

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TOWN OF ISLIP,

Appellant,

-against-

No. 95

NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
April 29, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

ERNEST R. STOLZER, ESQ.
BOND SCHOENECK & KING, PLLC
Attorneys for Appellant
1399 Franklin Avenue, Suite 200
Garden City, NY 11530

DAVID P. QUINN, ESQ.
NYS PUBLIC EMPLOYMENT RELATIONS BOARD
Attorneys for Respondent PERB
80 Wolf Road, Fifth Floor, Room 500
Albany, NY 12205

LIAM L. CASTRO, ESQ.
KOEHLER & ISAACS, LLP
Attorneys for Respondent UPSEU
61 Broadway, 25th Floor
New York, NY 10006

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 95, the Town
2 of Islip?

3 Okay, counselor, go ahead.

4 MR. STOLZER: Thank you, Your Honor. My
5 name is Ernest Stolzer. I am the attorney for the
6 petitioner-appellant Town of Islip. I believe I have
7 twelve minutes - - -

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. STOLZER: - - - and I'd ask for three
10 for rebuttal?

11 CHIEF JUDGE LIPPMAN: Three, sure, go ahead
12 counsel.

13 MR. STOLZER: Thanks a lot.

14 CHIEF JUDGE LIPPMAN: You're on.

15 MR. STOLZER: In this case, if the court
16 affirms PERB's and the Appellate Division's
17 decisions, it would be improperly preventing the Town
18 from enforcing its own laws.

19 CHIEF JUDGE LIPPMAN: Coun - - - why isn't
20 this a deference case? Why - - - why shouldn't we
21 defer to the agency here?

22 MR. STOLZER: Why should you not?

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MR. STOLZER: Well, this is - - -

25 CHIEF JUDGE LIPPMAN: Why - - - what makes

1 it not a case to just say their own deference
2 expertise, and let it go from there?

3 MR. STOLZER: Because in this case we have
4 something unusual. There are - - -

5 CHIEF JUDGE LIPPMAN: What's unusual?

6 MR. STOLZER: What's unusual is the Local
7 Law 14-12, which makes - - -

8 CHIEF JUDGE LIPPMAN: What's your - - -

9 JUDGE GRAFFEO: But the Town - - - the Town
10 ignored it for eighteen, twenty years, didn't it?

11 MR. STOLZER: Excuse me?

12 JUDGE GRAFFEO: The Town ignored it for
13 eighteen to twenty years - - -

14 MR. STOLZER: Yes, it did.

15 JUDGE GRAFFEO: - - - didn't they? Somehow
16 eighty - - -

17 MR. STOLZER: And improperly did so.

18 JUDGE GRAFFEO: Am I correct reading the
19 record that eighty Town employees had vehicles - - -
20 had Town vehicles?

21 MR. STOLZER: Eighty Town employees had
22 vehicles.

23 CHIEF JUDGE LIPPMAN: Why - - - why aren't
24 you stuck with your own interpretation - - - or your
25 own actions in relation to the local law?

1 MR. STOLZER: Because - - -

2 CHIEF JUDGE LIPPMAN: You seemed to think
3 it was perfectly appropriate, as Judge Graffeo just
4 said, that eighty employees - - - this isn't just an
5 isolated incident where the - - - where the Town law
6 was - - - was not followed, at least in - - - from
7 your view. Why - - - why shouldn't we say that - - -
8 that that was your interpretation, and now at the
9 point that you want to renegotiate it, what - - -
10 what gives you the right, at this point, to just, you
11 know, ignore all those years of - - - of allowing
12 this situation?

13 MR. STOLZER: Well, first of all, I
14 wouldn't agree that it was appropriate. I think it
15 was inappropriate. There was a period of time this
16 sat - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but you're the
18 one who determined it was appropriate in terms of the
19 law. In other words, that's the way the Town
20 interpreted its own law.

21 MR. STOLZER: Well, that's - - -

22 CHIEF JUDGE LIPPMAN: You're saying wrongly
23 so, and so we just forget about it?

24 MR. STOLZER: Well, I'm not saying forget
25 about it. It happened. It needed to be corrected.

1 CHIEF JUDGE LIPPMAN: And you can on a - -
2 - on a dime, say, gee, that may be eighty people - -
3 - it may be all these years - - -

4 MR. STOLZER: I wouldn't say on a dime,
5 since we're six years into the litigation, but - - -

6 JUDGE READ: Yeah, actually, I - - - I
7 would have to say - - -

8 MR. STOLZER: - - - if - - -

9 JUDGE READ: - - - I don't even understand
10 it.

11 MR. STOLZER: Excuse me?

12 JUDGE READ: I don't even understand the
13 provision. To me, it's very ambiguous and murky. I
14 mean, I - - - particularly this piece - - - what's
15 this exception? "Except when such services are
16 available to the public generally".

17 MR. STOLZER: Well, the situation is this:
18 the Town was providing the cars - - - I think the
19 crucial language here is "permit the use of Town-
20 owned vehicles for personal convenience". And - - -

21 JUDGE READ: And you didn't - - - didn't
22 provide them for personal convenience or profit?

23 MR. STOLZER: Well, that's not what the
24 union said.

25 JUDGE READ: Okay.

1 MR. STOLZER: What the union said at the
2 hearing was - - -

3 JUDGE READ: So you - - -

4 MR. STOLZER: - - - and I'll quote from
5 page 56 - - -

6 JUDGE READ: Is this a question of whether
7 or not you con - - - whether or not you consider
8 commuting back and forth to work to be personal - - -
9 personal convenience or profit? I mean, what - - -
10 what was - - - if I - - - if I was one of the eighty
11 people and I had the Town car or I had a car provided
12 by the Town, I could commute back and forth to work,
13 could I then take it out to buy groceries, or could I
14 stop and buy groceries on my way home from work to
15 home? I mean, would that be considered - - - would
16 that - - - would that be okay?

17 MR. STOLZER: I don't believe it's even
18 okay to commute back and forth - - -

19 CHIEF JUDGE LIPPMAN: But isn't it kind of
20 contradictory in nature? I think that's what the
21 judge is saying - - -

22 MR. STOLZER: But I don't think we have to
23 - - -

24 CHIEF JUDGE LIPPMAN: - - - that the rule
25 is really - - - the law is hard to decipher what's

1 personal, what's not. And - - - and then, again, I
2 bring up my point, and - - - because it is murky and
3 it is ambiguous, you obviously interpreted it in a
4 certain way. Why - - - why aren't you just stuck
5 with that?

6 MR. STOLZER: But it's not murky in this
7 particular case, because the charging party, the
8 union, conceded that these vehicles were used for
9 personal business. It's on - - -

10 JUDGE SMITH: Did - - - did - - -

11 JUDGE GRAFFEO: The administrative manual
12 says that it's for employees that are on twenty-four-
13 hour call. Were all of these eighty employees - - -
14 did they all have jobs that they were on call - - -

15 MR. STOLZER: No.

16 JUDGE GRAFFEO: - - - twenty-four hours a
17 day?

18 MR. STOLZER: No.

19 JUDGE PIGOTT: You know, that's very un - -
20 -

21 JUDGE SMITH: Is it - - - is it - - -

22 JUDGE PIGOTT: Go ahead.

23 JUDGE SMITH: Is it your position that the
24 - - - that the Town misinterpreted its law all those
25 years or that it just ignored it?

1 MR. STOLZER: I - - - I don't know what was
2 in - - -

3 JUDGE SMITH: And does it make a dif - - -
4 does - - -

5 MR. STOLZER: You know, I wasn't making the
6 decision, Your Honor, but - - -

7 JUDGE SMITH: I mean, I guess I'm - - -

8 MR. STOLZER: - - - I think they
9 inappropriately applied it.

10 JUDGE SMITH: - - - what I'm getting at is
11 does it - - - does it make a difference? Does it
12 make a difference whether this was a - - - something
13 - - - whether allowing this vehicle use was something
14 arguably legal, and - - - and the - - - and they - -
15 - everybody - - - and maybe PERB found it was legal.
16 Then maybe we have to defer. But if - - - if this
17 thing was clearly illegal, then can - - - can PERB
18 say that an illegal custom has become binding?

