

Villegas and Falcone together spoke with Sheriff Spicuzzo about the incident. Spicuzzo testified that neither Falcone nor Villegas told him that Kasha was speaking to officers about FOP business or that FOP members were meeting in the hallway (8T83; 8T84). Spicuzzo testified that Villegas said that he saw Kasha talking with "one or two other officers" in the hallway (8T82). Spicuzzo was not specifically asked if Villegas or Falcone told him that FOP president Kijula was among the officers with Kasha in the hallway. I infer that either or both so advised him.

On cross-examination, Spicuzzo denied that he knew that Kasha was seen talking with "several FOP members" or with a "group" of sheriff's officers in a security corridor (8T237). Spicuzzo was then asked to read a portion of his deposition testimony provided to the Charging Party during discovery on December 1, 2000. Spicuzzo read this portion from that transcript:

I had gotten a call from the Captain, and the Chief came in to me and said he had gotten a call [about] a group of sheriff's officers meeting in the security corridor of the courthouse. [8T237]

The Sheriff's deposition testimony conflicts with and undermines his cross-examination testimony. I do not credit his testimony. I find that "the Chief" [i.e., Falcone] informed Sheriff Spicuzzo that a "group of FOP officers" were seen meeting in the security corridor (see finding no. 8).

Spicuzzo did not inquire about the particular circumstances of the reported incident. He instructed Falcone to "take care of whatever they needed to do in order to straighten out the problem" (8T81; 8T83-8T84; 8T236; 8T239). In further cross-examination, Spicuzzo conceded that he told the superior officer to "handle it the way he had to handle it to break up the group that was gathering in the security corridor who may not be doing their job" (9T73). Spicuzzo denied under oath that he instructed Falcone to reassign any sheriff's officer(s) because he was a FOP member (8T84). I



credit that testimony in the sense that Spicuzzo delegated the public employer's response to Villegas' complaint to Falcone. I do not credit it in the sense that Spicuzzo was unaware that the complaint concerned FOP members in the Courthouse, specifically.

2. The Sheriff's department has five divisions. They are: the Courts, Transportation, Process, Investigation, and Identification (BCI) (7T159; 8T85; 2T36-2T37). A Courts assignment for a sheriff's officer is a post in a courtroom or in an outside building, such as the Probation building or Family Courthouse. Other Courts posts are standing guard at holding cells and metal detectors and performing errands on "the bank run" (7T146; 8T85; 8T88; 8T95). A "reassignment" is a change of post within one division. For example, a sheriff's officer may be "reassigned" as needed from a courtroom post to a probation post (8T95). A "transfer" is a post change between divisions, normally requiring a notice or posting of a site's availability and a "bid" or application from interested sheriff's officers (8T86; 7T159; 7T138). In 1998, (and earlier, I infer), Chief Warrant Officer Donald Almasy had a responsibility in the bidding process. He described it:

I would receive all bid applications from line officers and forward them to [Chief] Falcone. After the 2-week period to submit those bids had been met, he and I would discuss the possible appointments to those assignments. And then bring that forward to Sheriff Spicuzzo with our recommendations, and he would make the final decision on who was awarded the bid. [7T138]

Article XXV of the agreement concerns job postings.

Section B provides, in pertinent parts:

1. The Sheriff agrees the following requirements and rating system will be utilized in determining the selection of an applicant for a job posting.

- a. Seniority
- b. Demonstrated ability
- c. Past experience

d. Employee attendance

5. Upon request of the officer who has been denied reassignment, the employer will advise said employee the reason for denial in writing within two (2) weeks.

6. It shall be the sole right of the Sheriff of the County of Middlesex to reassign employees between units of the Department provided that such reassignments are in accordance with the recognized N.J. State Department of Personnel procedures.... [A-9, p. 36]

3. In 1982, Bruce Allen was hired as a Middlesex County sheriff's officer (5T14). From 1982-1987, he was a PBA member; from 1987 through the date of his testimony, Allen has been an FOP member (5T19). Between 1990 and 1993, Allen was a training instructor in highway safety ("spinal" program) and drug intervention programs (5T20; 5T50). He also received training in a "canine" program, a drug interdiction effort involving an officer's use of dogs trained to detect illegal drugs by scent (5T22; 5T46). The "canine" program ended in 1994; Spicuzzo determined that large municipal police departments had implemented similar programs, thereby lessening the need for and cost-effectiveness of the County's program (5T22; 8T58; 8T177). Spicuzzo permitted Allen to keep as pets the dogs he had used in the program (5T48). In 1999, Allen was promoted to sergeant (5T15; 5T48).

Allen testified that on unspecified dates after 1993, he has "tried to participate" in the same training programs which he had instructed and "once filed a written request" to be designated an instructor - apparently to no avail (5T20). Allen did not request training in "MOI" (Method of Instruction) classes and was "not sure" if he had requested to participate in a "community awareness" program (5T23; 5T24).

In October 1997, sheriff's officer Bruce Allen was reassigned from a Courts division fifth floor courtroom post in Judge Travis Francis' courtroom to a juvenile holding cell post on

the first floor. He had been steadily assigned to the courtroom for about one and one-half years and was unaware of anything that might have caused the reassignment (5T37; 5T38; 5T41). During breaks and a lunch period on any given day, both before and after the reassignment, he spoke with (and met) other FOP member/sheriff's officers in the Courthouse (5T39).

4. On or around the same unspecified date in October 1997, sheriff's officer and FOP president Randall Kijula was reassigned from Judge Harriet Derman's courtroom on the first floor of the Courthouse to Assignment Judge Robert Longhi's courtroom on the second floor (4T156; 5T248-5T250; 5T262). Judge Longhi had not retained a sheriff's officer before that date; he formerly relied upon a court attendant (5T262; 8T91). Longhi asked Sheriff Spicuzzo to assign a "competent" and "dependable" sheriff's officer to his courtroom until another attendant was hired or until he decided not to retain that sheriff's officer (10T36). Spicuzzo instantly decided that Kijula "fitted the bill," meaning that he was trustworthy and had been a good officer for many years (8T91-8T92).

Kijula was FOP president from 1988 until his retirement in fall 1998. He was not disciplined from 1990 through 1998 (5T294; 5T295). He testified that in the "early days," he was a "marked man" but offered no specific example (5T294). Nor did Kijula testify that he was disciplined or charged with a disciplinary offense during his presidency. Spicuzzo testified that on an unspecified date, Kijula was one of a group of sheriff's officers charged with "not being available [for duty] in an emergency" (8T165). I credit the Sheriff's testimony.

Kijula did not receive notice of the reassignment; a sergeant instructed him to report directly to Judge Longhi (5T263). Kijula did not believe that the assignment implicated any provision of the collective agreement (5T262). Spicuzzo spoke with Kijula about the reassignment; Kijula thanked the Sheriff for this thoughtfulness (8T93). On cross-examination, Kijula was asked if he was happy with the reassignment. He replied: "As it turned out, I

worked 25 years in the Courthouse. I would work anywhere in here - except the holding cells" (5T296). I infer from Kijula's evasive answer that he was at least content with his reassignment to Judge Longhi's courtroom. Spicuzzo's conversation with Kijula was on an unspecified date soon after the FOP president was ordered to report to Judge Longhi (5T296). I infer that Spicuzzo promptly complied with Judge Longhi's request for a sheriff's officer.

5. Michael Filomeno was hired as a sheriff's officer in 1990. He joined the FOP in 1994 or 1995 and has maintained his membership continuously (6T162; 6T163-6T164). In fall 1996, Filomeno was assigned to a post in Judge Francis' courtroom (6T167). In February 1997, Filomeno wrote an incident report about a juror's discovery of a drawing of cheese on a sheet of paper in a jury room (R-33; 6T191). (I gather that "cheese" was somehow related to the ensuing criminal trial in Judge Francis' courtroom; the "cheese" had tempted an informant or "rat"). Further investigation by the County prosecutor implicated Filomeno's conduct; he admitted to having omitted an important fact in his report (6T200).

On June 3, 1997, Judge Francis sent Spicuzzo a letter advising that contrary to any "misinformation," he has not recommended any action against Filomeno pertaining to the February 1997 jury room incident (CP-23). Judge Francis wrote that Filomeno told him that "he had been advised by you that I and [Assignment] Judge Longhi had recommended that he no longer serve as an officer in minor or any other criminal court...." Judge Francis wrote that he "cannot speak for Judge Longhi" (CP-23). On March 30, 1999, Judge Longhi wrote a letter to Spicuzzo, confirming that "...Filomeno at my request has not been assigned to any post that involves overseeing a jury." He wrote that Filomeno should attend "an appropriate course or sensitivity training" before returning to a courtroom (R-34). Judge Longhi wrote the letter after Spicuzzo "reminded" him that Filomeno had been not assigned to a courtroom for "a long time" and had bid on an available transportation post

(8T160). I credit Judge Longhi's representation that he had asked Sheriff Spicuzzo not to assign Filomeno to a criminal courtroom. I infer that his request was prompted by the February 1997 jury room incident.

Preliminary and Final Notices of Disciplinary Action were issued in July and August 1997, respectively. FOP president Kijula represented Filomeno at the hearing (6T171-6T172). A proposed 5-day suspension was reduced to a reprimand (6T165).

On an unspecified date soon after October 1997, Filomeno was reassigned from Judge Francis' courtroom to an adult holding cell post in the Courthouse (6T166-6T167; 5T284). Filomeno promptly asked Chief Donald Almasy for the reason for the reassignment (6T169-6T170). Almasy informed him that a judge had complained that he was a "security risk" for assignment to any "criminal case" courtroom (6T169). Filomeno was assigned to the adult holding cell for 17 months, until April 1999 (6T174). Two months elapsed between the Final Notice of Disciplinary Action and Filomeno's reassignment. The Respondent presented no explanation for the delay, especially in light of Judge Longhi's request that Filomeno not be assigned to protect criminal proceedings.

6. On October 8, 1997, sheriff's officer Kasha was reassigned from Judge Daley's courtroom to the adult holding cell in the Courthouse basement (R-20; 4T35). Kasha was informed that Chief Falcone ordered his reassignment, which coincided with other reassignments of FOP members (4T29-4T31; 4T36). Kasha considered a courtroom post "desirable" and the holding cell as a "filthy pig sty" (4T32; 4T46). The holding cells were entirely refurbished in the early to middle 1990's and are well-lighted and camera-monitored for safety. Some sheriff's officers volunteer for holding cell posts (8T87-8T88).

On October 8, 1997, Chief Almasy sent Sheriff Spicuzzo a memorandum advising that the previous day, Kasha phoned him and said he rejected the "bank run" assignment "as opposed to the adult holding cell" assignment (R-20). Sheriff Spicuzzo also testified

that Kasha was offered "the bank run" or courier post before he was assigned to the holding cell (8T88). Kasha testified that he does not remember if he was offered "the bank run" assignment, conceding that it is a "good position," though not his preference (4T117; 4T119). I find that Kasha was offered one or the other assignment, each of which was a reassignment from his post in Judge Daley's courtroom.

7. In October 1997, sheriff's officer and FOP member Robert Castasna was reassigned from a courtroom post to the "bank run" post, after Kasha had declined that courier post (4T116-4T117; 4T157; 7T229; 8T89). Castasna did not testify in the hearing. He worked in the "bank run" post until at least December 2000 (7T163). Sheriff's officer and FOP member Joe Giordano was reassigned from the adult holding cell in the Courthouse basement to a courtroom (other than Judge Daley's) on the first floor (4T111; 4T123; 4T157). Sheriff's officer and PBA member Keith Lane was reassigned from his post at the Courthouse juvenile holding cell to a post in Daley's courtroom, where Kasha had been assigned before October 7 (4T115; 4T157). Giordano and Lane did not testify in the hearing.

8. Soon after the reassignments, FOP president Kijula asked Chief Almasy why the sheriff's officers were reassigned. Almasy replied: "We have the right to reassign" (5T252). Kijula knew that Chief Falcone was a friend of sheriff's officer Bruce Allen. Kijula asked Falcone why he reassigned his friend. Falcone replied: "Give me a week" (5T254-5T255). One day after Allen was reassigned from Judge Francis' courtroom to the juvenile holding cell, he was reassigned back to the judge's courtroom. Judge Francis told Allen that he had interceded on his behalf (5T42).

Kijula requested a meeting with Sheriff Spicuzzo to discuss the reassignments. Falcone and Almasy also attended (5T255). Kijula said that the reassignments were "uncalled for" (5T257). Spicuzzo said to Falcone: "Tell Kijula what the sheriff's officer who made the complaint to you said." Kijula testified that Falcone said:

The sheriff's officer made a complaint about a group of FOP officers on the first floor, talking about FOP business and PBA business. And this officer cannot stand it anymore, so he went down and spoke to me about it. [5T258]

Falcone was unavailable to testify in this case. Spicuzzo did not deny or rebut Kijula's testimony. I credit it. I also infer that Falcone had reported the quoted version of the complaint to Spicuzzo sometime before the meeting with Kijula; Spicuzzo ordered Falcone to rebut Kijula's complaint that reassignments of FOP members were "uncalled for." I infer that Falcone said "group of FOP officers" in reporting Villegas' complaint to Spicuzzo.

9. Sheriff's officer Kasha was assigned to an adult holding cell post from October 1997 until April 1998 (4T35). On some unspecified date, Kasha filed a grievance about the reassignment, which was denied (4T78).

On February 27, 1998, Kasha sent a memorandum about an alleged argument between two other sheriff's officers to Spicuzzo. Kasha wrote that he did not hear the argument. He noted that "the noise level [in the adult holding cell] was so high it was difficult to hear" and that he "[has] been having problems with my own hearing. I have made an appointment with my own physician..." (CP-10). The memorandum does not include a request for reassignment.

On an unspecified date before April 21, 1998, Spicuzzo summoned Kasha to his office "on a disciplinary matter regarding absenteeism" (8T94). By that date, Kasha had acquired several reprimands for absenteeism (R-21; R-22; R-23; R-24; 4T104). In 1996 and 1997, Kasha had exhausted his contractually-allotted sick time by April and then used allotted (but unscheduled) vacation days as additional sick time (R-25; R-26; 4T136; 4T141-4T142). Most of the absences were on Mondays and Fridays (4T143). By April 19, 1998, Kasha had used 14.5 of 15 sick days for the calendar year (R-27). In their meeting, Kasha mentioned to Spicuzzo that working in the holding cells was harming his hearing. Spicuzzo said that he would

promptly reassign him (7T354-7T355; 8T94). On April 21, 1998, Spicuzzo issued a memorandum to Kasha confirming the reassignment, effective April 27 (CP-17).

Kasha took his remaining one-half sick day on April 29. He used 15 vacation days as sick leave between May 1 and July 3, 1998 (4T144-4T145). Kasha took a two-week vacation in July and was out sick 7.5 days in August and September, for which he was not compensated (4T145). On September 23, 1998, Spicuzzo issued a memorandum to Kasha scheduling a meeting for October 5 to discuss his "excessive absenteeism" and suggesting that a union representative may accompany him (R-28). The meeting was postponed. Kasha was out sick all of the following week and was not compensated (R-27; 4T147).

10. On October 22, 1998, Spicuzzo conducted a meeting with Kasha about his attendance deficiencies. Eckel also attended. Spicuzzo rejected Kasha's reasons for his absences and advised that Kasha would be suspended for three days in the following week (4T89-4T92; 8T98). On the same date, Spicuzzo issued a "Notice of Minor Disciplinary Action" to Kasha, suspending him three days - October 27, 28 and 29 - for "excessive absenteeism" (CP-12). Kasha did not file a grievance contesting the suspension (4T95). On October 29, 1998, Kasha sent a memorandum to Spicuzzo advising that he was "submitting for [his] retirement effective November 1, 1998" (R-29). Kasha did not inform the Sheriff about his retirement before October 29 (4T85).

Sheriff's officer retirees receive a retirement identification card together with a badge (8T100). The County orders several retirement identification cards and badges periodically. The Sheriff does not formally present the card and badge to each retiree (8T101). A sergeant assigned to administrative duty normally phones the retiree about scheduling a date and time for the informal presentation of the retirement badge (8T101). Sergeant Sandra Mackiewicz told Kasha that when a retirement badge was available he could collect it at the Sheriff's



office (7T42). On an unspecified date, the badges were delivered to the Sheriff. Kasha phoned and Mackiewicz told him about the delivery. Kasha said he would soon pick up his retirement badge. He never did (7T42).

