1996 WL 929752 (N.J. Adm.), 96 N.J.A.R.2d (CSV) 646

Office of Administrative Law
State of New Jersey

ROBERT OCHES, Appellant,
v.
MIDDLETOWN TOWNSHIP, Respondent.

Civil Service

OAL Docket No. CSV 1933-92 and 5932-92 (Consolidated, on remand, CSV 2757-91)

Initial Decision: May 24, 1994

Order to Remand: November 2, 1994

Initial Decision on Remand: November 15, 1995
Final Agency Decision: February 20, 1996

INITIAL DECISION

AND

ORDER TO REMAND

AND

DECISION ON REMAND

AND

FINAL AGENCY DECISION

Steven A. Varano, Esq., for appellant
Bernard M. Reilly, Esq., for respondent-appointing authority (Dowd & Reilly, attorneys)

LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Robert Oches, alleges that the action of the Appointing Authority of the Township of Middletown to bypass him, on two occasions, on the eligible list for police captain for less qualified individuals was discriminatory, arbitrary, capricious and in bad faith.
This matter was originally transmitted to the Office of Administrative Law (OAL) on March 9, 1991, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On January 15, 1992, the undersigned issued an Order

dismissing the matter for appellant's failure to answer interrogatories within the time prescribed. On March 11, 1992, the Merit System Board (MSB) of the Department Of Personnel (DOP) ordered that the matter be remanded to the OAL for a hearing.
On August 4, 1992, the MSB transmitted a second appeal by appellant to the OAL for hearing, wherein the respondent-appointing authority had again bypassed appellant for the position of police captain. The matters were consolidated at the direction of the MSB. Hearings were held on ten days commencing on September 23, 1992 and ending on May 13, 1993. The parties requested, and were granted leave to submit posthearing briefs. The hearing record closed on October 18, 1993, with the last submission. The undersigned was granted extensions in order to complete this initial decision.

BACKGROUND FACTS

On August 24, 1990, the eligible list for police captain was certified to the Middletown Department of Public Safety. The eligibles, in the order of their respective scores, were: Eugene P. Hannafey (non-veteran), Robert Oches (veteran) and, William Fowlie (veteran). The appointing authority (Township Administrator) appointed William Fowlie to the position of police captain, effective September 1, 1990. Appellant filed his appeal with the MSB thereafter, contesting Fowlie's appointment. (OAL Dkts. CSV 2757-91, On Remand CSV 1933-92).
The eligible list for police captain, Middletown Township was also certified to the Middletown Township's Public Safety Department on October 8, 1991. Eugene Hannafey and Robert Oches (appellant) together with Edward A. Kryscnski (veteran) appeared in that order as the first, second and third ranked eligibles. The appointing authority returned the certification to the DOP indicating that it had appointed Kryscnski to the position of captain, effective November 1, 1991. The certification, however, was not actually returned until April 1992. Appellant appealed this action by the appointing authority (OAL Dkt. No. CSV 5932-92).

SUMMARY OF TESTIMONIAL EVIDENCE

Joseph McCarthy, retired Chief of Police of Middletown Township, testified on appellant's behalf. Former Chief McCarthy left the Middletown Police Department in or about December 1989; however, his retirement became official on August 1, 1990. McCarthy served in the position of Chief of Police for twenty-three years. He had a total of 37 years' service as a police officer. He has known appellant, Fowlie, and Kryscnski, each for a period of twenty-five years as subordinates under his command.
During the latter periods of his service as Chief of Police, Robert Letts served as his Deputy Chief. While Chief McCarthy confided in appellant, who was a troubleshooter for the Chief, Deputy Chief Letts did not get along with appellant. In fact, Deputy Chief Letts did not care for the relationship between Chief McCarthy and appellant.
Prior to June 1980, appellant was assigned to the Detective Division. In or about June, 1980, petitioner filed a grievance concerning an unfair labor practice wherein members of the Police Department Patrol Division were paid for court appearance time and the members of the Detective Division were not paid for such court appearances. Chief McCarthy was in favor in paying the detectives for their court appearances, however, Deputy Chief Letts opposed the payment.
Soon after appellant filed his grievance, appellant was transferred out of the Detective Bureau. Subsequently, Captain William Halliday, who was in charge of the Detective Bureau, approached Chief McCarthy and requested that appellant be transferred back into the Detective Bureau. Deputy Chief Letts was opposed to the transfer. Appellant was not transferred back to the Detective Bureau because of the pending grievance. Subsequent to the resolution of the grievance, appellant was placed back into the Detective Bureau.
In 1983, Deputy Chief Letts assigned appellant to conduct background investigations of

new police applicants and recruits. Appellant investigated the background of applicant Charles Scott, son of Police Captain Arthur Scott. Appellant discovered a problem concerning Scott with the use of drugs and an attempted suicide. Appellant reported his investigation to Chief McCarthy. Chief McCarthy believed that Charles Scott would be a detriment to the police department and disqualified the applicant. Captain Scott approached Chief McCarthy and complained that appellant was looking too closely into his son's background. Chief McCarthy testified that there was a lot of departmental infighting concerning the case, which was most difficult, because Deputy Chief Letts and Captain Scott were friends. Deputy Chief Letts and Captain Scott played golf together. Chief McCarthy asserted that appellant took a great deal of "heat" from Captain Scott.
Appellant was also in charge of conducting the background investigation of police applicant Frederick Deickmann, the son of Sergeant Richard Deickmann. Appellant determined that applicant Deickmann had a problem as a special police officer in the municipality of Sea Bright, New Jersey, and while an employee at the Monmouth County Jail. The problem concerned applicant Deickmann's work records at the two different job sites. Deputy Chief Letts was in favor of hiring applicant Deickmann, however, appellant was not. Sergeant Deickmann complained to Chief McCarthy about appellant digging too close into the investigation of his son.
Lieutenant Walter Monahan is Deputy Chief Letts' brother-in-law. Lieutenant Monahan retired in 1988. Prior thereto, Lieutenant Monahan had seniority over appellant in the Detective Bureau. It was general knowledge that Lieutenant Monahan had a drinking problem. Monahan had a police patrol car assigned to him. Chief McCarthy testified that on many occasions appellant was ordered by Deputy Chief Letts to go to a bar and pick up Monahan's assigned police vehicle. Appellant complained to Chief McCarthy that he had been ordered to pick up Lieutenant Monahan and his car by Deputy Chief Letts. Chief McCarthy testified that he also ordered appellant to pick up Monahan's car. Chief McCarthy characterized it as a "dirty job." He further asserted that appellant had never disobeyed an order issued by Deputy Chief Letts to pick up Monahan's police car. Former Chief McCarthy testified that appellant was assigned to this duty because he was accountable, honest, and demonstrated a high degree of integrity.
While serving as a lieutenant in the Detective Bureau, appellant was also in charge of press releases. An incident occurred in which the then Mayor's son was alleged to have been shoplifting in a Bradlees Department store. The information subsequently was revealed in a local newspaper. Chief McCarthy asserted that appellant did not release the information. However, Deputy Chief Letts accused appellant of releasing the information to the newspaper.
Former Chief McCarthy opined that appellant was the most outstanding officer and lieutenant on the police force. He was well-trained and commended by the Monmouth Prosecutor's Office for police work he had accomplished. Chief McCarthy would assign appellant the most difficult cases and appellant would resolve the cases in the most favorable fashion. Chief McCarthy asserted that he would give appellant confidential cases which he would assign to no one else.
Chief McCarthy testified that prior to December 1989, there was an eligible list for the position of captain on the force. He asserted that first on the list was a non-veteran, appellant was second and a veteran and Fowlie was third and a veteran. Chief McCarthy asserted that he recommended to the Town Administrator, James Alloway, that appellant be appointed to the position of captain. Chief McCarthy asserted that Alloway, who was the appointing authority, did not like appellant or Chief McCarthy. Lieutenant Fowlie, third on the list of eligibles, was appointed to the position of Captain by the appointing authority, Alloway. Chief McCarthy saw appellant, Fowlie and Kryscnski all as potential leaders and future captains in the Police Department. Chief McCarthy, however, recommended appellant who was passed over.
Chief McCarthy asserted that James Alloway had trouble with every police department with which he worked. A Middletown woman was murdered in San Jose, California and Chief McCarthy talked with the Chief of Police of San Jose concerning the incident. The Chief of Police of San Jose asserted that he ran James Alloway out of San Jose. Alloway,

on the other hand, stated that he was glad to be out of San Jose. Chief McCarthy stated that the relationship between Fowlie and Alloway was very good because they were both ex-Marines.

Fowlie was promoted from Lieutenant in August 1990 to Chief of Police in February 1992. Former Chief McCarthy testified extensively concerning his relationship with appointing authority James Alloway. Alloway advised Chief McCarthy that Alloway wanted the rules and regulations changed in order that Alloway would be in charge of the Police Department. Alloway is alleged to have threatened McCarthy by withholding McCarthy's salary increase if McCarthy did not comply. McCarthy stated on the record "I never took orders from a politician and don't intend to take orders from politicians because the politicians appoint him (Alloway) and they would be telling him what to do with the Police Department." McCarthy testified that he cooperated with Alloway in every way possible, however, the day-to-day operations of the Police Department was under his authority and he would not surrender it. He asserted that he had been before the Superior Court on this issue may times with other Township Administrators and he had never had this trouble before. He asserted, among other things, that he did not get along at all with Alloway.

Former Chief McCarthy testified concerning an investigation that was started by appellant concerning a female police applicant. Deputy Chief Letts had removed appellant from the investigation and assigned Sergeant Pollinger to continue the investigation. Subsequently, appellant approached Chief McCarthy and advised the Chief that the investigation was incomplete. Appellant asserted that he did not want to get involved in the investigation because he had been removed and that he was on the "shit list" with Letts. In any event, he advised Chief McCarthy that the female police applicant had attempted suicide and that Sergeant Pollinger's report did not reflect this fact. Appellant advised Chief McCarthy to look into it. As a consequence, Chief McCarthy contacted Deputy Chief Letts and advised him to have Pollinger check on this particular case to determine whether the allegation was true or not. Deputy Chief Letts contacted Sergeant Pollinger, and subsequently, reported to Chief McCarthy that Pollinger could find no record of this allegation. Thereafter, appellant was in contact with Chief McCarthy where Chief McCarthy told appellant that there was no record of the female police applicant having attempted to commit suicide. Appellant again advised Chief McCarthy that appellant did not want to get involved with the investigation, however, if Chief McCarthy put another police officer in charge of the investigation, appellant would tell the Chief what to do. Appellant suggested that Lieutenant William Brunt be placed in charged of the investigation, and Chief McCarthy did so. Upon advice from appellant, Chief McCarthy advised Lieutenant Brunt to go to Riverview Hospital to determine if he could find out anything. Lieutenant Brunt continued the investigation and procured hospital reports which indicated that the applicant not only attempted suicide once, but it was revealed that there were two such attempts. As a consequence of appellant's advice and the subsequent discovery of information, Chief McCarthy asserted that he "raised hell" at the next staff meeting. He told his subordinates that the information was there, they were told to check it out and they failed to do so. He asserted that he did not want this to happen again. Chief McCarthy told his officers that he was responsible for the actions and activities of the Police Department. When the Police Department failed to perform, it reflected directly upon him.

Notwithstanding appellant's involvement in the investigations of Deickmann, Scott and the female applicant, appellant was never placed back on background investigations. It was Deputy Chief Letts' determination to remove appellant from background investigations and it was Deputy Chief Letts who refused to allow him to continue.

On cross-examination, former Chief McCarthy asserted that he was a "hands-on" police chief. Although he delegated a great deal of responsibility to others in the Department, he insisted that he be kept up-to-date and informed of all activities. There were times when McCarthy shared the decision making with his subordinates; i.e., captains and lieutenants, among others. He asserted, however, that sometimes the decision of the group was wrong. He acknowledged that the ultimate decision with respect to personnel matters was his.

Former Chief McCarthy testified that he arranged for Deputy Chief Letts to become the Chief of Police. Letts, whom McCarthy had known for forty years, was a protege of former Chief McCarthy. McCarthy found Letts' judgment to be sound, however, he often differed in the opinion of Letts. Although Letts was respected, McCarthy did not always agree nor follow his advice.

Chief McCarthy asserted that he would not hold a grudge against any of his subordinates who disagreed with him. In particular, he cited the grievance initiated by appellant. McCarthy asserted that Letts held a grudge against appellant, but did not hold a grudge against other police officers who disagreed with Letts. McCarthy held appellant in high esteem and Letts did not like it. Appellant shared McCarthy's way of thinking about police work which involved the community, lower crime rate, and a direct approach to problem solving. McCarthy was not close nor a personal friend of appellant's while both were on the police force. McCarthy would confide in appellant and with Lieutenant Brunt and Deputy Chief Letts. McCarthy considered appellant and appellant's advice as outstanding.

Former Chief McCarthy testified, among other things, concerning the criteria he used to promote individuals in the Police Department. Those factors included, among other things, that the individual be number one on the eligible list, a veteran, demonstrate dependability, be a person who wished to make a career out of law enforcement and did not have outside employment, someone who lived in the town, the individual was to be involved in the community activities such as boy scouts, fire department, first aid, church groups, etc. He asserted that he had selected the number one eligible on the certified list for promotion in all cases except two. In one of the two instances, the individual had a drinking problem and refused to undergo a sanctioned hospitalization rehabilitation program. Although the police officer was recognized as a good officer, former Chief McCarthy refused to promote him because of his problem with alcohol.

Former Chief McCarthy testified extensively about the purchase and operation of a $600,000 computer for the Police Department. He asserted that he assigned then Lieutenant Fowlie to work on the computers to replace then Captain Scott. McCarthy stated that Fowlie did an excellent job, however, the computer did not function as McCarthy thought it was supposed to function when Fowlie completed the task. The former Chief asserted that the computer was supposed to reduce the paperwork for the police officers when, in fact, it increased the paperwork. He asserted that it cost a great deal of time to bring the officers in off the road to do the required paperwork for reports, which were then difficult to locate the following day. McCarthy declared that the computer had its good points as well as its pitfalls, and that the pitfalls remain today.

Captain Joseph T. Shaffery testified on behalf of appellant. Captain Shaffery has been with the Middletown Township Police Department for twenty six years and, at the time of hearing, he was the captain of the combined uniform divisions; i.e., the Traffic Division and the Patrol Division. He asserted that Chief McCarthy retired in or about December 1989. Thereafter Letts was then appointed Chief of Police. Chief Letts thereafter retired and left the position in the Spring of 1991. Captain Shaffery testified that the appointing authority of the Township of Middletown did not call for a Chief of Police examination immediately upon Chief Letts' departure from the Middletown Police Department. Shaffery opined that it should have called for an examination in the Spring of 1991 upon Letts' departure. The examination, however, was not administered until November 1991. Captain Shaffery testified that he knew, as well as others, that Letts would be leaving the Police Department sometime right after the first of the 1991 new year. He asserted that then Deputy Chief Ernest Volkland advised Shaffery that Volkland was not interested in assuming the position of Chief and that either Shaffery or Captain Kerrigan would assume the position of Chief of Police. Captain Shaffery asserted that this conversation occurred in February 1991.

Captain Shaffery testified that on or about May 31, 1991, he received a telephone call from appellant regarding a conversation appellant had in the Detective Bureau concerning the Chief of Police examination. He asserted that appellant had telephoned his home to advise Captain Shaffery that appellant had a confrontation with Kathy Fowlie, wife of William Fowlie. Appellant stated to Shaffery that Mrs. Fowlie had related to appellant that

the chief's test was going to be delayed in order that her husband would be eligible to take the examination. In May 1991, Captain Fowlie had not served one year in position to be eligible to take the Chief of Police examination.

Captain Shaffery asserted that on the next day, during a drug rally, he had the occasion to speak with then Mayor Parkinson concerning the Chief of Police examination. Captain Shaffery stated to Mayor Parkinson that it was Shaffery's understanding that the appointing authority was going to hold up the Chief's examination in order that Fowlie would be eligible to take the examination. Shaffery asserted that the Mayor stated that the appointing authority wanted all of the captains to take the test. At the time there were three Captains; i.e., Captain Shaffery, Captain Kerrigan and Captain Fowlie. Captain Scott was still employed but he did not take the examination because he was on terminal leave prior to his retirement.

Captain Shaffery testified that the results of the Chief of Police examination indicated that Shaffery was first, Fowlie was second and Captain Kerrigan had failed the test. Captain Shaffery asserted further that he was not interviewed for the chief's position before or after the list was received. Captain Shaffery did not know whether or not any of his personnel documents were reviewed by the appointing authority, however, he believed they were not. Shaffery did not know of any other members of the Middletown Police Department who were interviewed to determine their character, efficiency, job performance or anything of that nature with regard to the position. Captain Shaffery testified that William Fowlie was appointed Chief of Police.

Captain Shaffery stated that no one ever gave him an explanation as to why the examination was delayed in order to make it available to all three captains who were deemed to be qualified. He asserted that no one ever gave him an explanation as to why the number two candidate eligible for the position was selected. Shaffery asserted that he asked the question of several people, however, he never received a satisfactory or decent answer. Captain Shaffery asserted that he specifically asked Mr. Alloway, the appointing authority.

With respect to the second captain promotion which occurred in or about April 1992, Captain Shaffery testified that he overheard Sergeant Deickmann make a statement to appellant that appellant need not go to the interview because appellant was not going to be promoted. Captain Shaffery asserted that he heard Sergeant Deickmann state "they are picking Kryscnski."

Captain Shaffery testified that he found appellant to be extremely competent. He asserted that appellant is very strong minded and generally knows what he is talking about. Appellant has a tendency to either like someone or dislike them. In the event appellant doesn't like someone, he is up front about it and the individual would know it. He asserted that appellant's loyalty is second to none.

William Halliday, a retired Captain of the Middletown Township Police Department, now teaching Criminal Justice at Brookdale College, testified on behalf of appellant. Mr. Halliday recalled the grievance filed by appellant in 1980 concerning overtime hours in the Detective Bureau. He asserted that appellant was transferred out of the Detective Bureau shortly after he filed the grievance. Mr. Halliday stated that it was his opinion, at the time of the transfer, that appellant should not have been transferred out of the Bureau because appellant was one of the best detectives that Halliday had in the Detective Bureau at the time. Subsequently, then Captain Halliday made a request to Chief of Police McCarthy to transfer appellant back into the Detective Bureau. Halliday could not recall whether this request was made before or after the final resolution of the grievance. He asserted that Deputy Chief Letts was opposed to appellant's return to the Detective Bureau. Halliday did not know why Letts was opposed to appellant's transfer, however, he did know that Deputy Chief Letts was opposed to the grievance that appellant had filed.

Mr. Halliday testified that he knew Walter Monahan and that they had worked together in the Detective Bureau. Prior to Halliday's retirement, Monahan, who was Letts' brother-in-law, was transferred back into the Detective Division and worked under Halliday's supervision. Halliday knew that Monahan had a drinking problem and that he was an

alcoholic and drank constantly.

Halliday testified that appellant was concerned when he was ordered by Deputy Chief Letts to retrieve Monahan's police vehicle when Monahan was drinking at local bars. Appellant stated his concern to Captain Halliday and even suggested that appellant might refuse an order of Deputy Chief Letts to retrieve the police officer's vehicle. Halliday testified that he counseled appellant against refusing a direct order stating, among other things, that Halliday had been ordered to pick up the vehicle and that appellant should not disregard an order of a superior officer. Halliday expressed to appellant that he was also angry and upset because he was ordered to do the same thing and did like it either. Mr. Halliday opined that appellant was one of the best criminal investigators. He asserted that appellant was tenacious, a quality that he looked for in a criminal investigator. Halliday observed that appellant was tough on the men when they had to do their job. As a person, appellant was generally a "pretty good guy," honest with integrity. These are qualities that Halliday knew appellant possessed and which Halliday admired.

Robert H. Murray, one of five elected Township Committeemen, testified on behalf of appellant. He asserted, among other things, that in 1990 the Township Committee consisted of three Republicans and two Democrats. Mr. Murray was one of the two Democrats and Mr. Patrick Parkinson, who served as Mayor, was one of the three Republicans. He asserted that the Township Committee took no official role with respect to promotions in the Police Department.

Mr. Murray testified that he was familiar with the promotional policies of the township through his discussions with the former Chief of Police McCarthy. He asserted that the promotions were based upon the ranking and the Civil Service eligible list. He testified that it was not common practice in Middletown Township to skip an individual on the promotion list, however, he was aware of one individual which was skipped over. He further asserted that it was not normal practice to discuss an individual to be skipped on the list by the Township Committee.

Mr. Murray testified that early in the spring of 1991, the Township Committee was informed that Chief Letts was leaving the position of Chief of Police. During an executive session on March 24, 1991, the Committee discussed the issue of a new Chief of Police. The discussion was concerned about the methods by which the chief was to be replaced. The various options opened to the Township Committee were discussed and whether the examination should be opened or limited, to stay in-house and to make the test available to both lieutenants and captains. Mr. Murray was in favor of allowing lieutenants and captains to participate in the chief's examination, however, Mayor Parkinson was opposed and reminded Mr. Murray that two lieutenants, Haffery and Oches, were in litigation against the Township.

Mr. Murray testified that in June of 1991 the Township Committee held an executive meeting where it discussed the methods by which it would call for a Chief of Police Examination. The Township Committee instructed Mr. Alloway to call for an examination at that time. Mr. Alloway advised the Township Committee that there were three captains available for the examination. Mr. Alloway asserted that Captain Fowlie was one of the three available to take the examination. Mr. Murray advised Mr. Alloway that Captain Fowlie did not have sufficient time in grade to qualify for the Chief of Police examination. Mr. Alloway advised Mr. Murray that Captain Fowlie had veteran status and regardless as to whether or not he took the examination, Fowlie could be made chief where the other two men did not have such a status. Mr. Murray suggested to Mr. Alloway that Alloway check the records to determine whether Captain Fowlie had sufficient time in grade. Mr. Alloway advised Mr. Murray it was not a problem because Alloway was the former head of the Civil Service and he could see to it that the test did not take place until after September, when Captain Fowlie would have been in grade, which guaranteed that there would be three people taking the examination. Mr. Murray testified that he wanted the test to be conducted immediately. He asserted that Alloway was instructed in June 1991 to call for the Civil Service examination. He asserted that it was sometime after September 1, 1991, where Alloway called for the test which, he asserted, took place in January 1992.

Mr. Murray contended that he had asked Alloway on several occasions after June 1991 when the test was going to be administered. Alloway told Murray there was a delay in the Civil Service certification and that it was being held up. Murray asserted he never did get a straight answer from Alloway as to when the test was going to be conducted. Mr. Murray asserted that Alloway advised him that having been the Director of Civil Service, Alloway knew how the system worked and he could delay the test until Captain Fowlie was in grade one year.

Mr. Murray testified that Alloway was scheduled to retire on February 15, 1992. Alloway's retirement was delayed until the end of February. In February 1992, the Township Committee interviewed the candidates for the position of Chief of Police. The Township Committee wished to employ a chief before Alloway left. Mr. Murray did not know the reason for the urgency as to why the appointment needed to be made before Alloway left for another position. He asserted that the two candidates for Chief were Captain Fowlie and Captain Shaffery. The Township Committee interviewed both, although Alloway was not present. Captain Shaffery was interviewed first and he appeared first on the examination list, where Fowlie was second. The interviews for both men consumed between 30 and 35 minutes. Captain Shaffery appeared for the interview and, in the opinion of Murray, was extremely well prepared with a fifteen to twenty page document illustrating the strengths and weaknesses of the Police Department. Captain Shaffery explained to the Township Committee his expertise in the areas he had concerning his service in the various police divisions.

Mr. Murray testified that he was surprised at Captain Fowlie's interview because he came in with no documentation or anything to support his position. Murray asserted that it looked as though it was a "done deal" for Fowlie. Murray asserted that because Fowlie didn't present anything to the Committee, Fowlie didn't meet the requirement of the letter of instructions or appear to be prepared for the interview.

Murray asserted that prior to the interviews he had requested Alloway's opinion of both of the candidates. Alloway did not venture an opinion to Murray. Following the interviews, Murray stated that there was a "hurry up" executive committee meeting to appoint the new Chief of Police. He asserted that ordinarily, a Resolution to be acted upon by the Township Committee is generally circulated among the Committee members prior to a vote. He testified, in this instance, a Resolution had already been drafted with Fowlie's name on the Ordinance appointing Fowlie to the position of chief. It was reported to Murray that Alloway said that he was appointing the Chief of Police before he left town.

Mr. Murray testified with respect to an executive session of the Township Committee held on April 2, 1992. Mr. Murray testified that he was informed that the executive session was called for the purpose of discussing litigation. There was no litigation discussed. Rather, the executive meeting dealt with the reorganization of the Police Department. Captain Scott had announced his retirement, therefore, one captain position was to be eliminated with a reduction from four divisions to three divisions within the Department. With the reorganization there would be only one captain's position open, rather than two. Those eligible to be promoted to captain were; Hannafey, Oches and Kryscnski.

Mr. Murray asserted that Chief Fowlie wanted Lieutenant Kryscnski to be promoted to captain and expressed this position at the executive committee session. Fowlie was instructed to conduct interviews of the eligible candidates with the new administrator.

Mr. Murray testified that the computer system installed at the Police Department was a source of constant complaints. Captain Shaffery had informed the Committee, in his interview, that the computer was not compatible with the County Prosecutor's system.

Mr. Murray also testified that former administrator Alloway had been appointed by a Republican Township Committee. He further asserted that Fowlie and Fowlie's wife were registered Republicans and that they had Republican affiliations.

On cross examination, Mr. Murray acknowledged that the Township had budget problems in 1990-1991. He asserted that he was a strong advocate of streamlining township government which included the Police Department.

When Chief Letts announced he was retiring from the Police Department, it was the consensus of the Township Committee to appoint Deputy Chief Ernest Volkland as the

Chief of Police. Deputy Chief Volkland first declined to take the position, however, he changed his mind and determined that he would accept the position. Finally, Deputy Chief Volkland again declined to accept the position due to his wife's ill health.
Chief Letts remained on the Police Department's payroll until December 31, 1991. It was about this time when Alloway announced that he was resigning as the Township Administrator to take a position as an administrator on the Marshall Islands. The majority of the Township Committee wanted Alloway to appoint a new Chief of Police before he left Middletown Township's employ. The majority of the Township Committee believed that Alloway was familiar with the candidates, therefore, as the appointing authority he could make the selection. Mr. Murray did not agree with the Township Committee majority and wanted to wait for a new administrator to appear on the scene to make the appointment. Nonetheless, Alloway selected Fowlie as the chief and the majority of the Township Committee ratified the selection. Murray asserted that there was no urgency to fill the chief's position.
Chief Letts's last day on the payroll was December 31, 1991. There were two eligible candidates certified by the DOP for the chief's examination. Murray asserted that Alloway wanted to make the appointment of the Chief of Police before he left on January 27, 1992. Murray wanted the new administrator, replacing Alloway, to make the appointment because the new administrator would work with the new Chief of Police. In any event, the Township Committee passed a resolution approving the appointment of Fowlie to the position of Chief of Police on January 27, 1992. Alloway did not, however, make appointments of police lieutenant and police captain which were also pending at the time that he left office.
John Hazard, Monmouth County Assistant Prosecutor, testified that appellant was a good police officer, and well prepared in investigating his cases. Mr. Hazard found appellant to be candid, in the event appellant had made a mistake. Mr. Hazard found appellant to be highly competent; an instrumental factor in winning the Fitzpatrick case. He opined that appellant was above average in performance.
Assistant Prosecutor Hazard was also called to testify on behalf of the appointing authority. He asserted, among other things, that he had found Fowlie and Kryscnski to be cooperative and competent. However, Hazard had less contact with these two men. He could not, moreover, assess Fowlie's performance with regard to investigations.
Todd E. Thompson testified that appellant was in charge of security at the Monmouth County Hunt in 1988 and 1989 where between 10,000 and 15,000 people attended. He asserted that before appellant was in charge of security, there were a number of problems with crowd control and drunk and disorderly behavior, among other things. When appellant worked the Hunt event, appellant improved significantly the security where the crowd was controlled and arrests were made of those demonstrating drunken behavior. Mr. Thompson was pleased with appellant's organizational abilities and opined that appellant was one of the most competent of those in charge of security in the past ten years.
Appellant testified on his own behalf asserting, among other things, that he has been a member of the Middletown Township Police Department for over eighteen years. He joined the force in June 1974, and was promoted to sergeant in June 1983. In or about November 1985, appellant was promoted to the rank of lieutenant, which he now holds. At the time of the hearing, appellant was assigned to planning, training and internal affairs. He coordinates the training activities for the Police Department and also investigates allegations of and complaints made against policemen. Appellant was assigned to the planning, training and internal affairs in or about May 1992. Prior to that period he was assigned to the Detective Bureau in which he served approximately thirteen years.
Appellant attended Middletown High School, however, he dropped out of school before graduation. He subsequently enlisted in the United States Marine Corps. After serving six months with the Corps, he was honorably discharged due to the medical condition of bronchial asthma. Subsequently, in or about 1971, appellant took the General Educational Development (GED) test and was granted his high school diploma. He

graduated from the New Jersey State Police Academy at Sea Girt in or about December 1974. Thereafter, appellant received specialized training in law enforcement in the areas of; narcotics, criminal investigation, investigation of sex crimes, investigation of organized crime, special tactical firearms (SWAT), evasive driving techniques, child sexual abuse and community prevention treatment, a joint social workers and law enforcement seminar, advanced interrogation and interview techniques, practical homicide seminar, the REID Technique of interviewing and investigation, forensic science and the fatal accident/homicide investigation, stress management and communication, special and technical service forensic science seminar, management of a detective unit, sexual assault and crisis intervention, detection and recognition of injuries related to the death and abuse of children, criminal apprehension for prosecution enforcement, among others.

Appellant is involved in a variety of community activities which include, among others, member of the Middletown Athletics Club which sponsors the Middletown Pop Warner football; volunteers at the Middletown Help Its Own, a local charity for under privileged people; and engages in public speaking where he is asked to address local civic groups and associations in law enforcement topics.

Appellant is a member of the Fraternal Order of Police (FOP), Lodge #53; the American Legion; the International Association of Chiefs of Police; the Honor Legion of New Jersey; and, the Superior Officers Association (SOA) of New Jersey, the Middletown Township Local, of which he is the recording secretary.

As the recording secretary of the SOA, appellant assists the president of the organization in filing grievances on behalf of its members. In 1979, appellant filed a grievance against Deputy Chief Robert Letts while appellant was assigned to the Detective Bureau. The grievance complained that police assigned to the Detective Bureau did not receive overtime pay for court appearances while patrolmen received such pay. Deputy Chief Letts opposed granting the members of the Detective Bureau overtime pay for court time appearances, notwithstanding that it was a contractual violation as alleged by appellant. At the time appellant filed his grievance he was assigned to the Detective Bureau. Appellant was invited into Deputy Chief Letts' office prior to the filing of the grievance to discuss appellant's complaint. Letts advised appellant that the Police Department and the Township were faced with a budget crisis and that Letts wanted everyone to cooperate to reduce expenditures. Letts acknowledged to appellant that Letts was wrong, however, he wished appellant to go along with his recommendation. When appellant advised Deputy Chief Letts that it was a violation of the negotiated contract, Letts asserted that if appellant did not like it appellant could get out his "blue suit," meaning that appellant could go back to uniform duty. Appellant responded to Letts that appellant believed he was right in this instance and he was going to file a grievance if the detectives did not get overtime pay for court appearances. That discussion concluded the meeting between Letts and appellant.

On July 3, 1979, appellant had a court appearance in the afternoon. Appellant was scheduled to work from 4:00 p.m. until 12 midnight, therefore, he was entitled to two hours overtime pay for the court appearance. When he returned to the Detective Bureau he submitted an overtime card to Captain Halliday who, in turned, denied the overtime. Appellant understood that he had no standing to file a grievance until such time as a contractual violation affected him. Consequently, after the denial by Captain Halliday, appellant submitted his grievance.

Prior to filing the grievance, appellant took the document to Chief McCarthy and advised the Chief as to the action appellant intended to take. Chief McCarthy requested appellant to withdraw his grievance and advised appellant to go along with Deputy Chief Letts' request. The Chief, however, stated that he respected appellant's position and advised appellant he would not hold it against him. Appellant proceeded with the grievance. Subsequent to appellant having filed his grievance, Deputy Chief Letts called appellant to his office and asked appellant whether or not he was to reconsider the grievance. Appellant advised Deputy Chief Letts that he was not, whereupon Letts handed appellant a letter advising appellant that he was transferred out of the Detective Bureau. Appellant

had two weeks to clear out his desk in the Detective Bureau.
Thereafter, Captain William J. Halliday wrote to Chief McCarthy asserting that Halliday had found appellant to be a competent and capable detective willing to learn new concepts and techniques. Captain Halliday asserted that appellant had the potential to become an excellent detective and recommended that appellant be again assigned to the Detective Division.
Chief McCarthy reassigned appellant to the Detective Bureau on September 15, 1981. Deputy Chief Letts did not concur with appellant's transfer. Chief McCarthy called appellant to his office to advise appellant to "watch your ass" because of the grievance he had filed against Letts. Captain Halliday also advised appellant that Deputy Chief Letts was against appellant's reassignment to the Detective Bureau and further advised appellant to stay out of Letts's way.
Sometime after June 9, 1983, Deputy Chief Letts assigned appellant to perform police applicant background investigations. Appellant subsequently investigated Frederick Deickmann, a police applicant who was the son of police officer Sergeant Deickmann. At the time, candidate Deickmann was employed at the Monmouth Corrections Facility (Monmouth County Jail) on a full time basis and was also employed on a part-time basis by the Sea Bright Police Department. The Sea Bright Chief of Police did not believe that Deickmann should be appointed as a regular police officer. The Sea Bright Chief opined that Deickmann was immature.
Appellant discovered that candidate Deickmann had changed dates and times he worked at the Monmouth County Jail in order to work as a special police officer in Sea Bright. Appellant discovered that candidate Deickmann had called the Monmouth County Jail and reported that he was out sick, however, he worked at Sea Bright on the date he reported out sick.
Appellant brought this information to the attention of Deputy Chief Letts. Letts believed that appellant was being too thorough in his investigation and asked appellant if the information must remain in Deickmann's file. Appellant felt that falsifying records was a major concern and asserted that if Chief McCarthy told him to remove the information from the Deickmann file he would do so. Appellant reported his findings to Chief McCarthy and McCarthy advised appellant that everything was to remain in the file. Appellant wished to return to Sea Bright to gather further information, however, Letts advised appellant that he had found enough. Shortly thereafter, Letts relieved appellant from further recruit investigations and assigned Lieutenant Kryscnski to investigate police applicants. Kryscnski stated to appellant that Deputy Chief Letts wanted appellant to redo the Deickmann file.
Only July 8, 1986, appellant wrote to Lieutenant Kryscnski concerning police applicant Deickmann, after Kryscnski had asked appellant to reduce his findings to writing. Thereafter, Kryscnski advised Letts that Kryscnski would not reevaluate Deickmann after reading appellant's memorandum. As a consequence, Deickmann was passed over for appointment as a police officer with the Middletown Police Department. However, Deickmann was subsequently employed as a police officer.
Prior to appellant's having been relieved of investigation duty of police applicants, he was assigned to investigate police applicant Charles Scott, the son of Captain Arthur Scott of the Middletown Police Department. Captain Scott and Deputy Chief Letts were known to be friendly with one another and, in fact, played golf together.
Appellant was not familiar with police applicant Charles Scott. When Scott's name came up on the list for appellant to investigate, appellant had a number of telephone calls from people within the Police Department, including friends of Captain Scott, who directed appellant to look for certain information concerning police applicant Charles Scott. The information to which appellant was directed demonstrated that Charles Scott had a history of substance abuse and that he had problems while serving in the military. Appellant advised Deputy Chief Letts about the negative information concerning applicant Scott. Letts again believed that appellant was overdoing his investigation. Deputy Chief Letts realized that Charles Scott had some problems in the past but Letts advised appellant that Charles Scott had been substance free for about eighteen months.