19 MR. STOLZER: Well, I think in this - - -

20 JUDGE SMITH: You should be able to answer
21 that last one - - -

22 JUDGE READ: The answer to that - - - the
23 answer - - -

24 JUDGE SMITH: That's one of Judge Pigott's
25 softballs.

1 JUDGE READ: The answer to that's no. But
2 - - - but I - - - because to me, it's very murky. I
3 mean, I - - - it's very ambiguous. And so that goes
4 back to Judge Smith's first alternative. I mean,
5 it's - - - it was an ambiguous law, and maybe you
6 misinterpreted it, or you interpreted it one way; you
7 could have interpreted it another way, and then - - -

8 CHIEF JUDGE LIPPMAN: And let me - - -

9 JUDGE READ: - - - so aren't you stuck
10 then?

11 CHIEF JUDGE LIPPMAN: Let me follow up on
12 that. I guess, what - - - what I'm saying is I think
13 it's the same thing that the judge is saying, if - -
14 - if you have a local law, and let's say it's subject
15 to different interpretations, and the - - - the
16 administration interprets it a certain way for twenty
17 years, and then a new administration comes in and
18 say, you know what; I don't read it that way; you
19 know, we think it's the opposite. To - - - can - - -
20 can the Town benefit that? A new person comes in and
21 says it's illegal, and then you say, oh, yeah, it's
22 really illegal - - - it's really - - - you know, we
23 couldn't do that. Isn't that an odd way that
24 government should work?

25 And I think that was the thrust also of

1 Judge Smith's question, is it - - - is it that they
2 ignored the law, or is it that over those twenty
3 years, whether it's ambiguous, murky, whatever it is,
4 there was one view of it. A new group comes in
5 saying, you know, that's not really our view, and
6 could we really - - - can government really run that
7 way?

8 MR. STOLZER: Well, I think government - -
9 -

10 CHIEF JUDGE LIPPMAN: Especially when
11 you're negotiating with - - - with employees, and
12 there's got to be some element of fairness in
13 relation to how you deal with them.

14 MR. STOLZER: Well, I think government can
15 correct its mistakes. And I think it has an
16 obligation - - -

17 CHIEF JUDGE LIPPMAN: Misinterpretation or
18 ignoring, in - - - in answer to Judge Smith's
19 question?

20 MR. STOLZER: I would say it was a
21 misinterpretation.

22 JUDGE READ: But that - - - is that is - -
23 -

24 JUDGE RIVERA: But how can that be if you -
25 - - if - - - if the Town was deducting money from the

1 paychecks? Why would you then compound that by
2 actually taking money from their paychecks to offset
3 the benefit?

4 MR. STOLZER: Oh, I'm - - - I'm not
5 defending that. You - - - it was compounded. That
6 doesn't make it any better.

7 JUDGE READ: But whether - - - whether it
8 was - - -

9 MR. STOLZER: It's still an improper use of
10 those vehicles to allow these people who are not
11 twenty-four-hour responders - - -

12 JUDGE RIVERA: No, but what I'm saying is -
13 - - is - - - isn't the point that there's a deduction
14 from the paycheck an indication that it was the
15 interpretation of the Town; that indeed they could
16 allow these particular individuals to use these cars
17 for purposes of commuting to and from work?

18 MR. STOLZER: The Town, at that point - - -
19 yes. I - - - I mean, I can't - - -

20 JUDGE ABDUS-SALAAM: Well, counsel, whether
21 it was a - - -

22 MR. STOLZER: - - - deny that. They had
23 this record of it. I'm not saying they didn't know -
24 - -

25 JUDGE ABDUS-SALAAM: Okay, counsel, what -

1 - -

2 MR. STOLZER: - - - they were incorrect - -

3 -

4 JUDGE ABDUS-SALAAM: Counsel, whether it
5 was ignorance that you ignored the law, or you
6 misinterpreted the law, either way, can the Town - -
7 - isn't the question really can the Town just decide
8 it's not going to make it a matter of negotiation.
9 That they can take that off the table. And isn't
10 that really what we're dealing with here?

11 Whatever the reasons that you believe that
12 the law was improperly applied, shouldn't that be a
13 part of the negotiations, not just the Town saying,
14 well, now we're going to do something different?
15 That's what we really have to decide here.

16 MR. STOLZER: I agree. And I don't think
17 the Town has an obligation to be negotiating with the
18 union about the legal issues. If it's illegal - - -

19 JUDGE SMITH: Well, suppose - - - suppose -
20 - - suppose the Town - - -

21 MR. STOLZER: - - - you shouldn't have - -

22 -

23 JUDGE SMITH: Suppose the Town for twenty,
24 fifty, a million years, interpreted this law in a
25 particular way, and suppose they were wrong. Suppose

1 a court decides they were wrong. The law doesn't
2 mean what they thought it said. It's perfectly
3 plain. It means you don't get cars unless you're on
4 call 24/7. If they - - - on that assumption, does
5 the - - - does PERB have the authority to order the
6 Town to keep - - - to keep providing the cars?

7 MR. STOLZER: My answer would be no.

8 JUDGE PIGOTT: I'm - - - I'm surprised a
9 little bit - - -

10 MR. STOLZER: If it's illegal - - -

11 JUDGE PIGOTT: - - - how much you're giving
12 up. When I read the statute and read the - - - you
13 know, it said, if you - - - you know, if you're 24/7,
14 if you're this, if you're that. And the testimony
15 was so thin at this hearing, but of course, you labor
16 lawyers know what you're doing, and we civilians
17 don't.

18 But they said, you get a - - - you know, if
19 you - - - if your job entails it, you get this, and
20 you can take it home, but we're going to charge you
21 for that, and you need your supervisor's approval.
22 Now if the violation is that the supervisor wasn't
23 signing off or something, I get that. That wasn't in
24 the record.

25 But what's wrong with saying for your

1 convenience, because you drive this - - - you know,
2 you're going to go out and the appraisers, I guess,
3 the - - - the real estate guys get these things, and
4 - - - so you can leave from your house and go to
5 wherever you have to do the next assessment or
6 whatever, you just have to pay us for what you think
7 is the fair market value of you having driven the car
8 back and forth to home, but you can't have a Mary Kay
9 sticker in the back window, you can't use it for any
10 personal reason. And I thought that's what the Town
11 was doing. But they're not. You're saying they
12 didn't. They - - - they did - - - they violated
13 their own statute?

14 MR. STOLZER: They violated their own
15 statute, then they changed it because they were
16 allowing people to commute - - - use the vehicles to
17 commute back and forth from home, when it had no
18 benefit to the Town or the operation of the Town.

19 JUDGE GRAFFEO: So what - - - what
20 precipitated the change in the policy? Did the
21 electorate finally realize - - -

22 MR. STOLZER: We had a change - - --

23 JUDGE GRAFFEO: - - - it was footing the
24 bill for eighty cars or I mean - - -

25 MR. STOLZER: You had a change in

1 supervisors.

2 JUDGE GRAFFEO: - - - was it - - - is it a
3 budget situation? Is that what precipitated the
4 change?

5 MR. STOLZER: Well, you had a change in
6 supervisors and they relooked at the statute, and
7 part of it was to save money. You have the public
8 paying their monies, their taxes, for these employees
9 to commute to and from home - - -

10 CHIEF JUDGE LIPPMAN: So it has no effect -
11 - - even - - - even - - -

12 MR. STOLZER: - - - and it's at no benefit
13 to the Town.

14 CHIEF JUDGE LIPPMAN: Even assuming that it
15 was a - - - an obvious violation of the statute for
16 all those years, again, you can just say at some
17 point, you know what, this is costing too much money;
18 we're not going to violate the statute anymore?
19 That's basically what happened in your view, right?

20 MR. STOLZER: They are not going to violate
21 the statute anymore, correct.

22 JUDGE SMITH: But you - - - you said they
23 should never have violated it in the first place.

24 MR. STOLZER: Well, that would have been
25 the better option, yes.

1 JUDGE PIGOTT: Well, suppose - - - suppose
2 for example, the opinion came from the county
3 attorney that this is an unconstitutional gift of
4 public funds. You're - - - you're taking money that
5 belongs to the taxpayers and you're giving it to
6 personal people, and that's unconstitutional in the
7 State of New York. I mean, wouldn't that end it? I
8 mean, you can't negotiate that, can you?