11. In 1973, Jack Milazzo was hired as a sheriff's officer. In 1977, he was promoted to sergeant, and in 1983, he was promoted to lieutenant (6T60; 6T61-6T62). Milazzo was a PBA member continuously from 1973 to about 1995, when the PBA prohibited its members from dual memberships in police employee organizations (6T60-6T61). In 1995 or 1996, Milazzo joined the FOP (at a time when his majority representative was the SOA, which is unaffiliated with either fraternal organization) (6T60-6T61; 6T70). Milazzo retired from the County in December 2000 (6T60).

From 1997 to 2000, Milazzo's "direct" superior officer was Captain Barbieri, a former PBA member (6T63-6T64). In 1997, Milazzo was one of two lieutenants assigned to the Transportation division in North Brunswick on the day shift, where he had "oversight" of 20 sheriff's officers (6T71-6T72). He forwarded recommendations for discipline of any officer through the chain of command (6T65; 6T66; 6T67). Milazzo believed that his fellow day shift lieutenant was also a member of the FOP (6T74).

Milazzo testified that on an unspecified date and time of year in 1997, Chief Falcone phoned him in North Brunswick (6T65; 6T66). Falcone instructed Milazzo to "...implement disciplinary procedures against any FOP member for any departmental infraction [he] could find." Falcone allegedly said: "[We] want to transfer FOP members from Transportation to the courthouse" (6T65). A Courts division post provided "less freedom" to sheriff's officers than a Transportation division post (6T68). Falcone also mentioned the names of other sheriff's officers - unspecified PBA members - and said to Milazzo: "If you write them up, the disciplinary charges aren't going anywhere" (6T69). Milazzo testified that he complied with Falcone's instructions; he "found violations for FOP officers," including Eckel (6T69). He testified that he "referred the

disciplinary matters in writing and never heard anything about them" (6T85). Milazzo could not recall the name(s) of any FOP members (other than Eckel) about whom he filed a report. Nor was Milazzo called as a witness in any disciplinary proceeding (6T82).

Eckel was transferred from the Transportation division to the Courts division in July 1997 (see finding no. 19 and R-11). A grievance arbitrator determined that the transfer was for legitimate reasons unrelated to discipline (R-11). Accordingly, Eckel's July 1997 transfer is not corroborative of Milazzo's testimony. Eckel testified that he successfully bid on a Transportation division post position in or around January 1998 (3T104). He also testified that he was transferred back to a Courts division post on an unspecified date before July 1998 (i.e., before the June 29-30 "drug test" incident) (3T105). I credit his testimony.

In 1999, Milazzo solicited assistance from the PBA, despite a 4-year lapse in his membership (6T76; 6T78; 6T85; 8T163). Milazzo solicited money and services from PBA members to assist in the construction of "an addition [to his] house for his permanently disabled wife" (6T78). The PBA in turn, sought Spicuzzo's "influence" with certain building trades (i.e., unions), which the Sheriff provided (8T196). During the construction, the PBA requested an accounting of the monies and services provided to Milazzo (8T164; 6T81). Milazzo testified that the PBA vice-president "said I did not have to provide [such] a report" (6T81). I infer that Milazzo did not wish to comply with the PBA's request. Spicuzzo was asked to mediate a "confrontation" between the PBA and Milazzo, the consequence of which is not clear from the record (8T164).

I am disinclined to credit Milazzo's testimony about Falcone's order, despite an absence of directly conflicting evidence. Falcone was unavailable to testify in this case. On January 5, 2000, Falcone boldly threatened Siegelman, demonstrating a calculated (or actual) anger toward the exercise of an asserted Constitutional right and an interest in charging employees

accordingly (see finding no. 28). I infer that Falcone was dispositionally capable of targeting sheriff's officers in the manner Milazzo has testified.

Eckel's successful January 1998 bid on a Transportation division post evidences an unexplained and perhaps sudden reversal of Falcone's 1997 directive, plan and rationale and it seriously undermines the veracity (if not the credibility) of Milazzo's testimony. I am also concerned that Milazzo did not report Falcone's instruction to anyone in the elapsed 3 years or more between the directive and his testimony in this case. Milazzo offered no explanation for the delay. In the interim, Milazzo became embroiled in a dispute which eventually concerned Spicuzzo and may have engendered Milazzo's anger, thus providing a possible motive for his testimony. I am also concerned that Milazzo did not specify a date, month or time of year in 1997 that Falcone directed him to "write up" FOP members and let alone PBA members. I am also skeptical about the likelihood of Falcone ordering an FOP member to discipline other FOP members for minor infractions. Finally, nothing in Eckel's employment record indicates Milazzo's compliance with Falcone's directive. The record of Eckel's 1997 infractions of work place rules and regulations appear unrelated to Milazzo or to any report he may have filed. Nor were any of Milazzo's purported 1997 "violations for FOP officers" introduced for identification. Accordingly, I do not credit Milazzo's testimony about Falcone's order.

12. In or around June 1998, sheriff's officer and PBA member John Dwyer asked sheriff's officer and PBA member Adrian Villegas if he wished to switch positions, temporarily (7T73; 7T82). Dwyer was assigned to the Transportation division and Villegas was assigned to the Courts division (7T73-7T74). Villegas liked the idea of a second shift assignment because it was convenient (7T79). Dwyer sought Falcone's approval and Falcone authorized it after confirming the switch with Villegas (7T75).

The "switch" was initially for one week and was extended

for about six weeks, until August 1998 (7T82; 7T262). Villegas successfully bid on a permanent Transportation division post that month (7T82). Almasly testified that he was familiar with the circumstances of the "temporary" switch; he and Falcone "...took into account their problems and [ ] wanted to assist them and that's when we made our decision until the bid process came up" (7T263).

On cross-examination, Eckel was asked if he knew of any FOP members that requested to switch shifts and were denied. Eckel testified: "Other than myself, I don't recall. There could be, but I just don't remember" (3T88). I infer that Eckel meant that his request(s) for transfer were "denied" and not that his request for a switch with another FOP member was denied. No evidence demonstrates that the Sheriff, including Falcone and Almasly, denied two FOP member/sheriff's officers' request to switch their shifts or positions temporarily.

13. In 1996 and later years, the Sheriff's department, together with the County, sponsored entertainments on "Bring-Your-Child-To-Work-Day" (2T58-2T59). The PBA and FOP participated; in 1997, the FOP presented a "buckle up for safety" program (2T62). Eckel testified that in 1998, the FOP was "not invited to participate," but upon its' late request, did participate (2T63; 2T65). The FOP also asked to participate and was so permitted in 1999 (3T81).

In 1998 Eckel "designed" an FOP letterhead stationary which included the Middlesex County Sheriff's department "logo" (2T216; CP-8). He conceded under oath that he did not seek the Sheriff's approval of the letterhead before using it (3T211). Chief Falcone told Eckel that the departmental shield could not appear on FOP letterhead (2T218). Spicuzzo testified without contradiction that "several years ago," the PBA had produced letterhead which also included the Sheriff's logo and that he "stopped that" (8T252). In 1999, Chief Almasly issued a memorandum to Eckel, advising that "FOP Lodge #59 is not to display the departmental patch on its

letterhead" (7T347; CP-32). No evidence indicates that the PBA was permitted to include the departmental logo on its letterhead from 1995 through 2000.

14. Eckel testified that sheriff's officer Michael Cannone failed to write a report to the Sheriff regarding a hazardous materials spill on George Street in New Brunswick, pursuant to a Sheriff's department regulation requiring the filing of written reports on "unusual" incidents (2T86-2T87). Eckel conceded under oath that Cannone informed the Sheriff's department communications center about the spill (3T96). He did not inform the New Brunswick police department (3T95). I credit Eckel's testimony.

15. Eckel also testified that a sheriff's officer Ripish was "not suspended or fined" by the Sheriff for having been criminally charged as a disorderly person during off-duty hours (2T92). Eckel conceded that Ripish had testified in an arbitration proceeding and on cross-examination admitted that he did not recall Ripish's discipline and "may have been confused" (3T96; 3T98). I do not credit Eckel's testimony that sheriff's officer Ripish was not suspended or fined.

16. In or around January 1998, sheriff's officer and FOP member Bruce Hall requested and was denied permission to wear a "pancake" (i.e., flat or unobtrusive) gun holster (2T129). Four PBA members - Randl, Sathau, Pal and Yohas - were permitted to wear pancake holsters (2T130). Almasy credibly testified that Hall wanted to wear a "pancake" holster to ease his back pain (7T156). Hall was initially denied permission to wear a pancake holster; after he provided a doctor's note explaining the medical need for it, he was permitted to wear one (7T156).

17. Sheriff Spicuzzo has been awarded at least three "silver" and "gold" honorary PBA lifetime membership cards. He received one before he was first elected as Middlesex County Sheriff in 1980 (8T184-8T185; 8T74). He did not solicit any honoraria (8T185). The FOP has not presented Spicuzzo any comparable acknowledgment (2T136). Spicuzzo credibly testified that in about

August 1999, State FOP President Rick Whelan and State PBA President Mike Madonna separately asked him to "intervene" on behalf of County police officers whose positions were discontinued when the County police department was disbanded (8T186; 8T187). Spicuzzo intervened and the officers were hired into various police departments and the Sheriff's department (8T186). At least one of the officers was an FOP member (8T186; 8T188).

Finding Nos. 18 and 19: The Reassignment  
and 10-Day Suspension of Steven Eckel

18. On an unspecified date in June 1998, one or two sheriff's investigator(s) (a title included with sheriff's officers in the negotiations unit but apparently not within the auspices of the Department of Personnel) reported to Sheriff Spicuzzo "accusations" or "rumors" of investigators' ingestion of unlawful substances at a wedding celebration (8T120). Spicuzzo called PBA President Robert Semler and explained his concerns. He suggested that the department and investigators acquire "proper proof" that no unlawful substances were consumed (8T121). Spicuzzo alerted Semler of his intention to ask the investigators to submit to a drug test (8T211). In a meeting with a PBA representative and all investigators, Spicuzzo suggested that they "voluntarily" submit to urinalysis. The investigators agreed to the tests, with the understanding that the matter "would remain [confidential] within the investigation unit" (8T121-8T122). In the absence of any conflicting evidence, I infer that the PBA had no objection to the testing.

Eckel testified that he spoke with sheriff's officer Robert Landis about the testing sometime on or before the evening of June 29, 1998 and that Landis told him that he "heard" that investigators had taken drug tests (1T93; 1T94). On July 1, 1998, Landis wrote an "incident report" to Spicuzzo, denying that he had spoken with anyone about the testing (CP-1). Landis was not called to testify in the hearing. I do not need to resolve the conflicting evidence; Landis may or may not have informed Eckel about the testing.

In the evening of June 29, 1998, Eckel phoned investigator Brian Knelle at home and asked him about a drug test given to the investigators (1T78; CP-1). Eckel asked Knelle why the PBA and the investigators "did not protest." Knelle told Eckel that the investigators had "submitted voluntarily" to the tests and had "no problem with it" (CP-1). Knelle promptly informed Sergeant Walter Baran about Eckel's call, who in turn, advised the "administration." About 4 p.m. on the next day, June 30, Knelle provided an "incident report" to Spicuzzo about Eckel's phone call in which he wrote that he informed his superior officer of Eckel's remark that sheriff's officer Landis was "running around telling everybody about this matter" and that "I wanted to eliminate suspicion of the Investigations Unit spreading the rumor" (CP-1).

At about 10:30 a.m. on June 30, in a Courthouse "security corridor" (a hallway used by judges and jurors but not accessible to the general public), Eckel asked sheriff's officer and PBA delegate representative Mark Papi if he knew anything about investigators submitting to drug tests (1T92; 7T107). Papi replied that he did not know anything about the tests and that no PBA member had so complained to him (7T107). Eckel replied that the Sheriff had not followed the State Attorney General guidelines for drug testing, to which Papi again denied knowledge of the circumstances (7T108). In his July 1, 1998 incident report to Sheriff Spicuzzo, Papi wrote that he also said to Eckel: "...[I]f [the testing] took place, the administration has every right to request drug testing at any time from any employee as per Attorney General guidelines" (CP-1). No evidence suggests that Papi's report was unreliable; I credit it.

Papi wrote that Eckel became "argumentative" and said that the "Sheriff is clueless about most of the things [that] happen in his department." Papi wrote that he advised Eckel that the Sheriff knew "everything that goes on in his department..." (CP-1). In the absence of conflicting testimony from Eckel, I credit their exchange, pursuant to Papi's report. On June 30, Papi promptly reported the incident to a Captain Jacko (7T109; 7T126). Jacko

advised Papi to write the incident report (7T126).

On June 30, 1998, Eckel was assigned to a post in Judge Travis Francis' courtroom. The record does not show that he was assigned to a command or "judge's man" post (1T88; 1T96; 9T113). I find that Eckel was one of perhaps two or three sheriff's officers assigned to the courtroom (2T35; 10T78; 10T82). Generally, a sheriff's officer assigned to a courtroom must be in that courtroom whenever court is "in session" or the judge is "on the bench" (8T234; 9T104-9T105). The judge may order a sheriff's officer to perform an errand, requiring her or him to briefly leave the courtroom (e.g., make photocopies of a document) (9T105). A noisy disturbance outside the courtroom could justify a sheriff's officer stepping outside the room to show a "presence" (10T79).

On June 30, investigator Rocco Bollaro was ordered to deliver packages to several judges personally, one of them being Judge Francis (7T200). Bollaro walked down a "security corridor," looking for Judge Francis' chambers. Doors connecting a courtroom to a security corridor have eye-level windows.<sup>2/</sup> Bollaro testified that he "walked past one of the courtrooms and Eckel came out and said something to the effect, 'You got to [pee] in a cup?'" (7T200; 7T209-7T210). Bollaro replied that he didn't know what he [Eckel] was talking about. (Bollaro acknowledged under oath that he intentionally lied to Eckel). Eckel retorted, "What? Are you kidding me? You're the only one that doesn't have to pee in a cup?" (7T201; 7T203). Bollaro answered, "Well, if I did or didn't, if it was voluntary to be done, I would" (7T203). Bollaro testified that Eckel next asked him the reason for his presence in the hallway and he replied that he was looking for Judge Francis (7T210). Eckel said that the Judge was "on the bench" (7T210). Bollaro testified that he walked down the corridor looking for Judge Francis' chambers (and secretary) and that Eckel "briefly followed" him while their conversation ensued (7T203; 7T210). Bollaro testified that Judge

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<sup>2/</sup> I base this finding upon my personal observation of a courtroom and security corridor in the Courthouse, where several days of the hearing in this case were held.



Francis walked out of a courtroom (presumably, the same door through which Eckel emerged) and that he gave the judge the package (7T204).

Bollaro was "upset by his conversation with Eckel because 'it' [i.e., the drug test] was nobody's business" (7T206-7T207). He reported the incident to Chief Falcone, who ordered him to write an incident report (7T207). Bollaro's June 30 handwritten report to Spicuzzo largely corroborates his testimony and specifies that Eckel "confronted" him at about 12:20 p.m. (R-38). Upon reviewing his report under oath, Bollaro testified that his report was reliable (7T205). The report adds the following to Bollaro's remark that he was not troubled by a request for a "voluntary" submission:

S/O Eckel replied, 'That's really fucked up. They can't do that to you guys.' S/O Eckel then asked, 'What do I need?' I told S/O that I needed to personally give Judge Francis a package. Judge Francis then came off the bench and package was delivered. This investigator then left Courthouse. [R-38]

Eckel testified that he saw Bollaro in the corridor from his position in the courtroom and that Bollaro "waved [him] out" (1T96). Eckel stepped outside the courtroom and asked, "What's up?" Bollaro replied, "Is Judge Francis still on the bench? I have something to give him from the Sheriff." Eckel replied, "Yes. He'll be off soon. Is there something I can do?" Bollaro said, "No." Eckel testified:

Then I asked, 'Hey, Rocco, did you pee in a cup?' He said, 'No, those other guys did, but I didn't.' I said, 'Well, if the PBA is not doing anything for the investigators, give the FOP a call. Maybe we can help.' I went back into the courtroom. [1T96]

Eckel estimated that he was out of the courtroom for less than one minute (CP-1). I credit his estimate. I infer however, that Eckel's version of his conversation with Bollaro would consume substantially less than one minute and does not account for all of his actions and remarks. On July 6, 1998, Eckel filed an incident

report with Spicuzzo, which was partially corroborated by his direct examination testimony (CP-1). Eckel acknowledged on cross-examination that he walked and talked with Bollaro in the security corridor while Judge Francis' court was in session (3T48-3T49). Only Bollaro's testimony and incident report sets forth other remarks by Eckel which might reasonably coincide with the circumstance of one officer attempting to engage another while proceeding together down a hallway.

