

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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RACINE POLICEMEN'S PROFESSIONAL AND PROTECTIVE CORPORATION,	:	
	:	
Complainant,	:	
	:	
CITY OF RACINE (POLICE DEPARTMENT),	:	Case CXXIII
	:	No. 25714 MP-1071
	:	Decision No. 17605-C
	:	
Respondent.	:	
	:	
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ORDER REVISING EXAMINER'S FINDINGS OF FACT, PARTIALLY REVERSING EXAMINER'S CONCLUSIONS OF LAW, AND REVERSING EXAMINER'S ORDER

Examiner Stuart S. Mukamal having, on February 11, 1981, issued Findings of Fact, Conclusion of Law and Order, together with Memorandum Accompanying same, in the above-entitled matter, wherein said Examiner concluded that the City of Racine had committed a prohibited practice within the meaning of Section 111.70(3)(a)3 of the Municipal Employment Relations Act, and wherein the the City was ordered to cease and desist therefrom, and to take certain affirmative action with respect thereto; and the City having timely filed a petition, pursuant to Section 111.07, Wis. Stats., requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and the parties having filed briefs in support of said petition for review, and in opposition thereto; and the Commission, having reviewed the entire record, the Examiner's decision, the petition for review, the briefs filed in support thereof and in opposition thereto, being fully advised in the premises, makes and issues the following

REVISED FINDINGS OF FACT

1. That the Complainant Racine Policemen's Professional and Protective Corporation, hereinafter referred to as the Union, is a labor organization representing law enforcement personnel for purposes of collective bargaining; and that the Union has its offices at Racine, Wisconsin.
2. That the Respondent City of Racine, hereinafter referred to as the City, is a municipal employer and has its principal offices at the City Hall, 730 Washington Avenue, Racine, Wisconsin; that the City, among its governmental functions, maintains and operates a Police Department; and that at all times material herein James J. Carvino has served as the Chief of the Police Department, and that, among others, Terrance Conway, at all times material herein, has served in a supervisory capacity as a Shift Commander in said Police Department.
3. That at all times material herein the Union has been, and is, the exclusive collective bargaining representative of non-supervisory law enforcement personnel employed in the Police Department of the City; and that in said relationship, and during the times material herein, the Union and the City were parties to a collective bargaining agreement covering the wages, hours and working conditions of said law enforcement personnel for the years 1978-1979; and that said agreement contained among its provisions the following material herein:

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.

. . .

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

. . .

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 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 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.

. . .

4. That said 1978-1979 collective bargaining agreement, in Article VIII, contained provisions for the processing of grievance involving "any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employe or the City concerning the interpretation or application of this contract"; and that said procedure provided for final and binding arbitration of grievances which were not resolved through the steps of the procedure preceeding the arbitrable step.

5. That Dale C. Zierten commenced his employment with the Police Department in 1970; that at all times thereafter, up to and including the date of the hearing herein, Zierten has held the rank of Patrolman (PH-2), a position in the collective bargaining unit represented by the Union; that in 1970 Zierten became a member of the Union, and has retained such membership at all times material thereafter; that Zierten has served as a member of the Board of Directors of the Union, as its Treasurer, and also a member of its Grievance Steering Committee; and that in the latter capacity, during the period in which the 1978-1979 agreement was in effect, Zierten was responsible for the screening and processing of grievances filed by fellow officers in the collective bargaining unit represented by the Union, and has represented such grievants therein.

6. That in June, 1978 Zierten and some twenty to twenty-five other police officers took an exam, pursuant to Article VIII of the collective bargaining agreement, for placement on an eligibility list for promotion to the rank of Investigator (PH-4); and that the five highest scores in said exam were obtained by the following officers:

<u>Officer</u>	<u>Grade</u>
Lo Piccolo	75%+
Peterson	75%+
Larson	74.16%
Bickel	74.10%
Zierten	72.50%

7. That in order to be placed on the eligibility list for promotion, an officer must achieve a grade of at least 75%; that since there were only two officers who passed the June 1978 Investigatory (PH-4) exam, Chief Carvino requested the Union to agree to lowering the passing score from 75% to 70% because he anticipated there would be an insufficient number of officers on the promotion eligibility list; and that after a vote by its membership, the Union rejected Chief Carvino's request in that regard.

8. That, also in June, 1978, Officers Larson and Bickel took and passed the promotional examination for the position of Sergeant, a position not in the bargaining unit; that prior to May 5, 1979 Officers Lo Piccolo and Peterson were promoted to Investigator positions; that on an undisclosed date prior to January, 1979 Larson was promoted to the position of Sergeant; that on January 11, 1979 Bickel initiated a grievance contending that he was improperly bypassed for the position of Sergeant, in violation of the collective bargaining agreement; that during the processing of said grievance and in January, 1979, Chief Carvino advised Bickel that if his deficiencies improved, Bickel could be promoted in the future; and that said grievance proceeded to arbitration, and the Arbitrator issued his award in the matter on July 17, 1979, wherein he concluded that Chief Carvino had not violated the agreement in denying Bickel's promotion to Sergeant, for various reasons, including certain shortcomings of Bickel as an employe.

