

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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RACINE POLICEMEN'S PROFESSIONAL :  
AND PROTECTIVE CORPORATION, :  
 : Case CXXIII  
 : No. 25714 MP-1071  
Complainant, : Decision No. 17605-B  
 :  
vs. :  
 :  
CITY OF RACINE (POLICE DEPARTMENT), :  
 :  
Respondent. :  
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Appearances:

Schwartz, Weber & Tofte, Attorneys at Law, by Mr. Robert K. Weber,  
704 Park Avenue, Racine, Wisconsin 53403, on behalf of the  
Complainant.

Daniel P. Wright, Esq., Deputy City Attorney, City of Racine,  
City Hall, 730 Washington Avenue, Racine, Wisconsin 53403, on  
behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Policemen's Professional and Protective Corporation (hereinafter referred to as the "Complainant") filed a complaint on January 28, 1980 with the Wisconsin Employment Relations Commission (hereinafter referred to as the "Commission") wherein it alleged that the City of Racine (Police Department) (hereinafter referred to as the "Respondent") had committed certain specified prohibited practices contrary to Section 111.70 of the Municipal Employment Relations Act. The Commission, by its Order dated February 21, 1980 appointed Ellen J. Henningsen as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as set forth in Section 111.07(5) of the Wisconsin Statutes. Hearing was held before said Examiner on April 2, 1980 in Racine, Wisconsin. The parties thereafter filed briefs, and the Complainant filed a reply brief, the last of which was received on July 9, 1980. Examiner Henningsen subsequently became unavailable to determine this matter, and by its Order Substituting Examiner dated October 7, 1980, the Commission appointed Stuart S. Mukamal, as Examiner to issue Findings of Fact, Conclusions of Law and Orders as set forth hereinabove. After consideration of the arguments of the parties and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant is a labor organization which represents for purposes of collective bargaining a bargaining unit comprised of all full-time sworn law enforcement officers employed by the Police Department of the City of Racine and holding the ranks of Patrolman (PH-2) Traffic Investigator (PH-3) and Investigator (PH-4).

2. The Respondent is a municipal employer having its offices at the City Hall, 730 Washington Avenue, Racine, Wisconsin 53403. The Respondent exercises its governmental functions through numerous departments, including a Police Department.

3. Mr. Dale C. Zierten, the individual whose complaint forms the basis of this proceeding, is employed and has been employed at all times material hereto, as a police officer by the Respondent, holding the rank of Patrolman (PH-2). Officer Zierten has also, at all times material hereto, been a member of the Complainant, and has served the Complainant in various capacities, including as a member of its Board of Directors, as its Treasurer and as a member of its Grievance Screening Committee. In the latter capacity, Officer Zierten has been responsible for the screening and processing of grievances arising within the Complainant's bargaining unit and for the representation of grievants in connection therewith.

4. At all times material hereto, Mr. James J. Carvino has served as Police Chief of the City of Racine. Chief Carvino was appointed to his position in 1977 and had not previously been employed by the Respondent.

5. At all times material hereto, Mr. Terrence Conway was employed by the Respondent as a police officer in the rank of Lieutenant. Lieutenant Conway served as a shift commander within the Police Department and was a superior officer to Officer Zierten.

6. The parties entered into a collective bargaining agreement for the years 1978-1979 (hereinafter referred to as the "1978-1979 Agreement") covering the wages, hours and working conditions of the members of the Complainant's bargaining unit described in Finding of Fact number 1 hereinabove. Said 1978-1979 Agreement contained, inter alia the following provisions:

#### ARTICLE IV - MANAGEMENT RIGHTS

The City possesses the sole right to operate the Racine Police Department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this Agreement and the past practices within the Racine Police Department unless the past practices are modified by this Agreement or the rules of the Racine Police Department. These rights, which are normally exercised by the Chief of Police include, but are not limited to, the following:

A. To direct all operations of and to maintain the efficiency of the Racine Police Department.

B. To establish reasonable work rules. The Corporation acknowledges that the establishment and modification of the rules of the Racine Police Department are within the sole and exclusive power of the Chief of the Racine Police Department and that he may establish, modify or repeal rules without negotiations of any type. However, the City agrees that such rules will be reasonable with the reasonableness of the rules subject to the Grievance Procedure beginning at the second step.

C. To recommend for promotion, to transfer and assign officers in positions within the Racine Police Department.

D. To suspend, demote, discharge and take other disciplinary action against employees pursuant to Section 62.13, Wisconsin Statutes.

E. To relieve employees from their duties because of lack of work or for budgetary reasons.

F. To establish reasonable schedules of work.

G. To take whatever action is necessary to comply with State or Federal law.

H. To introduce, improve, modify and change methods or equipment.

I. To determine the number, structure and location of divisions; the kind and amount of services to be performed; and the number and kind of positions and job classifications to perform such services. If new pay grades are established by the City, it shall have the right to set the pay for such grades with the reasonableness of such pay subject to the Grievance Procedure. However, the exercise of this clause shall not lead to an unreasonable imbalance in existing workloads of employees.

J. To contract out for goods or non-police services.

K. To take whatever action is necessary to carry out the functions of the City in situations of emergency. The City agrees that such action will be undertaken only for the duration of the emergency.

The Corporation and the employees agree that they will not attempt to abridge these management rights and the City agrees it will not use these management rights to interfere with rights established under this Agreement or to attempt to undermine the Corporation, this Agreement or the existing past practices within the department, unless such past practices are modified by this Agreement or the rules of the Racine Police Department.

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#### ARTICLE VIII - GRIEVANCE PROCEDURE

1. Definition of Grievance: A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or the City concerning the interpretation or application of this contract. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications. The City as well as the Corporation may file grievances and proceed to arbitration under this Agreement.

2. Time Limitations: The failure of a party to file or appeal a grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. A party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. However, if it

is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

3. Names of Corporation and City Officials: The Corporation shall provide the City with a list of the members of the grievance committee in writing and further present the City with a list of the Corporation officials assigned to various aspects of the grievance process. The City shall also provide the Corporation with a list of City and Police Department officials assigned to process grievances.

4. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

5. Steps in Procedure:

Step 1.

The employee, alone or with not to exceed two (2) Corporation representatives shall orally contact the regular shift or division Commander, whichever has been appropriate in the past, within ten (10) calendar days after he knew the cause of his grievance. In the event of a grievance, the employee shall perform his assigned work task and grieve his complaint later. The employee's regular shift or division Commander shall within five (5) working days, orally inform the employee of his decision.

Step 2.

If the grievance is not settled at the first step, the employee and/or the Corporation within five (5) working days after the oral decision of the shift or division Commander, shall submit a written grievance to the Police Chief. The Chief or his designee will review the record and further investigate the grievance. The Chief will inform the aggrieved employee and the Corporation in writing of his decision within ten (10) days after receipt of the grievance.

Step 3.

If the grievance is not settled in the second step, the subject matter of the grievance may be appealed as follows within five (5) working days after the written decision of the Chief. If the grievance is covered by Section 62.13(5), Wisconsin Statutes, it may be appealed to the Police and Fire Commission in accordance with Section 62.13, Wisconsin Statutes. If the subject matter of the grievance does not involve the subjects set forth in the previous sentence, it may be appealed to arbitration within five (5) working days after the written decision of the Chief.

ARTICLE IX - ARBITRATION

1. Time Limit: If satisfactory settlement is not reached in Step 3 of the Grievance Procedure, the Officer

and the Grievance Committee of the Corporation must notify the Chairman of the Finance Committee and the Personnel Director in writing within fifteen (15) calendar days after the decision of the Chief that they intend to process the grievance in arbitration.

2. Arbitrator: Any grievance which cannot be settled through the above procedures may be submitted to an Arbitrator to be selected as follows: the City and the Corporation shall use their best efforts to select a mutually agreeable Arbitrator. If the City and the Corporation are unable to agree on an Arbitrator within fifteen (15) days, either party may request the Wisconsin Employment Relations Commission to prepare a list of five (5) Impartial Arbitrators. The Corporation and the City shall then alternately strike two (2) parties each on the slate with the party filing the grievance exercising the first and third strikes. The Corporation and City shall exercise their strikes with fifteen (15) days following receipt of the slate from the WERC. The remaining Arbitrator on the slate after the strikes shall then be notified of his appointment by the moving party.

3. Arbitration Hearing: The Arbitrator selected or appointed shall meet the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing the Arbitrator shall render a written decision as soon as possible to both the City and the Corporation which shall be final and binding on both parties.

4. Costs: The losing party shall bear all costs of arbitration, except those incurred by the winning party for the presentation of its case. Attorneys' fees shall not be included in the costs of the arbitration. If either party orders a transcript, the transcript costs shall be paid by the loser, including the cost of one (1) original transcript for the Arbitrator, one (1) copy for the City and one (1) copy for the Union. Testimony or other participation by the employees during arbitration proceedings shall take place outside of the employees' working hours if possible, but in any event such participation shall not be reimbursed or paid for by the City unless the employees involved are participating during their regularly scheduled work hours.