9 MR. STOLZER: I don't believe you can.

10 JUDGE PIGOTT: But you didn't make that
11 argument that I noticed.

12 MR. STOLZER: But it has to be an
13 unconstitutional gift of public funds. In this case,
14 it was a violation of their local law. And I think
15 you're correct, Your Honor. I gave up on that too
16 easily. I don't think that this statute is as murky
17 as - - - as we're discussing it here. It was a use
18 of a Town-owned vehicle for personal convenience.

19 Even the union said that it was - - - that
20 there was no question in this proceeding - - - in
21 this particular circumstance, that the vehicles were
22 used for personal business. Those individuals who
23 had the vehicles taken away from them, were not using
24 - - - were not taking those vehicles home so they
25 could report to a - - - they were, for instance - - -

1 CHIEF JUDGE LIPPMAN: Okay, okay - - -

2 MR. STOLZER: - - - a fire inspector.

3 CHIEF JUDGE LIPPMAN: You'll have - - -
4 you'll have more time to go into this in rebuttal.
5 Let's hear from your adversary.

6 MR. QUINN: Good afternoon, I'm David
7 Quinn. I represent the Public Employment Relations
8 Board.

9 CHIEF JUDGE LIPPMAN: Counsel, do you agree
10 that the - - - the - - - there was no personal use
11 here?

12 MR. QUINN: Oh, no, there was personal use.
13 That is the - - -

14 CHIEF JUDGE LIPPMAN: And did the Town and
15 the employee understand that there was personal use?

16 MR. QUINN: There's no question about it.
17 This was - - -

18 JUDGE SMITH: Was - - - what's your
19 position on whether the Town law was violated? The
20 local law.

21 MR. QUINN: Well, I can answer that simply
22 that PERB has no jurisdiction to enforce the Code of
23 Ethics for the Town of Islip - - -

24 JUDGE SMITH: No, wait, wait, wait.

25 MR. QUINN: - - - then say, on this record

1 - - -

2 JUDGE SMITH: No, wait, that - - - that's
3 not the question. You - - - no one's asking you to
4 enforce the - - - the question is can you order
5 people to violate it?

6 MR. QUINN: On this record, one thing is
7 plainly clear, is that the 1968 local ordinance was
8 never implemented - - -

9 JUDGE SMITH: Absolutely, absolutely.
10 Let's suppose they had an absolutely clear law - - -
11 let's suppose they said it in bright red letters, no
12 cars for employees. A valid law and it's ignored for
13 twenty-four years. Can PERB or - - - order a town to
14 keep ignoring it?

15 MR. QUINN: Yes. We have to.

16 JUDGE SMITH: What says that?

17 MR. QUINN: Well, because here's - - -
18 here's the analogy that I'll give you. Because this
19 is a mandatorily negotiable term and condition of
20 employment, if the union had sat down with this
21 employer, and - - -

22 JUDGE PIGOTT: Well, you're assuming that,
23 right? In other words, you're assuming that it's a
24 mandatory - - -

25 MR. QUINN: I'm assuming that the economic

1 benefit of using Town-owned equipment is mandatorily
2 negotiable.

3 JUDGE PIGOTT: Is that's - - -

4 JUDGE SMITH: You're - - - you're saying
5 the law was invalid the day it was passed?

6 MR. QUINN: No, no. I'm not saying - - -
7 I'm not saying that at all. If this - - -

8 JUDGE SMITH: Well, if - - - if - - - if it
9 said you can't negotiate a mandatorily negotiate - -
10 -

11 MR. QUINN: Oh, yes. That would be - - -
12 yes, yes. That would be an invalid law.

13 JUDGE SMITH: Okay. So you are saying - -
14 -

15 MR. QUINN: I am.

16 JUDGE SMITH: - - - you are saying it's a
17 valid - - -

18 MR. QUINN: Oh, yes, yes, yes. That law
19 would be invalid insofar that it barred the
20 collective bargaining concerning its benefit.

21 JUDGE SMITH: Okay, was - - - was - - -

22 MR. QUINN: Yes.

23 JUDGE SMITH: Was this one invalid the day
24 it was passed?

25 MR. QUINN: It was never implemented.

1 JUDGE SMITH: I didn't ask you that. Was
2 it invalid the day it was passed?

3 MR. QUINN: Well, under the Tay - - - let
4 me - - - maybe we have disconnect.

5 CHIEF JUDGE LIPPMAN: Are you arguing - - -
6 I think what Judge Smith is ask - - - are you arguing
7 that there's no way that the Town could have
8 interpreted that law as - - - as allowing for the
9 kind of - - - eighty people who had cars all that
10 time? Or are you saying the law was clearly no good
11 from day one and they just ignored it? What - - -
12 what is your view as to what they did?

13 MR. QUINN: No, Judge, I was trying to
14 respond to Judge Smith's question.

15 CHIEF JUDGE LIPPMAN: Yes, tell me.

16 MR. QUINN: But insofar as your question is
17 concerned, this practice was not inconsistent from
18 PERB's perspective with the local law. In 1968 - - -

19 CHIEF JUDGE LIPPMAN: That's what I'm
20 asking you, yeah.

21 MR. QUINN: Yeah, the 1968 ordinance didn't
22 speak - - -

23 CHIEF JUDGE LIPPMAN: So - - - so you're -
24 - - yeah, go on; I'm sorry.

25 MR. QUINN: - - - didn't speak of 24/7s or

1 any of these other conditions that were put on - - -

2 JUDGE READ: What if it had been?

3 MR. QUINN: - - - in the 2008 ordinance.

4 JUDGE READ: What if it had been clearly
5 inconsistent? What if - - -

6 MR. QUINN: I'm sorry.

7 JUDGE READ: Well, you're saying, well, no,
8 our position is that - - - that what they did was not
9 inconsistent with the local law.

10 MR. QUINN: That's correct.

11 JUDGE READ: What if it had been clearly
12 inconsistent?

13 MR. QUINN: Now that - - - if it had been
14 inconsistent with the local law - - - a legislative
15 body has no right or duty to negotiate. It's only
16 upon executive implementation of the legislative
17 enactment that gives rise to a Taylor Law event.

18 JUDGE SMITH: So is it your position that -
19 - - that local legislatures are without power to
20 forbid the - - - the personal use of automobiles by
21 employees?

22 MR. QUINN: A local legislature can pass
23 any prohibition it wants. It's the implementation
24 that gives rise to the refusal to negotiate.

25 JUDGE SMITH: Wait a minute. You're saying

1 they can pass anything they want, but they can't
2 implement it?

3 MR. QUINN: If the local legislative body
4 passes a law that says there shall be no collective
5 bargaining in the Town of Islip - - -

6 JUDGE PIGOTT: Well, that's not - - -

7 MR. QUINN: - - - it would have no meaning
8 until - - -

9 JUDGE SMITH: That's - - - that would - - -
10 that would - - - but that would be an invalid law.

11 MR. QUINN: It would have no meaning.

12 JUDGE SMITH: And what about a law that
13 says there shall be no personal use of automobiles -
14 - -

15 MR. QUINN: That's Doyle.

16 JUDGE SMITH: - - - is that an - - - is
17 that an invalid law, too?

18 MR. QUINN: That's Doyle, yes.

19 JUDGE SMITH: That is an invalid law.

20 MR. QUINN: Yes. But that's - - - that's
21 what Doyle stands - - -

22 JUDGE SMITH: Even though - - - even though
23 at the time the law was passed, there was no
24 established policy of giving personal vehicles.
25 There's no evidence that there was at the time the

1 law was passed.

2 MR. QUINN: There's no evidence in this
3 record, whatsoever, about anything before the Town -
4 - -

5 CHIEF JUDGE LIPPMAN: So on day one - - -
6 on day one, if they passed this law, you're saying
7 they still have to negotiate it?

8 MR. QUINN: No, if they passed the law, and
9 nothing happens with respect to it - - -

10 JUDGE SMITH: Well, on your theory - - -

11 MR. QUINN: - - - there's no refusal to
12 negotiate.

13 JUDGE SMITH: - - - on your theory, it
14 doesn't matter what happens.

15 JUDGE GRAFFEO: I guess, my question is,
16 does this mean that every successive administration
17 in the Town in Islip is stuck with these eighty
18 vehicles? They - - - they can never correct the
19 misuse of, say, some of these vehicles - - -

20 MR. QUINN: No.

21 JUDGE GRAFFEO: - - - perhaps twenty-five
22 or thirty of them should never have been - - -

23 MR. QUINN: Well - - -

24 JUDGE GRAFFEO: - - - given to the
25 employees? Because the employees aren't satisfying

1 any of the conditions of the statute or the
2 administrative manual.