9. That in September, 1979 Chief Carvino caused notices to be placed on the lockers of the officers in the Police Department, to the effect that such lockers were subject to inspections by the Chief; that the officers took exception to the proposed inspections on the belief that such inspections, without a search warrant, violated their constitutional rights, and that in said regard, the Union's Board of Directors, which included Zierten, commenced an action in the Racine County Circuit Court, seeking an order requiring the Chief refrain from such inspections; that hearing in said matter was held on September 25, 1979, during the course of which Officer Zierten testified with respect to actions

authorized by the Chief in the matter, and to a conversation had with Chief Carvino relating to the Chief's stated reasons for the planned inspections; and that following said hearing, and on October 12, 1979, the Court issued the following "Temporary Injunction Order":

IT IS ORDERED that James Carvino, the defendant, and his agents do absolutely desist and refrain from searching the lockers of members of Racine Policemens Professional and Benevolent Corporation without a search warrant, until the furth order of this court.

10. That following the promotions of Lo Piccolo and Peterson and some time prior to December, 1979, Chief Carvino promoted two officers (Kaebisch and Miller) to Traffic Investigator (PH-3), a rank midway between Patrolman and Investigator (PH-4); that Miller had previously held the position of Traffic Investigator when he resigned to move to Arizona and after a short period of time he returned to the Police Department as a Patrolman; that Miller did not take the promotional exam for Traffic Investigator, but was promoted by Chief Carvino to Acting Traffic Investigator, which promotion became permanent after one year, pursuant to the collective bargaining agreement; that Kaebisch, on the other hand, took the promotional exam and failed it with the highest grade of those failing the exam; and that Chief Carvino promoted Kaebisch because of the latter's qualifications and his satisfactory job performance.

11. That the relationship between the Union and the Police Department supervisory persons experienced an increase in controversy, with respect to grievances and the utilization of the contractual grievance and arbitration procedure from September, 1979, and to at least the onset of 1980; that Zierten, in fulfilling his Union responsibilities, played an active role in the processing of the grievances involved; and that said grievances included the discipline of two officers, the use of certain automatic weapons, and the questionable safety of Departmental squad cars.

12. That during the course of bargaining on a successor to the 1978-1979 collective bargaining agreement, the Union and the City, on December 20, 1979, executed a document extending the 1978-1979 agreement, in total, to January 31, 1980.

13. That on December 31, 1979, Chief Carvino issued an order promoting Officer Bickel to the Investigator (PH-4) vacancy, which had existed since May, 1979, with such promotion to be effective as of January 1, 1980; and that the claimed basis for such action, according to the Chief, resulted from Bickel's improvement in previous deficiencies in his work record.

14. That in January, 1980, and prior to the 9th of that month, while processing the disciplinary grievance of an Officer, in the grievance step involving the participation by the Chief, and after the latter indicated that he would sustain the discipline, Zierten became angered and characterized the action of the supervisory personnel in the matter by remarking as follows:

"Lieutenant Conway was screwing up this particular punishment, that Captain Hansen had perpetuated that mistake, and that the Assistant Chief had also screwed up the process of the punishment."

and that in said conversation, Chief Carvino stated to Zierten that he (the Chief) "had opened his mouth before, he was going to do it again, and that he had been screwed by something he said before," apparently referring to the conversation had by the Chief with reference to the reason stated by him to Zierten for the intent to inspect the lockers of the officers, which conversation the Chief, in his belief, deemed to be confidential, and which conversation Zierten repeated in testimony in the court action leading to the order restraining the Chief from such inspections.

15. That on January 9, 1980 Zierten and Lieutenant Conway had a conversation, which originally focused on a disciplinary action involving another officer, and wherein the conversation lead to a discussion with respect to the relationship between the Union and supervisory and managerial personnel of the

Department; that in the latter regard Conway related to Zierten, in the presence of a Sergeant, the fact that, in the past, three former Chiefs, and other supervisory personnel, including Conway, had previously been active members of the Union, had held offices therein, and as a result, the relationship between the Union and management had been more amenable, since Chief Carvino had been recruited from outside the Department, and further since supervisory law enforcement personnel were no longer members of the Union, and that Zierten's "anti-management" attitude could result in the latter becoming "unpromotable"; that Conway, in making said remarks, did so on his own; that he had not been authorized to make same; that Chief Carvino was unaware that said conversation had occurred until sometime later after Chief Carvino had failed to promote Zierten, which refusal resulted in the filing of the instant complaint, and that Conway was not involved in any way with the Chief's decision not to promote Zierten.

16. That as a result of the retirement of a Captain on December 14, 1979, and continuing at least through January 11, 1980, there occurred a string of Departmental promotions, including the promotion of Investigator Kindsvater to a Sergeant's position on the latter date, thus creating a vacancy in said Investigator position; that, as of the latter date, Zierten, although he had not received a passing grade in the June, 1978 examination for the position, had obtained the highest grade of those who had taken said examination, and who had not been promoted; that, on a date not established in the record, Chief Carvino, in order to obtain a new promotional list in January, 1980, as required in the extended collective bargaining agreement, scheduled a new promotional examination for the Investigator (PH-4) position vacated by Kindsvater; that said examination was held on January 11, 12, and 13, 1980; that Zierten took same, but did not receive a passing grade; and that Officer Ackley, who passed said examination with the highest grade, was promoted to the position on an "Acting" basis in February, 1980, apparently following the complaint filed herein, since the permanency of the appointment was subject to the disposition of the instant complaint proceeding.

17. That after such appointment of Ackley, a grievance was filed on behalf of Zierten, contending that Chief Carvino failed to promote Zierten to the Investigator position, in violation of the collective bargaining agreement between the parties; and that said grievance was denied by the Chief and had been withdrawn prior to seeking arbitration thereon, the Union choosing to pursue relief through the instant complaint proceeding.