I credit Bollaro's version. Eckel had asked two or three unit employees about the drug test(s) in the 12 to 15 hours preceding his discussion with Bollaro. I infer that Eckel was actively interested in learning and corroborating details and circumstances of the testing. Bollaro's coincidental appearance outside Judge Francis' courtroom on June 30 was an opportunity for Eckel to spontaneously solicit a confirmation of the testing from an investigator. I find that Eckel inquired eagerly and assertively of Bollaro without that investigator's alleged request for help. Accordingly, I specifically credit Bollaro's testimony that he had "walked past" Judge Francis' courtroom.

Sheriff Spicuzzo testified about his understanding of the circumstances of the June 30 Eckel/Bollaro incident and of Eckel's conversations with sheriff's officer Knelle and PBA delegate Papi (8T104-8T108). On June 30, Spicuzzo was informed of the Eckel/Bollaro incident by Chiefs Falcone and Almasy and an unidentified investigator (8T102). Spicuzzo was told about the incident before he received Bollaro's incident report (8T103). On July 1, Spicuzzo was informed about Eckel's June 29 conversation with Knelle and he ordered Knelle and his sergeant to report to his office (8T107). In the Sheriff's view, Knelle expressed the same concerns about Eckel's questions as did Bollaro. Spicuzzo testified:

Knelle did not want to speak about it, but Eckel continued to try to insinuate that the Sheriff was trying to do something illegal and [the investigators] should never have allowed that to

happen and if it was the FOP in charge it wouldn't have happened. [8T107]

Spicuzzo also testified that Eckel criticized him in his (Eckel's) discussion with Papi, pursuant to Papi's incident report (8T109). I credit the Sheriff's testimony.

Spicuzzo essentially credited Bollaro's version of events and did not credit Eckel's written representation that Bollaro had "waved him out of the courtroom" (8T226; 9T111). The Sheriff accurately testified that Eckel had been admonished previously for "leaving his assignment" (8T227; also see finding no. 19). On July 1, 1998, Spicuzzo received a memorandum from a sergeant Lowrie advising that on June 30, "Judge Francis' courtroom worked until 12:40 p.m." (R-13; 8T110).

On June 30, 1998, Eckel was summoned to the Sheriff's office. Eckel testified that he was called between 12:35 and 12:40 p.m. (1T114). No other witness fixed the date and time precisely. In the absence of conflicting evidence, I credit Eckel's testimony. I infer that Eckel was summoned by the Sheriff immediately after Falcone, Almasy and an investigator reported the incident to him. FOP president Kijula, Chief Falcone and Sheriff Spicuzzo were gathered in his office (1T110; 2T56; 3T53; 5T267). Spicuzzo was angry (1T115). Eckel and Kijula testified that the Sheriff said that he (Eckel) would have to learn "how to keep his mouth shut," referring to his questioning about the drug tests (1T115; 5T268). Kijula testified that Spicuzzo said: "I have to hit Eckel hard because I have to keep him quiet" (5T268). Kijula also testified that other superior officers-- Captain Jacko and Chief Falcone said to him (on other occasions) that Eckel would be moved to "shut him up" (5T238; 5T239; 5T241). Kijula was not certain that their remarks were reactions to the Eckel/Bollaro incident (5T241; 5T243). Although Kijula may be confused about which superior officer spoke of the need to "move" Eckel, and when the remarks were spoken, he was not equivocal or tentative about Spicuzzo's statements. Eckel testified that Spicuzzo said: "I'm going to keep

you from running your mouth. I'm going to keep you away from your FOP members. You're going to be sent over to the probation post" (1T115). (Spicuzzo was unaware that Eckel was Kijula's likely successor as FOP president (5T265)). On the next day of his direct examination, Eckel was asked: "And during your disciplinary process in ten days was there any reference by the Sheriff or any of his direct reports to your union association?" Eckel testified: "Only that he was going to keep my mouth shut and isolate me and ship me out to the probation post" (2T55). Kijula corroborated that Spicuzzo threatened a transfer (5T270). He also testified that Spicuzzo mentioned a suspension (5T269). Spicuzzo did not deny Eckel's and Kijula's testimonies.

I credit Kijula's testimony, primarily. Kijula appeared to me as a guileless, honest and forthright witness, removed from the fray of work place circumstances in his retirement. (Note my minor exception in finding no. 4). He recalled statements to the best of his ability and conceded that his memory of some events or conversations was no longer sharp. He specifically recalled Spicuzzo's remark that Eckel would have to learn "how to keep his mouth shut" and that he threatened a transfer and suspension. I infer that his recollection of those remarks would coincide with a recollection that the Sheriff also (allegedly) said, "I'm going to keep you away from your FOP members." Kijula did not so testify. Nor did Eckel consistently testify on direct examination that the Sheriff admonished that he would be "kept away from his FOP members." I do not credit Eckel's testimony that Spicuzzo said, "I'm going to keep you away from your FOP members."

On or about July 6, 1998, Eckel was reassigned from the Courthouse in New Brunswick to a probation department post in Piscataway, a distance of about 5 to 7 miles (1T117; 2T54; CP-1 (p. 000301). Spicuzzo testified that Eckel was reassigned for several reasons:

Going back on his record of not being able to get along with other officers, members of the public

or superior officers and constantly wandering from his post, I believed that one of the better places for him to be assigned to be sure he would do his work properly was the probation post.  
[8T154]

Spicuzzo added that the probation post did not provide Eckel "many places for him to wander." He testified that he did not reassign Eckel to that position to isolate him from the FOP (8T155).

I do not credit the Sheriff's testimony about his reasons for reassigning Eckel. Although Eckel's employment record is not unfairly characterized by the Sheriff, nothing suggests that he had assessed the officer's employment record or said he had assessed it on June 30, when he told Eckel (with Kijula present) that he needed to learn "how to keep his mouth shut" and would be "shipped out to the probation post." The statement connotes his spontaneous reaction to contemporaneous event; specifically, Eckel's inquiry about Bollaro's drug test. Although I did not find that Spicuzzo said that he was "going to keep Eckel away from his FOP members", I again note that he did not specifically deny the statement. Spicuzzo testified that he, the PBA president and the investigators had agreed upon the need to maintain the confidentiality of the testing to limit "rumors of possible drug use among investigators." He then testified: "My concern was that Eckel was using the situation to show that the FOP would never allow the Sheriff to give you a urine test" (8T122). He testified that Eckel's (presumed) intention:

...causes disharmony among sheriff's employees because it started a lot of people talking within the department as to whether the Sheriff has a right to do it under the Attorney General guidelines. [8T122-8T123]

I infer that the Sheriff's testimony means that he was concerned that Eckel's propagandistic motive (i.e., to rally sheriff's officers into FOP membership) resulted in "a lot of people in the department" debating his lawful authority to order the drug tests. Such discussions were "disharmonious." I do not infer that the

Sheriff's testimony means that he has or had a proprietary interest in the PBA's status as majority representative. I find that the Sheriff reassigned Eckel to the probation post to "shut him up" or, more precisely, to keep him away from all (or as many as possible) sheriff's officers and investigators.

On July 6, Sheriff Spicuzzo issued a Preliminary Notice of Disciplinary Action to Eckel (8T112; CP-1). The Notice set forth the "specification":

On June 30, 1998, while assigned to a courtroom, you left your post to engage another employee of this Department in a matter unrelated to your assignment. You also demeaned a fellow employee and criticized the Sheriff and other members of the Department. [CP-1]

The Notice also set forth the "charges":

Violation of Sheriff's Department Rules and Regulations: 3.1.2 - Loyalty; 3.1.7 - Neglect of Duty; 3.1.8 - Performance of Duty; 3.1.10B - Insubordination; 3.1.11 - Conduct Toward Superiors and Associates; 3.1.13 - Criticism of Official Acts or Orders.<sup>3/</sup> [CP-1]

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<sup>3/</sup> The Middlesex County Sheriff's Office Manual sets forth these definitions of "Professional Conduct and Responsibilities":

3.1.2 - LOYALTY. Loyalty to the department and to associates is an important factor in department morale and efficiency. Members and employees should maintain loyalty to the department and their associates as is consistent with the law.

3.1.7 - NEGLECT OF DUTY. Members and employees shall not commit any affirmative act nor shall they commit [] any omission that constitutes neglect of their responsibilities under this manual, department rule, policy or order, order of the Sheriff, Undersheriff, Superior Officer or the law.

3.1.8 - PERFORMANCE OF DUTY. All members and employees shall perform their duties as required or directed by law, department rule, policy, or order of the Sheriff, Undersheriff or a Superior Officer. All lawful duties required by competent authority shall be performed promptly as directed, notwithstanding the general assignment of duties and responsibilities.

3.1.10B - INSUBORDINATION. Members and employees shall not commit acts of insubordination. The following specific act() [is] prohibited by this section:

The Notice also set forth "removal" as a possible disciplinary action and specified that a hearing was scheduled for July 22. Eckel received the Notice on July 8, 1998 (1T98; CP-1).

Spicuzzo testified that Eckel's "criticism" of the Sheriff and other department members was "disloyal" and accordingly, violated the "Loyalty" rule and regulation. He testified:

I believe that when an officer questions the smooth running of the department and the good reputation of the department for his own selfish needs in trying to make the FOP look better than the PBA, that that in fact is someone who is trying to cause confusion in the department and cause a loyalty problem.... [8T230]

Similarly, the same "criticism" ran afoul of the "Criticism of Official Acts and Orders" rules and regulation (8T222). Spicuzzo elaborated:

He criticized my requesting the investigators to voluntarily take a drug test by saying that 'if the FOP was in charge, you guys would never have had to piss in a cup.' [8T231]

The Sheriff testified that Eckel was "insubordinate" by "not staying in his courtroom" and had "questioned the decision of myself and the investigators, bringing disharmony within the department," thereby violating the regulation, "conduct toward superiors and associates" (8T230-8T231). Although Eckel may have been insubordinate by not staying in his assigned courtroom, the cited provision prohibits "disrespectful, mutinous or abusive

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Footnote continued from previous page

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B. Any disrespectful, mutinous, insolent or abusive language or action toward the Sheriff, Undersheriff or a Superior Officer.

3.1.11 - CONDUCT TOWARD SHERIFF, UNDERSHERIFF, SUPERIOR, SUBORDINATE OFFICERS AND ASSOCIATES. Members and employees shall treat superior officers, subordinates and associates with respect. They shall always be civil and courteous in their relationships with one another. When on duty and particularly in the presence of other members, employees, or the public, officers should be referred to by rank.

3.1.13 - CRITICISM OF OFFICIAL ACTS OR ORDERS. Members and employees shall not criticize actions, instructions or order of any Office members in a manner that is defamatory, obscene, unlawful, or which tends to impair the efficient operation of the Office. [R-17(b)]

language." I find that the Sheriff included "insubordination" in the list of charges in part because Eckel had been disrespectful to him in his "questioning of the drug test." In Spicuzzo's view, an officer's "liability" under the "conduct toward superiors and associates" regulation includes off-duty remarks, provided that "[the remarks] criticize the decision of the department" (8T232). Spicuzzo also testified that "bringing disharmony" meant the "questioning of the drug test" (8T113). On cross-examination, the Sheriff was asked, if in addition to the "charge" against Eckel being concerned with leaving his assignment, was it not also about "[his] speaking about things he shouldn't be speaking about?" The Sheriff replied, "Correct" (9T109). I infer that a particular "thing" to which the Sheriff alluded was drug testing of the investigators. Spicuzzo conceded in cross-examination that he did not know which other or how many officers were assigned to Judge Francis' courtroom on June 30 (9T111; 9T112).

On July 8, Eckel sent a grievance to Spicuzzo, writing that his reassignment was an "anti-FOP discriminatory union transfer...", pursuant to specified Articles of the collective agreement (CP-1). Also on July 8, Eckel received the Preliminary Notice of Disciplinary Action (CP-1).

On July 22, the Sheriff convened a hearing on the charges and specification set forth in the Preliminary Notice. FOP president Randy Kijula, charging party counsel, and Eckel attended on behalf of the FOP. Spicuzzo and Falcone appeared for the County. Chief Almasy and investigator Bollaro were called as witnesses (1T105-1T108; 8T134). During the proceeding, the Preliminary Notice was amended to include another charge against Eckel for his alleged breach of section 3.1.1 of the Rules and Regulations, "Standard of Conduct."<sup>4/</sup> The amended notice states that Chief Falcone had intended to include the (omitted) section in the July 6 Notice (1T105; CP-1). Eckel testified that he "didn't

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<sup>4/</sup> This provision states: "Members and employees shall conduct their private and professional lives in such a manner as to avoid bringing the department into disrepute" (R-17(b)).



think" that he testified in the July 22 hearing, that witnesses "from the Sheriff's side of the case did"; and that the FOP declined a proposed 30-day suspension (1T119-1T121).

On July 28, Sheriff Spicuzzo issued a Final Notice of Disciplinary Action to Eckel, setting forth as punishment, a 10-day unpaid suspension, pursuant to the hearing on the Preliminary and amended Preliminary Notices. The Sheriff sustained all seven charges. The Final Notice also listed six witnesses who testified at the hearing, including Eckel (A-1). I credit the exhibit over Eckel's uncertainty.

Spicuzzo testified that in deciding upon the 10-day suspension, he considered Eckel's disciplinary record, including reprimands and suspensions (8T135). He testified that the principle of "progressive discipline" was applied in determining the number of days in Eckel's suspension (8T256; 8T259). He testified that all of the charges "combined to be 10 days" (9T109). He acknowledged under oath that a "part of the reason" for the 10-day suspension was Eckel's evening [i.e., off-duty] phone call to Knelle about "peeing in a cup" (8T208). He also testified that "the charge[s] were important" to insure that: (1) "disharmony" did not "flow through the office of the sheriff"; (2) [officers] know they should not leave their assignment, especially when a judge is on the bench; and (3) [sheriff's officers should] not disrespect superior officers (8T135). I infer from Spicuzzo's testimony that the three concerns figured in his decision on the penalty. Spicuzzo also "believed" that an "Internal Investigation Report" had been prepared concerning the events precipitating the Preliminary Notice (8T217). Eckel acknowledged under oath that he had a "conversation" with Internal Affairs officers "after" his reassignment to the probation post (2T80). I infer that the "conversation" occurred between the reassignment and the July 22 hearing. All reports were provided to the FOP before July 28 (8T218). He specifically noted Eckel's several verbal and written reprimands, a 5-day suspension and occasions when no discipline was inflicted (8T256). Spicuzzo denied

that Eckel was suspended 10 days because of his affiliation with the FOP or because he had engaged in protected activities (8T153).

19. In the summer of 1988, Steven Eckel began his employment as a Middlesex County sheriff's officer, pursuant to his graduation from the police academy (1T51-1T52). Eckel was reprimanded several times while he attended the academy (3T7). On April 4, 1988, Eckel received a written "recruit" evaluation (first of three) setting forth one "comment": "It was necessary to reprimand recruit Eckel on several occasions for not following Academy rules. Expect to see improvement in future" (R-1). Spicuzzo was "disturbed" by the evaluation and admonished Eckel (8T137).

In August 1988, Eckel joined the FOP and has maintained his membership continuously (1T51). The FOP was the majority representative of the County sheriff's officers and investigators from 1988 until 1993, when the PBA prevailed in a Commission election (RO-93-96). Eckel was also a PBA member from 1993 until 1994 or 1995, when that organization advised the sheriff's officers that "dual memberships" were prohibited (1T152-1T154). Eckel admitted that he was disciplined during the period he retained dual membership in the FOP and PBA (1T54-1T55).

On December 22, 1989, Middlesex County Lieutenant Jack Milazzo sent an "interoffice memo" to Sheriff Spicuzzo criticizing Eckel's conduct (R-2). The memorandum details an incident in which Eckel claimed to be ill so that he could "go out for a drink," and another incident in which he showed "improper radio procedure." Eckel's conduct was characterized as "unpredictable," "infantile" and "unprofessional." The lieutenant recommended "disciplinary action" and a "transfer" to a "controlled environment with close supervision" (R-2).

On June 21 and July 18, 1990, Lieutenant Milazzo and Captain D. Jacko sent memoranda to Spicuzzo recommending that Eckel be reprimanded. The memoranda concerned Eckel's negligent failure to check fluid levels on "his assigned vehicles" (R-3).

On October 17, 1990, Spicuzzo issued a "written reprimand" to

Eckel for violating Rule and Regulation 3.1.10, "Insubordination" (R-4). Attached are memoranda from Sergeant D. Sidders and Captain Jacko describing Eckel's "disrespectful" and "insolent" attitude.

On January 13, 1993, a commander of the Division of State Police mailed Spicuzzo a letter, together with a trooper's report, advising of an "unfortunate incident" concerning Eckel (R-8). The report recounted a verbal altercation between Eckel and the trooper, pursuant to a motor vehicle stop for speeding on the Garden State Parkway. Eckel reportedly argued with the trooper, calling him an "asshole" and saying "fuck you" several times (R-8).

