

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION,	:	
	:	
Complainant,	:	Case 240
	:	No. 38546 MP-1948
vs.	:	Decision No. 24498-B
	:	
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT),	:	
	:	
Respondent.	:	
	:	

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.

ORDER MODIFYING EXAMINER'S FINDINGS  
OF FACT, AND AFFIRMING EXAMINER'S  
CONCLUSION OF LAW AND ORDER

Examiner Raleigh Jones having, on January 19, 1988, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he dismissed Complainant's allegation that Respondent's failure to promote a particular Sergeant in the Sheriff's Department violated Sec. 111.70(3)(a)3, Stats.; and the Complainant having on, February 8, 1988, timely filed a Petition for Review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties having filed written arguments in support of and in opposition to the petition, the last of which was received on April 7, 1988; and the Commission having reviewed the record in this matter and having considered all of the parties' written arguments and being satisfied that the Examiner's Findings of Fact should be modified and the Examiner's Conclusion of Law and Order should be affirmed;

NOW, THEREFORE, it is hereby

ORDERED 1/

A. That the Examiner's Findings of Fact are hereby modified as set forth below, and as so modified are hereby adopted by the Commission.

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

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

(Footnote 1 continued on Page 2)

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(Footnote 1 continued)

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

## MODIFIED 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 I'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 William Trapp has been employed by the County in the Sheriff's Department since 1970; that Trapp has always been a member of the bargaining unit and has been a sergeant since 1980; 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; and that he has not served as a Association officer since 1985.

4. That shortly after the Sheriff took office in August, 1983, he met with representatives of the Association including Trapp; that at the start of this meeting Trapp requested that Inspector Bollhoffer be asked to leave the room because as second in command to former Sheriff Klamm he lacked credibility with the Association; that although the Sheriff considered the request unusual, he complied and Bollhoffer left the meeting; that a discussion then took place on promotions which were alleged to be made on the basis of friendship; that another topic of discussion was staffing levels in that some personnel were assigned to one location on paper when they were physically working in a different location; that after this meeting Trapp sent the Sheriff a list of deputies who were listed at one location but working at another; and that within the next three months the Sheriff took corrective action so that employees appeared in the organizational accounts where they were actually physically located.

5. That the Sheriff met with the Association on a number of occasions after the August, 1983 meeting; that Trapp was in attendance at these meetings; that Trapp and Deputy Robert Hillman, Vice President of the Association, met a couple of times with the Sheriff to discuss unidentified labor-management matters; that Trapp did not have any one-on-one meetings with the Sheriff to discuss Association-County matters; and 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 left there when the Sheriff had forgotten to lock his car.

6. That Trapp testified in a hearing related to the Sheriff's demotion of Inspector Bollhoffer to Deputy Inspector; that Trapp also testified in a unit clarification petition before the Commission against the Sheriff's position to exclude Sergeants from the bargaining unit; and that in the unit clarification proceeding Trapp testified contrary to the County's position with respect to the unit inclusion of an individual named Baldwin and the exclusion of an individual named Tobiasz with ultimate rulings in the matters both being favorable to the Association.

7. That on or about March 23, 1984, the Association's attorney notified the Sheriff that the Association's concerns with promotions were that department ratings were suspect and that oral evaluators for promotions should be selected in a way so that there would be no appearance of influence by the Sheriff's Department; that the Sheriff took exception to certain remarks in the above letter; that the Sheriff on July 2, 1984, in a letter to the Association's President, indicated that he had received correspondence concerning the policy on off-duty weapons and noted that he had previously requested the name of the Association designee to whom he should respond, but that the Association had designated its entire Executive Board; that the Sheriff objected to the Association having more than one representative designated in order to avoid conflict and confusion; that on or about April 8, 1985, an article appeared in the Milwaukee Journal concerning the shortage of jail personnel and referenced James

Klopp, the Association's president, as the Association's spokesman; and that by a letter dated April 15, 1985 by Inspector Jarecki, the Sheriff's second in command, it was indicated that no future labor-management meetings appeared necessary because the Sheriff would thereafter react to what he read in the newspaper.

8. That in response to the Association's objections on promotions, the Sheriff instituted a new procedure whereby the department's evaluations were not used; that when a vacancy occurs in the Sheriff's 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 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.

