

RECEIVED

STATE OF WISCONSIN

CIRCUIT COURT BRANCH VIII

RACINE COUNTY
MAR 30 1983

STATE OF WISCONSIN ex rel. RACINE POLICEMEN'S
PROFESSIONAL AND PROTECTIVE CORPORATION,

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION
: D E C I S I O N

Petitioner,

: Case No. 82-CV-1572

-VS-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

: Decision No. 17605-C

Respondent.

INTRODUCTION

This matter was commenced by filing on 22 November 1982. The City of Racine filed a Notice of Appearance on 10 December 1982. Respondent answered and made affirmative allegations on 13 December 1982. On 14 December 1982 the clerk established a briefing schedule. Both sides have filed memorandum and the last date for doing so was 16 March 1983.

Petitioner seeks a review, under Chapter 227.15, Stats., (and following), of a decision and order of the Wisconsin Employment Relations Commission dated 22 October 1982.

FACTS

Petitioner is a labor organization which represents for collective bargaining purposes a bargaining unit consisting of all full-time sworn law enforcement officers employed by the City of Racine Police

Department. It filed a complaint on 28 January 1980 with the WERC alleging that the Department had committed prohibited practices contrary to 111.70, Stats., of the Municipal Employment Relations Act.

Thereafter Respondent appointed an examiner to conduct a hearing. This took place on 2 April 1980. Because the initial examiner terminated her employment, the decision was made by a properly appointed successor.

As a result of the hearing, credible evidence (worthy of belief) established the following:

1. Dale Zierten is a policeman employed by the Department and holding the rank of patrolman (PH-2). He is also a member of Petitioner union. In the past he served as Treasurer, a member of the grievance committee, and a member of Board of Directors.
2. James J. Carvino, at all times pertinent, was Chief of the Racine Police Department. One of his lieutenants was Terrence Conway who was the shift supervisor of Officer Zierten.
3. Petitioner and the Department were governed by a collective bargaining agreement for the years 1978-1979. Article IV contained a Management Rights Clause. Article VIII established a Grievance Procedure. Article IX dealt with Arbitration. Article XIII established Promotional Procedures. The entire agreement was available in the record to the examiner.
4. On 20 December 1979, Petitioner and the Department agreed to extend the 1978-1979 agreement en toto through 31 January 1980. It was hoped that negotiations on a new 1980-1981 contract would be concluded by then.
5. The 1980-1981 contract was agreed to on 31 March 1980 and was made retroactive to 1 January 1980. Modifications were made to each of the articles referred to in No. 3 above. The exact language will not here be repeated, but same is a part of the record. In addition, wages were adjusted for positions covered.

6. 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 (75% was a passing score) 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%

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. The 1978 examinations and subsequent lists were to be valid for a period of two years.
9. 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 LoPiccolo 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 employee.

10. 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 Ziarten became heavily involved in the increasingly stormy relationship between the parties as a consequence of his various activities on behalf of the Complainant.

11. 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 Ziarten, 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 Ziarten 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 further order of this court.

12. 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,

Ziarten, 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, 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 Ziarten 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.

Chief Carvino stated to Ziarten 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 Ziarten for the intent to inspect the lockers of the officers, which conversation the Chief, in his belief, deemed to be confidential, and which conversation Ziarten repeated in testimony in the court action leading to the order restraining the Chief from such inspections.

13. That on January 9, 1980 Ziarten 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 Ziarten, 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 Ziarten'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.

14. 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.

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 well as on Officer Bickel's evidence interest in and qualifications for promotion to Investigator (PH-4) rank. Officer Bickel's promotion became effective as of January 1, 1980.

15. 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 Department.

The extension of the 1978-1979 Agreement, 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.

16. 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.

The dispute centers on whether the Department was motivated, in part at least, by animus toward Zierten due to his involvement in activity on behalf of the Petitioner.