Spicuzzo summoned Eckel to his office. Eckel apologized for the incident. No discipline was issued (8T147).

On January 4, 1994, Sergeant Michael Barbieri sent a memorandum to Spicuzzo about Eckel's conduct in the Courthouse (R-5). Barbieri wrote that he observed Eckel "out of his courtroom too much that day." Barbieri wrote that when he so advised Eckel, the sheriff's officer "raised his voice" and "called him a liar" in an "overly loud voice" that turned into "a spectacle." The memorandum notes: "This action is being taken after numerous [previous] warnings to Eckel that I delivered to him in an attempt to permanently correct his tendency to leave his courtroom without official purpose" (R-5).

On March 22, 1994, Spicuzzo issued a memorandum to Eckel advising of an "oral reprimand" for violating Rule and Regulation 3.1.11, "Obedience to Laws and Regulations" for conduct described on an attached memorandum from Lieutenant Salvatore Covino. The March 11, 1994 memorandum described Eckel's "persistent dissatisfaction" with an assignment. The lieutenant "raised his voice" to secure Eckel's obedience to "competent authority." Lieutenant Covino recommended a "suspension" because "this type of behavior occurred in the past." Spicuzzo's memorandum was placed in Eckel's personnel file (R-6).

On June 14, 1994, Spicuzzo sent a memorandum to Eckel, advising that he had been issued a written reprimand for conduct

which violated Rule and Regulation 3.1.8, Performance of Duty (R-7). An attached "report" concluded that Eckel had "disobeyed a standing order not to use certain doors in the holding cell area."

On January 17, 1996, Captain Jacko wrote a memorandum to Spicuzzo, advising that Eckel had departed work before his shift ended without permission (R-9).

In late November 1996, Eckel was charged with numerous violations of the Rules and Regulations, arising out of one incident. He was found to have been insubordinate, disrespectful to officers, and to have loudly spoken obscenities, etc. (R-39; R-40). Spicuzzo concurred with the internal investigation report and suspended Eckel for 4 days (8T130-8T133).

On October 21, 1997, Sheriff's Officer Robert Coen sent Chief Almasy a memorandum setting forth "findings of fact" about a verbal altercation between Eckel and another sheriff's officer (R-12). Although Coen did not sustain an accusation that the other officer was "demeaned" by Eckel, he wrote that in his "opinion," Eckel "exhibits an attitude of belligerence and antagonism towards anyone he perceives as not being submissive or respectful to him." Spicuzzo received a copy of the memorandum on October 22, 1997 (8T150). I infer that Eckel was not disciplined (8T148).

On August 3, 1997, a South Brunswick police officer/PBA delegate sent a letter on PBA letterhead to Sheriff's Officer and fellow delegate Mark Papi, apprising him of his "unfortunate" off-duty incident with Eckel. On July 19, the day after a verbal altercation between Eckel and the police officer during an automobile traffic delay, the police officer's lieutenant asked him about the incident. The police lieutenant purportedly told the officer that "a lieutenant in the Sheriff's office" had telephoned him and complained about his (the police officer's) conduct. On September 16, 1997, Eckel was served a Preliminary Notice of Disciplinary Action. On October 22, Spicuzzo conducted a hearing. On November 7, 1997, Spicuzzo sustained a charge of failing to submit a report on the incident and issued a 5-day suspension to

Eckel.

On October 12, 1999, a grievance arbitrator found just cause for the 5-day suspension and specifically found inadequate proof that Eckel's July 20, 1997 transfer (out of the Transportation division for unrelated reasons) and November 7 discipline were "adversely affected [by his] affiliation with the FOP" (R-11). The arbitrator wrote that Eckel's failure to submit a report to the Sheriff, following his own complaint to the South Brunswick Police Department, was "poor judgment." He also found that the transfer was "in accordance with NJ State Department of Personnel procedures" and did not violate the collective agreement.

The Sheriff's department maintains three types of files which variously or separately store reports about sheriff's officers' conduct - personnel, internal investigation, and incident (7T308). For example, an officer's "incident report" may be placed in an "incident file" - which stores facts or reports about "a situation and not a person" - or in a "personnel file" (7T308; 7T310). An officer is not necessarily informed that a report of his or her conduct is stored in an incident file. If the officer's conduct was not egregious enough to result in any discipline, a report of it could be stored in an incident or internal investigation file but not in a personnel file (7T313). Similarly, personnel files may be periodically expunged of disciplinary notices; the record does not show if the expunged notices are stored in other files. An internal investigation file is created for any sheriff's officer who was the subject of an internal investigation (7T308).

I find that on July 28, 1998, Spicuzzo was aware of Eckel's employment record, excepting the grievance arbitration award. Some unspecified letters of commendation are kept in that record (9T91). That Eckel was purportedly unaware of some of these writings, or did not "see" them in his personnel file, or recalled the incidents differently than the way they have been memorialized, does not alter their value as employment records (i.e., records from which the

Sheriff may adduce justifications for penalties on Eckel's prospective infractions of work place rules) (3T12; 3T13; 3T15-3T16; 3T19-3T24; 3T27; 3T29; 3T32; 3T33; 3T35; 3T37-3T38). All such files are also reviewed by Almasy and Falcone in determining bid and training officer assignments (7T314).

20. In June 1998, Eckel was transferred temporarily to the Process division to substitute for a vacationing sheriff's officer (2T76-2T78). Eckel was displeased by the transfer because the position often required overtime, which he "could not work" (2T78). Eckel told a supervisor, Lieutenant Colleen Gasper, an FOP member, that he could not perform mandatory overtime (2T78; 7T87). Gasper insisted that the position required the holder to work overtime and Eckel again refused to work overtime. A brief time later, Gasper told Eckel that Falcone ordered that he not be permitted to remain at the Process division post (2T79). I infer that Gasper told Falcone about Eckel's refusal.

21. Between 1995 and 1998, Chief Warrant Officer Donald Almasy and Chief Sheriff's Officer Anthony Falcone convened monthly staff meetings (except in summer) at the Sheriff's administrative offices on George Street in New Brunswick. The meetings were attended by superior officers and the presidents of the PBA and FOP (7T166-7T168). The purposes of the meetings were to facilitate an efficient Sheriff's department and engender cooperation and trust among staff (7T175). FOP president Randy Kijula and FOP delegate Kasha attended the meetings through September 1998 (CP-35; 7T168). Eckel was elected FOP president in September 1998 (1T50).

In October 1998, Eckel asked Almasy for transportation from his post to the staff meeting (7T169). Almasy referred the request to Falcone, who presided over the staff meetings. Falcone denied the request, saying to Almasy: "We don't provide transportation to and from staff meetings" (7T170). Eckel soon responded, "Well, then, would you pay for my mileage?" Falcone also denied that request. Eckel said that his automobile insurance policy provider would not provide coverage beyond his round-trips from home to his

"initial" assignment and back (7T171-7T172). Falcone said that Eckel was free to attend the monthly meetings or he could designate someone in his place (7T172). Eckel attended the October 1998 staff meeting (2T114). On October 15, he sent a memorandum to Spicuzzo requesting "mileage reimbursement" for driving his car to the meeting.

On October 16, 1998, Sheriff Spicuzzo issued a memorandum to Eckel, denying his request for mileage reimbursement. Spicuzzo wrote:

On the morning of the October 14th staff meeting, when you requested that an officer and a vehicle be sent to pick you up from your probation post to bring you to our 290 George Street location as you did not want to drive your personal vehicle, you were advised by Chief Almasy that we did not have an available officer and vehicle to transport you. Chief Almasy also advised you that it was not necessary for you to attend, that any member of the FOP could come in your place. Therefore, as the decision you made to attend this meeting was voluntary and not mandated, your reimbursement is denied. [CP-26]

Spicuzzo also wrote that when neither Kijula nor Kasha could attend a meeting, another FOP member attended in their place (CP-26).

Eckel testified that he was "not permitted to attend" the November 1998 staff meeting. He testified that Chief Almasy told him that "since the FOP was not the majority representative, [it] was not allowed to attend." Eckel purportedly asked Almasy to reconsider, to which Almasy replied that he (Eckel) should ask the PBA about the "goings on" at the meetings (2T114; 2T115).

On my proddings, Almasy testified that his "best recollection" of when the FOP was no longer "invited" to staff meetings was late November or early December 1998 (7T179). He also testified that Eckel had requested transportation for any occasion in which he was required to work or be trained away from the probation post (7T177-7T178). I find that Almasy's recollection about precisely when the FOP was no longer "invited" to staff

meetings is not reliable. Nor were the dates of the November and December staff meetings placed in the record. On an unspecified date after the October staff meeting, Almasz asked County counsel to "check" whether an automobile insurer would decline coverage in the way Eckel had described the limitation in his policy (7T227; 7T239). Almasz told Eckel the County counsel's opinion - that the insurer would provide coverage and even if it did not, the Sheriff's department self-insured policy would (7T228). Eckel insisted that his insurer would not provide coverage (7T229). Spicuzzo denied that he decided not to allow the FOP to attend staff meetings (9T94). Almasz "did not recall" if he had any conversation with Eckel about his attendance at staff meetings after October 1998 (7T174). He was next asked if Eckel was not allowed to attend a meeting. Almasz testified:

No, we never told him he wasn't allowed until maybe two months after the initial meeting he was supposed to attend. And at that point in time, it was decided that the FOP would no longer be invited to the staff meetings. [7T174]

I infer that the "initial meeting" was the October staff meeting; it was the first such meeting after Eckel became FOP president. Almasz was asked why the FOP was no longer invited to staff meetings. He testified:

The cooperation that was secured by or exhibited by President Kijula and Delegate Kasha no longer seemed to be there when these demands on getting officer Eckel back and forth and the insurance problems just seemed not to be existing any longer. [7T176]

I credit Eckel's testimony that the FOP was denied permission to attend the November staff meeting. Eckel was not challenged in cross-examination about his direct examination testimony. Almasz's testimony is evasive; he did not recall speaking with Eckel after the October staff meeting about his attendance at the November meeting. His partially declarative response, "We never told him he wasn't allowed..." was immediately



undercut by his next phrase "...until maybe two months after the initial meeting." I find that sometime after the October meeting and before the November meeting, Almasz asked County counsel about the automobile insurance issue that Eckel had raised and he confronted Eckel with the legal opinion. I infer that when Eckel continued to deny that he would be "covered" in the event of an accident en route to or from the staff meeting, Almasz alone or together with Falcone decided to exclude the FOP from attendance at the staff meetings. I credit Almasz's testimony about why the FOP was not allowed to attend staff meetings.

22. In October 1998, Eckel submitted a bid on a Process division posting and fellow sheriff's officer and FOP member Filomeno submitted a bid on a Transportation division posting (CP-3; 3T105; 6T182). Neither bid was approved. Eckel's and Filomeno's "bids" were among 35 or 40 bids received for the posts (7T139). Almasz and Falcone received all the bids (7T139). Sheriff's officers Kelly and Noble, PBA members, "received the bids" or were approved for transfers to the Process division (2T94-2T95). Sheriff's officers Gouge and Ouinette, PBA members, received the bids on the Transportation division transfers. Eckel testified that he had "more seniority and demonstrated ability" than Kelly and Noble, referring to two factors listed in Article XXV B of the agreement (2T96). He also testified that Filomeno was more senior than Gouge and Ouinette, acknowledging that the former had been a lieutenant in the Hudson County Sheriff's department (2T96).

On October 6, 1998, Spicuzzo issued a memorandum to Eckel, replying to Eckel's request for an explanation why his bid was not approved (CP-28). Spicuzzo wrote that in selecting officers for assignments, "consideration is given to an officer's ability, maturity and knowledge" and that "seniority will have some bearing and may be a consideration." The Sheriff also wrote that "you had been given your third choice in the August 13, 1998 job posting and thus, you were permanently assigned to the Courts" (CP-28).

Almasz testified that Eckel's "disciplinary problems

[meant] in my mind that he needed more supervision than would be available in the Process section" (7T144). Almasy also testified that Eckel had rejected overtime work when he was assigned to the Process division temporarily. (see finding no. 20). Almasy testified credibly and without contradiction about the circumstances often causing mandatory overtime in the Process division (7T143). On cross-examination, Almasy testified that he did not know which sheriff's officers are members of the PBA or FOP; he believed that Eckel, Kuter, Clyburn, Gasper, Chaney, Rysinski and Dudas were FOP members (7T242-7T243). Almasy testified that an officer's "desire [to work] overtime," "need for supervision," and ability to work with others may be assessed under the "demonstrated ability" requirement listed in Article XXV B of the agreement (7T248; 7T251; 7T252). The agreement does not define "demonstrated ability." Nothing in the record contradicts or suggests an insincerity in Almasy's opinion; I credit it. Almasy also testified credibly that officers Noble and Kelly had legitimate and high-quality "past experience" in the Process division; possessed appropriate demeanor, and ability to work with minimum supervision, all of which "made them top candidates for the positions" (7T141-7T142). Finally, neither Noble nor Kelly refused overtime employment when they were previously assigned to the Process division (7T143).

Sheriff's officer Gouge had been employed as a supervisor of patrol for an unspecified county park police and had "exhibited supervisory capabilities" (7T147). Sheriff's officer Ouinette had demonstrated "maturity" for having been assigned to the "bank run" without incident. Almasy described "the bank run" as a "responsible post" (i.e., officer delivers monies and mail to and from court facilities, banks, etc.) where "you don't have much supervision if any at all" (7T145-7T147). Sheriff's officer Filomeno had been recently disciplined, indicating that he was not "acceptable" for a position requiring little supervision, according to Almasy (see finding no. 5; 7T147-7T148).

Other memoranda from Spicuzzo to Eckel were presented to

witness Almasy. Dated in February and August 2000, they similarly explained why Eckel was not awarded a transfer or reassignment. Spicuzzo had written:

It is in the discretion of the Sheriff to select an officer to fill a particular post. The Sheriff...looks to each officer's career in its entirety. In making the selection, length of service is considered, as well as maturity, capability, ability, attendance and disciplinary problems or lack thereof.... [T]here are always employees disappointed in not being selected for a position on which they bid. This is not a reflection on the officer, but rather a confirmation of the caliber of the officers available for each position. [CP-28]

Almasy conceded on cross-examination that Eckel had tried to be reassigned to a Courthouse post within the Courts division and had "no explanation why he has been denied [that] opportunity" (7T306).

From January 1995 to February 1998, Eckel wrote 9 memoranda to Chief Falcone requesting to be selected as a training instructor (CP-27). Sheriff's officers were occasionally selected to instruct fellow officers in the proper use of firearms and the PR-24 baton, and in recognizing and diffusing domestic violence. Sheriff's officers were required to be annually or bi-annually "recertified" in the proper use of some equipment. Relatively few officers were selected to instruct the public, including school children, about the dangers of drug use, drunk driving, etc. Officers also sought instruction in varied matters of public safety and in teaching methodologies; the latter was entitled "MOI" (Method of Instruction) (2T121-2T122; 2T124; 5T21). Eckel sought placement in most of these courses; he once requested to become an instructor for "anything" (CP-27). On December 11, 1998, Eckel and sheriff's officer John Scaturro sent a memorandum to Almasy requesting permission to enroll in a class entitled, "Law Enforcement and the Internet" (2T125; CP-4). The request was denied (2T127). Scaturro was unaware of any sheriff's officer enrolled in an internet training class (5T168).

Chief Almasy normally received the written requests; he

initialed, date-stamped and wrote his recommendation ("approve" or "disapprove") on them and passed them to Falcone for final disposition (7T279). The 9 memoranda have no such markings; I infer that the exhibit is comprised of Eckel's copies of the memoranda he submitted. Almasly knew that Eckel had requested "training positions" but he did not identify CP-27, specifically (7T278).

Almasly testified that "scrutiny" of applicants for training positions is "even closer" than that applied in awarding reassignments and transfers (7T286). He testified that the department is "directly affected" by training officers and that "additional considerations" are used to select officers, beyond the 4 criteria listed in Article XXV of the agreement (see finding no. 2) (7T289). He conceded that such "considerations" are not articulated in the agreement or any document (7T289).

No evidence particularly shows that between 1995 and 2000, the Sheriff, Falcone or Almasly did not consider the factors of "ability, maturity and knowledge" in choosing successful bids for transfer or reassignment. Nor does the record show that these and other variables to which Almasly alluded as "additional considerations" were not applied in deciding Eckel's (unsuccessful) requests for training, including his request for internet training. Almasly was not asked to define "additional considerations" but he conceded under oath that the variables of "capability, attendance and disciplinary problems or lack thereof" - as they are written in Spicuzzo's letter (CP-28) - are not set forth in the collective agreement or in another document (7T289-7T290).

