

No. 19127-C

## ARTICLE I

### RECOGNITION

The County hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Marinette County Sheriffs Department, but excluding the Sheriff, Chief Deputy, Captain and Lieutenant.

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## ARTICLE IV

### SENIORITY

Section 1. Definition of Seniority: Seniority is defined as the length of time that the employee has been hired by the County, computed from the most recent hiring date.

Section 2. Application of Seniority: Promotions, lay offs, and recall after lay off will be determined upon the basis of the County's appraisal of the individual employees skill and ability, but where these are relatively equal, the employee with the greatest seniority will be given preference over those with less seniority.

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## ARTICLE VII

### GRIEVANCE PROCEDURE

Should any difference (sic) arise between the Employer and the Unit as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, failure to negotiate in good faith, or deadlock in negotiations, they shall be settled under the provisions of this Article.

Section 1. The aggrieved employee, the Unit Committee and/or the Unit Representative shall present the grievance to the Sheriff. The Sheriff shall give his answer to the grievance in writing within one (1) week of receipt of said grievance.

Section 2. If a satisfactory settlement is not reached as outlined in Section (1) within one week, the Unit Committee and/or the Unit Representative shall present the grievance to the appropriate committee of the County Board. Said committee shall give their answer in writing to the Unit within four (4) weeks of receipt of said grievance.

Section 3. If a satisfactory settlement is not reached as outlined in Section (2), either party may request the other to submit the grievance to arbitration. The Arbitration Board shall consist of one (1) member appointed by the Wisconsin Employment Relations Commission from its Staff. The decision of the Arbitration (sic) shall be final and binding on both parties.

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## ARTICLE XXII

### EXISTING PRACTICES

All existing practices pertaining to working conditions not specifically mentioned herein shall continue in force as at present unless they are adjusted by agreement between the County and the Union.

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ARTICLE XXV

DURATION

THIS AGREEMENT shall be effective January 1, 1981, through December 31, 1981, and shall continue in full force and effect from year to year, unless either party gives written notice to the other requesting changes prior to July 1, of each year.

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APPENDIX "B"  
RULES FOR THE ADMINISTRATION  
of  
THE CLASSIFICATION AND COMPENSATION PLAN

. . . .

(d) Promotion: Promotion is the movement of an employee from one (1) class to another class having a greater job rate (maximum). When an employee is promoted to a position in a higher class, he shall serve a forty-five (45) day trial period. If during this period the employee demonstrates ability to carry out the newly assigned duties and responsibilities, upon completion his pay shall be increased to the job rate (maximum) for the higher class according to the number of months of employment. (Employees whose performance does not meet acceptable standards, shall be restored to a position commensurate with his former status for which he is qualified.)

(e) Transfer: Transfer is the movement of an employee from one class to another class having the same job rate (maximum). There shall be no immediate change in the pay rate of an employee who is transferred.

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6. That Joseph Larson is the Sheriff of Marinette County and that Sheriff Larson directs and supervises the operation of the Marinette County Sheriff's Department.

7. That on or about July 15, 1981 Sheriff Larson posted the position of Sergeant-Investigator; that the position of Sergeant-Investigator was a newly created position; and that the posting provided the following:

July 15, 1981

POSTING

THERE WILL BE A TRANSFER OF A SERGEANT TO THE POSITION OF SERGEANT INVESTIGATOR, AS OF AUGUST 1, 1981.

THIS WILL NOT BE A PROMOTION.

DUTIES ARE AS FOLLOWS:

1. THIS POSITION WILL REPORT DIRECTLY TO THE CHIEF DEPUTY, LT. OR SHERIFF FOR INVESTIGATIVE ASSIGNMENTS.
2. CHARGE OF CIVIL PROCESS.
3. INVESTIGATIONS
4. JUVENILE OFFICER

5. ANY OTHER DUTY ASSIGNED BY MANAGEMENT.
6. THIS POSITION INCLUDES REVOLVING SHIFT WORK, INCLUDING WEEK-ENDS AND HOLIDAYS.