Appellant opined to Letts that appellant did not believe that eighteen months was sufficient time for an applicant to be considered for a law enforcement position. Appellant telephoned the pension system to inquire about their regulations with respect to hiring people with substance abuse problems and having that individual approved as a member of the pension system. Appellant was told that if the pension system knew about such substance abuse it would have to review the pension applicant before he would be accepted to the pension system.

Deputy Chief Letts had a subsequent discussion with appellant concerning the Charles Scott's investigation. Letts told appellant that Captain Scott had complained to Letts about not keeping Captain Scott informed concerning appellant's action with Charles Scott's application. Appellant asserted that Captain Scott had asked him on numerous times, in the police station, about his son's application. Letts told appellant that Captain Scott had alleged that appellant had released some of the investigation information concerning candidate Scott to other police officers in the station house. Shortly thereafter, appellant was removed from investigation of police applicants.

Appellant asserted that he advised Chief McCarthy about police applicant Scott's problem. Chief McCarthy told appellant that the Chief was well aware of Charles Scott's problem and that the Chief would recognize immediately whether or not appellant had done a good or bad job with his investigation. Chief McCarthy advised appellant not to delete any of his findings with regard to the application. Charles Scott was never hired as a police officer with the Middletown Police Department.

After appellant had given his report to Chief McCarthy concerning applicant Scott, Deputy Chief Letts made an indirect threat to appellant. Letts informed appellant that Chief McCarthy would not be around forever to protect appellant.

Appellant testified about an incident which occurred in January 1986, where the principal of Middletown High School South received a letter from an parent alleging that a teacher, Walter Wood, had falsified payroll records in his son's name during summer employment with the Township Recreation Commission. The letter alleged that Walter Wood falsified the boy's time card after which a check was issued and Wood cashed the check and shared the money with the boy. Appellant was summoned by Letts and instructed to investigate the falsification of public records for monetary gain. Appellant secured the payroll records and then spoke with the boy's father. The investigation confirmed the father's allegations against Walter Wood. Appellant submitted a report of his findings to Deputy Chief Letts dated February 1, 1986. Appellant opined that criminal charges should be levied against Wood and so advised Deputy Chief Letts. Appellant had interviewed Wood, who admitted the wrongdoing. Deputy Chief Letts asked appellant to rethink the criminal charges because the Wood family and Letts family were very close. In fact, it was Wood's grandmother who was largely responsible for getting Letts on the Middletown police force. Letts asked appellant to attempt to resolve the situation because Letts did not want charges to be brought against Wood. Appellant advised Letts that he did not believe that the situation could be resolved with the boy's father. The boy's father was quite insistent that he participate in the prosecution and that the boy should testify in order to reinforce in his son's mind the difference between right and wrong. The father believed that it would be a good lesson for everyone to learn. Deputy Chief Letts asked appellant for time to consult with the Township attorney.

Appellant apprised Deputy Chief Letts that appellant would hold off for awhile before pressing charges against Wood. Appellant advised Letts, however, that appellant thought they were flirting with a potential problem of misconduct and that he was worried about what the Prosecutor's Office would do.

Deputy Chief Letts did bring the Wood matter to the attention of the Township attorney and the Township administrator. The Township attorney assured appellant that appellant could not be charged with misconduct in office if appellant persuaded Mr. Wood to pay back the money. The Township attorney assured appellant that even if the Prosecutor's Office did find out, there was very little it could do about the matter and that appellant would not be in jeopardy. Appellant asserted that he was concerned about his career as a police officer at that time.

The Monmouth County Prosecutor's Office did learn about the Wood incident. However, the Prosecutor's Office did not learn about the incident from appellant. Appellant was telephoned by an investigator from the Monmouth County Prosecutor's Office who asked appellant if there had been an investigation concerning the misuse of public funds. Appellant there upon referred the Monmouth County Prosecutor investigator to Deputy Chief Letts. A short time later, Letts called appellant to his office. Letts wanted to know if appellant was the person that had forwarded anything to the Monmouth County Prosecutor's Office. Appellant explained to Letts that he did not, and that appellant was the one that had the most to lose. Deputy Chief Letts then asked appellant for a copy of the Walter Wood file which appellant turned over to Letts. Appellant did not believe that Letts believed him when he advised Letts that he did not advise the Monmouth County Prosecutor's Office of the Wood incident.

Lieutenant Walter Monahan was appellant's first supervisor when appellant joined the force in June 1974. Monahan was the brother-in-law of Deputy Chief Letts. Subsequently, appellant was assigned to the Detective Bureau when Lieutenant Monahan was its Executive Officer or the second in command. Lieutenant Monahan had a drinking problem based upon numerous incidents where appellant was ordered to retrieve Monahan's police car located outside of establishments that served liquor. Appellant would retrieve Lieutenant Monahan's police car during Monahan's working hours and appellant's working hours. Appellant was ordered by Deputy Chief Letts to retrieve the Monahan Police vehicle, for the most part. Occasionally Chief McCarthy and Captain Halliday would also instruct appellant to retrieve Monahan's police car. Appellant estimated that he carried out this assignment approximately fifteen times. Appellant did not care for this task and told Deputy Chief Letts that he was "fed up" with the assignment. Appellant stated that it came to a point that Monahan would telephone appellant at night at home when Monahan was drunk cursing appellant, and threatening bodily harm, among other things. Appellant told Deputy Chief Letts that he did not mind too much going to retrieve Monahan's car, however, he did resent Monahan calling appellant at his home and verbally abusing appellant month after month. Appellant asserted to Letts that perhaps Letts should find someone else to retrieve Monahan's car because it always created a problem between appellant and Monahan when Monahan would report to work. Letts instructed appellant to continue to retrieve Monahan's police car. Letts asserted that if anyone else were to find out that Letts knew that Monahan was using a police car for transportation to and from drinking establishments, then Monahan might be in a position to lose his police pension. Appellant testified that Lieutenant Monahan would frequently appear at the Detective Bureau at 8:00 a.m. and complete the assignment of cases for the day. Thereafter, Monahan would mark himself out for a half sick day or a half personal day and then disappear by 9:30 a.m. Occasionally Deputy Chief Letts would call appellant and ask appellant if he knew where Lieutenant Monahan had gone. Appellant would tell Deputy Chief Letts what appellant knew.

Appellant testified there were numerous incidents in which Lieutenant Monahan was involved as a result of his drinking. In one particular incident, Monahan tore up a girl's driver's license when she presented it to him for her identification at a Veterans of Foreign Wars (VFW) Hall. Another incident involved Lieutenant Monahan in an automobile accident with an unmarked police car in Atlantic Highlands. Lieutenant Monahan was drunk at the time of the accident and received a summons. Lieutenant Monahan subsequently entered a plea of guilty to the summons in Municipal Court. The accident occurred when Lieutenant Monahan was leaving a bar on Route 36 in Atlantic Highlands. Deputy Chief Letts knew about the incident, however, Letts took no action against Lieutenant Monahan.

On another occasion, appellant was working at police headquarters when a call was received from a bar that Lieutenant Monahan was involved in a fight and had waved his gun in the air. The individual who called from the bar wanted police action. The detective with whom appellant was working that day advised appellant that he should not go to the bar because the detective believed that Monahan would engage appellant in a physical altercation. The detective was very friendly with Lieutenant Monahan. He went to the bar

and took Monahan and his car to Monahan's home. Deputy Chief Letts knew about the incident, but did nothing about it.

Appellant asserted that Lieutenant Monahan's drinking problem was the subject of at least two underground publications circulated around police headquarters. Appellant reported his knowledge of Monahan's drinking problem to Chief McCarthy. Deputy Chief Letts knew and understood that appellant informed Chief McCarthy of his brother-in-law's drinking problem.

Appellant contended that Lieutenant Monahan received preferential treatment from Deputy Chief Letts. One incident involved a time when appellant was the Information Officer and there was a release of information to the media by Monahan. Deputy Chief Letts called appellant to Letts' office and appellant recognized that it was not one of his releases but, rather, one released by Monahan. When appellant advised Letts that Letts should discuss this with Lieutenant Monahan, Letts excused the action. Appellant asserted that if he had given the press release he would have been chastised, but because Monahan had released it it was "okay" with Letts. Appellant asserted that he had become the "whipping boy" for Monahan's mistakes.

Subsequently, appellant addressed a memorandum to Chief McCarthy requesting that appellant be named the Executive Officer of the Detective Bureau to replace Monahan who was not doing the job. Chief McCarthy asked appellant to rescind his letter because Deputy Chief Letts was upset that appellant had made statements in writing against Monahan. Chief McCarthy asserted to appellant that appellant had made statements which Letts did not want to be revealed. Appellant refused to rescind his memorandum.

Appellant testified about an incident which occurred in February 1988, at a Bradlees Department Store. The 17 year old son of a member of the Township Committee was apprehended for shoplifting by the Bradlees security. The Committeeman was summoned to the department store to sign a release for his son. While there, the Township Committeeman was most uncooperative and, according to a police report, the Committeeman threatened Bradlees with future problems. In his official capacity the committeeman could slow down and refuse work permits and work requests, among other things, brought to the attention of the Middletown Township Committee for approval. Appellant, who was responsible for press releases at the time, discussed the police report (A-20) with others in the department and it was determined to turn this report over to the Monmouth County Prosecutor. Thereafter, the information and contents of the police report was improperly leaked to the press. Deputy Chief Letts summoned appellant to Letts's office and asked appellant if he had released the article. Appellant denied the release because the individual arrested was a juvenile. Letts asserted to appellant that if it was further revealed that appellant did, in fact, release the information of a police report, there could be real problems for appellant. Thereafter, appellant reported the incident and his conversation with Deputy Chief Letts to Chief McCarthy.

Appellant testified concerning an incident in 1989 when he was in charge of security for the Monmouth County Hunt and Racing Association. A police officer from another jurisdiction, Hazlet Township, was investigating a juvenile for alcohol when he discovered a large hunting knife. Appellant placed the hunting knife in a box with other evidence and forgot about it. Appellant had placed a note on the knife which read, "not to be released as per Detective Lieutenant Oches." Subsequently, appellant observed Detective Ohnmacht about to release the weapon. Appellant stopped the release and Detective Ohnmacht stated to appellant that Ohnmacht had received a call from a friend who asked to release the knife. Appellant later spoke with Deputy Chief Letts who agreed with appellant that the knife should not be released. Subsequently, on December 26, 1989, Letts came to appellant's office and asked appellant if appellant would reconsider releasing the knife. Letts was being sworn in as the Chief of Police and the Township's new mayor asked Letts to release the knife. Letts reminded appellant that appellant should also start off on a good footing with the new mayor. Letts allowed the knife to be released.

Appellant testified that in 1988 he was the recording secretary of the SOA. He had also

been treasurer of the Fraternal Order of Police (FOP) and helped to organize the FOP. The SOA had been active in filing grievances for its members. The SOA is the bargaining unit for the senior officers and has taken an active role with regard to promotions in the police department. It has filed grievances on behalf of its members which included one for the delay of the Chief of Police examination and others for promotions where the first or second on the examination had been passed over for the third qualified candidate.
Appellant testified that he has aligned with the Democratic Party in Middletown Township. He has been active where he has helped with some Democrat Party campaign literature. He has also posted signs to elect Democrats to public office and these signs have been placed on his parent's lawn. In 1989 the Middletown Township Committee was all Republican. He asserted that then administrator Alloway was not registered to vote for either party, however, Alloway was appointed as administrator by an all Republican Party - Township Committee. He asserted that William Fowlie and Chief Letts were both registered Republicans. Beginning in 1990, the Township Committee was composed of three Republicans and two Democrats.
On August 28, 1990, appellant received from the DOP a Notification of Certification for Position asserting that appellant's name had been certified for consideration for appointment to the position of police captain on August 24, 1990. The Notification stated that if appellant was interested in the position he was to write to the appointing authority within five days. The Notice also admonished appellant not to write to the New Jersey DOP. On August 29, 1990, appellant addressed a letter to administrator Alloway, the appointing authority, that he was interested in the position of police captain. William Fowlie was appointed to the position of police captain on August 27, 1990, when Letts was Chief of Police and Alloway was the appointing authority. Appellant was second on the examination list and Fowlie was third. Appellant was not interviewed for the position by the appointing authority nor did anyone talk to appellant prior to the promotion regarding his qualifications, his capabilities, or his competency for the position. There was no record that anyone associated with the administration reviewed appellant's personnel file nor did anyone interview appellant's superior officers for comment or recommendation.
On January 14, 1991, the SOA filed a grievance with Chief of Police Letts asserting, among other things, that appellant was entitled to receive compensation as acting captain in the absence of Captain Shaffrey who was attending school out of state. On January 22, 1991, Chief Letts denied the grievance asserting that appellant's transfer was necessary for the economy and efficiency of the Detective Bureau and was properly made within the Chief's management prerogative. On January 23, 1991, the mayor and Township Committee affirmed Chief Letts's actions. The matter subsequently went to arbitration. Appellant was instrumental in filing the grievance against Chief Letts.
On February 14, 1991, appellant first learned of Chief Letts's decision to leave the Middletown Township Police Department through an article published in the Asbury Park Press. The Chief's resignation and retirement would create an opening in the Department for a captain's position. Appellant contends that the Middletown Township Committee should have called for a Police Chief Examination upon Chief Letts's announcement that he was retiring.
Detective Sergeant Michael Slover testified on behalf of respondent-appointing authority. Sergeant Slover has been employed by the Middletown Police Department for twenty-six years and was supervised by appellant fifteen of those 26 years. Slover was under appellant's supervision in the Detective Bureau while appellant served as a Sergeant and Lieutenant. Sergeant Slover testified that during the fifteen years he worked with appellant there were cases where they worked well together. He opined, however, that appellant would be abrasive, self-centered, and was rough around the edges. He further asserted that appellant dressed well, that he was intelligent, and at times a "real good guy," but a lot of times he just had a bad attitude. Sergeant Slover testified that Captain Shaffrey had spoken favorably about appellant asserting, among other things, that appellant was just as good as Fowlie and that he should not have been skipped over for promotion. Sergeant Slover did not have much of a relationship with appellant, however,

Sergeant Slover found appellant to be intelligent and competent. Sergeant Slover admitted that appellant, as Slover's supervisor, had ordered Slover not to use any of the police department portable radios for any reason from January 2, 1986 forward. Slover admitted that he had failed to comply with Lieutenant Halliday's order to return portable radios in a timely fashion.

Patrolman John Estock testified on behalf of respondent-appointing authority asserting, among other things, that he was present in the Detective Bureau on May 31, 1991, when he heard appellant say something to the effect that Fowlie had made Captain because Fowlie and Chief Letts had a tie-in with the Republicans and that the appointing authority was going to hold up the promotion list in order that Fowlie would be eligible for the Chief's examination. Patrolman Estock testified that more was said, however, he could not remember what was said. He did recall that Mrs. Fowlie, who was in her office, came out of her office and told appellant that if appellant had anything to say about William Fowlie, that appellant should say it to Fowlie's face. Patrolman Estock asserted that Detective Ronald Ohnmacht was present with other officers. Patrolman Estock believed that there were two other policemen in the Detective Bureau at the time, however, he could not recall precisely. Patrolman Estock testified that he did not recall Mrs. Fowlie saying anything about the Chief's test being held up.

Detective Ronald Ohnmacht testified that he recalled a conversation between Mrs. Fowlie and appellant sometime in 1991. He asserted that Mrs. Fowlie stated to appellant that appellant should not say things behind Fowlie's back, that if appellant was upset or annoyed, appellant should say them to Fowlie's face. Detective Ohnmacht could not testify as to what Mrs. Fowlie and appellant were discussing nor did he recall the topic of conversation.

Detective Ohnmacht asserted that the general reputation of appellant was good and that appellant was competent and thorough in his work, however, demanding. Appellant wanted things done right. He asserted that appellant is a good investigative officer. He further asserted that there was a conflict between appellant and Sergeant Deickmann, who did not like appellant.

Former Township Administrator James Alloway testified for respondent-appointing authority by telephone from Majaro, the Marshall Islands. Alloway was appointed Assistant Township Administrator in August 1987, in anticipation of the retirement of the then Township Administrator. Pursuant to the Middletown Township Charter, all classified positions under the DOP are appointed by the administrator who is the appointing authority.

Subsequent to Letts being appointed Chief of Police, Alloway had several meetings with Letts concerning the reorganization of the Police Department. Alloway was not in favor of replacing the Deputy Chief of Police position, which Letts had vacated upon his appointment as Chief of Police. Letts, on the other hand, had taken a very strong position that the deputy chief position should be filled. As a consequence, further meetings were held with then Mayor Parkinson, the Township Committee, Letts and Alloway concerning the issue as to whether or not to fill the position of deputy chief. Letts had met with members of the Township Committee and persuaded it that the position of deputy chief should be filled. Thereafter, Captain Ernest Volkland was recommended by Letts to fill the position of deputy chief. Alloway affirmed Letts's recommendation and appointed Volkland to the position.

As a consequence of Volkland's promotion from captain to deputy chief, a vacancy occurred for the position of captain. Alloway could not recall details, however, he testified that the examination for the captain's position was delayed because of the time involved in Deputy Chief Volkland's appointment and police recruits coming on board after graduating from the Police Academy. It was Alloway's best recollection that the police recruits were to be assigned duty in mid-1990.

Mr. Alloway asserted that the captain's position was filled on September 1, 1990, by then Lieutenant Fowlie. Alloway believed that the other candidates for the position were Lieutenant Hennesey and Lieutenant Detective Oches. Alloway asserted that he held extensive discussions with Letts concerning the three candidates because they were on

the Captain's List from the Civil Service Commission (DOP). Alloway asserted that he and Letts reviewed the pro and con of the various candidates and Alloway believed that he asked Letts to develop a letter that would go to the governing body which would back up the reasons for the recommendation. Alloway could not recollect, however, he did believe that Letts prepared a letter which substantiated the reasons for the appointing authority to select Fowlie for the captain's position. Mr. Alloway admitted on direct examination that he was not familiar with any of the candidates on a personal basis because he rarely got involved with people in the various departments under his charge. He asserted that he believed the police department did have a set of personnel records for each of the individuals and that he did review those personnel records prior to the promotion.

Mr. Alloway testified that Lieutenant Fowlie was promoted to captain from the list of eligibles. He asserted that Lieutenant Fowlie was in the Records Bureau during the time when it changed over from handwritten to a computer system of recordkeeping. He stated that Fowlie had worked in other divisions, had a college degree, and was a graduate of the FBI Academy.

Mr. Alloway expressed his opinion of appellant where it was his belief that appellant served in the Detective Bureau at the time and that the Bureau was not performing to the best of professional expectations. He asserted that appellant never really surfaced predominantly either in reports or actions. Alloway knew appellant only to exchange greetings and opined that appellant never surfaced as an outstanding officer.

Mr. Alloway further opined that the Middletown Police Department had been affected by a lack of true professional dedication to the better interest of the citizens and of the people it served. He stated that the members of the police department played "too many games." Many of these games involved personalities which interfered with the best performance of the department and the best interest of the citizens. Mr. Alloway asserted that appellant was one of those engaged in activities which interfered with the best performance of the police department. He contended, moreover, that Fowlie was a problem solver. When given an assignment Fowlie would do it and do it well.

Mr. Alloway admitted that he did not interview the three candidates for the position of captain. Alloway further asserted that he did not rely or act solely upon Letts's recommendation. Alloway contended, among other things, that the appointment was solely his and no one else, including that of the governing body, in a classified position.

Mr. Alloway expressed the reason he did not interview the three candidates was that they had each taken the qualifying examination. Therefore, Alloway knew that they were very much interested in the position. He had been in the position of Township Administrator for several years and had watched the performance of the police department and reviewed the records and reports with regard to the performance of the candidates. He testified that surprisingly, no politicians came to him to advise him who to promote. He asserted that Middletown Township was quite political, but none of the politicians talked to him concerning the appointment. Alloway further asserted that political affiliation played no part in his decision. He testified that it was by accident that he learned that Lieutenant Hannafey had an association with the Democratic Party. Alloway stated he had received a telephone message from Hannafey, which referred to a telephone number Alloway was to call. Alloway did call the number and received a response by a representative of the Democratic Headquarters.

Mr. Alloway contended that he did not know Fowlie's political affiliation during the period of the captain's vacancy. Alloway asserted, however, that when Fowlie was promoted to chief, Alloway learned that Fowlie was a member of the Republican Party. Alloway contended that he did not know with which political party, if any, appellant was affiliated.

Mr. Alloway testified that prior to finalizing the Fowlie appointment to captain, Alloway was made aware that Lieutenant Hannafey would take legal action concerning the appointment. Later, Alloway heard through the rumor mill that appellant intended to contest the appointment.

Mr. Alloway testified that he was extremely upset when he learned that Letts was going to leave the position of Chief of Police. Alloway asserted that he wanted Letts to remain as Chief for five or more years, although Alloway knew that Letts was eligible to retire.

Alloway contended that there was a tacit understanding that Letts would remain in the position for a period of years in order to carry out his own objectives for the Department. Mr. Alloway could not testify with any certainty when he became aware that Letts was going to leave the police department. He assumed that it was sometime either in July, August or September 1991, when he became aware that Letts was to retire. He asserted that Deputy Chief Volkland would be the natural successor of Letts. Deputy Chief Volkland originally said that he would accept the position of Chief of Police. Alloway discussed Volkland's promotion with the governing body and it felt, as did Alloway, that Volkland was an excellent officer and that he would succeed Letts when Letts retired. Subsequently, Volkland approached Alloway and indicated that his wife was physically impaired and not improving; therefore, he would not accept the position of Chief of Police. There came a time sometime later when Volkland changed his mind and asserted that he would, in fact, accept the position. Subsequently, Volkland again stated that he would not take the position. Alloway assumed that this on-again-off-again position of Volkland's lasted one or two or several months.

Deputy Chief Volkland served as the Acting Chief of Police. Alloway reviewed the existing captains on the police force and determined that it was necessary to call for a test to establish a list of eligibles for the position of Chief of Police. Alloway made contact with the DOP Testing Unit and requested that an examination for the position of chief be established. Alloway testified that when he spoke with a representative of the testing unit of the DOP, he requested a special examination as had been provided when Letts was appointed Chief. Alloway asserted that because the DOP was downsizing it could no longer provide the service of a special chief examination to Middletown Township. Alloway further asserted that the examination process could not be expedited because of the downsizing in the DOP. Alloway had no recollection of the individual with whom he talked in the Testing Unit. Mr. Alloway believed that the examination was scheduled sometime in September 1991. Alloway denied that he did anything to delay the examination. He asserted that he attempted to expedite the examination, however, it was in the hands of the DOP.

Mr. Alloway testified that Captain Fowlie was one of the three potential candidates to take the Chief of Police examination. It was his belief that an individual needed a year in grade in order to take an examination for a promotion. After Alloway was informed by the DOP that the examination would be held sometime in September, Alloway made inquiry with the DOP asking whether Fowlie would or would not be eligible to sit for the examination. Alloway asserted that the DOP advised him that Fowlie would be eligible and then stated that it was a "Civil Service determination, not mine." (Transcript September 25, 1992, at page 44). Alloway testified that three officers sat for the examination.

Mr. Alloway testified that in the latter part of 1991, probably in November, 1991, Alloway made a determination that he had finished his pension requirement and that he would leave the position of Township Administrator to take the position of City Manager of the Marshall Islands. Alloway announced that he would be in the Marshall Islands by February 1, 1992.

Mr. Alloway testified that he believed that he was better qualified to make the appointment of Chief of Police than the new, incoming, Township Administrator - appointing authority. Alloway decided that Fowlie was the best of the three candidates. Alloway asserted he had more exposure with Fowlie after Fowlie became a Captain and, therefore, Alloway recommended Fowlie to the governing body for the position of Chief of Police. Alloway had reviewed his recommendation with the Mayor and it had been discussed in executive session with the governing body. Alloway asserted that it was not a majority (unanimous) vote for Fowlie.

On cross-examination, Alloway testified that all classified promotions in the police department were reviewed by Letts and Alloway. Alloway opposed the continuation of the Deputy Chief of Police when Letts was appointed Chief. However, Letts was in favor of maintaining the position. Although Alloway testified that the final decision was his, he testified that Letts went to the Township Committee over Alloway's head and that the Mayor changed Alloway's mind to keep the Deputy Chief of Police position.

Mr. Alloway testified that in early to mid-1990, he discussed with Letts the opening in the captain's position. Thereafter in June, July and August 1990, further discussions were held. Alloway asserted that the three eligibles for the captain's position in the order of their examination results were Hannafey, appellant and Fowlie. Alloway stated that Letts made his recommendation in July 1990 to promote Fowlie and that Alloway concurred with Letts and made the ultimate decision to appoint Fowlie. Alloway contended that he last discussed the captain promotion with Letts in August 1990.

On cross-examination, counsel for appellant read portions of Letts' deposition taken on August 4, 1992, to Alloway. According to Chief Letts deposed statement, Alloway accepted Letts' recommendation of Lieutenant Fowlie for promotion to Captain. Alloway accepted Letts' recommendation and concurred with Letts' deposed statement based upon his own evaluation.

Alloway admitted that he did not believe it was necessary to interview the candidates, although he did not have full knowledge of all three candidates. He asserted that he had adequate knowledge. Alloway could not testify as to how many commendations appellant had received. Alloway had no knowledge of Captain Shaffrey's opinion of appellant, asserting that it was no concern of his, although Captain Shaffrey was appellant's superior officer in a command position.

Mr. Alloway could not testify with any certainty, or with regard to any specific facts, concerning appellant not being an outstanding officer. Mr. Alloway testified that the reports from the Detective Bureau did not reflect any outstanding achievement by appellant. Alloway admitted he did not know that appellant prepared the monthly reports for the Detective Bureau. Alloway stated that he had no problems with the reports prepared by appellant. Nor could Alloway recollect any specific details concerning his opinion that appellant was involved in any personality conflicts or that appellant was "backbiting."

Alloway admitted that both he and Fowlie were ex-Marines and that he and Fowlie took a trip together in March 1990 to Paris Island under a VIP sponsorship. Alloway denied that he had a personal friendship with Fowlie.

The record indicates that Chief Letts announced in February 1991 that he would be leaving the position of Chief of Police in December 1991. The record further shows that Letts actually stopped working for the Police Department in April of 1991. Mr. Alloway could not testify with any certainty when he contacted the DOP to request a chief of police examination after Chief Letts advised he was leaving in February or after he actually left in April of 1991. Alloway testified that if there were no potential candidate is for the vacant position, a five month delay in requesting the chief's examination could be considered abnormal.

Mr. Alloway testified that as the appointing authority he preferred to make appointments and promotions from a certified list. He admitted, moreover, that there was no list when Chief Letts was appointed to the position of Chief of Police. He asserted that Letts was the only one eligible and, therefore, there was no need for a list.

Mr. Alloway testified that it was a mere coincidence that the chief's examination was delayed for five months and that Fowlie became eligible for the chief's examination. The five months provided Fowlie with the necessary time of one year in grade to be eligible. Alloway admitted that Captain Shaffrey was number one on the total score of the chief's examination and Fowlie was number two. Alloway could not state facts on the record on which he relied to select Fowlie over Shaffrey. Alloway understood that Shaffrey had a bachelor's degree, however, he was unaware that Shaffrey also held a master's degree. Alloway admitted that he did not interview either Shaffrey or Fowlie for the position of Chief of Police.

Robert M. Letts, retired Chief of Police of the Middletown Township Police Department testified on behalf of respondent-appointing authority. He asserted that he had a very good working relationship with appellant in the 1970s. He recalled a grievance filed by appellant concerning appellant not being paid for overtime work performed. He asserted that the overtime work had not been approved by Captain Halliday, appellant's superior at the time. Letts asserted that the police department experienced budgetary problems

and that Captain Halliday executed a directive indicating that if a detective was working nights and had a court case during the day, that detective was required to adjust his hours and report for duty during the daylight hours. Letts asserted that it was Chief McCarthy who made the decision concerning the overtime adjustment. Mr. Letts characterized Chief McCarthy as a totalitarian, a strong chief, the leader who made the decisions for the department. At staff meetings, Chief McCarthy would solicit advice and recommendations that any officer might offer, however, Chief McCarthy would make the final decision. Letts asserted that one of the ways he survived as Deputy Chief with Chief McCarthy was to know the Chief's thinking and to conform his pay thinking with that of the Chief.

Mr. Letts testified that in 1980 it was Chief McCarthy who made the decision about the overtime pay. The grievance was submitted by the PBA on July 2, 1980, with a subsequent arbitration award. Letts asserted that he was advised on September 2, 1980, of the grievance which was denied on September 2, 1980, by Chief McCarthy. Letts concurred and believed that the grievance should be denied by shifting the night detectives to the day shift to avoid overtime. Letts asserted that he was not annoyed by the filing of the grievance.

Mr. Letts testified concerning the circumstances for appellant's transfer from the detective division to the patrol division on July 1980. Letts asserted that it was Chief McCarthy who made the transfer because of severe budget problems.

With regard to the 1980 grievance concerning overtime pay, Letts asserted that he testified along with Captain Halliday and Chief McCarthy at the arbitration hearing. Letts asserted that he could not recall anything that occurred at the hearing that personally upset him. Nor could he recall anything that was unusual or caused him aggravation during the arbitration hearing process. Letts understood that the arbitration decision was a split one; i.e., the Township was in error and that appellant had presented his grievance in the wrong manner.

Mr. Letts could not recall any discussion outside of the arbitration hearing room during a recess with Chief McCarthy and the attorney representing the Township. Nor did he recall any discussion outside of the hearing room related to Letts being angry at appellant or anyone else related to the grievance. He contended that he had never expressed or stated that he was mad, aggravated, or annoyed at appellant as a result of the grievance.

Mr. Letts testified that during his career with the police department he was involved in between twenty-five to fifty grievances. Subsequent to the determination by the arbitrator in the 1980 grievance concerning overtime pay, Letts asserted that the Township abided by the negotiated contract and eliminated the reassignment of police officers from the night shift to the day shift. If the officers were working the night shift, they remained on the night shift and went to court during the day and received overtime pay.

Mr. Letts did not recall a 1981 staff meeting concerning the possibility of transferring appellant back into the Detective Bureau. Nor did he recall that Captain Murdoch objected to appellant transferring back into the Detective Bureau. Letts asserted, moreover, that to his knowledge or recollection, he did not specifically object to appellant being transferred back to the Detective Bureau at a staff meeting.

There came a time in the mid-1980s when Letts assigned appellant to do background investigations of police recruits and applicants. Letts asserted that at the time he thought appellant was doing an outstanding job and appellant did thorough background investigations. Letts stated that he had no problem with appellant or the background investigations until some time later in the 1980s. This was the time when Letts removed appellant from the assignment. With respect to the Frederick Deickmann background investigation, Letts testified that appellant uncovered some information concerning time records with the Sea Bright Police Department and the Monmouth County Sheriff's Department where Deickmann worked as a guard. Letts testified that appellant was also doing a background investigation on applicant Scott and, he asserted, some of that information that appellant received was being disseminated through the police

department and to the public. Letts contended that appellant was relieved of the investigative assignment because of the dissemination of the information.

Mr. Letts testified that a review board composed of Division Captains, Chief McCarthy and himself as the Deputy Chief, reviewed the Deickmann file where it was determined to pass over Deickmann as a candidate for the Middletown Township Police Department. Letts contended that the final decision was made by Chief McCarthy. The review panel was concerned that Fred Deickmann demonstrated behavior of immaturity. Letts viewed the falsification of records as an immature act and not as a criminal act. Frederick Deickmann was subsequently employed as a police officer with the department. Letts asserted that it was Chief McCarthy who made the decision to hire young Deickmann. Letts contended that he never told appellant not to dig deeper in his investigation of Deickmann. Nor, he asserts, did he tell appellant to redo the investigation. Letts testified that he was not a social friend of senior Deickmann; rather, their relationship was professional.

Former Chief Letts stated that his relationship with the elder Scott was strictly professional. Letts admitted, however, that he occasionally played golf with Scott. Letts stated that it was during the course of the Scott investigation that certain matters leaked to the members of the police department and to people outside the department. It came to Letts's attention that appellant had leaked the information. Letts did not testify who informed him that appellant had leaked the information concerning the Scott investigation. Appellant denied to Letts that he had leaked the information, however, Letts did not believe appellant. As a consequence, Letts relieved appellant of background investigations of police recruits and applicants.

Mr. Letts admitted that appellant had found two DWI convictions against young Scott. Appellant had also discovered a couple of blemishes on young Scott's military record. Letts spoke to Captain Scott and suggested that young Scott submit a request that young Scott's name be removed from the eligible list. Captain Scott advised Letts that his son was over 21 years of age and becoming a policeman was what he wanted to do. Letts denied that he asked appellant to sanitize the background investigation of young Scott. The internal review board, comprised of captains and chiefs, was presented the information concerning applicant Scott. Young Scott was denied an appointment upon the recommendation of the board and the decision by Chief McCarthy. Subsequently, young Scott appealed the denial of his appointment before the Merit System Board (MSB). The MSB sustained the appointing authority's determination to deny young Scott a position on the police force.

Mr. Letts testified that he removed appellant from the investigations because of the leaks in the Scott investigation. Letts asserted that all investigations were to be held confidential. Lieutenant Kryscnski stated that appellant had revealed his findings to him. Captain Scott asserted that his daughter, a schoolteacher, had heard the information about young Scott out in the community. Letts then went to Chief McCarthy and requested that appellant be removed from background checks and investigations.

With regard to the Walter Woods incident, Letts asserted that he received a call from the Township Administrator about a situation involving a Township employee. It appeared that Mr. Woods was a supervisor in the Township Recreation Department. A young boy, who worked under Walter Woods' supervision, hurt his foot and was unable to work any further. Mr. Woods was alleged to have placed the boy's name on a time sheet, when the boy was unable to work, received the young boy's paycheck and cashed it. Letts asserted that the matter was resolved when the Township received restitution from Woods and Woods was terminated from his summer employment. Letts contended that he was happy about he outcome of the situation.