5. Decision of Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the areas where the alleged breach occurred. The Arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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#### ARTICLE XIII - PROMOTIONAL PROCEDURES

1. Promotional Procedure: Promotional appointments shall be made in accordance with Section 62.13(4), Wisconsin Statutes. An officer who is promoted within

the bargaining unit shall serve a probationary period in his new position for twelve (12) months following the date of his promotion. During this probationary period the officer shall be entitled to return to his former position at his former rate of pay if he so decides or, if in the Police Chief's judgment the officer is not sufficiently qualified in the position to which he was promoted, he may be returned to his former position at his former rate of pay. The City may be required to show the reasonableness of such action through the Grievance Procedure. In the event that an officer returns to his former position and former rate of pay for any reason under the terms of this Section 1, the officer who filled the position from which he was promoted shall also automatically return to his former position and former rate of pay.

2. Notice of Job Assignment Vacancy: In the event that a vacancy exists in a job assignment within a rank within the bargaining unit, the City agrees to post a notice of that vacancy at least ten (10) days prior to the filling of the vacant position. Employees within the rank may request on a form approved by the Police Department that they may be considered to fill the vacancy and the name of the employee selected to fill the assignment shall be posted.

3. Assignment to "Acting" Position: In the event that it is necessary to assign an employee to an "acting" position which is higher than his regular pay grade, the employee selected for such assignment shall be that employee who stands first on the promotional eligibility list for the position to which it is necessary to assign such employee. If the employee standing first on the list refuses the "acting" assignment, the employee standing next on the list will be chosen for such assignment. In the event that an employee is assigned to an "acting" position, that employee will receive the rate of pay for the higher classification to which he is assigned on an "acting" basis beginning on the ninety-first (91st) calendar day following the commencement of his work in the higher classification. This ninety (90) day period shall apply only once in the event of repeated "acting" assignments of an employee to a particular higher pay grade. Such "acting" position shall not be maintained for more than one (1) year or it shall become a permanent position.

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5. Promotion to Grade of Traffic Investigator (PH-3): If a vacancy occurs requiring the promotion of an employee to the classification of Traffic Investigator, an employee wishing to take the written test for such promotion must have at least three (3) continuous years of experience as a policeman on the Racine Police Department. Thereafter, the employee will be promoted from a promotional eligibility list set up under the terms of Paragraph 7 of this Article XIII.

6. Promotion to Grade of Investigator (PH-4). If a vacancy occurs requiring the promotion of an employee to the classification of Investigator, an employee wishing to

to take the written test for such promotion must have at least five (5) continuous years of experience as a policeman on the Racine Police Department. Thereafter, the employee will be promoted from a promotional eligibility list up under the terms of Paragraph 7 of this Article XIII.

7. Compilation of Promotional Eligibility Lists for Grade of Traffic Investigator (PH-3) and Investigator (PH-4): The union recognizes that promotion to the grades of Traffic Investigator (PH-3) and Investigator (PH-4) requires specialized knowledge of police technology, administrative ability, leadership qualities and the ability to manage personnel.

The City agrees that, pursuant to Section 62.13, Wisconsin Statutes, it will recommend to the Racine Police and Fire Commission for promotion the employee who stands first on the respective eligibility list for the said position. Position on the eligibility list for the grades of Traffic Investigator (PH-4) shall be determined by the numerical composite score, such composite score being determined by the addition of the written test score and one-half (1/2) point for each complete year of continuous service since the date of appointment as an officer on the Racine Police Department. Complete continuous years of service shall be calculated to January 1 immediately prior to the administration of the written test in even numbered years.

An officer must achieve a grade of at least seventy-five percent (75%) on the written test for a pay grade to which he wishes to be promoted in order to be placed on the eligibility list for promotion to that grade.

8. Police and Fire Commission Interviews: The promotional candidate being recommended by the Chief for promotion may, at the option of the Commission, be interviewed by the Racine Police and Fire Commission prior to its consideration of this recommendation for promotion.

9. Written Test: The written test for each pay grade shall be prepared and scored by an independent testing agency which shall prepare the test based upon a bibliography of materials determined by the Chief of Police or his designee. The tests shall be administered during January of even numbered years, except the written test for the 1978-1979 promotional list shall be administered in June of 1978.

#### ARTICLE XXXVI - ENTIRE MEMORANDUM OF AGREEMENT

The City and the Corporation agree that all negotiable items have been discussed during negotiations leading to this agreement, that this Agreement as a result of these negotiations is binding upon both parties, that no additional negotiations or changes of any provision pertaining to wages, hours, or conditions of employment shall be undertaken except by mutual consent. The foregoing Agreement constitutes the entire Agreement between the parties and supersedes and cancels all previous Agreements, verbal or written, except

that past practices not in conflict with this Agreement or not in conflict with the rules of the Racine Police Department remain in effect. All existing ordinances and resolutions of the City Council affecting wages, hours, and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth.

7. On December 20, 1979, the parties mutually agreed in writing to extend their 1978-1979 Agreement in toto through January 31, 1980, pending completion of their negotiations for a 1980-1981 collective bargaining agreement.

8. On March 31, 1980, the parties reached agreement on, and executed, a 1980-1981 collective bargaining agreement (hereinafter referred to as the "1980-1981 Agreement") which, by its terms, was made effective retroactively to January 1, 1980. Said 1980-1981 collective bargaining agreement carried over unchanged the above-quoted provisions of the 1978-1979 Agreement with the following exceptions:

- (a) the addition of a paragraph to the end of Article IV - Management Rights, reading as follows:

"Nothing in this Agreement shall preclude the assignment of officers who do not stand first on the promotional eligibility list to an "acting" position where the Chief or his designee determines that such an assignment is necessary. Any such assignment shall be temporary, and shall not be used to circumvent the permanent promotional procedures set forth at Article XIII of the Agreement."

- (b) a revision of Article VIII - Grievance Procedure Section 5, Step 1, last sentence, to read as follows:

"The employee's regular shift or division commander shall within seven (7) calendar days inform the employee of his decision in writing."

- (c) a change from ten (10) to fourteen (14) days in the time permitted for the Chief's response in Step 2 of the contractual grievance procedure.
- (d) a revision of Article XIII - Promotional Procedures, Sections 7 and 9, to read as follows:

7. Compilation of Promotional Eligibility Lists for Grade of Traffic Investigator (PH-3) and Investigator (PH-4): The Union recognizes that promotion to the grades of Traffic Investigator (PH-4) requires specialized knowledge of police technology, administrative ability, leadership qualities and the abilities to manage personnel.

The City agrees that, pursuant to Section 62.13, Wisconsin Statutes, it will recommend to the Racine Police and Fire Commission for promotion



the employee who stands first on the respective eligibility list for the said position. Position on the eligibility list for the grade of Traffic Investigator (PH-3) and for the grade of Investigator (PH-4) shall be determined by the numerical composite score, such composite score being determined by the addition of the writing test score and one-half (1/2) point for each complete year of continuous service since the date of appointment as an officer on the Racine Police Department. Complete continuous years of service shall be calculated to January 1 immediately prior to the administration of the written test in even numbered years.

Primary List: All officers who achieve a grade of seventy-five percent (75%) or higher on the written exam for a pay grade for which they wish to be promoted will receive a composite score consisting of the sum of their written test score and one-half (1/2) point for each complete year of continuous service since the date of appointment as an officer on the Racine Police Department. Officers in this category shall then be ranked sequentially from (sic) highest to lowest based upon said score.

Secondary List: The next highest twenty-five percent (25%) of the officers taking the written exam but scoring less than seventy-five percent (75%) shall also receive a composite score as set forth in the previous paragraph and shall also be ranked sequentially from highest to lowest on a separate eligibility list. If the list of eligible officers scoring seventy-five percent (75%) or above on the exam becomes exhausted, this secondary promotional list shall then be used to award promotional opportunities which may arise.

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9. Written Test: The written test for each pay grade shall be prepared and scored by an independent testing agency which shall prepare the test based upon a bibliography of materials determined by the Chief of Police or his designee. The tests shall be administered during January of the even numbered years.

9. Said 1980-1981 Agreement additionally contained provisions relative to a cost-of-living allowance and to salary schedules for the years 1980 and 1981, which read as follows:

#### ARTICLE XXXIII - COST-OF-LIVING ALLOWANCE

1. Payment of Allowance: A cost-of-living allowance shall be granted as determined below to all full-time employees in the bargaining unit. This allowance will be paid in equal installments corresponding to the salary payment.

2. Basis for Allowance: The amount of cost-of-living allowance shall be determined quarterly as provided below on the basis of the "All Urban Consumers" Index - U.S. City Average on "All Items" as issued by the Bureau of Labor Statistics. The Index which includes public employees shall be referred to hereinafter as "index".

No Adjustments: No adjustment, retroactive or otherwise shall be made to the cost-of-living allowance due to any revision which may later be made in the published figures for the index for any quarter. In the event the Bureau of Labor Statistics does not issue the index in a timely fashion, the adjustment listed above shall be made at the beginning of the first pay period after receipt of the index.

3. Determination of Cost-of-Living Allowance: The Cost-of-Living allowance will be adjusted as provided according to the chart below. Adjustments shall be effective the first pay day of the pay period following the date set forth below:

COLA Adjustment	Between indexes for	
January 1, 1980	For the percentage change if any	Sept. 1979 & Dec. 1979
April 1, 1980	For the percentage change if any	Dec. 1979 & Feb. 1980
July 1, 1980	For the percentage change if any	Feb. 1980 & May, 1980
October 1, 1980	For the percentage change if any	May 1980 & Aug. 1980
January 1, 1981	For the percentage change if any	Aug. 1980 & Nov. 1980
April 1, 1981	For the percentage change if any	Nov. 1980 & Feb. 1981
July 1, 1981	For the percentage change if any	Feb. 1981 & May 1981
October 1, 1981	For the percentage	May 1981 & Aug. 1981

All calculations up to and including the October 1, 1980 adjustment shall use the May, 1976 index of 193.3 as a base. Thereafter all calculations shall use the August, 1980 index as a base.