ANY SERGEANT INTERESTED PLEASE SIGN BELOW:

that the posting was signed by Sergeants Harbick and Jerue and by Deputy Michael Perry.

8. That upon seeing the posting, Mr. Perry telephoned Jerry Prefountain, President of Local 1752B, complained of the Sergeants only limitation on the posting and asked if Prefountain would file a grievance; Mr. Prefountain replied that he had not seen the posting but that he would file a grievance.

9. That on, or about, July 16, 1981 Mr. Prefountain submitted a grievance challenging the Sergeants only eligibility limitations contained in the posting and demanding that the posting be open to all members of the bargaining unit; that Mr. Prefountain signed the grievance in his capacity as President of Local 1752B..

10. That following the filing of the grievance Sheriff Larson took down the July 15 posting and on or about, July 20, 1981 reposted the Sergeant-Investigator position; that the July 20 posting differed from the July 15 posting in two ways: First, the July 20 posting eliminated reference to "Lt. or Sheriff for Investigative Assignments" from the line of reporting authority in paragraph number 1; second, the word Sergeant in the last sentence of the posting (Any Sergeant interested please sign below) was underlined.

11. That the July 20 posting was signed by all five departmental Sergeants and by Michael Perry.

12. That on August 6, 1981 representatives of the Union, including Jerry Prefountain, Richard Lepkowski, Secretary for Local 1752B, and James Miller, Union Representative, and of the County assembled before an arbitrator for the purpose of submitting a different grievance dispute involving a Sergeant Harbick to the arbitrator, but that in lieu of a hearing on the Harbick matter the parties resolved that dispute and the grievance dispute raised by the July 16 grievance.

13. That the resolution of the two grievances was the following: the Harbick grievance was settled; the Sheriff was permitted to limit the applicant pool for the Sergeant-Investigator position to Sergeants on a non-precedential basis; that the transfer to the Sergeant-Investigator position would be subject to the civil service testing process and that the Sheriff would be required to select the number one candidate certified by the Civil Service Commission; and that the resulting Sergeant position vacancy, created by the transfer, would be filled from existing candidate lists previously established by the Civil Service Commission.

14. That at the time of the resolution of the grievances there existed two certified candidate lists for Sergeant. One list, applicable to the position of Jail Sergeant had Jerry Prefountain certified number 1. The second list, applicable to the position of Road Sergeant, had Michael Perry certified number 1, Richard Lepkowski certified number 2, and Michael Waugus certified number 3.

15. That a position of Road Sergeant became vacated when Sergeant James Jerue was selected for the Sergeant-Investigator position pursuant to the grievance resolutions; that Michael Waugus disqualified himself from consideration for the Road Sergeant position; and that Sheriff Larson selected Richard Lepkowski for the Road Sergeant position.

16. That Mr. Perry was not consulted prior to the resolution of the July 16 grievance, that he opposed the resolution of that grievance and asked Prefountain and Lepkowski to reconsider their decision with respect to the grievance resolution; that Prefountain and Lepkowski refused to reconsider their actions; that there is no formal internal Union procedure available to Perry to further appeal the resolution of the grievance.

17. That, in 1978 Michael Perry unsuccessfully ran for Sheriff of Marinette County against Sheriff Joseph Larson.

18. That the Local Union has historically settled grievances without submitting the resolution of those grievances to the membership for a vote, and that the elected union representatives involved in the handling of grievances possess the authority to negotiate resolutions to those grievances.

19. That the Union representatives involved did not act in an arbitrary, discriminatory or bad faith manner in resolving the July 16 grievance.

#### CONCLUSIONS OF LAW

1. That Michael Perry is a municipal employe within the meaning of Section 111.70(1)(b), Wis. Stats.

2. That Marinette County is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

3. That Marinette County Sheriff's Department Employees Union, Local 1752B, AFSCME, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

4. That the actions of the labor organization in resolving the July 16, 1981 grievance relative to job posting fell within the latitude available to that organization and did not violate Section 111.70(3)(b)(4), Wis. Stats., nor any other provision of the Municipal Employment Relations Act.