3 MR. QUINN: Well, the local law, which
4 really - - - what it boils down to is, can this
5 practice be authorized? As a matter of fact, we
6 consider the practice - - -

7 JUDGE GRAFFEO: No, I'm asking can any
8 successive administration ever change this practice -
9 - -

10 MR. QUINN: Well - - -

11 JUDGE GRAFFEO: - - - and I guess you're
12 saying, no - - -

13 MR. QUINN: I would say no.

14 JUDGE GRAFFEO: - - - except through
15 collective bargaining.

16 MR. QUINN: That's correct. However, I
17 want - - -

18 CHIEF JUDGE LIPPMAN: What's the principle
19 of that?

20 MR. QUINN: Because the terms and - - -
21 because the policies of the Taylor Law are that - - -

22 CHIEF JUDGE LIPPMAN: Regard - - -
23 regardless of what the local law says?

24 MR. QUINN: The local law - - -

25 CHIEF JUDGE LIPPMAN: Whether they're

1 complying with it or not? Doesn't matter?

2 MR. QUINN: No, the local law doesn't trump
3 the state law's duty to negotiate.

4 JUDGE SMITH: So your - - - your position
5 is that no local law can regulate any term or
6 condition of employment?

7 MR. QUINN: Not by resolution. It's the
8 implementation. That is correct.

9 JUDGE PIGOTT: I don't understand the
10 implementation business.

11 MR. QUINN: I know.

12 JUDGE SMITH: Well, I don't understand
13 that. What do you mean, you can - - -

14 MR. QUINN: Because that - - - well - - -

15 JUDGE SMITH: - - - you can go - - - once
16 there's a resol - - - you mean, you can - - - you
17 could resolve as long as you don't implement?

18 MR. QUINN: Yes.

19 JUDGE SMITH: That - - - that's nonsense.
20 You can pass a law as long as you don't enforce it?

21 MR. QUINN: A legislative body with neither
22 the right nor the duty to negotiate cannot refuse to
23 negotiate.

24 JUDGE SMITH: Okay, well, I can - - - if
25 you're just saying the law's invalid, I understand

1 that. I might have a problem in agreeing with it,
2 but I understand it. But if you're saying it's
3 valid, it just can't be enforced, that sounds to me
4 like a contradiction in terms.

5 MR. QUINN: Well, let me - - - let me - - -
6 I understand where the - - - where the disconnect is,
7 and it's the difference between the legislative
8 body's role and the executive's role.

9 JUDGE PIGOTT: Yeah, but PERB said it was
10 invalid.

11 MR. QUINN: If PERB said that the local - -
12 - PERB said that the local law does not bar the
13 bargaining allocation.

14 JUDGE PIGOTT: No, you said it's invalid.
15 I can - - - it says - - - that - - -

16 MR. QUINN: Yes, under Doyle it said it was
17 invalid.

18 JUDGE PIGOTT: Even if 14-12 of the Ethics
19 Code - - -

20 MR. QUINN: That's correct.

21 JUDGE PIGOTT: - - - had any applicability,
22 it could not serve - - -

23 MR. QUINN: That - - -

24 JUDGE PIGOTT: - - - as an authorization
25 for the Town's unilateral action, because the local

1 law is invalid to the extent that it precludes
2 collective negotiations that were - - -

3 MR. QUINN: That is correct.

4 JUDGE PIGOTT: So they said it was invalid.

5 MR. QUINN: And citing Doyle for that
6 proposition - - -

7 JUDGE PIGOTT: No, but they said it was
8 invalid.

9 MR. QUINN: Yes.

10 JUDGE PIGOTT: You said, oh, it's valid,
11 they just can't enforce it.

12 MR. QUINN: Well - - -

13 JUDGE PIGOTT: But the fact of the matter
14 is that it's invalid, right?

15 MR. QUINN: It can't be - - - yes.

16 JUDGE PIGOTT: All right. And - - - and
17 that's - - - that's - - - to get back to Judge - - -

18 MR. QUINN: I appreciate it. Thank you.

19 JUDGE ABDUS-SALAAM: So I just - - - I
20 would like to understand too. So you're saying that
21 the minute the law is enacted, and the day it - - -
22 it's implemented - - - if it's enacted today and
23 implemented tomorrow, then it becomes a matter of
24 negotiation.

25 MR. QUINN: Yes.

1 JUDGE ABDUS-SALAAM: If it's enacted today
2 and not implemented for years, it never becomes a
3 matter of negotiation?

4 MR. QUINN: It never becomes a bargainable
5 event.

6 JUDGE GRAFFEO: But I thought it's the past
7 practice principle that - - -

8 MR. QUINN: Past - - -

9 JUDGE GRAFFEO: - - - you were relying
10 upon? So how does that apply if it's passed on
11 Monday, and Tuesday they implement it?

12 MR. QUINN: The past practice is
13 established by the executive. The past practice in
14 this case was established by consecutive Town
15 supervisors, department heads - - -

16 JUDGE SMITH: But if that - - - but if that
17 practice - - -

18 MR. QUINN: - - - human resources people.

19 JUDGE SMITH: I thought Judge Graffeo's
20 question was if that practice had not existed, on --
21 - - on your theory the result would be the same,
22 because they still have to negotiate it.

23 MR. QUINN: Oh, if - - - if there was no
24 past - - -

25 JUDGE GRAFFEO: Isn't - - - isn't that what

1 you're saying - - -

2 MR. QUINN: Yeah - - -

3 JUDGE GRAFFEO: I guess, the past practice
4 doesn't matter here - - -

5 MR. QUINN: No, the past practice - - -

6 JUDGE GRAFFEO: - - - because you're saying
7 it's a term and condition of employment, so it's
8 always a subject of collective bargaining. I'm just
9 trying to understand your posture.

10 MR. QUINN: There - - - at the bargaining
11 table, if the union demanded to negotiate this
12 subject, the Town could not say, we have no Taylor
13 Law duty to negotiate the subject, because we have a
14 local ordinance.

15 CHIEF JUDGE LIPPMAN: Are you - - - are you
16 saying it doesn't matter whether the law is valid or
17 invalid? It's basically - - - once they've
18 implemented it, as Judge Graffeo just said, it's a
19 past practice issue. They've implemented. Do we - -
20 - do we not have to look at the law, is that what
21 you're saying? It doesn't matter whether it was a
22 violation of their own local law. Or the theory is
23 that that's the way they interpreted that local law,
24 and that's not a crazy interpretation, but you're not
25 going along that route at all?

1 MR. QUINN: No, I would say both of those -
2 - - both of those propositions are correct.

3 CHIEF JUDGE LIPPMAN: To find for you, we
4 can - - - we can look at that in either of those two
5 ways?

6 MR. QUINN: I believe you can.

7 JUDGE PIGOTT: Can you also find that this
8 applies to all members of the union? In other words,
9 why just the forty-five? Shouldn't they supply
10 vehicles to everybody in the union?

11 MR. QUINN: No, no, the practice - - -

12 JUDGE PIGOTT: Why not?

13 MR. QUINN: - - - in this case was limited
14 to specific people who received the benefit from
15 their department head.

16 JUDGE PIGOTT: And how was it limited? How
17 - - - how did - - - how did you determine that it was
18 limited, based on 14-12, which spelled out which ones
19 get cars, and which ones don't?