18. That the record adduced herein does not establish, by a clear and satisfactory preponderance of the evidence, that the refusal of Chief Carvino to promote Officer Zierten to the Investigator position, when vacant, was motivated by anti-union considerations, and/or by the exercise of Zierten's right to engage in lawful concerted activity on behalf of the Union and/or its membership.

Upon the basis of the above and foregoing Revised Findings of Fact, the Commission makes and issues the following

#### PARTIALLY REVERSED CONCLUSIONS OF LAW

1. That the City of Racine, its officers and agents, including Chief of Police, James J. Carvino, by failing and refusing to promote Officer Dale C. Zierten to the rank of Investigator (PH-4) at any time between June, 1978 and April 2, 1980, the date of the hearing herein, did not discriminate against Dale C. Zierten because of the exercise of his right to engage in lawful concerted activity on behalf of Racine Policemen's Professional and Protective Corporation and/or its members, and that, therefore, the City of Racine, its officers and agents, including Chief of Police, James J. Carvino, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act.

2. That, since Racine Policemen's Professional and Protective Corporation did not exhaust the grievance and arbitration procedure set forth in its collective bargaining agreement with the City of Racine, with respect to the grievance of Officer Dale C. Zierten, alleging that the failure to promote Zierten to the position of Investigator (PH-4) violated provisions of said collective bargaining agreement, the Wisconsin Employment Relations Commission will not exercise its jurisdiction to determine whether the failure to affectuate such promotion constitutes a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Revised Findings of Fact and Partially Reversed Conclusions of Law, the Commission makes and issues the following

REVISED ORDER 1/

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed in its entirety.

Given under our hands and seal at the City of  
Madison, Wisconsin this 22nd day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli  
Gary L. Covelli, Chairman

Morris Slavney  
Morris Slavney, Commissioner

Dissent:

Herman Torosian  
Herman Torosian, Commissioner

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- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after (Continued on Page Eight)

1/ (Continued)

the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.



MEMORANDUM ACCOMPANYING  
ORDER REVISING EXAMINER'S FINDINGS OF FACT,  
AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S  
CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

BACKGROUND

In its complaint initiating the instant proceeding, the Union alleged that the City had committed prohibited practices within the meaning of Section 111.70(3)(a)3 and 5 of MERA, by denying to Officer Zierten a promotion to the rank of Investigator in January, 1980. The Union alleged that the failure to promote Zierten violated the collective bargaining agreement existing between it and the City, and that the overriding reason for the refusal to promote Zierten resulted from anti-union animus, in particular, Chief Carvino's antagonism toward Zierten because of his union activity. In its answer, the City avers that the collective bargaining agreement contains a grievance/arbitration procedure, that the Union failed to comply therewith with regard to the alleged contractual violation. The City denies that Officer Zierten's union activity had any basis for the decision not to promote him.

THE EXAMINER'S DECISION

Hearing in the matter was conducted by Examiner Ellen J. Henningsen on April 2, 1980, who resigned her employment with the Commission prior to issuing her decision in the matter. As a result, the Commission by order, substituted Examiner Stuart S. Mukamal to issue Findings of Fact, Conclusions of Law and Order based on the record made before Examiner Henningsen.

In as much as the collective bargaining agreement involved herein provided for final and binding arbitration of grievances arising thereunder, and since the Union failed to exhaust such procedure, the Examiner declined to assert the Commission's jurisdiction with respect to the alleged contractual violation, and dismissed the allegations relating thereto.

The Examiner correctly set forth that the Union must demonstrate, by a clear preponderance of the evidence, that the refusal to promote Officer Zierten was based, at least in part, on anti-union considerations, in order to establish that the City committed a prohibited practice in violation of Sec. 111.70(3)(a)3, MERA. In order to sustain that burden, the Union must establish that: 1) Zierten was engaged in lawful concerted activity; 2) the agents of the City had knowledge of such activity; 3) said agents bore animus toward Zierten because of such activity; and 4) the City's stated reasons for denying the promotion to Zierten were pretextual, and that the real reason, at least in part, was based on its animus toward Zierten's union activity.

The Examiner found that Zierten had been actively involved in protected concerted activity, which included holding various offices in the Union, and serving as a member of its collective bargaining team, as well as its Grievance Screening Committee. In the latter role, Zierten evaluated and processed grievances, and represented fellow officers in meetings with the Chief and/or his assistants, in disciplinary actions. Zierten also testified, as a Union witness, in the court case in which the Union sought to enjoin the Chief from inspecting personnel lockers of officers under his command. The Examiner concluded that the City was well aware of Zierten's concerted activity. The Examiner's findings with respect to "animus" were set forth as follows:

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 rend him "unpromotable".

The Examiner concluded that there was ample evidence to establish that the decision not to promote Zierten to the Investigator (PH-4) vacancy, which occurred as of January 11, 1980, was motivated, at least in part, by animus toward Zierten's protected concerted activities. In so finding, he relied on the following: 1) the timing of the decision not to promote occurred immediately following several months of a markedly deteriorating relationship between the parties resulting from a number of factors, including the giving of testimony by Zierten at the September 24, 1979 court injunction hearing seeking to restrain the Chief from inspecting storage lockers of police officers and the processing of several grievances by Zierten, including a meeting in early January, 1980, in which he became angry and accused the Chief of mishandling the processing of grievances; and 2) the disparity of treatment between Zierten and other police officers who received promotions in the preceding year even though they were not on the promotion list.