5. That this Examiner lacks jurisdiction to consider allegations that Respondent County violated Section 111.70(3)(a)(5), Wis. Stats.

#### ORDER

That the complaint be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 23rd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

The circumstances giving rise to this action occurred during July of 1981. At that time Marinette County authorized creation of a new position, Sergeant-Investigator, which position was included in the collective bargaining unit consisting of law enforcement personnel employed within the Sheriff's Department. Following creation of the position, Sheriff Joseph Larson posted the position as "a transfer of a sergeant to the position of sergeant." This posting indicated that the position would be effective as of August 1, 1981, set forth the duties of the position, and added "This will not be a promotion." The posting directed "any sergeant interested" to sign up. This posting, dated July 15, 1981, was signed by Sgt. James Jerue, Sgt. Robert Harbick, and by Michael Perry, the Complainant.

Deputy Perry, upon seeing the posting (and signing it) called Local Union President Jerome Prefountain, and asked if he had seen the posting. The latter replied that he had not. Perry indicated that the posting was improperly limited to Sergeants and asked Prefountain if he would file a grievance. Prefountain indicated that he would, and did so on July 16, 1981. The grievance alleged a violation of Article XXII 2/ and contended that the "new position must be thrown open to all Dept. employees." The relief sought was a reposting of the position without limitation relative to who might apply. The grievance was signed by Jerry Prefountain, in his capacity as President of Local 1752-B.

The July 15 posting was taken down on or about July 20 and replaced with a substantially identical posting. The second posting differed from the first in that it deleted the Lieutenant or Sheriff from the line of reporting authority, and underlined the word Sergeant in the sentence "Any Sergeant interested please sign below." This second posting was signed by all five department Sergeants and by Michael Perry.

During this time period, there was another grievance, involving Sergeant Robert Harbick, pending between the County and the Union. Sgt. Harbick had applied for, and had been given, the position of Jail Sergeant in January, 1981. Harbick wanted to return to his former position of Road Sergeant and the Sheriff returned him to that position. The Union had grieved the Sheriff's action in transferring Harbick back to his former position, demanding that the Road Sergeant position which came available in January (apparently as a result of Harbick's transfer to the jail) be filled pursuant to the collective bargaining agreement. 3/ The "Harbick grievance was scheduled to be heard by an arbitrator on August 6, 1981.

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ARTICLE XXII

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3/

ARTICLE IV

SENIORITY

Section 1. Definition of Seniority: Seniority is defined as the length of time that the employee has been hired by the County, computed from the most recent hiring date.

Section 2. Application of Seniority: Promotions, lay offs, and recall after lay off will be determined upon the basis of the County's appraisal of the individual employees skill and ability, but where these are relatively equal, the  
(Continued on page 7)

The parties assembled before an arbitrator on August 6, 1981. The Union was represented by James Miller, the AFSCME Union Representative from Green Bay who services the Local Union. Accompanying Mr. Miller were Jerry Prefountain and Richard Lepkowski, the Local Union Secretary. The County was represented by its Corporation Counsel, James Murphy. Prior to going through an evidentiary hearing the parties resolved not only the "Harbick" grievance, but also the July 16 grievance concerning the postings.

The agreement which resolved the grievances was that the Harbick grievance was settled; that the Sheriff was permitted to limit the applicant pool for the Sergeant-Investigator position to Sergeants, on a one time only non-precedential basis; that the resulting transfer would be subject to the civil service testing process and that the Sheriff would be required to select the number 1 certified candidate for Sergeant-Investigator; and that the resulting Sergeant position vacancy would be filled from existing candidate lists established by the Civil Service Commission.

Following resolution of the two grievances, Prefountain and Lepkowski brought the results back to the membership at a meeting scheduled for the evening of August 6, where the disposition of the grievances was greeted with mixed reviews. The matter was not put to a vote of the members, consistent with the long standing practice of the Union.