20 MR. QUINN: Well, no, the practice was the
21 department head issued the car to the people based on
22 whatever their department head's criteria were, and
23 I'm must - - -

24 JUDGE READ: So does it go along with job -
25 - -

1 MR. QUINN: - - - I think it had to do with
2 seniority, Your Honor.

3 JUDGE READ: Does it go along with job
4 titles going forward? I guess, that was one - - - my
5 question, too, Mr. Quinn, is what - - - what is the
6 remedy here that you - - - you want to - - - these
7 cars have to be restored to everybody? Is that the -
8 - -

9 MR. QUINN: Well, the remedy is - - -
10 compliance is going to be an interesting issue in
11 this case. I understand the cars have been sold.
12 But the economic benefit can be restored in many
13 different ways, and that would be a question of
14 compliance. I would submit that the remedy would be
15 not only either - - -

16 JUDGE READ: Well - - -

17 MR. QUINN: - - - it would be either give
18 them the cars or give them the money that they would
19 otherwise get.

20 JUDGE GRAFFEO: Does the Town - - -

21 JUDGE RIVERA: So what - - - what does the
22 three dollars that's deducted per day mean? What if
23 anything does that go into that measurement of the
24 remedy?

25 MR. QUINN: Well - - -

1 JUDGE RIVERA: Is that supposed to be the
2 equivalent of what the value was, or do they have to
3 say what it would cost to commute?

4 MR. QUINN: Standing here today, I'm not
5 sure. But I would submit that the tax - - - that the
6 - - - if it were to be reduced to a compensation
7 level, it would be the mileage - - - whatever the
8 mileage - - - you wouldn't - - -

9 JUDGE RIVERA: Can I ask you - - - you
10 decided - - -

11 MR. QUINN: Ten cents a mile or something,
12 whatever it is.

13 JUDGE RIVERA: Right. PERB - - - PERB
14 decided it was a pa - - - past practice, correct?

15 MR. QUINN: That's correct.

16 JUDGE RIVERA: Okay, so I'm a little
17 confused how you reached that decision, given that
18 they argue that this was a violation of the Ethical
19 Code, so how could there ever be a reasonable
20 expectation by these union members to continue this
21 unethical practice?

22 MR. QUINN: Well, it's unethical only
23 because the latest supervisor considered it to be
24 unethical. Nobody else did. As a matter of fact,
25 the previous supervisor put this subject on the table

1 where it belongs.

2 CHIEF JUDGE LIPPMAN: So you're also
3 arguing that - - - that this is a rational
4 interpretation by the Town itself of its own law.
5 That's - - -

6 MR. QUINN: I would say.

7 CHIEF JUDGE LIPPMAN: That's one of your
8 arguments?

9 MR. QUINN: No - - - rational or
10 irrational?

11 CHIEF JUDGE LIPPMAN: A rational - - - the
12 original interpretation. Letting them have these
13 cars was their own interpretation of their own law,
14 which was irrational and they should be stuck with
15 it.

16 MR. QUINN: It - - -

17 CHIEF JUDGE LIPPMAN: Is that - - - is that
18 your argument?

19 MR. QUINN: Thank you, Your Honor. That is
20 precisely - - - they have interpreted their local law
21 in a way that allowed the establishment of a past
22 practice that is fully cognizable under the Taylor
23 Law - - -

24 JUDGE SMITH: And how - - - how - - - how
25 is that a defensible interpretation when it says that

1 the only permissible use is for official business?

2 MR. QUINN: No, it's not the only
3 permissible use. It can - - -

4 JUDGE SMITH: Well, I'm quoting the local
5 law.

6 MR. QUINN: It says the car can be provided
7 - - - a car cannot be provided for personal use or
8 convenience or profit, unless the car is provided for
9 official use. This car was provided for official
10 use.

11 JUDGE PIGOTT: You make the argument that
12 it's personal. The fact that - - - as Mr. Stolzer
13 was pointing out, you make the argument that we're
14 talking personal now. We're not talking about - - -
15 about uses in the course of your employment.

16 MR. QUINN: It - - -

17 JUDGE PIGOTT: And you're the one that's
18 saying, you now have to give us cars for our personal
19 use.

20 MR. QUINN: It was given for official use.
21 At the end of the day they were allowed to drive it
22 home. They don't have these cars, except initially
23 for official use.

24 CHIEF JUDGE LIPPMAN: You're saying you
25 can't get the car unless it's for official use, but

1 once you have it, you can have personal use.

2 MR. QUINN: Precisely.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. QUINN: You got the car. And by the
5 way, the practice with respect to this personal use
6 is extremely limited. There is no dispute that the
7 only use - - - personal use - - - of this car, the
8 economic benefit, was to drive from work to home back
9 to work.

10 JUDGE READ: So I couldn't make a detour
11 and go and run my errands some place?

12 MR. QUINN: That's correct. You can't go -
13 - -

14 JUDGE RIVERA: And you say - - -

15 JUDGE SMITH: And I'm sure no one ever did.

16 MR. QUINN: I don't know.

17 JUDGE RIVERA: And you say - - -

18 MR. QUINN: That's not in the record, Your
19 Honor.

20 JUDGE RIVERA: And that's not in violation
21 of the Town's law? I'm sorry; perhaps I've lost - -
22 -

23 MR. QUINN: How you get - - -

24 JUDGE RIVERA: - - - the thread of your
25 argument.

1 MR. QUINN: - - - how you get the car is
2 for official use. You can't - - - the car was not
3 given to these employees for any other purpose,
4 except for official use.

5 JUDGE RIVERA: Well, I'm sorry. Isn't - -
6 -

7 MR. QUINN: Once has - - -

8 JUDGE RIVERA: What - - - isn't the use
9 only to commute?

10 MR. QUINN: Wha - - - no, oh, no, no.
11 These people used these cars to do their official
12 business during the day.

13 JUDGE SMITH: Where is that in the record?

14 JUDGE RIVERA: So - - -

15 MR. QUINN: That's in the record. That's
16 undisputed- - -

17 JUDGE RIVERA: So there's not a single
18 person who got the car only for purposes of
19 commuting?

20 MR. QUINN: Not - - -

21 CHIEF JUDGE LIPPMAN: But this is - - -

22 MR. QUINN: - - - not on this record.

23 CHIEF JUDGE LIPPMAN: Counselor, this is
24 not such an unusual situation - - -

25 MR. QUINN: No, sir.

1 CHIEF JUDGE LIPPMAN: - - - that government
2 employees get cars for official use, and then they
3 use it to get back and forth to work, and then they -
4 - - they have to compensate for that use.

5 MR. QUINN: That's correct, Your Honor.

6 CHIEF JUDGE LIPPMAN: I mean, that's not -
7 - - this is not nuclear science or a new thing in
8 government. This is - - - this is very, very common.

9 MR. QUINN: This is very common. The fact
10 that I'm arguing this case before the Court of
11 Appeals is - - - is, I believe, only because of this
12 local law that barred the establishment - - -
13 allegedly, barred the establishment of the practice
14 in the first instance.

15 JUDGE PIGOTT: But one of your - - - one of
16 your people who testified seemed to be indicating
17 that he had to go out and buy a car because - - -

18 MR. QUINN: Well - - -

19 JUDGE PIGOTT: - - - of the change in the
20 thing. Now we're not going to reimburse him for the
21 cost of the Volvo, are we?

22 MR. QUINN: The compliance side of this
23 proceeding, as I say, is going to be a different - -
24 - a different issue.

25 JUDGE PIGOTT: Why wouldn't it just be

1 three dollars a day?

2 MR. QUINN: Because that's just - - -
3 that's the tax consequences - - - I - - - my - - - I
4 don't know what the tax bracket is. I don't know - -
5 - honestly, I don't know the answer to that. Three
6 dol - - - when they came to an assessment that said
7 the value of this car - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. QUINN: - - - was for tax purposes is
10 three bucks withholding.

11 CHIEF JUDGE LIPPMAN: Oh, Judge Smith and
12 Judge Read - - -

13 JUDGE READ: Yes - - -

14 CHIEF JUDGE LIPPMAN: Oh, Judge Read and
15 Judge Smith?

16 JUDGE READ: I have one other - - - it's -
17 - - so, let's say I'm one of the employees that has
18 this car, okay, and I retire, all right. And
19 somebody is hired into my same job title. Does the
20 entitlement of the car automatically follow forever -
21 - -

22 MR. QUINN: No.

23 JUDGE READ: - - - unless you negotiate
24 something different?

25 MR. QUINN: Actually, once you've retired,

1 you're no longer an employee, so the terms and
2 conditions of employment that are cognizable under
3 the Taylor Law, do not go with you. You - - -

4 JUDGE READ: So my - - - my - - - my
5 successor doesn't necessarily get the same benefit I
6 enjoyed.

7 MR. QUINN: Sorry. Your successor, who is
8 an employee, when that employee becomes entitled to
9 it, when the department head finds that you've had
10 enough seniority, that you're entitled to use the car
11 for your - - - driving around town to do your
12 official business, you can do it and then take it
13 home at night.