The adjustment in the cost-of-living allowance shall be made on the basis of the percentage change in the index from one quarterly report to the next. Up to and including the October 1, 1980 adjustment the percentage change shall be rounded to two (2) decimal places and shall be multiplied times the employee's January 1, 1977 base salary (excluding cost-of-living) to determine the amount of increase or decrease in the cost-of-living allowance. Thereafter the percentage change shall be rounded to two (2) decimal places and shall be multiplied times the employee's base salary on January 1, 1981 (excluding the January 1, 1981 COLA adjustment but including the fold). Any such increase or decrease shall be rounded to the nearest cent. Except as provided below, the cost-of-living allowance shall be considered a fund separate from salary and shall not be used to calculate salary, overtime, longevity or other benefits or payments of any kind except contributions to the Wisconsin Retirement Fund which are based on an employee's total compensation.

#### EXAMPLE OF CALCULATIONS

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199.3   September 1978 Index
-195.3   June 1978 Index
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   4.0
4.0 = 2.0481% Difference = 2.05% Increase
195.3

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In the event the index decreases during a quarter, the above formula shall be applied and the amount of decrease shall be deducted from the cost-of-living allowance. If the cost-of-living allowance is not sufficient to absorb the decrease, the decrease shall not be applied against the base salary of the employee.

4. Fold-In: Effective January 1, 1981 the cost-of-living allowance in effect on December 31, 1981 including the adjustment made for the May, 1980 through August, 1980 quarter, will be made a part of the monthly rate and will be protected against any decreases in the Consumer Price Index. Any future cost-of-living allowance will be carried forward as a float and will be available for any decreases in the Consumer Price Index should such decreases occur.

5. Change in Basis: In the event that the Consumer Price Index defined in Section 2 of this Article shall be discontinued, changed or otherwise become available during the term of this Agreement, and if the Bureau of Labor Statistics issues a conversion table by which change in the present Index can still be determined, the parties will promptly undertake negotiations solely with respect to agreeing upon a substitute for determining a comparable cost-of-living adjustment.

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#### APPENDIX A - SALARY SCHEDULE JANUARY 1, 1980

Pay Grade Pay Range & Class Title	Starting	End of First Yr.	End of Second Year
PH-2	7.20	7.57	7.73 (Reg.)
	7.46	7.84	8.01 (O.T.)
	576.00	605.60	618.40 (Bi-Wkly)
	1,248.00	1,312.17	1,339.92 (Monthly)
	14,976.00	15,746.00	16,079.00 (Yearly)
127	Police Officers		
PH-3	7.83	8.00	-0- (Reg.)
	8.11	8.29 (End of	-0- (O.T.)
	626.40	640.00 6 mos.)	-0- (Bi-Wkly)
	1,357.25	1,386.67	-0- (Monthly)
	16,287.00	16,640.00	-0- (Yearly)
8	Traffic Investigators		
PH-4	8.13	8.29	-0- (Reg.)
	8.42	8.59 (End of	-0- (O.T.)
	650.40	663.20 6 mos.)	-0- (Bi-Wkly)
	1,409.25	1,437.00	-0- (Monthly)
	16,911.00	17,244.00	-0- (Yearly)
34	Investigators		
1	Range Officer		

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#### APPENDIX A - SALARY SCHEDULE - 1981

The 1981 wage schedule for all Police Officers in the PH-2 through PH-4 classifications shall be determined as follows:

1. All Cost-of-Living payments in effect on October 1, 1980 shall be folded into the officer's base rate effective January 1, 1981 and that new rate shall become the officer's new base rate effective January 1, 1981.

2. Effective July 1, 1981, all base rates which become effective January 1, 1981 in the PH-2 through PH-4 Police Officer classifications shall receive an additional 2% wage increase.

3. The Cost-of-Living formula shall continue in full force and effect in accordance with the terms outlined in Article XXXIII - Cost-of-Living Allowance.

10. In June, 1978, Officer Zierten and four other police officers sat for the promotional examination administered, pursuant to Article XIII Sections 7 and 9, for the rank of Investigator (PH-4). The results of that examination were as follows:

<u>Candidate</u>	<u>Score</u>
Officer LoPiccolo	75%+
Officer Peterson	75%+
Officer Larson	74.16%
Officer Bickel	74.10%
Officer Zierten	72.50%

11. Officers LoPiccolo and Peterson, being the only officers passing the June, 1978 examination referred to in Finding of Fact number 10 hereinabove, were subsequently promoted as vacancies occurred to the rank of Investigator. Officer Larson passed the June, 1978 promotional examination for the rank of Sergeant and was subsequently promoted to that rank.

12. Officer Bickel, who failed the June, 1978 promotional examination for the rank of Investigator, referred to in Finding of Fact number 10 hereinabove, passed the June, 1978 promotional examination for the rank of Sergeant. However, the Respondent subsequently declined to promote Officer Bickel to that rank when a suitable vacancy subsequently arose, citing alleged deficiencies in his work record and in particular, alleged excessive absenteeism and tardiness. Officer Bickel subsequently filed a grievance over the matter, which grievance was pursued to arbitration and resulted in an award upholding the Respondent's decision.

13. The parties' working relationship, which had previously been good, experienced a marked deterioration throughout the latter part of the year 1979 and extending through the early part of the year 1980. This period was characterized by increased friction between officials of the Complainant and of the Respondent, a decline in the quality and effectiveness of communication between them, and an increase in the utilization of the contractual grievance-arbitration procedure. Officer Zierten became heavily involved in the increasingly stormy relationship between the parties as a consequence of his various activities on behalf of the Complainant, as set forth in Finding of Fact number 3 hereinabove.

14. The single most important factor contributing to the deterioration of the parties' working relationship as described in Finding of Fact number 13 hereinabove stemmed from a dispute arising in September, 1979 concerning the authority of Chief Carvino to inspect the personal storage lockers of police officers under his command. This dispute

resulted in a highly contested hearing before the Honorable John C. Ahlgrimm of the Circuit Court for Racine County which took place on September 25, 1979 and which resulted in the Complainant obtaining a temporary injunction against the conduct of any such inspections.

15. Officer Zierten testified on behalf of the Complainant during the hearing before Judge Ahlgrimm referred to in Finding of Fact number 14 hereinabove. Chief Carvino considered Officer Zierten's testimony at said hearing to be a breach of confidence between them and thereafter refrained from engaging in personal conversation with Officer Zierten.

16. During the month of January, 1980, several grievances were pending within the City of Racine Police Department including grievances concerning the discipline of Officers Marino and Gleason, and grievances concerning the use of certain automatic weapons and the safety of certain of the Police Department's squad cars. Officer Zierten assisted in the processing of these grievances in the course of performing his responsibilities on behalf of the Respondent. In the course of a meeting involving Officer Gleason's grievance, Officer Zierten became quite angry and accused Chief Carvino of mishandling the processing of the grievance. This provoked a response from Chief Carvino alluding to his feelings of resentment stemming from Officer Zierten's testimony at the September 25, 1979 hearing referred to in Finding of Fact number 15 hereinabove.

17. On January 9, 1980, Officer Zierten and Lieutenant Conway held a conversation which touched on the state of the working relationship between the parties and Officer Zierten's status within the Police Department. During the course of this conversation, Lieutenant Conway expressed concern that Officer Zierten's advocacy role on behalf of the Complainant was causing him to adopt an "anti-management" attitude and stated to him that his attitude might render him "unpromotable".

18. During the year 1979, Officer Kaebisch was promoted from the rank of Patrolman (PH-2) to the rank of Traffic Investigator (PH-3) at the discretion of Chief Carvino. Officer Kaebisch failed the requisite promotional examination and did not appear on the applicable contractual promotional eligibility list.

19. In December 1979, Chief Carvino recommended the promotion of Officer Bickel to the rank of Investigator (PH-4) to fill a vacancy existing as of that time in spite of the fact that Officer Bickel had failed the promotional examination for that rank and therefore did not appear on the applicable contractual promotional eligibility list. Chief Carvino based his decision to recommend Officer Bickel's promotion upon alleged improvement in those deficiencies in his work record that had caused him earlier to be passed over for promotion to Sergeant (as described in Finding of Fact number 12 hereinabove) as well as on Officer Bickel's evident interest in and qualifications for promotion to Investigator (PH-4)' rank. Officer Bickel's promotion became effective as of January 1, 1980.

20. On January 11, 1980, a position with the rank of Investigator (PH-4) became vacant as a result of the promotion of Investigator Kindsvater to the rank of Sergeant. As of that time, Officer Zierten was the only remaining police officer who had sat for the June, 1978 promotional examination for Investigator and who had not received a promotion. Chief Carvino was aware for a period of at least several weeks prior to January 11, 1980 of the likelihood of an upcoming vacancy in the rank of Investigator (PH-4).