Mr. Perry could not attend the August 6 meeting. A few days later he discovered that the grievance concerning the July postings had been resolved and went to Prefountain and Lepkowski to ask them to reconsider. Each man refused to reconsider and so advised Perry.

At the time of the resolution of the grievances there were two certified candidate lists for Sergeant positions. One list, applicable to the jail portion of the law enforcement department had Jerry Prefountain certified as number 1. The second list, applicable to the road portion of the law enforcement operation, had Michael Perry certified number 1, had Richard Lepkowski, who has less seniority than Perry, ranked number 2, and had Michael Waugus, who has more seniority than Mr. Perry, certified number 3.

The number 1 ranked candidate for the Sergeant-Investigator was Sgt. James Jerue, who was awarded the position. Jerue's transfer created a vacancy in the Road Sergeant position he previously held. During the interview process Michael Waugus withdrew from consideration for the Sergeant position for personal reasons. Sheriff Larson selected Richard Lepkowski for the Road Sergeant job.

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3/ (Continued)

employee with the greatest seniority will be given preference over those with less seniority.

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APPENDIX "B"  
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(d) Promotion: Promotion is the movement of an employee from one (1) class to another class having a greater job rate (maximum). When an employee is promoted to a position in a higher class, he shall serve a forty-five (45) day trial period. If during this period the employee demonstrates ability to carry out the newly assigned duties and responsibilities, upon completion his pay shall be increased to the job rate (maximum) for the higher class according to the number of months of employment. (Employees whose performance does not meet acceptable standards, shall be restored to a position commensurate with his former status for which he is qualified.)

Mr. Perry ran for Sheriff against Mr. Larson in 1978. As of the date of the hearing, Mr. Perry had announced that he was entering the primary elections as a candidate for Sheriff once again, and once again running against the incumbent. It was Mr. Perry's testimony that prior to the July, 1981 posting dispute he had experienced very little difficulty with the Sheriff. Since the posting dispute Perry testified to a great deal of difficulty between the men and further indicated that two were "almost on a nonspeaking basis". 4/

#### POSITIONS OF THE PARTIES

It is the position of the Complainant that the County violated the collective bargaining agreement by restricting the posting to Sergeants. This restriction was unprecedented and is thereby alleged to violate Article XXII. The contractual violation is also alleged to violate Section 111.70(3)(a)(5), Wis. Stats. The Complainant further contends that the Union, by concurring in the posting limitations, also violated the collective bargaining agreement. This violation is also alleged to violate Sec. 111.70, Wis. Stats.

The Complainant alleges that the July 16 grievance was arbitrarily disposed of. Complainant alleges that the Union officers involved stood to gain from the disposition of the July grievance and infers that this factor influenced their actions. The refusal of Union officers Prefountain and Lepkowski to reconsider their decision is also alleged to be arbitrary and to violate the Complainants right to be fairly represented. Complainant alleges that the failure of the Union to contact him prior to disposing of his grievance or to contact him promptly upon its resolution is improper.

Complainant seeks attorney fees in addition to make whole relief.

It is the position of Respondent Union that the Union fairly and adequately represented Mr. Perry. Respondent Union, citing Ford Motor Co. v. Huffman 345 U.S. 330, 73 S. Ct. 631 (1953) and Armored Car Chauffeurs v. NLRB 54 LRRM 1356 (1964), contends that it possesses a wide range of discretion in processing grievances. Respondent Union cites Vaca v. Sipes 386 U.S. 171 (1964) for the proposition that a union is free to resolve even meritorious grievances short of grievance arbitration. Respondent Union contends that the rationale of Vaca has been adopted by the Wisconsin Courts, and cites Neider v. J.G. Van Holten & Son, Inc. 41 Wis. 2nd 602 (1969) as support for its contention that only in extreme cases of abuse should intrusion into union decisions be made by the Courts.