The examiner entered his decision on 11 February 1981. This was appealed by the City and the Department to Respondent. In reversing the examiner's decision, Respondent, in a two to one decision, ruled on 22 October 1982 that the Department did not commit any prohibited practices. No additional facts were presented but Respondent came to an opposite conclusion in several respects. Petitioner's action for review is directed at Respondent's 22 October 1982 decision.

LAW

The instant review is under the provisions of Chapter 227. Only final administrative decisions are reviewable. Pasch v. Wis. Dept. of Revenue, 58 Wis. 2d 346 (1973). In order to have standing, the decision being reviewed must cause injury or loss to the Petitioners, and the interest asserted must be one protected by law. Wis. Environmental Decade v. P.S.C., 69 Wis. 2d 1 (1975).

The trial court's decision in a review proceeding is based [in most cases - see 227.19(1), Stats.] on the record established before the Commission. 227.18, Stats. The Court is to defer to the Commission's judgment (experience, technical competence, specialized knowledge, and discretionary authority) regarding interpretations of law if the agency has special expertise and knowledge, if a rational basis for the interpretation is stated, and if the interpretation does not conflict with the law. Bucyrus-Erie v. DILHR, 90 Wis. 2d 408 (1979). The

credibility of witnesses and the weight of the evidence are for determination by the Commission and not the Court. Neff v. Industrial Commission, 24 Wis. 2d 207 (1964). If there is any credible evidence to support the decision of the Commission, it must be upheld even if contrary to the great weight and clear preponderance of the evidence. E.F. Brewer Co. v. ILHR Dept., 82 Wis. 2d 634 (1978). The findings of fact made by the Commission are conclusive if supported by credible and substantial evidence. The term "substantial evidence" is such relevant evidence as a reasonable person, acting reasonably, might accept as adequate to support a conclusion. Valadzic v. Briggs and Stratton, 92 Wis. 2d 583 (1979).

The question of whether an employee's union activity was a motivating factor in a discharge is a question of fact. Kenosha Teachers Union v. Wisconsin E.R. Commission, 39 Wis. 2d 196 (1968). When more than one inference reasonably can be drawn, the finding of the agency is conclusive. Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis. 2d 230 (1977). The Court is not to substitute its judgment for that of the Commission as to the weight of the evidence, but the Court is not bound by the agency's interpretation of the law. Robertson Transportation Co. v. P.S.C., 39 Wis. 2d 653 (1968). It is proper for the Court to consider legislative analysis of applicable statutes. Westring v. James, 71 Wis. 2d 462 (1976). The Court reviews a decision to determine whether it is arbitrary or capricious. Holtz and Krause, Inc. v. DNR, 85 Wis. 2d 198 (1978).

A good overall summary is found in Hamilton v. ILHR Dept., 94 Wis. 2d 611 (1980):

"The agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

If the administrative agency's interpretation has no rational basis, the reviewing court is not to defer to its conclusions of law. Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976).

In evaluating the claim of anti-union animus, the Court is to look to the total circumstances. Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d. 466 at 470 (9th 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."

Section 111.70(3)(a)(3), Stats., makes it prohibited practice for a municipal employer to "encourage or discourage a membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment." In Muskego-Norway Consolidated Schools Joint School District No. 9 v. Wisconsin Employment Relations Board, 35 Wis. 2d 540, 561-563 (1977), the Wisconsin Supreme Court interpreted Section 111.70(3)(a)(3) in the same manner as Section 8(2)(3), National Labor Relations Act, i.e., regardless of any valid reasons for discriminating against an employee, a prohibited practice exists if part of the motivation for the discrimination is anti-union animosity.

A good overall statement of factors to be considered is made by Respondent in LaCrosse County (Hillview Nursing Home), Case XLIII, Decision No. 14704-A as follows at page 13:

"To prevail, Complainant must establish that... (grievant) was active in union affairs and that Respondent had knowledge of such activities; that Respondent bore animus against... (grievant) because of such activities; and that finally, Respondent's stated reasons for its actions taken vis-a-vis... (grievant) were pretextual in nature, and that one of the reasons for Respondent's actions were based on the fact that... (grievant) was active in union affairs."