The Examiner rejected the City's reason for refusing to promote Zierten, namely that Zierten was not on the eligibility list because he had not passed the Investigator's test in June, 1978 and again in January, 1980.

In concluding that the City's reason was pretextual, the Examiner relied, to a degree, on the fact that the 1978-1979 collective bargaining agreement had been extended through January 31, 1980, and as a result the promotional list derived from the June, 1978 examination was still viable. He also found that the City's

argument that, due to the curtailment in promotional opportunities resulting from the age discrimination law extending the retirement age past 55 years, it was important to have an actual vacancy at the time of the examination to combat a feeling of futility in the Department with respect to studying and taking a promotional exam was without basis, since that same information was available when Officer Bickel was promoted less than two weeks earlier.

The Examiner concluded that the refusal to promote Zierten on January 11, 1980 constituted illegal discrimination and thus, the City committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3 of MERA. He ordered the City to cease and desist therefrom, to promote Zierten to the rank of Investigator (PH-4) effective as of January 11, 1980, to make Zierten whole for any loss of pay, and to post notice with regard to said prohibited practice.

#### THE PETITION FOR REVIEW

The City timely filed a petition requesting the Commission to review and reverse the Examiner's decision, contending that the record does not support the Union's position by a clear and satisfactory preponderance of the evidence, and "that only by depriving the City's testimony of any credibility whatever and piling inference upon inference can findings be made which arguably support the Union's position". The City argues that the Examiner made improper credibility determinations when he discredited testimony of the City witnesses and drew inferences therefrom without personally hearing the testimony or observing the demeanor of the witnesses.

Secondly, the City takes exception to the Examiner's findings that the relationship of the parties at the time establishes that the Chief had animus toward Zierten as a result of his union activities. It also takes exception to the Examiner's finding that its treatment of "similarly situated" police officers supports a finding of animus. In that regard, the City contends that, by extending the 1978-1979 contract through January, 1980, the Chief was obligated to administer a new promotional exam in January, 1980, and by giving the exam and promoting the applicant who scored the highest on the exam, rather than Zierten who failed the examination, the City was abiding by the terms of the contract.

The Union would have the Commission affirm the Examiner in all respects.

#### DISCUSSION

The Commission has reviewed the entire record, the briefs filed with the Examiner, the Examiner's lengthy decision, the petition for review, and the briefs filed in support of and in opposition to said petition. We have also consulted with former Examiner Henningson, who conducted the hearing in the matter, to obtain her personal observations and impressions of the witnesses with respect to their credibility.

The only prohibited practice allegation at this stage of the instant proceeding concerns itself with the issue as to whether the failure of the Chief to promote Zierten was motivated by the latter's exercise of his right to engage in protected concerted activity, in violation of Sec. 111.70(3)(a)3 of MERA, since the Union took no exception to the Examiner's refusal to exercise the jurisdiction of the Commission to determine whether the City had violated the provisions of the collective bargaining agreement existing between it and the Union, by not promoting Zierten to the Investigator position.

As noted earlier, the City takes exception to "credibility determinations" made by the Examiner. The conclusionary findings made by the Examiner were not based on any credibility determination resulting from the demeanor of any of the witnesses. Rather, such findings were based on an interpretation of the events material to the issues herein, and the inferences drawn therefrom by the Examiner. In the Commission's conference with the Examiner who conducted the hearing, we are satisfied that any conflicts in testimony, if any, cannot be attributed to the demeanor of any witness. The inferences to be drawn, in determining whether the failure to promote Zierten were motivated by anti-union animus, must be drawn from the actions of the parties, and not from what they may contend as the reasons therefore.

The Examiner, however, seems to have exercised poetic license in his Findings of Fact, as well as in his memo, in describing the climate existing between the parties and some of the events involved herein. His characterization of certain

events is not supported by the record. In paragraph 12 of his Findings of Fact, the Examiner described the working relationship between the parties in the latter part of 1979 as having "experienced a marked deterioration", and as an "increasingly stormy relationship". Reference to "the deterioration of the parties' working relationship" was set forth again in paragraph 14, and in the latter paragraph the Examiner characterizes the court hearing, leading to the restraining order with respect to locker inspections, as "a highly contested hearing". A review of the transcript, made an exhibit herein, discloses that the court hearing was orderly, that the testimony was calmly presented, and that neither Counsel were admonished in any way by the presiding Judge. The Examiner's penchant for dramatization is reflected in his memorandum also, e.g., as set forth on page 19 thereof as follows:

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.

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 . . .

We have modified the Examiner's Findings of Fact setting forth the material events as they occurred, without dramatizing said events and/or the attitude of the principals involved, namely Officer Zierten and Chief Carvino. In instances we have revised certain Findings. We have enlarged other Findings and we believe we have set forth all the material facts.

We wish to note that there is an absence of evidence with respect to various events, especially the specifics with regard thereto, commencing with the Captain's vacancy and leading up to the vacancy created in the Investigator position on January 11, 1980. We note that in paragraph 20 of his Findings, the Examiner set forth that the Chief "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)". We find nothing in the record to support such a finding.

However, the record does establish that Zierten was an active officer of the Union, that he was actively engaged in the screening and processing of grievances of fellow officers in the bargaining unit, that he participated in the decision of the Union to seek a restraining order with respect to the intent of the Chief to search the lockers of Officers, and that he testified in the latter proceeding. The record also establishes that the Chief and other supervisory law enforcement personnel was aware of such concerted activity. We must focus on whether the record, by a clear and satisfactory preponderance of the evidence, supports an ultimate finding that the reasons stated by the Chief, for failing to promote Zierten to the Investigator position in January, 1980 were pretextual, thus constituting an attempt to disguise a reason resulting from the exercise of protected concerted activity by Zierten.