14 Somebody makes that determination based - -
15 - as I understand it, Your Honor, I believe that this
16 record establishes that it's based on seniority. How
17 the employee gets the pra - - - the vehicle is,
18 frankly, not very well fleshed out in this record.

19 JUDGE RIVERA: So if they had instead of as
20 a - - - as - - - just said we're not going to do this
21 at all as a - - - as a blanket prohibition, but
22 instead had gone back, and made an individual
23 determination about each employee being able to get
24 these cars, would that have been a violation?

25 MR. QUINN: Yes. Is - - - the terms and

1 conditions of employment attach to the employee, not
2 the fact that it's one or two - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. QUINN: - - - or six or - - -

5 CHIEF JUDGE LIPPMAN: Judge Smith, did you
6 have one more question?

7 JUDGE SMITH: No, I'm - - - I'll pass.

8 CHIEF JUDGE LIPPMAN: No? Okay, thank you,
9 counsel.

10 MR. QUINN: Thank you very much, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: I appreciate it.
13 Counsel, you're on; go ahead.

14 MR. CASTRO: Good afternoon, may it please
15 the court, my name is Liam Castro. I'm the attorney
16 for the union.

17 CHIEF JUDGE LIPPMAN: How does your
18 position differ from PERB - - -

19 MR. CASTRO: It - - -

20 CHIEF JUDGE LIPPMAN: - - - if at all?

21 MR. CASTRO: It does not.

22 CHIEF JUDGE LIPPMAN: Okay, go ahead.

23 JUDGE PIGOTT: So if, as I think - - -

24 JUDGE SMITH: Is the law valid or invalid?
25 What is their position? I got - - - had some

1 trouble.

2 MR. CASTRO: Our position is that the
3 Town's argument that the Town law supersedes any
4 bargaining obligations under the Taylor Law is wrong.
5 They - - - they argue that - - -

6 JUDGE SMITH: I haven't heard whether it's
7 valid or invalid yet.

8 MR. CASTRO: Okay. To the extent that it
9 violates the Taylor Law or imposes - - -

10 JUDGE SMITH: Okay, does it to what extent
11 - - - does it violate the Taylor Law or doesn't it -
12 - -

13 MR. CASTRO: I - - - I believe - - -

14 JUDGE SMITH: - - - the law as written?

15 MR. CASTRO: I believe to the extent that
16 it - - - it - - - it bars negotiating with the union,
17 it is invalid under the Taylor Law.

18 JUDGE PIGOTT: Was it invalid in 1968 or
19 has it just become invalid because of something - - -
20 somebody brought this up about forty years later?

21 MR. CASTRO: Well, I - - - I mirror PERB's
22 argument in that the implementation is - - - is
23 important, not necessarily the passage of the
24 statute, because that's a legislative act.

25 JUDGE SMITH: So it was not - - - so it was

1 not valid - - - well, you - - - you mirror their
2 argument that it's okay to pass it as long as they
3 don't implement it?

4 MR. CASTRO: Yes, yes, because - - -

5 JUDGE SMITH: How - - - how does that make
6 any sense?

7 MR. CASTRO: Well, because the leg - - -

8 JUDGE SMITH: How can you - - - how can it
9 be okay - - -

10 MR. CASTRO: Yes.

11 JUDGE SMITH: - - - to pass a law that no
12 one can implement?

13 MR. CASTRO: Well, because the law is
14 something the legislature can do, pass a law. It is
15 up to the executive officer - - - here, the Town
16 supervisor, to implement that law.

17 JUDGE SMITH: When the legislature passes
18 laws, isn't the executive supposed to execute them?
19 Isn't that why they're called the executive?

20 MR. CASTRO: Well, they're supposed to, and
21 in this case, they didn't. However, to the - - - to
22 the extent that this practice here is - - - is relied
23 upon, we think the practice is justifiable under the
24 Town law.

25 CHIEF JUDGE LIPPMAN: You're saying that

1 that the - - - that - - - again, I don't want to put
2 words in your mouth, but you're argument as I asked
3 PERB, is in part that it's their interpretation of
4 the law, and that was a reasonable interpretation,
5 and letting whatever they did with these eighty
6 people was consistent with the law till a new
7 administration came in and said, well, I don't think
8 it's consistent, or we want to save money, or
9 whatever the - - -

10 MR. CASTRO: Yeah, it was consistent with
11 the - - -

12 JUDGE PIGOTT: So just so we're clear,
13 though, you say - - - so you're saying that these
14 forty-five cars that they said we can't afford
15 anymore. We're going to take them off our insurance.
16 We're, you know, we're getting rid of them to save -
17 - - save money in the budget. They can't. They have
18 to keep those cars.

19 MR. CASTRO: I'm not - - - I'm not going so
20 far as to say that.

21 JUDGE PIGOTT: Okay.

22 JUDGE READ: You're saying they have to
23 negotiate - - -

24 MR. CASTRO: I'm not - - - the - - - the
25 cars are still provided for official business.

1 That's what the statute says. That - - -

2 JUDGE PIGOTT: The forty-five cars that
3 they got rid of, because they said we - - - we want
4 to save money. And you're saying you can't do that.
5 You got to get our permission before you can do - - -

6 CHIEF JUDGE LIPPMAN: You're saying you got
7 to bargain. Is that your argument?

8 MR. CASTRO: You got to bargain. But I'm -
9 - - I'm not going so far as to say that they can't -
10 - -

11 JUDGE SMITH: Yeah, but - - - but - - -
12 until - - -

13 MR. CASTRO: - - - that they take all - - -

14 JUDGE SMITH: - - - until a change is
15 agreed on, they got to go buy those cars back?

16 MR. CASTRO: Well, I - - -

17 JUDGE SMITH: And supply them to you,
18 right?

19 MR. CASTRO: Well, I'm not - - - I'm not
20 going so far as to say that - - - that they can't
21 get rid of the cars. If in fact, they - - - they're
22 saying the cars and - - - and no - - - something
23 we're no longer going to provide to our employees and
24 they - - -

25 CHIEF JUDGE LIPPMAN: How could they do

1 that - - - if they have to negotiate, how could they
2 just say I'm getting rid of the car?

3 MR. CASTRO: Well, that changes the terms
4 and conditions of employment, correct? Because if
5 you're obligated to transfer - - - to transport
6 yourself from the Town Hall, let's assume that's your
7 work - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but if they
9 don't have a car, how can they transport - - -

10 MR. CASTRO: Correct.

11 CHIEF JUDGE LIPPMAN: - - - themselves?

12 MR. CASTRO: Right, it would be - - -

13 CHIEF JUDGE LIPPMAN: So you're saying they
14 can't get rid of the car.

15 MR. CASTRO: Right. Well, they - - - they
16 would - - -

17 CHIEF JUDGE LIPPMAN: Well, they have to
18 give a - - - continue to give a car; it doesn't have
19 to be that car, but then they don't save any money if
20 they do.

21 MR. CASTRO: Well, it's clearly the Town's
22 obligation to transport the employee from location A
23 to location B. Location A being, let's say, their
24 report site, and location B, let's say, a house that
25 they have to assess.

1 JUDGE ABDUS-SALAAM: So could they
2 institute a policy of pooling, instead of having
3 eighty cars. Could they have forty-five cars and
4 make people pair up?

5 MR. CASTRO: Well, we think that the - - -
6 the PERB's determination here - - -

7 JUDGE ABDUS-SALAAM: That that's still - -
8 -

9 MR. CASTRO: - - - that the - - - the
10 benefit was the - - - the permission for the employee
11 to use the vehicle from their home to wherever their
12 reporting location was, was an economic benefit.
13 There's a value associated to that benefit.

14 JUDGE GRAFFEO: But I - - - I think what -
15 - - I think what Judge Abdus-Salaam is asking you,
16 and what's my question also, they can't do a pooling
17 arrangement where people that have a need to use the
18 car the next morning can take the pool car home?
19 That - - - they can't do that? Even that has to be
20 bargained?