Respondent Union alleges that the Complainant must demonstrate arbitrary, discriminatory, or bad faith conduct to prevail. According to Respondent Union none of these has been demonstrated.

Respondent Union alleges that Perry has failed to use the contractual grievance procedure in pursuit of relief. This failure, argues the Union, requires that the action be dismissed for failure to exhaust internal dispute resolution mechanisms available. The Union cites City of Menasha (13283-A, 2/77) in support of this contention.

The Union alleges that no violation of the collective bargaining agreement occurred because there was no promotion involved. The Union also argues that since this was a newly created position there could be no applicable past practice.

Finally, the Union contends that the position of Sergeant-Investigator was a new position created during the term of the 1981 labor agreement. The Union waived any rights it possessed to bargain over the position in 1981 and the pay level and filling of the position are matters outside the scope of the labor agreement and matters over which the Union cannot be held accountable in any fashion.

Respondent County points out that Perry had never filed a grievance over the grievance dispositions, though that is a forum open to him. The County argues that its total involvement in this matter was to resolve two grievances. The

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4/ Tr. 114.



County contends that it acted in good faith and in an evenhanded fashion toward all employees.

## DISCUSSION

The initial matter for consideration is whether this action should be dismissed for failure to exhaust internal dispute resolution mechanisms, specifically, the grievance procedure. As noted above, both Respondents urge such a dismissal.

In cases such as this, both the Commission and the Courts have consistently held that a prerequisite to asserting jurisdiction over alleged breach of contract complaints, where the contract allegedly violated contains a grievance and arbitration procedure, is Complainant's exhaustion of contractual remedies. 5/ Both the Courts and the Commission have excused the failure to file a grievance or to exhaust the grievance procedure in instances where the Union has refused to proceed with the advanced stages of the grievance/arbitration procedure or where the filing of a grievance would be futile. 6/ It is the burden of the Complainant to demonstrate that resort to the grievance/arbitration procedure is futile.

The County action triggering the events underlying this dispute was its limiting the opportunity to compete for the Sergeant-Investigator position to Sergeants. Perry expressed his concern over the matter by signing the postings and by contacting his union relative to filing a grievance. The Union, aware of Perry's interest, grieved the Sheriff's action. The grievance was resolved to the mutual satisfaction of both the County and the Union. From each of their points of view, the dispute underlying the grievance was resolved. When Perry asked the Union officers to reconsider their actions he was rebuffed.

Under these facts I do not believe that Perry was under an obligation to file a grievance. The purpose of requiring a Complainant like Mr. Perry to exhaust the contractual dispute resolution mechanism is to afford the parties involved an opportunity to deal with and resolve the matters in controversy. The essence of this proceeding is the Complainant's assertion that the manner utilized by the parties to resolve the underlying dispute as well as the results achieved were objectionable.

Perry asked his union to reconsider its position, which it refused to do. The record establishes that Local 1752B has no by-laws 7/ and evidences no internal Union appeal mechanism available to Perry to contest the decision. The resolution entered into by the Union was binding upon him.

The contractual grievance procedure is available to handle disputes "between the Employer and the Unit". Following resolution of the grievances, no such dispute existed. This complaint is essentially directed against the Union, and the way the Union handled the posting grievance. The grievance procedure is structured to bring about relief from representatives of the County, not the Union. Having struck a deal with the Union the County was in no position to meaningfully renegotiate its agreement with a disgruntled member of the unit, even in the context of resolving a subsequent grievance. Submission of a second grievance would have been no more than an annoying exercise in futility.

In light of the foregoing, I believe that Perry exhausted the meaningful internal relief available to him and that further efforts in this regard would have been futile.

The second matter for consideration is whether the Union breached its duty of fair representation owed the grievant.

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5/ Mahnke v. WERC 66 Wis. 2d 524, 1974; Town of Menasha (17369-A), 3/81; City of Janesville (15209-C) 3/78; City of Madison (15079-D) 1/78.

6/ City of Madison (15079-D).

7/ Tr. 84.