9. 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 were as follows:

NAME	ACTUAL GRADE
Trapp, Sr., William W.	91.00
Fillipowicz, 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 in the experience of the Department of Human Resources giving and grading exams, there was no practical difference between the above grades; that the Sheriff received the eligibility list showing all 23 candidates' scores on the Lieutenant exam; that both Sheriff Artison and Inspector Jarecki were aware that Trapp ranked first on the eligibility list; and that at the Association's 1985 summer picnic, the Sheriff congratulated Trapp on placing first on the eligibility list.

10. That in January, 1987, there was a permanent vacancy in the Lieutenant's classification in the Sheriff's Department; that the Sheriff asked the Department of Human Resources to provide a list of qualified candidates for the position; that in compliance with this request, the Department of Human Resources prepared the following certification list which consisted of those applicants from the 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.

11. That on January 26, 1987, the Sheriff appointed three sergeants as acting Lieutenants to fill in for absent Lieutenants; that Sergeant Konicke replaced Lieutenant Cox while Cox attended the FBI Academy through March 22, 1987; that Sergeant Lagowski replaced Lieutenant Krause while Krause attended Northwestern University through March 15, 1987; that Sergeant Filipowicz replaced Lieutenant Leutomski while Leutomski was on extended sick leave; that at some point Inspector Jarecki contacted Sergeant Zens about an acting Lieutenant assignment but Zens was not interested because he did not want to change shifts and on February 8, 1987, Sergeant Misko was made Acting Lieutenant to replace Leutomski; that Konicke and Lagowski were selected because they were in the same part of the department as the person they replaced, the absences were for a short period, and there would be minimal disruption; and that as of the date of the hearing, Konicke and Misko had returned to their sergeant positions.

12. That in February, 1987, the Sheriff appointed Filipowicz to the permanent Lieutenant vacancy; that the Sheriff wanted someone with administrative ability to fill this position; 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 as Acting Lieutenant; that Jarecki did not review any of the candidates' applications or personnel records before making his recommendation to the Sheriff; and that Jarecki never had any labor management discord with Trapp; that Trapp once came to talk with Jarecki about a labor-matter and, at that time, Trapp told Jarecki he was one of the command staff that Trapp could deal with.

13. That prior to making the Lieutenant 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 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.

14. 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.

15. 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.

16. That Trapp 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."

17. That Trapp was the only candidate on the certification list who was ever an officer of the Association; that Robert Hillman, a Deputy I, is Vice President of the Association and has been for four years; that in his capacity of Association officer, he has dealt with both the Sheriff and Jarecki on labor-

18. 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.

B. That the Examiner's Conclusion of Law and Order shall be and hereby are affirmed and adopted as the Commission's.

Given under our hands and seal at the City of  
Madison, Wisconsin this 18th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING  
ORDER MODIFYING EXAMINERS FINDINGS OF FACT  
AND AFFIRMING EXAMINERS CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating this proceeding, the Association alleged that the County violated Sec. 111.70(3)(a)3, Stats. by the Sheriff's failure to promote Sergeant William Trapp to a vacant Lieutenant position because of his past concerted protected activities. At the hearing, the Association amended its complaint alleging that Trapp was also not appointed to certain acting Lieutenant positions because of his concerted protected activities. The County answered the complaint as amended denying that it had committed any prohibited practice.

THE EXAMINER'S DECISION

The Examiner found that the evidence was insufficient to conclude that anti-union animus was a basis for the Sheriff's failure to promote Trapp to the vacant Lieutenant and Acting Lieutenant positions. The Examiner concluded that the number 1 ranking on the basis of test scores for the Lieutenant's examination was not significant as all 10 names on the list were considered qualified for the position. The Examiner determined that the reasons given for the selection of the individuals appointed to the permanent and acting positions were not arbitrary and capricious and that it was appropriate to weigh the negative effect of Trapp's lack of control of his temper. The Examiner noted that although Trapp was the sole Association activist on the list, the County had appointed Deputy Hillman to an acting sergeant position and concluded that this was evidence that the County was not hostile toward union activists or the Association in general. Because the burden of proof was not carried by the Association, the Examiner dismissed the complaint in its entirety.