No evidence in the record explains Spicuzzo's sentence in his October 6, 1998 letter that Eckel had been awarded his "third choice" on a bid for reassignment in August and was "permanently" assigned to the Court division. I cannot discern if Eckel requested a "permanent" assignment or if Spicuzzo unilaterally determined that it was to be permanent. I infer from Eckel's 1998-2000 written requests for reassignment that he no longer wished to be assigned to the probation post of the Courts division. Nor is the record clear

that the overall wording of the memoranda addressed to Eckel was not also routinely used in all memoranda sent to sheriff's officers (including PBA members) who demanded "the reason for denial" of their separate requests for reassignment, pursuant to Article XXV. Finally, no evidence suggests that the FOP or the PBA had filed a grievance at any time contesting the criteria set forth in Spicuzzo's correspondence.

I find that from 1995 through 2000, Eckel was denied at least 10 requests for training and many requests for reassignment and transfer. He was also granted at least two requests for reassignment or transfer. The Sheriff's formulaic or "boilerplate" written explanations for denying several of Eckel's requests are not especially probative of his state of mind. In one sense it suggests that Eckel was treated no differently than any other sheriff's officer who asked for a reason why his or her bid was rejected.

23. On April 23, 1998, Sergeant Michael Dapolito, the department's training officer, compiled a list of six sheriff's officers scheduled to receive training in fingerprinting. One was an FOP member (CP-20; 5T191). On January 5, 1999, Dapolito compiled another list of eight officers scheduled to receive training in fingerprinting. One was an FOP member (CP-20; 5T193). On February 17, 1999, Dapolito compiled a list of eight sheriff's officers scheduled to attend a "N.J. Narcotic Association" seminar. None were FOP members (CP-20; 5T194). On March 30, 1999, Dapolito compiled a list of two sheriff's officers scheduled to receive "medical team" training. Neither were FOP members (CP-20; 5T193). On March 30, 1999, Dapolito compiled a list of 13 sheriff's officers scheduled for firing range training. None were FOP members (CP-20; 5T194).

In fall 2000, Dapolito prepared a list of sheriff's officers who had received MOI (Method of Instruction) training, field training and community awareness training over several years. This exhibit, unlike CP-20, was compiled during the litigation of this case (R-16; 8T179). Four of fifteen officers receiving MOI

training were FOP members; four of eleven officers receiving field training were FOP members; and two of ten officers receiving community awareness training were FOP members (R-16; 3T153; 3T155; 3T158; 8T182).

24. In August 1990, Richard Rysinski was hired as a sheriff's officer. He promptly joined the PBA, notwithstanding the FOP's status as majority representative (6T24; 6T26). From 1993 to 1995, Rysinski was a "dual" member of the PBA and FOP. In 1992, Rysinski attended training classes for PR-24 baton instruction and MOI (Method of Instruction). From 1992-1995, Rysinski instructed an unspecified number of PR-24 baton classes (6T29-6T31). (On January 13, 1993 and December 7, 1994, the PBA was certified as majority representative, pursuant to elections conducted by the Commission). In 1995, the PBA prohibited dual memberships; Rysinski retained his FOP membership (6T32).

Sometime in early 1995, Rysinski was scheduled to instruct a PR-24 baton recertification class. On an unspecified date before the class convened, Michael Dapolito informed Rysinski that "due to manpower, they wouldn't need me there unless one of the other instructors couldn't make it during the week" (6T34). Rysinski testified that Dapolito was a "line officer" on the date his instruction class was cancelled (6T34). He also testified that he "believed" that Dapolito was a PBA member (6T34). Dapolito did not testify in the hearing. An exhibit dated April 1998 concerning an unrelated matter shows that Dapolito was a sergeant (CP-20). I credit Rysinski's testimony.

In 1995 and later years, Rysinski has not been "asked or approached" to instruct classes (6T35). In 1997 and 1998, when Rysinski was last certified for using the PR-24 baton, all five such instructors were PBA members (6T36).

Rysinski testified that in July 1998, he witnessed an automobile accident and assisted in an ensuing rescue during off-duty hours (6T43-6T44). Rysinski informed his supervisor, a lieutenant, about the incident. The lieutenant ordered Rysinski to

file a report "as soon as you can." Almasy called Rysinski two weeks later, demanding a copy of his report and remarking that it should have been filed not later than 24 hours after the accident. Rysinski was not disciplined (6T44-6T45). I credit his testimony.

In December 1998, Rysinski was assigned to the Transportation division. He and another sheriff's officer, hired in January 1998 and regularly assigned to the Courts division, were ordered to transport a juvenile from a State psychiatric facility to a County facility in a County vehicle (6T49; 6T52; 7T186). Such vehicles are outfitted with videotape monitors. Rysinski conceded that he was the senior officer assigned to the task (6T52). He also conceded that no videotape was in the monitor (6T48). The prisoner "acted up" during the trip, and Rysinski disarmed himself and sat next to the prisoner for the remainder of the trip (7T188). Both officers filed reports on the incident. Almasy orally reprimanded Rysinski but did not reprimand the other officer, about whom Rysinski is "almost positive" of his PBA membership (6T45; 6T50; 6T51; 7T189).

25. In December 1988, Gregory Bennett was hired as a sheriff's officer. The record does not indicate his membership in either organization from 1988 to 1993. In 1989, Bennett chastised his partner (a sheriff's officer) during an on-duty automobile stop (7T256-7T257). Almasy characterized Bennett's conduct as "immature" and "not conducive to working in the Transportation division, where cooperation and reliance upon [one's] partner are integral to safe[ty]" (7T149; 7T150). From 1993 to 1995, Bennett was a member of the PBA and FOP and retained only his FOP membership when the PBA prohibited dual memberships (5T61-5T62). From 1995 to 1997, Bennett was a second vice-president of the FOP and from 1997 to 1999, he was first vice-president (5T64).

In or around June 1999, Bennett submitted a "bid" to be transferred from a post in Judge Barnett Hoffman's courtroom to a post in the Process division (5T73; 7T151). His bid was rejected; sheriff's officers Kelly and Noble were transferred to the posts.

Bennett testified that he was more senior than both Kelly and Noble (5T74). I credit his testimony. Bennett requested an explanation for the denial and received a memorandum from Chief Almasy, stating that "...consideration is given to an officer's ability, maturity and knowledge [and] seniority will have some bearing and may be a consideration" (5T77-5T78; CP-3). Bennett inquired again because he wanted to learn "how the criteri[on] were applied" (5T78). He received another memorandum from Almasy, repeating verbatim his previous memorandum (5T78). Bennett inquired yet again, requesting to be informed about "what areas of his performance were deficient" (5T79). He did not receive a reply.

Almasy testified that Bennett was "doing a fine job" in the courtroom; that his imposing physical size in the courtroom was favored by Judge Hoffman; and that the decision "not to move Bennett" was made for the "smooth running of the Courthouse" (7T149; 7T151; 7T260). Almasy admitted under oath that Bennett was not informed that the "smooth running" of the Courthouse figured in the decision not to select him for transfer and that such efficiency is not one of the four criteria for selecting applicants for a post vacancy, pursuant to Article XXV of the collective agreement (7T260).

In 2000, Bennett submitted bids to be transferred from the Courts division to both Process and Transportation divisions (5T81). Sheriff's officers and PBA members Sullivan and Villegas and FOP member Janet Romer were transferred (or "received the bids") to Process (Sullivan) and Transportation (Villegas and Romer) (5T82; 5T83; 5T121). (In August 1999, Romer had also successfully bid on a Transportation division post (6T58)). Bennett acknowledged that Sullivan and he attended the police academy together and that "his date of hire" was "shortly after mine" (5T82). Also in 2000, Bennett "accepted" a 60-day suspension and a \$3000 fine on a disciplinary charge that he had routinely left work early (5T85; 7T90-7T91; 7T101). Bennett also acknowledged under oath that Spicuzzo rescinded the imposed fine after learning that the payment



"would be a hardship." Spicuzzo also permitted Bennett to count sick days and vacation days against the suspension (5T85; 8T183; 8T184).

26. In or around July 1996, a functioning telephone was positioned on a sheriff's officer's desk at the probation department (5T176). In July 1999, about one year after Eckel had been reassigned to the probation post, Sheriff Spicuzzo received a phone call from County or Sheriff's department personnel director Tom Cross, who complained about Eckel's conduct (8T162; 2T158). Cross complained that Eckel had been "loud" and "belligerent" in his phone conversation with a personnel department employee named "Natalie" (8T162; 2T158). Eckel had used the desk phone "to argue a point for [sheriff's officer and FOP member] Scaturro as his union president" (2T158). Spicuzzo did not receive a written complaint from Cross or Natalie (8T198).

Spicuzzo summoned Eckel to his office. Sheriff's officer John Marsicano also attended as Eckel's FOP representative (2T159-2T160). Eckel told Spicuzzo his account of the disputed phone call (2T162). Spicuzzo "yelled" at Eckel for being "abusive" and telephoned "Natalie" during the meeting (2T160-2T161). Eckel testified that while the phone was on "speaker" mode, the Sheriff asked Natalie if he had been abusive and she replied, "no" (2T162). In the absence of conflicting evidence, I credit Eckel's testimony. Eckel received a written reprimand for "abusive language," which he disputed in a written response (2T162-2T163). Eckel conceded that he was "argumentative" (3T56). Eckel was transported back to his post.

About one-hour after Eckel's return, Spicuzzo phoned him and asked that his call be transferred to the probation post supervisor (2T163). A short time later, the supervisor walked to Eckel's desk and advised him that she had been directed to remove the phone; that the Sheriff advised that "...officers at the post were no longer in need of the phone" (2T164). The phone was removed (2T157; 5T176). Officers can use their "walkie-talkies" in

emergencies (8T162).

Eckel requested the PBA to file a grievance about the phone's removal on his behalf. The telephone has not been returned to the probation office desk (2T164; 2T167).

Eckel testified that PBA officers are "allowed" to conduct "union business over the radio." He testified about several examples; one was that the PBA secretary radioed PBA president Semler (or Lucarelli) while he "should have been out on the road, processing" (2T170; 2T171). Eckel testified that he and other FOP members heard similar transmissions "so frequently, that I said, 'if they're going to do it, then we're going to do it'." Sheriff's officer Scaturro corroborated Eckel's testimony; he testified that he "has heard PBA members using the radio for PBA business" (5T182-5T183). Eckel testified that he "told different officers to 'call me out of probation if I was needed for a union-related matter'" (2T172). Finally, Eckel testified that he was "reprimanded" at least twice for using the radio to talk about FOP business with fellow members. In 1998, he was reprimanded by Almas; in March 2000, he was reprimanded by Captain Barbieri,

...who drove out [to the probation post] to tell me and Scaturro that we were not allowed to use the radio for anything other than departmental use. He said that we could use the fax machine - in the absence of a telephone. [2T172]

In the absence of conflicting evidence, I credit Eckel's testimony. Eckel's testimony does not specifically show that the Sheriff, Chiefs Falcone or Almas, or other superior officers knew that PBA officials conducted "union business" over their radios. I infer that superior officers also heard PBA representative transmissions over the radio in the same way they heard FOP transmissions. Eckel acknowledged under oath that "FOP members can conduct union business during the workday." For example, Eckel was permitted to visit the Courthouse if he "was downtown" (2T168). I infer that if Eckel reported to a superior officer or performed a work-related task in New Brunswick, he was allowed to speak with FOP members assigned to

the Courthouse.

27. Eckel testified that in September 1999, he was denied permission to accompany sheriff's officer Scaturro as his union representative at an OAL proceeding (2T182). He also testified that he used his own car to attend an OAL "conference and hearing" on an unspecified date (2T106). When asked if PBA representatives were provided transportation to such proceedings, Eckel answered "Yes and no" (2T106). He then testified that the PBA used a County vehicle "that day" to "testify" at Scaturro's hearing (2T107). Eckel's testimony is confusing; I cannot discern if he was denied permission to attend the OAL matter or merely denied a County vehicle or whether he was referring to his attendance on behalf of Scaturro on different days. Eckel testified that the collective agreement authorized his attendance at the proceeding. (The collective agreement identifies "PBA Local 165" as the "exclusive bargaining representative" of sheriff's officers and investigators. Article XXIV, "Grievance Procedure" enables "the PBA president" or "his designated representative" to assist a grievant in "any stage" of the grievance procedure) (A-9).

Scaturro testified that "during a few hearings" beginning in April 1999, Eckel represented him and he could not remember a time that he was not allowed to represent him (5T153-5T154). Scaturro testified that Eckel did not "represent" him at his OAL hearing (5T154). I credit Scaturro's testimony. The record is not clear that the OAL "proceeding" to which Eckel was denied permission to attend was the same proceeding as the OAL hearing. On March 29, 2000, an Administrative Law Judge issued an Initial Decision sustaining a 30-day suspension Spicuzzo ordered, pursuant to a departmental hearing conducted on June 10 and 30, 1999 (R-30). The OAL hearing was conducted in February 2000, following an unsuccessful "settlement conference" on October 8, 1999 (R-30). Eckel was included in the witness list at hearing (R-30). I infer that in September 1999, Eckel was denied permission to attend the October 8 settlement conference, at which Scaturro was represented

by FOP counsel (5T191).

Eckel also testified that in 1998 or 1999, he was denied permission to accompany sheriff's officer Kuter at a scheduled review of his personnel file (2T184). Eckel believed that "the agreement allows us to do that." Eckel testified that Chief Almsy informed him that FOP member and sheriff's officer John Marsicano, who was regularly assigned to the Courthouse, was permitted to accompany Kuter (2T184). I credit Eckel's testimony. Article XIII of the agreement, "Personnel File," provides in a pertinent part that, "a designated representative of the Association may be present [at the inspection of the personnel file] when requested by the officer concerned" (A-9).

28. In 1990, Robert Kuter was hired into a permanent sheriff's officer position and has been an FOP member throughout his employment (6T217-6T218). In 1996 or 1997, Kuter attended "MOI" (Method of Instruction) classes; he was interested in instructing classes on "unarmed defensive tactics" (6T220; 6T222). The current instructor is sheriff's officer and PBA member Michael Ansaldo (6T223).

In April 1998 and January 1999, Sergeant Michael Dapolito scheduled Kuter to attend training classes in fingerprinting (CP-20; 6T226). Kuter testified that Dapolito later informed him that he "would be attending" a domestic violence training class in March 1999 (6T227). Soon before the class was conducted, Kuter was informed that he would not attend. He testified that sheriff's officer and PBA member Christopher Coen "went in his place," and conceded that Coen had more seniority than he (6T228). Kuter testified that another attendee, sheriff's officer and PBA member Lori Hamilton, was less senior than he (6T228). I credit his testimony.

In 1999, Kuter was served with a Notice of Disciplinary Action and received a penalty of a 5-day suspension (6T246). Kuter testified that sometime in 2000, Sergeant Mackiewicz said to him:

Until things are all finished with you, between

you and the department, they're going to hold off on [your] community awareness duties, which include the instructor qualifications. [6T233]

Mackiewicz testified in the hearing. She was not asked any question(s) about her alleged statement to Kuter. I infer that her remark to Kuter referred to his pending disciplinary 30-day suspension. Kuter credibly testified that he had not participated in a community awareness program in more than one year (6T234).

In March 2000, sheriff's officers Kuter and Bennett were together assigned to posts in a courtroom (7T88; 6T236). Late in the day shift on March 14, an unspecified chief ordered lieutenant and FOP member Colleen Gasper to summon Bennett to an unspecified captain's office. Gasper was promoted to sergeant in 1997 and to lieutenant in 1999 (7T86). Gasper radioed Bennett; "Kuter responded and said Bennett left for the day" (7T88). A short time later, Kuter appeared at the designated office, though Gasper had not so ordered him (7T89). Kuter testified that:

I asked one or two questions to the lieutenant and her response was: 'No, you do not need union representation at this time; it's not necessary.' [6T238]

Gasper denied that Kuter asked her if he should have a union representative (7T89). She testified that their brief conversation did not include any references to a union representative (7T90). She testified that Kuter walked into the office, threw up his hands and asked, "What's going on?" She replied: "I think it has something to do with [Bennett] leaving early today." Kuter retorted: "Well, he does that all the time" (7T90-7T91).

I credit Gasper's testimony. Her testimony was consistent and forthright and she was unflappable under cross-examination. She is also a FOP member and would have no ostensible reason to testify differently than Kuter because of union affiliation. On the other hand, Kuter would have a reason to disavow his excited utterance, "Well, he does that all the time," especially when it was used to substantiate a charge that Bennett had frequently left work early

(see finding no. 25). I am also unpersuaded by Kuter's vague testimony that he had asked Gasper "one or two questions" and by his "inquiry" of her about his possible need for a union representative.