When a union takes on the responsibility of representing employees for purposes of collective bargaining with their employer it also assumes an obligation to fairly represent all employees in the bargaining unit. This latter obligation, known as the duty of fair representation, is a judicially imposed responsibility arising from the fact that the union is granted exclusive representation rights. Individual employees forfeit individual negotiating rights and, of necessity, must look to the union to represent their interests.

In Mahnke v. WERC, 66 Wis 2d 524, the Wisconsin Supreme Court set forth guidelines for use in analyzing the conduct of a union when the Union is engaged in determining whether or not to arbitrate a grievance. In Mahnke the Court required the union to rationally, and in good faith, analyze grievances. Mahnke requires that, when challenged by an individual, a Union's exercise of discretion must be put on the record in sufficient detail to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors and further that the weighing process was not done in a perfunctory or arbitrary fashion. Correspondingly, so long as a union exercises its discretion in good faith and with honesty of purpose, the collective bargaining representative is granted broad discretion in the performance of its duties for the bargaining unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. 8/

The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member. 9/ In applying the Mahnke test the WERC has held that absent a showing of arbitrary, discriminatory, or bad faith conduct, a union is not obligated to carry grievances through all steps of the grievance procedure 10/, that the failure of a union to notify a grievant about the disposition of his grievance is an inadequate basis for finding a breach of the duty 11/, and that the Commission will not sit in judgment over the wisdom of union policies and decision making relative to the disposition of grievances. 12/

It is the burden of the Complainant to come forward and demonstrate, by a clear and satisfactory preponderance of the evidence 13/ each element of its contention. Absent such proof the Commission has refused to draw inferences of perfunctory or bad faith grievance handling. 14/

Application of the foregoing standards of proof dooms the complaint to dismissal. There is no evidence that the Union acted in an arbitrary, discriminatory or bad faith manner in disposing of the July 16 grievance.

It is for the Union, and not this Examiner, to determine the scope of authority its representatives are clothed with. Prefountain and Lepkowski were given the authority to settle grievances short of arbitration. The exercise of that authority inevitably has consequences for the bargaining unit and for individual members of that unit. It is equally true that there are consequences arising out of the lack of authority to settle grievances short of arbitration, not the least of which is lost opportunity. Under the authority conferred upon them Lepkowski, Prefountain, and Miller were free to make decisions relative to the disposition of grievances.

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8/ Bloomer Jt. School Dist. No. 1 (16228-A) 8/80.

9/ Mahnke, supra, 532.

10/ City of Appleton (17541) 1/80.

11/ University of Wisconsin - Milwaukee Housing Department 11457-F (1977).

12/ U.W. - Milwaukee Ibid.

13/ Section 111.07(3), Wis. Stats, City of Appleton, supra.

14/ City of Janesville (15209-C) 3/78.

Notwithstanding Mr. Perry's telephone call to Mr. Prefountain I believe that the grievance is most properly regarded as a union grievance, in contrast with one filed on behalf of Mr. Perry alone. The record establishes that individuals, including Mr. Perry, have filed grievances on their own, signing them as such. This grievance, in contrast, was not filed by Mr. Perry, but rather by Mr. Prefountain, in his capacity as President of the Union. The grievance makes no reference to Mr. Perry nor to any other individual within the Department. The record establishes that a number of bargaining unit members, who are not Sergeants, desired to apply for the Sergeant-Investigator positions. 15/ Under these circumstances I regard the July 16 grievance as an institutional attack upon the actions of the Sheriff. However, there can be no doubt that the Union was on notice of Perry's interest in the matter.

As noted above, the failure of the Union to contact Mr. Perry over the resolution of the grievance is, in and of itself, of no legal consequence. As a practical matter the Union approached the grievance settlement discussions representing a number of interested members. Harbick and the other four Sergeants were all interested in the disposition of the grievances. Perry and at least three other deputies 16/ were interested in the Sergeant-Investigator position. Given the number of people involved, the difficulty in consulting with and gaining approval from all interested parties is apparent. The Union was represented by Mr. Miller, its professional representative and by Messrs. Prefountain and Lepkowski, elected representatives empowered to resolve the matter. To hold, as a matter of law, that Miller, Prefountain and Lepkowski needed the consent of all affected to resolve the grievance short of arbitration is too emasculate them of the authority entrusted to them by the general membership.