Mr. Letts conceded that a member of the Monmouth County Prosecutor's Office investigated the Woods incident. Letts denied, however, that he ever met with the Monmouth County Prosecutor concerning the incident. Letts admitted that he knew Woods' father and grandmother. He further admitted that he knew the Woods family all his life, however, he denied that he ever got involved in the cause of action. Letts asserted that the Monmouth County Prosecutor's Office did not find any criminal activity

by Woods. Letts denied that he had any feeling about the Woods matter and further denied that he knew that appellant had made a call to the Monmouth County Prosecutor.
Mr. Letts testified that Lieutenant Monahan was his brother-in-law and the Executive Officer of the Detective Division. Letts admitted that Lieutenant Monahan had an occasional beer drinking problem when Monahan would place himself off-duty and go to a local tavern. Letts asserted that all detectives were assigned Township owned unmarked police cars. There were times when Letts would request that a police officer go to a tavern, remove the car and return it to police headquarters. Letts stated that he was concerned about the liability of the Township. Letts asserted that he would assign a police officer one or two times to retrieve the police vehicle. Chief McCarthy assigned police officers five or six times to retrieve the Monahan police vehicle. Letts contended that he asked appellant to retrieve Lieutenant Monahan's police vehicle only two or three times over a ten year period.
Mr. Letts testified that Lieutenant Monahan's drinking problem became progressively worse. Lieutenant Monahan retired from the police force in 1989. Letts asserted that appellant never complained to him about picking up Lieutenant Monahan's motor vehicle. Letts denied that he ever threatened appellant for appellant's refusal to pick up Monahan's police vehicle.
Mr. Letts admitted that Lieutenant Monahan was involved in an automobile accident while on duty and driving in Atlantic Highlands, New Jersey. Mr. Letts asserted that as a consequence of that automobile accident, Monahan was issued a summons for careless driving. Monahan subsequently pled guilty to the charge. Mr. Letts admitted that no disciplinary action was taken against Monahan as a consequence of the motor vehicle accident with a police vehicle. Mr. Letts stated that he did not recall Lieutenant Monahan ever having been involved in a fight in a bar.
On June 17, 1988, appellant sent a memorandum to Chief Joseph M. McCarthy requesting that appellant be assigned as the Executive Officer of the Detective Division. (A-19) Lieutenant Monahan was serving as the Executive Officer at the time and appellant contended, among other things, that appellant had been performing many of the functions assigned to the Executive Officer. Letts asserted that Chief McCarthy had shown appellant's memo to him. Letts testified that in 1988, Monahan had not indicated he was leaving the police force. Letts testified that he held no ill will toward appellant at that time.
Mr. Letts testified that he had no involvement in the incident which involved the son of Committeeman Parkinson having been arrested for shoplifting at a Bradlee's Department Store in December 1988. Letts understood that confidential police matters had been released to the press and that Chief McCarthy believed that the release was by a clerk in the Records Division. Collective bargaining negotiations were on going at the time and it was Chief McCarthy's belief that the release of the information was a way to embarrass the Township Committee. Letts understood that the Monmouth County Prosecutor's Office was investigating the leak. Letts denied that he questioned appellant about the news leak or that if appellant had caused the leak it could jeopardize his future with the police department.
Former Chief Letts was aware that appellant had confiscated a knife from a youth in October 1989 at the Monmouth County Hunt. Appellant had advised Letts that he had confiscated the knife. Appellant advised that the knife was to be kept in the evidence locker and that it was not to be released unless appellant authorized the release. On December 26, 1989, the night that Letts was sworn in as Chief of Police, the then Mayor Raynor asked Letts if the knife could be release to the boy's father. The knife apparently had some value. Appellant was at the swearing in ceremony to take photographs of Letts and his family. Letts testified that when he asked appellant if the knife could be released, Letts asserted that appellant stated there was no problem in releasing the knife. Letts saw no problem in its release because no charges had been filed against the boy and the boy's father would take charge of the knife. The boy's father accompanied Letts to the evidence vault and Letts released the knife to the father. Former Chief Letts conceded that he did not have the legal authority to release the knife without appellant's approval.

Without appellant's approval, the boy's father would have necessarily gone to Superior Court for an Order to have the weapon released. Letts maintained that there was no disagreement with appellant concerning the release of the knife.

Immediately after Letts was sworn in as Chief of Police on December 26, 1989, Letts requested a meeting with the Mayor to discuss the reorganization of the police department. Township Administrator Alloway was opposed to the appointment of a deputy chief, the position which Letts had just vacated. Alloway wanted to eliminate the position of deputy chief. Letts was opposed to the elimination of the position. Subsequently, a meeting was held with Alloway, Letts and Mayor Parkinson.

Mr. Letts testified that if the position of deputy chief were not filled, it would not create an opening for a captain. Because a captain would be promoted to the position of deputy chief, the Mayor concurred with Letts's position that a deputy chief should be appointed. The meeting between Alloway, Letts and the Mayor occurred sometime in February 1990. Letts asserted that at that meeting he recommended that Captain Volkland, who was then Captain of the Service Records Division, be promoted to the position of deputy chief. Letts also recommended that Lieutenant Fowlie be promoted to the position of captain. Lieutenant Fowlie served as the Executive Officer in the Service Records Division. Letts admitted that Lieutenant Hannafey and appellant were the other eligibles for the captain's position in February 1990. Letts further admitted that he had made up his mind to promote Fowlie to the position of captain. Letts further admitted that it was about this time, February 1990, that his relationship with appellant began to sour. In the latter part of February 1990, a news release appeared in the local press indicating that there would be a reorganization and promotions in the police department. Appellant approached then Chief Letts and asked the Chief if there was any chance that Letts would pass over appellant on promotion. Letts advised appellant that that was a possibility and it would depend upon what positions became vacant. Letts asserts that with that statement appellant got very upset and left Letts's office. Letts followed appellant out of his office and encountered Lieutenant Kryscnski who asked Letts what he had done to appellant. Letts went to the Detective Bureau where Captain Shaffrey asked Letts the same thing. After that incident, Letts had very little contact with appellant.

Mr. Letts testified that in or about February 1990, Captain Shaffrey, who was in charge of the Detective Division, approached Letts and requested that appellant be transferred out of the Detective Division. Letts asserted that Captain Shaffrey told Letts that Shaffrey and appellant had different personalities and different work styles. Letts characterized Captain Shaffrey as more of a laid back individual while appellant's style was more military in nature. Letts assumed that there were certain conflicts between the men due to these characterizations. In any event, then Chief Letts refused Captain Shaffrey's request and asserted that he would have to work out the problems with appellant.

Mr. Letts testified that the assignments he gave to appellant were completed very competently. At times, appellant had trouble with some of his subordinates. Sometimes appellant could be very abrupt with his subordinates. If appellant said he wanted something done, it was to be done immediately.

Former Chief Letts related a situation which involved Detective Slover. Slover would check out a portable radio in the morning but would fail to return it at night for recharging. Slover became a problem by not putting his radio back to be recharged. This created a conflict where appellant requested that Detective Slover be transferred out of the Detective Bureau. Mr. Letts testified that he persuaded appellant not to have Detective Slover transferred out of the Detective Bureau because Slover was doing his job in narcotics and appellant would not want to take a man doing an outstanding job out of the position and transfer him just because he did not return the radios to be recharged.

In or about August 1990, Chief Letts discussed with Township Administrator Alloway Letts's recommendation for promotions. Alloway requested that Letts reduce his recommendations to writing. On August 13, 1990, Letts forwarded to Alloway his recommendation that Captain Ernest Volkland be promoted to Deputy Chief and that Lieutenant William Fowlie be promoted to Captain, together with eight promotions to

Sergeant. Letts requested that the promotions be made effective September 1, 1990. (R-10) Letts testified that he was not certain whether or not Alloway had reviewed the personnel records of all of those eligible for promotion. Letts insisted that it was Alloway, the administrator, who made the ultimate and final determination as to the promotions.
On August 27, 1990, then Chief Letts submitted a memorandum to Alloway which, among other things, indicated the top three candidates on the Captain's Eligible List. The three eligibles, in order of their examination results were:
1. Eugene P. Hannafey (non-veteran);
2. Appellant (veteran);
3. William Fowlie (veteran).
Chief Letts's memorandum continues to extol the background and qualifications of Lieutenant Fowlie and recommend, in accordance with the Bureau of Personnel's (sic) "Rule of Three," that Fowlie be promoted to the position of captain. (R-11)
Under direct examination Letts testified concerning an event in the 1980s, about the time he was promoted to Deputy Chief, where his son was arrested by Patrolman Waldyko for stealing hubcaps from a motor vehicle. Letts asserted that his son did not remove the hubcaps but, rather, they were removed by the boy his son was with that evening. Letts asserted that his son returned the hubcaps and replaced them on the hood of the motor vehicle from which they were taken. About that time, Patrolman Waldyko appeared upon the scene and after questioning Letts's son, Waldyko arrested Letts's son.
On cross-examination, Letts admitted that he was upset that his son was wrongfully charged. Letts asserted that his son's attorney advised the young man to plead guilty to a downgraded offense. Letts asserted that at no time did he retaliate against Patrolman Waldyko. Captain Halliday testified at this hearing that Letts held a grudge against Waldyko.
Mr. Letts disagreed that appellant's reason for wanting to transfer Sergeant Slover was based upon Slover's poor work performance. Letts contended that the work styles of appellant and Slover were different. Letts also admitted that Slover would not submit his reports to appellant on time. Letts further admitted that the submission of reports in a timely fashion is work performance. Letts also admitted that the issue of Slover returning the portable radios to be recharged was also work performance. Letts conceded, therefore, that appellant's reason for wanting Slover to be transferred from the Detective Bureau was, in fact, based upon Slover's work performance.
Mr. Letts testified that it was Lieutenant Halliday who issued a directive that detectives working nights would necessarily have to adjust their schedules and work days on those occasions when they were required to appear in court. Such a scheme would eliminate the need to pay overtime. Letts denied that it was his decision to issue the order. But, rather, the idea originated with Chief McCarthy. Letts admitted, however, he was opposed to paying overtime for court appearances. Mr. Letts denied he advised the appellant that if appellant did like the idea of no overtime pay, that appellant could go back to a "blue suit." Letts contends it was Chief McCarthy who told appellant that appellant could go back to a "blue suit."
Mr. Letts did not recall saying to anyone that he was embarrassed at the overtime payment grievance proceedings. Letts was reminded that Chief McCarthy testified at this hearing that Letts was, in fact, embarrassed by the proceedings. Letts contended that Chief McCarthy had lied.
In less than two weeks after filing the grievance in July 1980, appellant was transferred out of the Detective Bureau. Subsequently, Halliday requested that appellant be transferred back to the Detective Bureau. Letts denied that he spoke against appellant's return to the Detective Bureau. He was reminded, moreover, that both Halliday and McCarthy testified that Letts spoke against appellant's return to the Detective Bureau. Letts contended that both Halliday and McCarthy lied under oath when they stated that Letts spoke against appellant. Letts admits that both Halliday and McCarthy were at the review board meeting when the request was made to return appellant to the Detective Bureau.
Mr. Letts testified that the background investigations conducted by appellant prior to the

Deickmann and Scott incidents were exemplary. Appellant conducted fifteen or twenty such investigations and no one ever complained that he did not do a thorough job. Captain Scott brought to Letts' attention that appellant's investigation was adverse to Captain Scott's son. Letts admitted that he had more than a working relationship with Captain Scott because they played golf together. Appellant came to Letts and told Letts that Scott had asked appellant about the investigation of Scott's son. Appellant advised Captain Scott that the only person he could reveal such information to was to Chief McCarthy. Appellant related to Letts the adverse information he had gathered against young Scott.

Mr. Letts denied that he attempted to delete any information gathered by appellant concerning the Scott and Deickmann investigations. Letts did, however, take appellant off the investigations while appellant was investigating both Scott and Deickmann. Letts claimed it was not a coincidence but, rather, because of leaks of information concerning the investigations to others. Letts admitted that whenever Chief McCarthy had an important assignment, Chief McCarthy would give the assignment to appellant.

Mr. Letts testified that he did not recall the PBA filing a grievance on July 3, 1980, concerning the Detective Bureau overtime pay. The record indicates that appellant was transferred out of the Detective Bureau on July 15, 1980. Letts did recall, however, a grievance filed on September 2, 1980 by the PBA.

Mr. Letts admitted that appellant had found that police applicant Deickmann was falsifying documents which indicated that Deickmann was working at the Monmouth County Department of Corrections and the Sea Bright Police Department on the same day and at the same time. Letts admitted that Deickmann was falsifying documents. Appellant was removed from the investigation and the investigation was turned over to Lieutenant Kryscnski and Sergeant Pollander. Notwithstanding the fact that Deickmann had signed a waiver, Sergeant Pollander was unable to review the work records of applicant Deickmann at the Monmouth County Department of Corrections. Appellant had advised Letts before he was removed from the investigation that there was more to be found concerning applicant Deickmann. Letts did not order either Lieutenant Kryscnski or Sergeant Pollander to go to Sea Bright for further investigation of Deickmann. Letts asserted that he did not feel it was important to do any further investigation of applicant Deickmann.

Subsequently, applicant Deickmann was employed as a police officer with the Middletown Township Police Department. Letts admits that the investigation of Deickmann was incomplete when Deickmann was employed. Letts did not, however, inform the police review committee that there might be additional information concerning applicant Deickmann. Appellant was not invited to the second meeting of the review board to disclose the Deickmann information.

Letts testified that Captain Scott had come to Letts to advise that information concerning young Scott's background was being released. Captain Scott's daughter was alleged to have told Captain Scott that information was being circulated. Letts admits that it was on the basis of the release of information concerning young Scott that he removed appellant from the background investigations. Letts admits, moreover, that he did nothing to verify Scott's daughter's allegations to ascertain whether or not they were true.

With regard to the Scott investigation, Letts testified that Kryscnski told Letts that appellant stated that Scott's son would get appointed to the police department over appellant's dead body. Kryscnski told Letts that appellant had informed Kryscnski that young Scott had two drunk driving arrests and also had experienced problems in the military. Letts testified that he approached appellant about the statements made by Captain Scott and Lieutenant Kryscnski concerning young Scott's background investigation. Letts asserted that appellant had denied he was disclosing information throughout the police headquarters or to the public. Letts admitted that he did nothing to verify Captain Scott's or Lieutenant Kryscnski's allegations.

With regard to the Walter Woods incident, Letts testified that he received a telephone call from Township Administrator, Mr. Bradshaw, who requested that a detective be assigned to investigate the Township employee. Letts testified that he assigned the matter to

appellant who did his usual competent job and disclosed the relevant information. Letts admitted that appellant had discovered that Walter Woods had committed a crime. Letts further admitted that he did not refer the matter to the Monmouth County Prosecutor's Office. Letts also admitted he knew the Woods family very well. He asserted that the young man's grandmother was a Republican committeewoman in the Township when Letts was employed by the Township Police Department. Letts denied that the Woods' grandmother was instrumental in getting him hired onto the police force. Letts testified that he brought the Woods matter to the attention of Chief McCarthy. However, Chief McCarthy testified at this hearing that he had no knowledge of the Woods matter at the time it occurred.

Mr. Letts denied that his brother-in-law, Lieutenant Monahan, was an alcoholic. Letts characterized Monahan's drinking as a mild problem. He admitted, however, that there were periods when Lieutenant Monahan would continually go to a local tavern and drink beer for a period of three or four days at a time. Letts testified that to his knowledge Monahan never drank while on duty. Letts admitted, moreover, that Monahan would not have told Letts of his drinking while on duty. Letts did not see that alcohol effected Lieutenant Monahan's performance. Letts reviewed Exhibit A-19, the memorandum in which appellant requested to replace Lieutenant Monahan as the Detective Division's Executive Officer. Appellant alleged in A-19, that Monahan's work was not being performed. Letts testified that appellant's statements in Exhibit A-19 were not accurate. Letts admitted, however, that he did nothing to verify appellant's statements in the memorandum. Letts denied that he went home ill after reading Exhibit A-19 for the first time.

Former Chief Letts testified that the automobile accident Lieutenant Monahan was involved in with an unmarked police car in the Atlantic Highlands concerned allegations that Lieutenant Monahan was under the influence of alcohol. Letts asserted that the woman whose car Lieutenant Monahan struck alleged that Monahan was drunk. Letts testified that he did not know that to be a fact, however, he learned of the allegations from conversations conducted at the Middletown Township Police Station. Letts asserted that if the allegations were true and Lieutenant Monahan had been drinking at the time, it would have been a disciplinary matter. Letts admitted that there was no investigation of the incident carried out by the Middletown Police Department. Letts asserted that he did not deem the matter to be sufficient to warrant an Internal Affairs investigation because the Atlantic Highlands Police Department did not charge Lieutenant Monahan with DWI.

Mr. Letts testified that he recalled the incident where Lieutenant Monahan tore up a girl's driver's license at the Veterans of Foreign Wars (VFW) Hall. Letts asserted that more than likely alcohol was related to that incident as well. Letts further testified that he did not charge Lieutenant Monahan with any disciplinary action with regard to the incident. Letts admitted that Lieutenant Monahan's conduct was contrary to the rules and regulations that a police officer must represent himself with dignity and good reputation outside of the department. Letts further admitted that he did not recommend to Chief McCarthy that disciplinary action should have been taken against Lieutenant Monahan for this conduct.

Former Chief Letts denied he told Chief McCarthy that Letts believed appellant leaked information concerning Committeeman Parkinson's son's involvement in the shoplifting incident at Bradlees Department Store. Despite Chief McCarthy's testimony to the contrary at this hearing, Letts asserted that McCarthy's recollection was different than his. Letts further denied that he told appellant there would be a chilling effect on appellant's career if Letts learned that appellant had leaked the information concerning the Bradlees incident.

Former Chief Letts testified that he did not believe it was improper for Mayor Raynor to use his influence over Letts, who was to be sworn in as the Chief of Police, to get property release from the evidence locker. This testimony was in reference to the knife appellant confiscated from a young man at the Monmouth County Hunt.

With regard to appellant's second appeal, Mr. Letts testified that upon Chief McCarthy's retirement and terminal of leave, Letts took over as Chief from his Deputy Chief's position. Letts was sworn in as the Chief of Police on December 26, 1989.

Notwithstanding Township Administrator Alloway's opposition to filling Letts's former position of Deputy Chief, Letts was able to persuade Mayor Parkinson that the position should be filled. Mayor Parkinson sided with Letts against the Township Administrator for continuing the position of Deputy Chief of Police. Letts testified that he wanted to make Ernest Volkland the Deputy Chief. There were four captains who would have been eligible for the deputy chief's position had Letts called for a deputy chief's examination. However, Letts did not call for the deputy chief's test. Therefore, no deputy chief's examination was given.

Volkland's appointment to deputy chief then created a vacancy for captain. Letts testified that he wanted Lieutenant Fowlie to move up to the captain's position. Letts admitted that he had his whole plan set in his mind in January 1990. Letts admitted that he did not interview the top three candidates for the position of captain. Letts further admitted that he only talked with Volkland, who was Fowlie's supervisor. He did not talk to the supervisors of the other two candidates, including the supervisor of appellant. Letts admitted that he did not review any personnel files of the three men eligible to be promoted to captain; i.e., appellant, Lieutenant Fowlie or Lieutenant Hannafey. Letts admitted that he had to get the Mayor to influence the Township Administrator to go along with his plan because the Administrator was opposed to it.

Letts testified that in the latter part of February 1990, appellant approached Letts and asked Letts if there was a chance that appellant would be bypassed. Letts testified that he told appellant it was possible that appellant would be bypassed.

Mr. Letts testified that the deputy chief's examination was called for in May of 1990. He asserted that it was up to the Township Administrator to call for the examination. Letts could not recall whether or not he had appointed Ernest Volkland as the Acting Deputy Chief before the results of the deputy chief's examination were published. He asserted that Captains Kerrigan, Shaffrey and Volkland sat for the deputy chief's examination.

Mr. Letts testified that one of the reasons for promoting Lieutenant Fowlie to the position of captain was because of Fowlie's experience with computers. Letts recalled having his deposition taken on August 4, 1992, concerning this matter. In his deposition taken on August 4, 1992, Letts was asked the question "did the fact that Lieutenant Fowlie has any prior training or experience with computers play a role in your decision?" Letts answered "no." (TR-September 29, 1992 at page 141-142).

Katherine Fowlie, wife of William Fowlie, testified on behalf of the appointing authority. Mrs. Fowlie has been employed by Middletown Township for eight and one-half years and at the time of hearing had been married to William Fowlie for six years. Mrs. Fowlie testified concerning an incident that occurred on May 31, 1991, when she was employed as a police stenographer in the Township's Detective Bureau. Her normal working hours were from 8:00 a.m. to 4:00 p.m. However, on May 31, 1991, Mrs. Fowlie was held over to take statements from police and/or prisoners between 5:00 p.m. and 5:30 p.m.

At approximately 5:00 p.m., while sitting in her office, Mrs. Fowlie overheard a conversation coming from the Detective Room which was in the rear of the Detective Bureau. The conversation was between appellant, Detective Ohnmacht, and Patrolman Estock. Mrs. Fowlie testified that she overheard appellant state that appellant had a friend on the Township Committee that kept appellant informed of its activities and that there was no way that Fowlie was going to become Chief of Police. Mrs. Fowlie asserted that appellant used graphic language while speaking about Fowlie. She stated that appellant told the two other men that Fowlie would not be able to take the Chief's test because Fowlie would not have had a year in grade as Captain at the time of the Chief's test.

Mrs. Fowlie was making tea in her office, which she left to go to the refrigerator in the Detective's Room, when Detective Ohnmacht asked Mrs. Fowlie when would Fowlie have a year in grade as Captain. Mrs. Fowlie testified that she responded "in August." Mrs. Fowlie then looked at appellant and stated that she did not understand why appellant was calling her husband these names and that appellant never had the nerve to do it to his face. After a brief acrimonious exchange, Mrs. Fowlie left the Detective's Room and returned to her office. That evening, she told William Fowlie of the conversation that took

place in the Detective's Room.
Rosemarie Peters, Mayor of Middletown Township, testified on behalf of appointing authority. Mayor Peters was elected to her second three year term to the Township Committee in November 1991 as a Republican. The Township Committee is composed of five members who serve staggered terms. At the time of hearing, the Township Committee was composed of three Republicans and two Democrats. The Township Committee selects the Mayor on January 1, 1991 and the Mayor serves a one year term. The Mayor works on the agenda for the Township Committee meetings and chairs the Township Committee meeting.
Mayor Peters asserted that Letts was appointed as Chief of Police during her first year on the Township Committee. Letts had been serving as the Deputy Chief and there was no discussion as to the length of term Letts was to serve as the Chief of Police. Prior to Letts's appointment as Chief, the Township Committee had discussions concerning the reorganization of the Police Department. At that time, there were more Lieutenants than Sergeants. Therefore, the organization was considered top heavy and not organized as a pyramid. The Township Committee had serious questions as whether a Deputy Chief was necessary after Letts had left the position to assume the position of Chief of Police. Chief Letts wanted to fill the position of Deputy Chief, however, Administrator Alloway, the appointing authority, was opposed to filling the position. Mayor Peters was not aware that at that time, Chief Letts had a meeting with the then Mayor, Parkinson and Alloway where Letts lobbied for the position of Deputy Chief. Subsequently, the Township Committee ultimately went along with Chief Letts and provided funds for the position of Deputy Chief. Letts then recommended Volkland to the position of Deputy Chief.
Mayor Peters testified that Chief Letts wanted to promote eight patrolmen to the position of Sergeant. She believed that there were discussions of such promotions in early 1990. The Sergeant promotions were implemented in August or September 1990, however, she could not recall any discussion with respect to a promotion to Captain. The Mayor recalled that in March 1990, Lieutenant Hannafey had contacted her and the Deputy Mayor and spent some time lobbying for the position of Captain. She asserted that Hannafey was first on the eligibility list.
After the promotions were in effect, Mayor Peters asserted that the Legislative mandated budget CAP was imposed with fiscal restraints upon the Township Committee. The Township Committee did not want to layoff any uniform personnel. It discussed ways to streamline the Police Department into an organizational pyramid structure.
Mayor Peters testified that during her term as Mayor, Letts surprised her when he announced his retirement in February 1991. She asserted that the Township Committee assumed that Deputy Chief Volkland would assume the Chief of Police position. Deputy Chief Volkland, however, stated that he would not take the position because of personal reasons. The Township Committee then discussed who would be considered for the Chief's position. Subsequently, Deputy Chief Volkland stated he would assume the position of Chief of Police. Later, Volkland contacted Administrator Alloway to state that he would not take the position because of his wife's illness. Mayor Peters asserted that Volkland's on-again off-again positions continued over a span of several months.
Mayor Peters testified the Township Committee made a decision that the Chief of Police examination would be open to Captains and the Deputy Chief after Volkland stated he would not take the position. The Township Administrator was in receipt of a letter from the DOP which stated that the Chief's test would be conducted in May. Otherwise, the test would not be given until the subsequent May, 1992. The Township Committee did not want the position to remain open for one year. Administrator Alloway advised that a special examination could be given at a cost of $500. On July 18, 1991, the DOP stated it would announce a Police Chief examination for Middletown Township on September 1, 1991, with a closing date of September 14, 1991, and would be open to Deputy Police Chief and Police Captains. (R-12 in evidence).
Mayor Peters asserted it was subsequently learned that the Chief's Examination would not be scheduled until January 8, 1992.
In or about December 1991, Mayor Peters learned that Administrator Alloway was

announcing his resignation with only about two months notice until he left his position. Mayor Peters testified that the Township Committee majority believed that Administrator Alloway should make the appointment of Chief of Police because of his background and knowledge of the Middletown Police Department. She asserted the Committee did not believe a new Administrator would be able to make the appointment.

In January 1992 the examination for Chief of Police was administered with Shaffrey and Fowlie certified. Mayor Peters testified the Township Committee interviewed both Fowlie and Shaffrey for the position. In the interviews, the Township Committee asked the individuals about their goals, plans and issues facing the Police Department. Mayor Peters asserted that the day before Administrator Alloway left his position as Administrator, he appointed Fowlie to the position of Chief of Police. She asserted the Township Committee was divided three to two with the Republicans voting affirmatively for Fowlie and the two Democrats voting against.

Mayor Peters testified the Township Committee wanted Fowlie to streamline the Police Department because of budget constraints. In April 1992, Chief Fowlie proposed to eliminate one of the Captain's position, which would drop the Captains slots from four to three by consolidating the Traffic Division with the Patrol Division into one single uniform unit. It was the consensus of the Township Committee to move forward with this reorganization.

As a consequence of Fowlie's promotion to Chief, a Captain's position remained vacant. Lieutenant Hannafey, appellant and Kryscnski were the three eligibles for the one position. Chief Fowlie informed the Township Committee that he had selected Lieutenant Kryscnski for the Captain's position. Mayor Peters stated that she understood that Kryscnski was third on the list of three eligibles and that objection to Kryscnski's promotion was voiced at a public meeting of the Township Committee.

On cross examination, Mayor Peters testified that after Letts became Chief the Township Committee held discussions concerning the position of Deputy Chief. The Mayor and Committee was aware that Administrator Alloway did not want the position. She asserted, however, the final determination as to whether or not there was to be a Deputy Chief position was up to the Administrator as the appointing authority. She asserted there is no line item in the budget for the position of Deputy Chief, however, if the Administrator appointed a Deputy Chief, the Township Committee would be required to fund the position. She asserted that the Township Committee does not have the legal authority to override an appointment by the Administrator.

Mayor Peters was aware that in 1990 there were three Lieutenants on the eligible list for promotion to Captain. She asserted that these were appellant, Hannafey and Fowlie. There were discussion during the summer of 1990 concerning Chief Letts's promotions. On August 13, 1990, Chief Letts told the Township Committee whom Letts was going to promote to the positions of Sergeant, Captain and Deputy Chief (William Fowlie was promoted to the position of Captain). She asserted there were no extended discussions concerning any of the candidates or the promotions. Mayor Peters was not certain if there was any discussion about skipping the top eligible on the list for Captain. She stated, moreover, that she and the Committee would probably want to know why such a skip took place.

Mayor Peters stated that in February 1991, Chief Letts announced his retirement. It was assumed by the Township Committee that Volkland would step into the position as Chief. Within a month of Letts's announcement, Deputy Chief Volkland stated that he would not take the position. She asserted that Administrator Alloway was still in the position as Administrator and was a former member of the New Jersey Civil Service Commission. Mayor Peters stated she knew that a Chief of Police examination was required when Deputy Chief Volkland asserted he would not take the position. Mayor Peters contended that she did not recall that Administrator Alloway informed the Township Committee that the examination for Chief of Police was offered only once per year. The Chief of Police examination was administered in May 1991, for that year.

Mayor Peters asserted that when it was determined Deputy Chief Volkland was not going to assume the position of Chief of Police, the Township Committee ordered Administrator

Alloway set up a Chief's examination and open it to the three sitting Captains. Mayor Peters believed the examination was scheduled for November 1991. Mayor Peters learned that the test was put off from September 1991 to January 19, 1992. She asserted that three Captains sat for the Chief's examination which included Captain Shaffrey, Captain Halliday and Captain Fowlie. Mayor Peters knew that Administrator Alloway was leaving during the selection of the Chief of Police. She stated that the examination was close between Shaffrey and Fowlie. She asserted that seniority put Shaffrey ahead of Fowlie in the final results. She asserted that the day after Fowlie was appointed by Alloway, Alloway left his position.

Detective Sergeant Richard Deickmann testified he worked under appellant's supervision for several years and believed that appellant was not well regarded by a number of the Detectives as well as by Captain Shaffrey. Richard Deickmann testified that he did not like appellant. He contended that appellant had lied about his son which later proved to be a lie because his son was hired by the Middletown Township Police Department. With regard to Richard Deickmann's son, Frederick Deickmann's application, Richard Deickmann asserted that he did not know what appellant's background check of his son disclosed. Richard Deickmann asserted that he knew appellant had found that his son Frederick had not gone to work in Freehold and that someone had been injured. Richard Deickmann asserted that his son, Frederick Deickmann, had told his father that appellant had lied. Richard Deickmann admitted he has testified that appellant lied because his son told him it was so. Richard Deickmann did not know the actual reason for Frederick Deickmann's rejection as a police officer on his first application. The only basis of Deickmann's assertion that appellant lied was his son's assertions.

On inquiry by this Court, Detective Sergeant Richard Deickmann testified that his son had told him that the son had taken off sick from one place of employment and worked in the other place of employment. Richard Deickmann admitted that when Frederick Deickmann reported in sick to the Monmouth County Department of Corrections, he was paid for that time and he also was paid when he worked as a Special Police Officer at Seabrook later the same day.

Detective Sergeant Michael Cerame testified on behalf of the appointing authority. He testified concerning certain evidence problems in an armed robbery and burglary case known as the "Gloria Nielson case." At the trial, the Judge ruled that all statements made by Oches at the trial were inadmissible and that Cerame's statements were also inadmissible due to MIRANDA issues. It appears that the accused did not want to talk to appellant, however, he did want to talk to Detective Cerame. Because of statements taken by Cerame and appellant, the Court believed that the statements were inadmissible. Both appellant and Cerame did not believe that they had done anything wrong and they further believed that Cerame's statements should have been admissible at trial. Captain Shaffrey was unhappy with the result.

Detective Sergeant Cerame asserted that he did not recall whether Lieutenant Monahan was at the interrogation and drunk. Detective Cerame stated that it was not unusual that Monahan was drunk on the job. He asserted that one suspect did speak with appellant but not with Monahan because Lieutenant Monahan was drunk at the time.

Walter Bennett, Director of Information Services for Middletown Township, testified on behalf of the appointing authority. He was employed by the Township in January 1988 and reported directly to the Township Administrator. He was responsible for the design and the implementation of the computer system within the Township. With regard to the police computer, its specifications were written by a consultant and the bids were received after Bennett was employed. Captain Scott, Lieutenant Fowlie and one other officer worked with Bennett on the computers.

Mr. Bennett testified about Fowlie's knowledge of records management and his ability to perform with the computers. He asserted that there was no problem with the initial system. In 1989, however, there was a problem with the software which he characterized as not user friendly. NCR (National Cash Register) changed the software. Fowlie, however, recommended that the software be returned to NCR.

Bennett characterized Fowlie's involvement in handling of the computer system as above

the average. He also asserted that he worked with appellant on some reporting techniques. He compared the level of sophistication of Fowlie and appellant and asserted that Fowlie had a broader understanding of computers whereas appellant was an individual user. Bennett reported to Administrator Alloway on a regular basis and reported that he was impressed with Fowlie's performance with computers. Bennett asserted that Fowlie was competent and, when asked by Alloway, Bennett opined that Fowlie would be a good Chief of Police.

On cross examination, Bennett testified, among other things, that he was aware of the inner workings of the Police Department. He did not know, however, what appellant's abilities demonstrated as a Detective. He knew very little of appellant's abilities and reported only on what he had heard.

Mr. Bennett testified that when he came to work for the Township, Fowlie had no training with computers. Bennett stated that any competent police officer could have done what Fowlie did.

Lieutenant John Pollinger testified that in the early part of 1987, he was assigned to perform background investigations. Lieutenant Edward Kryscnski assigned him the responsibility to follow up on the Frederick Deickmann investigation. He reviewed appellant's investigation notes and then the Deickmann file. Lieutenant Pollinger was told by Kryscnski to update Frederick Deickmann's application and background. He was instructed to specifically look at Deickmann's work record at the Monmouth County Corrections Institute. He testified that he did, in fact, go to the Monmouth County Corrections Institute where he reviewed, copied and updated Deickmann's evaluations that had been issued between the date appellant compiled his report (July 8, 1986) until the latest evaluation in 1987.

Pollinger testified that he specifically found that Frederick Deickmann did not work two jobs during the same hours as had been reported by appellant. Lieutenant Pollinger found that Deickmann worked at the Monmouth County Corrections Institute from 12:00 Midnight to 8:00 a.m. and was a Special Police Officer on weekends with the Sea Bright Police Department from 11:00 a.m. to 7:00 p.m. On the date of September 2, 1985, while working at the Monmouth County Corrections Institute, Deickmann asked to be relieved from duty at approximately 3:00 a.m., asserting that he was sick. The officer in charge advised Deickmann that no replacement could be provided for him and that the incident might be looked upon unfavorably by the administration because it was a holiday weekend. Deickmann insisted that he was ill and the officer in charge reluctantly allowed him to leave.

Lieutenant Pollinger found that subsequently, on the same date, September 2, 1985, at 10:07 a.m., Deickmann telephoned Sea Bright Police Department to advise it that he would be late for work. The record shows that at 3:46 p.m., on September 2, 1985, Frederick Deickmann was involved in a police action in Sea Bright.

Lieutenant Pollinger asserted that Frederick Deickmann's record of employment demonstrated a pattern of tardiness and sickness. This was due, in part, to a time when Deickmann was involved in police actions in Sea Bright which would make him late for work at the Monmouth County Corrections Institute. Or, on the other hand, when the Monmouth County Corrections Institute would have a lock-down or a search, it would preclude Deickmann from getting out of work on time to meet his obligation at Sea Bright. Lieutenant Pollinger did not find any evidence of any falsification of records by Deickmann or by anybody, for that matter. He asserted that appellant's report concerning Frederick Deickmann was correct where appellant indicated that applicant Deickmann did not get along with other members of the force nor did Deickmann follow orders or general directions well. Pollinger also agreed with appellant's report that Frederick Deickmann was a female chaser while on duty. Lieutenant Deickmann asserted that his investigation corroborated this information as revealed by appellant. Lieutenant Pollinger's investigation also corroborated appellant's investigation that Frederick Deickmann's promotion to Sergeant at the Monmouth County Corrections would be impractical due to his inability to get along with other members of the Department. Lieutenant Pollinger also corroborated and agreed that if Frederick Deickmann needed

guidance on certain police matters, he would never use his fellow officers or supervisors, but rather, would rely upon his father and brother who were both policemen. Lieutenant Pollinger subsequently made a recommendation to Chief McCarthy through Lieutenant Kryscnski, that Frederick Deickmann be appointed as a Middletown Township Police Officer. Frederick Deickmann was subsequently employed. There was some confusion as to the date in question; i.e., whether it was September 2, 1984 or September 2, 1985. The record reveals, moreover, that Frederick Deickmann was not employed at the Monmouth County Jail in September 1985, having resigned from that position in March 1985 to become a full-time police officer at Sea Bright.