29. In August 1995, David Siegelman was hired as a Middlesex County sheriff's officer, following his graduation from the police academy (6T94). Siegelman was a PBA member from 1995 to about October 1999, when he relinquished his membership and joined the FOP (6T95; 6T99). Siegelman was disciplined six or seven times between 1995 and October 1999 (6T97-6T98). On an unspecified date, he was verbally reprimanded for insubordination (6T101). In October 1999, Siegelman argued with another sheriff's officer while they worked; a sergeant Salerno heard the argument and wrote a report (6T105; 6T107). On the date of the argument, and for at least two days afterwards, Siegelman was a PBA member and not a member of the FOP (6T108). Two days after the argument, Chief Sheriff's Officer Anthony Falcone spoke to Siegelman about the incident. Sheriff's officer and PBA delegate Mark Papi accompanied Siegelman at the meeting. Falcone threatened a two-week suspension (7T116-7T117). Falcone also said: "The last thing [I'm] doing before retirement is walking [you] to the unemployment office. I'll make things up if I have to. I'll ride you like a bull" (6T110). Siegelman was transferred from a midnight shift in the Transportation division to another shift at a holding cell in the Courts division (6T105; 6T111).

On or about November 12, 1999, Almasy conducted a hearing about Siegelman's conduct during his argument with the other sheriff's officer in October. PBA delegate Papi represented Siegelman at the hearing (6T113; 7T114). Siegelman received a written reprimand (6T103; 6T113).

Siegelman testified that after the hearing, as he and Papi descended a staircase together, Papi said: "See, if you were with the other guys, you would have gotten a whole lot worse" (6T113). Siegelman understood the remark as meaning that if he was an FOP

member, he "would have been suspended for a lot longer" (6T114). I infer that Siegelman meant that he understood Papi to say that if he was an FOP member, he would have received discipline more severe than a written reprimand.

Papi testified that he said to Siegelman after the hearing: "You did good" (7T118). Papi testified that he meant that Siegelman received a more lenient punishment than the two-week suspension that Falcone had threatened. Papi denied that he mentioned Siegelman's PBA membership or said that his intervention on Siegelman's behalf spared him from harsher discipline (7T117).

The record does not reveal any context for Papi's alleged remark (to Siegelman) that if he was with "the other guys," he would have been harshly disciplined by Falcone. Siegelman did not testify that he had informed Papi that he had become or was intending to become an FOP member. One might even infer that such a confession before the November 12 hearing would appear to Siegelman not to be in his best interest. Although Papi may have independently learned of Siegelman's disaffection, nothing in the record suggests his knowledge. I do not infer it. Accordingly, I do not credit Siegelman's testimony about his staircase conversation with Papi. I credit Papi's version.

Sometime in November or December 1999, Siegelman received a notice to report to Falcone's office about an "absenteeism problem." On that date, Siegelman was a PBA member (6T136). Siegelman had also been ordered to write a report about an unrelated matter; he allegedly used a parking permit without authorization (6T139-6T140). Siegelman wrote the report to Chief Almasi, which set forth an admission that he used the permit without authorization (6T141-6T142).

On January 5, 2000, Falcone and Almasi convened a meeting or inquiry about Siegelman's conduct. Eckel accompanied Siegelman as his representative; it was the first time that Siegelman's membership in the FOP was apparent (6T115; 7T333). Siegelman surreptitiously recorded the meeting because he was concerned about

threats to his employment (6T115). A transcript of the meeting was prepared by a transcription service and marked into evidence (CP-21).

In the first portion of the meeting, Siegelman answered questions about his possession and use of a parking permit. Almasly remarked that he "had not been looking for [the permit]. Somebody went out there to help you because you left your lights on" (CP-21, p. 5). Siegelman also gave Almasly and Falcone his written report about using the permit. Falcone asked:

What is this, with the Constitution? What are you writing here? I want a report on why this was in your car, not the Constitution of the United States. [CP-21, p. 5]

Siegelman had written that he was reserving his Constitutional rights under "Garrity" (referring to a U.S. Supreme Court case, Garrity v. State of N.J., 385 U.S. 493 (1967)); he believed that writing the decision name on the report assured him of procedural rights he may otherwise have waived. Falcone responded:

Since you state the Constitution to me, I'm bringing you up charges. Because you (inaudible) fucking make a fool of me, I'll bring you up on charges. Okay? Anytime you state the Constitution to me, I'll bring it up on charges. We don't need that kind of shit. We just asked for a simple report on a parking pass, and we're seeing the Constitution. Everytime that comes up and it states the Constitution, we'll bring it up on charges. That's our right. And you defend it. [CP-21, p. 6]

Falcone next said that he was giving Siegelman "a warning on your patterns," meaning that Siegelman's absences were on Mondays and Fridays (CP-21, p. 6; 6T138). Falcone reiterated that any officer writing "Garrity" on a report would be "charged." Falcone then dismissed Siegelman and Eckel from his office.

On January 7, 2000, Siegelman was ordered to write a report about his alleged impermissible use of a cellular phone while on-duty (6T130). Siegelman was ordered to write the report for



"Internal Affairs" (6T131). Siegelman was not disciplined for the alleged usage (6T130).

30. John Scaturro has been employed as a sheriff's officer since August 1989 and has maintained membership in the FOP throughout his employment (5T133-5T134). On February 5, 1996, Scaturro was assigned to a probation post in Piscataway (5T157). On April 21, 1998, Spicuzzo issued a memorandum to Scaturro, advising that he will be reassigned to a Courthouse adult holding-cell post, commencing April 27 (CP-16). Scaturro did not seek the reassignment; he was switched with Kasha, who had complained of a hearing problem while assigned to the holding cell (see finding no. 9). Scaturro promptly sought a reassignment away from the holding cell; Chief Almasy advised him that he may be "moved" when "the next class graduates [from] the academy." Scaturro asked him if, in exchange for not pursuing a contractual grievance, he would be assured of such a reassignment, and Almasy agreed (5T163; 5T164). In August 1998, Scaturro was reassigned to Judge Daley's courtroom. In November 1998, he was returned to a probation post in Piscataway, where he worked with Eckel (5T164).

Scaturro and Eckel requested and were granted permission to "join" or "tack-on" contractually-allotted 15-minute morning and afternoon break periods with the 30-minute lunch period. The round-trip travel distances from the probation office to eateries and return could not be easily reconciled with a 30-minute lunch period (7T181-7T182). From sometime in 1999 until March 2000, Scaturro and Eckel were permitted to combine break periods with the lunch period (1T182; 2T196).

In March 2000, Eckel and Scaturro received a memorandum from a Captain Barbieri, advising that they were no longer permitted to join break periods with lunch periods and that they must take lunch periods separately (while the other remained on duty) at designated times (2T196). Barbieri is a former PBA president (5T171). I infer that Barbieri was not PBA president during the period he served in the rank of sergeant (see recognition provision

of A-9). Almasy testified without contradiction that Eckel and Scaturro were together "...taking their lunches later and later - 1 p.m.; 2 p.m. - [which] wasn't a good thing because probation was receiving people and these clients were sometimes loud or belligerent" (7T182). Almasy determined that the workplace would be "safer" if they conformed to the contractually-allotted break and lunch periods (7T183). Almasy acknowledged that "people on the job who have appointments or want to see someone or make payments do come in at lunch hour" (7T194). I infer that Eckel's and Scaturro's "later" lunch periods provided "coverage" at peak mid-day visitations to the Probation department (7T296). Almasy and Falcone determined, nevertheless, that "we really couldn't afford to give them an [uninterrupted] hour off" (7T195). Eckel and Scaturro filed a grievance, which was denied (5T173-5T174).

Almasy also testified without contradiction about "exceptions" to the timing of break periods and the lunch period. Sometimes, sheriff's officers assigned to the Transportation division cannot take a 15-minute break in the morning because they are "on the road." Upon request and authorization, they may be permitted to "tack-on" a 15-minute break period to their 30-minute lunch period. A comparable scenario may result in cancellation of the morning break periods for sheriff's officers assigned to a courtroom (7T184-7T185). Almasy denied that all sheriff's officers assigned to a Courthouse post may "tack-on" a 15-minute break period to a lunch period; each "tack-on" must be authorized (7T296-7T297). The Charging Parties did not rebut Almasy's testimony; I credit it.

31. On September 30, 1999, Marie D'Angelo, a health insurance company employee, wrote a memorandum to Chief Almasy describing her recent telephone conversation with Eckel about his "back problem" (R-15; 1T122-1T123). D'Angelo wrote that on September 29, she spoke with Eckel (who was off-duty) about "light duty" and at a point of disagreement, "...he started yelling and said, 'Fuck you, all you care about is me going back to work. My wife is 9 months pregnant and I'm in pain'" (R-15; 8T204). D'Angelo

wrote that Eckel "hung up" the phone and that she immediately phoned him and "...he again became hostile...and said, 'Fuck you.'" D'Angelo wrote that she told Eckel that she would report his remarks to his employer (R-15).

Eckel testified that he did not "curse out" D'Angelo (1T123). Spicuzzo testified that Eckel acknowledged that he had cursed (10T65). I do not credit Eckel's testimony. No evidence suggests that Eckel knew D'Angelo before their September 29 phone conversation. I have no reason to doubt the authenticity and veracity of the exhibit. I infer that D'Angelo would have no ostensible reason to report Eckel's conduct to the Sheriff unless his remarks were stridently vulgar, offensive or abusive. Other reports memorialized similar conduct (see finding no. 19). I have also not credited other of Eckel's testimony.

An Internal Affairs investigation ensued, after which Spicuzzo decided to fire Eckel (1T123; 8T157; 8T191; 10T61). Spicuzzo phoned Anthony Fusco, an attorney who frequently represented FOP members in employment litigation, and told him, "This is the first time I believe I ever terminated anybody" (8T169). Fusco convinced Spicuzzo to decrease the penalty to "something less than a termination" and to conduct a hearing (8T169; 8T193).

Eckel testified that on an unspecified date, Spicuzzo "offered" a 30-day suspension, which the sheriff's officer discussed with unidentified FOP counsel (1T120; 1T125). FOP counsel informed Spicuzzo that Eckel agreed to the suspension (1T125). Eckel testified that Spicuzzo replied that "he would [also] have to drop all litigation." Spicuzzo allegedly provided Eckel time to consider the proposal, which was declined (1T127). Spicuzzo did not deny Eckel's testimony or offer a differing version. I credit Eckel's testimony. Spicuzzo next arranged a hearing that Eckel's (FOP) attorney attended but Eckel did not attend (8T170; 8T193). Spicuzzo issued Eckel a 20.5 days suspension (8T166; 8T170).

On an unspecified date, Spicuzzo suspended sheriff's

officer and PBA delegate Leonard Moss 30 days "...because of an incident that occurred between [the officer and the Sheriff]" (8T166). He was later promoted to sergeant (8T190).

32. At about 9 a.m. on May 23, 2000, Spicuzzo convened a disciplinary hearing at his New Brunswick office, pursuant to a Preliminary Notice of Disciplinary Action he issued to sheriff's officer Robert Kuter (7T14; R-36). The Notice had issued on May 9 and specified that Kuter "may" receive a 30-day suspension for "taking afternoon breaks at the end of [his] shift," thereby violating several departmental Rules and Regulations (R-36). On May 11, Kuter requested that Eckel represent him at the upcoming hearing (R-37; 8T172). Kuter also sought an attorney (7T17).

Kuter attended the proceeding, as did his representatives, FOP President Eckel and attorney Darryl Saunders (6T240). Eckel had been reassigned that day from probation, his routine post in Piscataway, to the Courthouse, as an accommodation for his appearance. Another sheriff's officer was apparently reassigned to probation (3T171). Chiefs Almasy and Falcone attended, along with Spicuzzo on behalf of the County. Spicuzzo had also arranged work schedules so that Sergeant Allen and Lieutenant Gasper attended as witnesses (6T240; 8T172; 10T49).

Spicuzzo testified credibly and without contradiction that he "normally wrote a punishment on a Preliminary Notice as a starting point." Only rarely did he not substantially reduce the ascribed penalty, pursuant to his discussions with the targeted officer and representative or attorney (8T171; 8T254; 10T55). Kuter had received "more than a few" Preliminary Notices of Disciplinary Action and conceded that he had "worked them out with the Sheriff" (7T19-7T20). In October 1999, for example, Spicuzzo substantially reduced an ascribed penalty, after Kuter answered questions and explained "his side of the story" at a similar hearing on unrelated charges (7T20-7T21).

Saunders had represented FOP member/sheriff's officers at similar proceedings and had a brief discussion with Spicuzzo before

the hearing began (4T200). I infer that no one else heard their remarks. Saunders wanted to "resolve" the matter. Spicuzzo said, "You shouldn't have brought Steve [Eckel]" (4T200). Their private discussion apparently did not resolve the case.

Convening the hearing, Spicuzzo read the charges aloud and asked Kuter if he "would like to make a statement" (8T172). Kuter said: "On advice of my union and counsel, I wish to not testify and I waive the hearing" (7T22; 8T173). Kuter had not informed the Sheriff of his intention at any time before his reply (7T19). Eckel admitted that he advised Kuter not to speak at the hearing (3T209). Spicuzzo summoned his secretary to record Kuter's "position" (8T173). Spicuzzo asked Kuter some questions about differences between his account of what he said to a witness and that witness' account (7T23). Saunders asked some questions but the record does not show to whom they were directed (8T174). Kuter testified that about 2 hours elapsed before he "could leave the room" (7T30). Spicuzzo testified that about 10 minutes elapsed before he stated to all present: "Based on the findings of the reports and reports of witnesses, I have decided to uphold the 30-day suspension, pursuant to the Preliminary Notice of Disciplinary Action" (8T174). Nothing in the record corroborates Kuter's testimony or establishes events or conversations that could have consumed the purported breadth of time. I credit Spicuzzo's estimate.

The Sheriff's articulated finding apparently ended the hearing. Spicuzzo and Saunders walked together from one room to another, toward the hallway (8T176). Spicuzzo said:

I don't know why you brought Steve [Eckel] here. You know he's argumentative. You know, you would have gotten a better deal if you had [brought only] Kuter. [4T202]

Spicuzzo admitted that he told Saunders that "if it wasn't for Eckel, Kuter may not have gotten 30 days" (8T175; 8T176). Eckel heard the Sheriff's admitted remark (2T189; 3T207; 4T201).

Spicuzzo also testified that he "said" other remarks. I

find that he did not say those remarks, but credit his testimony as defining the meaning of the remarks he actually said:

I was disappointed that we didn't go through this hearing because in the past...once I have heard explanations from the charged parties...and arguments from attorneys and I have allowed them to go back and forth...we were always able to come up with sort of an agreeable amount of days.... And I felt that if we did talk it out, if we did hear some explanation from Kuter, his 30-day suspension wouldn't have been that extreme.... [8T175]

Spicuzzo's testimony is corroborated by his remarks later that morning in a surreptitiously recorded conversation with FOP member/sheriff's officer John Marsicano. Spicuzzo said: "I wanted to have [Kuter] tell his side of the story and Eckel insisted that he keep his mouth shut" (CP-33, p. 23). He also said to Marsicano: "My fear is that I come down harder than I would normally come down if people were talking to me" (CP-33, p. 25). Spicuzzo acknowledged under oath that a union has the right to "waive" a hearing and proceed to the next "step." Before May 23, 2000, no sheriff's officer or union representative invoked that right in a hearing before the Sheriff (8T255).

33. Eckel testified that after the Kuter "hearing," Sheriff Spicuzzo directed him to return to his regular probation post (3T171). Spicuzzo testified that Eckel returned to his Courthouse assignment (arranged for that day), where a supervisor directed him to return to his regular Probation post in Piscataway. Eckel objected, advising the supervisor that he was grieving the order. The supervisor phoned Chief Almasy, who promptly informed Spicuzzo (9T36-9T37; 10T50).

Their testimonies do not really conflict; Eckel's does not provide details about when Spicuzzo ordered him to return to the probation post. I credit the Sheriff's version. FOP member and then-sheriff's officer Marsicano represented Eckel that day on his grievance contesting the order to return to the probation post

(8T14-8T15). Marsicano was hired as a sheriff's officer in 1984 and has been an FOP member continuously since 1987 (7T3; 7T6). Marsicano had been disciplined on three occasions, the last in 1992 for insubordination (7T10; 7T11-7T13). In July 2000, Spicuzzo designated Marsicano to be a provisional sergeant, pursuant to Department of Personnel rules. The rules did not obligate Spicuzzo to select Marsicano (7T31-7T32; 8T177).

