

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVENS POINT POLICE OFFICERS ASSOCIATION and JAMES DOWLING, JOHN BUERMESCH, EDWARD EGGLESTON and DAVID KRATZKE,	:	
	:	
Complainants,	:	Case 73
	:	No. 43999 MP-2353
vs.	:	Decision No. 26525-A
	:	
THE CITY OF STEVENS POINT and the POLICE AND FIRE COMMISSION OF THE CITY OF STEVENS POINT,	:	
	:	
Respondents.	:	
	:	

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainants.
 Mr. Louis Molepske, City Attorney, 1525 Church Street, Stevens Point, Wisconsin

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Stevens Point Police Officers Association and James Dowling, John Buermesch, Edward Eggleston and David Kratzke filed a complaint on May 4, 1990 with the Wisconsin Employment Relations Commission alleging that the City of Stevens Point and the Police and Fire Commission of the City of Stevens Point had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 3, Stats., when it failed to promote the individually named Complainants on May 8, 1989 because of their past union activities. The complaint was later amended to make the same allegation concerning promotions which occurred November 11, 1988, July 12, 1989 and November 8, 1989. 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 Stevens Point, Wisconsin, on January 7 and 8, 1991 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs whereupon the record was closed October 16, 1991. 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.

No. 26525-A

FINDINGS OF FACT

1. The Stevens Point Police Officers Association, hereinafter referred to as the Association, is a labor organization located at 1550 Strongs Avenue, Stevens Point, Wisconsin 54481. At all times material hereto, the Association has been the exclusive collective bargaining representative for all sworn, non-supervisory law enforcement personnel employed by the City of Stevens Point and working in its police department. All the individually named Complainants were non-supervisory police officers employed full-time by the City. All except Buermesch continue to be employed by the City.

2. The City of Stevens Point, hereinafter referred to as the City, is a municipal employer which among its many functions operates a police department. The Department's offices are located at 1550 Strong's Avenue, Stevens Point, Wisconsin 54481. The Police and Fire Commission of the City of Stevens Point exists under the authority of Sec. 62.13, Stats. Where material hereto, it approves or disapproves of promotions recommended by the Police Chief. At the time the complaint was filed, the Chair of the Police and Fire Commission was Patricia Woodka, 2825 Simonis, Stevens Point, Wisconsin 54481.

3. All the individually named Complainants were chair officers and executive board members of the Association in 1988 and 1989. During that period James Dowling was president, John Buermesch was vice-president, Edward Eggleston was secretary and David Kratzke was treasurer. All four participated in collective bargaining negotiations with the City and other activities related to their positions with the Association. Dowling has been the Association's president for the last seven years and has served as its chief spokesman during that period.

4. Joseph Fandre was the City's Chief of Police from 1983 until his retirement on January 6, 1990. The current Chief of Police is Robert Keeson. At the time the complaint was filed, other supervisors within the Police Department were Captain John Schmidt, Captain Leonard Perlak, Lieutenant Donald Sankey, Lieutenant David Johnson, Lieutenant Fred LaRosa and Lieutenant Anthony Bemke.

5. Sometime in 1983, a citizen complained that Dowling had insulted him. The end result of this citizen complaint was that Dowling received a written reprimand concerning same. Dowling contested the reprimand and asked for a trial board to review the matter. A trial board headed by Lt. Sankey was convened and heard the case. At this hearing Dowling was not allowed to cross-examine those who testified. Dowling then retained a lawyer who wrote a letter to City officials saying Dowling had been denied due process by the trial board. Afterwards, a second trial board headed by Captain Perlak convened to hear Dowling's appeal. The record does not indicate what the final disposition of this appeal was. Dowling later sought unsuccessfully to have the Police and Fire Commission pay the legal fees he had incurred in this matter.

6. In August, 1983, the Association filed a grievance contending that the City failed to follow the proper promotional procedure in the promotion of Audrey Reeves from Detective to Corporal. This grievance was ultimately arbitrated. One of the issues in that case was whether the Association had the right to file grievances on its own behalf. Dowling testified on this point for the Association. Another issue in this case was whether the City violated the parties' labor agreement when it promoted Reeves without testing her and without complying with the promotional procedure. The Arbitrator found for the Association on both issues.

7. On August 14, 1985, Sergeant Dennis Koehler was suspended by Chief Fandre. On August 15, 1985, Association President Dowling sent the following letter to Fandre concerning same:

Chief Joseph Fandre
Stevens Point Police Department
1515 Strong's Ave.
Stevens Point, WI 54481

Re: Dennis Koehler

Dear Sir,

On August 14, 1985, the Organization was notified by Sergeant Dennis Koehler that you suspended him on August 14, 1985, the suspension to be immediate and of undetermined duration and with loss of pay.

The Organization requests a written explanation of the cause for the suspension and an explanation of charges to be brought against Sgt. Koehler.

Additionally, the Organization expects compliance with Wisconsin Statutes concerning suspension. As the chief administrator of the Department, it seems inconceivable that you are unaware of the requirements of the law in this matter. Therefore, it must be concluded that your actions constitute a willful and intentional violation of statute. The Organization wishes to inform you that compliance with the provisions of 62.13(h) is expected and will be required by any means necessary to insure compliance.

Sincerely,

James E. Dowling
President

copies: Sgt. Koehler
Capt. Perlak
Paul Jadin
Mayor Haberman
Police & Fire Comm.
Personnel Committee

Fandre responded to this letter in writing but his letter is not part of the instant record. On August 16, 1985, Dowling sent the following letter to Fandre concerning Koehler's suspension:

Chief Joseph Fandre
1515 Strongs Ave.
Stevens Point, WI 54481

Re: Dennis Koehler

Dear Sir:

The Organization is in receipt of your letter of August 15, 1985 to Sgt. Koehler. We are gratified that you have chosen to cease your violation of the law and comply with the provisions of statute 62.13(h) concerning suspension without pay, after having been reminded of the content of the statute.

We note in your letter that it is amended from a letter to Sgt. Koehler which was dispatched earlier in the day. The Organization congratulates you on finally compiling a list of charges, something which would reasonably have been expected to be accomplished well in advance of taking such drastic action.

The Executive Committee of the Organization has discussed this matter and issues the following

observations. We conclude that your behavior in this matter indicates that you have gone off half-cocked, as you are prone to do. Your actions were impulsive and reckless and have done irreparable harm to the character and reputation of Sgt. Koehler and have held Sgt. Koehler and his family up to public embarrassment and humiliation. Your behavior most certainly does not conform to any acceptable norm of proper police conduct. Furthermore, there is no rational reason for suspension at this time as is evidenced by a quote attributed to you in the August 15, 1985 issue of the Stevens Point Journal in which you say that the investigation is "too premature" to release (sic) more information. Surely if the investigation is too premature to release more information, it is also too premature to do irreparable harm.

It is apparent that we must remind you of a legal presumption of innocence until proven otherwise. The Organization therefore asks that you reinstate Sgt. Koehler to duty status unless and until such time as it is proven that he has committed an infraction of law or regulation of such severity as to warrant suspension. We ask that you admit your mistake and take the honorable action.

Sincerely,

James E. Dowling
President

8. In September, 1985, the Police and Fire Commission heard the charges against Sgt. Koehler. The Commission upheld four of the eight charges brought against Koehler, suspended him for two weeks without pay and demoted him to the rank of corporal. On September 25, 1985, an article concerning the matter appeared in the Stevens Point Journal under the headline "Koehler matter isn't resolved: union head." Said article stated:

The disciplinary action taken against Stevens Point Police Sgt. Dennis Koehler by the Police and Fire Commission Wednesday night does not bring the issue to an end, says James Dowling, president of the Stevens Point Police Officers Organization.

"I can assure you 100 percent that the matter is not resolved," Dowling said. He said he would be consulting with the organization's attorney later today to get opinions on what course of action the organization might take. He will then take those opinions to the organization's meeting Monday night, at which time a decision is expected to be made, he said.

Dowling said there are several courses of action the group might take, but did not elaborate, except to say that the options include possible action against Police Chief Joseph Fandre and the city.

Fandre brought Kohler up on charges for exchanging two

handguns from the department's property inventory for \$90 in fishing equipment at Bill's House of Guns, Merrill. Koehler said he then put \$90 in a drawer at the department to be used by the Emergency Services Squad.