21. Chief Carvino made a decision at some point in early January, 1980 not to promote Officer Zierten to the vacancy left by Investigator Kindsvater but instead decided to schedule a new promotional examination for the rank of Investigator. Said examination was held on January 11, 12 and 13, 1980. Officer Zierten sat for this examination, but did not receive the highest score of the candidates sitting for the examination. The highest score on this examination was received by Officer Ackley who was promoted to Investigator (PH-4) rank in February, 1980 in an acting capacity, pending the outcome of this proceeding.

22. Officer Zierten filed a grievance concerning the decision of Chief Carvino not to award him the vacant position formerly occupied by Investigator Kindsvater but did not pursue that grievance to arbitration, electing instead to cause the complaint instituting this proceeding to be filed.

23. Throughout the entire period involved in and relevant to, this proceeding, Officer Zierten was involved to a considerable degree in activities on behalf of the Complainant, which activities were highly visible and well-known to the Respondent.

24. The extension of the 1978-1979 Agreement noted in Finding of Fact number 7 hereinabove, which extended that entire Agreement including Article XIII Sections 7 and 9 thereof, extended the effectiveness of the examination scores derived from the June, 1978 promotional examination for Investigator (PH-4) through January 31, 1980.

25. During the year prior to the date on which Investigator Kindsvater's position became vacant, two instances referred to in Findings of Fact numbers 18 and 19 hereinabove occurred in which officers who failed promotional examinations were subsequently promoted to the ranks for which these examinations were given. One of these instances occurred within two weeks of the date of occurrence of that vacancy. Throughout this period, the practice of the Respondent was not to impose the passing of the applicable promotional examination or the presence on the applicable contractual promotional eligibility list as a firm prerequisite for the promotion of a police officer.

26. The parties' 1979-1980 and 1980-1981 Agreements specifically incorporated past practices within the Police Department unless otherwise specifically indicated by other provisions of those Agreements.

27. Nothing in the record indicates that Officer Zierten was in any way not interested in or not qualified for the vacancy created by the promotion of Investigator Kindsvater save for his failure to obtain a passing grade on the June, 1978 promotional examination for the rank of Investigator (PH-4).

28. The decision of Chief Carvino not to promote Officer Zierten to the rank of Investigator (PH-4) as of January 11, 1980 was arbitrary, discriminatory and reflected the application of a double standard to Officer Zierten with regard to "promotability" which was not applied to other police officers in the Respondent's employ.

29. The decision of Chief Carvino not to promote Officer Zierten to the rank of Investigator (PH-4) as of January 11, 1980 was motivated, at least in part, by animus towards Officer Zierten's engagement in activity on behalf of the Complainant.

On the basis of the Foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The responsibilities performed by Officer Zierten on behalf of the Complainant and the activities conducted by him in connection therewith constituted lawful concerted activity within the meaning of Section 111.70(2) of the Municipal Employment Relations Act.

2. The Respondent, by its decision not to promote Officer Dale C. Zierten to the rank of Investigator (PH-4) as of January 11, 1980 committed, and has continued to commit, prohibited practices within the meaning of Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

3. The Complainant has failed to exhaust the applicable grievance/arbitration procedure as set forth in the parties' 1978-1979 and/or 1980-1981 collective bargaining agreements; and therefore the Commission shall not assert its jurisdiction to determine the Complainant's allegations that the Respondent has committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the Respondent, the City of Racine and its officers and agents shall immediately:

1. Cease and desist from discrimination against any of its employees within its Police Department with regard to promotional opportunities within the Police Department or otherwise because of the engagement by said employees in lawful concerted activities on behalf of the Complainant or of any other labor organization within the meaning of the Municipal Employment Relations Act.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act.

(a) Promote Officer Dale C. Zierten to the rank of Investigator (PH-4) within its Police Department, which promotion shall be considered to have been effective as of January 11, 1980.

(b) Pay to Officer Dale C. Zierten a sum of money equal to the difference between the pay which he would have earned had he been promoted to the rank of Investigator (PH-4) as of January 11, 1980, and the pay which he actually has earned since that date, as set forth by the parties' 1980-1981 collective bargaining agreement including salary and cost-of-living allowances. 1/

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1/ Only the 1980-1981 Agreement would be pertinent to the computation of this sum given that its provisions were made retroactive to January 1, 1980, and all police officers covered by said Agreement presumably received pay in accordance with that Agreement retroactive to that date.

(c) Notify all employes of its Police Department by posting in conspicuous places where said employes are employed, copies of the notice attached hereto and marked "Appendix A". Said notice shall be signed by a duly authorized officer or agent of the Respondent, shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. The Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order as to what steps have been taken to comply therewith.

Dated at Milwaukee, Wisconsin, this 11th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal  
Stuart S. Mukamal, Examiner



APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately promote Officer Dale C. Zierten to the rank of Investigator (PH-4) which promotion shall be considered to have been effective as to January 11, 1980, and we will immediately pay to Officer Zierten retroactive to that date all losses of salary and cost-of-living allowances sustained by him as a result of his not having been promoted to the rank of Investigator (PH-4) as of that date.
2. WE WILL NOT discriminate, with regard to promotional opportunities or otherwise, against Officer Dale C. Zierten or against any other employee because of the engagement by any employee in lawful concerted activities on behalf of the Racine Policemen's Professional and Protective Corporation or of any other labor organization.

Dated this            day of February, 1981.

CITY OF RACINE

By \_\_\_\_\_

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER

This matter concerns the Respondent's denial to Police Officer Dale C. Zierten of a promotion to the rank of Investigator in January, 1980. The gist of the complaint filed herein is that Officer Zierten was allegedly denied a promotion that he would have otherwise received as a consequence of lawful, concerted activities engaged in by him as an official and as a member of the Board of Directors of the Complainant, the Racine Policemen's Professional and Protective Corporation.

BACKGROUND:

Two separate bargaining units have been organized within the Police Department of the City of Racine, representing sworn law enforcement officers employed by the Department for purposes of collective bargaining. One such bargaining unit includes all officers holding the rank of Sergeant and is not involved in this proceeding. The other such bargaining unit includes all officers holding the ranks of Patrolman, Traffic Investigator and Investigator. The Complainant at all times relevant hereto has served as the collective bargaining representative for the latter unit. Officer Zierten, whose denial of promotion underlies this matter, has been at all times relevant hereto, a member of the Complainant's Board of Directors and a member of its contract bargaining team and a member of the Complainant's Grievance Screening Committee. He has also served as Treasurer, an elective office within the Complainant's organization. Officer Zierten has for a number of years been heavily engaged in union activities in his capacity as an officer and as a representative of the Complainant, and his union activities have been highly visible and well-known to the Respondent. In particular, Officer Zierten is and has been involved in the evaluation and processing of grievances arising within the Complainant's bargaining unit.

The Respondent's Chief of Police since June 15, 1977 has been Mr. James Carvino. Chief Carvino had attained a great deal of experience in police work outside the City of Racine, but had not been a member of the Respondent's Police Department prior to his appointment as Chief of Police.

For a period of time following Chief Carvino's appointment, the working relationship between the Complainant and the Respondent's management officials was quite good. However, this relationship began to deteriorate as time passed, apparently as a result of policy differences between Chief Carvino and other ranking officials of the Respondent and certain members of the Police Department's rank-and-file. The deteriorating labor-management relationship during this period was marked by a decline in the frequency and effectiveness of communication between top officials of the Respondent and of the Complainant, a sharp increase in the number of grievances filed and pursued to arbitration, 2/ and a

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2/ These included several grievances over allegedly unwarranted or excessive discipline against police officers and a number of policy grievances concerning inter alia work rules on the use of certain automatic weapons and alleged safety defects in squad cars. This list is not necessarily exhaustive.

growing level of distrust between the parties. The parties' working relationship reached a new low during the month of September, 1979 as a result of a controversy arising at that time regarding the authority of Chief Carvino to order unannounced inspecting of storage lockers used by rank-and-file of the Police Department. This incident will be further described below. The ongoing conflict between the parties continued at least until the early part of 1980, a period marked by a very low level of communication between them and the existence of a number of unresolved grievances.