THE PETITION FOR REVIEW AND THE ASSOCIATION'S  
ARGUMENTS IN SUPPORT THEREOF

The Association contends that the Examiner's Findings of Fact are erroneous and contradicted by the uncontroverted evidence in the record. It submits that the most egregious error in the factual findings is that the test scores bore no relationship to the selection for promotion. It argues that while the Department of Human Resources considered the test score differences to be minute and all ten to be qualified, the Sheriff, in actual practice, simply goes down the list according to test scores. The Association further claims that the finding with respect to the negative "temper" factor being held against Trapp is not supported in the record. It insists that there was animosity between the Sheriff and the Association and the Examiner completely ignored the evidence presented on this point. It maintains that the Examiner's finding that there was no animosity is contradicted by the evidence. It asserts that Trapp's testimony in several different proceedings contrary to the administration's position, establishes Trapp's visible and outspoken position which did not please the Sheriff. The Association also disagrees with the Examiner's finding that the selection of Filipowicz was not arbitrary and capricious, arguing that the evidence established that Trapp was better qualified than Filipowicz. It takes the position that the repeated failure to promote Trapp in light of the evidence leads to the unmistakable inference that Trapp's union activities were the reason for his not being promoted.

The Association argues that the statutory burden of proof is so vague and subject to individual interpretation that a claimant cannot ascertain the actual burden and the Examiner's conclusion that the Association failed to meet the burden of proof in this case is therefore meaningless. It claims that the result of the Examiner's decision is to require direct proof of anti-union animus to meet the burden of proof. The Association notes that the law recognizes that proof of animus need not be direct but can be inferred from all the circumstances. It submits that the circumstantial evidence here supports an inference of anti-union animus against Trapp. It claims that the evidence establishes that the Sheriff's standard practice was to promote people based on their rank according to test scores. It insists the Examiner erred by finding that the test scores ranking was not dispositive. It points out that those appointed just happened to be ranked 2,



3, 5 and 6 with the applicant ranking 4 turning down the opportunity. It also refers to Jarecki's statement to Hillman that sergeants were appointed by going down the list. The Association argues that the reasons offered for the non-selection of Trapp are pretextual and that the Examiner's reliance on Jarecki's decision based on reports of Trapp's temper is fallacious. The Association further contends that Jarecki repeatedly contradicted himself and the information on Trapp was stale and no longer valid.

The Association asserts that where action is motivated even in part by anti-union animus, then a violation of Sec. 111.70(3)(a)3, Stats. is established. It submits that Hillman's promotion to acting sergeant is irrelevant to Trapp's being passed over five times. It concludes that under the totality of circumstances the evidence establishes that the Sheriff discriminated against Trapp on the basis of his union activities when it failed to promote him. It requests the Commission to reverse the Examiner's decision and to order appropriate remedial relief.

#### COUNTY'S POSITION

The County contends that the Examiner's Findings of Fact, Conclusion of Law and Order should be affirmed in all respects. It argues that the Association's allegations that the Examiner erred are unfounded. It points out that the evidence that the differences in test scores are so minute as to have no bearing on the ranking of candidates was the unrefuted testimony of Michael Behrens from the Department of Human Resources. The County maintains that the Association failed to make its case that the County did not appoint Trapp because of his union activities. It alleges that the Examiner was persuaded and the evidence showed that the Sheriff selected the applicants he felt were suited for the available position and did not look adversely on the other applicants. According to the County, the Association has attempted to reason backwards to show that Trapp was highly qualified but not selected because of his union activities. It insists that the Association failed to produce sufficient evidence to support its theory. The County recites Trapp's Association activities and notes the lack of animosity and the positive changes the Sheriff made in response to the concerns expressed by the Association. It further points out that Inspector Jarecki and Trapp had a good relationship and no evidence was presented that the Inspector's recommendation of Filipowicz was tainted by Trapp's union activities.

With respect to the burden of proof, the County submits that the burden of proof is set forth in the statutes and the Association's arguments concerning it are more appropriately addressed to the legislature. The County states that the totality of circumstances is used to determine whether the options of management were proper or the product of anti-union animus but the burden of substantiating the Association's position must be established by a clear and satisfactory preponderance of the evidence and it has not met this burden. The County requests that the Examiner's decision be affirmed.