Some period of time elapsed between the end of the Kuter "hearing" and the grievance meeting concerning the order to Eckel to return to the probation post, evidenced by a period of time in which Marsicano walked from the Courthouse to the Sheriff's office. Only Spicuzzo's version is consistent with an interim period between the Kuter "hearing" and discussion of the Eckel grievance. Neither Spicuzzo nor Eckel testified that they discussed his grievance immediately after the Kuter "hearing" ended.

Upon hearing of Eckel's grievance, Spicuzzo said to Almasy: "This is ridiculous. Bring Eckel here with his union representative because I want to get down to what's happening here" (10T50). Eckel designated FOP member/sheriff's officer Marsicano as his representative. Marsicano was advised to report to Spicuzzo's office (8T14-8T15). Eckel gave Marsicano a pocket-sized tape recorder with a microcassette immediately before they entered the building housing the Sheriff's office (8T15). The meeting was attended by Spicuzzo, Almasy, Falcone, Marsicano and Eckel (4T176). Marsicano surreptitiously recorded the meeting by keeping the recorder in a jacket or shirt pocket. Afterwards, Marsicano gave the recorder and the microcassette to Eckel, who delivered the tape to a certified court reporting business for transcription (4T177; 4T184). Eckel testified that the prepared transcript accurately reports the recorded comments (4T180). I credit his testimony.

The transcript of the recorded meeting was marked in evidence (CP-33; A-10; 10T6). Spicuzzo said at the outset:

You know, I've been going on 20 years now as Sheriff, and I've never had so much confrontation in 20 years as I've had since Mr. Eckel has become a member of this FOP. And I think we're now on the point of borderline harassing, not only the County Sheriff's Department but the entire county.

Now, I don't know when this shit is going to stop, but that's going to be up to you, we're either going to stop you in the courts or we're going to stop you by you losing your job. I've had it up to here with you. You filed a first-step grievance just now about what?  
[CP-33, p. 2]

Spicuzzo testified that the "harassment" was the FOP's numerous frivolous grievances and an FOP-filed civil action in federal court, in addition to cases pending at OAL and PERC. He testified that he was "upset" and "confused" by all of the litigation (10T56-10T58). I credit his testimony. Spicuzzo testified that "...stop you by losing your job" was not a threat. He testified that the remark "was a concern that an employee was creating an unfavorable situation in the department" and that "if it persisted, that is, in violating rules and regulations, he would lose his job" (9T37-9T38). I find that Spicuzzo threatened Eckel's employment; if he continued to "harass" the County Sheriff's department, he would be fired.

Eckel replied that he was "ordered" to report to the Courthouse "for [the Kuter] hearing today," beginning at 8:30 a.m. He said the "norm" would have been to report to the Sheriff's office at 8:30 a.m., "wait one-half hour, and then go back to probation." The order led him to "plan on being in [the Courthouse] all day." Spicuzzo asked him, "What gives you the right to believe that you can pick and choose your [Courthouse] assignments?" Providing Eckel a copy of the current collective agreement, Spicuzzo asked him: "Where is the violation of [the collective] agreement?" (CP-33, pp. 2-5).

Eckel cited Article XXV, "Employee Rights," Section B.6



and read a portion aloud (CP-33, p. 8). Eckel said: "Number 6: "The sole right of the Sheriff, County of Middlesex to reassign a police unit to department (inaudible) such reassignments in accordance with recognized New Jersey Department of Labor Procedures." Eckel said that he did not receive a "5-day notice," pursuant to the provision. The provision states, in part:

It shall be the sole right of the Sheriff of the County of Middlesex to reassign employees between units of the Department....

[A-9]

The probation post is included in the Courthouse unit, a fact not contested by the FOP. Eckel conceded the fact, saying, "It's a courthouse assignment, but it's a change of building." The contract provision does not refer to "buildings." This exchange ensued:

**Spicuzzo:** This is where you waste the County's fucking time. That's bullshit, Steve, and you know it and your lawyer knows it.

**Eckel:** I'm not going to argue with you, Sheriff.

**Spicuzzo:** I'm not going to argue with you, either. I'm tired of - stop wasting our fucking time.

**Eckel:** Okay.

**Spicuzzo:** You do nothing but waste the time of this department and put your own members in jeopardy. When the hell [are] you going to smarten up? Are you going ahead with this grievance?

**Eckel:** I'll withdraw it, Sheriff.

[Eckel leaves the room]

[CP-33, pp. 8-9]

The Sheriff testified that, "...put your own members in jeopardy" was a reference to the Kuter discipline only, despite the plural noun (9T46; 9T49). I credit his testimony; one may easily exaggerate in a highly agitated or angry state of mind by generalizing the particular, as did the Sheriff. I find that he similarly exaggerated in saying to Eckel: "You've caused chaos in this department.... You've probably been a cause of people being

suspended longer than they generally should be" (CP-33, p. 7).

Spicuzzo had also said to Eckel and Marsicano:

I'm tired of getting these abusive grievances that don't go anywhere, that you guys constantly lose. I'm trying to figure out what your grievance is about and find out if you have a legitimate argument. You guys got to tell me what your legitimate argument is, because I'm tired of wasting the County's money and time on Stevie Eckel.

It's not about the FOP, because I couldn't give a darn if John belongs to the FOP, never had a problem with John Marsicano or any other member, in most cases, of the FOP. It's Steve Eckel that's the problem in this county. It's Steve Eckel that causes the problem with the FOP and Sheriff's Department in Middlesex County.

[CP-33, p. 6]

I infer that "cases" means any individual sheriff's officer employment record, if that person is also a FOP member.

Eckel testified that the Sheriff "coerced him into dropping [his] grievance that day" (2T139). I credit his testimony as reporting his state of mind because the Sheriff had referred to his grievance as "shit" and threatened to "stop [him] by losing [his] job." I find a probability that Eckel had determined to record the Sheriff's remarks because he was aware that Spicuzzo was frustrated by the FOP's effective cancellation of the Kuter "hearing" a short time earlier that day. Eckel also knew that Spicuzzo was annoyed at him for his role in that cancellation. Spicuzzo's frustration was predominantly concerned with the time and effort used to assemble witnesses and participants for the aborted hearing. I also find that he was particularly frustrated by his inability to "negotiate" a lesser penalty than the imposed 30-day suspension. Eckel spontaneously "filed" a grievance. I find that when he was unexpectedly summoned to the Sheriff's office, Eckel quickly decided to tape record Spicuzzo in what he reasonably believed was his heightened state of agitation.

After Eckel left the room, Sheriff Spicuzzo said to Marsicano: "You do the job." I infer that the Sheriff implied that Eckel did not perform his job. He complained that, "most of the witnesses on [Eckel's] fucking scheduled lawsuit are FOP members.... I don't understand -- I mean, we're getting to the point where the County is looking to file charges against the FOP for malicious prosecution...." He added:

Well, I just don't understand what I'm supposed to do. If there's a legitimate contract violation; that [provision] that he just read to me, he knows that wouldn't fly in arbitration. He knows that wouldn't fly [in] the next step past me. But it starts to be harassment. [CP-33, pp. 11-12]

Spicuzzo said to Marsicano:

It's not up to me to stop this. It's up to your own members to stop it. You're a minority group to begin with, you guys have gotten in more trouble, not you guys - meaning you, but your members, have gotten in more trouble probably based on listening to Mr. Eckel, than anybody else in this department. [CP-33, p. 12]

I infer that the Sheriff was again critical of Eckel's recommendation to Kuter not to explain his "side" of the events prompting the issuance of the Preliminary Notice of Disciplinary Action. Spicuzzo said that he was "frustrated" by an officer "tacking on his afternoon breaks at the end of the day." I infer that Spicuzzo believed that such conduct was an obvious violation of work rules. He said to Marsicano:

I don't get -- you want to know something? I don't care if you belong to the FOP, PBA, SOA - my men and women are my men and women. I don't care, as long as everybody does their job, and doesn't violate the contract. I shouldn't violate the contract as much as you shouldn't violate the contract. And when you guys violate the contract or rules and regulations, I can't allow it to continue because then everybody will start trying to get away with shit. [CP-33, pp. 13-14]

The Sheriff said that he didn't think he had "ever gone after John Marsicano because "you're an FOP member" to which Marsicano replied, "Oh, no I don't think --- I can't say that" (CP-33, p. 15). I infer that Marsicano had virtually articulated his agreement with Spicuzzo. Before completing the thought by saying "so", he paused and then demurred (perhaps appreciating that his remarks were being recorded). The Sheriff responded as though Marsicano had agreed with his previous remark. Spicuzzo replied:

And that's the whole point. We may have had our disagreements - I may have thought you'd done something wrong, you may have thought it was right and we had to battle ourselves out. I don't care about that. I don't mind doing battle with people. Believe it or not, I do battle with the PBA everyday, and sometimes they win and sometimes I win, but we don't go to this harassing and day after day and stupid things like this here. [CP-33, pp. 15-16]

Marsicano had not been disciplined since 1993 (8T36). Marsicano was charged with an insubordination in 1993, when he was a member of both the FOP and PBA (8T35). Marsicano remarked: "Between the two of you, obviously there's a personality conflict, it's outside of the job, it's more than that, because I see it" (CP-33, p. 16).

Spicuzzo suggested that Marsicano should invite him to an FOP meeting, for the same reason he had attended PBA meetings - so that "both sides of the story come out, and the people who are sitting in that audience listen to what both sides of the story are, and to what the facts are, because you guys keep on hearing his side of the story" (CP-33, p. 19).

The Sheriff remarked that he was friendly with the State FOP president and with the FOP attorney Anthony Fusco. He said that he had phoned Fusco and said to him:

[Y]ou guys got to talk to [Eckel] because he's doing nothing but harassing this department now; we're at the point of harassing. I mean, if you go back into the records of all the hearings and all the grievances and everything

-- it's like, why? To create chaos in order to disrupt the smooth running of this department? You should be over there right now doing the job.... [CP-33, pp. 22-23]

The Sheriff and Marsicano next discussed the merits of a pending disciplinary case (CP-33, pp. 26-32).

Spicuzzo reiterated his frustration with meritless grievances filed by the FOP, including the grievance Eckel had just withdrawn. He said:

[I]f we didn't bring him in now, we would have had to listen to a second-step grievance; he would have went up to the third step, and we would have been in some arbitration case, based on him being assigned back out to the probation post. That's nuts. [CP-33, p. 33]

This exchange ensued:

**Marsicano:** Well, call a truce for a little bit - Let him cool off.

**Spicuzzo:** Me? Let him cool off? Let me cool off.

**Marsicano:** Well, Like I said --

**Spicuzzo:** I'm the one that's hot.

**Marsicano:** He is too.

**Spicuzzo:** He should be.

**Marsicano:** I know.

**Spicuzzo:** [If] it wasn't for him today, I don't believe Kuter would have gotten what he got.

**Marsicano:** They may believe it, some others may not.

**Spicuzzo:** They'll never get a chance to know -- can you imagine us going to the Administrative Law Judge and them waiving their right to a hearing, and then challenging what my decision was? That's crazy.

**Marsicano:** Yeah.

**Spicuzzo:** If they gave me any kind of evidence to the contrary that would have forced me to be more lenient, but they didn't even get up a defense. [CP-33, pp. 33-34]

I find that Spicuzzo's remark, "If it wasn't for [Eckel] today, I don't believe Kuter would have gotten what he got," was criticism of Eckel's competency as a union representative that day, and

consistent with his testimony and with other surreptitiously-recorded remarks. I find that the remark does not mean that Eckel's mere presence at the disciplinary "hearing" caused Spicuzzo to impose a harsher discipline on Kuter than he otherwise intended. I also find that Spicuzzo's final remark of the transcript segment corroborates his testimony that he was disappointed not to have heard Kuter's explanation of his conduct, which could have justified a lesser discipline than a 30-day suspension.

#### ANALYSIS

##### The Unfair Practice Complaint: Eckel reassignment and suspension

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 charging parties have demonstrated by a preponderance of evidence that protected conduct was a motivating factor in the Middlesex County Sheriff's decisions to reassign sheriff's officer Steven Eckel and to suspend him 10 days. I find that Eckel's inquiries about the drug testing of certain unit members is conduct protected by the Act; that Sheriff Spicuzzo knew of the inquiries; and that he reassigned Eckel and later suspended him for 10 days at least in part in retaliation for that conduct. I also recommend that the Sheriff did not demonstrate by a preponderance of the evidence that he would have reassigned Eckel and suspended him 10 days in the absence of protected conduct. I find, however, that the Sheriff would have disciplined Eckel for leaving his post in Judge Francis' courtroom and for violating one or more sections of the Middlesex County Sheriff's Office Manual, even in the absence of protected conduct. Those infractions would have resulted in a penalty of less than a 10-day suspension.

N.J.S.A. 34:13A-5.3 enables public employees to "form, join and assist any employee organization...." The Act prescribes that the "exclusive representative for collective negotiation concerning terms and conditions of employment" must be "...designated or selected...by the majority of the employees in [an appropriate] unit." The Act permits "an official" to meet with an employee organization for the "purpose of hearing the views and requests of its members..." so long as,

(a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances....

The Appellate Division has recently determined that the

FOP, as a minority employee organization in Middlesex County, is prohibited from processing grievances to arbitration. Middlesex County Sheriff's Officers FOP Lodge 59 and Steven Eckel and PERC, County of Middlesex, aff'd 27 NJPER 103 (¶32040 App. Div. 2001). Statutorily and decisionally denied the right to represent employees in "presenting or processing" grievances and statutorily bereft (since its loss of majority status in 1993) of the right to "negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment," the FOP leadership and membership are nonetheless protected from interference, restraint, coercion and discrimination in exercising rights guaranteed by section 5.3. N.J.S.A. 34:13A-5.4a(1) and (3).

Employees may freely discuss their employment concerns subject to reasonable time and place restrictions. County of Sussex, P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994). Drug testing of police employees is an employment condition, various aspects of which have been determined to be managerial prerogatives or mandatorily negotiable. See N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997) (random testing of police officers for illegal drugs is constitutional); City of Newark and Fraternal Order of Police, Lodge No. 12, P.E.R.C. No. 91-5, 16 NJPER 435 (¶21186 1990), aff'd NJPER Supp.2d 257 (¶212 App. Div. 1991) (drug testing procedures addressing notification, chain of custody, confidentiality and accuracy are mandatorily negotiable). Employees may also "present their views" to employers on matters that affect them, even if they may not ultimately be submitted to binding arbitration. Bd. of Ed. of Tp. of Bernards v. Bernards Tp. Ed. Assn., 79 N.J. 311. (1979).

I find that Eckel's questioning of unit employees about drug testing in June 1998 is generally protected by the Act. That investigators Knelle and Bollaro perceived Eckel as an interloper does not alter the legitimacy of his inquiry about a term and condition of employment; they were free to say nothing. Nor is the protection afforded his obnoxious questions undercut by the



agreement of the principals (the Sheriff, PBA and investigators) that the testing shall be "confidential." Eckel did not know about the adjusted term and condition of employment.

At about 12:20 p.m. on June 30, Eckel left his post in Judge Francis' courtroom to ask investigator Bollaro about the test. Minutes later, Bollaro reported the event to Falcone and then to Spicuzzo. At about 12:40 p.m., the Sheriff angrily told FOP president Kijula and officer Eckel that he (Eckel) would have to "learn how to keep his mouth shut" and that he would be "shipped out to the probation post." The Sheriff's admonitions demonstrate that he was angered by the subject of Eckel's questions and remarks - drug testing. One week later, Eckel was reassigned from the Courthouse post to a probation department post in Piscataway, a distance of 5 to 7 miles.

I did not credit the Sheriff's proffered reasons for reassigning Eckel. Although the Sheriff reviewed Eckel's employment record, which revealed an "inability to get along with other officers, members of the public," etc., he did not review it between 12:20 and 12:40 p.m. on June 30, when he threatened the reassignment. The Sheriff also testified that Eckel's record demonstrated that he "constantly wandered" from his post(s). But the Sheriff did not say on June 30 that Eckel's "wandering" justified a reassignment to a remote post. Under all the circumstances, I find that sheriff's officer Eckel was reassigned in retaliation for his engaging in protected activity; specifically, asking fellow negotiations unit members about drug testing and soliciting their FOP membership, accordingly.