Officer Zierten was a major participant in the continuing controversy existing between the parties during this period; indeed, his position and his activist bent placed him at the center of the storm. His role as a grievance representative, was most pertinent in this regard, since he was called upon to evaluate and process grievances and to represent members of the bargaining unit in meetings with the Chief and/or his assistants concerning disciplinary actions. At times when occupying that role, Officer Zierten exhibited impatience and anger towards top officials of the Respondent. 3/

The friction between Officer Zierten and management, while in part arising as a consequence of the increasing tension between the Complainant and the Respondent, was sharply intensified as a result of the events surrounding the locker-inspection controversy alluded to above. The events surrounding that episode as relates to this matter can be briefly described as follows: In September 1979, Chief Carvino ordered stickers placed on police officers' individual storage lockers located in the basement of the City's Safety Building stating "Racine Police Department, Subject to Inspection, Chief of Police". The Complainant immediately filed suit against Chief Carvino and sought a temporary injunction against the conduct of any such inspection. On September 25, 1979, a hearing was held before the Honorable John C. Ahlgrimm, Judge of the Circuit Court for Racine County, during the course of which Officer Zierten provided testimony. Certain police officers testified inter alia that the Chief issued the inspection in reaction to evidence that police officers were "on the take", that they were storing contraband and items inventoried from city prisoners in their personal storage lockers and that they were smoking marijuana while on duty and storing marijuana in the lockers. Officer Zierten's testimony attributed the Chief's motivation for the order to a desire to forestall lawsuits from being filed against the City and himself concerning items allegedly illegally stored in the lockers and the alleged smoking of marijuana by police officers on duty. Officer Zierten further testified at that hearing that contraband items could be planted in the lockers without an officer's knowledge. The injunction sought by the Complainant was granted at the close of the hearing. The significance of these events is that Officer Zierten's testimony engendered a degree of antagonism

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3/ Thus, for example, Officer Zierten testified that he had become "quite angry" during a discussion with the Chief occurring early in January 1980 concerning the discipline of Officer Gleason for alleged sick leave abuse. He further stated that various high-ranking Police Department officers had "screwed up" the processing of the grievance. See transcript of the April 2, 1980 hearing held in this matter at pp. 11-12, 27 (all further references to the transcript shall hereinafter be denoted as "Tr.").

between himself and Chief Carvino, apparently because Chief Carvino felt that Officer Zierten had breached a confidence in testifying as he did, and because he may have felt that Officer Zierten's testimony cast him in an adverse light. 4/ Personal relations between the two men appear to have virtually ceased subsequent to the September 25, 1979 hearing, 5/ although the record is unclear as to the state of that relationship prior to that time. What is clear from the record is that there indeed existed a degree of personal friction between Officer Zierten and Chief Carvino - and perhaps between Officer Zierten and other top-ranking Department officials subsequent to September, 1979.

During the period at issue, Officer Zierten was awaiting promotion from the rank of Patrolman (PH-2) to the rank of Investigator (PH-4), although he was not formally eligible for such a promotion. The events underlying Officer Zierten's promotion are as follows: Promotions within the Department were made as a result of examinations taken by police officers indicating the desire to be considered for promotion. Examinations for promotion to particular ranks were given periodically. The examination most pertinent to this proceeding was given in June 1978 and was directed towards promotion to Investigator rank. Officer Zierten and four other police officers sat for this examination. The examination has been revised to include a number of subjects not covered on previous examinations concerning the Department's operating rules and procedures and pertinent provisions of the law. As such, it was a more sophisticated examination than those previously administered, and as a result it required more effort and study than did those previous examinations. 6/

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- 4/ Officer Zierten testified that during the discussion with Chief Carvino referred to in fn. 2 supra, "The Chief said that . . . he had been screwed by something he said before - while he was looking at me. I took that to be an acknowledgement that he felt he was screwed by me in regard to my testimony in the injunction hearing" Tr. p. 21. Chief Carvino, in response to the question of whether he believed that Officer Zierten violated a confidence by testifying as he did at the September 25, 1979 hearing stated that "I believe that I was too candid in expressing my opinion to Officer Zierten at that time and that perhaps I would have been better off not to have done so, been so candid". Tr. p. 101.
- 5/ Chief Carvino testified that "I don't have any personal conversation with Officer Zierten" although he also stated that he had no personal animosity towards him, and appreciated the fact that Officer Zierten as a union representative was at times required to adopt positions on various issues that differed from his own views. Tr. pp. 101-102. Officer Zierten testified that Chief Carvino and he rarely met subsequent to the September 25, 1979 hearing and that the Chief ignored him on those occasions.
- 6/ See testimony of Chief Carvino, Tr. pp. 83-84.

The parties' 1978-1979 collective bargaining agreement (the then-effective agreement) contained a provision setting the passing grade on promotional examinations for the ranks of Investigator (PH-4) and Traffic Investigator (PH-3). This provision (the last paragraph of Article XIII - Promotional Procedures, Section 7 at page 18 of that Agreement) read as follows:

"An officer must achieve a grade of at least seventy-five percent (75%) on the written test for a pay grade to which he wishes to be promoted in order to be placed on the eligibility list for promotion to that grade".

Partly as a result of the upgrading of the June, 1978 examination relative to earlier examinations, Chief Carvino realized that it would become more difficult to pass the examination and that consequently a problem might arise over possible shortages of eligible candidates for future promotional vacancies. Therefore, in early 1978, he requested that the Complainant and the Respondent agree to lowering the passing grade from 75% to 70%, a request turned down by the Complainant. 7/

Only two officers of the five sitting for the June 1978 promotional examination passed with scores of 75% or more - Officers LoPiccolo and Peterson. Both were subsequently promoted to Investigator rank. 8/ The next-highest scoring applicant, Officer Larson, scored 74.16%, i.e. below the passing grade. However, Officer Larson had also passed the June, 1978 promotional examination for the rank of Sergeant with a grade of over 75% and was subsequently promoted to that rank. The fourth and fifth ranking officers taking the June 1978 Investigator examination were, respectively, Officer Bickel with a score of 74.10% and Officer Zierten, with a score of 72.50%.

Officer Bickel had also sat for the June, 1978 promotional examination for Sergeant, and had passed that examination with a score of over 75%. However, Chief Carvino passed over Officer Bickel for promotion to Sergeant when his name came up for consideration, citing among other reasons that the promotion in question was not a matter covered by the then-effective 1978-1979 collective bargaining agreement entered between the Complainant and the Respondent, and that Officer Bickel's allegedly less than exemplary sick leave and tardiness record impinged upon his suitability for supervisory status. 9/ The Complainant grieved the Respondent's failure to promote Officer Bickel which grievance was ultimately determined by an arbitration in favor of the Respondent. 10/ However, Officer Bickel was promoted to the rank of Investigator effective January 1, 1980 following a re-evaluation of his performance indicating improvement in those areas formerly deemed deficient. 11/

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7/ Id. Tr. p. 79, 84, 93-94. The parties re-negotiated this provision in negotiations for their 1980-1981 collective bargaining agreement to provide for a "primary" eligibility list consisting of officers attaining a score of 75% or higher and a "secondary" eligibility list composed of certain officers scoring below 75%.

8/ Tr. p. 95.

9/ Tr. pp. 81-82.

10/ See Corporation (Complainant's) Exhibit 6, award of Arbitrator Frank P. Zeidler concerning the Jess Bickel grievance, dated July 17, 1979.

11/ Tr. p. 82

This promotion was made in spite of the fact that Officer Bickel had failed to pass the June, 1978 promotional examination for Investigator rank. (In fact, as of that time, the contractual eligibility list consisting of officers who had passed that examination had been exhausted.)

During the period in question, three promotions including that of Officer Bickel were made within the bargaining unit involving police officers who had not passed the applicable promotional examination and who were therefore not placed on the contractual eligibility list. One involved Officer Mike Miller, who was promoted to the rank of Traffic Investigator (a rank midway between Patrolman and Investigator) without having taking the requisite examination at all. The record indicates that Officer Miller had been promoted in an acting capacity by Chief Carvino to fill a vacant Traffic Investigator position at a time when the promotional eligibility list for that rank had been exhausted, which promotion was made permanent one year later in accordance with Article XIII Paragraph 3 of the parties' 1978-1979 collective bargaining agreement. <sup>12/</sup> The second such instance concerned the promotion of Officer Kenneth Kaebisch from Patrolman to Traffic Investigator at some time in 1979. Officer Kaebisch had taken the requisite promotional examination and had obtained the highest grade of any candidate but had scored lower than 75% (apparently indicating that no candidate had passed that particular examination for Traffic Investigator). Nevertheless, he was promoted to Traffic Investigator by Chief Carvino on the grounds that he was interested in and qualified for that position. <sup>13/</sup> The third instance involved the promotion of Officer Jess Bickel, as noted above and to be more fully discussed below.

Important events concerning both the friction between the parties and Officer Zierten's promotional status dovetailed during January, 1980. During the early part of that month, Officer Zierten was involved in his representative capacity in the presentation of several matters regarding disciplinary action pending against certain members of the bargaining unit - in particular, Officers Gleason and Marino. During this period, there occurred several heated conversations between Officer Zierten and Chief Carvino (and his assistants) which reflected the poor state of the relationship between the parties at that time. <sup>14/</sup> On January 9, 1980, Officer Zierten and Lieutenant Terrence Conway engaged in a conversation concerning the imminent discipline of Officer Marino, during the course of which Officer Zierten indicated that he would call the attention of the public to the state of the relationship between Chief Carvino and the City's police officers. <sup>15/</sup> This conversation soon turned to other matters, including the state of labor-management relationships within the Police Department, the effect of Chief Carvino's appointment upon that relationship and Officer Zierten's status. Lieutenant Conway's testimony about this aspect of the January 9, 1980 conversation concerning Officer Zierten's position was as follows:

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<sup>12/</sup> Tr. pp. 79-80.

<sup>13/</sup> Tr. pp. 15-16, 80-81.

<sup>14/</sup> See fn. 3 and 4 supra.

<sup>15/</sup> Tr. p. 54.