21 MR. CASTRO: What has to be bargained is
22 the - - - is what would - - -

23 JUDGE GRAFFEO: No, an - - - could you
24 answer my question? Is that - - -

25 MR. CASTRO: Yeah.

1 JUDGE GRAFFEO: Yes, that has to be
2 bargained. So they can't even try to save money by
3 still providing the access, but instead of saying,
4 you get car A, he gets car B, you can't do a pooling
5 arrangement - - -

6 MR. CASTRO: They must - - -

7 JUDGE GRAFFEO: - - - so that the employee
8 still has the same access to a vehicle.

9 MR. CASTRO: The employee must have the
10 same access to the vehicle from the - - - the
11 reporting location, due home, and back.

12 CHIEF JUDGE LIPPMAN: Is it the same access
13 or they just have to be compensated for taking away
14 that access?

15 MR. CASTRO: I'm sorry, Your Honor. I
16 didn't catch that.

17 CHIEF JUDGE LIPPMAN: Is it the same access
18 or just that they have to be compensated for taking
19 away that access?

20 MR. CASTRO: We believe - - - we believe -
21 - -

22 CHIEF JUDGE LIPPMAN: If there's an
23 economic benefit - - -

24 MR. CASTRO: Yes.

25 CHIEF JUDGE LIPPMAN: - - - is that what

1 you're saying?

2 MR. CASTRO: What we're say - - - we're
3 saying that the vehicle must be provided.

4 JUDGE PIGOTT: No, you're negotiating it,
5 and you're saying - - -

6 MR. CASTRO: Well, until you - - -

7 JUDGE PIGOTT: Wait, let me finish. Let me
8 finish. You're saying, you know, give me another
9 hundred dollars a week and you can have the car for
10 the rest of your - - - the rest of its life. I mean
11 - - -

12 MR. CASTRO: Well, I don't - - -

13 JUDGE PIGOTT: - - - it's a negotiation.

14 MR. CASTRO: It's - - - it - - - nothing's
15 taken - - -

16 JUDGE PIGOTT: I - - -

17 MR. CASTRO: - - - in a vacuum, Your Honor,
18 during negotiations, correct?

19 JUDGE PIGOTT: I think Mr. Stolzer
20 mentioned in his brief that if - - - if someone, God
21 forbid, has been giving their administrative
22 assistant every Friday off, and then decides, you
23 know, I - - - I really need him, you know, every
24 Friday, and then - - - is the union going to jump in,
25 wait a minute, wait a minute, wait a minute. You - -

1 - you're just not going to make him come in and work
2 forty hours when you've been giving him, you know,
3 Fridays off now. We're going to have to negotiate
4 that, right?

5 MR. CASTRO: No, Your Honor, that is not
6 this case here.

7 JUDGE PIGOTT: I know it's not, but I - - -

8 MR. CASTRO: Yeah. And that - - -

9 JUDGE PIGOTT: - - - are we getting to that
10 point - - -

11 MR. CASTRO: Oh.

12 JUDGE PIGOTT: - - - where if - - - where
13 if there's an exercise of discretion on the part of
14 government that inures to the benefit of any
15 employee, that that - - - they run the danger of that
16 becoming a bargainable point?

17 MR. CASTRO: No, not - - -

18 JUDGE PIGOTT: They're not running that
19 danger?

20 MR. CASTRO: No, that - - - that - - -

21 JUDGE SMITH: Well, why - - - why isn't
22 Judge Pigott's case - - - why isn't a term and
23 condition of employment that the administrative
24 assistant only works four days a week? How can - - -
25 how can the - - - how can the employer change that

1 unilaterally?

2 MR. CASTRO: Well, I would - - - I would -
3 - - that's a hypothetical, and there are a lot of
4 variables - - -

5 JUDGE SMITH: Yeah, that's - - - that's - -
6 - yeah, that's why he asked.

7 MR. CASTRO: So we're going down a very
8 slippery slope, where we're going to start to
9 maneuver around and I - - -

10 JUDGE SMITH: I mean, yeah, the reason we
11 ask hypotheticals is we want to find out what you - -
12 - whether you think one result compels the other.
13 How is the case that Judge Pigott put to you
14 distinguishable from what you're asking us to do?

15 MR. CASTRO: Well, it's distinguishable
16 here - - - because in this case we have a local law
17 that arguably allows for it. It does. It says
18 personal convenience. Now I'm reading it in the
19 record - - - personal convenience - - -

20 JUDGE SMITH: So you think - - - you think
21 your case would be weaker if there were no local law
22 here?

23 MR. CASTRO: I - - - no, our - - - our case
24 - - - our case would be stronger. We wouldn't - - -
25 I don't think we would be here if there were no local

1 law. Then - - -

2 JUDGE PIGOTT: But you like the local law.

3 MR. CASTRO: I'm sorry?

4 JUDGE PIGOTT: You like the local law.

5 MR. CASTRO: The local law is - - - is - -
6 - in our position, as we pointed out in our brief, is
7 very consistent with the past practice. You can use
8 it for personal convenience, so long as you - - -

9 CHIEF JUDGE LIPPMAN: Do you think it's
10 ambiguous, the local law or - - -

11 MR. CASTRO: No, not in this - - -

12 CHIEF JUDGE LIPPMAN: - - - you think it's
13 clear?

14 MR. CASTRO: No, I - - - I don't believe
15 that it is.

16 CHIEF JUDGE LIPPMAN: You think it's clear
17 in the way that you - - - you - - -

18 MR. CASTRO: I - - - yes, Your Honor,
19 provide - - -

20 JUDGE RIVERA: Can you finish that thought?
21 It's - - - it's - - - you can use it for personal
22 convenience - - - finish it - - - because?

23 MR. CASTRO: When a car is provided to you
24 pursuant to municipal policy for the use of - - - of
25 - - - by that office or employee in the conduct of

1 official business, then you can use it for personal
2 convenience. It says so.

3 CHIEF JUDGE LIPPMAN: Well, obviously, if
4 you have it for twenty-four hours a day, you can use
5 it for personal convenience to get back and forth to
6 work, right, that's the whole purpose of having the
7 car.

8 MR. CASTRO: Well, that - - -

9 CHIEF JUDGE LIPPMAN: You may have to pay
10 them something back for your personal usage. That's
11 what I was saying before to your colleague from PERB
12 that that's not uncommon.

13 MR. CASTRO: That's not - - -

14 CHIEF JUDGE LIPPMAN: That people - - -

15 MR. CASTRO: No.

16 CHIEF JUDGE LIPPMAN: - - - have the use of
17 the car because of business, and then you - - - you
18 pay for your personal usage.

19 MR. CASTRO: Your Honor, that is not a new
20 concept. We've cited in our brief the County of
21 Nassau and several other cases - - - I think it's
22 County of Onondaga, or some - - - Second and Third
23 Department cases that very clearly said that the
24 personal use of vehicles - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. CASTRO: - - - is a mandatory subject -
2 - - this is not a new issue, Your Honor.

3 JUDGE RIVERA: May I - - - may I just - - -

4 CHIEF JUDGE LIPPMAN: Yeah, sure, Judge
5 Rivera.

6 JUDGE RIVERA: So what - - - what is your
7 argument for how your members have a reasonable
8 expectation of the - - - for the continuation of what
9 the Town is arguing is a violation of their Town law?

10 MR. CASTRO: Your Honor, I appreciate that
11 quest - - - I understand that question.

12 JUDGE RIVERA: Yeah.

13 MR. CASTRO: There are several reasonable
14 bases - - -

15 JUDGE RIVERA: Um-hum.

16 MR. CASTRO: - - - for a reliance on the
17 past practice. One is - - -

18 JUDGE RIVERA: Not that they can rely on
19 it. That wasn't the question. The question is the
20 reasonable expectation that it would continue.

21 MR. CASTRO: That it would continue.

22 JUDGE RIVERA: Yes.

23 MR. CASTRO: Right. The reasonable
24 expectation that it would continue, is one, the
25 passage of time. This has been allowed to other

1 employees in the same title who use the car for the
2 same reason. Two, that - - - that those employees
3 were - - - were taxed for that benefit, and we would
4 be taxed as well.