It was the testimony of James Miller, who negotiated and recommended the settlement, that he regarded the deal as a good one. Miller was satisfied with the arrangement for two reasons: first, had Harbick transferred back to the road, a Sergeant position would have been lost 17/, second, that the agreement required the County to select the number 1 candidate certified for the position. This restriction on the Sheriff's discretion is alleged to be unprecedented and to constitute a significant concession.

As noted above, it is not the role of the Commission to sit in judgment of the Union's tactics and decision making. Here, the Union dropped two grievances. In exchange, the Sheriff's discretion to select the Sergeant-Investigator was eliminated and a higher paying Sergeant position that might otherwise have been lost was preserved. Each of these represent goals traditionally sought by trade unions and cannot, on their face, be viewed suspiciously.

The Complainant claims that the grievance resolutions worked to the advantage of Lepkowski and Prefountain by enhancing their opportunity for promotion, and infers an improper motivation on their part. It is certainly true that the grievance resolutions enhanced the chances that Lepkowski and Prefountain would have an opportunity to try for a Sergeant position. However, there is no basis in the record for drawing the inference sought. Lepkowski and Prefountain were not the only ones on existing candidate lists. Mr. Perry was the number 1 certified candidate for a road Sergeancy.

What Mr. Perry ultimately sought was an opportunity to be one of a large number (the record establishes that at least nine members of the unit would have tried for the Sergeant-Investigator position) of bargaining unit members to sign the posting for Sergeant-Investigator. If successful in being certified among the top 3 candidates by the Civil Service Commission, Perry would have been among the three people from whom the Sheriff could select the Sergeant-Investigator.

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15/ Tr. 92, 94, 98.

16/ At the hearing Deputies Carl, Zimmerman and Waugus testified that they would have signed the posting for Sergeant-Investigator had it been open to them.

17/ Miller testified that the negotiated settlement of the grievances preserved a Sergeant position that would otherwise have been lost (T. 140, 143). His testimony in this regard is uncontradicted and credited.

What the Union delivered was a Sergeant position for which Perry was the number 1 certified candidate. He did not get the position because the Sheriff exercised discretion under Article IV to pass over Perry. This discretion is identical to that which the Sheriff would have possessed under the scheme proposed by Mr. Perry. It is the discretion exercised by the Sheriff, and not the actions of the Union, which ultimately undid Mr. Perry.

The propriety of the Sheriff's exercise of discretion was not raised in this proceeding. Even assuming that there was an abuse of discretion on the part of the Sheriff in not selecting Perry there is no basis in the record for anticipating that such an abuse might occur. Though the two men are political rivals it was Mr. Perry's testimony that there was no difficulty between them prior to the posting incident. If, after years of working for the Sheriff, Mr. Perry sensed no work impacting difficulties with the Sheriff it seems unrealistic to impute such a concern to the Union. It cannot be said that the Union believed, or reasonably should have believed, that its actions would serve to harm the interests of Mr. Perry.

I conclude that the Union acted well within the sphere of discretion available to it by settling the two grievances. While I recognize the difficulties in marshalling forth proof in this type of case inferences cannot be drawn from speculation alone. It is the burden of the Complainant to demonstrate by a clear and satisfactory preponderance of the evidence the existence of arbitrary, discriminatory or bad faith conduct on the part of the Union. There is nothing in the record to suggest that the Union was motivated by factors other than the pursuit of the interests of those it represents.

Having concluded that the Union did not breach its duty of fair representation toward the Complainant, I am without authority to consider Complainant's breach of contract claims, and I am accordingly dismissing them.

Dated at Madison, Wisconsin this 23rd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner