

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS'  
ASSOCIATION,

Complainant,

vs.

MILWAUKEE COUNTY  
(SHERIFF'S DEPARTMENT),

Respondent.

Case 240  
No. 38546 MP-1948  
Decision No. 24498-A

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, by Mr. Franklyn M. Gimbel and Ms. Marna M. Tess-Mattner, One Plaza East, Suite 930, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Mr. Robert G. Ott, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION  
OF LAW AND ORDER

Milwaukee Deputy Sheriffs' Association filed a complaint on March 20, 1987 with the Wisconsin Employment Relations Commission alleging that Milwaukee County (Sheriff's Department) had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., when it failed to appoint Sergeant William Trapp to fill a vacant lieutenant's position because of his past union activities. The complaint was later amended to include three other acting lieutenant appointments. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Milwaukee, Wisconsin, on June 17 and July 14, 1987 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and the Association filed a reply brief whereupon the record was closed on October 27, 1987. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Complainant or Association, is a labor organization with its office located at 821 West State Street, Milwaukee, Wisconsin 53233; and that at all times material hereto, the Complainant has been the exclusive collective bargaining representative for certain of Respondent's employees in a unit consisting of all Deputy Sheriff's, II's and Sergeants.

2. That Milwaukee County, hereinafter referred to as the Respondent or County, is a municipal employer which among its many functions operates a sheriff's department with its principal offices located at 901 North 9th Street, Milwaukee, Wisconsin 53233; that prior to August, 1983, William Klamm was Sheriff of Milwaukee County and that since August, 1983, Richard Artison has been Sheriff; and that Daniel Jarecki, who is presently the Inspector, was the Deputy Inspector during the tenure of Sheriff Klamm.

3. That when a vacancy occurs in the Sheriffs' Department, the Sheriff advises the Milwaukee County Department of Human Resources that there is a need to fill a particular position; that the Department of Human Resources then administers an examination to the applicants and an outside panel interviews them; that the Human Resources Department then compiles two lists which it sends to the Sheriff; that the first, known as the eligibility list, ranks all the applicants

according to their overall test scores; that the second list, known as the certification list, takes the ten highest ranked candidates from the first list and arranges their names alphabetically and without grades; that test scores are not included on the certification list so that minute differences in scoring do not affect the selection process; that the Department of Human Resources considers any of the ten individuals on the certification list to be qualified for the position in question; that in November, 1986, the Department of Human Resources directed department heads, including the Sheriff, to advise candidates on the certification list of the selection procedure being used to screen candidates and to make the appointment; that the purpose of this directive was so candidates would be made aware of the criteria used in making the appointment; that prior to November, 1986, such notification was not required; that the Department of Human Resources does not review compliance with this directive and enforcement lies with the County Civil Service Commission; that the Department of Human Resources has prepared sample letters to notify candidates of the selection procedure, but there is no requirement that these sample letters be used; that the Sheriff's Department does not have a written method by which candidates are selected for promotion within the Department; that the Sheriff indicated that the candidate ranked first on the eligibility list would not always get the promotion because he believes testing is not always indicative of performance; that the Sheriff's Department is not required by rule or regulation to take any specific standards into account when making a selection off the certification list; and that the Sheriff can select whomever he wants from the certification list so long as he complies with Sec. 63.05(2), Stats., which provides that the selection to fill a vacant position shall be based solely on merit and fitness.

4. That in 1985, the Department of Human Resources gave a promotional examination for the position of lieutenant because the previous eligibility list for that position had expired; that this examination was open only to sergeants in the Department; that after the Department of Human Resources had administered an examination to the 23 applicants, it compiled an eligibility list which ranked them by cumulative score; that the scores of the applicants ranged from a high of 91 to a low of 76; that the rank and grade of the top ten applicants was as follows:

NAME	ACTUAL GRADE
Trapp, Sr., William W.	91.00
Filipowicz, John K.	89.00
Lagowski, John T.	88.00
Zens, Jeffrey S.	88.00
Misko, Peter J.	88.00
Konicke, James A.	87.00
Iushewitz, David M.	87.00
Delaney, Joseph D.	87.00
Devine, Michael J.	87.00
Lango, Peter J.	86.00;

that Michael Benich of the Department of Human Resources testified that based on

1985 lieutenant examination process who achieved the ten highest grades with their names arranged alphabetically and without test scores:

Name of Eligible

Delaney, Joseph D.  
Devine, Michael J.  
Filipowicz, John H.  
Iushewitz, David M.  
\*Konicke, James A.  
Lagowski, John T.  
Lango, Peter J.  
Misko, Peter J.  
Trapp, William W., Sr.  
Zens, Jeffrey S.;

that the asterick by Konicke's name was to indicate that the Department of Human Resources had notified him by letter to report for an interview for the position since he was the most senior individual on the list; that prior to making the appointment from this list of ten names, the Sheriff did not advise the candidates being considered, in writing, of the procedure to be used to screen candidates and make the appointment; that Jarecki indicated such was the case because the new directive from the Department of Human Resources mandating notice to candidates did not reach him until after the lieutenant's vacancy had been filled; that the Sheriff wanted someone with administrative ability to fill this position; and that the Sheriff appointed Filipowicz to the permanent lieutenant's position in February, 1987.

6. That after this selection had been made, the Sheriff sent letters to the unsuccessful candidates on the certification list which advised them he had "reviewed the applications of all of the candidates and interviewed those individuals who appeared to be the best qualified to fill this particular vacancy"; that this letter was based on a sample letter prepared by the Department of Human Resources; and that this letter was not accurate because the Sheriff did not review any of the candidates' applications and did not interview any of the applicants.

7. That in selecting Filipowicz for the permanent lieutenant's position, the Sheriff relied on the judgment of his second-in-command, Inspector Jarecki, who has 30 years experience in the Department; that the Sheriff and Jarecki had an informal discussion among themselves as to whom Jarecki thought was the best qualified candidate; that Jarecki felt the choice among the candidates was clear cut; that Jarecki recommended Filipowicz for the position and the Sheriff relied on Jarecki's recommendation; that in making his recommendation to the Sheriff, Jarecki did not rely on a written or established selection procedure, but rather relied on past experiences with the candidates and personal observations of them in making his subjective determination that Filipowicz was the most-qualified candidate; that Jarecki recommended Filipowicz to the Sheriff for the following reasons: 1) his development of a new policy and procedure manual for the Department, 2) his work with the news media, 3) his organizing speeches for the Sheriff and representing the Sheriff at various community functions, 4) his writing prompt, concise and efficient reports, and 5) his doing, in Jarecki's opinion, a good job at acting lieutenant; that Jarecki did not review any of the candidates' applications or personnel records before making his recommendation to the Sheriff; that of the ten individuals on the certification list, Jarecki interviewed only Konicke, Lagowski and Zens; and that Jarecki indicated that a negative factor against Trapp was that two old evaluations of Trapp by Captains Mooney and Estrada both indicated that one of Trapp's weak points was that he had a temper and should control it.

8. That the position to which Filipowicz was appointed was Night Commander; that the lieutenant holding that position is in charge of the entire department

during the night shift; and that in this capacity, he is responsible for the night supervision of the various functions of the Sheriff's Department that operate around the clock such as the jail, expressways, airport and institutions.

9. That Filipowicz has been with the Department since 1973 and was a sergeant from 1984 until he was promoted to lieutenant in February, 1987; that in 1983, when he was still a Deputy I, the Sheriff assigned him the responsibility of preparing a comprehensive policy and procedure manual for the Sheriff's Department; that his work on the manual is still ongoing; that both the Sheriff and Jarecki were pleased with Filipowicz's work in this area; that for the entire time Filipowicz was a Sergeant, he acted as a public information officer handling administrative tasks for the Sheriff; that Jarecki felt Filipowicz performed this job admirably; that this work was outside the usual chain of command within the Department; that prior to his promotion to lieutenant, Filipowicz had no supervisory experience within the Department; that he has a bachelor's degree in criminal justice, a master's degree in urban affairs and has taken additional education credits; and that he was never an officer of the Association.

10. That Trapp has been with the Department since 1970 and a sergeant since 1980; that he is presently a patrol sergeant with EPIS (Expressway Patrol and Institutions Security); that he has worked in virtually every branch of the Department: process and courts, jail, airport, institutions, expressway patrol and detective; that Trapp has a bachelor's degree in criminal justice and has taken additional education courses; and that in a class completed shortly before the lieutenant's vacancy was filled, Trapp and another deputy received the highest grade in the class, a "B", while Filipowicz received an "Incomplete."

11. That just prior to filling the permanent lieutenant's position, several acting lieutenants were also named; that the following sergeants were made acting lieutenants: Filipowicz, Lagowski, Misko and Konicke; that these four sergeants were rated second, third, fifth and sixth on the eligibility list; that Jarecki talked with Sergeant Zens (fourth on the eligibility list) about an acting lieutenant's position, but Zens took himself out of consideration for the appointment because he did not want to change shifts; that Jarecki never asked Trapp to consider an acting lieutenant position; that Filipowicz and Misko replaced Lieutenant Leutonski while Leutonski was on extended sick leave; that Lagowski replaced Lt. Krause while Krause attended Northwestern University through March 15, 1987; that Konicke replaced Lieutenant Cox while Cox attended the FBI Academy through March 22, 1987; that Jarecki testified that Lagowski, who worked in the jail, was appointed to take Lieutenant Krause's place in the jail so as not to disrupt the entire department; that Jarecki testified that Konicke was likewise appointed to take Lieutenant Cox's place so as not to disrupt the entire department; that Jarecki testified that Misko was appointed to an acting lieutenant's position because he had done a commendable job in past assignments; and that as of the time of the hearing, Misko and Konicke had returned to their Sergeant positions.

12. That Trapp was the only candidate on the certification list who was ever an officer of the Association; that from 1979 to 1985, Trapp was an officer of the Association; that in this capacity, he served first as a Trustee and later as Treasurer, and that he also served on the Association's bargaining committee; that he has not served as a union officer since 1985; that when he was a union officer, he was one of the more vocal and aggressive spokesmen for the Association; that in his capacity of union officer, he testified on behalf of the Association at various hearings; that Jarecki never had any labor management discord with Trapp; that Trapp once came to talk with Jarecki about a labor-management matter, and, at that time Trapp told Jarecki he was one of the command staff that Trapp could deal with; that Trapp did not have any one-on-one meetings with the Sheriff to discuss labor-management matters; that the only one-on-one encounter between the Sheriff and Trapp occurred when the Sheriff complimented Trapp for locking the Sheriff's car and retrieving a radio the Sheriff had left there; that Trapp's contact with the Sheriff to discuss labor-management issues was limited to occasions where the union officers or executive board collectively met with the Sheriff at meetings or luncheons; that the first of these meetings occurred shortly after the Sheriff took office in August, 1983; that at the start of this meeting, Trapp asked the Sheriff to have then-Inspector Bollhoffer leave the room because, as a member of the preceding administration, he lacked credibility with the Association; that although the Sheriff considered this an unusual request, Bollhoffer was excluded from the meeting; that thereafter, Trapp and Deputy Robert Hillman, Vice-President of the Association met a couple of times with the Sheriff to discuss unidentified labor-management matters; and that while the Sheriff and Jarecki were aware of

Trapp's protected concerted activity on behalf of the Association, there is nothing in the record to indicate they were hostile or bore any animus toward Trapp for engaging in such activity, or that the decision to not promote Trapp to either the acting or permanent lieutenant positions was based on such animus.

13. That Robert Hillman, a Deputy I, is Vice President of the Association and has been for four years; that in his capacity of union officer, he has dealt with both the Sheriff and Jarecki on labor-management matters; that he has been openly critical of the Sheriff and his administration, and no adverse personnel actions have been taken against him as a result; that he believes he has been as active in the Association as Trapp was, but he considers his personal demeanor to be less abrasive than Trapp's; that from February 1 to mid-March, 1987, Hillman was appointed as an acting sergeant; that Hillman filled in for Sergeant Misko while Misko was made an acting lieutenant; and that when Misko's temporary appointment to lieutenant ended and he became a sergeant again, Hillman, in turn, became a Deputy I again.

14. That the record adduced herein does not establish, by a clear and satisfactory preponderance of the evidence, that the Sheriff's failure to promote Sergeant Trapp to the vacant permanent lieutenant's position or any of the acting lieutenant positions was motivated by anti-union considerations, and/or by the exercise of Trapp's right to engage in lawful concerted activity on behalf of the Association and/or its membership.

Based upon the above and foregoing Finding of Fact, the Examiner makes the following

#### CONCLUSION OF LAW

That the County's failure to promote Sergeant William Trapp to either the acting or permanent lieutenant positions was not due to animus toward Trapp because of his lawful concerted activity on behalf of the Association, and therefore the County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

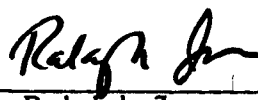
#### ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 19th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Raleigh Jones, 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

(Footnote 1/ continued on page 6.)

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, CONCLUSION  
OF LAW AND ORDER

BACKGROUND

The complaint alleged that the Sheriff committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3 when it failed to appoint Sergeant Trapp to fill a vacant permanent lieutenant's position because of his past union activities. The complaint was amended on the first day of hearing to include three other temporary lieutenant appointments. The County denied any union animus on the part of the Sheriff as to both the permanent appointment as well as to the temporary lieutenant assignments made between January and March, 1987.

PARTIES' POSITIONS

It is the Association's position that the Sheriff bypassed Trapp for four lieutenant promotions, despite his merit and fitness for the position, because of Trapp's union activities. According to the Association, there is no logical explanation for the Sheriff's failure to promote Trapp to a lieutenant's position except for his union activities. It therefore submits that the Sheriff's promotion decisions here involved anti-union animus which it believes is virtually self-evident and, in any event, is established through circumstantial evidence. In this regard, it notes that none of the four people who have been made acting or permanent lieutenant since January, 1987 was a union officer during the Artison administration, while Trapp was. The Association asserts this was not mere coincidence. Moreover, it characterizes Trapp as a vocal, abrasive, demanding and persistent union officer who often acted as a spokesman for the union. The Association then makes the following arguments in support of its position. It first contends that the Sheriff, via the Inspector, has no established, consistent and objective method for selecting people to be promoted. It submits that, to the contrary, the Inspector's recommendations here were based upon the subjective criteria of his sense of things and his past experiences with the candidates. The Association believes the Sheriff and the Inspector knew Filipowicz well and liked his work, so they rewarded him with a promotion. The Association submits that on an objective basis, Trapp was far better qualified than Filipowicz for the Night Commander appointment because his range of experience as a sergeant was broader than Filipowicz's, he had worked in virtually every bureau, had earned a bachelor's degree, had received the highest score on a recent course and had received the highest score on the promotional exam. Second, the Association contends the Sheriff failed to comply with pertinent civil service and statutory requirements because the Sheriff never notified the candidates what procedure would be used in making the selection. Third, the Association argues that with the exception of Trapp, the Sheriff promoted people here in the order of their scores on the promotional examination. In this regard, it notes that the people who were rated second through sixth on the promotional list were either appointed to an acting or permanent lieutenant position or declined the promotion (Zens); only Trapp, number one on the list was passed over for promotion. Finally, the Association contends that the merit and fitness standard for selecting lieutenants, which the County claimed it used, was simply a pretext for not promoting Trapp because of his union activities. It cites the following factors to support this contention: Filipowicz had no supervisory experience; Jarecki did not consider the merit and fitness of candidates other than Filipowicz because he never looked at a single document or personnel record; and Trapp was rated number one on the eligibility list. As a remedy for the County's alleged prohibited practice, the Association seeks an order making Trapp whole by vacating the Filipowicz appointment and appointing Trapp instead to the Night Shift Commander position, plus an order to the Sheriff's Department to cease and desist from discriminating against employees because of their union activities.

The County initially submits that its motion to dismiss, which was taken under advisement at the hearing, should now be granted. According to the County, it was clear at the conclusion of the Association's case that they had failed in their attempt to prove that the Sheriff had any anti-union bias in general or any specifically directed at Trapp. It also contends that no evidence was put forward that shows that Jarecki's recommendation of Filipowicz was in any way tainted by Trapp's union activities. In the event that the Examiner feels the Association did put a prima facie case into evidence, it argues the complaint should still be dismissed for the following reasons. First, although the Association made much of the fact that Trapp was ranked number one on the eligibility list, there is no

requirement that the Sheriff take the highest ranked applicant from that list. If such were the case, it argues, the certification list would not consist of ten names but only one - the person with the highest score. Second, the County asserts it complied with the statutory requirement of Sec. 63.05(2), Stats., that the selection be based solely on merit and fitness because all ten candidates had the necessary merit and fitness to fill the lieutenant's position or they would not have been certified in the first place. It further contends that the Sheriff did not look at the certification list from a perspective of whom he did not want to take, but rather from a perspective of which candidate he felt was best of the ten. In the opinion of both the Sheriff and Jarecki, Filipowicz stood out above the rest of the candidates and consequently he was appointed to the position. Third, with regard to the temporary lieutenant appointments which were made when the permanent lieutenants were not available for duty, the County asserts that Jarecki gave good managerial reasons why certain sergeants were selected for the temporary assignments. Last, the County acknowledges that it cannot take an applicant's union activity into account when an appointment is made. It argues that here, though, the Association did not prove their allegation that Trapp was not selected because of his past union activities. In support thereof, it cites the testimony of both the Sheriff and Jarecki to the effect that they had no union bias when the selection was made, and also points to the fact that a temporary sergeant appointment was given to Deputy Hillman, whom it characterizes as equally an avid union leader as Trapp.

## DISCUSSION

The gist of the Association's argument is that the County's filling of the lieutenant positions was flawed because: 1) the Sheriff allegedly failed to comply with civil service and statutory requirements in filling the positions, 2) the Sheriff allegedly had no selection process for determining "merit and fitness" under Sec. 63.05(2) Stats., and 3) Trapp was allegedly not promoted because of his union activities. Of these three allegations, only the latter is within the Commission's jurisdiction to remedy because only it involves matters which arise under the provisions of MERA; the former involve matters which arise not under the provisions of MERA, but instead under the provisions of the (Milwaukee County) Civil Service statutes (Sec. 63.01-63.17, Stats.), which is not within the Commission's jurisdiction to enforce. 2/ Therefore, assuming for the sake of argument that the Sheriff did fail to comply with a directive from the County Department of Human Resources to advise all persons on the certification list of the method used to select the person chosen for promotion, as argued by the Association, the Association has not established how this can be remedied by the WERC. To the contrary, the record clearly establishes that the Milwaukee County Civil Service Commission is charged with enforcing rules promulgated by the County Department of Human Resources. This rationale also applies to the Association's allegation that the Sheriff allegedly had no selection process for determining "merit and fitness" under Sec. 63.05(2), Stats. Assuming, once again for the sake of argument, that the Sheriff did not have an established, objective method for determining "merit and fitness" under Sec. 63.05(2), Stats., but instead made his selections here entirely on a subjective basis, the Association has not established how the WERC is empowered to review compliance with Sec. 63.05(2) Stats. Consequently, neither of these allegations will be addressed herein.

In light of the above, the Examiner therefore turns to the Association's allegation that Trapp was not promoted because of his union activities.

A municipal employer violates Sec. 111.70(3)(a)3 of MERA where it takes actions designed to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment." The scope of said provision, with its reference to other terms or conditions of employment, clearly includes promotional opportunities. 3/ Therefore, not promoting an employee because of his/her union activity falls within this proscription. Under Wisconsin law, it is well established that anti-union animus need not be the employer's primary motive in order for a discriminatory

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2/ Milwaukee County (Medical Complex), Dec. No. 19912-B (Crowley, 4/84), aff'd. by operation of law, Dec. No. 19912-C (WERC, 5/84).

3/ State of Wisconsin, Department of Administration (Professional-Social Services), Dec. No. 15699-B (WERC, 11/81).



act to contravene the statute. If animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 4/ Thus, in the instant case, if it is established that the decision to not promote Trapp was in any part motivated by his union activities, the Examiner is obliged to grant relief in the form of remedial and affirmative orders.

In order to prevail on a complaint of discrimination under Sec. 111.70(3)(a)3, the Association must prove, by a clear and satisfactory preponderance of the evidence 5/ that:

- 1) Trapp was engaged in protected activities; and
- 2) The County had knowledge of those activities; and
- 3) The County was hostile toward those activities; and
- 4) The decision to not promote Trapp was, at least in part, motivated by the County's hostility toward participation in protected activities. 6/

The absence of any one of these elements precludes a finding of a violation.

Elements one and two above are not in dispute here. It is undisputed that Trapp engaged in lawful, concerted activities as a union officer from 1979 to 1985 and that the County (via the Sheriff and Jarecki) had knowledge of Trapp's protected activities. Elements three and four are in issue though, with the County denying that Trapp's union activities played any part in the filling of the positions in issue.

Evidence of illegal motive may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. 7/ Here, there is nothing in the record to indicate or show any direct hostility by either the Sheriff or Jarecki toward Trapp because of his union activities, so, by necessity, the Examiner must look at the circumstances surrounding the promotions involved. This requires a determination of whether the reasons given by the County 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. 8/

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4/ ". . . an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid grounds exist for firing him." Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967), at page 562.

5/ Sec. 111.07(3), WEPA (made applicable to proceedings under MERA by Sec. 111.70(4)(a), MERA).

6/ See, Town of Salem, Dec. No. 18812-A (Crowley, 2/82), at page 9, and cases cited therein at footnote 14.

7/ Thus, in Town of Mercer, Dec. No. 14783-A (Greco, 3/77), the Examiner stated that:

" . . . it is well established tht the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on 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."

8/ Cooperative Educational Services Agency #4 et. al., Dec. No. 13100-E, (Yaffe, 12/77).

At first glance, it does appear suspicious that Trapp was not promoted because he was the only union activist on the certification list and those promoted happened to be rated second, third, fifth and sixth on the eligibility list while he was rated first. Be that as it may, the Examiner concludes that these factors do not form a sufficient basis upon which to infer anti-union animus against Trapp for the following reasons.

First, although the Association makes much of Trapp's ranking on the eligibility list and the rankings of those people chosen for the various appointments, ranking is not dispositive here because the test score results of the ten highest scoring candidates on the lieutenant's examination were so close numerically that the Department of Human Resources considered there to be no practical difference between them. Consequently, when the certification list was compiled of the top ten scoring candidates off the eligibility list, test rankings from the eligibility list ceased to be a factor of consideration because everyone on the certification list was considered qualified for a lieutenant's position by the Department of Human Resources. Thus, since all four of the people ultimately chosen for the appointments were, in fact, on the certification list, there is nothing suspicious about the fact that Trapp was one of six individuals on the certification list not selected for an appointment.

Second, while everyone on the certification list (including Trapp) was qualified to be appointed to lieutenant positions, Jarecki articulated reasons why Filipowicz was chosen for the permanent lieutenant's position and why Lagowski, Misko and Konicke were made acting lieutenants. While these reasons may be, as argued by the Association, subjective in nature, they certainly were not arbitrary and capricious. Moreover, there is no requirement that objective or specific standards be utilized in making an appointment off the certification list. Most importantly, Jarecki cited a factor which weighed against promoting Trapp to any of the lieutenant positions, namely that two of Trapp's supervisors had indicated that he (Trapp) had a temper and needed to control it. Clearly, Jarecki was not precluded from taking this factor into account in making the selections, especially since this was the only negative comment that Jarecki offered about any of the candidates on the certification list.

Finally, even though Trapp was the sole union activist of the ten individuals on the certification list, this factor, in and of itself, is insufficient to infer a finding of anti-union animus. In this regard, it is noted that at the same time that Trapp was not promoted, another union activist (Deputy Hillman) was promoted to acting-sergeant. In light of Hillman's promotion, it cannot be said that either the Sheriff or Jarecki showed anti-union animus against all union activists.

In sum, it is concluded that the Association did not establish, by a clear and satisfactory preponderance of the evidence, that the Sheriff's failure to promote Trapp to either the acting or permanent lieutenant positions was motivated by Trapp's past protected, concerted activities. Consequently, the County did not violate Sec. 111.70(3)(a)3, Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 19th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Raleigh Jones, Examiner