"I felt that, having served in his capacity, having been on the board of directors of the policemen's benevolent corporation, protective corporation in the past, and having served on its bargaining committee and processing grievances, that he was letting the position cause him to forego reason and cause him to be argumentative. Having observed him over a long time, I felt that he was becoming increasingly bitter towards management, and it was a direct result of his position as having to deal with grievances and so forth . . ." 16/

Lieutenant Conway further indicated that Chief Carvino, having come from outside the Department, might not have had the same feel for understanding the organizational position and objectives of the Complainant as did some of his predecessors. He then told Officer Zierden that "if you consistently antagonize management, you may find yourself "unpromotable". 17/ The use of the term "unpromotable" was indicated by the testimony of both Lieutenant Conway and Officer Zierden and by Sergeant Bernard LaMere. 18/ The conversation and the use of the term was apparently spontaneous and was a personal opinion of Lieutenant Conway rather than a purposeful expression of the policy of the Police Department. 19/ There was no evidence in the record to indicate that Lieutenant Conway spoke for Chief Carvino or that he was asked to communicate a message from Chief Carvino to Officer Zierden. Lieutenant Conway himself stated that his purpose was to spotlight what he felt was Officer Zierden's "anti-management attitude" and his concern that such an attitude might "poison" the morale of the Department. 20/ Officer Zierden terminated this portion of the conversation by stating that he would in effect, have to do what was required of him in his representative capacity. 21/

At about the same time, an additional Investigator position became vacant due to the promotion of Investigator Kindsvater to the rank of Sergeant. This vacancy became available as of January 11, 1980, very shortly following the events heretofore recited. At that time the eligibility list for Investigator rank was exhausted, and the only remaining candidate from the June, 1978 examination who had not been promoted was Officer Zierden, who had not attained the passing grade of 75%. Chief Carvino chose not to promote Officer Zierden (as he had done with Officer Bickel shortly before) but rather he determined that a new promotional examination be given for Investigator positions and that a new eligibility list be derived from that examination. Chief Carvino explained his decision to the Complainant's Board of Directors during a meeting requested by the Complainant. This examination was given on January 11, 12 and 13, 1980, and the highest-scoring candidate on that examination was Officer Ackley. Officer Ackley was thereupon promoted to Investigator rank in an acting capacity pending resolution of this dispute. 22/ Officer Zierden also sat for this examination but

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16/ Tr. p. 55.

17/ Tr. p. 56.

18/ Tr. pp. 17, 56, 60.

scored lower than 75% and lower than Officer Ackley. The Complainant thereupon filed the complaint at issue herein, charging that Chief Carvino's motivation for not awarding the vacant Investigator position to Officer Zierten resulted from his opposition to Officer Zierten's union activities.

Article XIII Paragraph 9 of the parties' 1978-1979 collective bargaining agreement indicated that the promotional list resulting from the June, 1978 examination was to be effective for the years 1978-1979. The parties, however, mutually agreed in writing to extend their 1979-1980 agreement through the month of January 1980, 23/ presumably because they were at that time involved in collective bargaining which ultimately resulted in a 1980-1981 agreement.

#### POSITIONS OF THE PARTIES:

##### A. The Complainant

The Complainant claims that the overriding reason for Chief Carvino's decision not to promote Officer Zierten on January 11, 1980 to the vacancy created by the promotion of Investigator Kindsvater was his anti-union animus and in particular, his antagonism towards Officer Zierten resulting from the latter's union activity. In support of this contention, the Complainant cites the various high-ranking positions held by Officer Zierten within the Complainant's organization throughout the relevant period, the high level of his activity on behalf of the Complainant during this period, and the fact that Officer Zierten's union activity was well-known to Chief Carvino and other ranking officers of the City of Racine Police Department. The Complainant asserts that certain of Officer Zierten's union activities and in particular his responsibility for screening and processing grievances, periodically required him to confront the Department's management and to adopt - and strongly advocate - positions in opposition to those of management. As a result, the Complainant alleges that Chief Carvino and other ranking managerial officers of the Department became hostile and antagonistic towards Officer Zierten and thus determined not to promote him. This attitude was, according to the Complainant, exemplified by Lieutenant Conway's remark to Officer Zierten that his "anti-management attitude" had rendered him "unpromotable". The Complainant particularly notes that the timing of the low point of labor-management relations between the parties, and a peak level of highly controversial grievance activity by Officer Zierten coincided almost perfectly with Lieutenant Conway's remark as to Officer Zierten's "unpromotability", the availability of the Investigator position at issue and Chief Carvino's decision not to promote Officer Zierten and instead to order that a new promotional examination be given. The Complainant states that it is irrelevant whether other factors may have been present which would have justified the selection of an officer other than Officer Zierten for promotion so long as Officer Zierten's union activity was a motivating factor behind that decision, and that ample evidence in the record demonstrates that such was indeed the case.

The Complainant dismisses as pretextual the Respondent's claim that Officer Zierten was not promoted due to: (a) his failure to pass the June, 1978 promotional examination and thus gain placement on the resulting eligibility list and (b) the effect of a curtailment in the number of promotional opportunities (as a result of amendments to the Age Discrimination in Employment Act) in spurring the decision of

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23/ See Corporation (Complainant's) Exhibit 4 dated December 20, 1979.



Chief Carvino to apply a wholly new promotional eligibility list to the Kindsvater vacancy. Concerning the first contention, the Complainant notes the past practice of the Respondent in promoting police officers who were not on any eligibility list - including both officers who had failed the requisite examination and those who had not taken that examination. It asserts that on several very recent occasions, Chief Carvino had recommended officers for promotion in order of their examination scores without regard for whether they had passed the examinations that they took; and concludes that Chief Carvino dealt with Officer Zierten in a disparate manner as a result of his animosity towards Officer Zierten's union activity. It discusses the latter contention as baseless in view of the fact that the Age Discrimination in Employment Act amendments referred to by the Respondent were not new - having been made effective as of January 1, 1979. It noted further that Officer Bickel (who had failed the requisite promotional examination) had been promoted to Investigator rank as of January 1, 1980, following not only the effective date of those amendments but also the passage by the Racine City Council of the pertinent resolution implementing those amendments. The Complainant notes that Officer Zierten was interested in and qualified for an Investigator position - the same standards applied by Chief Carvino in recommending the promotion of Officer Bickel only a few days earlier. 24/ The Complainant concludes that Chief Carvino's decision not to promote Officer Zierten was in violation of Sections 111.70(3)(a)3 and 111.70(3)(a)5 of the Municipal Employment Relations Act, citing in support of its conclusion the allegedly similar Massachusetts case of City of Malden v. Kerr. 25/

#### B. The Respondent

The Respondent denies that Officer Zierten's union activity and Chief Carvino's opposition thereto formed the basis of the decision not to promote Officer Zierten to the vacancy opened by the promotion of Investigator Kindsvater as of January 11, 1980. It readily agrees that Chief Carvino was well aware of Officer Zierten's position within the Complainant's organization and his responsibilities stemming therefrom, and the high level and public visibility of his union activities. However, it disagrees with the Complainant's view that this knowledge influenced Chief Carvino's decision not to promote Officer Zierten.

The Respondent argues that the record is devoid of any direct evidence indicating any animus on its part towards Officer Zierten as an individual. It states that any friction as may have existed during late 1979 and early 1980 between the parties was confined to the organizational level and did not either logically or factually translate into hostility towards any particular police officer. It also notes that a change in the Complainant's leadership and the accession of Officer Carl Lillich to the presidency of its organization early in 1980 had resulted in a marked improvement in the state of the working relationship between the parties.

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24/ Tr. p. 82.

25/ Mass. Labor Relations Commission Case No. MUP-3017 (3/20/79).

With regard to Lieutenant Conway's comment concerning Officer Zierten's "unpromotability", the Respondent argues that Lieutenant Conway had not been authorized to speak for Chief Carvino - or for the Respondent - and that his offhand remark was a personal opinion not reflective of the Respondent's policy and/or intentions.

The Respondent claims that Officer Zierten, not having passed the June, 1978 examination for Investigator was not placed on the eligibility list for promotion to that rank and therefore was properly not granted the promotion in question. It distinguishes the case of City of Malden v. Kerr (cited by the Complainant, supra) on these grounds since the police officer in the Malden case had passed the relevant promotional examination. It argues that Officer Zierten was thus at best on a so-called "ineligibility" list (given that the parties' 1978-1979 collective bargaining agreement did not provide for the placement of any scores below 75% on the eligibility list), and that no contractual language or past practice existed in support of the promotion of "ineligibles". In this connection the Respondent notes that the Complainant rejected Chief Carvino's request to lower the passing grade on the June, 1978 promotional examination to 70% - an action which, if accepted, would have placed Officer Zierten on the eligibility list resulting from that examination. 26/

The Respondent defends Chief Carvino's decision to fill the Kindsvater vacancy from the "new" (i.e. January 1980 examination) eligibility list on three grounds. First, it claims that with the exhaustion of the "old" (i.e. June 1978 examination) eligibility list, Chief Carvino could and did properly exercise his managerial prerogatives as set forth by the management rights clause of the 1978-1979 collective bargaining agreement (Article V paragraph C) by ordering that a new examination be held for the purpose of filling the Kindsvater (and future) Investigator vacancies. Second, it claims that the 1978-1979 eligibility or "ineligibility" list did not extend into January 1980 and was thus inapplicable to the Kindsvater vacancy. Third, it argues that in view of the fact that Officer Zierten sat for - and did not pass - both the June, 1978 and January 1980 promotional examinations it would have been manifestly unfair to promote him in preference to a police officer who had taken - and passed the January 1980 examination. The Respondent distinguishes from the instant case the aforementioned promotions of Officer Miller (who had never taken an examination but who was promoted from acting to permanent status) and Officer Bickel (whom, it asserts had been passed over for promotion to Sergeant even though he was at the top of an examination list, which action was upheld in arbitration). In this connection, the Respondent notes that at about this time, promotional opportunities were being curtailed as a result of recent amendments to the Age Discrimination in Employment Act extending the mandatory retirement age past 55 years. It further notes that this made it more imperative to make it worthwhile for officers to sit for promotional examinations by filling all future vacancies (including the Kindsvater vacancy) from eligibility lists derived from new examinations rather than from "ineligibility" lists derived from old examinations. It maintained that the morale of the Department's police officers would suffer, and that officers would find no value in sitting for examinations.