The Examiner, in concluding that Zierten's failure to receive the promotion was motivated, at least, in part, by the Chief's animus toward Zierten's protected activities, relied on the rationale set forth in his memorandum as follows:

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 the time and (2) the Respondent's conduct involving certain police officers awaiting promotion and thus similarly situated to Officer Zierten during this period.

In rejecting the claimed basis for not promoting Zierten--he was not on the promotional eligibility list, and the Chief's decision to utilize the eligibility

list derived from the January, 1980 promotional examination--the Examiner concluded that the extension of the 1978-1979 agreement through January, 1980 also extended the effectiveness of the promotional list derived from the June, 1978 examination, and also, concluded that the City's argument--that the administration of a new examination to fill the Kindsvater vacancy was justified by a curtailment in promotional opportunities caused by the Federal Age Discrimination Act in Employment--was without merit since the City did not consider this a factor when making other promotional decisions, in particular, the promotion of Officer Bickel, only a few weeks earlier.

In finding animus, the Examiner, relying on a conversation involving a grievance meeting regarding the discipline imposed on Officer Gleason, in paragraph 16 of his Findings of Fact stated ". . . 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 . . ." However, the actual testimony of Zierten was that he accused other supervisory personnel of mishandling the grievance, not the Chief. In addition, the finding of "resentment" by the Examiner can only be supported if the Chief's testimony regarding his feelings toward Zierten is completely ignored or is not credited, which we have not done as we so note later in our discussion.

The Examiner also felt that the existence of animosity, on the part of the Chief, can be inferred from the fact that the Chief avoided "personal" conversations with Officer Zierten after his court testimony on September 25, 1979 hearing. However, as the following testimony elicited by the Chief on cross-examination indicates, the avoidance of personal conversation with Officer Zierten was not due to personal animosity, but out of a need to differentiate between the role an officer performs when he is the union representative:

Q Despite the feeling that you now believe you were perhaps too candid and would have been better off not to have told Officer Zierten what you did prior to that hearing, is it your testimony that you don't feel any personal animosity toward him or hostility toward him as a result of his testimony?

A No. I think that it was my inability to differentiate at that time between Officer Zierten, the person, the officer, the union representative, and that I should not attempt to go off the record in a situation where he's acting as a union representative. And I have no personal animosity; just that I have to be educated as to when a person is standing before me as a union representative and when a person is standing before me as a man. I was not able to make that differentiation; and therefore I blame myself, not Officer Zierten.

Q And have you changed---in accordance with your beliefs now, have you changed your position on what you will talk to Officer Zierten about?

A I don't have any personal conversation with Officer Zierten, in fact, I really talk with---about union---it's the union that initiates the activity with me most of the time. There have been innumerable instances, which I cannot document, where they have come in with grievances in hand that they were going to submit and, after informal discussion it was determined that for one reason or another the grievance would not be submitted. Sometimes they have indicated that they saw my point of view and left and didn't submit the grievance; and other times I changed my point of view and went along with what they said. This has diminished in the last three years, I would agree with that . . . (Transcript 102-103)

The Examiner also relied on the conversation between Zierten and Lieutenant Conway on January 9, 1980 "to corroborate" the existence of animus on the part of Chief Carvino. However, his findings with regard to that conversation fail to include several relevant facts, including that the opinion expressed by Lieutenant Conway was his personal opinion and not that of the Chief, that the Chief had no knowledge of said conversation or authorized or suggested that the Lieutenant have same, and that Lieutenant Conway did not have any conversation with the Chief regarding Officer Zierten's possible promotion. When viewed in the total factual

context, including the fact that Zierten and Conway had frequent informal discussions over the years regarding their personal feelings concerning the Police Department, we cannot agree with the Examiner that said conversation corroborates the existence of any anti-union animus on the part of Chief Carvino with respect to Zierten.

In concluding that animus existed, the Examiner found compelling the City's treatment of other officers who were promoted during the year prior to the denial of same to Zierten, even though said officers did not appear on the contractual promotional eligibility list, namely Officers Kaebisch and Bickel. A finding by the Examiner, further supporting his conclusion of disparate treatment, but which was erroneous, set forth that Zierten as of January 11, 1980 was the only remaining police officer who sat for the June 1978 promotional examination for Investigator and who had not received a promotion. This finding was probably deduced from an earlier erroneous finding that Officer Zierten was one of only five police officers to sit for the promotional examination administered for the rank of Investigator (PH-4) in June, 1978. To the contrary, there were some 20 to 25 officers who took said examination, and therefore, some 15 to 20 other officers who, like Zierten, did not receive a promotion because they did not receive a grade of 75% or more. Our revised findings correct those errors.

One of the key facts which is central to the Examiner's conclusion of disparate treatment is set forth in paragraph 24 of his Findings, wherein he concludes that the extension of the 1978-1979 agreement on December 20, 1979, extending it through January 30, 1980, also extended the effectiveness of the examination scores derived from the June, 1978 promotional examination for Investigator (PH-4). We disagree with said Finding.

(Chairman Covelli and Commissioner Slavney concur and agree with the Memorandum up to this point. There follows their separate concurring memoranda.)