Also, in the case of City of Malden (20 March 1979), Case No. MVP-3017, Respondent, in a matter conceptually similar to the instant dispute, noted:

"Adverse personnel actions which are motivated by anti-union animus are unfair labor practices under Sections 10(a)(1) and (3) of the Law. The sole issue in this case is whether or not William Kerr was passed over for sergeant because of his activities as president and vice-president of the Union. If the motive for bypassing Kerr was his union activity, the City has violated the Law, even if there existed legitimate reasons for the appointment of another individual to the sergeant's opening. If, however, it is not established by the Union that the decision to deny promotion was motivated by Kerr's protected activity, we cannot properly substitute our judgment for the employer's and determine who was the better man for the job. Employer motivation is a question of fact to be determined from all of the evidence, and may be inferred from circumstantial evidence and reasonable inferences drawn therefrom."

DISCUSSION

Both parties agree that the issue to be resolved is whether or not, given the record before the Court, anti-union animus was a factor

in the police chief's decision not to promote Officer Zierten. Further, there is agreement that the applicable legal standard to be applied includes

1. Consideration of total evidence (direct, circumstantial and reasonable inferences).
2. See if credible evidence establishes that Petitioner was active in union affairs.
3. See if credible evidence establishes that the Department knew of Petitioner's union activities.
4. Review Department's stated reasons to determine, under total circumstances, if its actions, in part, were the product of anti-union animus (and thus pretextual), or whether they were a proper exercise of management options under the contract.

Though the examiner and Respondent (majority members) emphasized different facts and arrived at different inferences from conceded facts, no substantial dispute exists on the important facts. Both sides agree that Petitioner was active in union affairs -- a lawful and protected activity. He was on the Board of Directors, an officer, a member of the Grievance Committee, a member of the union's collective bargaining team, and participated with the union in a legal action (injunction) against the Department.

The Department was aware of Zierten's union activity. The police chief knew Zierten testified for the union in the injunction matter. Zierten participated, with the Department present, in bargaining and grievance meetings. Zierten had had a run-in with the chief.

The Department's stated reason for not promoting Zierten was that he had not passed the Investigator's test (score of 72.50%) in June, 1978,

and thus was not eligible for promotion. Further, in January, 1980 Zierten was not at the top of the list of officers eligible for promotion. Officer Ackley was, and he therefore was promoted.

The Department asserts that this is reasonable and not suggestive of animus because

1. Zierten did not pass the 1978 test and was not eligible for promotion.
2. The list itself had expired as a result of the labor contract.
3. A new test and list were required.

The facts of this case compellingly reject each of the postulates. The theory of Respondent is not supported by any credible or substantial evidence.

For weight to attach to the assertion that Zierten should not be promoted from the 1978 list because he did not pass the test, then the same would hold true for others who were similarly situated. Yet we know from uncontested credible evidence that Larson was promoted to the position of sergeant because of his ranking on a list for that position. In addition, Bickel was promoted off the investigator list effective 1 January 1980 even though he too did not have a passing grade. The Court determines that the only weight which can be given to the credible evidence regarding the Bickel promotion is that anti-union animus did exist. His situation was not just similar to Zierten's, it was the same.

For weight and believability to attach to the assertion that the list had expired, then all persons on the list would be in the same position. Yet we know through the Bickel promotion that this interpretation

did not hold true. The Department applied the standard of a viable list to Bickel and an expired list to Zierten. This discrimination makes reasonable an inference of animus. It does not support in any way the reasoning offered by the Department for its conclusion. Even without a valid list, the actions were disparate and indicative of discrimination.