Finally, the Respondent notes Chief Carvino's repeated denials that Officer Zierten's union activities played any part in his choice not to

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26/ Chief Carvino testified that Officer Zierten would have been recommended to fill Investigator Kindsvater's position had this occurred. Tr. p. 95.

promote him. 27/

On the basis of the above, the Respondent claims that the Complainant has not sustained its burden of showing a violation of Sections 111.70(3)(a)3 and 111.70(3)(a)5 of the Municipal Employment Relations Act, and asks that the complaint filed herein be dismissed.

DISCUSSION:

Alleged Violation of Section 111.70(3)(a)5

The parties' 1978-1979 and 1980-1981 collective bargaining agreements both contain provisions for final binding arbitration of grievances arising thereunder. 28/ The Commission has repeatedly held that it will not assert its jurisdiction to determine alleged violations of collective bargaining agreements when the complainant fails to exhaust the applicable grievance/arbitration machinery, absent a showing of waiver or frustration of the efforts of the complainant to utilize same. 29/ The record contains no indication that the parties have agreed to waive the application of the contractual grievance/arbitration machinery. The record further indicates that the Complainant never even attempted to utilize the available grievance/arbitration machinery past the early steps of grievance initiation. 30/ Therefore, the Commission's jurisdiction to determine any alleged contractual violations in this matter shall not be asserted, and the Complainant's allegations with respect to alleged violations of Section 111.70(3)(a)5 of the Municipal Employment Relations Act are hereby dismissed.

Alleged Violation of Section 111.70(3)(a)3

The Complainant alleges that the Respondent violated that portion of Section 111.70(3)(a)3 of the Municipal Employment Relations Act which makes it a prohibited practice for a municipal employer:

"to encourage or discourage a membership in any labor organization by discrimination in regard to hiring tenure or other terms or conditions of employment . . ."

The gist of the Complainant's position is that Officer Zierten was denied a promotion to the rank of Investigator that he would otherwise have received but for his union activities. If this contention is demonstrated by a clear and satisfactory preponderance of the evidence, a violation of Section 111.70(3)(a)3 will be established. In order to sustain this contention, the Complainant must demonstrate that:

- (1) Officer Zierten during the relevant period of time was engaged in lawful concerted activity, and
- (2) The Respondent (or its officers and agents) had knowledge of such activity, and

- (3) The Respondent (or its officers and agents felt animus towards such activity, and
- (4) The Respondent's denial of the promotion at issue to Officer Zierten was motivated, at least in part by its animus towards his union activity. 31/

The Wisconsin Supreme Court has adopted the following standard for the interpretation of cases arising as a result of claimed violations of Section 111.70(3)(a)3, which standard is consistent with that applied by the Federal courts in applying Section 8(a)(3) of the National Labor Relations Act. 32/ Although the yardstick was originally enunciated in a matter involving an allegation of discriminatory discharge, it is equally applicable to the allegation at issue herein:

"The issue before us is not, of course, whether or not there existed grounds for discharge of these employees apart from their union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason, good or bad, so long as it did not discharge them for their union activity. And even though the discharges may have been based upon other reasons as well, if the employer were partly motivated by union activity, the discharge were violative of the Act.

Several other Federal cases are in accord. Although these cases all involve a construction of unfair labor practices under the Wagner Act, the case of St. Joseph's Hospital v. Wisconsin Employment Relations Board (264 Wis. 396, 59 N.W. 2d. 448 (1953)) adopts their legal conclusion that an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him. 33/ (Emphasis added by the Court).

In determining whether the Respondent's decision not to promote Officer Zierten was motivated at least in part by animus towards his union activities it must be determined whether the reasons given for that decision were genuine or pretextual, based upon an examination of the total circumstances of the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. 34/ The evidence necessary to support the allegation need not be direct; it may be inferred

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31/ See e.g. Town of Caledonia (Fire Department) (17684-A) 9/80; Waterloo Jt. School District No. 1 (15009) 10/78; Cooperative Educational Services Agency #4 et. al. (13100-E) 12/77.

32/ 29 U.S.C. Sec. 158(a)(3).

33/ Muskego-Norway Consol. Jt. School Dist. No. 9 v. Wisconsin Employment Relations Board 35 Wis. 2d. 540, 561-562, 151 N.W. 2d. 617 (1967) quoting in part from N.L.R.B. v. Great Eastern Color Lithographic Corp. 309 F. 2d. 352, 355, (2 Cir. 1962). In accord, see Cooperative Educational Services Agency #4 et. al. supra. n. 31; St. Crois County (12753-A, B) 12/73; City of Marinette et. al (11674-A, B); City of Wisconsin Dells (11646) 3/73.

34/ Cooperative Educational Services Agency #4 et. al., supra; Mercer School Board (8449-A) 8/68.

from the circumstances. 35/

The record contains ample evidence demonstrating that the Respondent's decision not to promote Officer Zierten to the position vacated by Investigator Kindsvater as of January 11, 1980 was in fact motivated at least in part by its animus towards Officer Zierten's activities on behalf of the Complainant. In this regard, two elements of the record provide particularly compelling support for this conclusion: (1) the timing of the Respondent's decision in view of the parties' relationship at that time and (2) the Respondent's conduct involving certain police officers awaiting promotion and thus similarly situated to Officer Zierten during this period.

It is undisputed that Officer Zierten's various positions within the Complainant's organization and his responsibilities stemming therefrom necessarily involved him in a high level of union activities, and that his union activities were both highly visible and well-known to the Respondent, throughout the time period relevant to this matter. The Respondent has acknowledged this. It is also clear that those activities were in fact, lawful concerted activities within the meaning of Section 111.70(2) of the Municipal Employment Relations Act. It is equally clear that the working relationship between the parties had markedly deteriorated during the months immediately preceding the denial of Officer Zierten's promotion, almost to the point of open hostility. This conclusion is supported by the testimony of Officer Zierten and of three other members of the Complainant's Board of Directors - Officers Anthony Schiro, Allen Clausen and Sandra Mott - as well as the entire tenor of Chief Carvino's testimony. 36/ This deterioration could be traced to a number of factors, including the events surrounding the locker-inspection controversy of September, 1979, the increase in the number of grievances arising within the bargaining unit during late 1979 and early 1980, and the high level of friction and the low level of communication then existing between the parties. The record clearly indicates that the parties experienced a great deal of difficulty in resolving problems and in working together on many matters during this

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35/ Thus, in Town of Mercer (14783-A) 3/77, the Examiner stated that:

" . . . it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case of this subject, Shattuck Denn Mining Corp. v. N.L.R.B. 362 F 2d. 466, 470 (9 Cir., 1966):

"Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the then of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book".

36/ See e.g. Tr. pp. 7-8, 35-37, 5-51, 102-105, 110-111. See also Lieutenant Conway's testimony at Tr. p. 56 concerning the change in the parties relationship following the appointment of Chief Carvino, which tends to corroborate this view.

period. 37/

It is equally clear that during this period the Police Department's commanding officers had developed a degree of personal animosity towards Officer Zierten. Some of this animosity may have stemmed from Officer Zierten's grievance processing and grievance representation duties, and some may have had their roots in personal frictions or differences of style and behavior. However, the origin of this animosity is less relevant, than its existence, which is clearly spotlighted in the record. Evidence of its existence includes: (1) Chief Carvino's feeling that he had been "too candid" with Officer Zierten in discussing the locker-inspection matter with him, which supports the inference that he regarded Officer Zierten's testimony at the September 25, 1979 injunction hearing as a breach of a confidence; (2) the occurrence of a conversation involving the processing of Officer Gleason's grievance between Chief Carvino, his assistants and Officer Zierten in early January, 1980 during which Officer Zierten, in an evidently angry tone "spoke his mind" and roundly criticized the Chief's handling of that grievance, and (3) the tenor of Chief Carvino's testimony, which indicated that he went out of his way to avoid speaking to Officer Zierten in anything other than a strictly business capacity during this period. 38/ Chief Carvino's testimony when considered against the factual background then applicable indicates, at the least, that the relationship between the two men was quite cold and distant at that time. This is consistent with Officer Zierten's testimony on the same point, 39/ and which casts some doubt upon Chief Carvino's assertion that he felt no animosity towards Officer Zierten.

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37/ The evidence contained in the record pertaining to an improvement in the parties relationship since the accession of Officer Carl Lillich to the Complainant's presidency is irrelevant to this matter inasmuch as Officer Lillich apparently did not even assume his duties until January 1, 1980, after at least most of this period had passed. Furthermore, this contention was advanced by the Respondent and the Complainant did not indicate any concurrence therewith. If anything, the testimony as to a greatly improved relationship between the parties following the appointment of Officer Lillich further supports the conclusion that their relationship had been quite poor prior to that time. It is also instructive that at about this time, an existing grievance involving the discipline of a police officer was resolved only after the officer involved decided to seek a mitigation of the penalty imposed by approaching Police Department officials directly and on his own, without any participation on the part of the Complainant. Tr. pp. 42, 45-46.