Police Officer Frederick J. Deickmann testified as to his work history. He was employed as a full-time corrections officer at the Monmouth County Jail from March 1984 until April 1985; a full-time Sea Bright policeman from April 1985 until January 1986; and returned to the Monmouth County Jail from February 1986 to August 1987, at which time he was employed by the Middletown Township Police Department. During the summer of 1984, while employed full-time as a Monmouth County Jail corrections officer on the 12:00 Midnight to 8:00 a.m. shift, Deickmann also worked weekends as a Special Police Officer for the Borough of Sea Bright, on the 10:00 a.m. to 6:00 p.m. shift.

In March 1985, Frederick Deickmann resigned from his Monmouth County corrections officer position for a full-time position of police officer at Sea Bright. He was employed ten months in Sea Bright until January 1986, when he resigned to returned to full time employment with the Monmouth County Corrections Institute. During the summer of 1985 he did not work for the Monmouth County Jail.

During the period Frederick Deickmann was employed full time as a Sea Bright police officer, his name was on the eligible list for police officer with Middletown Township. He asserted that the Borough of Sea Bright intended to send him to the Police Academy, but he did not want Sea Bright to pay for the Academy because his name was on the eligible list at Middletown. Frederick Deickmann asserted that both Monmouth County Corrections and the Sea Bright Police Department were aware that he was employed at both jobs.

Frederick Deickmann testified that either in February or March 1987 he was interviewed by members of the police force with regard to his application to become a police officer. To the best of his recollection, he recalled that Chief Joseph McCarthy, Captain Shaffrey, Captain Thorne, Captain Kerrigan, appellant and Chief McCarthy's secretary were in the room when he was interviewed. Deickmann had not previously been interviewed by anyone from the Police Department related to his application. He asserted that he was not asked any questions concerning any discrepancy with payroll records or "double-dipping" in the interview. Nor was any question or issue raised concerning alleged improper conduct on either of his jobs at Sea Bright or Monmouth County. Subsequently, Deickmann returned home to observe that his mother was very upset who advised him to call Lieutenant Kryscnski. Deickmann called Kryscnski who asserted there was a problem that arose in Deickmann's background and that he was not going to be hired at this time. Deickmann did not know what the problem was, however, he subsequently learned that it involved an incident that occurred at the Monmouth County Jail. Frederick Deickmann testified that when he was passed over by Middletown he returned to work at the Monmouth County Jail.

Frederick Deickmann learned that an Incident Report dated September 2, 1984, by Lieutenant Burke of the Monmouth County Corrections Department, was the source of the problem. Deickmann testified that he was assigned to the 12:00 Midnight to 8:00 a.m. shift on that date. At approximately 3:00 a.m. Deickmann advised Lieutenant Burke that he was ill and wished to go home. Lieutenant Burke advised Deickmann that it was a holiday weekend (Labor Day) and would be difficult to get a replacement. Deickmann asserted that he had worked the shift at the jail and at Sea Bright on September 1, 1984. At midnight he had returned to the jail to begin work on September 2, 1984. Lieutenant Burke's Incident Report refers to the assault on two inmates on the 4:00 p.m. to 12:00 midnight shift, September 1, 1984. There were no such incidents which occurred during the 12:00 midnight to 8:00 a.m. shift on September 2, 1984. Deickmann contends that appellant's report concerning his activities are inaccurate. After he left the Monmouth

County Jail, Deickmann went home and slept and was able to work his regular shift at Sea Bright on September 2, 1984. He asserted that appellant's characterization that Deickmann feigned illness, falsified public records, and abused sick time was inaccurate.
Frederick Deickmann contended that his employment record with the Sea Bright Police Department was good. He had conducted over 100 arrests in a ten month period. He also asserted that he had no problem in returning to work with the Monmouth County Jail, because he had a good employment record. Patrolman Deickmann testified that he did not list his part-time employment with the Sea Bright Police Department on his Middletown application because he thought the question only referred to full-time positions. He listed his full-time Sea Bright employment and believed that Sea Bright would be checked and his part-time special police work would be known to Middletown.
Deputy Chief Ernest Robert Volkland testified that he had been employed by the Middletown Township Police Department for 28 years and had worked up from the position of patrolman. He was appointed Deputy Chief on August 28, 1990, which created an opening for Captain and was filled by Fowlie. While Volkland served as Captain of the Records Service Division, Lieutenant Fowlie was Volkland's Executive Officer.
Deputy Chief Volkland testified that in May 1990, he learned that Chief Letts had planned to leave his position. Subsequently, in or around the Christmas season of 1990, Volkland learned that Chief Letts had definitely planned to leave early in 1991. Volkland testified that he told the Township Administrator that he was interested in the position sometime in December 1990. In January 1991, however, Volkland told Administrator Alloway he was not interested in the position. In April 1991, Volkland changed his mind and advised the Township Administrator that he was interested in becoming Chief of Police. It was May 10, 1991, that Volkland finally told Township Administrator Alloway that he was not interested in the job. Volkland served as Acting Chief until William Fowlie was appointed Chief.
A vacancy in a Captain's position occurred in July 1991. Volkland testified that the Township Administrator felt that the new Chief should make the appointment to the Captain's position. Volkland testified that he did not make any recommendations for the Captain's position while he served as Acting Chief.
On cross examination, Deputy Chief Volkland testified that if the Chief's examination had been given in May 1991, William Fowlie would not have been eligible because he lacked sufficient time in the grade of Captain. He testified that William Fowlie had one year in graded as of September 19, 1991.
Volkland also testified that when Fowlie was made Chief, it created another Captain's position. As a result of one Captain who retired in July 1991, two Captain positions were available. Fowlie was appointed Chief in February 1992 and in March 1992 a new list for the Captain's examination was issued prior to any Captain being appointed. The Captain's examination was to establish a new list of eligibles rather than rely upon the old list. Volkland testified that on April 2, 1992, the Township Council gave authority to Chief Fowlie to appoint from the old, existing list. In the meantime, Township Council eliminated one Captain's position. Deputy Chief Volkland testified that Lieutenant Kryscnski did not take the new Captain's examination. Rather, Lieutenant Kryscnski was selected from the old list of eligibles. The new list was published in April 1992 after Kryscnski was appointed Captain.
It was Captain Scott's retirement on July 1, 1991, which created the vacancy in the position of Captain. Even with the elimination of one Captain's position, Scott's position was not filled until April 1992.
Captain Edward A. Kryscnski testified and described his employment background and experience, his military service record, his educational background and commendations. He was employed by the Middletown Township Police Department on October 1, 1969 and had 24 years' service as a police officer at the time of hearing.
Captain Kryscnski testified that Captain Scott retired on July 1, 1991. Captain Scott effectively left his position in May 1991. In May 1991, while Kryscnski held the rank of Lieutenant, he was assigned to the duties held by Captain Scott.
Kryscnski testified that he took the Captain's examination in or about 1988 or 1989. He

asserted that the list was active for three years and that it was extended for an additional year. Kryscnski was not eligible to be appointed a Captain in 1990 because he was fourth on the list. When Fowlie was promoted, however, Kryscnski moved up to third position. Kryscnski asserted that he wanted to be a Captain and he was interested in the promotion because it was a good career move for retirement purposes. When he expressed interest in the promotion to the Captain's position, appellant told Kryscnski that he would get the promotion. Appellant and Lieutenant Halliday were also interested in the position.

Kryscnski testified that he was interviewed for the Captain's position by Chief Fowlie and the new Township Administrator, Joseph Leo. Sometime after the interview, Chief Fowlie told Kryscnski that he had the promotion to Captain.

Captain Kryscnski testified that he submitted a report to Chief McCarthy concerning Frederick Deickmann in which appellant had previously been involved. Kryscnski, while a Lieutenant, assigned Sergeant Pollinger to follow-up on appellant's investigation of Frederick Deickmann. Captain Kryscnski admitted that he recommended Frederick Deickmann to the position of police officer with the Middletown Township Police Department.

Kryscnski also testified that appellant was taken off of investigations because of appellant's investigation of Captain Scott's son. Kryscnski asserted that Captain Scott's son was not a fit candidate for the police department. He contended, that appellant had discussed Scott's son with other members of the police force and with Kryscnski in particular.

On cross examination Captain Kryscnski testified that when Captain Scott left in 1991, Kryscnski, as a Lieutenant, was eligible to be appointed to Captain. He asserted that the DOP attempted to get the Township to appoint a Captain, however, the Township Administration ignored the DOP.

Kryscnski testified that he wanted to be a Captain but he did not wish to take the examination. He asserted that the old eligible list was to expire in May 1992 and, therefore, he would not be eligible for Captain position on the new list.

Concerning his promotion to Captaincy, Kryscnski testified that he talked with Chief Fowlie after appellant had stated to Kryscnski that he would get the promotion. Kryscnski went to Chief Fowlie and the Chief stated that Kryscnski was to be promoted to Captain. Kryscnski testified that Township Administrator Leo was the prime interviewer during the interview process. He asserted that Chief Fowlie's questions amounted to no more than 20 percent of the interview. Kryscnski asserted that he was told by Fowlie he was promoted on his demonstrated ability and past performance.

Captain Kryscnski admitted that he was promoted on April 7, 1992, and that his salary was backdated to November 1, 1991, although he had been Acting Captain since May 1991. Kryscnski admitted that he had no prior experience with budget, traffic, communications, or other divisions.

With respect to Kryscnski's report concerning Frederick Deickmann, he asserted that it was based upon appellant's report. He stated there was no reference in Sergeant Pollinger's report that Deickmann was booking off on one job and working on another job. Kryscnski admitted, moreover, that he was of the

opinion that Deickmann had double-dipped when Kryscnski submitted his report to Chief McCarthy. Yet, Kryscnski recommended Frederick Deickmann's appointment, although he was of the further opinion that "double-dipping" is a criminal offense. Kryscnski also testified that he was aware that appellant discovered information which was derogatory to Captain Scott's son and that the information kept Scott's son from becoming a police officer.

Joseph P. Leo, the Township Administrator who replaced Township Administrator Alloway, testified that he began his employment in Middletown on March 25, 1992. On his first day of employment, Assistant Township Administrator Ed Dunn, advised Leo of

certain problems with the New Jersey DOP. Leo was specifically advised of the Township's failure to appoint a captain to the police department as a consequence of Captain Scott's retirement in July 1991. Township Administrator Leo testified that it was his understanding the Township was to act immediately and to make an appointment to captain from the existing eligible list. Leo testified that the was not aware that a new captain's examination was to be held on March 28, 1992.

Township Administrator Leo testified he met with Chief Fowlie on the first day of his employment. Leo asked Fowlie to work with Leo's secretary to set up the personal interviews of the eligibles for the captain position. Leo's secretary set up the interviews for April 3, 1992; eight days after Leo began his employment with the Township. The three eligibles for the captain's position included Lieutenant Kryscnski, appellant, and Lieutenant Hannafey. Leo did not ask Chief Fowlie who should be appointed prior to the interview process. Leo reviewed the individual personnel file of each of the three candidates. He devoted approximately fifteen minutes for each of the files. Leo asserted that upon his arrival on the job, he was not immediately made aware of the pending legal actions initiated by appellant and Hannafey.

Township Administrator Leo testified he conducted the interviews with Chief Fowlie and Assistant Township Administrator Dunn. However, Mr. Dunn was not in attendance at all times with all of the interviews. During the course of the interviews with each of the three candidates, Leo used a form which he had developed and had used in the past. He asserted the form made certain that specific items were covered in each of the interviews. The form which he developed is divided into four sections; i.e., (1) education and experience, (2) knowledge, (3) skills and abilities, and (4) presentation at the interview. Each of these major headings are subdivided and ascribed point values which, when taken together, would total 100 points for a perfect score. (R-17) Leo stated that each form was filled out during the interview of each of the candidates. He contended the interview lasted from approximately forty-five minutes to one hour. Leo testified that Kryscnski's score equaled 66 points; appellant's score equaled 56 points (it appears to add up to 58 on the form); and Hannafey scored 52 points. After the interviews, Leo asked Fowlie for his recommendation. Leo asserted that Fowlie recommended Kryscnski for the position of captain and that if it had been different from Leo's scoring sheet, Leo would have examined Fowlie in depth as to why there was a difference. On April 6, 1992, Chief Fowlie addressed a memorandum to Township Administrator Leo recommending that Kryscnski be promoted to captain.

Leo testified he believed that Fowlie's in-put into the selection of the captain was important because Fowlie would have to work with the individual. Leo asserted it was his belief all three candidates were good men, although he suggested that each needed training in specific areas.

Leo defended the selection of Kryscnski by asserting that Kryscnski was the most senior and had more time in service than the other two candidates. He also measured Kryscnski's strength in the budget preparation, which he contended the others did not have.

Township Administrator Leo testified that he was familiar with the DOP regulation with respect to appointments. He asserted that promotional lists are time limited; i.e., three years in duration. He stated that the promotional list may be extended for one year, however, he had never requested an extension of an eligible promotional list because he assumed that the DOP would reject such a request.

Subsequent to Chief Fowlie making his recommendation to promote Kryscnski to captain, Kryscnski was appointed to the position. Thereafter, the DOP was notified that the appointing-authority had again skipped over appellant for promotion. Leo admitted that his knowledge of the three candidates was very limited.

Township Administrator Leo testified with regard to a closed session of the Township Committee under the provisions of the Open Public Meetings Act on April 2, 1992. He asserted the reason for the Township Committee to adjourn into closed session was to discuss the reorganization of the police department and the promotion list to captain, lieutenant and sergeants. He asserted there was no discussion of any pending litigation

at the meeting.
Chief of Police, William Fowlie testified extensively about his employment and police background and experiences, his education, military service citations, awards and certificates. With regard to his promotion to captain, Fowlie learned of the promotion in February 1990, when Chief Letts advised Fowlie that Letts was going to recommend Fowlie for the promotion. Letts further advised Fowlie that there would probably be problems with his promotion. Chief Letts told Fowlie the promotion would not take place until July, 1990, because of budget considerations. Subsequently, early in August 1990, Letts advised Fowlie of the actual promotion. The actual promotion occurred on August 27, 1990, effective September 1, 1990. Letts stated that Fowlie would be in charge of records and that Captain Volkland would be promoted to the position of Deputy Chief. Prior thereto, on January 1, 1990, Fowlie was assigned as Administrative Assistant to Chief Letts. This position brought Fowlie into contact with Township Administrator Alloway on a variety of occasions. In August 1990, Fowlie became commanding officer of the Service (Records) Division.
In February 1991, Fowlie learned that Chief Letts intended to leave the Department at the end of April 1991. Letts had become Chief of Police in 1989, and it was Fowlie's understanding that Letts had made a commitment to stay in the position for several years. Fowlie was advised by Letts that Letts' wife suffered from lupus (lupus erythematosus), and that after 35 years of service to the Township, Letts wanted to enjoy what time he could of his retirement with his wife.
It was assumed that Ernest Volkland would replace Letts as the Chief of Police. Volkland, however, changed his position as to whether or not he would take the position of chief for the ensuing three months. Fowlie advised Volkland that he should take the position. Volkland vacillated as to whether or not to accept the position because his wife was also ill. In the middle of May, 1990, Volkland spoke with Fowlie and determined that he could not take the Chief of Police position after Volkland had had a lengthy discussion with his wife.
Fowlie testified that in March 1991, he and Township Administrator Alloway attended a Marine Corps Recruiting promotional meeting at Paris Island, Beaufort Air Station in South Carolina. Fowlie testified that during this meeting, Township Administrator Alloway advised Fowlie that Volkland would assume the position of Chief of Police. Fowlie asserted to Alloway that if Fowlie had a shot at the job, Fowlie would take it. Fowlie contended that he had no further conversations with Township Administrator Alloway about the Chief's position thereafter.
Mr. Fowlie testified that he learned that there was going to be a test for the Chief's position by reading it in the newspaper. He then was notified in September 1991 that there was going to be an examination. He testified that he and the other two captains were handed a form by Ed Dunn, the Township Personnel Director, to apply for the test. The examination was administered in the first week of January 1992, Fowlie believed it was January 8, 1992. The results of the examination were available on January 24 or 25, 1992.
Chief Fowlie testified that he did not learn that Township Administrator Alloway was leaving his position until the middle of January 1992.
Fowlie testified that on January 25, 1992, the Township Committee interviewed the two candidates for the position of Chief; i.e., Captain Fowlie and Captain Joseph Shaffrey. On January 28, 1992, the Township Committee met and selected Fowlie as its Chief of Police. At 8:00 a.m., Fowlie reported to Township Administrator Alloway's office on January 29, 1992, and Alloway selected Fowlie as the Chief. Alloway left the Township three days later on January 31, 1992. Fowlie's appointment became effective February 1, 1992.
On April 2, 1992, Chief Fowlie presented a reorganization plan for the police department to the Township Committee with the personnel changes to be made. Fowlie also recommended for promotion one captain, three lieutenants and three sergeants. Fowlie was aware that the Township police department was under an order from the DOP to fill the position of captain. Under Fowlie's reorganization plan one captain's position was

eliminated and therefore, the department only needed three captains, not four. The position open would be for the Records and Service Division. Chief Fowlie did not discuss any names with the Township Committee of those he intended to promote. Fowlie had, moreover, formed the opinion to promote Lieutenant Kryscnski to the position of captain, among other promotions.

Chief Fowlie met Township Administrator Leo on Leo's first day on duty. Fowlie discussed with Leo the Department reorganization which Fowlie intended to recommend to the Township Committee. Fowlie also advised Leo that it was necessary to fill positions through promotion in the Department. Fowlie gave Leo the names of all the eligibles for promotion and Leo expressed the desire to interview all the candidates before there were any promotions. Chief Fowlie set up the appointments for the interviews, and he believed that Leo held the interviews the morning after he had presented the Township Committee with his personnel proposals.

Chief Fowlie set up the interviews for the captain's position to be interviewed first. He advised each of the candidates what time to appear at the conference room with Mr. Leo. Chief Fowlie also advised them as to how they were to dress for the interview; i.e., each was to wear a jacket and a necktie. Chief Fowlie was present at all of the interviews, he testified that Mr. Leo ran the interviews. Leo handed a score sheet to Fowlie and Dunn, who was also present, and then Leo proceeded to question the candidate. Lieutenant Kryscnski was the most senior officer and therefore, he was interviewed first. Next, Lieutenant Hannafey was interviewed followed by appellant. On April 6, 1992, Fowlie recommended Kryscnski to the position of captain. Fowlie testified that he made the recommendation based upon Kryscnski's education, training, veteran status, command experience, writing grants, and management skills, among other things.

On cross-examination, Chief Fowlie testified extensively concerning his training and work with the Police Department computer system.

With regard to his promotion to captain in 1990, Fowlie testified Chief Letts told Fowlie in mid-February 1990 that even though Fowlie was the number three man on the examination, Letts was nevertheless going to promote Fowlie to the position of captain. Letts also advised Fowlie that Letts was going to promote Volkland to the position of Deputy Chief even though Township Administrator was against the appointment and wanted to eliminate the position. Letts stated to Fowlie there would be problems in promoting Fowlie as the number three eligible over those who scored higher on the examination.

With respect to his position as Chief of Police, Fowlie testified he understood that his present position was conditional depending upon the herein appeal by appellant. Fowlie further testified that if the Chief of Police examination was held in April 1991, he was not eligible to sit for the examination. He opined, however, that it was possible to waive the time in grade to take the examination. Fowlie contended that he was eligible for the examination held in September 1991.

With regard to Fowlie's promotion to captain by Chief Letts, Fowlie admitted there were no interviews of the candidates. Letts did not specifically state he reviewed the file of any individual candidates. Chief Fowlie testified that Letts had told Fowlie that he had, in fact, reviewed personnel files. Former Chief Letts testified, however, he did not review personnel files. With regard to his promotion to Chief of Police, Fowlie admitted he was number two on the list, behind Captain Shaffrey.

Fowlie testified on cross-examination that sometime in the month of March 1992, he had made up his mind to appoint Lieutenant Kryscnski to the position of captain. Fowlie testified he had reviewed appellant's performance evaluations submitted by Captain Halliday and Captain Shaffrey. The record revealed that appellant's personnel file, as of July 10, 1992, contained no performance evaluations. Fowlie then admitted his decision to appoint Kryscnski was without review of performance evaluations or interviews of the eligible candidates. The appointing authority, Leo, was new to the position and relied upon Fowlie's recommendation.

Chief Fowlie testified that he did not recall a conversation with Captain Shaffrey on

February 4, 1992, in Fowlie's office. He did not recall he asked Captain Shaffrey if Captain Shaffrey would appoint appellant, where Shaffrey is reported to have stated he would have appointed appellant. Fowlie suggested to Captain Shaffrey that the Township attorney had advised against appellant's appointment because of the pending litigation. Captain Fowlie testified that appellant had never worked under Fowlie's command. Fowlie, however, worked under appellant's command for a raid and at the Hunt. Fowlie would rate appellant's performance fair to good with respect to the Hunt. In a memorandum from Township Administrator Alloway to then Chief McCarthy, appellant was congratulated for exemplary actions, for the planning, organization, coordination and execution of the most successful Hunt festivity. (A-27)

In his cross-examination, Fowlie asserted that Detective Sergeant Cerame told Fowlie he did not respect appellant's judgment or abilities and said appellant was an idiot. It was pointed out to Fowlie that Cerame's testimony in this matter did not indicate that Cerame thought appellant was an idiot. Cerame testified he believed appellant was competent and that Cerame did not have any problems working with appellant. Cerame also asserted that appellant was responsible for Cerame being promoted to sergeant.

Appellant offered rebuttal testimony where, among others, Captain Joseph Shaffrey testified. Captain Shaffrey asserted that appellant had served under the Captain in the Detective Bureau and appellant had prepared ninety-nine percent of the monthly reports. This was offered to rebut Chief Fowlie's testimony that appellant did not prepare budgets. It was stipulated on the record that from June of 1989 through April 1992, until appellant was transferred out of the Detective Bureau, appellant prepared every monthly report except two.

Captain Shaffrey testified that Chief Letts had said to the Captain that "under the circumstances, I cannot send Bob (Oches) to the FBI Academy." Captain Shaffrey believed that "under the circumstances" meant that it was appellant's litigation against the Department which caused Chief Letts not to approved appellant's application to the FBI Academy.

Sergeant William Brunt testified that appellant was one of Brunt's supervisors. Brunt found appellant to be a competent officer with command abilities. He asserted that appellant got the job done and that he had never had a problem with appellant. Sergeant Brunt testified he never observed appellant have a problem with any other officers in the Detective Bureau. Nor did he observe appellant in situations which would lead to a fight. Sergeant Brunt testified further that Sergeant Richard Deickmann did not get along with appellant. Sergeant Brunt never found appellant to be abrasive nor did he know it as a fact that others found appellant to be abrasive. Appellant was a direct supervisor at times. Sergeant Brunt dealt with appellant every day while Brunt was assigned to the Detective Bureau.

Detective Jeffrey Barner testified that he worked under appellant's supervision from September 1990 until March 1992. He had no problems with appellant and found him to be competent, able and a thorough officer. Detective Barner was not aware of any problems appellant had with other officers. He asserted that appellant was not the most popular officer in the police department, and that some would view him as abrasive. He asserted appellant did not socialize with other officers.

Sergeant Michael Rubino testified that he was assigned to the Detective Bureau from 1987 until May 1992 under appellant's supervision. He characterized appellant as a competent police officer and supervisor. He had nothing critical to say concerning appellant. He asserted that appellant's style was upfront and he dealt with problems as they arose. He stated that appellant was an aggressive manager and that Sergeant Rubino was also aggressive. He contended that appellant's aggressiveness was not confrontational. He asserted that any disagreements with appellant were not problems and it was not a fact that Sergeant Rubino did not get along with appellant. He denied he had a conversation with Fowlie who testified that Rubino had a problem with appellant.

Patrolman William Straniero testified that appellant was his supervisor from January 1991 through January 1992. He asserted appellant was as competent as any other

supervisor he had served under in the ten years he had been with the Township Police Department. Appellant was helpful with questions and appellant's command ability were just as good as any other officer in the police department. Patrolman Straniero stated he never had a problem with appellant nor did he witness any problems appellant had with any other officers. Straniero asserted he was not aware of any officers who did not get along with appellant.

Robert DiGrazia, a consultant in the criminal justice field, testified on behalf of appellant and was qualified as an expert in police practices, which involved management training and personnel, among a variety of other areas.

Mr. DiGrazia offered his expert opinion as to the proper practices and procedures with regard to personnel promotions. He asserted that the first element would an examination to determine which candidates were eligible on a promotional list. Second, there should performance evaluations of the candidate. Third, there should be a complete review of the personnel file of the candidate. With regard to the promotional list, it should be in a numerical listing with the best qualified persons available for promotion. Mr. DiGrazia asserted that considerable weight must be given to the eligibility list because it demonstrates the knowledge that the individual has in relation to the job performance that must be undertaken. The numerical listing demonstrates the individuals who are best qualified as far as a their knowledge of what is good police practice. He opined that considerable weight must be given to the eligibility list.

Mr. DiGrazia is aware of the Rule of Three and has worked with it in different police departments throughout the United States. He asserted the Rule of Three provides an administrator with some flexibility in making a selection from a promotion list. It should only be applied for an individual who is not qualified or because of numerous problems that are reflected in the individual's performance evaluation. That individual, he asserts, might be bypassed with justification. In his opinion it would be appropriate to skip over an individual on an eligible list for promotion who is either not qualified or unreliable. Otherwise, it is inappropriate to skip over if all of the individuals are qualified. This is important for morale in the department and provides incentive and motivation for those below seeking future promotions. If, on the other hand, members of the department see that promotions are based on bias or on political considerations, then one could expect problems to arise within the department. There is no justification to skip over an otherwise qualified individual.

Mr. DiGrazia testified that an appropriate interview procedure would involve from three to five interviewers. He asserted the interview provides an opportunity to evaluate the candidates and provides the candidates with another forum to demonstrate their qualifications. He contended, however, he would not ascribe as much weight to the interview as he would to the examination. He asserted the interview would be second to the examination. Mr. DiGrazia asserted there should be a consistent rating form for all of the interviewers. The rating system must be objective, not subjective, and contain specific criteria for the rating system. It should be a structured process with more than one individual asking questions of the candidates. All of the participants are to ask questions and rate the candidates individually. Subsequent to the interview, the interviewers should accumulate the score, and hold discussions similar to those conducted in a jury room.

Mr. DiGrazia stressed the importance of reviewing personnel files of each of the eligible candidates prior to the interview. The interviewer must have knowledge and background of the experiences and performance of the candidates.

Mr. DiGrazia stated that the performance evaluation of each of the candidates was important. The performance evaluation demonstrates the supervision and development of the individual candidate. Here again, the use of a structured form, similar to the interview rating system, should be used. This is to insure its objectivity. The performance evaluation demonstrates whether the candidate is qualified for promotion. It must be reviewed prior to the interview and it must contain information necessary to evaluate the candidate.

Mr. DiGrazia expressed his expert opinion with respect to appellant having been passed

over for the position of captain by Chief Letts. He observed there was no promotional process. There was no review of the personnel files and evaluations by Chief Letts. He opined that Chief Letts' determination to promote Fowlie was arbitrary, because Fowlie was third on the list of eligible candidates. There was no reference as to why the number one and number two candidates on the list were not qualified. He further opined that all candidates should be interviewed under structured conditions, however, no interviews were conducted with respect to Fowlie's promotion to captain by Chief Letts. In his report, dated April 21, 1993, Mr. DiGrazia summarized his professional opinion as follows:

1. Obvious arbitrary decision as to who was to be promoted within the Middletown Township Police Department.
2. Lack of personnel records and performance evaluation review by both the Chief of Police and the Township Administrator prior to the announcement of the promotion.
3. Lack of personal interview of eligible candidates by either the Chief of Police or the Township Administrator. 4. Lack of written justification for skipping over candidates listed higher on the eligibility list over the candidate eventually appointed. (A-53)

Mr. DiGrazia also expressed his professional opinion with respect to the second promotion denied appellant on April 8, 1992. In a Supplemental Report, dated April 30, 1993, Mr. DiGrazia states, in part, the following:

1. The continued failure by the Department to follow accepted standard police personnel practices, and the continued failure to follow a reasonable standard of care as it relates to the promotion of personnel in the Township of Middletown.
2. Because of Chief Fowlie's conditional appointment as Chief of Police and his future dependence upon the outcome this litigation by appellant, created an extensive conflict of interest in Fowlie's involvement in the promotion process.
3. Chief Fowlie had determined, prior to the interview, that Lieutenant Kryscnski was the person to be promoted.
4. The Township Administrator, who had been on board only for approximately one week, was strongly influenced by Fowlie in the selection of Lieutenant Kryscnski for promotion to the captain position.
5. That Township Administrator Leo's very short fifteen minute review of the personnel folders of the candidates did not provide him with sufficient basis to make an appointment, even though a face-to-face interview was conducted with each of the candidates. Township Administrator Leo totally lacked an understanding of the situation in the police department.
6. The interview procedure was flawed because Edward Dunn, Assistant Administrator, did not participate in the full interview of appellant. It was further flawed by Leo's use of an evaluation sheet which was useless and did not present any objective standard for its use.

My opinion, which is based on my training and experience, is that the Township of Middletown violated all established practices and procedures regarding the promotional procedures. Having reviewed Lieutenant Oches' resume, read the transcript of his personal interview, and the testimony of Captain Shaffrey, it is my belief that Lieutenant Oches would be qualified for any Captain's positions within the Department. (A-53)

In DiGrazia's expert opinion, bad faith was demonstrated when appellant was passed over by Chief Letts. It was demonstrated there was a conflict between Deputy Chief Letts and appellant when Letts was embarrassed by his own testimony at a grievance hearing. In addition, DiGrazia asserted there was absolutely no process by Letts or the Department when Fowlie was selected as Captain.

With respect to the second promotion, Mr. DiGrazia opined he could not say who should have been promoted. However, there was nothing in the record or documents to indicate that a person with a lower examination score than appellant should have been promoted. He opined that Lieutenant Kryscnski should not have been promoted over appellant. He asserted the record was clear and obvious that the decision to promote Lieutenant Kryscnski was made prior to the interview of the three candidates.

On cross-examination, DiGrazia testified, among other things, that under the Rule of

Three in New Jersey the appointing authority must select the number one eligible unless the appointing authority can demonstrate that the first eligible is not qualified. He further asserted that the appointing authority must justify a selection and promotion of an individual other than the number one eligible. He asserted it was incorrect and improper to select anyone other than the number one eligible if all three are equally qualified.
Detective Wayne Bradshaw testified he had worked with appellant in the Detective Bureau in December 1988. He asserted that appellant was a very competent police officer, but he had numerous disagreements with appellant concerning the methodology of a case. Bradshaw asserted, moreover, that he had no personal problems with appellant. He stated he was angry with appellant at the end of a case and expressed his anger to appellant and then left the scene. He did not recall whether or not he had talked with Fowlie subsequent thereto, and did not know what he said to Fowlie, if anything.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, and having given fair weight thereto; I FIND the following FACTS in this matter:

1990 Promotion

1. On May 26, 1988, a DOP Promotional List was promulgated for the position of captain within the Middletown Township Police Department. The promotional list indicated the following rankings:
1. Eugene Hannafey, non-veteran 88.010
2. Robert Oches, veteran 87.050
3. William Fowlie, veteran 82.280
5. Edward Kryscnski, veteran 81.320
2. In December 1989, Chief of Police Joseph M. McCarthy announced his retirement. Chief McCarthy had served in that position since 1969.
3. Deputy Chief of Police, Robert Letts, was named to succeed Chief McCarthy without a formal testing or interview process.
4. In 1980, appellant had filed a grievance where he sought overtime payment for work done by detectives pursuant to a bargained for agreement. The overtime payment had been denied by then Deputy Chief Letts.
5. Within a day or two after filing the grievance, Deputy Chief Letts transferred appellant out of the Detective Bureau to the Patrol Division.
6. Captain Halliday, appellant's direct supervisor, and Chief McCarthy believed that appellant should be returned to his position as a detective. The move was opposed by Deputy Chief Letts. After a period of approximately one year, Chief McCarthy overruled Deputy Chief Letts' objections and reassigned appellant to the Detective Division on September 1, 1981.
7. At the hearing held concerning the grievance, Deputy Chief Letts testified against appellant. On cross-examination, the Deputy Chief's references to payroll practices were found to be false and Letts was embarrassed by being caught in contradictions.
8. Appellant learned from Chief McCarthy that Deputy Chief Letts was angry with appellant because of his embarrassment as a consequence of his contradictory testimony.
9. In or about 1986, appellant was assigned to investigate possible illegal activities by a Mr. Walter Woods, an employee of the Middletown Board of Education. It was alleged that Mr. Woods had falsified time sheets of a subordinate on a public summer job, and then shared the overpayments with the subordinate. Sufficient evidence was developed by appellant to charge Woods with a crime. Walter Woods' grandmother was a friend of the Letts family. Deputy Chief Letts asked appellant not to charge Walter Woods with a

crime. Appellant was assured by the Township Administrator and the Township Attorney that the case could be handled quietly without any prosecution. Appellant was dissatisfied, but he took no further action and no charges were preferred.
10. Lieutenant Walter Monahan, who served as the Executive Officer of the Detective Division, was appellant's supervisor and Letts' brother-in-law. Lieutenant Monahan was in the habit of reporting for duty and after a short stay, marking himself out. Lieutenant Monahan could then be located in local taverns, sometimes in a state of inebriation. Appellant was often ordered by Deputy Chief Letts to pick up Monahan's assigned police car in order that Monahan would not drive while under the influence of intoxicating liquor.
11. Appellant, on the advice of a police captain, wrote a letter to Chief McCarthy requesting the opportunity to replace Lieutenant Monahan as the Executive Officer of the Detective Department. Deputy Chief Letts was reported to be quite perturbed about appellant's memorandum.
12. Subsequently, on May 1989, Captain Shaffrey was directed to advise Lieutenant Monahan that Lieutenant Monahan could no longer use a police department vehicle. On the following day, Lieutenant Monahan commenced his terminal leave and never again reported for duty.
13. While serving in the Detective Department, appellant was assigned the responsibility of conducting background investigations of individuals who had applied for positions with the Middletown Township Police Force. During the course of this assignment, appellant was required to investigate the background of Charles Scott, the son of Captain Arthur Scott, and Frederick Deickmann, the son of Sergeant Richard Deickmann.
14. Appellant's investigation of Charles Scott determined that he had used alcohol and dangerous drugs to an excess and also had suicidal tendencies. Letts requested that appellant omit the detrimental information and sanitize the report because Charles Scott had not had a substance abuse problem for approximately two years. Appellant reported Deputy Chief Letts' request to Chief McCarthy, who in turn directed appellant to include all pertinent findings in his report. Captain Arthur Scott alleged that appellant had leaked information about young Scott to the community and fellow police officers.
15. In his investigation of Frederick Deickmann, an applicant to the police force, appellant's investigation determined that Frederick Deickmann had been employed by the Monmouth County Department of Corrections while also being employed by the Sea Bright Borough Police Department as a special police officer. Appellant erroneously determined that Frederick Deickmann falsified time cards while employed by the Monmouth County Department of Corrections. Frederick Deickmann had, however, reported off sick at his permanent position with the Monmouth County Department of Corrections and subsequently, on the same day, reported to work for the Sea Bright Borough Police Department.
16. Subsequent to the Scott investigation and while the Deickmann investigation was ongoing, Letts relieved appellant of the responsibility of any further background investigations of police applicants. Letts failed to investigate Captain Scott's allegation against appellant although it formed the basis for appellant's removal from the investigations.
17. As a consequence of appellant's background investigations, neither Scott nor Frederick Deickmann were employed as police officers.
18. Subsequently, Frederick Deickmann was given a second opportunity and was employed as a police officer by the Township of Middletown.
19. Sergeant Richard Deickmann, as a consequence of appellant's investigation of his son, formed a dislike for appellant.
21. Upon Robert Letts being appointed Chief of Police, Captain Ernest Volkland was appointed to the position of Deputy Chief, over the objections of Township Administrator Alloway, the appointing authority.
22. Volkland's promotion to the position of Deputy Chief of Police, created a vacancy in the position of captain.
23. In February 1990, Chief Letts advised Lieutenant Fowlie that Fowlie would be

promoted to the position of captain, thereby bypassing both Lieutenant Hannafey and Lieutenant Oches. In August 1990, James Alloway, the Township Administrator and appointing authority, agreed that Fowlie could be promoted to captain. Fowlie's promotion was effective September 1, 1990.
24. Chief of Police Letts conducted no interviews of the eligible candidates for the position of captain, nor did he review any personnel records, nor did he review any performance evaluations of the three candidates.
25. There is nothing in the record which would demonstrate that Eugene Hannafey, who was number one on the examination, was not qualified to hold the position of captain. Nor is there anything in the record which would indicate that appellant, Robert Oches, a veteran, was not qualified for the position of captain. The record demonstrates that William Fowlie, a veteran, ranked third on the eligible list.
26. Township Administrator Alloway admitted, on this record, that he did not interview the three candidates for the position of captain. Alloway, as the appointing authority, could not demonstrate that his appointment of Fowlie to the position of captain was objective, without bias or prejudice against appellant.

1992 Promotion

27. In May 1991, Captain Scott commenced his terminal leave in anticipation of his retirement on July 1, 1991. Captain Scott's retirement created a vacancy in the position of captain.
28. As a consequence of Fowlie's promotion to captain, Edward A. Kryscnski moved up from fourth to the third position on the promotion list for the position of captain behind, Eugene Hannafey as number one and appellant as number two.
29. The list on which Lieutenant Kryscnski, Hannafey and appellant were placed was to expire. However, it was extended to expire on May 26, 1992. Late in 1991 or early 1992, a new captain's examination was given. Edward Kryscnski did not take the examination.
30. Chief of Police Letts let it be known that he would retire at the end of 1991. Letts' announcement came as a surprise to Mayor Rosemarie Peters, who believed that Letts had made a long time commitment to the Chief of Police position when he was appointed.
31. Deputy Chief Volkland was offered the position of Chief of Police but rejected it.
32. Township Administrator James Alloway, a former member of the Civil Service Commission (now, DOP) should have known that the DOP administered only one examination for the Chief of Police, to be held in May 1992.
33. The appointing authority did not immediately call for a Chief of Police examination through the DOP upon Chief Letts' announced retirement.
34. In March 1991, Captain Fowlie and Township Administrator took a trip together to the United States Marine Corps base in Paris Island, North Carolina. Fowlie expressed his interest in the position of Chief of Police to Alloway. Fowlie, however, did not have sufficient time in grade as captain to be eligible to take the examination for Chief of Police. Fowlie's one year in grade would not result until September 1991.
35. In March 1991, Volkland changed his mind and expressed his interest in taking the job as Chief of Police.
36. In May 1991, Volkland asserted that he would not take the position of Chief of Police.
37. Ernest Volkland was appointed Acting Chief of Police in May 1991 and served until February 1992.
38. In December 1991, Township Administrator Alloway announced that he was resigning his position to take a position in the Marshall Islands.
39. The test results for the Chief of Police were issued and the two eligibles, Captain Shaffrey and Captain Fowlie, were certified a few days before Township Administrator Alloway left his employment.
40. The test results demonstrated that Captain Shaffrey was number one and Captain

Fowlie number two.
41. Township Administrator appointed Fowlie to the position of Chief of Police, which was subsequently ratified by a three to two vote of the Township Committee on January 28 1992.
42. On March 25, 1992, Joseph P. Leo commenced employment as the Township Administrator and appointing authority.
43. The Township appointing authority was under a directive from the DOP to fill a vacant position of captain.
44. Prior to April 2, 1992, Fowlie had formed an opinion to promote Lieutenant Kryscnski to the position of captain.
45. On April 2, 1992, on short notice, the three eligibles for the captain's position were advised of candidate interviews to be conducted that day. Appellant was unable to gather information, documents and other material in time for his scheduled interview.
46. Appellant was the first of the three eligibles for the captain's position to be interviewed by Township Administrator Leo and Chief of Police Fowlie. Assistant Administrator Ed Dunn appeared at the interview well after the interview had commenced. Ed Dunn did not fully participate in all three interviews. Township Administrator Leo had reviewed appellant's personnel file approximately 15 minutes prior to the interview.
47. During the interviews, Township Administrator Leo used a score sheet with a total of 100 points ascribed to different "criteria" of the interview process. (R-17)
48. Township Administrator Leo was the only one of the three involved in the interview process to use his interview score sheet.
49. Robert DiGrazia, appellant's expert witness, asserted that such interviews should include from three to five individuals who should have a consistent rating form scored by the interviewers. Such rating system must be objective, not subjective, and must have specific criteria for the individual items on the rating system. He opined that Mr. Leo's interview score sheet did not meet these criteria.
50. Mr. DiGrazia stated that in the order of preference, weight should first be given to the results of the qualifying examination for the promotional list; second is a review of the performance evaluations by the candidate's superiors and third, a total review of the candidate's personnel file.
51. Township Administrator Leo admitted that he did not review any performance evaluations of appellant, because they were nonexistent.
52. On April 7, 1992, Lieutenant Kryscnski, who ranked fourth on the original and third on the eligible list, was promoted to captain.
53. Both Lieutenant Hannafey and appellant were again passed over for promotion.
54. There is nothing in this record to demonstrate that either Lieutenant Hannafey or appellant were not qualified to be promoted to the position of captain.

DISCUSSIONS AND CONCLUSIONS

There is no dispute that under the law, the appointing authority is granted broad discretionary authority to make appointments and promotions to career service employment under the "Rule of Three." N.J.S.A. 11A:4-8 provides, in part, that "A certification that contains the names of at least three interested eligibles shall be complete and a regular appointment shall be made from among those eligibles." The rule has withstood Constitutional challenge, In re Crowley, 193 N.J. Super. 197 (App. Div. 1984); Marranca v. Harbo, 41 N.J. 569, 576 (1964), with the appointing authority "...under no obligation to select the candidate standing highest on the list (of eligibles)." Pringle v. N.J. Dept. of Civil Service, 45 N.J. 329, 331-332 (1965). The final test of selection may be "inevitably subjective." Matter of Vey, 124 N.J. 534, 543, (1991) quoting from Maine Human Rights Comm'n v. City of Auburn, 425 A.2d. 990, 997 (Me. 1981).
The Vey Court also observed and held that:

Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review. Administrative agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 67, 577 A. 2d. 829 (1990). When the absence of particular findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration. Application of Howard Sav. 32 N.J. 29, 53, 159 A. 2d. 113 (1960). 124 N.J. 543-544.

1990 Promotion

The hearing record clearly demonstrates that subsequent to Chief Joseph McCarthy's retirement on or about December 1989, as Chief of the Middletown Township Police Department, Robert Letts was sworn in as Chief of Police on December 26, 1989. Robert Letts had vacated the position of Deputy Chief, which position the Township Administrator-appointing authority wished to eliminate. Chief Letts wished to continue the position of Deputy Chief, despite the need to reduce the upper level of police personnel which made the Police Department appear to be top-heavy with superior officers. Chief Letts lobbied and convinced the then mayor to maintain the position of deputy chief. Township Council, with no objection expressed by the appointing authority, ratified and retained the position with the appointment of Ernest Volkland as Deputy Chief, without the benefit of an open competitive examination administered by the DOP. In January 1990, Chief of Police Letts had determined to promote Lieutenant William Fowlie to the position of captain occasioned by Volkland's promotion to Deputy Chief of Police. On August 13, 1990, Chief Letts forwarded his recommendation that Fowlie be promoted to captain to the appointing authority, Township Administrator Alloway. On August 24, 1990, the eligible list for police captain was certified with Lieutenant Hannafey (a non-veteran) number one, appellant number two and Lieutenant Fowlie number three. On August 27, 1990, Chief Letts sent Township Administrator Alloway the names of the top three candidates on the Captain's Eligibility List. On August 28, 1990, appellant received notice of certification for the position from the DOP. On August 29, 1990, appellant advised the appointing authority of his interest in the position of police captain. On September 1, 1990, Fowlie's promotion to captain was effective.

Letts admitted, on the hearing record, that he neither interviewed the two candidates who held the position of number one and two on the eligible list, nor did he review their personnel files. Letts also admitted that he did not advise the appointing authority of his reasons for not selecting Hannafey or appellant. The appointing authority's failure to report its reasons to the DOP were in violation of the Administrative Code. Under N.J.A.C. 4A:4-4.8, it provides that:

(b) The appointing authority shall notify the DOP of the disposition of the certification by the disposition due date in the manner prescribed by the Department.

1. The report of disposition of the certification shall include:

. . . .

iv. A statement of the reasons why a higher ranked eligible was not selected (emphasis supplied)

This is also the admonition, as set forth by the Court, in Vey, at 124 N.J. 543-544. There is nothing in this hearing record to demonstrate that Township Administrator Alloway complied with the regulatory scheme and provided the DOP with a statement of the reasons why it did not select Lieutenant Hannafey or appellant. The reason for such noncompliance is clear from the record; Chief Letts made the selection of Fowlie rather than Alloway.

It is also clear from the credible testimony of former Chief McCarthy and appellant, among others, that Letts disliked appellant. Former Chief McCarthy testified, credibly, that Letts was angry with appellant because Letts was embarrassed by his contradictory and incredible testimony at the grievance hearing in 1980, which grievance was brought

on by appellant. Letts was so angry with appellant that Letts removed appellant from the Detective Bureau to which appellant had been assigned. When it was subsequently recommended that appellant be returned to the Detective Division, Letts opposed the move, unsuccessfully. Appellant was advised to stay out of Letts' way.

While in the position of Deputy Chief of Police, Letts assigned appellant the task of completing background checks of police applicants. Appellant had successfully and competently completed between 15 and 20 such background checks when the sons of two Middletown police officers applied for positions as police officers with the Department. Appellant commenced the background checks of Frederick Deickmann, the son of Sergeant Deickmann, and Charles Scott, the son of Captain Arthur Scott. Letts received complaints from both Sergeant Deickmann and Captain Scott concerning appellant's conduct of the investigations. Appellant discovered information which, when presented to the police review board, prevented both Deickmann and Scott from being employed as police officers with the Middletown Police Department. Deickmann was given another chance and was successful. Scott was not. Letts, however, removed appellant from the Deickmann and Scott investigations prior to their completion. Appellant was removed for unsubstantiated rumors that appellant had disclosed information about young Scott to members of the Police Department and the community at large. Letts made no effort to verify the assertions by Captain Scott that it was appellant who leaked the information. Information concerning young Scott's alcohol and drug abuse was known among members of the department. Letts, however, removed appellant from all further police applicant background checks.

Letts was also very protective of his alcoholic brother-in-law, Lieutenant Walter Monahan. Deputy Chief Letts did not discipline Monahan when Monahan would check himself out of the Detective Bureau after spending only an hour or so on the job. Letts did not discipline Monahan when Monahan would drive his unmarked police vehicle to a local bar and consume intoxicating liquor the rest of the work day. Rather, Letts sent appellate to retrieve Monahan's police vehicle. Monahan would then subject appellant, at his home, to a drunken tirade. Letts was upset, angry and resentful that appellant had written Letts a memorandum requesting that appellant be named Executive Officer of the Detective Division because Monahan was not performing his assigned duties and appellant was doing Monahan's work in Monahan's absence.

Former Chief Letts' testimony was incredible when he testified that both former Chief McCarthy and Lieutenant Halliday lied, under oath, concerning Letts' relationship with appellant. The Courts have addressed the matter of the credibility of a witness in In re Perrone, 5 N.J. 514, 522, (1950) where it was held that:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstance (citations omitted).

In the matter of Congleton v. Pura-Tex Stone Corp., 53 N.J.Super. 282 (App. Div. 1958), the Appellate Court said, at 287, that:

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony (citations omitted).

In the instant matter, Robert Letts' testimony with regard to his adverse conduct, behavior and relationship with appellant is "inconsistent with other testimony," and "overborne by other testimony," i.e., the credible testimony of former Chief McCarthy and Lieutenant Halliday, among others.

In addition, it has long been held that a court is not free to substitute its judgment as to the wisdom of a particular administrative action for that agency so long as that action is statutorily authorized and not otherwise defective because it is arbitrary or unreasonable. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-563 (1978). It has further been held that arbitrary and capricious action by an administrative or executive agency should be overturned. Worthington v. Fauver, 88 N.J. 183, 204 (1982).

I FIND and CONCLUDE that the proofs clearly demonstrate that then Chief of Police

Robert Letts' selection of William Fowlie's for the position of captain in January 1990, preceding the DOP's certification for the position by seven months, was arbitrary and an abuse of the Rule of Three. Then Chief Letts' pretest selection of William Fowlie to the position of captain made a sham and mockery of the examination process and procedure. Appointing authority Alloway contributed to the pretext by his failure to conduct an independent, objective analysis of the candidates prior to the appointment of Fowlie. Both Letts and Alloway failed to "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Vey, supra. at 543-544, quoting, with approval, from Van Holton Group v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990).

I CONCLUDE, therefore, that Lieutenant William Fowlie's appointment to the position of captain, effective September 1, 1990, must be invalidated and overturned. See Benjamin F. Brenner v. City of Atlantic Cty, (OAL Dkt. No. CSV 5662-89, Decided January 24, 1991; MSB, March 1991).

ORDER

Accordingly, it is ORDERED that the appointment of Lieutenant William Fowlie to the position of Police Captain, effective September 1, 1990, is hereby INVALIDATED AND OVERTURNED.

1992 Promotion

The facts with respect to this appeal are, for the most part, undisputed. Captain Arthur Scott announced his retirement and commenced his terminal leave in May 1991, with his retirement from the force effective July 1, 1991. Therefore, his retirement created a vacancy in a captain's position. The appointing authority, however, did nothing to fill the position. There was extant at the time, a promotion list due to expire on May 26, 1992. The eligibles certified on the captain's promotion list included the following with their ranking: First, Eugene Hannafey, a non-veteran; Second, appellant Robert Oches, a veteran; and Third, Edward Kryscnski, a veteran. Lieutenant Kryscnski was ranked forth on the original promotion list and, therefore, ineligible for consideration for promotion. Kryscnski moved into third position by virtue of Captain William Fowlie's promotion to Chief of Police in February 1992. William Fowlie held the third position on the promotion list when he was promoted to captain effective September 1, 1990.

The DOP issued its certification for the position of police captain to the appointing authority on October 18, 1991. The certification required that the appointing authority make an appointment to the vacant captain position on or before November 18, 1991. The appointing authority did not do so within the required disposition date of November 18, 1991. The DOP issued its certification for police captain subsequent to Chief Letts' announced retirement in January 1991 and prior to Township Administrator Alloway's announced resignation in or about December 1991.

There was ample time between the certification issue date of October 18, 1991, until the disposition date of November 18, 1991 to make an appointment to the position of police captain. The appointing authority argues, to the contrary, that the appointment was not made because, among other things, a new Chief of Police was to be appointed and it wished to work on a new table of organization for the Police Department.

The herein record further demonstrates that the then appointing authority, James Alloway, was more concerned with the appointment of the new Chief of Police before he left his position at the end of February 1992, than the appointment of a captain from October 18, 1991, certification. In fact, Alloway appointed Fowlie to the Chief's position and left the appointment of captain (Kryscnski) to the new appointing authority, Township Administrator Leo, and Fowlie.

The facts demonstrate that Alloway appointed Fowlie Chief on January 25, 1992, over Captain Joseph Shaffrey, who was first on the competitive examination. Alloway left his

position as appointing authority on January 31, 1992. Alloway was replaced by Joseph P. Leo, who commenced employment on March 25, 1992. On April 3, 1992, the three candidates for the captain position were interviewed, on short notice, by Leo with Fowlie in attendance. Sometime prior to the interviews, Fowlie had made his determination to appoint Kryscnski to the position. Kryscnski ranked third on the eligible list. Township Administrator Leo acceded to Fowlie's recommendation to appoint Kryscnski.

Fowlie was and is acutely aware that his appointments to the positions of captain and Chief of Police are conditional pending the resolution of this and other matters before the MSB. In fact, Fowlie discussed promoting either appellant or Hannafey with Deputy Chief Volkland but decided in favor of Kryscnski instead. Fowlie's decision to promote Kryscnski over Hannafey or appellant was due, in part, to the pending litigation before the MSB.

Notwithstanding the aforementioned legal principles concerning the broad discretionary authority of the appointing authority under the rule of three, I FIND and CONCLUDE that the process and procedure with respect to the 1992 appointment from the DOP's certification for police captain was flawed. This is so because of Fowlie's admitted testimony that he had selected Lieutenant Kryscnski for the captain's position prior to the conclusion of the process; i.e., a review of the respective candidates personnel files and the interview with Township Administrator Leo. Again, the appointing authority and Fowlie failed to "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Vey, supra., Van Holten Group, supra. No such standards or principles were articulated to the candidates. Nor were such standards or principles articulated to this tribunal. Rather, Lieutenant Kryscnski's appointment was an arbitrary and capricious action by Fowlie through Leo, the appointing authority. Worthington, supra.

I CONCLUDE, therefore, that Lieutenant Edward Kryscnski's appointment to the position of captain, on April 7, 1992, retroactive to November 1, 1991, must be invalidated and overturned.

ORDER

Accordingly, it is ORDERED that the appointment of Lieutenant Edward A. Kryscnski to the position of Police Captain on April 7, 1992, retroactive to November 1, 1991, is hereby INVALIDATED AND OVERTURNED. See Brenner, supra. I hereby FILE my initial decision with the MSB for consideration.

This recommended decision may be adopted, modified or rejected by the MSB, which by law is authorized to make a final decision in this matter. If the MSB 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 DIRECTOR, APPELLATE PRACTICES AND LABOR RELATIONS, DEPARTMENT OF PERSONNEL, Three Station Plaza, 44 South Clinton Avenue, CN 312, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

ORDER TO REMAND

ANSELMINI, Commissioner:

The appeal of Robert Oches, Police Lieutenant, Police Department, Middletown Township, concerning the bypass of his name for appointment from the Police Captain (PM2893J) eligible list, was heard by Administrative Law Judge Lillard E. Law (ALJ), who rendered his initial decision on May 24, 1994. Exceptions and cross exceptions were filed on behalf of the appellant and also on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on September 7, 1994, ordered that this matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

Appellant challenges the Township of Middletown for its actions bypassing his name for appointment to the position of Police Captain of the Middletown Police Department on two occasions. Appellant alleges that the Township bypassed him because of a longstanding conflict between himself and the former police chief and due to his political affiliations and union activities. The appointing authority asserts that its actions appointing William Fowlie and Edward A. Kryscnski to the subject positions were based on legitimate business reasons. This matter was referred to the OAL for hearing.

In addition to the numerous fact witnesses who testified at the hearing, the appellant presented the expert testimony of a consultant in the criminal justice field, Robert DeGrazia, who advised that the rule of three does not permit an appointing authority to bypass an individual on an eligible list unless the individual were either not qualified or unreliable. In this regard, it is noted that expert opinion in not admissible concerning the domestic law of the forum. Rather, questions of law existing in the judge's mind may be resolved after considering briefs and arguments of counsel. State v. Grimes, 235 N.J. Super, 75, 80 (App. Div. 1969) and cases cited therein. It is well settled that the statutory rule of three set forth in N.J.S.A. 11A:4-8 "authorizes the employing authority to appoint "one of the three ... certified (as) ... standing highest' among the candidates for the position" but the
statute does not purport otherwise to circumscribe the manner in which the authority must select the "one of the three" for appointment. Thus, the purpose of the "rule of three" is to narrow hiring discretion, not to eliminate it. The rule of three recognizes employment discretion and seeks to ensure that such discretion is not exercised in a way inconsistent with "merit" considerations.

Terry v. Mercer County Freeholder Board, 88 N.J. 141, 149-150 (1981). See also In re Crowley, 193 N.J. Super., 197, 210 (App. Div. 1984) (the "rule of three" is intended to guarantee the appointing authority an opportunity to exercise minimal discretion in the selection of particular employees.) Thus, expert opinion as to the interpretation of the rule of three was inadmissible and should not have been considered.

Following the hearing, the ALJ issued an initial decision setting forth his findings and conclusions in this matter. He found that the appointing authority's selections of Fowlie and Kryscnski for appointment to Police Captain were arbitrary and not in accordance with the rule of three. Accordingly, the ALJ determined that the promotions should be invalidated.

In reaching the above determination, the ALJ relied on the Supreme Court's decision in In the Matter of Anastasia M. Vey, 124 N.J. 534 (1991), which reiterates the longstanding principle that an administrative agency's exercise of discretion may not be arbitrary, capricious or unreasonable. In Vey, a candidate for the position of police officer challenged the appointing authority's removal of her name from the eligible list on the grounds of psychological unfitness. Finding no evidence in the record of a correlation between the assertedly undesirable personality traits which Vey possessed and actual job performance, the Court remanded the matter to the Merit System Board for clarification of the standard of psychological unfitness.

Unlike Vey, appellant herein has not been removed from the eligible list and disqualified from consideration for appointment. Rather, the appointing authority exercised its discretion under the rule of three to select one of the other qualified eligibles. Rather, appellant asserts that the appointing authority abused its discretion because it bypassed him for appointment for arbitrary and capricious reasons; i.e., his political affiliations and union activities and a longstanding conflict between himself and the former police

chief. However, the appointing authority asserts that its actions were based on legitimate business reasons.

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. Cf. Jamison v. Rockaway Township Board of Education, 242 N.J. Super, 436 (App. Div. 1990). In Jamison, supra at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a prima facie showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the employment decision.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the profferred reasons are pretextual or that the retaliatory or political reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

As the ALJ herein did not review the testimony and evidence rendered in this matter in accordance with the above analysis, this matter should be remanded for that purpose.

ORDER

The Merit System Board orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

INITIAL DECISION ON REMAND

LAW, ALJ:

STATEMENT OF THE CASE AND

PROCEDURAL HISTORY

This matter is on remand from the Merit System Board (MSB) from an initial decision wherein the undersigned determined that the appointing authority's bypassing appellant's name for the appointment to the position of Police Captain on two occasions was arbitrary and not in accordance with the Rule of Three. Appellant asserts that the appointing authority abused its discretion because it bypassed him for appointment for arbitrary and capricious reasons; i.e., his political affiliations and union activities and a long-standing conflict between himself and the former police chief. The appointing authority asserts, however, that its actions were based upon legitimate business reasons.

The Merit System Board, in its remand, said in part that:

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. Cf. Jamison v. Rockaway Township Board of Education, 242 N.J. Super. 436 (App. Div. 1990). In Jamison, supra. at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a prima facie showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for

the employment decision.
If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the retaliatory or political reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.
The Merit System Board correctly observes that the undersigned did not review the testimony and evidence in accordance with the above analysis.

SUMMARY OF TESTIMONIAL EVIDENCE

I adopt the summary of testimonial evidence set forth in the initial decision under the OAL Docket Numbers CSV 1933-92 and CSV 5932-92.

BACKGROUND FACTS AND FINDINGS OF FACTS

I adopt the background facts and findings of fact as set forth in the initial decision under the OAL Docket Numbers CSV 1933-92 and CSV 5932-92.

LEGAL ARGUMENTS OF THE PARTIES

APPELLANT'S ARGUMENTS

I.

INTRODUCTION

In consideration of the September 7, 1994, decision by the Merit System Board to remand the matter to the Court, and in accordance the Court's request at the March 28, 1995, telephone conference between the parties and the Court, appellant Lt. Robert Oches, hereby submits this Supplemental Posthearing Brief on the issue of the applicability of Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. 436 (App. Div. 1990) and its progeny to the facts of this proceeding as found and subsequently announced by the Court in its May 24, 1994 decision.

II.

FINDINGS OF FACT AND

CONCLUSIONS OF THE COURT

Notwithstanding the apparent contempt that Middletown holds for this Court's May 24, 1994 decision on this matter, appellant Oches believes the summary of testimony, findings of fact and conclusions contained therein are proper and valid. Accordingly, appellant Oches hereby incorporates the Court's May 24, 1994 decision into this brief by reference. A true copy of the decision is attached hereto as Exhibit A.

III.

LEGAL ANALYSIS

In Jamison vs. Rockaway Township Board of Ed., 242 N.J. Super. 436 (App. Div. 1990), the Appellate Division of the New Jersey Superior Court set forth the standards and burdens of proof that are applicable to an employee's claim of retaliation/discrimination based on a public hiring authority's failure to promote.

As will be demonstrated below, appellate Oches has satisfied each and every one of those standards, and he has further met all of his required burdens of proof. Middletown, on the other hand, has not and cannot meet its burdens of proof.

A. Appellant Oches Has Established a Prima Facie Case of Retaliation/Discrimination by Middletown

Under Jamison v. Rockaway Township Board of Ed., supra., appellant Oches must first establish a prima facie case of retaliation/discrimination based on the hiring authority's failure to promote Id. at 446. In order to establish such prima facie case, appellant Oches must prove by a preponderance of the evidence that (1) he engaged in a protected activity that was known to the alleged retaliator, (2) the promotion he sought was denied, and (3) his engagement in the protected activity was causally related to the denial of the promotion. Id. at 446.

1. Oches Engaged in Protected Activities that were Known to Middletown

The Court's findings of fact and conclusions clearly show that appellant Oches satisfied the first prong of his prima facie case of retaliation/discrimination on the part of Middletown.

a. The 1990 Promotion

Although under Middletown's local ordinances the Township Administrator is the "Hiring Authority" imbued with the power to make promotions in the Police Department, in actual fact then Police Chief Robert Letts made the decision to bypass appellant Oches in favor of William Fowlie for the captain's position that opened in the Middletown Police Department in 1990. James Alloway, the Township Administrator at the time, merely rubber stamped Chief Letts' decision to promote Fowlie over Oches. See, OAL Decision at page 81, lines 5-6.

Unfortunately for appellant Oches, Chief Letts developed a strong animus against him prior to making his captain promotion decision as a result of a series of protected activities in which appellant Oches engaged in commencing in 1980. See, OAL Decision at page 81, lines 8-15. Mostly these protected activities involved the lawful disclosure of violations of law. However, they also involved union activity and the filing of grievances and litigation to protect contract and statutory rights.

The first such protected activity was a grievance proceeding initiated by appellant Oches in 1980 to force Middletown to pay detectives for the time they spent testifying in court. Then Deputy Chief Letts opposed such court time pay, and within a day of the filing of the grievance he transferred appellant Oches out of the Detective Division into the Patrol Division of the Middletown Police Department. At the hearing on the grievance Letts testified against appellant Oches. On cross-examination, Letts' testimony was found to be false, which caused him severe embarrassment. Letts' anger at appellant Oches was extreme and noticed by several Middletown police officers, including former Chief Joseph McCarthy. See, OAL Decision at pp. 72-73, par. 4-7; page. 81, lines 8-15.

Appellant Oches' second protected activity was his gathering of sufficient evidence in 1986 to charge one Walter Woods, a Middletown Board of Education employee, with falsifying time sheets and splitting the ill-gotten proceeds with a fellow employee. Then Deputy Chief Letts asked appellant Oches not to proceed with the investigation and charge Woods with a crime because Woods' grandmother was a friend of Letts' family. Appellant Oches argued with Letts about the propriety of such a course of conduct, but ultimately acceded to Letts' wishes. However, some time later the Monmouth County Prosecutor made an inquiry of the incident. Although appellant Oches vigorously denied he initiated the prosecutor's inquiry, Letts apparently believed he did initiate it. Letts' animosity towards appellant Oches thus increased. See, OAL Decision at page, 20, lines

30-34; page 21, lines 1-35; page 22, lines 1- 7; page 73, par. 9.
Appellant Oches' third protected activity was his ultimate refusal to continue covering-up for then Deputy Chief Letts' alcoholic brother-in-law, Walter Monahan. Monahan would frequent local taverns while on duty and intoxicate himself with liquor. Letts frequently required appellant Oches to retrieve Monahan'sDPA1ice vehicle from the local taverns, which usually resulted in Monahan subjecting Oches to a drunken tirade. Letts protected his brother-in-law and saw to it that he was not disciplined for his outrageous activities. After a time, appellant Oches informed Letts and then Chief McCarthy that he would no longer have anything to do with Monahan.
Related to this protected activity was appellant Oches' formal request to then Chief McCarthy that Monahan be replaced by Oches as the Executive Director of the Detective Division on account of Monahan's failure to perform his assigned duties because of his alcoholic condition. As a result of this lawful request and appellant Oches' refusal to cover up for Monahan's alcoholic condition any longer, Letts became infuriated with Oches. See OAL Decision at page 37, lines 27-35; page 38, lines 1- 24; page 73, par. 10-12; page 82, lines 1-7.
Appellant Oches' fourth protected activity was his background investigation and report of findings on two Middletown police officer applicants, Charles Scott, the son of then Captain Arthur Scott, and Frederick Deickmann, the son of Sergeant Richard Deickmann. Prior to these two background investigations, appellant Oches had successfully and competently completed 15-20 other background investigations on police officer applicants. See OAL Decision at page 81, lines 17-19.
The investigation of Charles Scott indicated that he had used illicit drugs and alcohol extensively, and that he had suicidal tendencies. The Deputy Chief Letts asked appellant to omit the detrimental information. Oches reported this request to then Chief Joseph McCarthy, who instructed Oches to keep the information in the report. The investigation of Frederick Deickmann indicated that he may have falsified time cards while in the employment of the Monmouth County Department of Corrections and the Sea Bright Borough Police Department. Letts also wanted this information removed from the investigation report, and Oches told Letts that the information would remain unless Chief McCarthy instructed him otherwise.
Letts was extremely unhappy that Oches would not omit the detrimental information concerning Charles Scott and Frederick Deickmann from his investigation report, and Letts was also angry that Oches had reported Letts' unethical requests to do so to then Chief McCarthy. Letts was so incensed that he retaliated against appellant Oches by removing him from the task of performing background checks on police officer applicants. See OAL Decision at page 18, lines 24-33; page 18, lines 1-34; page 20, lines 1-29; page 73-74, par. 13-18; page 81, lines 16-35.
Numerous other incidents concerning Letts and his confrontations and disputes with appellant Oches over Oches' engagement in protected activities are documents in the Court's May 24, 1994 decision in this matter, and they are incorporated into this brief by reference. b. The 1992 Promotion
All of the protected activities that were engaged in by appellant Oches respecting the 1990 promotion bypass by Middletown are also applicable to Middletown's 1992 promotion bypass of him.
In addition, to those protected activities, appellant Oches filed the instant appeal against Middletown respecting the 1990 promotion bypass shortly after the August 1990 promotion of Fowlie to the rank of Captain was made by Middletown. This appeal in and of itself constitutes a protected activity by appellant Oches.
Again, although under the Middletown's local ordinances the Township Administrator is the "Hiring Authority" imbued with the power to make promotions in the Police Department, in actual fact Chief William Fowlie made the decision to bypass appellant Oches in favor of Edward Kryscnski for the captain position that opened in the Middletown Police Department in 1991 (though the promotion was not made until April 1992). Joseph Leo, the Township Administrator at the time, had only been appointed to that position approximately two weeks prior to the formal appointment of Kryscnski to

Captain. Thus, Leo merely rubber stamped Chief Fowlie's decision to promote Kryscnski over Oches. See OAL Decision at page 77, par. 42 and 44; page 78, par. 52; page 84, lines 25-33; page 85, lines 1- 6, 18-20. Besides retaliating against appellant Oches for initiating the instant appeals against Middletown, Chief Fowlie also had his own personal reasons for retaliating against Oches by refusing to promote him to Captain in 1992. Early in 1991, then Chief Letts told members of the Police Department that he would be retiring. On April 8, 1991, Letts formally notified the Township Committee of his plans for retirement. On May 1, 1991, Letts ended his service with the Police Department and was placed on terminal sick leave until his retirement became effective on January 1, 1992. See, OAL Decision at pp. 76-77, par. 30-41. Deputy Chief Ernest Volkland advised Middletown that he was not interested in the Chief's position for personal reasons. See, OAL Decision at page 77, par. 36.

Although Middletown should have requested an examination for police chief when it learned of Chief Letts' retirement plans in April 1991 (IT126:10), it delayed making such request to the Department of Personnel until September 1991 because William Fowlie would not have served the necessary one year in grade until that time (4T44:3). Township officials always intended to appoint Fowlie to the rank of chief, regardless of the qualifications of the other eligible captains.

Appellant Oches discovered Middletown's manipulative strategy on May 31, 1991, when he was in the Detective Division office speaking with two other police officers about potential candidates for the vacant police chief position. During the discussion, Mrs. Kathy Fowlie, the wife of William Fowlie and a secretary in the office, entered the room. Lieutenant Oches mentioned that only captains Kerrigan and Shaffery would be eligible for the chief's examination. Mrs. Fowlie interjected that her husband would also be eligible. Appellant Oches replied that then Captain Fowlie did not have the necessary time-in-grade, and Mrs. Fowlie responded that the Township Committee had agreed to hold up the examination until Fowlie became eligible (3T57:23).

Oches' testimony at the hearings on the instant appeal recounted the conversation in detail. So did Shaffery's testimony, as he had received a telephone call at home from Oches within minutes after the conversation ended. (IT130:1).

Subsequent to Oches' conversation with Fowlie's wife, Middletown did hold up the Chief's test for several months so that Fowlie would be eligible to sit for it. See, OAL Decision at pp. 76-77, par. 32-40.