5 So those two reasons are remarkably
6 important. In addition, it is - - - this was open
7 and notorious. This - - - this - - - these cars were
8 provided to certain employees based on sen - - - not
9 only seniority but also title. So we're not - - -
10 we're not - - -

11 JUDGE PIGOTT: So it would upset - - - it
12 would probably upset a lot of people to know that
13 there are certain favorites that are getting cars.
14 Wouldn't you think? Talk about - - - I mean - - -

15 MR. CASTRO: Well - - -

16 JUDGE PIGOTT: You mentioned it's
17 notorious. I mean, I just can't imagine what it does
18 for employee morale to know that Ralph's going to - -
19 - drive home on a car I'm paying for.

20 MR. CASTRO: Well, then I would submit,
21 Your Honor, that - - - that employee should get to
22 where that other employee is, become as senior, and
23 get that title.

24 JUDGE PIGOTT: Mr. Quinn said you can't get
25 them for everybody.

1 MR. CASTRO: No, no, I - - - we agree.
2 It's based on seniority. It's based on title. We're
3 not saying every - - - listen, we're not opening up
4 the can of worms here that every Town employee then -
5 - - within this bargaining unit needs to now get
6 cars.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. CASTRO: Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: We got it. Thank
10 you.

11 Let's have rebuttal. Counsel, let me ask
12 you one question. If you - - - you - - -

13 MR. STOLZER: Okay.

14 CHIEF JUDGE LIPPMAN: If you - - - if you
15 accept the premise that - - - that what you did in
16 allowing these employees to have cars was a quite
17 viable interpretation of the local law - - - assume
18 that that's the case - - - and then you allowed them
19 to have the cars, and you have a past practice, in
20 terms of letting these people have cars, can you just
21 unilaterally say, we're going to discontinue the past
22 practice, and if you can, on what basis does - - -
23 does - - - is that okay?

24 MR. STOLZER: In this particular case, Your
25 Honor - - -

1 CHIEF JUDGE LIPPMAN: I - - - but assume
2 that the - - - that what you did was a reasonable
3 interpretation of your own law, and you did it many
4 years, past practice, now you want to stop. Under
5 what conditions can you stop?

6 MR. STOLZER: Well - - -

7 CHIEF JUDGE LIPPMAN: Why don't you have to
8 negotiate it?

9 MR. STOLZER: First of all, I - - - not to
10 be disrespectful, but I disagree with - - -

11 CHIEF JUDGE LIPPMAN: Again, this is a
12 hypothetical. That's for - - -

13 MR. STOLZER: Okay, but I disagree with the
14 premise. I don't think we have - - - we can have a
15 premise here that it was proper at its inception.

16 CHIEF JUDGE LIPPMAN: But - - - but - - -
17 but give me a little space and just - - -

18 MR. STOLZER: Okay. I apologize.

19 CHIEF JUDGE LIPPMAN: - - - and agree with
20 me for the time being - - -

21 MR. STOLZER: Okay.

22 CHIEF JUDGE LIPPMAN: - - - that - - - that
23 this was okay; it was a reasonable interpretation of
24 your own law, and you let them do it, then you want
25 to stop. Can you? If you accept that premise, which

1 I know you disagree with.

2 MR. STOLZER: If I accept your premise,
3 you're correct.

4 CHIEF JUDGE LIPPMAN: You cannot stop.

5 JUDGE SMITH: If you accept the Chief's
6 premise, you lose the case.

7 MR. STOLZER: If I accept the Chief's
8 premise, which - - - not to be rude, but I don't
9 accept - - -

10 CHIEF JUDGE LIPPMAN: No, that's okay.

11 JUDGE READ: We understand that.

12 MR. STOLZER: If we can just put this in a
13 - - -

14 JUDGE RIVERA: Can we accept that premise
15 if - - - if everyone else has already conceded that -
16 - - that that premise cannot apply?

17 MR. STOLZER: Well, I don't think
18 everyone's conceded that, Your Honor.

19 JUDGE RIVERA: Everyone has not conceded
20 that?

21 MR. STOLZER: Excuse me?

22 JUDGE READ: Well, we do have to defer - -
23 - we do have to defer to PERB, don't we, at a certain
24 point?

25 JUDGE RIVERA: Aren't there certain - - -

1 yes, aren't there certain findings?

2 MR. STOLZER: You have to defer to PERB,
3 unless it's an issue of law. I - - - if I could just
4 - - -

5 CHIEF JUDGE LIPPMAN: Yeah, sure, go ahead.

6 MR. STOLZER: - - - if you could indulge me
7 for a moment and put this in just a little bit of
8 historical context.

9 In 1964, the general municipal law is
10 passed. Chapter 18 says, municipalities, the state's
11 decided we want you to pass ethics codes. It's
12 permissive at that point.

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. STOLZER: The Town does it. They do
15 what they're supposed to, actually, in that case.
16 From there, in 1968, they adopt a code of ethics,
17 including this 14-12. The vehicles are not given to
18 employees, the record shows, until eighteen to twenty
19 years before the hearing, which was in 2006. So
20 we're in the - - - in the mid-80s. So for twenty-
21 plus years, there's no vehicles.

22 I have some quibble with Mr. Quinn in that
23 you can't have a violation until the - - - until the
24 executive branch implements something, because there
25 was nothing to implement. What - - - what would they

1 have done? They didn't give vehi - - - it wasn't
2 implemented - - -

3 CHIEF JUDGE LIPPMAN: So what happened? So
4 what happened that - - - what happened that it was
5 implemented?

6 MR. STOLZER: Someone made a decision to
7 give cars. I don't go that far back with the Town.

8 CHIEF JUDGE LIPPMAN: But doesn't that go
9 back to the first question we asked you, I think
10 Judge Smith asked it, is it - - - is what happened
11 that the powers that be in the Town ignored the law
12 in - - - in allowing these personal cars, or was it
13 that they looked at the law, and said, oh, this is
14 our interpretation of the law; let's give these guys
15 cars.

16 MR. STOLZER: I believe if you look at the
17 law, in its context, I believe they ignored the law
18 and gave the car.

19 CHIEF JUDGE LIPPMAN: So you believe they
20 ignored the law. That's what we're asking you
21 upfront.

22 MR. STOLZER: And I think that's a
23 reasonable assumption based on what that statute says
24 - - -

25 CHIEF JUDGE LIPPMAN: Even though it was

1 open and notorious as - - - as was the law?

2 MR. STOLZER: Which was open and notorious?

3 CHIEF JUDGE LIPPMAN: Even though the - - -
4 the giving the cars was open and notorious, as the
5 law was open and notorious - - -

6 MR. STOLZER: Well, I think that - - -

7 CHIEF JUDGE LIPPMAN: - - - you still think
8 they basically said, I don't know what this is about,
9 or just didn't look and did what they did, in your
10 view?

11 MR. STOLZER: I think they did it
12 incorrectly. I think they created this benefit - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. STOLZER: - - - that was illegal at its
15 inception, which makes it - - -

16 JUDGE SMITH: On - - - on the question - -
17 -

18 MR. STOLZER: - - - improper.

19 JUDGE SMITH: On the question that both the
20 Chief and I have been asking you, which is did they
21 ignore the law, or did they just interpret the law,
22 did PERB decide that question? Has PERB ruled on
23 that question?

24 MR. STOLZER: In this particular case?

25 JUDGE SMITH: Yes.

1 MR. STOLZER: No.

2 JUDGE SMITH: Yeah, I don't see it either.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. STOLZER: PERB's holding's a little
5 broader. It's - - - their holding really is, any
6 local law - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. STOLZER: - - - is overcome - - -

9 JUDGE SMITH: And PERB - - -

10 MR. STOLZER: - - - by the Taylor Law,
11 which - - -

12 JUDGE SMITH: And PERB - - - and I - - - I
13 heard - - - I thought they were saying - - -

14 MR. STOLZER: - - - is way too broad.

15 JUDGE SMITH: - - - it's okay to ignore it,
16 and indeed, you've got to ignore it. Is that what
17 you heard?

18 MR. STOLZER: Any other questions?

19 CHIEF JUDGE LIPPMAN: Yeah - - - well - - -

20 MR. STOLZER: Thank you, have a nice
21 afternoon.

22 CHIEF JUDGE LIPPMAN: Okay. Thank you all,
23 appreciate it.

24 (Court is adjourned)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Town of Islip v. New York State Public Employment Relations Board, No. 95, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 7, 2014