#### Chairman Covelli

Since the eligibility list derived from the June, 1978 examination had been exhausted since at least May, 1979 it follows that it cannot be extended. The contract required:

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.

If the Union had agreed to the lowering of a passing score to 70% as requested by Chief Carvino, there would have been names on the eligibility list including, Officer Zierten, at the time of the Kindsvater vacancy but that did not occur. It just does not make sense for Chief Carvino to request an agreement from the Union to lower the eligibility score to 70% and the Union to reject his request, if Chief Carvino was already obligated to promote officers who scored below 75%, as the Examiner found.

In view of the fact that the 1978-1979 eligibility list was exhausted and the extended agreement required the administering of a new promotional examination in January, 1980 it supports the City's position to utilize the new eligibility list for filling the vacancy that occurred on January 11, 1980. This is buttressed by the fact that there would be a curtailment in promotional opportunities resulting from fewer retirements caused by the lifting of the mandatory retirement age of 55 for one year due to the Age Discrimination Act 2/ and the resulting sense of

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2/ On December 4, 1979 the Finance Committee of the Racine Common Council adopted the following resolution: ". . . all members of the protective services required to retire as of January 1, 1980, under the age 55 policy be extended (sic) for a period of one year and that the City Attorney, Personnel Director and respective chiefs be directed to investigate the affect of the Federal Age Discrimination in Employment Act and report back to this Committee within two (2) months". (See Union's Supplementary Exhibit 2.)

futility on behalf of officers in the Department to study and take an examination for which no vacancies may develop. There is no factual dispute as to the feelings of futility due to the Age Discrimination Act but rather a question of the sincerity of those reasons, when you consider the timing of Officer Bickel's promotion who was not on the eligibility list.

There are several facts that distinguish the circumstances surrounding the promotion of Officer Bickel when compared to the facts surrounding the decision not to promote Officer Zierten. The first distinguishing fact is that the vacancy that Officer Bickel was being considered for and eventually promoted to occurred as of May, 1979 long before there was a possibility of a new eligibility list which would result from the contractually mandated promotion examination to be administered in January, 1980. This compares with a vacancy that occurred as of January 11, 1980 at the time when a new examination was given and a new eligibility list would be readily available.

Secondly, in January, 1979, after Bickel was denied a promotion to Sergeant, even though he was on the eligibility list, Chief Carvino told him that if he corrected the deficiencies that led to the denial, he could be promoted in the future. Thirdly, Chief Carvino delayed the decision to promote Officer Bickel until December, 1979 so that he would have a sufficiently long period of time to evaluate his improvement since January, 1979.

Although it could be argued that if Chief Carvino felt strongly about having vacancies available at the time of the promotional examination to combat the feeling of futility, not promoting Bickel would have meant two vacancies and therefore a better inducement for officers to take the examination than one, said argument does not discount Chief Carvino's reasons for not promoting Officer Zierten.

The promotion of Officer Kaebisch to the rank of Traffic Investigator (PH-3) also took place after the exhaustion of the appropriate eligibility but before the possibility of new eligibility being available. Although the record is not clear as to the exact date of Kaebisch's promotion, it is clear that the promotion took place some time during 1979 well in advance of December, 1979.

The Examiner appeared to gloss over the fact that Chief Carvino had always utilized the promotional eligibility list in recommending promotions pursuant to his contractual obligation and it was only when there was no one on the eligibility list that he promoted someone else, which didn't apply to Officer Zierten's situation since a new eligibility list would be available.

Contrary to the Examiner's findings, the record clearly indicates that Officer Zierten was not on either the promotional eligibility list derived from the June, 1978, nor the January, 1980 examination and for that reason Chief Carvino promoted Officer Ackley, who received the highest passing score on the January, 1980 examination. In light of the above, I cannot accept the Examiner's conclusion that 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 toward Officer Zierten engaging in protected activity on behalf of the Complainant.

#### Commissioner Slavney

The Examiner appears to have ignored the plain reading of Article XIII of the existing agreement. Paragraph 9 of Article XIII, the pertinent portion, concludes with the sentence:

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.

Also in support of his conclusion that Zierten was not promoted because of his concerted activity, the Examiner set forth the following rationale on page 31 of his decision:

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. 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 average or even above average according to the testimony of his superiors, and who was not promoted, according to Chief Carvino, primarily because he had failed the Investigator examination. 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. 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 Examiner's Findings of Fact contain no specific finding with respect to the promotion of Miller. Paragraphs 12 and 19 relate to Bickel, while paragraph 18 relates to Kaebisch. In the memorandum portion of this decision, and as part of the "Background" portion thereof, the Examiner summarized the facts relating to the Miller and Kaebisch promotions as follows:

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. 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. The third instance involved the promotion of Officer Jess Bickel, as noted above and to be more fully discussed below.




It is to be noted that the dates of the Miller and Kaebisch promotions were not established in the record. Had they occurred prior to the court proceeding would the Examiner have relied on said promotions as indicating disparate treatment of Zierten? I believe not. Further, at no time herein has the Chief given as a reason for not promoting Zierten to the January 11, 1980 vacancy the failure of Zierten to obtain a passing grade in the June, 1978 examination. Frankly, the Examiner's rationale with respect to the "disparity of treatment" theory loses significance and reliability in light of his factual recitation immediately above, namely to the effect 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," and with regard to Kaebisch, who "had obtained the highest grade of any candidate but who 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. . ."