After the chief test results were announced, Fowlie, who had scored number two, was promoted to the rank of chief over the highest-rank eligible, Captain Joseph T. Shaffery, effective February 1, 1992. Shaffery's appeal of his promotion (OAL Dkt. No. CSV 02997-92), together with the earlier appeals of Fowlie's promotion to captain by Oches and Hannafey, caused the Department of Personnel to record the latter's status as "conditional." (A-29).

In light of the information obtained from Mrs. Fowlie, appellant Oches felt compelled to reduce the substance of the conversation to writing. An affidavit was prepared by Captain Shaffery's attorney for Oches' approval and signature (A-2). That affidavit was submitted to the Department of Personnel in support of Shaffery's appeal on February 5, 1992.

Immediately thereafter, both Chief Fowlie and his wife retained personal counsel, Norman M. Hobbie, Esquire, although they obviously were not parties to any pending litigation. Their indignation, directed against both appellant Oches and Shaffery, is apparent from the vituperative tone of Mr. Hobbie's correspondence to Shaffery's attorney (A-4). Although Oches' execution of the affidavit in the Shaffery case (which confirmed the manipulative scheme to appoint Fowlie) was an activity protected under N.J.S.A. 11A:2-24 as it constituted the disclosure of information as to the violation of the law, governmental mismanagement and abuse of authority, Chief Fowlie nevertheless retaliated against appellant Oches by promoting Edward Kryscnski to Captain over him two months later in April 1992.

In summation, there can be virtually no doubt that appellant Oches engage in protected activities, and that Middletown was aware of those activities prior to bypassing him for

promotion in 1990, and again in 1992.

2. Oches was Twice Denied Promotions to the Rank of Captain by Middletown

The Court's findings of fact and conclusions clearly show that appellant Oches has satisfied the second prong of his prima facie case of retaliation/discrimination on the part of Middletown, as Oches was twice denied promotion to the rank of Captain.

a. The 1990 Promotion

On May 26, 1988, a Department of Personnel promotion list was promulgated for the position of Captain within the Middletown Police Department. The promotion list indicated that the qualified candidates had received the following scores on their Civil Service Examination, and they were ranked accordingly:

1. Eugene Hannafey: 88.01 (nonveteran)
2. Robert Oches: 87.05 (veteran)
3. William Fowlie: 82.28 (veteran)
4. Edward Kryscnski: 81.32 (veteran)

See, OAL Decision at page 72, par. 1.

On December 26, 1989, Deputy Chief Robert Letts was appointed Chief of the Middletown Police Department to replace the retiring Joseph McCarthy. Shortly thereafter, Captain Ernest Volkland was appointed Deputy Chief to replace Letts, and this appointment created a vacancy in the Captains' ranks. See, OAL Decision at page 79, lines 33-36; page 80, lines 1-8.

Chief Letts made his decision to promote William Fowlie over appellant Oches in January 1990. On August 13, 1990, Letts forwarded his recommendation that Fowlie be promoted to Captain to James Alloway, the Township Administrator. On August 24, 1990, nearly eight months after Chief Letts had made his decision to promote Fowlie to Captain, the eligible list for police captain was certified by the DOP. On September 1, 1990, Fowlie's promotion to Captain became effective, thus bypassing appellant Oches. See, OAL Decision at page 80, lines 9-20.

b. The 1992 Promotion

William Fowlie's promotion to Captain in 1990 allowed Lt. Edward Kryscnski to move from the fourth position on the captain promotion list to the third position. Effective July 1, 1991, Captain Arthur Scott retired from the Middletown Police Department. His retirement created a vacancy in the Police Department's captain ranks as of that date. Chief Letts also announced that he would be retiring in early 1991 effective December 31, 1991. See, OAL Decision at page 76, par. 27-28 and 30.

Notwithstanding the captain vacancy, Middletown did nothing to fill it for a time. The DOP certified the eligible list for police captain on October 18, 1991, and gave Middletown until November 8, 1991 to fill the captain vacancy. Middletown ignored this deadline. See, OAL Decision at page 84, lines 5-9.

After Letts' retirement from the Chief's position, William Fowlie was appointed Chief by Township Administrator James Alloway on January 25, 1992. Alloway then left his post for another position in the Marshall Islands on January 31, 1992. See, OAL Decision page 84, lines 25-27.

On April 2, 1992, Fowlie notified appellant Oches that he would be interviewed that same day for the captain vacancy, along with two other eligible candidates. Unbeknownst to appellant Oches at the time, Fowlie had already determined to promote Edward Kryscnski to fill the Captain vacancy before he announced the interview to Oches. See, OAL Decision at page 77, par. 44.

On April 7, 1992, Kryscnski was promoted to Captain by Chief Fowlie through the new Township Administrator, Joseph Leo (Leo had only been appointed March 25, 1992, two weeks prior to Kryscnski's appointment). See, OAL Decision at page 78, par. 52.

3. There is a Causal Connection Between Oches' Engagement in Protected Activities and Middletown's Refusal to Promote Him

The Court's findings of fact and conclusions clearly illustrate that appellant Oches has satisfied the third prong of his prima facie case of retaliation/discrimination on the part of Middletown by showing that there is a causal connection between his engagement in protected activities and Middletown's refusal to promote him.

a. The 1990 Promotion

Given the facts that (1) then Chief Letts developed an extreme animus against appellant Oches based on Oches' protected activities commencing in 1980 (OAL Decision at page 81, lines 7-8); (2) Letts made his decision to promote William Fowlie over appellant Oches in January 1990, nearly eight months prior to the certification of the Captain's list by the DOP (OAL Decision at page 80, lines 9-11); (3) Letts conducted no interviews, did not review personnel files, and did not conduct or review any performance evaluations of any of the eligible candidates for the available Captain's position, including appellant Oches, (OAL Decision at page 80, lines 21-23); and (4) Letts did not advise the Middletown hiring authority (Township Administrator James Alloway) or the DOP of his reasons for not selecting appellant Oches or the other eligible candidate in violation of N.J.A.C. 4A:4-4.8(b) (OAL Decision at page 80, lines 23- 26), it is only reasonable for the Court to conclude that there is a causal connection between Oches' engagement in protected activities and Middletown's refusal to promote him to Captain in 1990. Indeed, the 1990 Captain promotion was the first substantial opportunity that then Chief Letts had to retaliate against Oches for all of Oches' protected activities.

The reasonableness of the causal connection is especially clear in light of the fact that William Fowlie was ranked lower than appellant Oches on the DOP Captain's certification list, and that Fowlie scored significantly lower than Oches on the Civil Service Examination. See OAL Decision at page 72, par. 1. Indeed, the Court has previously found that then Chief Letts' "... selection of William Fowlie to the position of Captain made a sham and mockery of the examination process and procedure." See OAL Decision at page 83, lines 6-8 (emphasis added).

b. The 1992 Promotion

Given the facts that (1) Chief Fowlie was in an adversarial relationship and admitted conflict of interest with appellant Oches because of Oches' pending lawsuit against Middletown (which, if successful, would defrock Fowlie from both his position as Chief and from his prior rank of Captain) (OAL Decision at page 85, lines 1-6); (2) interviews of the three eligible candidates were conducted by Fowlie and the newly hired Township Administrator, Joseph Leo, with no prior notice and in a haphazard fashion (OAL Decision at page 77-78, par. 45-51); and (3) Fowlie had made the decision to promote Kryscnski to Captain before the interview process was even initiated (OAL Decision at page 77, par. 44; page 84, lines 30-33; page 85, lines 9-20), it is only reasonable for the Court to conclude that there is a causal connection between Oches' engagement in protected activities and Middletown's refusal to promote him to Captain in 1992.

Indeed, the Court has previously found that Chief Fowlie's decision to promote Kryscnski over appellant Oches was made, in part, due to Oches' pending litigation against Middletown respecting its 1990 promotion bypass of him. See OAL Decision at page 85, lines 5-6.

It is submitted that in light of the above, appellant Oches has clearly established by a preponderance of the evidence of his prima facie case of retaliation by Middletown by its failure to promote him to Captain in 1990, and again in 1992.

B. Middletown Has Not Shown a Legitimate Reason for Refusing to Promote Appellant Oches to Captain First in 1990, and Again in 1992

Under Jamison v. Rockaway Township Board of Ed. 242 N.J. Super. 436, after appellant Oches establishes a prima facie case of retaliation/discrimination based on Middletown's failure to promote him, the Township then has the burden of going forward with evidence that articulates some legitimate non-retaliatory reason for failing to promote Oches. Id. at 446. Despite ten days of testimony at the hearings on this matter, Middletown has not gone forward with any such legitimate evidence.

1. The 1990 Promotion

At first glance, Middletown appears to have met its burden under Jamison v. Rockaway Township Board of Ed., supra., of going forward with some evidence that articulates a legitimate non-retaliatory reason for failing to promote Oches respecting its 1990 promotion bypass of him. This is because James Alloway, the Township Administrator and this hiring authority at the time, gave testimony that he promoted William Fowlie

over appellant Oches because Fowlie had a college degree, had overseen the computerization of the Records Bureau, and had graduated from the FBI Academy. See OAL Decision at page 29, lines 407. Alloway also felt that Fowlie was a problem solver, and that when given an assignment he would do it well. See OAL Decision at page 29, lines 20-22.

Alloway's opinion of appellant Oches, on the other hand, was that he never surfaced predominately either in reports or actions (though Alloway admitted on cross examination that he did not realize that the reports he was referring to had been prepared by appellant Oches. (3T87:5). Alloway also stated that Oches was a member of the Detective Bureau, which in Alloway's opinion was not performing to the best of professional expectations. See OAL Decision at page 29, lines 8-13. Alloway further believed that Oches played "too many games" regarding the Middletown Police Department (though Alloway admitted on cross examination that he could not identify one instance of "game playing" by appellant Oches.) See OAL Decision at page 29, lines 19-20; 3T95:23.

When one looks deeper into the facts surrounding the 1990 promotion, however, it is clear that James Alloway's stated reasons for promoting Fowlie over appellant Oches are nothing more than a chimera. This conclusion is inescapable when one realizes that Alloway did not make the decision to promote Fowlie over Oches. Rather, the Court has previously found that then Chief Letts made the decision to promote Fowlie over Oches before even discussing the issue with Alloway. Alloway merely rubber stamped Chief Letts' decision. See OAL Decision at page 81, lines 5-6.

In his testimony before the Court, Letts could not come up with even one legitimate reason why he promoted Fowlie over appellant Oches. [FN1] Rather, he admitted that he had made up his mind to promote Fowlie over Oches nearly eight months before the eligibles list for the captain position was certified by the DOP, that he did not review the personnel files of the eligible candidates, that he conducted no interviews of the eligible candidates, that he neither conducted nor reviewed performance evaluations of the eligible candidates, and that he only talked with Fowlie's supervisor about Fowlie's work habits and not appellant Oches' supervisor. See OAL Decision page 39, line 35; page 40, line 1; page 46, lines 26-33.

As Chief Letts, the person ultimately responsible for the promotion of Fowlie over appellant Oches, could not articulate even one legitimate reason for his preference, Middletown has failed to meet its burden under Jamison vs. Rockaway Township Board of Ed., supra. of going forward with some evidence that articulates a legitimate non-retaliatory reason for failing to promote Oches respecting its 1992 promotion bypass of him. This is because Joseph Leo, the Township Administrator and thus hiring authority at the time, gave testimony that he promoted Edward Kryscnski over appellant Oches because of the respective scores they earned in the interviews of the eligible candidates that Leo participated in. See OAL Decision at page 61, lines 14-32. Leo also believed Kryscnski should be promoted because he was the most senior of the eligible candidates, and Kryscnski had experience in budget preparation. See OAL Decision at page 62, lines 3-6.

2. The 1992 Promotion

As with the 1990 promotion, however, when one looks deeper into the facts surrounding the 1992 promotion, it is clear that Joseph Leo's stated reasons for promoting Kryscnski over appellant Oches are also nothing more than a chimera. This conclusion is inescapable when one realizes that Leo did not make the decision to promote Kryscnski over Oches. Rather, the Court has previously found that Chief Fowlie made the decision to promote Kryscnski over Oches before even discussing the issue with Leo. Leo, having been on the job only one week before the sham interviews of the eligible candidates took place, and only two weeks before Kryscnski's promotion became effective, merely rubber stamped Chief Fowlie's decision. See OAL Decision at page 77, par. 44; page 84, lines 30-33, page 85, lines 9-20.

Insofar as Middletown has failed to articulate any legitimate reasons for refusing to promote appellant Oches to Captain in 1990, and again in 1992, under Jamison v.

Rockaway Township Board of Ed. supra., a presumption of retaliation on the part of Middletown against Oches should arise.

C. Middletown's Stated Reasons for Twice Refusing to Promote Appellant Oches to Captain are a Pretext for Retaliation, and Motivated by a Discriminatory Reason

Even assuming arguendo that Middletown has enunciated facially valid reasons for twice refusing to promote appellant Oches to the rank of Captain, a presumption of retaliation against Oches on the part of Middletown still should arise.

Under Jamison v. Rockaway Township Board of Ed. 242 N.J. Super. 436, after Middletown goes forward with evidence that articulates some legitimate non-retaliatory reason for failing to promote Oches, Oches must show by a preponderance of the evidence that a discriminatory intent motivated Middletown's failure to promote him. This can be accomplished by proving that (1) Middletown's articulated reasons for refusing to promote Oches are a pretext for retaliation, or (2) a discriminatory reason more likely motivated Middletown in refusing to promote Oches. Id. at 446.

The Court's findings in its May 24, 1994, decision show that Middletown's stated reasons for refusing to promote appellant Oches are, in fact, pretextual, and/or primarily motivated by a discriminatory reason.

1. The 1990 Promotion

a. The Court has Previously Found that Middletown's Stated Reasons for Refusing to Promote Appellant Oches are a Pretext for Retaliation and/or Motivated by Discrimination Against Him

In its May 24, 1994, decision in this matter, the Court specifically found that Chef Letts' decision to promote William Fowlie over appellant Oches in January 1990, more than seven months prior to the DOP's certification of the list of eligible candidates, was arbitrary and an abuse of the Rule of Three. See OAL Decision at page 83, lines 3-6. The Court further found that Letts' promotion of Fowlie "made a sham and mockery of the examination process and procedure." See OAL Decision at page 83, lines 6-8. Indeed, the Court referred to Letts' examination process and procedure respecting the 1990 captain promotion as a "pretext". See OAL Decision at page 83, line 9.

The Court also found that Chief Letts developed a strong dislike for appellant Oches prior to making his captain promotion decision as a result of a series of protected activities in which Oches engaged in commencing in or about 1980. See OAL Decision at page 81, lines 7-8. Lett's anger and unwarranted bias against Oches manifested itself in numerous ways, some of which were quite blatant. For instance, Letts had Oches demoted from the Detective Division to the Patrol Division when Oches filed a grievance to force Middletown to pay detectives for their court time, and he subsequently tried to block Oches' transfer back into the Detective Division after the grievance proceeding was settled. See OAL Decision at pp. 72-73, par. 4-7; page 81, lines 8-15. Letts also had Oches removed from assignments when Oches refused to comply with Letts' illegal and unethical requests. See OAL Decision at page 18, lines 24-33; page 19, lines 1-34; page 20, lines 1-29; page 73-74, par. 13-18; page 81, lines 16-35. Letts also made verbal threats against Oches regarding his career with the Middletown Police Department. See OAL Decision at page 20, lines 27-29.

Given Letts' demonstrable anger and bias against appellant Oches, and also given the fact that (I) Letts made his decision to promote William Fowlie over appellant Oches in January 1990, more than 8 months prior to the certification of the Captain's list by the DOP (OAL Decision at page 80, lines 9-11); (ii) Letts conducted no interviews, no review of personnel files and no performance evaluations of any of the eligible candidates for the available Captain's position, including Appellant Oches (OAL Decision at page 80, lines 21-23); and (iii) Letts did not advise the Middletown hiring authority (Township Administrator James Alloway) or the DOP of his reasons for not selecting appellant Oches or the other eligible candidate in violation of N.J.A.C. 4A:4-4.8(b) (OAL Decision at page 80, lines 23-26), it is only reasonable for the Court to conclude that Middletown's stated reasons for its refusal to promote Oches to Captain in 1990 are merely a pretext, and/or Middletown was more likely motivated by a discriminatory intent in not promoting Oches.

b. Expert Testimony Put On by Appellant Oches Establishes That Middletown's Stated Reasons for Refusing to Promote Appellant Oches Are a Pretext for Retaliation and/or Motivated by Discrimination Against Him.

In addition to the Court's own findings in this matter, Robert DeGrazia, appellant Oches' expert witness, testified without rebuttal concerning the defects in the promotion process employed by Letts respecting the 1990 captain promotion. Such testimony, and the Court's prior acceptance of its credibility in the Court's May 24, 1994, decision, is crucial under Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. 436.

In Jamison, the Appellate division permitted the plaintiff's expert witness to establish the pretextual nature of the Hiring Authority's reasons for refusing to promote plaintiff by setting forth the deficiencies in the selection process utilized by the Hiring authority. Id. at 449.

Appellant Oches' expert testified to the following deficiencies in then Chief Letts' promotion selection process:

. Lack of personnel records review by both Chief Letts and Township Administrator James Alloway.

. Lack of performance evaluation review by both Chief Letts and Township Administrator James Alloway;

. Lack of personal interview of eligible candidates by both Chief Letts and Township Administrator James Alloway; and

. Lack of written justification for skipping over candidates listed higher on eligibility list over the candidate eventually appointed.

See OAL Decision at page 69-70, par. 1-4.

The Court agreed with the expert's assessment, and found that Chief Letts' promotion of Fowlie "... made a sham and mockery of the examination process and procedure." See OAL Decision at page 83, lines 6- 8 (emphasis added). Accordingly, the Court should find that Middletown's stated reasons for its refusal to promote Oches to Captain in 1990 are merely a pretext, and/or Middletown was more likely motivated by a discriminatory intent in not promoting Oches.

2. The 1992 Promotion

a. The Court Has Previously Found That Middletown's Stated Reasons for Refusing to Promote Appellant Oches Are a Pretext for Retaliation and/or Motivated by Discrimination Against Him.

In its May 24, 1994 decision in this matter, the Court specifically found that Chief Fowlie's decision to promote Edward Kryscnski over appellant Oches in 1992 was made, in part, due to Oches' pending litigation against Middletown respecting its 1990 promotion bypass of him. See OAL Decision at page 85, lines 5-6. Given this finding, it must follow that Middletown's stated reasons for its refusal to promote Oches to Captain in 1992 are merely a pretext, and/or Middletown was more likely motivated by a discriminatory intent in not promoting Oches.

A finding of retaliation/discrimination is also compelled by the fact that (1) Fowlie had an admitted conflict of interest with appellant Oches (OAL Decision at page 85, lines 1-6) (2) interviews of the three eligible candidates were conducted by Fowlie and the newly hired Township Administrator, Joseph Leo, with no prior notice and in a haphazard fashion (OAL Decision at page 77-78, par. 45-51); and (3) Fowlie had made the decision to promote Kryscnski to Captain before the interview process was even initiated (OAL Decision at page 77, par. 44; page 84, lines 30- 33; page 85, lines 9-20).

b. Expert Testimony Put on by Appellant Oches Establishes That Middletown's Stated Reasons for Refusing to Promote Appellant Oches Are a Pretext for Retaliation and/or Motivated by Discrimination Against Him.

In addition to the Court's own findings in this matter, Robert DeGrazia, appellant Oches' expert witness, testified without rebuttal concerning the defects in the promotion process employed by Fowlie respecting the 1992 captain promotion.

As previously noted, in Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. 436, the Appellant Division permitted the plaintiff's expert witness to establish the pretextual nature of the Hiring Authority's reasons for refusing to promote plaintiff by

setting forth the deficiencies in the selection process utilized by the Hiring Authority. Id. at 449.

Appellant Oches' expert testified to the following deficiencies in Chief Fowlie's promotion selection process

. Chief Fowlie's involvement in the 1992 promotion process created an extensive conflict of interest because his position as Chief and his prior position of Captain depended upon the outcome of the instant litigation over the 1990 promotion bypass of appellant Oches;

. Chief Fowlie had determined prior to the interviews of the eligible candidates that Edward Kryscnski was to be promoted over appellant Oches and the other eligible candidate;

. Joseph Leo, the newly appointed Township Administrator, was strongly influenced by Chief Fowlie's selection of Kryscnski for the Captain position;

. Township Administrator Leo's 15 minute review of the personnel folders of the eligible candidates did not provide him with sufficient basis to make the promotion of Kryscnski to Captain;

. Township Administrator Leo lacked an understanding of the prevailing situation in the Middletown Police Department; and

. The interview process and procedure was flawed because of the lack of people participating in the interview and Township Administrator Leo's use of an evaluation sheet (which was not used by Chief Fowlie) which did not present any objective standard for its use.

See OAL Decision at page 70, par. 1-6.

The Court agreed with the expert's assessment, and found that "the process and procedure with respect to the 1992 appointment from the DOP's certification for police captain were flawed." See OAL Decision at page 85, lines 8-21 (emphasis added). Accordingly, the Court should find that Middletown's stated reasons for its refusal to promote Oches to Captain in 1992 are merely a pretext, and/or Middletown was more likely motivated by a discriminatory intent in not promoting Oches.

D. Appellant Oches is the Most Qualified Candidate for the 1990 and 1992 Captain Promotions.

Under Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. 436, once appellant Oches shows by a preponderance of the evidence that a discriminatory intent motivated Middletown's failure to promote him, a presumption of improper retaliatory intent is in place. Id. at 445-446. Middletown must then prove by a preponderance of the evidence that its failure to promote Oches would have occurred regardless of its retaliatory intent. Id. at 446. This is accomplished by requiring Middletown to prove that the individuals promoted over appellant Oches were more qualified that Oches for the rank of Captain. Id. at 447 (emphasis added). "In other words, the burden of disproving causation is on (Middletown) once the presumption of retaliation occurs ..." Id. at 450.

1. The 1990 Promotion

Three persons were eligible to be promoted to the rank of Captain by Middletown in 1990: Eugene Hannafey, appellant Oches, and William Fowlie (who actually was promoted). Therefore, under Jamison v. Rockaway Township Board of Ed., Middletown must prove by a preponderance of the evidence that William Fowlie and Eugene Hannafey were more qualified to be promoted to Captain than appellant Oches. Id. at 447.

a. Hannafey Should Not Be Considered by the Court.

Before beginning the analysis of the most qualified candidate for the position of Captain in 1990, it must be noted that Eugene Hannafey should be disqualified from consideration for such promotion. Hannafey previously appealed Middletown's removal of his name from the certified list of eligibles for the Captain vacancy and subsequent failure to promote him to such rank in 1990. Hannafey's appeal was tried before the Honorable Joseph F. Fidler. On May 29, 1992, Judge Fidler issued his initial decision which effectively denied Hannafey's appeal. On July 14, 1992, the Merit System Board affirmed Middletown's removal of Hannafey's name from the certified list of eligibles and

subsequent failure to promote him to Captain in 1990. See In the Matter of Eugene P. Hannafey, (July 14, 1992), a true copy of which is attached hereto as Exhibit B. The disposition of Hannafey's appeal is thus res judicata of his entitlement to be promoted to Captain in 1990. See, e.g., Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. at 446 (consideration must be given to the competition only "where it exists".)

b. Appellant Oches Was the Most Qualified for the 1990 Promotion.

With respect to William Fowlie, it cannot be overemphasized that Fowlie was ranked number three on the DOP certified list of eligibles, while appellant Oches was ranked higher at number two. The rankings are even more dramatic when it is considered that Appellant Oches substantially outscored Fowlie on the Civil Service examination by nearly five (5) points (87.05 vs. 82.28). The respective scores received by Appellant Oches and Fowlie on the Civil Service examination should preclude Middletown from being able to prove that Fowlie was more qualified than Oches for the rank of Captain. See New Jersey Constitution, art. VII, line 1, par. 2. [FN2]

Wherein a civil service promotion "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination."

Even without the benefit of the rankings on the DOP certified eligibles list, appellant Oches was more qualified than Fowlie for the 1990 Captain vacancy. Direct testimony given at the hearings on this matter by appellant Oches revealed that:

. Oches began his police career with Middletown in May of 1974 after being honorably discharged from the United States Marine Corps. (2T126:24 2T128:17).

. Oches has been a Lieutenant since 1985. Since 1992 he has been assigned to the Internal Affairs Division of the Police Department.

. Prior to his Internal Affairs assignment, Oches was the Executive Officer of the Detective Bureau, where he was assigned a total of thirteen years. (2T127:3; 2T128:15).

. Appellant Oches has received formal training in the following areas (2T130:5 2T133:12):

2/75 Basic Drug Enforcement at New Jersey State Police Academy
11/77 Criminal Investigation at New Jersey State Police Academy
3/78 SWAT Training at FBI Academy, Quantico, VA.
3/79 Evasive Driving Techniques
12/79 The New 2C Criminal Code
6/82 Sex Crimes Investigation by FBI
10/83 Organized Crime and Criminal Groups at New Jersey Police Academy
11/83 Child Sexual Abuse and Community Prevention Sponsored by Cornell & Rutgers University
9/83 Advanced Interview and Interrogation by N.J. Polograph Association
3/87 Practical Homicide Investigation by V. Gegreth at Westchester Co. Police Academy, N.Y.
4/87 Reid Technique of Interview and Interrogation
4/87 Forensic Science Fatal Accident & Homicide I.V.
1/88 Stress Management & Communication
1/88 Special and Technical Service Forensic Science Seminar at New Jersey State Police Academy
8/88 Detective Bureau Management at Delaware University
10/88 High Performance Police Management at Essex Co. College
3/89 Specialized Police Operation (SWAT) by Ocean Co. Sheriff's Dept.
3/90 Sexual Assault and Crisis Intervention by New Jersey State Police

. Oches received numerous commendations and awards for his police work. (A-27; 2T42:14; 2T42:23).

. Oches' community activities included membership in the Middletown Athletic Club which sponsors the Middletown Pop Warner Eagles football team, working for Middletown Helps Its Own which feeds underprivileged people, conducting public speaking for local civic groups on law enforcement topics such as sex crimes and child abuse prevention. (2T133:7; 2T134:15).

. Oches is also a member of the Middletown Chapter of the Fraternal Order of Police, where he serves as Treasurer; the Middletown Twp. Superior Association, where he serves as the Secretary; the American Legion; the International Association of Chief's of Police; and the Honor Legion of New Jersey. (2T134:7; 2T134:15).

A copy of Appellant Oches' resume, which details his educational background, military experience, community service activities and membership in organizations may be found at Exhibit A-8. (2T129:22).

Aside from objective qualifications, Appellant Oches was and is highly regarded by virtually all of his superior officers and subordinates.

Former Chief Joseph McCarthy, who served as Middletown's Chief of Police for 23 years before retiring in 1990, testified that he relied on Oches' unique abilities for numerous confidential assignments. (IT10:4). McCarthy testified that he thought Oches was one of the most outstanding Lieutenants in the Middletown Police department, that he was well trained, and that he always gave Oches the tough cases. (IT29:2). McCarthy testified that he recommended to then-Township Administrator James Alloway that Oches would someday be a good Chief of Police, and that he would promote Appellant Oches, Fowlie and Kryscnski to Captain in that order. (IT36:5, IT36:11). Tellingly, McCarthy testified that based on his 23 years of experience as a Chief of police and with the officers on the certified list of eligibles for the 1990 Captain vacancy (i.e., Oches, Fowlie and Hannafey), he would not have skipped Oches to promote Fowlie, and if he could only make one Captain it would have been Oches. (IT34:18; IT37:1). Indeed, when there was a temporary vacancy in 1989 in the Captain ranks, Oches was appointed by McCarthy to fill it. (A-24; 3T21:9; 3T21:16).

Captain Joseph T. Shaffery, a 26 year veteran of the Middletown Police department and Appellant Oches' immediate superior for many years, testified that Oches was "extremely competent" and that his "loyalty was second to none". (IT118:11; IT136:12; IT136:21).

William J. Halliday, a retired Captain of Detectives who served on the Middletown Police department for 25 years prior to his retirement, testified that Appellant Oches was one of the best detectives who ever worked under him. (IT180:22). Halliday also testified that Oches was one of the best criminal investigators, was tenacious, was honest, and had integrity. (IT185:1).

John Hazard, an assistant Monmouth County Prosecutor for more than fifteen years, testified that Oches is a good police officer, is thorough, and is always well prepared. (2T109:17). Hazard wrote Oches a letter of commendation for some of his work. (2T110:21).

Even witnesses called by Middletown to testify against Oches had to admit that he was extremely competent, diligent and had a great deal of integrity.

Detective Michael Slover, a 26 year veteran of the Middletown Police department, testified that Appellant Oches was knowledgeable, intelligent and competent. (4T120:6-10).

Detective Ronald Ohnmacht, a 23 year veteran of the Middletown Police department, testified that appellant Oches was a good investigator, competent and very thorough. (4T160:14; 4T165:6; 4T165:11).

Sergeant Michael Cerame, a 14 year veteran of the Middletown Police department, testified that appellant Oches was a competent police officer and very thorough. (5T228:7-11).

Even then Chief Robert Letts, whom the Court has previously found had a deep dislike for appellant Oches, had to admit that he had nothing negative to say about Oches. (5T62:8). Letts testified that all the assignments he gave to Oches were done very competently (265:3), and that Oches was an extremely competent law enforcement officer (5T62:11). Letts further testified that Oches was an individual who could be relied upon (5T62:5; 5T62:16).

In sum, appellant Oches' qualifications and the expert opinions of his superiors all point to the fact that he was the most qualified candidate for the 1990 Captain promotion.

2. The 1992 Promotion

Three persons were eligible to be promoted to the rank of Captain by Middletown in 1992: Eugene Hannafey, Appellant Oches, and Edward Kryscnski (who actually was promoted). Therefore, under Jamison v. Rockaway Township Board of Ed., Middletown must prove by a preponderance of the evidence that Edward Kryscnski and Eugene Hannafey were more qualified to be promoted to Captain than Appellant Oches. Id. at 447 (Kryscnski retired from the Middletown Police department effective January 1, 1994).

a. Hannafey Should Not Be Considered by the Court.

As previously noted, Eugene Hannafey should be disqualified from consideration for the 1992 promotion. The Merit System Board affirmed Middletown's removal of Hannafey's name from the certified list of eligibles and subsequent failure to promote him to Captain in 1990. See, e.g., Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. at 446 (consideration must be given to the competition only "where it exists".)

b. Appellant Oches Was the Most Qualified for the 1992 Promotion.

With respect to Edward Kryscnski, it cannot be overemphasized that Kryscnski was ranked number three (originally number four) on the DOP certified list of eligibles, while appellant Oches was ranked higher at number two. The rankings are even more dramatic when it is considered that appellant Oches substantially outscored Kryscnski on the Civil Service examination by nearly six (6) points (87.05 vs. 81.21). The respective scores received by appellant Oches and Kryscnski on the Civil Service examination should preclude Middletown from being able to prove that Kryscnski was more qualified than Oches for the rank of Captain. See New Jersey Constitution, Art. VII, line 1, par. 2 [FN3], wherein a civil service promotion "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination."

It should also be noted that several weeks prior to the time Middletown through Chief Fowlie promoted Kryscnski (April 7, 1992), a new Captain's examination had been conducted by the DOP. The results of that examination, which came out in May 1992, ranked appellant Oches number one (with a score of 89.78). Hannafey was ranked number two, and Bruce Winter was ranked third.

Even without the benefit of the rankings on the DOP certified eligibles list, appellant Oches was more qualified than Kryscnski for the 1992 Captain vacancy.

Appellant Oches' qualifications for the 1990 Captain vacancy are detailed herein at Section III (D)(1). Those qualifications are equally applicable to the 1992 Captain vacancy.

As of April 1992 (the date the 1992 Captain vacancy position was filled by Middletown), Oches had obtained additional qualifications for the vacant Captain position by attending a seminar on the Detection and Recognition of Child Abuse and Death by Forensic Associates at the New Jersey State Police Academy (9/90), and by attending a Fugitive Apprehension Seminar (12/90).

Appellant Oches' qualifications for the vacant Captain position in 1990 and 1992 are second to none. As Oches ranked higher on the DOP certified list of eligibles than Fowlie in 1990 and Kryscnski in 1992, it is per se impossible for Middletown to prove that either of those individuals was more qualified to be promoted than Oches. [FN4]

IV.

CONCLUSION

Appellant Oches has satisfied each of his assigned burdens of proof under Jamison v. Rockaway Township Board of Ed., 242 N.J. Super. 436 (App. Div. 1990). Given the testimony and documentary evidence adduced at the hearings on this matter, Oches has proven beyond a reasonable doubt (much less a preponderance of the evidence) that Middletown retaliated against him for his engagement in protected activities by not promoting him to the rank of Captain in 1990, and then again in 1992.

Moreover, Middletown cannot satisfy its assigned burden of proof under Jamison v.

Rockaway Township Board of Ed. by showing that the eligible candidates for the rank of Captain in 1990 and 1992 were better qualified than appellant Oches. Oches' ranking on the certified eligibles list, his service record and his achievements all demonstrate that he should have been promoted to Captain instead of William Fowlie in 1990 and Edward Kryscnski in 1992.

Accordingly, appellant Oches respectfully requests the Court enter its judgment invalidating the 1990 promotion of William Fowlie, and appointing Oches to the rank of Captain in his stead effective September 1, 1990. Alternatively, appellant Oches requests the Court invalidate the 1992 promotion of Edward Kryscnski, and appoint Oches to the rank of Captain in his stead effective April 7, 1992. Appellant Oches further requests the Court award him back pay, back benefits, seniority rights, reasonable attorneys' fees, and cost of suit. See, e.g., In re Gerald J. LaStella, (Merit System Board determined that back pay, back benefits, seniority rights, attorneys' fees and court costs were properly awarded to appellant who was retaliated against by hiring authority).

APPOINTING AUTHORITY'S ARGUMENTS

The Law on Retaliatory Promotion

The appellant's complaint was that he had been improperly retaliated against in the 1990 and 1992 promotion decisions. He proffered a conglomeration of unconnected, subjective, and speculative plaints, claiming essentially that chief Letts bore him animosity for events many years before which tainted the 1990 promotion. Appellant then challenged the 1992 promotion as tainted on the basis that Fowlie, by then Chief, took part in the process by the interview and making a recommendation.

In fact, as shall be detailed, the appellant did not even make a pass at the proofs required for retaliatory promotion claim.

As to the proof requirements, the New Jersey courts have followed Federal Title VII precedents, in order to provide uniformity to the law. See Erickson v. Marsh & McLennan Co., 117 N.J. 539, 549 (1990); Burke v. Township of Franklin, 261 N.J. Super. 592, 598-599 (App. Div. 1993). The nature of a claim of retaliatory employment action results in a shifting burden of going forward with evidence, but the ultimate burden of proof remains with the complainant. The most recent State Supreme Court analysis is set forth in Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990):

The McDonnell Douglas approach established the elements of a prima facie case of unlawful discrimination. The plaintiff must demonstrate by a preponderance of the evidence that he or she (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applicants for persons of plaintiff's qualifications. Establishment of the prima facie case gives rise to a presumption that the employer unlawfully discriminated against the applicant. The burden of going forward then shifts to the employer to rebut the presumption of undue discriminatory reason for the employee's rejection. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination. In such cases the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; only the burden of going forward shifts.

The United States Supreme Court addressed and further defined Title VII proof standards in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), a racial discrimination case. The employee there had made a prima facie case that discrimination was a likely reason for the employer's action. The employer then articulated legitimate non-discriminatory reasons. The Supreme Court found that the employer's production negated any presumption of discrimination, and the employee demonstrating the

articulated reasons were pretextual is insufficient. The employee still must prove the ultimate burden that the employment decision was actually made for the discriminatory reason.

The Hicks rule has been determined by the 3rd Circuit to be New Jersey law. See McKenna v. Pacific Rail Service, 32 F.3d 820 (3rd Cir. 1994). Thus, even if plaintiff demonstrates a prima facie case and that the reasons asserted by the employer for the promotional decision were false or pretextual, the plaintiff still has the ultimate burden of proving the promotional decision was motivated by retaliation for protected conduct and that this retaliation was the determining factor. Lack of proof of any of these elements, including the ultimate burden of proving that the retaliation for protected conduct was the determining factor in the promotion decision, is fatal to the claim. See Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 959 (5th Cir. 1993) (conclusionary allegations discrediting employer's reasons for employment decision insufficient, no direct evidence of discrimination, summary judgment upheld); Matchell v. Data General Corp., 12 F.3d 1310, 1318 (4th Cir. 1993) (no direct evidence of discriminatory motive, summary judgment upheld); Anderson v. Barter Health Services, 13 F.3d 1120, 1125 (7th Cir. 1994); Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 541-545 (5th Cir. 1994) (lack of direct evidence that improper discrimination had "determinative influence" on employment decision, judgment for plaintiff reversed).

Recent 3rd Circuit decisions are also instructive. Ezold v. Wolf, Block, Schors and Solis-Cohen, 983 F.2d 509 (3rd Cir. 1992) cert. den. 114 S. Ct. 88 (1994) involving the failure to promote a female attorney to partner, analyzes at length the tiers of proof to be followed in improper promotion claims (at p. 522-523), particularly assessing a managerial promotional decision, which may involve objective criteria but of necessity requires subjective judgment by the employer of the skills necessary for the management position and the candidates' ability in those skills. See also Griffiths v. Cigna, 988 F.2d 457, 467-472 (3rd Cir. 1993).

The two State Appellant decisions most relevant to this case arrive at subtle but meaningful differences as to the burden of proof on the comparison issue with other applicants. Kearny Generating Sys. Pub. Serv. v. Roper, 184 N.J. Super. 254 (App. Div.), cert. den. 91 N.J. 254 (1982) defines the burden of proof as upon the plaintiff to demonstrate that his qualifications are superior to the other applicants', so as to demonstrate the employer's articulated reasons as pretextual. Jameson v. Rockaway Tp. Bd. of Educ. 242 N.J. Super. 436, 447 (App. Div. 1990), referred to in the remand by the Merit System Board, sets forth a subtly different analysis of the burden of proof; stating that if plaintiff has made a prima facie case, then "at that point, the employer's proofs must focus on the qualifications of the other candidates. The employer must prove by a preponderance of the evidence that the adverse action would have taken place regardless of the retaliatory motives of the employer." The analysis in Kearny appears to be more in line with recent authority as the State Supreme Court in Grigoletti and the U.S. Supreme Court in St. Mary's, holding that the burden of proof on all issues remains with plaintiff, including the issue of comparison of qualifications. See generally Ezold, see also Alito, N.J. Employment Law § 100-101.2 (1992).

Under the analysis in those cases, appellant's burden to make a prima facie case was to demonstrate that (1) he engaged in a protected activity known to the employer, (2) he thereafter was subject to the adverse employment decision by the employer, and (3) there was a casual link between the two. The Township then had to articulate some legitimate reasons for the promotional decision. In this case, the employer Township on each promotional decision articulated the reasons for its selection: that the appellant was not the most qualified, that another in the pool of candidates was more qualified based upon such factors as education, experience, seniority, and a subjective assessment of candidates for the ranking position, and the selection (as to the 1990 promotion) would effect savings by allowing consolidation of jobs. The appellant than has the burden of proving the articulated reasons were false or pretextual and that retaliatory intent actually motivated the decision. The appellant had to prove that the articulated reasons were false, that he is the most qualified in the pool of candidates,

and the improper retaliation actually motivated the decision. In fact, to have a viable claim of improper retaliatory promotion, the appellant was required to prove that he is more qualified than all the other eligibles, and failure to prove this requirement is a fatal deficiency. [FN5] See Kearny, 184 N.J. Super. at p. 260; Jameson, supra, at p. 449; Ezold, 983 F.2d. at p. 533-538.

It is also important to understand that the retaliation, to be improper, must be for "protected conduct" and that most disagreements or complaints by an employee concerning his work or superiors are not protected conduct. Protected activity is limited to the exercise of certain rights such as refusal to commit illegal activities, or active whistleblowers who report illegal or improper employer practices. The employee's "activity", to be "protected", must directly concern a violation of a clear mandate of law or public policy of this State, and not merely a personal disagreement or dispute as to internal policies or management style. See Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 88-92 (1992). Matters of personal issue to the employee or complaints or objections to managerial style or office policy not involving illegality are not "protected conduct". See DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159, 170-173 (App. Div. 1991); Bourque v. Town of Bow, 736 F. Supp. 398 (D.N.H. 1990) (criticism of superior's shortcomings did not implicate public policy); Dicomes v. Washington, 782 P.2d. 1002 (WA. 1989) (disagreement concerning use of state funds did not rise to level of illegal conduct); Rice v. Ohio Dept. of Trans., 887 F.2d. 716, 720-721 (6th Cir. 1989) (failure to promote public employee as alleged retaliation for previous promotion complaint; court dismisses not "protected activity" as involved private concern only). Complaints about one's own employment situation only do not implicate a matter of public concern, and are not "protected conduct". See Yatvin v. Madison Metropolitan School Dist., 840 F.2d. 412, 418-420 (7th Cir. 1988; Mott v. Ledbetter, 806 F. Supp. 991, 992 (N.D. GA. 1993); Alexander v. Kay Finlay Jewelers Inc., 208 N.J. Super. 503 (App. Div.), cert. den. 104 N.J. 466 (1986); Berg. v. Hunter, 854 F.2d. 238 (7th Cir. 1988); McEvoy v. Shoemaker, 882 F.2d. 463 (10th cir. 1989) (police officer sends letter complaining of promotional policies and alleged mismanagement, not protected activity); Brown v. City of Trenton, 870 F.2d 318 (6th Cir. 1989).

N.J.S.A. 11A:2-24 establishes as protected conduct "an employee's lawful disclosure of the violation of any law or rule, governmental mismanagement or abuse of authority". That provision appears to protect active whistleblowing, the lawful reporting of such activities to appropriate authorities. Mere grumbling about alleged improper activities of co-workers or supervisors, without a refusal by the employee to participate or the reporting of the activity to a outside agency, is not "protected conduct". See Grundice v. Drew Chemical Corp., 210 N.J. Super. 32, 36 (App. Div.), cert. den. 104 N.J. 465 (1986) (private investigation of alleged criminal acts of fellow employees does not implicate public policy); House v. Carter-Wallace Inc., 232 N.J. Super. 42,50 (App. Div.), cert. den. 117 N.J. 154 (1989); Citizens State Bank v. Libertelli, 215 N.J. Super. 190 (App. Div.) 190 (App. Div. 1987) (internal complaints about alleged banking regulatory improprieties by superiors not protected conduct); compare Potter v. Village Bank of New Jersey, 225 N.J. Super. 547 (App. Div.), cert. den. 113 N.J. 352 (1988) (reporting bank improprieties to outside agency is protected). This distinction is highlighted in First Atlantic Leasing Corp. v. Tracey, 738 F. Supp. 863, 872 (D.N.J. 1990) comparing Potter, where no such disclosure occurred. See Fineman v. New Jersey DHS, 272 N.J. Super. 606, 628 Fn. 8 (App. Div. 1994). Thus, the various allegations must first be demonstrated as implicating a "protected activity".

It was appellant's further burden to prove he was the superior candidate of the three eligibles on each promotion, in such qualifications as educational level, job experience, and quality of work performed. See Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 84-85 (1978); Anderson v. Exxon Co., 89 N.J. 483, 491, 499 (1982). As the captain position was managerial, matters of personality and the subjective judgments of immediate supervisors become recognized as of more weight in the decision-making process. Peper, at page 80- 81; Turner v. Schering-Plough Corp., 901 F.2d. 59, 61 (3rd Cir. 1989) (when executive positions are involved, "particularly abstract considerations"

are implicated). See also Ezold, supra; Savko v. Port Authority, 800 F. Supp. 275 (D.C. Pa 1992). In that context, the courts have found legitimate, non-discriminatory reasons for an employment decision to be that the employee was contentious and adversely reacted to a superior's criticism of his performance, Ericksen, 117 N.J. at 560-561; Gorham v. AT&T Co., 762 F. Supp. 1138, 1144 (D.N.J. 1991); Bellissimo v. Westinghouse Elec., 764 F.2d. 175, 182 (3rd Cir. 1985); or that the employee and supervisor had genuine personality conflict, Velantzas v. Colgate Palmolive Co., 109 N.J. 189, 194 n. 2 (1988); or could not interact with superiors and others, Retter, 755 F. Supp. at 640; Gorham, 762 F. Supp. at 1144; or that the employee's attitude to work, public and other employees was poor, Lloyd v. Stone Harbor, 179 N.J. Super. 496 (Ch. Div. 1981); or that the employee promoted had better supervisory experience and was a better communicator; Weiss v. Parker Hannifan Corp., 747 F. Supp. 1188 (D.N.J. 1990). In the Civil Service area, the first scorer was properly bypassed on the basis that, although competent, she was believed by her superior to have difficulty dealing with the public and coworkers or projecting the desired image and was too eccentric. Kiss v. N.J. Dept. of Community Affairs, 171 N.J. Super, 193, 200 (App. Div. 1979).

The employer's burden is merely one of production; the plaintiff at all times retains the ultimate burden of proof. Kearny, supra. at page 259-260. Appellant cannot simply rely upon conclusionary assertions that he was denied promotion because of improper motivation, see Liotta v. Springdale, 985 F.2d. 119, 122 (3rd Cir. 1993); House v. Carter-Wallace Inc., 232 N.J. Super. 42, 54- 55 (App. Div.), cert. den. 117 N.J. 154 (1989) (summary judgment granted where plaintiff produced no testimony or evidence showing connection of alleged protected activity to employment decision, plaintiff's personal belief is merely speculative); Fineman v. N.J. Dept. of Human Services, 272 N.J. Super., (App. Div.1994). Conclusionary speculation by the employee is insufficient. Appellant is required to prove that retaliation was the motivating force for the promotion decision, "but for" the defendant's retaliation against the petitioner's protected activity he would have been the candidate promoted, see 45 Am Jur 2d Job Discrimination § 258, p. 291; Committee Organizer v. Mikinelle, 114 N.J. 87, 99-102 (1989); Matter of Bd. of Chosen Freeholders, 116 N.J. 322, 335 (1989). Ultimately, appellant must make a "persuasive showing... that the decision not to promote him was based upon something other than a bona fide evaluation of his qualifications" as compared to the other candidates. See Peper at page 80-81, 86 showing that the employer was innocently mistaken in its assessment of the relative qualifications does not carry appellant's burden, as the court does not sit as a super-personnel department. See Savko v. Pot Authority, 800 F. Supp. 275, 284 (D. PA. 1992). Nor does showing that the employer was subjective in his assessments and failed to make sufficient efforts to verify negative information as to plaintiff. Wachstein v. Slocum, 265 N.J. Super. 6, 18 (App. Div. 1993). The appellant must establish by direct proof, and this Court must find, that "but for" improperly motivated retaliation, he would have been the one promoted.

Further, appellant is not a member of a "protected class", for whom it can be presumed that adverse acts, otherwise unexplained, embody the effect of entrenched discrimination. Appellant (and all relevant parties) are white males, members of a class that has not historically been victimized by discrimination or retaliation. See Erickson, 117 N.J. at page 551-552: Wachstein, supra. at page 11-12. There is no presumption that adverse acts are discriminatory or retaliatory, and the causal connection had to be proven.

With that background, the appellant's disjoined factual claims provide no support for a claim or conclusion that there was a retaliatory promotion in either 1990 or 1992. The Township articulated legitimate reasons why other eligibles were selected, Fowlie in 1990 and Kryscnski in 1992; those reasons being that the appointed candidates had superior qualifications both objectively and subjectively. Those superior qualifications are undeniable, as detailed herein. Since the appellant is clearly not the superior candidate, he simply cannot establish the articulated reasons are false or pretextual and thus cannot present a viable claim of improper retaliatory promotion. Beyond that, there is no direct evidence ... in fact there is nothing beyond appellant's own conjecture and

supposition ... that retaliation for any past event, whether protected conduct or not, had any bearing on the promotional decisions. There certainly is no evidence that retaliation for protected conduct had a determination effect.

August 1990 Promotion Analysis

A) The first incident proffered was Oches' 1980 grievance. However, there is a complete lack of evidence for a connection between this by no means unusual employment event in 1980, only peripherally involving Letts, and the promotion decision ten years later.
Firstly, the one thing agreed on by all witnesses was that McCarthy... the Chief for 23 years until 1989... was a hands-on forceful chief and all personnel decisions (1T53-1 to 56-1), including the overtime issue resulting in Oches' 1980 grievance (1T73-20 to 78-18; 1T111- 7 to 113 - 10), were his decisions. While Letts agreed with and defended the chief's decision, it was McCarthy's decision. That is why Oches brought the grievance to McCarthy (2T140; 3T 114), and McCarthy responded by denying it in writing (R-1). Oches concurred that McCarthy was a strong Chief, who made all personnel decisions (3T102-22 to 106-17). The Court's findings, to the effect that it was Lett's decision that was grieved and then Letts transferred Oches out of Detectives (Findings 4 and 5) are clearly erroneous and not supported by any testimony. As to Oches' transfer from Detectives, in fact McCarthy himself acknowledged that, again, it was his decision... as were all personnel changes... made "because of a manpower shortage" and budget problems having nothing to do with Oches or the grievance (1T13-11). That it was McCarthy's decision on both the grievance and transfer was also confirmed by Letts (4T186- 6 to 192-25).
Oches testified he never knew that it was McCarthy's decision, both on the overtime grievance and his transfer, but he assumed it was Letts' decision (3T116-1 to 117-6; 3T121-10 to 123-20). Oches even acknowledged that McCarthy had told him the transfer was his decision and had nothing to do with the grievance (3T126-1 to 129-4). However, Oches simply chose to disbelieve that, and based only on his own speculation, blamed Letts. This Court then apparently accepted that speculation as fact.
Thus, the finding relating the 1990 promotion in part to retaliation by Letts because of a challenge to his 1980 overtime decision is totally

unfounded. It was not his decision in 1980, either on the grievance or transfer. Besides, there was no evidence that Letts would have any particular personal interest in this now 10 year old routine grievance, and obviously it was only one of many such routine management decisions over the course of Lett's 36 year career (4T186-6 to 198-12). Oches admitted he never spoke to Letts to determine whether he was upset, but instead on his own decided to give Letts "a wide berth" for the next ten years (4T34-7 to 38-15).
Whether or not Letts was upset in 1980, there was no proof at all of any causal connection to the promotion decision, ten years later. A point that was generally agreed to by all witnesses was that police work, as many work situations, resulted in numerous routine disagreements between co-workers, or between supervisors with subordinates, as to working techniques or tactics in a particular case. These disagreements, many involving Oches with others being brought up at the hearing, were generally described as "professional" in nature, not personal, and were put behind the parties after their resolution. See Cerame 9T 150; Brunt 9T 213; Rubino 9T 231; Bradshaw 10T171. Letts had a 36 year unblemished career, rising to Chief, and was described by all as a man of good character and judgment and an excellent police officer (1T59-14; 1T185-20 to 187-25). Oches even acknowledged that no one ever told him, from 1980 to 1990, that Letts was upset or harbored ill will against him as a result of this grievance or the hearing (3T132). McCarthy testified that Letts did not think highly of Oches, but he attributed it to a difference in operating style and personality, "a disagreement with a

trend of thinking" (1T60-20).

Why this routine and minor professional disagreement between a supervisor and subordinate in 1980 could or would have any causal connection to the 1990 promotional decision was not demonstrated. One of the key elements in demonstrating causal connection is timing: an inference of retaliatory motive may be established from an adverse action occurring reasonably soon after the employee's protected activity. See County v. Dole, 886 F. 2d. 147, 148 (8th Cir. 1989); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F. 2d. 563, 566 (8th Cir. 1980), cert. den. 450 U.S. 1040 (1981); Melcki v. Burns Int. Sec. Serv. Inc., 597 F. Sipp. 575 (E.D. Mich. 1984); Committee, supra., 114 N.J. at 101 (discharge occurred two weeks after protected activity). Conversely, the intervention of a long period of time is evidence of the lack of a causal connection. See 45A Am Jur 2d Job Discrimination § 256 and cases cited therein; House v. Carter Wallace Inc., 232 N.J. Super. 42, nl (App. Div.), cert. den. 117 N.J. 154 (1989).

In fact, the only demonstrated result of Letts allegedly being upset in 1980 about the grievance, or more correctly and ridiculously only Oches being told by McCarthy during lunch at the grievance hearing in September 1980 that Letts was upset, was that Oches ... without ever speaking to Letts to verify the problem or clear the air ... then "gave Letts a wide berth" for the next ten years; avoiding Letts until he became the Chief designee in September 1989 (4T34-7 to 38-15). Thus, the only evidence was that Oches acted ... or reacted ... to the grievance, by avoiding Letts for the next ten years. That a superior officer might legitimately not have a viable working relationship ... or the highest regard for ... a subordinate who intentionally avoided him for 10 years, for some undisclosed reason, seems neither surprising nor improper.

B) The next event, the appellant investigations of Deickmann and Scott, occurred almost six years later in 1986. As to Deickmann the initial information alleged disclosed by Oches in his background investigation that supposedly inflamed Letts ... Deickmann's alleged falsification of County Jail-Sea Bright records to get paid twice for the same hours ... was erroneous, and was so found by this court (Factual Finding 15, page 74). In fact, as detailed by Pollinger (7T10-5 to 32-8) and Fred Deickmann's testimony (7T85-10 to 131- 4), THE ALLEGED double dipping by Deickmann simply did not occur and Oches in his report put down the wrong year (1985), among numerous other fact errors. [FN6] In 1984 Deickmann's shifts as a full-time jail guard and weekend special officer in Sea Bright did not overlap, and in March 1985 Deickmann became a full-time Sea Bright officer and left County employment. While Deickmann going home sick at 3:00 a.m. on September 2, 1984 and recovering sufficiently to go into work at Sea Bright at 11:00 A.M. may well have arisen from his working too many hours on the two jobs, there was nothing either nefarious or illegal about his conduct or the incident. Thus, what was disclosed by Oches was an erroneous slanted version of Deickmann Senior (3T138-12 to 144-25). Oches' motivation for this inaccurate information on young Deickmann seems suspect. However, Oches' "errors" in his report were cleared up and corrected by Pollinger on his reinvestigation, and Deickmann was then properly hired as a police officer.

Be that as it may, the information obtained by Oches and Pollinger was disclosed, and Chief McCarthy made the hiring recommendation to the appointing authority. Letts' interest apparently is to be insinuated because Letts and Sergeant Deickmann, Fred's father, were co-workers, being neither social or close friends. Why Letts would harbor a personal single-minded vindictiveness from this was never explained or connected to the 1990 promotional decision, 5 years later.

The Scott matter was even more ephemeral. Oches, as background investigator, ascertained matters which were really of public record (DWI convictions) and apparently known by a number of persons even before this investigation (2T160-12 to 161-78). Scott was rejected for appointment by McCarthy, with Letts' concurrence, and both Letts and McCarthy testified in a subsequent administrative appeal against the hiring of Scott and that decision was upheld (4T207-6 to 215-25). Obviously, Scott Senior being a policeman made the situation unusual and sensitive. The inability of Oches to respect that sensitivity, by casually discriminating the flaws of young Scott around the

department, resulted in his being taken off applicant investigations. As to why Letts should take this incident personally and retaliate, the petitioner proffered only that he believed Letts and Scott Senior occasionally played golf together once in a while at police golfing events (2T159-25), certainly a personal connection tenuous in the extreme.

To find that Letts would carry a single minded vindictiveness for years ... for incidents that involved other policemen's relatives and had no personal connection to him ... is again without logic or support, attributing a pathological mind-set to a ranking police officer with an unblemished 35 year record described consistently as of good judgment and character. Whatever the disagreement, if any, as to whether Deickmann or Scott should be hired, there was absolutely no evidence beyond conclusionary speculation that Letts had a personal interest, or bore Oches any ill will over the matter, or that these events had any effect or impact upon the promotional decision several years later. Obviously, the point made earlier as to timing of the alleged adverse action applies here also.

C) In the 1986 Woods matter, Oches alleges that he, as the investigating officer, and Letts disagreed as to whether criminal charges should be filed against one Walter Woods, a township summer employee over allegations of theft of a small amount of money. Letts denied that any disagreement occurred. The Township Administration, being the then administrator and attorney, determined not to press charges upon obtaining restitution and terminating Woods' employment, and Oches as the investigating officer on his own determined not to file criminal charges. There was nothing illegal or improper about that position or resolution (4T217-1 to 223-11). Much later, there was a call from the prosecutor's office inquiring as to the matter. Oches' claim is that he incurred Letts' animosity only because he felt Letts believed he had called or complained to the Prosecutor. He had not done that and so informed Letts (2T166-6 to 178-3). More incredibly, Oches' belief that Letts did not believe him was based only upon Oches' interpretation of Letts' facial expression and tone of voice. Letts said or did nothing that showed ill will arising from this matter (3T167-13 to 176- 25). In fact, even according to Oches, Oches did nothing that should upset Letts; he did not file charges nor call the Prosecutor. The claim of animosity arises only from Oches' suspicion that Letts thought he had called. The Prosecutor's report on the matter, which Letts subsequently obtained, showed that the inquiry to the Prosecutor had been made by a teacher in the high school (4T217-7 to 219-3) and that it was the Township Administrator, and not Letts, that decided not to press charges upon restitution and resignation (4T5-25 to 12-22). Thus, there is a threshold question here of what is the alleged "protected activity". Presumably, Oches is inferring something was amiss in the Woods matter and if he had filed charges, or called the Prosecutor, he would have been acting correctly and in a protected activity. But he did neither. Oches' claim here seems to be that he was retaliated against because Letts suspected he engaged in a "protected activity" that he really never did. Such a converse claim ... of being suspected of "protected activity" but not doing it ... had never been held by the Courts as being a justifiable claim.

Beyond the threshold issue, the claim of animosity is based solely on Oches' unsupported suspicion that Letts disbelieved his unsolicited denial of calling Prosecutor"s office. Letts never thought he had, and the report confirmed Oches had not. In fact, there was nothing improper in the handling of the case and nothing to tie this matter, in which no disagreements had occurred, to the 1990 promotional decision.

Making these allegations particularly mystifying is the undisputed and documented fact that at the same time in 1986 that these improprieties were allegedly being perpetrated by Letts and Oches was supposedly suffering threats and abuses at his hand, Oches named Letts as his first reference on his FBI Academy Application (R-5), anticipating a favorable, or a least honest, reference. In fact, Oches acknowledged that Letts encouraged him to attend. Oches' rather lame explanation for this incredible incongruity ... that he wanted to use only Academy graduates in 1986 on the Middletown force. Common experience will also confirm that one usually puts first the person they feel is

their strongest and best reference on any job or professional application. To believe Oches' claim now is to believe he would name Letts as his first reference in spite of his having an at-this-time six year vendetta against Oches ... compounded with the on-going demands for improper deletion of information and veiled threats. In those circumstances, for Oches to put Letts down as his first reference for entrance to the country's premier law enforcement training school ... and Letts to then give him a good recommendation ... defies common sense and experience. Again there is not evidence causally connecting these 1986 matters to the 1990 promotional recommendation or Letts.

D) As to the allegation of animosity arising over Oches' alleged objections to retrieving Lt. Monahan's car, it was confirmed by all that it was Chief McCarthy's decision as to Monahan's position and use of the car. Oches was told several times to pick up the car by McCarthy, Letts, and Halladay, and apparently grumbled about it to McCarthy and Halliday (1T23-3 to 26-13). Both McCarthy (1T86-23 to 91-20) and Letts (4T228-8 to 234-21) testified that Letts had asked McCarthy many times to take Monahan's car away permanently; but that McCarthy would take the car only temporarily. There was no "protected activity" here. If Monahan was in fact intoxicated having access to a town vehicle, it obviously is proper to pick up the vehicle, or direct a subordinate officer to pick it up. Whether Monahan should have been disciplined, or have the car permanently taken, was the determination of Chief McCarthy, and McCarthy testified Monahan was a "fine" police officer with an occasional drinking problem off-duty and that discipline was not appropriate. As with other officers, McCarthy assisted them in addressing their drinking problem (1T24-6 to 26-7). There was no evidence that Letts was aware of Oches' complaints about the car or that he disagreed with the tenor of the complaints, i.e. that Monahan should not have use of the town car.

Appellant's railing about the "cover-up" concerning his "drunken superior" demonstrates an astounding lack of sensitivity and awareness that alcoholism is a handicap, defined in Clowes v. Terminex Inter. Inc., 109 N.J. 575 (1988) as a protected handicap. Discrimination or job action against Monahan premised on being an alcoholic would have been illegal under the Law Against Discrimination. See also Matter of Collester, 126 N.J. 468 (1992). Thus, his superiors could not discipline or publicly disgrace Monahan for being an alcoholic; their responsibility was to attempt reasonable efforts to accommodate his handicap. That reasonable accommodation was decided by McCarthy as temporarily taking Monahan's car, upon ascertaining that he was drinking. There is no evidence, beyond Oches' bald supposition, that Monahan was not properly doing his job, or that he had been driving the town vehicle while drunk, so as to be properly disciplined for improper work performance. Monahan's alcohol problem was an unfortunate affliction and handicap, but it was addressed reasonably and properly by Chief McCarthy. Oches' effort to turn this accommodation, and directives to pick up the car, into some type of illegal "cover-up" or act by Letts ... and his complaints about being required to help out into "protected conduct" ... is without any merit. It usually reflects an archaic and callous lack of judgment and sensitivity on his part to a protected handicap.

The Court, however, concludes concerning this matter that (decision, page 82):

Letts was upset, angry and resentful that appellant had written Letts a memorandum requesting that appellant be named Executive Officer of the Detective Division because Monahan was not performing his assigned duties and appellant was doing Monahan's work in Monahan's absence.

This conclusion is unfounded. First the memorandum by Oches to Chief McCarthy (A-19) seeks only Oches' own promotion, as such it is not "protected conduct". See cases cited at R-54. Second, the only "evidence" that Letts was upset by the request was Oches' totally hearsay claim that Chief McCarthy told him Letts was "upset so bad he went home sick the rest of the day" (2T191-8). However, McCarthy, Oches' witness, did not testify to any such "upset" and he was not even asked about the incident by Oches' attorney, so Oches' later testimony was totally unsupported hearsay. Letts testified he was shown the Oches memorandum by Chief McCarthy and was not mad but felt that it was not proper at that time to demote Monahan and replace him with Oches (4T237-1 to

238-18). Thus, the finding that Letts was "upset, angry and resentful" is simply unsupported.

E) Several other matters were raised by Oches as the basis for his claim of a retaliatory promotion decision. Those matters were not commented on by this Court, presumably because they were of no substance. They are referred to here only to illustrate how flimsy and conclusively the appellant's allegations really were. As to the 1988 Bradlees incident, the claim was that Oches suspected, due to Letts' voice inflection, that Letts did not believe Oches when he denied involvement in the leak to the press of the Bradlees police report. Oches acknowledged that it was legitimate that he be asked about the leak, and that if he had leaked the report it was legitimate that there be discipline. His feeling that Letts had animosity was solely his own conclusion ... based solely on Letts' tone of voice ... that Letts did not believe him. (4T16-7 to 23-17). First, there was no activity here, mush less "protected activity". Oches had no involvement in the Bradlees matter. Any inquiry to Oches was legitimate, and McCarthy made his own inquiry to Oches (1T91-16 to 95-17) ... an action which Oches found no problem with. The claim here ... based only on Oches' doubts whether Letts believed his denial of involvement ... is simply speculative. There was no proof that Letts did not believe his statement, or that Letts had any particular involvement or personal interest in this Bradlees matter or any ill will against Oches or anyone else from it, or that this matter had anything to do with the 1990 promotional decision.

F) As to the 1989 knife seizure incident, Oches complained that Letts, as Chief, released the knife to the youth's father, presumably a responsible adult, over Oches' objection (3T14-10 to 20-15). Letts testified Oches had no objection and concurred in its release (4T 242-24 to 249-4). No criminal charges were ever filed by Oches or any police officer related to this knife.

In fact, the police (or Oches) had no right to simply retain the knife, with no criminal charges being filed. As per the Forfeiture Act, N.J.S.A. 2C:64-1 et seq., the knife is not " prima facie contraband", subject to forfeiture without a judicial proceeding. Forfeiture of this knife would require the State to initiate a civil forfeiture action within ninety days of the seizure. See Dragutsky v. Tate, 262 N.J. Super. 257, 260-262 (App. Div. 1993). If the State does not institute such action, the owner asked the Mayor, McCarthy or Letts whether Oches concurred.

Taking Oches' claim as stated, his objection to return of the seized knife would not be a "protected activity" nor "lawful disclosure of the violation of any law or rule, governmental mismanagement or abuse of authority". In fact, simply keeping the property without due process would have been a violation of law and abuse of authority. Thus, as Oches alleged, if Letts disregarded Oches' objection and released the knife, he was actually taking the correct action. Actually, the incident again illustrates Oches' lack of judgment as a ranking officer; he is proffering here that a police officer can simply keep private property, without due process or charges, and that the returning of it to its owner constitutes an improper act.

G) Oches also very briefly raised inferences concerning union activity and political affiliation. As to union matters, Oches was recording secretary for the SOA, starting in 1988. However, he acknowledged that he did not participate in any communications or grievances or negotiation sessions with the employer (4T45-2 to 53-29). Letts was not aware of any union office or activity by Oches. Oches's described involvement in union action was limited to a casual discussion in early 1991 with Letts about a pending SOA objection to a Chief's directive about white shirts (4T53-20 to 57-20). Fowlie, in fact, had a much more extensive involvement in union affairs than Oches (8T180-14 to 182-13), being a PBA organizer and officer for many years.

The political claim was even more nebulous. Oches was neither a Democrat or Republican. His alleged political retaliation was that in 1989 he casually spoke around headquarters favorably about the Democratic candidates and hammered a Democratic political sign on his parents' lawn. There was no evidence that either if these minimal activities, union or political, were known by Letts or the decision-maker Alloway, or had any impact or bearing on the decision. The Court apparently found no substance to any

of this union or political claim, not commenting on them in the decision.

Analyzing each of the alleged incidents as to whether a prima facie case was demonstrated shows clearly that each is either attenuated, insubstantial, or did not involve protected activity. Beyond that, there is no proof of the ultimate requirement, i.e. that these allegations (as protected conduct) and causal connected between any of the allegations and the 1990 promotional action, proving that retaliation for an incident protected conduct was the "determinative influence" on the promotion decision by Alloway. Oches, in fact, acknowledged there was no evidence that any of these events played any part in Letts' promotional recommendation (4T34-7) and that any connection was his own conjecture.

Beyond that, the actual promotion decision was made by Alloway, and none of these tenuous allegations impugned the decision-maker or his decision. Alloway can reasonably and best be described as a career government managerial executive, having served in several large cities and internationally as a non-partisan municipal or city administrator and in New Jersey State government as head of Civil Service and the Division of Local Government in both Democratic and Republican administrations. His credentials, experience, and non-partisanship really cannot be legitimately attacked (R-6). He made the promotion decision based upon his review of each candidate's qualifications and his experience over 3 years with the candidates. Alloway was aware of Letts' recommendation of Fowlie, and the basis for it, and considered it in his decision. However, Alloway testified it was his decision based upon his own assessment of the three eligibles. Ultimately there is no evidence of any causal connection at all between any of Oches' alleged claims and Alloway or his promotional decision.

The Court's critical conclusion, which was clearly erroneous under proper Rule of Three analysis, was that "Alloway, as appointing authority, could not demonstrate that his appointment of Fowlie to the position of captain was objective, without bias or prejudice against appellant". (Factual Findings 26, page 75). As demonstrated earlier, it is appellant's burden to prove that improper retaliation was the "determinative influence"; it is not the employer's burden to prove it did not. Apparently on that faulty premise, the Court found that "Chief Letts' pretest selection of William Fowlie to the position of captain made a sham and mockery of the examination process and procedure. Appointing authority Alloway contributed to the pretext by his failure to conduct an independent, objective analysis of the candidates prior to the appointment of Fowlie" (page 83).

That is simply not so. Alloway testified in detail regarding the background as to the captain opening in 1990. He further described that process followed and detailed the basis for his decision, i.e. that Fowlie was best qualified by education and experience and his selection would eliminate the need for a lieutenant slot (3TA12-9 to 29-1). In that process, he reviewed their personnel records, and discussed their qualifications with Chief Letts and received his recommendation (see also 3TA 68-8 to 79-10).

In fact, the propriety of Alloway's decision-making process, on this exact decision, is detailed in the decision, adopted by Merit System Board, in Hannafey v. Middletown, 92 NJAR 2d. (CSV) 594 (1992):

Alloway testified that he is the appointing authority for Middletown Township. He reviewed promotion recommendations for both financial soundness and qualifications. According to Alloway, he presents his appointment choices for comment by the governing body. Although Alloway had not been in favor of filling the vacant deputy chief position because he thought it hindered competitiveness among the captains, the governing body decided that there should be a deputy chief. Alloway and Letts discussed the merits of each recommendation Letts presented for the captain and sergeant promotions. According to Alloway, he did not know each captain personally, but he read their reports and made inquiries about them. Alloway testified credibly that he had no problem with any of Letts' recommendations. When Letts and Alloway met with Parkinson to discuss the recommendations, Parkinson had no objections.

Alloway testified that the promotion matter was presented to the governing body in August 1990, and then Alloway implemented the promotions. According to Alloway,

numerous factors were considered in making his decisions to promote. He watched the activities of the police department and read the department daily and monthly reports. He reviewed the recommendations of chief Letts and questioned him about them. Alloway also considered the questions and answers developed in review by the governing body. It was Alloway's sincere testimony that a candidate for the position of captain must have superior officer ability and that Lieutenant Fowlie's background of experience made him the best candidate for promotion to captain. In Alloway's opinion, Fowlie's work in the record and service division was very important, as was his graduation from the FBI Academy. Fowlie had experience in other police divisions and was a well rounded officer.

Alloway was a straightforward, candid and sincere witness, and his testimony was believable in every respect.