#### ASSOCIATION'S REPLY

The Association replies that it is no surprise that the County argues that the Examiner's decision is supported by the record. The Association contends that the County has missed the crux of the Association's argument which is that the Examiner erred in not finding that the Sheriff made it a practice to promote by going down the list by test scores. It concedes that the Sheriff could select any of the ten certified and it accepts Behrens' testimony as to how the ten names are selected and submitted to the Department. However, it maintains that no matter how minute the differences in scores, the Sheriff or Inspector routinely goes directly down the list. It further insists that the Inspector gave no logical reason to by-pass Trapp. According to the Association, the only reason is Trapp's union activities.

The Association repeats its prior argument that it is not required to directly prove anti-union animus against Trapp specifically or the Association in general but may establish by circumstantial evidence that the motivation for the County's actions was, in part, based on Trapp's union activities. It submits that the Examiner ignored the evidence of hostility in the record and applied the wrong standard by requiring direct proof of anti-union animus. The Association opines that the only logical inference from the circumstances taken as a whole is that Trapp's union activities cost him a promotion.

## DISCUSSION

The Examiner has stated the applicable law and the necessary elements to prove a violation of Sec. 111.70(3)(a)3 Stats. We have applied the same requirements to our review of this case. While we have modified the Examiner's Findings of Fact to eliminate the reference to reports about Trapp's temper because said reports were not a basis for the promotion decisions, as well as to include a more complete history of the Association's and Sheriff's relationship and the dates of promotion, we have affirmed the Examiner's Conclusion of Law and Order because we find that the evidence is insufficient to prove anti-union animus and the explanations for the promotions are supported in the record and cannot reasonably be found to be pretextual. We, like the Examiner, are bound by Sec. 111.07(3) Stats., to apply the clear and satisfactory preponderance of the evidence standard and our review of the Examiner's decision leads us to conclude that he appropriately applied that standard. The Association's arguments on the burden of proof are not persuasive.

The Association has strenuously argued that the Examiner erred by not finding that the Sheriff went down the list of eligible employes on the basis of test scores, asserting that Trapp was skipped and applicants ranked 2, 3, 4, 5 and 6 were then appointed in that order or declined after being asked. The Association's statement of the facts is not supported by the record. The evidence establishes that Sergeants Filipowicz, Lagowski and Konicke were appointed Acting Lieutenants on January 26, 1987. 2/ They were ranked 2, 3 and 6 on the eligibility list. 3/ Konicke of the Training Bureau replaced Lieutenant Cox while Cox was at the FBI Academy. 4/ Lagowski, who was assigned to the jail, replaced Lieutenant Krause, who also is assigned to the jail, while Krause attended Northwestern University. 5/ Each were appointed so that there would be less disruption in the Department. 6/ Filipowicz was assigned to replace Lieutenant Leutomski who was on extended sick leave. 7/ The record does not indicate if this last appointment was made so there would be less disruption in the Department. This evidence demonstrates that the Sheriff did not just go down the promotional list on the basis of test scores. Here, applicants rated 2, 3 and 6 were appointed and there were logical reasons that applicants ranked 3 and 6 were appointed instead of applicants ranked 3 and 4 or 1 and 2. Thus, the above recited evidence does not support the Association's argument. Later, in February, 1987, Filipowicz was appointed to a permanent Lieutenant position. 8/ On February 8, 1987, Sergeant Misko was appointed Acting Lieutenant to replace Lieutenant Leutomski who was off until March 15, 1987. 9/ It is noted that Filipowicz had been appointed to act instead of Leutomski, so it appears that after Filipowicz got the permanent promotion, Misko replaced him. Additionally, Sergeant Zens was asked about this position but declined it. 10/ Zens was ranked fourth on the list, and Misko ranked fifth on the list. 11/ What area these two sergeants worked in is not clear but the sequence of appointment is 2, 3, 6, 4 and 5, with 4 turning it down. What is clear is that the sequence of appointment was not 2, 3, 4, 5 and 6. Additionally, logical reasons were given for the prior appointment of 3 and 6. Also, Jarecki testified that Misko was selected because of his commendable job performance as an administrator and as an undercover agent

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2/ Tr - 287-288.

3/ Jt. Ex - 19.