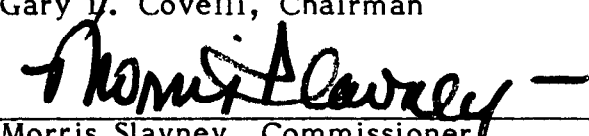
There are facts which distinguish the circumstances surrounding the promotion of Bickel and the failure of the Chief to promote Zierten to the vacancy which occurred in January, 1980. The vacancy to which Bickel was ultimately promoted arose in May, 1979. Bickel, after he was denied a promotion to Sergeant, as a result of his deficiencies as an employe, was told by Chief Carvino, in January, 1979, that if Bickel improved his performance he would be considered for promotion. In December, 1979, the Chief, upon being satisfied that Bickel had improved, promoted Bickel, as the remaining highest rated applicant on the promotional list, to the Investigator position effective January 1, 1980. Although the timing of the latter promotion seems suspicious, it appears to me that, in absence to any contrary evidence, apparently the Chief did so in order to relieve Bickel, also a Union member, from having to take a future promotional exam for the Investigator position. The position claimed by Zierten did not become vacant until January 11, 1980, during the month in which the agreement required a new promotional examination.

In reviewing the instant matter the members of the Commission have read and re-read the transcript, examined and reexamined the exhibits, as well as the Examiner's decision and all the briefs filed herein. The undersigned, constituting the majority, have come to the conclusion that the Union did not establish, by a clear and satisfactory preponderance of the evidence, that the Chief's decision not to promote Officer Zierten to the Investigator position, which became vacant on January 11, 1980, was motivated by Zierten's protected concerted activity, and therefore we have reversed the Examiner, resulting in revising the Findings of Fact, partially reversing his Conclusions of Law, and reversing his Order, and in the latter regard, by dismissing the complaint filed herein.

Dated at Madison, Wisconsin this 22nd day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Gary J. Covelli, Chairman

  
Morris Slavney, Commissioner

MEMORANDUM OF DISSENT

I agree with the majority's discussion and Findings, as opposed to the Examiner's, with regard to the early January 1980 grievance meeting conversation involving, among others, Zierten and the Chief; and that the number of applicants was not 5 as found by the Examiner but rather 20-25. 3/ Further I agree with Chairman Covelli's conclusion that the extension of the 1978-79 agreement on December 20, 1979 did not also extend the effectiveness of the June 1978 examination scores.

I do not concur however with the majority's reversal of the Examiner's decision that the Respondent in not promoting Zierten to the January 11 vacancy was motivated, at least in part, by Zierten's protected union activity. The Chief's inability to adequately explain the disparate treatment of Bickel and Zierten leads me to such conclusion.

The issue before us is if the Examiner reasonably inferred, from the total circumstances of the case, that the Chief's motive, at least in part, in not promoting Zierten was Zierten's protected union activity. As stated by the Examiner,

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 from the circumstances. 35/

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

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 trier 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."

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3/ Since Zierten scored next highest after Bickel on the 1978 examination, the fact that there were 20-25 applicants and not 5 is not really as important as the fact that Zierten was the next person on the list who had not been promoted.

Thus, critical in determining the ultimate issue here, is a determination of whether the reasons given by the Chief for not promoting Zierten, and instead giving an examination, were genuine or pretextual.

The Chief testified that he decided not to promote Zierten, who was ranked fifth just behind Bickel, because (1) in January 1980 the eligibility list of June 1978 had been exhausted, i.e., all those scoring a passing grade of 75% had been promoted, and therefore there was no valid list and he was free to promote as he wished pursuant to management rights clause, (2) he preferred to give a new exam which by contract was to be given in January of even numbered years, in order to provide promotional opportunities which had become curtailed as a result of recent (December 1979) amendments to the Age Discrimination in Employment Act extending the mandatory retirement age beyond 55 years, and (3) morale of applicants, who had studied for and were awaiting the January 1980 promotional examination, would suffer if Zierten, who had not passed the June 1978 examination, were promoted to fill the January vacancy.

First, as stated earlier, I agree with Chairman Covelli that no valid eligibility list existed at the time of the January 11 vacancy. Since the collective bargaining agreement established 75 as a passing grade for promotions and since all those that passed the exam had been promoted, there was no further obligation on behalf of Respondent to promote those falling below the 75% level. Important in this regard, however, is the fact that the Chief had exercised his discretion in the past by promoting those that did not pass the examination and he did so according to their ranking on the list. In this regard Kaebisch who failed the requisite promotional examination and, therefore was not on an eligibility list, was promoted to Traffic Investigator rank in 1979. Further, Miller who did not take an examination was promoted to Traffic Investigator at a time when the promotional eligibility list for that rank had been exhausted. 4/ More importantly Bickel who was ranked just ahead of Zierten, was promoted on January 1, 1980, 11 days prior to the disputed promotion herein, even though there was no valid eligibility list at the time. 5/ Again, as stated earlier, while I agree that Respondent had no obligation to promote Zierten since he did not pass the promotional examination, Respondent just the same was not free to exercise its discretion in a manner which discriminated against Zierten because of his protected union activity.

The majority in explaining the different treatment of Bickel and Zierten seem to rely heavily on the fact that the agreement required an examination in January 1980. In this regard Chairman Covelli states "In view of the fact that the 1978-79 eligibility list was exhausted and the extended agreement required the administering of a new promotional examination in January, 1980, it supports the City's position to utilize the new eligibility list for filling the vacancy that occurred on January 11, 1980." Commissioner Slavney states that "The position claimed by Zierten did not become vacant until January 11, 1980, during the month in which the agreement required a new promotional exam." I think the majority's apparent heavy reliance on this contractual provision is misplaced. More important to the issue herein, notwithstanding the contractual language, is what the Chief thought his options and obligations were under the agreement; a fact the

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4/ Commissioner Slavney notes that the exact dates of the Kaebisch and Miller promotions are not known and asks and answers the following question: "Had they occurred prior to the court proceeding would the Examiner have relied on said promotions as indicating disparate treatment of Zierten? I believe not." I disagree. First, in his disparate treatment analysis the Examiner does not rely on Miller's promotion and states that said situation ". . . 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." (P. 31) Secondly, what is important is not when the other officers were promoted relative to the court hearing, but rather the fact that Zierten's promotional opportunity, and his treatment in regard thereto, occurred after the court hearing and his other protected union activity. Thus the Examiner compares the treatment of Kaebisch and Bickel, who were promoted, to Zierten, who was not promoted, at a time he was active in union matters.

5/ Contrariwise, it seems in the opinion of Commissioner Slavney that a valid promotional list existed at the time of Bickel's promotion. He states "In December, 1979 the Chief, upon being satisfied that Bickel had improved, promoted Bickel as the remaining highest rated applicant on the promotional list, . . ."

majority seems to ignore. The Chief, referring to Zierten and the January 11 vacancy, testified that "... I was not under obligation to promote anyone other than someone I would choose to or wait until the new list came out." (Tr. p. 109.) Whether the Chief was correct in his assessment of whether he could promote without an examination is not important. What is important is that he thought he had the option to promote on merit or give a new examination. Thus, it is within this context that we must analyze the Chief's actions with regard to Zierten and the January 11 vacancy, and his reasons for same.

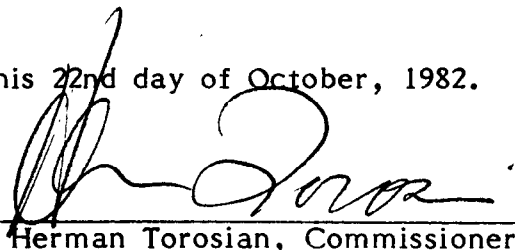
In exercising his discretion to give a new examination and not promote Zierten, the Chief stated that he did so because he wanted to provide promotional opportunities and because it was better for employee morale. Significantly these reasons which dictated unfavorable treatment of Zierten were also present 11 days prior on January 1 at the very time Bickel was promoted. The question that immediately comes to mind is if the Chief was so concerned over future promotional opportunities and employee morale, why did he promote Bickel and not Zierten? Bickel's vacancy was filled on January 1 at a time when the Chief must have also known of the upcoming January 11 vacancy. While the Chief testified that the contract requires an examination in January of even numbered years and thus he could either give an examination or promote on merit it appears that if the Chief was really concerned about promotional opportunities and employee morale he would have utilized the new January 1980 examination eligibility list to fill both vacancies instead of just the January 11 vacancy.

Given the reasons advanced by the Chief for not promoting Zierten, there just doesn't seem to be any valid reason for his treating Bickel and Zierten differently. Both failed to pass the 1978 promotional examination with Bickel ranking just ahead of Zierten. Both, nonetheless, were considered by the Chief to be competent and interested in advancement; criteria considered in other promotions of officers who similarly failed to pass the required promotional examination. Bickel, unlike Zierten, had a work related problem in that he had a record of excessive absenteeism and tardiness. Because of his record, Bickel was denied a promotion to Sergeant although he had passed the promotional examination for said position. In January 1979 Bickel was told by the Chief "that he should continue to perform as he had in the past and hopefully that the other things that created problems for him would come into line and he then could be promoted in the future". A vacancy did occur in May 1979 which was left open until Bickel's promotion to said vacancy on January 1, 1980. The fact that the vacancy filled by Bickel occurred in May or the fact that Bickel's work record improved, does not in the opinion of the undersigned adequately explain the disparate treatment between he and Zierten. Significantly neither the Chief nor Bickel claim that a commitment, even an informal one, was made to Bickel to the effect that he would be promoted without any further examination as soon as he improved his absenteeism and tardiness record; just a general statement that if he improved he could be promoted. No period was set in which he was to be evaluated and after which he would be reconsidered for promotion. Further, when a vacancy did occur in May, there is no evidence that Bickel was considered for promotion at that time or to that he would be promoted to fill the vacancy when his attendance record improved.

When considering the above in light of the Chief's claimed underlying concern of curtailed promotional opportunities and employee morale, it just does not seem reasonable Bickel would have been promoted just 11 days prior to the January 11 vacancy, since said reasons, which were the very reasons given by the Chief for not promoting Zierten, were present at the time Bickel was promoted. In the final analysis it is this disparate treatment without adequate explanation at a time when Zierten was active as a union representative, which brought him into contact with the Chief as late as early January (before the January 11 vacancy) and which led the Chief to cease talking to him because he (Chief) felt he had been "screwed" before by being too candid with him, and because he could not distinguish between Zierten, the person, officer, and union representative, that leads the undersigned to conclude that the reasons advanced by the Chief were not genuine but rather pretextual and that the real motivation, at least in part, was Zierten's protected activity as described in paragraphs 5, 9, 11, and 14 in the Revised Findings of Fact.

Dated at Madison, Wisconsin this 22nd day of October, 1982.

By

  
Herman Torosian, Commissioner