The Bickel promotion also augurs against a finding of reasonableness regarding the requirement of a new test and list. The Department, before the operative vacancy, was aware of its projected occurrence. This was before the Bickel promotion. Further, in 1979 the Department promoted another police officer (Kaebisch) from patrolman to traffic investigator when the officer involved had failed to pass the requisite promotional examination.

Thus within the period of less than one year, the Department promoted two officers who had failed the necessary promotional exam. This makes incredible the assertion that, as to Zierten, a straight gig line was required. Uniformity in the application of rules did not exist as to promotions. It is reasonable to infer that the Department was making discriminatory excuses in coming up with reasons for its nonaction regarding Zierten. Past practices make those excuses not credible.

In addition to the uncontroverted record regarding past promotional practices, certain other credible evidence indicates that Respondent's decision is arbitrary, pretextual, and not supported by any credible or substantial evidence.

1. A member (Conway) of the Department's command staff threatened Zierten on 9 January 1980 with being unpromotable due to his anti-management attitude.

This was just two days before the vacancy for investigator. This conversation took place when Zierten and Conway were on duty.

2. Zierten testified against the Department in the injunction matter. The Chief considered a part of this testimony to be a breach of confidence regarding an informal discussion between Zierten and the Chief. Thereafter, the Chief refrained from engaging in personal discussion with Zierten. The Chief was upset with Zierten.
3. During a grievance hearing in early January, 1980 (prior to 9 January 1980) involving Officers Moreno and Gleason, Zierten accused the Chief and his staff (Conway and Hansen) of mishandling the punishment. The Chief responded by referring to being screwed by something he had said before. The reference was to Zierten testifying against the Department in the injunction matter. The Chief was upset with Zierten.
4. Since the Department lost the injunction matter, it had ruled adversely to the union in all grievance matters up to and through this promotion matter in January, 1980.

The Department was upset with an adverse decision in the injunction matter. The Chief was visibly upset with Zierten and memorialized his feelings by bringing them up in a subsequent grievance hearing and by refusing to talk with Zierten. He had a right to do both, but these actions make reasonable the inference that he was upset with Zierten and acted in response to that feeling.

The clear and satisfactory preponderance of the credible evidence establishes that the Department (and its Chief) in refusing to promote Zierten to the investigator position, when vacant, was motivated by anti-union considerations and/or the exercise of Zierten's right to engage in lawful concerted activity on behalf of the union and/or its membership. The reasons given by the Department were pretextual.

Even if the 1978 list had terminated, the practice of the Department regarding promotions (Bickel and Kaebisch) was discriminatory when applied to Zierten. The Chief maintained (Transcript page 109) that any promotion consideration regarding Zierten on 11 January 1980 would be based on merit (management rights clause) or the results of a new examination.

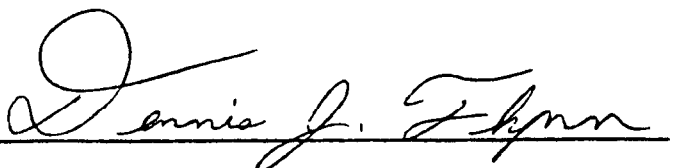
No credible evidence or reasoning has been presented for the disparate promotional treatment accorded Bickel and Zierten. The Department's posited reasoning is incredible under all the evidence presented.

CONCLUSION

The two to one decision of Respondent on 22 October 1982 is ordered set aside as arbitrary, discriminatory, reflective of the application of a double standard, and not supported by substantial evidence in the record. Petitioners have established by credible and substantial evidence that the City of Racine Police Department has committed prohibited practices (as alleged) contrary to Section 111.70 of the Municipal Employment Relations Act.

Dated at Racine, Wisconsin, this 23 day of March, 1983.

BY ORDER OF THE COURT:

A handwritten signature in cursive script, reading "Dennis J. Flynn", is written over a horizontal line.

DENNIS J. FLYNN, JUDGE
CIVIL DIVISION - RACINE COUNTY
CIRCUIT COURT BRANCH VIII