As demonstrated earlier, even if Alloway's decision was subjective or based on insufficient investigation that does not establish impropriety or invalidate this appointment. See cases, supra. at Rb 57. The next proof tier requires that the Township articulate legitimate non-retaliatory reasons for the promotion decision. The Township obviously satisfied that production requirement by articulating that the selection of Fowlie was based upon his superior education (Associates degree with 21 accounting credits), general experience including particularly being an FBI Academy graduate, seniority, and 5 years of specialized experience and expertise in the police computer and Records & Service. In addition, Fowlie's promotion permitted the elimination of the lieutenant slot in Records & Service, an action that could not have been if another candidate was promoted because the executive slot would not be deleted in other divisions and the other candidates were not qualified by education or experience for Records & Service (4T249-8 to 260-4; 5T27-22 to 29-25; 5T140-5 to 163-2). Both Letts and Alloway also testified that they were personally familiar with the eligibles, had reviewed their records, and determined that Fowlie was the best qualified candidate. The employer having articulated legitimate reasons for the decision, Oches then had the burden of proving that the reasons were false or pretextual, that he is the most qualified applicant and that improper retaliation actually motivated the decision. Appellant not only failed to prove that, he failed to even address it, instead merely relying upon his misleading conception of the rule of three that the higher test score entitled him to the promotion unless the Township proved he was not qualified.

In fact, on the issue of qualifications all the evidence was that Fowlie was the superior candidate. Even putting aside subjective analysis and comparing only the objective criteria, Fowlie clearly was superior. Fowlie had an Associates Degree with 21 accounting credits, Oches a High School Equivalency Diploma; Fowlie is an FBI Academy graduate, Oches is not; Fowlie 20 years seniority, Oches 16 years; Fowlie had 2 years Marine Corps. duty, Oches left the military after 6 months for asthma; Fowlie had specialized experience in computers and budgets, Oches had none. In addition, promotion of Fowlie permitted the Township to eliminate the executive officer slot in Records, because of his abilities and experience in that area.

In addition, the subjective assessments of Letts and Alloway that Fowlie was the superior candidate in capabilities, demeanor and ability to work with his superiors and other personnel was certainly never demonstrated to be false or pretextual. In fact Oches himself supplies several reasons supporting and indeed almost dictating the validity of the subjective assessment. Police captain is a division head, reporting directly to the Chief. Certainly, a valid consideration by a Chief for such a close working position is personal loyalty and respect and the expectation that his immediate division head would work closely with him to implement and promote his policies. See Germann v. City of Kansas City, 776 F. 2d. 761, 764-765 (8th Cir. 1985) (plaintiff properly passed over for promotion to fire battalion chief because of his "great deal of personal hostility and suspicion" of fire chief would make it unlikely he would implement and effect chief's policies); Hall v. Ford, 856 F. 2d. 255 (D.C. 1988) (athletic director must be compatible with his superior, the university president). Oches himself testified that after being told by McCarthy in 1980 that Letts was upset over the grievance, he then deliberately

avoided Letts as much as he could for the next ten years (3T 137-20 to 138-9), giving him "the widest berth that I could" (4T35-1). He only changed this posture of avoiding Letts in September 1989, when he thought Letts would shortly be the new Chief. That change lasted only until early 1990 when Oches inquired of Letts as to the promotion. Not believing Letts' response, Oches again unilaterally decided to "just stay away from him as much as I could". Thus, it was Oches that disliked Letts and avoided him as much as possible for many years, other than the limited time from September 1989 to early 1990 when he was angling for the promotion (4T35-9 to 38-15); all this apparently premised upon McCarthy's comment at lunch in 1980 and without ever discussing the matter with Letts. McCarthy, commenting on his perception that Letts and Oches did not get along, did not know the reason but felt it was because of a "disagreement with a trend of thinking" ... Oches being more confrontational or direct as McCarthy and Letts being more restrained (1T 60-20). Certainly, Letts and Alloway subjectively could favor the candidate who did not deliberately avoid the Chief and could communicate and had a similar "trend of thinking", and could weigh into the consideration the fact that Oches had made a deliberate and concentrated effort to avoid Letts and communicated with him as little as possible for ten years for ... to Letts ... some unstated and unknown reason.

Beyond that, it must be established that petitioner's qualifications were superior to all the other candidates. See Kearny, at page 260-261. Oches really never addressed that, relying simply on his test ranking. Even on that premise, Oches was number two on the list; the number one candidate was Hannafey. Under the premise that the number one candidate cannot be passed unless not qualified, Hannafey would have the entitlement to the position and not Oches. However, Fowlie has already been adjudicated by the Merit System Board as properly selected over Hannafey. See Hannafey v. Middletown Township.

Oches was generally considered competent as a detective lieutenant; however, he was also repeatedly described as abrasive and overbearing (R. Deickmann 6T150-9 to 156-20; Cerame 6T220-13 to 227-7; Slover 4T103-18 to 115-16; Ohnmacht 4T158-8 to 161-4; Barner 9T 223-25 to 225-5; Rubino 9T23010). His immediate superior Captain Shaffery acknowledged that he had gone to Letts in early 1990, at about the time Letts was considering his promotional recommendation, and requested Oches be transferred form the detective division because of morale problems and conflicts with both the subordinates and Shaffery. After Letts refused, Shaffery then had to act "like a buffer" between Oches and the men (1T148-25 to 165-3). On the other hand, Alloway and Letts found that Fowlie was the superior candidate in quality of work, professional dedication and demeanor, and causing no communication or morale problem. Even McCarthy classified Fowlie as "excellent", and before his retirement had recommended Oches, Fowlie, and Kryscnski for captain (1T32-5 to 35-17; 1T67-20 to 70-4). No proofs were submitted demonstrating Fowlie ... and for that matter Hannafey, the first eligible ... had any of the subjective deficiencies that clearly exist with Oches.

Thus, there is no evidence that Oches was the superior candidate. The proofs show that Fowlie was the superior candidate, both objectively and subjectively. There clearly is no basis for finding that the reasons articulated by the employer are pretextual or that retaliation for protected conduct motivated the decision. There is no basis for concluding that the promotional decision was not based upon the competing candidates' experience and qualifications and that "but for" the alleged improper retaliation Oches would have been promoted. See Ezold, supra; Fineman, 272 N.J. Super. at 628. In sum, it is clear that the 1990 promotional decision was not demonstrated to be motivated by improper retaliation and stands as a proper exercise of the employer's rule of three discretion.

April 1992 Promotion Analysis

In April 1992, the new appointing authority Leo selected Kryscnski for captain. Given Leo's brief time on the job, Oches could not claim any retaliatory motivation on his part.

Oches instead continues with a conglomeration of insinuation or innuendo, mostly concerning Fowlie's selection as Chief, and largely irrelevant to the 1992 promotion. Essentially, the thrust appeared to be there was the convoluted conspiracy by numerous Township officials to delay the appointment of a new Chief until Fowlie was eligible after one year as a captain and then appoint Fowlie as the new Chief so that Fowlie would then be in a position to retaliate against Oches in the 1992 captain promotion. Such a premise is based only on appellant's speculation.

Much testimony was directed to the timing of the chief's test and the claim that it was held up to permit Fowlie to take it. The evidence in fact shows that the Township administration acted reasonably and responsibly as to the Chief test. After Letts announced his pending retirement, the Chief position was offered to Deputy Chief Volkland, the obvious successor favored by all officials. Volkland wavered back and forth until mid May 1991, and then declined the position because of his wife's medical condition. The Township then very promptly requested a test (R-12). The DOP first responded that the test would be held in May 1992. The Township sought a special test as quickly as possible and even paid $500 to advance the test date. The DOP first announced the test in September 1991, to be held in November. Subsequently, due to DOP staffing cutbacks, the test was delayed to January 28, 1992 by Alloway, who left a few days later for a new job as administrator for the capital city of the Marshall Islands, and ratified by the Township Committee.

Alloway making the Chief appointment before he left is logical and is not at all inconsistent with having the Captain appointment made by the new administrator and Police Chief. Alloway was obviously more familiar with the eligibles for Chief, they being captains, and would make a more informed decision than a new administrator, to be hired some months in the future. The new Chief would and should then have the ability and opportunity for input to the new administrator into the selection of his new Captain, a division head who would be working closely to implement the Chief's policies and directives. In addition, the Township was in the midst of a reorganization of the police department from four to three divisions, one of its managerial prerogatives, to address budget pressures resulting from new CAP requirements, PBA arbitration salary awards, and tax pressures. Reductions in the work force for budget reasons are certainly legitimate nondiscriminatory activities. See Velantzas v. Colgate Palmolive Co., 109 N.J. 189, 194, n.2 (1988); Pitman v. LaFontaine, 756 F. Supp. 834, 837 n.2 839 (D.N.J.1991) (See 6T-17 to 60-25).

The promotion occurring in April 1992 was mandated to occur immediately by the DOP by a Salary Order. The Township had a list in effect and was obligated to select from the three eligibles, Hannafey, Oches, or Kryscnski. It would not have been legitimate, mush less possible in the face of the DOP salary order, to have further delayed the promotion simply to await a new list (R-16), as proffered by appellant.

Appellant proffers the claim that Fowlie, as a result of Oches' challenge to his 1990 promotion, had a "conflict of interest" in participating in the 1992 promotion. There is no legal basis for that position. The assessment that "Fowlie's decision to promote Kryscnski over Hannafey or appellant was due in part to the pending litigation before the MSB" (page 85) is simply not supported anywhere in the record. Fowlie's testimony indicated only that at one point he considered selecting Oches, even though he did not consider him the most qualified candidate, because it would settle the appeals and avoid further controversy or jeopardy to him. He decided that was wrong, as it clearly would have been (8T237-1 to 24), and made his decision on the merits. The inference proffered by petitioner is decided in Yatkin v. Madison Metropolitan School Dist., 840 F. 2d. 412, 412, 418 (7th Cir. 1988). There plaintiff had filed a discrimination charge on a first promotional rejection, and the person promoted participated in her second promotional rejection. The Court rejected the claim that the promoted individual's participation invalidated the second promotion, stating

Yatkin presented no evidence of retaliation, but only a conjecture that since she had implicitly accused Patterson of obtaining a job that rightfully belonged to her he must have harbored resentment against her which caused him to reject her second

application.
As Chief, Fowlie has administrative responsibilities; he is ultimately responsible for the proper functioning of the police department and has the right and obligation to participate in the selection of high-ranking officers to implement his policies and directives. A governmental official cannot be precluded or disqualified from performing his designated personnel responsibilities because of having previous involvement with other employees. See Ferrari v. Mellely, 134 N.J. Super. 583, 586 (App. Div. 1975); compare Cermele v. Township of Lawrence, 260 N.J. Super. 45, (App. Div. 1992).
A couple of further points should be considered. First, Oches never raised an objection to Fowlie's participation in the second promotion. Second, if Fowlie did not participate, the responsibility for participation and recommendation would logically fall to Deputy Chief Volkland. However, the Court sustained appellant's objection to Volkland testifying as to his intended recommendation (7T197-5 to 202-2).
Oches sought to give this claim some vitality by his affidavit (A-2), submitted in the Shaffery Chief appeal, as a "protected activity" and that Fowlie was retaliating for that. The accuracy of the affidavit must first be considered. Oches' version (3T51-1 to 69-4) was contradicted specifically by Katherine Fowlie, supposedly quoted in the affidavit, who gave a very precise description of the event (5T234-14 to 239-5) largely supported by the police officers present, Estock (4T138-24 to 151-6) and Ohnmacht (4T154-18 to 158-6). The fact is that Oches' affidavit was inaccurate. His call to Shaffery proffering his inaccurate version was apparently motivated by his desire to stir the promotion pot in any way possible. It should also be noted that Oches' use of vile and vicious terminology to his co-workers in referring to the Chief ... a fact not challenged or rebutted by Oches ... in and of itself was improper conduct. See Germann, supra., (fire lieutenant who calls Chief a liar and a chickenshit can properly be rejected for promotion); Marshall v. City of Atlanta, 614 F. Supp., 581 (N.D. GA 1988) (fireman calls his superiors obscene names in front of co-workers, termination proper as interfering with operational efficiency and creating disharmony).
Besides its inaccuracy, the affidavit does not address illegal activity by his employer, governmental mismanagement or abuse of authority, but concerns only Oches' effort, for his own personal benefit and reasons, to attack and impede Fowlie and the Township in the promotional arena. The affidavit simply does not meet the test of public concern required to be a "protected activity", it is a purely limited personal personnel concern. See cases cited supra. at Rb 54-55; also Arvinger v. City Council of Baltimore, 862 F. 2d 75 (4th Cir. 1988). Even if the affidavit were true, that the Township (or Administrator Alloway) was intending to delay the Chief's test so that Fowlie as a third captain would be eligible, there is nothing illegal or improper about that. Obtaining a compliment of three eligibles, so as to better assure the best qualified appointee, is a civil service guideline. See Matter of Police Chief, 288 N.J. Super. 101, 106-108 (App. Div. 1993); N.J.A.C. 4A:4-4.2.
Appellant ultimately presents no evidence of improper retaliation or a causal connection between the first claim, or his affidavit, and this 1992 promotion. The actual decision was made by Leo; obviously petitioner can make no claim of retaliatory motivation by Leo. Appellant was left with criticizing Leo's decision as being somewhat subjective. As cited earlier, even where Leo's decision was based partially on his subjective analysis of the candidates' abilities and work, that would not be unusual or improper, particularly given the managerial status of the position. The relevant court decisions ... whether rule of three or discrimination related ... universally recognize that the final decision is inevitably subjective, particularly in a command or management promotion. While one may quibble about how much time Leo should have spent looking at the personnel files, or that he should have scored his interview process differently, or perhaps been advised that a promotional challenge was pending so that he could have taken more detailed notes (or perhaps even tape-recorded everything), Leo undertook a reasonable process and procedure grounded in his three decades of personnel experience. Leo was the appointing-authority ... empowered and obligated to make his own decision from the three eligibles ... not some undefined committee. There was no evidence that he based

his decision on other that his bona fide assessment of the candidates. Even if his review and investigation was subjective or incomplete, that does not invalidate the decision. See Wachstein, supra.

Leo detailed the reasons supporting his selection of Kryscnski (8T4-24 to 22- 17), as did Fowlie for his recommendation (8T231-4 to 248-10). Appellant again did not prove the articulated reasons were false or pretextual, and did not even address his qualifications clearly support Kryscnski as the superior candidate. Kryscnski has an Associates degree in criminal justice, Oches has a High School Equivalency diploma, Kryscnski was a 4 year Navy veteran, Oches left the military after 6 months for medical problems; Kryscnski had 22 years seniority, Oches 18 years; Kryscnski had a more diverse police background with specific prior experience in budgets and records, Oches' experience was more narrow.

Subjective factors ... the perception by Leo and Fowlie of Kryscnski's greater ability to communicate and of trust and respect ... were solidly based in fact. Kryscnski was described by all as a solid steady performer, consistently considered excellent. The ultimate assessment by Leo that Kryscnski could better serve as a direct subordinate to Fowlie, and would be better able to communicate and carry out his policies and directives, is on its face accurate. Oches' problems as to being abrasive and difficult at times were discussed earlier and obviously apply here also.

Again, in the absence of appellant meeting his burden of proof, that the reasons articulated are false and pretextual, that he is the superior candidate over Kryscnski and Hannafey, and that the decision was actually motivated by retaliation, the claim on the 1992 promotion obviously is without merit.

Oches' Surreptitious Tape Recording

The potential bearing and impact of Oches' surreptitious tape recording of the promotion interview was set forth at length in the original Post-Hearing Memorandum submitted to this Court in October 1993 at page 81 to 89 and that analysis is incorporated by reference. The Court in its previous decision did not mention that action or submission. It continues to be submitted that such conduct by Oches exhibits and exemplifies a basic lack of trust, confidence and loyalty to his superiors and employer. That Leo, an experienced personnel administrator of over 30 years, was able to subjectively judge and sense Oches as lacking in these necessary character traits should not be surprising. The simple fact is that Oches' conduct was illegal, unprofessional and improper, and serves as a basis in itself to support the 1992 promotion action.

DISCUSSIONS AND CONCLUSIONS

Appellant sets forth a claim of retaliation/discrimination against him by the appointing authority's failure to promote him to Police Captain on two occasions. The Law against Discrimination (LAD) N.J.S.A. 10:-1 to -42, provides, at N.J.S.A. 10:5-12d. that:

It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

....

For any person to take reprisal against any person because he has opposed any practice or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act.

The first threshold to be determined is whether appellant is a member of a "protected class" under LAD. The appointing authority contends that appellant is a white male, as are all other relevant parties; and therefore, members of a class not historically victimized by discrimination or retaliation. It is observed, however, that our courts have not taken so narrow a view. In Wachstein v. Slocum, 265 N.J. Super. 6 (App. Div. 1993), the court entertained a cause of action of reverse discrimination and retaliation by a white male who contended he was demoted after a new public defender took office.

The Appellate bench in Wachstein found that the evidence supported a finding that the state public defender's proffered reasons for transferring demoted Wachstein, a regional public defender, were pretextual and that the actual reasons were in retaliation for Wachstein's pursuit of a lawsuit. Id. at 22-23.

Also, in Erickson v. Marsh & McLennan Co., 117 N.J. 496 (1990) our Supreme Court recognized a cause of action where the complainant was not a member of the minority class. The Court said, at 552, that:

Indeed, when a complainant is a member of the majority and not representative of persons usually discriminated against in the work place, discrimination directed against that person is "unusual."

I FIND and CONCLUDE that the discrimination/retaliation taken against appellant herein was "unusual" and, therefore, is protected under the LAD.

Appellant contends that Chief of Police Letts developed a strong animus against appellant which caused Chief Letts to bypass appellant for promotion. Appellant claims that the series of protected activities in which he engaged that caused Chief Letts to bypass him for promotion included: (1) The grievance proceeding initiated by appellant in 1980 to force Middletown Township to pay detectives for court appearances. Then Deputy Chief Letts opposed the payment and testified against appellant at a grievance hearing. Letts was embarrassed because his testimony was found to be false and he was angry with appellant because of his embarrassment. (2) The incident which involved appellant's investigation of a Middletown Township Board of Education employee who falsified time sheets of a subordinate summer student employee and divided the worker's pay with the absent worker. Then Deputy Chief Letts asked appellant not to proceed with the investigation. It was learned that Letts was a friend of the summer employee's grandmother. Appellant reluctantly stopped his investigation after arguing with Letts about the propriety of such course of conduct. Subsequently, the Monmouth County Prosecutor made an inquiry concerning the incident and Letts believed it was appellant who caused the County Prosecutor to make the inquiry, i.e., although appellant denied he had done so. (3) Appellant objected to an order given to him by then Deputy Chief Letts to locate Chief Lett's brother-in-law, then Executive Officer of Detectives, Lieutenant Walter Monahan, in a local tavern and return Monahan's assigned police car to the station house. Monahan was in the habit of reporting for duty, signing himself out, and proceeding to a local tavern and consuming alcoholic beverage throughout the workday. Appellant wrote a letter to then Chief McCarthy, requesting the opportunity to replace Monahan as the Executive Officer of the Detectives Bureau, because Monahan had failed to perform his assigned duties. Deputy Chief Letts was reported to be upset with appellant for making the request. (4) Deputy Chief Letts requested appellant to omit information appellant had investigated which was detrimental to two police department applicants who were the sons of members of the police department. Letts was also upset when appellant reported Letts' unquestionable ethics to then Chief McCarthy. Letts then removed appellant from conducting background checks of police office applicants, although appellant had successfully and competently conducted between 15 and 20 such background investigations.

In its remand to this administrative tribunal, the Merit System Board (MSA) instructed that the criteria set forth in Jamison v. Rockaway Tp. Bd. of Educ., 242 N.J. Super. 436 (App. Div. 1990) were to be applied to the instant matter. In Jamison, the appellant bench distinguished between retaliatory discrimination employment discharge and failure to promote. The Court applied and refined the criteria of the appropriate order of proof and the allocation of burden of proof, as set forth in Wrighten v. Metropolitan Hospitals, Inc. 726 F. 2d 1346 (9th Cir. 1984), which, it asserts, have some consistency and some contrast with those criteria utilized in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d. 668 (1973). The Jamison Court said:

The refinement is necessary because the claim of alleged retaliatory action here is the failure to promote rather than the typical employment discharge that occurred in Wrighten. In a discharge case, no consideration need be given to the competition because there is none. However, in a failure to promote case, consideration must be

given to the competition, where it exists. See Terry v. Mercer Cty. Freeholder Bd., 86 N.J. 141, 152, 430 A.2d 194 (1981). Id. at 446.

The Jamison Court then held:

Accordingly, we hold that in a failure to promote context involving a claim of retaliation, a claimant establishes a prima facie case by proving by the preponderance of the evidence that (1) the claimant engaged in a protected activity that was known to the alleged retaliator, (2) the promotion sought was denied, and (3) the claimant's engagement in the protected activity was a cause of the promotion denial. See Id. at 786.

The allocation of proof then follows the tiers set out in Wrighten until the presumption of retaliatory intent is in place. At that point, the employer's proofs must focus on the qualifications of the other candidates. The employer must prove by a preponderance of the evidence that the adverse action would have taken place regardless of the retaliatory motives of the employer. Id. at 786-787. By shifting the burden of proof, the responsibility is allocated to the party best able to marshal evidence and prove qualifications of other candidates. Id. at 786; See Erickson v. Marsh & McLennan Co., 117 N.J. 539, 554, 569 A.2d 793 (1990).

The proof on candidate qualifications thus resolves the issue of causation. Engaging in protected activities should not place a claimant in a better position than the candidate would be otherwise. Ruggles v. California Polytechnic State University, supra, 797 F.2d at 786. By requiring proof as delineated, we have avoided, through principles of causation, the potential of an inappropriate windfall, while at the same time properly allocating the burden of proving qualifications. Id. at 447.

The appointing authority contends among other things, that New Jersey has adopted the proof standards as addressed and defined by the U.S. Supreme Court in St. Mary's Honor Center v. Hicks, U.S. 113 S.Ct. 2742, L.Ed. (1993), a Federal Title VII racial discrimination case, and determined by the 3rd Circuit in McKenna v. Pacific Rail Service, 32 F.3d 820 (3rd Cir. 1994), and known as the "Hicks rule." The appointing authority contends that rather than a shifting burden of proof to the employees as in Jamison, the burden of proof on all issues remains with appellant under the Hicks rule and as articulated by the New Jersey Supreme Court in Grigoletti v. Ortho Pharmaceutical Corp., 188. N.J. 89, 97 (1990).

The MSB, having remanded the instant matter with instructions to apply the Jamison standards of proof, this tribunal will, therefore, comply with its instructions. Thus, I now turn to the proofs of the matter.

Second, the appointing authority would have this tribunal limit "protected conduct" to the exercise of certain rights such as the refusal to commit illegal activities or to active whistleblowers who report illegal or improper employer practices. It contends that retaliation, to be improper, must directly concern a violation of a clear mandate of law or public policy in order for the employee's activity to be protected, and not merely a personal disagreement or dispute as to internal policies or management style. See Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 88-92 (1992). such a limitation is rejected by this tribunal. See Dixon v. Rutgers, The State University of New Jersey, 110 N.J. 432 (1988) (contractual grievance procedure cannot deprive one of separate statutory right under LAD.) And, N.J.S.A. 10:5-12d. is not so limiting.

1990 Bypass for Promotion

I am persuaded that appellant has, by the credible evidence, established a prima facie case of retaliatory intent not to promote him to the position of Police Captain. Appellant has shown that while Robert Letts served as the Middletown Township Police Department Deputy Chief, appellant brought a grievance against Letts concerning the payment of detectives for the time spent testifying in court; payments afforded other police officers in the department. Deputy Chief Letts opposed the payment to detectives and the grievance went to a hearing where Letts embarrassed himself by giving false testimony. Former chief of Police Joseph McCarthy testified before this tribunal, credibly, that Letts

was angry with appellant because of the grievance which caused his embarrassment. Dixon, supra. Letts' animosity towards appellant continued during appellant's career with the police department, as a consequence of appellant exercising his protected activity of a contractual grievance proceeding.

I CONCLUDE that appellant has established a prima facie case by a preponderance of the credible evidence, with regard to this issue that appellant engaged in a protected activity that was known to Letts; that appellant was denied a promotion; and, there was causal connection between appellant's engagement in the protected activity and the denial to promote.

The record further demonstrates that there was a cumulative effect concerning Letts' animosity towards appellant. This is evident by Letts' conduct toward appellant concerning the Walter Woods incident where, among other things, appellant believed the offense committed by Woods required resolution through the criminal procedures. Deputy Chief Letts, appellant's senior officer, persuaded appellant to cease his investigation of the matter where appellant was aware that Letts was a friend of Woods' grandmother. Deputy Chief Letts was upset with appellant when the Monmouth County Prosecutor's office made inquiry about the Woods incident, even though appellant had denied any contact with the Prosecutor concerning Woods.

The animosity towards appellant by Letts is illustrated by appellant's removal from conducting background investigations of police officers applicants following appellant's investigation of applicants Charles Scott and Frederick Deickmann, both sons of Middletown Township police officers. While appellant's removal from police applicant investigation was in the nature of a management decision, rather than appellant's engagement in a "protected activity," Letts conduct in removing appellant was a further demonstration of Letts' continued enmity and antagonism towards appellant.

Deputy Chief Letts was further upset with appellant when appellant requested that appellant replace Letts' brother-in-law as Executive Director of the Detectives Division. The record demonstrates that Letts' brother-in-law, Lieutenant Walter Monahan, would report for duty and after a short period of time, check himself off the rolls and proceed to a local tavern where he would consume alcoholic beverage during his assigned workday. Appellant refused to play nursemaid to Monahan and requested to replace Monahan because he was not meeting his responsibilities nor providing the leadership required of the position. Chief Letts obviously protected his brother-in-law and was displeased with appellant's written memorandum to Chief McCarthy asserting Monahan's weaknesses.

The appointing authority asserts that:

Appellant's railing about the "cover-up" concerning his "drunken superior" demonstrates an astounding lack of sensitivity and awareness that alcoholism is a handicap, defined in Clowes v. Terminex Inter. Inc., 109 N.J. 575 (1988) as a protected handicap. Discrimination or job action against Monahan premised on being an alcoholic would have been illegal under the Law Against Discrimination. (Respondent's Brief at 68.)

The Clowes Court did, in fact, define alcoholism as a handicap, pursuant to N.J.S.A. 10:5-5(q). However, the appointing authority is mistaken when it states that it could not take disciplinary action against Monahan because of his drinking during the workday. The Clowes Court explicitly stated:

There are, to be sure, situations in which the handicap may affect the alcoholic's ability to do his or her job. The Law does not prohibit discrimination against the handicapped where "the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1; see also N.J.S.A. 10:5-2.1 (the Law does not "prevent the termination or change of the employment of any person who in the opinion of his employer, reasonably arrived at, is unable to perform adequately his duties ..."); cf. Anderson v. Exxon Co., supra, 89 N.J. at 496 (the Law allows the employer "freedom to reject those applicants who are unable to do the job, whether because they are generally unqualified or because they have a handicap that in fact impedes job performance. There should be no second-guessing the employer.").

For the appointing authority to state that appellant was insensitive to Monahan's

alcoholic handicap is to reverse the obligations and responsibilities. Rather, it was the appointing authority which was insensitive by not affording Monahan the opportunity for detoxification and rehabilitation. See Matter of Cahill, 245 N.J. Super. 397 (App. Div. 1991). It was appellant's right and duty to report Monahan's absence from duty, his neglect and non-performance in the position. To this, Letts took offense which caused him to recommend the bypass of appellant for the position of Police Captain.

I CONCLUDE that appellant engaged in a protected activity which was known to Letts; that the promotion appellant sought, i.e., Police Captain, was denied; and, appellant's engagement in the protected activity was the cause of the promotional denial. Jamison at 447.

The appointing authority asserts that its decision to appoint William Fowlie to the position of captain over appellant was based upon Fowlie's education and experience. The record demonstrates that Fowlie has an Associate degree with 21 accounting credits; that he is an FBI Academy graduate; he has seniority over appellant; and has five years of specialized experience and expertise with the Police Department computer and with its Records and Service Division.

The appointing authority contends that on the issue of qualifications, all of the evidence points to Fowlie as the superior candidate and would have been appointed over appellant in any event. It compares the qualifications of the two individuals by showing that Fowlie has an Associate Degree with 21 accounting credits. Appellant is a high school drop-out with a General Educational Developmental (GED) high school diploma. Fowlie is an FBI Academy graduate; appellant is not. Fowlie possesses 20 years seniority on the police force; appellant has 16 years. Fowlie had two years active duty with the U.S. Marine Corps; appellant left the military after six months with asthma. Fowlie had specialized experience with computer and budgets; appellant had none.

I CONCLUDE that the appointing authority has satisfied the Jamison criteria by articulating the superior qualifications of William Fowlie over the qualifications of appellant, for the 1990 appointment to the position of Police Captain.

1992 Promotion

Appellant claims that all of the protected activities in which he was engaged respecting the 1990 promotion bypass are also applicable to the 1992 promotion bypass of him. In addition, appellant claims an additional protected activity; i.e., his appeal to the MSB with respect to the 1990 bypass constitutes a protected activity.

Appellant contends that Chief Fowlie was in an adversarial relationship and in conflict of interest with appellant due to appellant's pending lawsuit against Middletown Township. In the event appellant were to prevail with his suit, Fowlie would revert back to his former position of Lieutenant. Appellant contends, among other things, that it was Fowlie, not the appointing authority Joseph Leo, who appointed Lieutenant Kryscnski to Police Captain over appellant. Appellant claims that there was a causal connection between his engagement in protected activities and the appointing authority's refusal to promote him to Captain in 1992.

I CONCLUDE that appellant has established, by a preponderance of the evidence a prima facie case by showing he engaged in a protected activity that was known to Fowlie, the alleged retaliator; that the promotion to Police Captain by appellant was denied; and, appellant's engagement in the protected activity was a cause of the promotional denial. Jamison, supra. at 447.

The appointing authority maintains that Administrator Leo made the selection of Lieutenant Kryscnski for Police Captain over appellant and that Chief Fowlie merely recommended Kryscnski to the position. The appointing authority further asserts that appellant did not address his qualifications as compared with Kryscnski and others. The appointing authority observes that Kryscnski has an Associate Degree in criminal justice while appellant has a high school equivalency diploma. Kryscnski is a four-year veteran of the U.S. Navy while appellant left the military service after six months for medical reasons. Kryscnski has 22 years seniority compared with appellants 18 years. Kryscnski

had a more diverse police department background with specific prior experience in budgets and records while appellant's experience with the police force was more narrow. It was also perceived by Leo and Fowlie that Kryscnski had the greater ability to communicate and held the trust and respect of his fellow officers. Appellant was perceived to being abrasive and, at times, difficult to deal with.

I CONCLUDE that the appointing authority has demonstrated, by a preponderance of the evidence, that it would have selected Lieutenant Kryscnski over appellant for the position of Police Captain regardless of appellant's suit against it. Jamison, supra. at 447.

I CONCLUDE, therefore, that the actions by the appointing authority to promote William Fowlie to Police Captain in 1990 and Edward Kryscnski to Police Captian in 1992 must stand pursuant to Jamison, supra.

ORDER

Accordingly, it is ORDERED that the promotion of William Fowlie to the position of Police Captain in 1990 over appellant is hereby SUSTAINED.

It is further ORDERED that the action by the appointing authority to promote Edward Kryscnski to the position of Police Captain in 1992 over appellant is hereby SUSTAINED.

It is also ORDERED that the herein appeal be and is hereby DISMISSED.

I hereby FILE my initial decision with the MERIT SYSTEM BOARD for consideration. This recommended decision may be adopted, modified or rejected by the MERIT SYSTEM BOARD, which by law is authorized to make a final decision in this matter. If 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 DIRECTOR, APPELLATE PRACTICES AND LABOR RELATIONS, DEPARTMENT OF PERSONNEL, Three Station Plaza, 44 South Clinton Avenue, CN 312, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

FINAL AGENCY DECISION

ANSELMINI, Commissioner:

The appeal of Robert Oches, Police Lieutenant, Police Department, Middletown Township, concerning the bypass of his name for appointment from the Police Captain (PM2893J) eligible list, was heard by Administrative Law Judge Lillard E. Law (ALJ), who rendered his initial decision on November 15, 1995. Exceptions were filed on behalf of the appellant. Cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (MSB) at its meeting on February 20, 1996, accepted and adopted the Findings of Fact as contained in the attached Administrative Law Judge's initial decision, the conclusion that the appointing authority established by a preponderence of the evidence that its bypass of appellant for appointment on two occasions would have occurred even absent any retaliatory motive for not selecting appellant for appointment and the recommendation that the appointing authority's actions promoting William Fowlie and Edward A. Kryscnski to the position of Police Captain be sustained and this appeal be dismissed. However, the Board noted that the ALJ's consideration of the provisions of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq. in determining whether appellant had an actionable claim in this matter was in error. Rather, the provisions of Title 11A of the New Jersey Statutes provide authority for Merit System Board consideration of appellant's claim that he was improperly bypassed for appointment. No other statutory authorization is necessary.

ORDER

The Merit System Board finds that the action of the appointing authority in bypassing appellant's name on the eligible list for Police Captain (PM2893J) was justified. The Board therefore affirms that action and dismisses the appeal of Robert Oches.
This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

FN1. Letts did testify at the hearings that one of the reasons he promoted Fowlie over Oches was because of Fowlie's experience with computers. However, Letts could not explain why he had testified to the contrary in his deposition of August 4, 1992. See OAL Decision at page 47, lines 12-18. Letts also claimed that he promoted Fowlie because he was an FBI Academy graduate (4T257:12). Letts neglected to mention that as Chief he refused to allow appellant Oches an opportunity to attend the FBI Academy. (9T193:8-194:11; 9T201:14; 9T207:13).

FN2. The court in Jamison v. Rockaway Township Board of Ed. was not faced with a "Rule of Three" case. The plaintiff in Jamison had not been ranked by the Department of Personnel on a certified eligibles list according to her civil service examination scores, job performance and seniority. If the plaintiff had not been so ranked, and if that rank were higher than any of the other certified eligibles, appellant Oches asserts that the Jamison court would not have afforded defendant the opportunity to prove that the other, lower ranked eligibles were more qualified than plaintiff. The same should hold true in the instant appeal, as Appellant Oches is ranked substantially higher than Fowlie.

FN3. The court in Jamison v. Rockaway Township Board of Ed. was not faced with a "Rule of Three" case. The plaintiff in Jamison had not been ranked by the Department of Personnel on a certified eligibles list according to her civil service examination scores, job performance and seniority. If the plaintiff had not been so ranked, and if that rank were higher than any of the other certified eligibles, appellant Oches asserts that the Jamison court would not have afforded defendant the opportunity to prove that the other, lower ranked eligibles were more qualified than plaintiff. The same should hold true in the instant appeal, as Appellant Oches is ranked substantially higher than Fowlie.

FN4. Appellant Oches reserves the right to respond in the event Middletown attempts to introduce evidence of Fowlie's, Kryscnski's or Hannafey's qualifications.

FN5. See the comparison of qualifications of Fowlie to Oches at Rp 76 and Kryscnski to Oches at Rp 86, detailing that Fowlie and Kryscnski were superior in education, seniority, training and experience.

FN6. The Court's initial decision continues to misstate the real date of the incident in misstating Pollinger's testimony (page 54). Pollinger clearly testified that the incident concerning Deickmann actually happened on September 2, 1984, not on September 2, 1985 as proffered in Oches' report (7T10-5 to 32- 8).
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