4/ Tr - 288, 291.

in the narcotics unit. Neither the County nor the Association offered an explanation of the reasons for the selection of 2 and 4. However, again, based on the above, the evidence fails to prove a practice of just going down the list based on test scores.

The Association argues that the Examiner failed to make any findings of animosity between the Sheriff and the Association. The Examiner found no direct hostility between the Sheriff and Trapp and Jarecki and Trapp. We agree with this finding. Additionally, there is nothing in the record on which to reasonably infer hostility. There was only a single one on one situation with Trapp and the Sheriff, and the Sheriff commended Trapp for locking his car. In August, 1983, Trapp had asked the Sheriff to exclude Bollhoffer from a union-management meeting which the Sheriff did. 12/ The Association pointed to other instances including Trapp's testimony in the Bollhoffer demotion and in two unit clarification proceedings as well as Trapp's presence at several union-management meetings and his being an officer of the Association. However, there is nothing in the record which would establish that the Sheriff ever showed any hostility to Trapp for any of this conduct. We also noted that Trapp ceased being an officer in the Association in 1985, more than a year prior to the promotions. 13/

The Association asserted that there was hostility between the Association and the Sheriff. It relies on selected statements by the Sheriff. 14/ A review of these incidents leads to the conclusion that no such hostility has been shown. The Sheriff was asked to consider changes in the promotional procedure and changes were made. There were objections to the way people were listed as being assigned according to the records rather than where they actually were physically assigned and the Sheriff corrected this practice. There were a number of meetings between the Sheriff and the Association to discuss problems and the relationship did not appear strained. The Sheriff did object to the Association having multiple spokesmen rather than just one and objected to airing matters in the press before a joint discussion on them between the parties, but this is not sufficient to conclude there was hostility between the Sheriff and the Association. Given the absence of evidence of hostility toward the Association, we cannot reasonably find an inference that the promotion of Filipowicz over Trapp was based on anti-union animus.

Additionally, the evidence falls short of demonstrating that the reasons given for Filipowicz's promotion were pretextual. As noted above, the acting promotions had sufficient objective bases to preclude a finding they were pretextual. With respect to the permanent promotion of Filipowicz, the evidence establishes that Jarecki was familiar with his work and was of the opinion he was the best man for the job. 15/ Inspector Jarecki had personally observed Filipowicz, was very familiar with his work and considered him the most qualified man for the job. 16/ The evidence does not establish that Jarecki first considered Trapp but rejected him because of any negative factors. 17/ It appears that Jarecki went directly to Filipowicz without considering any others. It could be argued that Jarecki played favorites, or was mistaken about Filipowicz's ability, or that Trapp was the better qualified, but none of these would be sufficient to draw an inference, under the facts of this case, that these reasons were pretextual and that Jarecki passed over Trapp because of his union activities. 18/ There is simply not sufficient evidence of hostility to reach an inference of anti-union animus.

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12/ Tr - 29.

13/ Tr - 93.

14/ Ex - 5, 8, 9 and 11.

15/ Tr - 236, 238, 251-252, 255, 264, 266-267.

16/ Tr - 235, 251-252, 266.

17/ Tr - 236, 250, 252, 284-286.

18/ For an example of a case in which a pretextual analysis was utilized, see State of Wisconsin ex rel. Racine Policemen's Professional and Protection Corporation v. WERC, Case No. 82-CV-1572, (3/83) CirCt Racine, reversing Dec. No. 176 05-C, (WERC, 10/82).

Neither does the inaccurate letter sent to Trapp after the promotion change our conclusion, since it appears that the primary purpose of the letter was to give the appearance that the Sheriff had complied with the new civil service procedures. While the manner in which the permanent promotion of Filipowicz occurred may be criticized as unfair, inadequate and arguably in violation of civil service requirements, the evidence fails to establish that the non-selection of Trapp was arbitrary or capricious as argued by the Association. Further, even assuming arguendo that the promotional decision was in some way arbitrary, based on the evidence taken as a whole, we cannot find any reasonable basis to infer that Trapp was not promoted, even in part, because of hostility toward union activity. Accordingly, we have affirmed the Examiner's Conclusion of Law and Order.

Dated at Madison, Wisconsin this 18th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Kempe  
A. Henry Kempe, Commissioner