The Sheriff's anger at Eckel's remarks is also evident in his decision to suspend the sheriff's officer for 10 days. I have credited witness and former FOP president Randall Kijula's testimony that the Sheriff threatened a suspension in the June 30 meeting (at which he told Eckel that he would be reassigned to the probation post to "keep his mouth shut"). In his July 6, 1998 Preliminary Notice of Disciplinary Action, the Sheriff set forth "charges"

against Eckel for alleged violations of Sheriff's Department Rules and Regulations. Sheriff Spicuzzo testified that Eckel breached the "Loyalty" obligation because he had "...question[ed] the smooth running and good reputation of the department for his own selfish needs in trying to make the FOP look better than the PBA...." He testified that Eckel breached the "Criticism of Official Acts or Orders" by "criticizing my requesting the investigators to voluntarily take a drug test by saying that 'if the FOP was in charge, you guys would never have had to piss in a cup'." The Sheriff testified that Eckel had breached the "conduct toward Sheriff...and Associates" regulation in part "by questioning the decision of myself and the investigators...." The Sheriff also found Eckel to have been "insubordinate" in part because he was "disrespectful" during his "questioning [about] the drug test." On July 28, 1998, the Sheriff determined that Eckel had violated these and other provisions of the Sheriff's Department Manual.

I find that the Sheriff determined that Eckel had violated the "Loyalty," "Criticism of Official Acts or Orders," and "Conduct Toward Sheriff and Associates" regulations largely because he angrily disapproved of Eckel's "questioning of the drug test" and his solicitation on behalf of the FOP. By the latter, I do not mean that the Sheriff disliked the FOP; rather, he was angered by Eckel's references to the drug testing as a means to propagandize for the FOP. On June 29, investigator Knelle told Eckel that the tests were "voluntary." The next day, in his conversation with sheriff's officer/PBA delegate Papi, Eckel accused the Sheriff of ignorance ("he's clueless") and impropriety ("he didn't follow Attorney General guidelines."). Eckel's accusations are protected because he reasonably believed that he was speaking to a union representative about a term and condition of employment. In another context, Eckel's criticisms of the Sheriff might have violated the "B" section of the "Insubordination" charge. I find in this case however, that his criticisms are protected.

The Sheriff also "specified" that Eckel "left his post" to

"engage another employee of this Department in a matter unrelated to [his] assignment." Eckel was "charged" with "Neglect of Duty" and "Performance of Duty." The Sheriff determined that Eckel had left his post, pursuant to the July 22, 1998 hearing at which Eckel was represented by counsel. I have independently found that Eckel left his post in the manner "specified" by the Sheriff. The evidence also shows that Eckel has a lengthy and notorious employment record, including 4 and 5-day suspensions, reprimands for insubordination, and a 1994 memorandum detailing Eckel's straying from his courtroom post (see finding no. 19).

I find that Sheriff Spicuzzo would have disciplined Eckel for leaving his post on June 30, 1998, even in the absence of protected conduct. Eckel's employment record commanded the Sheriff's close attention to his workplace rule infractions. The Sheriff also expressed a similar concern about all sheriff's officers to Marsicano in the secretly-recorded May 2000 conversation: "And when you guys violate the contract or rules and regulations, I can't allow it to continue because then everybody will start trying to get away with shit" (see finding no. 33). The Sheriff's remark is particularly credible because he was speaking to FOP member Marsicano and did not know that the conversation was being recorded. The Sheriff's remark is notably even-handed, given his exasperation with Eckel throughout that morning. I credit the Sheriff's remark as articulating his consistently vigilant pose toward workplace rule infractions, notwithstanding its utterance about 2 years after Eckel was suspended.

The Sheriff also testified that he applied the principle of "progressive discipline" to his determination that Eckel had violated the specification and charges set forth in the Preliminary Notice of Disciplinary Action, as amended on July 22, 1998. He testified that all the charges "combined to be 10 days." I credit the Sheriff's testimony to the extent that "progressive discipline" would have applied to the charges particularly attuned to the "specification" set forth in the Preliminary Notice of Disciplinary

Action; namely, "Neglect of Duty" and "Performance of Duty."

If the Sheriff sustained only those two charges, he would have disciplined Eckel. In his cross-examination, the Sheriff could not recall the particular circumstances (including the number of sheriff's officers remaining) in Judge Francis' courtroom at the time Eckel left it to engage Bollaro about his drug test. I find no aggravating circumstance that might have warranted a penalty beyond "progressive discipline."

Accordingly, I find that the "Loyalty," "Criticism of Official Act and Orders," "Conduct Toward Sheriff and Associates" and "Insubordination" charges were set forth in the Preliminary Notice of Disciplinary Action and later sustained in violation of 5.4a(3) of the Act. I also find that the Sheriff would have charged Eckel with and sustained the charges of "Neglect of Duty" and "Performance of Duty," even in the absence of protected conduct and would have applied the principle of "progressive discipline" in assessing a penalty.

#### The Merit System Board Appeal

Classified civil servants may be subject to major discipline for a wide variety of offenses connected to their employment. N.J.A.C. 4A:2-2.3(a). In appeal from a disciplinary action by an appointing authority, the burden of proof is on that authority to show that the action was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982). In a review of a disciplinary action against a civil service employee, the Merit System Board is required to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

I have found that the preponderance evidence shows that the charges of "Loyalty," "Insubordination," "Conduct Toward

Sheriff...and Associates" and "Criticism of Official Acts or Orders" were issued (and later sustained by the Sheriff) in retaliation for Eckel's protected activity, violating 5.4a(3) and derivatively, a(1) of the Act. For this reason, I find that the Respondent cannot show and has failed to show that these specific charges were justified. Accordingly, the Respondent did not prove that Eckel is guilty as so charged.

I have also independently found that on June 30, 1998, Eckel left his post in Judge Francis' courtroom for the sole purpose of engaging investigator Bollaro in a conversation about drug testing. Even if Eckel was authorized to leave a courtroom post in order to investigate or quell an audible disturbance immediately outside its doors, I find that no "disturbance" had prompted Eckel to enter the security corridor at about 12:20 p.m. and accompany Bollaro on his walk toward Judge Francis' chambers (see finding no 18). Accordingly, I find that the appellant is guilty of the charges, "Neglect of Duty" and "Performance of Duty."

During the July 22, 1998 departmental hearing, the Sheriff added the charge, "Standard of Conduct" to the Preliminary Notice of Disciplinary Action. The amended Notice states that Eckel's counsel agreed to "waive any time requirements." The Respondent has not carried its burden of showing how sheriff's officer Eckel had "conducted" his "private or professional life in a manner that brought the department into disrepute." I infer that the "conduct" was Eckel's remarks to investigators Knelle and Bollaro and sheriff's officer Papi. No evidence indicates that Eckel had asserted that any member of the department had ingested illegal drugs. Nor does any evidence suggest that investigators Knelle or Bollaro questioned the Sheriff's authority as a consequence of Eckel's remarks. Accordingly, I find that Eckel is not guilty of the charge, "Standard of Conduct."

Concepts of progressive discipline are applied in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 523-524; In re Parlo, 192 N.J. Super. 247

(App. Div. 1983). The Sheriff considered Eckel's record, progressive discipline, and "combined" the charges in assessing a penalty of a 10-day suspension.

I have considered the penalty imposed upon sheriff's officer Eckel. I have found Eckel guilty of violating 2 of the 7 charges filed against him, which could proportionately reduce the penalty to a 3-day suspension. I note that the public policy of this State is to provide appropriate authority to public officials so that they may carry out their responsibilities. N.J.S.A. 11A:1-2(b). I believe that any measure of discipline less than a progressive discipline imposed upon sheriff's officer Eckel would undermine the Sheriff's appropriate authority. Eckel has a long and notorious employment record, capped with a 5-day suspension, which was sustained by a grievance arbitrator in 1999. In 1994, he was criticized in writing for leaving his courtroom post, after receiving "numerous warnings." I also note that Sheriff Spicuzzo forbore from imposing discipline upon officer Eckel in the past (see finding no. 19). Under all the circumstances, I find that the appropriate penalty for violating the "Neglect of Duty" and "Performance of Duty" Rules and Regulations is a 6-day suspension.

The Unfair Practice Complaint: October 1997 reassignments; 1998-2000 instances of "disparate" treatment against FOP members

In October 1997, sheriff's officer and PBA member Adrian Villegas complained to Chief Sheriff's Officer Anthony Falcone that sheriff's officer and FOP member Joseph Kasha had left him alone with a prisoner in a courtroom, from which he saw Kasha speaking with FOP president Randall Kijula and "a group of FOP officers" a distance down the hallway. Villegas and Falcone reported the incident to Sheriff Spicuzzo, who instructed Falcone to "take care of the problem." Within a short period of time, six sheriff's officers/FOP members were reassigned to posts within the Courts division. One sheriff's officer/PBA member (Lane) was reassigned from his juvenile holding cell post to a courtroom. I find that his

reassignment enabled FOP member Bruce Allen to be reassigned from his post in a courtroom to the juvenile holding cell post. No immediate explanations were provided to the officers. No officers were disciplined. Kijula asked Falcone why Allen, a personal friend of the Chief, was reassigned. The next day, Allen was reassigned back to the fifth floor courtroom. Sheriff's officer/FOP member Filomeno was found to have acted inappropriately in his courtroom post in or around June 1997. He was not reassigned until October. Other reassignments were not intrinsically punitive. The Respondent offered no explanation for the near-simultaneous reassignments; it merely argued that the officers continued to meet in the Courthouse during morning, lunch and afternoon break periods. Under all circumstances, I find that the reassignments were an "adverse employment action" intended to punish FOP members for their meeting in a Courthouse hallway in view of sheriff's officer Villegas (see findings nos. 1-8). The reassignments violated 5.4a(3) and derivatively, a(1) of the Act.

The charging parties contend that the Sheriff has treated FOP members of the sheriff's officers and investigators negotiations unit disparately in matters of transfers, training, discipline, access, attendance at meetings, and use of "break" periods. The Commission has recognized that disparate treatment - unlawfully favoring one employee group faction over another - could violate the Act. Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 99 (¶17224 1986); see also Hammermill Paper Co. v. NLRB, 658 F.2d 155, 108 LRRM 2001 (3rd Cir. 1981); NLRB v. Shepard Laundries Co., 440 F.2d 856, 76 LRRM 3080 (5th Cir. 1971); Glass Guard Industries, Inc., 212 NLRB No. 47, 86 LRRM 1563 (1974).

I find that the charging parties have not proved that the Sheriff has treated FOP members disparately in any matter. FOP members have been transferred, pursuant to their bids and have received training, pursuant to their requests. They have also been promoted. The most that may be concluded from Chief Almasy's rationales for denying some bids is that some were not specified in

Article XXVB of the collective agreement. His proffered reasons were not pretextual and did not discriminate against FOP members. The PBA, as exclusive representative, is entitled to attend meetings, address recruits and participate in various programs, such as Bring-Your-Child-to-Work-Day. The FOP is not commensurately entitled.

I also find that Sheriff Spicuzzo's secretly-recorded remarks in May 2000 demonstrate his state of mind more clearly than the charging parties' circumstantial evidence about disparate treatment. The Sheriff articulated his indifference to an employee's membership in an organization: "I don't care if you belong to the FOP, PBA, SOA - my men and women are my men and women. I don't care, as long as everybody does their job..." (see finding no 33). Although I have found that Sheriff Spicuzzo had discriminated against officer Eckel in retaliation for certain protected conduct, he did not discriminate against Eckel or any sheriff's officer because of their membership in the FOP. (In this context, I distinguish the Sheriff's conduct from Chief Falcone's conduct). I recommend that the Commission dismiss all portions of the Complaint alleging disparate and unlawful treatment of FOP members.

RECOMMENDED ORDER ON THE UNFAIR PRACTICE COMPLAINT

I recommend that the Middlesex County Sheriff:

- A. Cease and desist from
  1. Interfering with, restraining or coercing sheriff's officers in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by reassigning FOP member Eckel for questioning unit employees about a drug test during non-work time; suspending FOP member Eckel in part for questioning unit employees about a drug test during non-work time; and reassigning FOP members for meeting in a hallway during non-work time or for no legitimate business reason.
  2. Discriminating in regard to hire or tenure of



employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act; particularly by reassigning FOP member Eckel for questioning unit employees about a drug test during non-work time; suspending FOP member Eckel in part for questioning unit employees about a drug test during non-work time; and reassigning FOP members for meeting in a hallway during non-work time or for no legitimate business reason.

B. Take the following affirmative action:

1. Reassign sheriff's officer Eckel from the Probation department post to a Courts division courtroom post.
2. Rescind the 10-day suspension from sheriff's officer Eckel's employment record setting forth violations of 7 charges, pursuant to a Final Notice of Disciplinary Action issued on or about July 28, 1998.
3. Insert a Final Notice of Disciplinary Action in sheriff's officer Eckel's employment record setting forth a 6-day suspension for violating the charges, "Neglect of Duty" and "Performance of Duty" as set forth in the Final Notice of Disciplinary Action issued on or about July 28, 1998.
4. Compensate sheriff's officer Eckel 4 days pay or credit his time records (whichever is appropriate), to offset the difference between the rescinded and modified penalties.
5. Offer to reassign sheriff's officers Allen, Filomeno, Castasna and Giordano to posts they held immediately prior to their reassignments on or about October 7, 1997.
6. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

Within twenty (20) days of receipt of this decision, notify

the Chair of the Commission of the steps the Respondent has taken to comply with this order.

DECISION AND ORDER ON MERIT SYSTEM BOARD APPEAL

It is hereby ORDERED that appellant is found NOT GUILTY of the charges, Loyalty, Criticism of Official Acts or Orders, Conduct Toward Sheriff, Undersheriff, Superior, Subordinate Officers and Associates, Insubordination and Standard of Conduct, based upon his conduct of June 29 and 30, 1998.

It is hereby ORDERED that appellant is found GUILTY of the charges Neglect of Duty and Performance of Duty, based upon his conduct on June 30, 1998. It is further ORDERED that his suspension for 10 days is modified to a 6-day suspension.

I hereby FILE my Initial Decision with the PUBLIC EMPLOYMENT RELATIONS COMMISSION, and the MERIT SYSTEM BOARD for consideration based upon their respective jurisdictions as set forth in Middlesex County Sheriff.

This recommended decision may be adopted, modified or rejected by the PUBLIC EMPLOYMENT RELATIONS COMMISSION, and/or the MERIT SYSTEM BOARD pursuant to their respective jurisdictions, which by law are authorized to make separate final decisions in this matter in accordance with the Joint Order in Middlesex County Sheriff. If the Public Employment Relations Commission and/or the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties any party may file written exceptions with the PUBLIC EMPLOYMENT RELATIONS COMMISSION, P.O. 429, Trenton, New Jersey 08625-0429; or with the OFFICE OF

ADMINISTRATIVE LAW, CLERK'S OFFICE, P.O. Box 049, Trenton, New Jersey 08625-0049, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/1/02  
Date

Jonathon F. Roth  
JONATHON ROTH, ALJ t/a

Receipt Acknowledge:

4/1/02  
Date

Millicent A. Masell  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

\_\_\_\_\_  
Date

\_\_\_\_\_  
MERIT SYSTEM BOARD

Mailed to Parties:

\_\_\_\_\_  
Date

\_\_\_\_\_  
OFFICE OF ADMINISTRATIVE LAW



**RECOMMENDED**



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

**We hereby notify our employees that:**

**WE WILL NOT** interfere with, restrain or coerce sheriff's officers in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by reassigning FOP member Eckel for questioning unit employees about a drug test during non-work time; suspending FOP member Eckel in part for questioning unit employees about a drug test during non-work time; and reassigning FOP members for meeting in a hallway during non-work time or for no legitimate business reason.

**WE WILL NOT** discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act; particularly by reassigning FOP member Eckel for questioning unit employees about a drug test during non-work time; suspending FOP member Eckel in part for questioning unit employees about a drug test during non-work time; and reassigning FOP members for meeting in a hallway during non-work time or for no legitimate business reason.

**WE WILL** reassign sheriff's officer Eckel from the Probation department post to a Courts division courtroom post.

**WE WILL** rescind the 10-day suspension from sheriff's officer Eckel's employment record setting forth violations of 7 charges, pursuant to a Final Notice of Disciplinary Action issued on or about July 28, 1998.

**WE WILL** insert a Final Notice of Disciplinary Action in sheriff's officer Eckel's employment record setting forth a 6-day suspension for violating the charges, "Neglect of Duty" and "Performance of Duty" as set forth in the Final Notice of Disciplinary Action issued on or about July 28, 1998.

**WE WILL** compensate sheriff's officer Eckel 4 days pay or credit his time records (whichever is appropriate), to offset the difference between the rescinded and modified penalties.

**WE WILL** offer to reassign sheriff's officers Allen, Filomeno, Castasna and Giordano to posts they held immediately prior to their reassignments on or about October 7, 1997.

Docket No. CI-H-98-59 County of Middlesex  
(Public Employer)

Date: \_\_\_\_\_ By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.  
If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372