38/ Tr. pp. 99-105.

39/ Tr. pp. 12-13.

The Complainant made much of Officer Zierten's conversation on January 9, 1980 with Lieutenant Conway during the course of which Lieutenant Conway volunteered the opinion that Officer Zierten's conduct might render him "unpromotable". Although it is true that Lieutenant Conway ventured a purely personal opinion and did not speak for Chief Carvino or for the Police Department, he was a commanding officer within the Department, and a superior officer to Officer Zierten. Therefore, the content of this conversation, while not constituting conclusive evidence in any way, does tend to corroborate other evidence supporting certain of the Complainant's contentions. Two aspects of this conversation are particularly instructive. First of all, Lieutenant Conway's statement to Officer Zierten that his "anti-management attitude" impeded his "promotability", together with his testimony that he saw Officer Zierten's attitude as threatening to the morale of the Police Department provides further corroboration of the Respondent's animosity towards Officer Zierten. Secondly, the timing of this conversation - just two days prior to the opening of the Investigator vacancy at issue - is very curious. As of January 9, 1980, Officer Zierten was not at all aware that he would soon be immediately up for promotion; 40/ however, it is apparent that Chief Carvino, and perhaps other top officials of the Police Department were aware of the imminence of the vacancy. 41/ Although Lieutenant Conway's "unpromotability" remark to Officer Zierten may have been entirely coincidental, it is not inconceivable that he may have been consciously attempting to "send him a message".

The disparity of treatment between Officer Zierten as compared with other police officers interested in and qualified for promotional opportunities during the same period is startling. Officer Miller's promotion to Traffic Investigator may be distinguished due to his service in that rank in an acting capacity for one year together with specific contractual language governing such promotions. 42/ However, Officer Kaebisch, who had failed the requisite promotional examination and was therefore not on an "eligibility list" was promoted to Traffic Investigator rank in 1979, by decision of Chief Carvino. The promotion of Officer Bickel, which occurred less than two weeks prior to the decision not to promote Officer Zierten, is even more difficult to explain. Officer Bickel was earlier not promoted to the rank of Sergeant even though he had passed the examination for that rank, due to alleged deficiencies in his record (alleged absenteeism and tardiness problems). However, he was subsequently promoted to the rank of Investigator even though he failed the examination for that rank, due to alleged improvement in his performance. This may be compared to the treatment of Officer Zierten whose performance as an officer had been considered average or even above average according to the testimony of his superiors

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40/ Tr. p. 116.

41/ Tr. pp. 84-85. Chief Carvino testified that the chain of events leading up to the promotion of Investigator Kindsvater to Sergeant began in mid-December 1979, and it is inconceivable that the upcoming vacancy in his position would not have been known to him (and, possibly, to his assistants) as of two days prior to its

and who was not promoted, according to Chief Carvino, primarily because he had failed the Investigator examination. 44/ That fact didn't prevent the promotions of Officers Kaebisch or Bickel within the immediately preceding year. Clearly, a place on the contractual "eligibility list" was not by past practice, a requisite, for promotion within the Police Department. 45/ Officer Zierten was clearly and admittedly interested in and qualified for the position left vacant by the promotion of Investigator Kindsvater. The Respondent's decision not to promote him on the basis of his examination scores constituted an unwarranted and discriminatory application of a double standard against Officer Zierten which had not been applied to any other police officer seeking a similar promotion. Significantly, the decision was made precisely at the time that tensions between Officer Zierten and the Respondent stemming from the former's advocacy role as a union representative had reached their peak. Clearly, one of the bases for the application of such a double standard was the Respondent's animus towards Officer Zierten's union activities.

The Respondent's two remaining defenses to this complaint are without merit. Its contention that Officer Zierten's promotional eligibility expired on December 31, 1979 as a result of Article XIII Section 9 of the 1979-1980 collective bargaining agreement (quoted in Finding of Fact number 6 hereinabove) is of marginal relevance to this matter and is in any event baseless given that the entire collective bargaining agreement had been extended to January 31, 1980 by mutual written agreement of the parties on December 20, 1979. This would certainly include extension of Article XIII Section 9 and thus extension through that date of the effectiveness of the promotional list derived from the June, 1978 examination. Thus even if the Complainant's position does depend upon the continuation of that promotional list through the effective date of the Kindsvater vacancy (i.e. January 11, 1980) that condition was fulfilled. The Respondent's argument that the administration of a new examination in order to fill the Kindsvater vacancy was justified by a curtailment in promotional opportunities caused by amendments to the Age Discrimination in Employment Act is similarly without merit. First of all it is unclear at best that those amendments bear any relevance at all to the issue at hand (i.e. the allegation of a violation of Section 111.70(3)(a)3 with respect to Officer Zierten). Even if a curtailment in future promotional opportunities as a result of those

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44/ Chief Carvino stated that his reasons for not promoting Officer Zierten "had nothing to do with (his) ability or qualifications". Tr. p. 96.

45/ It is not necessary in this connection to establish a past practice of promotion from the top of the list of police officers taking promotional examinations without regard to whether they had obtained passing or failing scores. It is necessary only to establish a past practice of not imposing a firm requirement of presence on the applicable "eligibility list" as a precondition for promotion. This was clearly established by the record. Note, again that the parties' 1978-1979 and 1980-1981 collective bargaining agreements specifically incorporate the parties' past practices. See Article IV, first paragraph, and Article XXXVI of both agreements. Additionally, for this reason, the fact that the Complainant's membership failed to concur in Chief Carvino's 1978 request for a lowering of the passing grades on the June, 1978 promotional examinations (from 75% to 70%) is irrelevant to the determination of this matter.



amendments is shown to bear relevance to the issue involved herein, the Respondent's conduct clearly demonstrates that this was a pretextual and not a genuine reason for denying Officer Zierten the promotion in dispute. Those amendments became effective as of January 1, 1979 and thus would have equally affected the promotions of Officers Kaebisch and Bickel, yet the amendments did not even constitute a factor of any importance in those promotional decisions. The promotion of Officer Bickel - less than two weeks prior to the decision not to promote Officer Zierten and subsequent to the December 4, 1979 adoption by the Racine City Council of an ordinance implementing those amendments - further belies the Respondent's position. Certainly the Respondent was in possession of the same information regarding future promotional opportunities within the Police Department on the dates of Officer Bickel's promotion and of Officer Zierten's non-promotion. It is absurd to argue, therefore, that the so-called "ADEA-amendments effect" should apply to Officer Zierten but not to Officer Bickel.

Under different circumstances, the Respondent's view that Chief Carvino possessed the managerial discretion to recommend the proper course of action with regard to the promotion at issue might have carried more weight. However, on the basis of the foregoing, the Complainant has amply sustained its burden of showing, by a clear preponderance of the evidence, that the Respondent's denial to Officer Zierten of a promotion to Investigator rank as of January 11, 1980 was motivated, at least in part by its animus towards his union activities and was thus in violation of Section 111.70(3)(a)3 of the Municipal Employment Relations Act. The promotion at issue thus is properly awarded to Officer Zierten retroactive to the date upon which it should have been received by him

#### Remedy

At the outset, Officer Zierten is clearly entitled to immediate promotion to the rank of Investigator with retroactive effect to January 11, 1980, together with full back pay in the amount of the difference between the pay for that rank (i.e. PH-4) and the pay for the rank which he has occupied (PH-2), dating back to the date on which his promotion should have become effective (i.e. January 11, 1980). This amount of back pay should include such salary differentials between the two ranks as are set forth by the salary schedule set forth in the 1980-1981 collective bargaining agreement between the parties (which, by its terms became effective as of January 1, 1980), together with all cost-of-living allowances attributable to the differential in the salaries of these respective ranks as set forth in Finding of Fact number 9 hereinabove.

The Complainant has requested additional relief in the form of attorney's fees, costs and other disbursements. The Commission will award attorney's fees and other costs of litigation only in the rarest and most exceptional of circumstances. These include situations in which the prevailing party is able to demonstrate that the opposing party has knowingly acted in bad faith, and has presented issues which on their face are insubstantial and without justification and which do not raise a colorable claim under applicable law. 46/ The Respondent

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46/ See e.g. Rice Lake Area School District (17763-A) 11/80; Madison Metropolitan School District (16471-A) 12/78; Madison Metropolitan School District (15007-A) 6/77; Madison Metropolitan School District (14038-B) 4/77, aff'd. Dane Co. Cir. Ct. 12/77.

has raised apparently in good faith, a colorable claim concerning its management rights to recommend police officers for promotion under applicable collective bargaining agreements. The Respondent also may well have had reasons in addition to its animus against Officer Zierten's union activities, for not recommending him for the promotion at issue and the situation presented herein was rather unique, and not likely to be repeated. To the extent that violations of the Act of this nature may recur, the Respondent has been ordered to cease and desist from committing same. Thus, the situation presented herein does not justify an award of attorneys' fees and costs and the Complainant's request for same is hereby denied.

Dated at Milwaukee, Wisconsin this 11th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Stuart S. Mukamal*

Stuart S. Mukamal, Examiner