Following a day-long disciplinary hearing Wednesday, the commission found Koehler guilty on four of the eight charges Fandre brought against him. He was suspended without pay for two weeks and demoted to the rank of corporal.

The charges he was found guilty of were all violations of department rules, including taking two handguns from the department without Fandre's permission, selling the weapons without permission, failing to obtain a cash register receipt for \$90 he put in the drawer, and retaining the \$90 in his personal possession by putting it in the drawer.

He was found innocent of violating any state statutes, including two charges of theft and one charge of disposing of firearms improperly.

"I'd say it was a disgusting display of city government in action," Dowling said of Wednesday's hearing.

Nearly 20 current and former members of the department were subpoenaed to the hearing, most of them prepared to take the stand as character witnesses.

Fandre, who had requested Koehler be discharged from the department said he was satisfied with the commission's decision and would pursue no further disciplinary action.

The Association later filed a grievance attempting to get the Koehler matter heard, a second time, by the Police and Fire Commission. The Commission declined to rehear the matter.

9. On November 19, 1985, an article appeared in the Stevens Point Journal under the headline "Concerned about police, fire conflicts and morale: mayor". Said article stated:

Concerns about a "running conflict" between the local police officers' union and management in the Stevens Point Police Department prompted Mayor Michael Haberman to ask the Police and Fire Commission to study some policies of the department, Haberman said this morning.

The Commission voted Monday to follow up on some of Haberman's suggestions, and will begin a study of the operation of the department's evidence room, review the departmental rules book, and look into the security of investigative information.

Haberman said some of his concerns about the police department arose during the commission's disciplinary hearing for Cpl. Dennis Koehler in September. Those

concerns, plus some expressed to him by members of the Stevens Point Police Officers' Union, deserve to be looked into, he said.

Haberman said he is also concerned about conflicts in the Stevens Point Fire Department.

"I'm concerned about the morale in two departments," he said. "I'm concerned about what I see as a running conflict between the associations and the management."

Police Chief Joseph Fandre, meanwhile, said he had no problem with the commission studying the listed concerns, but he resented some of his officers bringing their complaints to the mayor and not going through police department channels.

"I have no problem with these requests as presented if they (originated) from the Police and Fire Commission," he said. "I do, however, object if some malcontents within the organized structure of the Police Department violated existing rules and regulations by not following the chain of command afforded to them by making their complaints or suggestions known to management."

Fandre said he did not know what specific complaints the union has about any of the areas the commission will study.

"I don't know what the bitch is about the inventory room," he said. "We've had no complaints from the district attorney's office or the city attorney about the inventory room. I've yet to receive a complaint from anyone."

"And I don't know what the bitch is about the rules book," he said, adding that union representatives had input into the rules book when the current edition was drafted in 1977.

"Sure it could be modified," Fandre said. "But that could have been accomplished by a union member coming into my office and saying, 'Hey, let's make some changes.'"

Fandre said officers are encouraged to come to him with problems, and if they're not satisfied with his decision, then they should go to the commission. In this case, he said, he did not hear from any of his officers.

"When that starts happening in a police department... we're in trouble," he said, "Who'll be running the department, someone at the bottom or the chief of police?"

Dowling said the union was not out of line going to the mayor. "No bargaining unit has to follow a department's chain of command," he said.

He would not say what specific complaints the union had, saying that he union wished to pursue the matter quietly.

The Commission set no timetable for when the reports on the areas of concern will be completed. Commissioner Joe Alfuth will study the evidence room, Commissioners Pete Risberg and Barb Kanig will study the rules book, and Commissioners Art Davy and Jim Feigleson will study the security of investigative information.

Haberman's recent meeting with the commission marked the first time he has brought suggestions or concerns to the commission, he said.

"It is not my role to run the police and fire departments," he said. "And I'm not going to get in a habit of getting involved in police and fire issues." In this particular case, though, he said he had concerns and needed to express them. Whether the suggestions were followed, he said, was up to the commissioners.

Fandre indicated that the quotes attributed to him in this article were accurate.

10. On July 10, 1986, a letter to the editor by James Dowling was printed in the Stevens Point Journal under the headline "Record on Koehler 'purposely slanted'". Said letter stated:

To the Journal--After reading and viewing accounts in the Journal and on the Wausau television stations in the remanding of the Dennis Koehler matter to the Police and Fire Commission for rehearing on penalty, I see an obvious need to set the record straight.

This is a record which seems to have been purposely slanted by several persons, including the president of the Police and Fire Commission, as evidenced by the quote attributed to him in the July 8 edition of the Journal. Apparently there are those who believe that repeating the "Big Lie" often enough lends legitimacy to it.

Firstly, there was absolutely no finding of criminal intent on the part of Koehler. This finding was made by the special prosecutor assigned by the Portage County district attorney to make an impartial determination, as well as by the Police and Fire Commission, following the hearing.

Secondly, Koehler was found guilty of nothing. The finding of the Police and Fire Commission was that four of the eight charges in the specifications were sustained. Charges which were sustained all dealt with violations of department rules, not violations of criminal laws.

The record, at worst, suggests that Koehler,

unwittingly and with good intentions, used poor judgment in the disposal of the property. Poor judgment is something we are all guilty of on occasion, as was well-evidenced in the manner of the handling of the matter by the department administration and the commission.

Thirdly, Koehler did not trade two handguns for fishing equipment. The record clearly shows that Sgt. Koehler, believing he was the commander of the Emergency Services Squad (a belief also held by the person subsequently identified by the chief of police as being the head of the squad), and believing he had been authorized to dispose of the weapons in the interest of the ESS, obtained a \$90 credit (not cash) for the weapons.

His intention was to obtain equipment for the ESS through the business to which the weapons had been transferred. This was being done on his own time, when he was shopping for fishing equipment at the same business.

Finding nothing of use to the ESS squad, he applied the credit to his personal purchase of fishing gear. He then, immediately upon his return to Stevens Point, placed \$90 in cash into an envelope on which he noted the date and the fact that the money had been obtained from the sale of the weapons. This envelope was then placed within the ESS drawer in the Police Department.

On the date and time that a request was made to produce the money, he was able to do so immediately, producing the envelope containing the \$90 in cash from the drawer assigned to the ESS. This differs greatly from the "colored" version of "trading guns for fishing gear."

It should be of interest to note that the disposition of the property by Koehler has not been the only disposal of property by this department in a manner inconsistent with statute and department rules. Questionable handling and disposal of property is a fact well known to most if not all members of the department.

Subsequent to the Koehler incident, the Police and Fire Commission appointed one of its members to oversee a complete overhaul of the manner in which property is handled, stored and disposed of. Obviously a complete overhaul is ample evidence of a problem far greater than might reasonably be inferred from a single incident.

It would seem apparent that the ruling by Judge Fleishauer takes into consideration facts other than those that may have been made public during the reporting of this incident. Perhaps if Mr. Feigleson hadn't had so much trouble staying awake during the hearing, his recollection would be a little more clear.

JAMES E. DOWLING
President
Stevens Point Police
Officers Organization

Fandre became livid upon reading the above letter. He sought out Association Executive Board members Kurt Helminiak and Leonard Mlodik and asked them whether they had authorized or endorsed the aforementioned letter. Each said they had. Fandre then told them he was going to sue them, along with everybody on the (Association) Executive Board, for defamation. Fandre later discussed his desire to sue the (Association) Executive Board with the President of the Police and Fire Commission, one Feigleson, who referred Fandre to the City Attorney. Fandre later consulted with City Attorney Louis Molepske concerning his (Fandre's) desire to sue the (Association) Executive Board members. No lawsuit was even filed against the Association Executive Board concerning the aforementioned letter to the editor.

11. Sometime in 1988, probationary police officer Dawn Cyran was discharged. After being discharged, she sought union assistance in challenging her discharge. Dowling discussed her request with the union's legal counsel. A lawsuit was later filed over her discharge which was ultimately settled for an exchange of money. Prior to the filing of that lawsuit, Lt. David Johnson told patrol officer Ron Voelker that anyone siding with Cyran (in her fight with the Department concerning her discharge) would be on his (Johnson's) "black list" or "shit list". Johnson viewed Dowling as siding with Cyran in her fight with the Department. Additionally, Johnson told Koehler that Dowling was out of line in backing Cyran and that Dowling was supporting Cyran as a personal matter.

12. Sometime in 1988, the City unilaterally changed the health insurance coverage for police department employes in a cost-cutting measure. The Association objected to the change and filed a lawsuit against the City seeking to force the City to return to the original health insurance policy. A temporary restraining order was issued in circuit court which provided that the City continue to grant the identical coverage it previously had under the original insurance policy.

13. The Police Department's promotion procedure for the rank of corporal is known as Department Directive 80-3. It provides that whenever a corporal vacancy occurs in the Department, the vacancy is posted and any person considered who has at least three years service as a police officer. The applicants then take a written examination, receive an oral interview, and are evaluated on their performance, personal record and suitability. A value of 20% is assigned to each of these five factors/components in determining a final score. The written examination (i.e. the first factor) is a test conducted by the City and County Testing Service of the Wisconsin Department of Employment Relations. The oral interview (i.e. the second factor) is conducted by an Oral Interview Board appointed by the Chief of Police. This Board consists of three persons: one member is a captain or lieutenant from the Stevens Point Police Department, one member is a management-level police officer from another law enforcement agency and the remaining member is an at-large member who need not be a police officer. The remaining three factors (i.e. performance, personal record and suitability) are evaluations determined by the officer's past, present and future management-level superiors. Each of these three factors/components are considered separately. Each is then assigned a value of 20% so that together these three factors comprise 60% of the final promotion score. The performance factor (i.e. the third factor) involves an appraisal of the officer's past and present performance on the job with the Department. This evaluation is intended to show how the officer does his/her job. This

involves "proficiency", including car and foot patrol, criminal and traffic investigations, handling emergencies, oral and written communications, weapons, court, public relations, knowledge of laws, ordinances, and procedures. The personal record factor (i.e. the fourth factor) involves an appraisal of the officer's personal record. This evaluation is intended to show peripheral items such as the officer's personnel record (awards, letters of commendation, training scores, disciplinary actions, etc.), attitude, uniform and general appearance, respect toward superiors and cooperation with co-workers, care for equipment, attendance and willingness to learn. The suitability factor (i.e. the fifth factor) involves an appraisal of the officer's suitability for filling the promotional opening or vacancy. This evaluation is intended to show how the officer is suited for the higher rank and how he/she will perform his/her new duties if promoted. Additionally, the officer's leadership abilities, ability to supervise, plan, and organize are considered. Finally, consideration is given to job experience. After these three evaluations are completed by the supervisors, the results of all five components are tallied to reach a final score. When there is one corporal opening/vacancy, the captain in charge of the testing process submits the names of the four officers having the four highest accumulative scores. When there is more than one current opening/vacancy, the next two highest officers are added to the list. For example, if there are two openings, six names are placed on the promotion list, three openings, eight names are placed on the list, etc. In case of tie in scoring, the size of the list is increased to include all officers whose score was tied. The names on this eligibility list are arranged alphabetically, without any data or scores, and submitted to the Chief. The reason the names are listed alphabetically is that the Chief of Police does not have to select the highest scoring officer. Instead the Chief can select whomever he wants off the eligibility list for promotion. All candidates on this list are considered equally eligible candidates for promotion.

14. In 1988, thirteen patrol officers from the Department sought promotion to the rank of corporal. Pursuant to Department Directive 80-3, all thirteen officers took a written examination conducted by the City and County Testing Service of the Wisconsin Department of Employment Relations. Complainant Dowling was ranked first on the written exam with a score of 93.5, Complainant Kratzke was tied for fourth place on the written exam with a score of 85, Complainant Eggleston was ranked sixth on the written exam with a score of 84 and Complainant Buermesch was ranked ninth on the written exam with a score of 78. Next, all the candidates for promotion were given oral interviews by an Oral Interview Board in accordance with Department Directive 80-3. Dowling was ranked first on the oral exam with a score of 89.5, Kratzke was tied for fourth with a score of 86, Eggleston was ranked sixth with a score of 84.5 and Buermesch was tied for seventh with a score of 83.5. The performance, personal record and suitability evaluations were made by a management team in an all-day evaluation session which occurred in October, 1988. No minutes or tape recordings were kept of this meeting. The moderator and non-voting member of this management team was Captain Schmidt, who is not a supervisor of any of the candidates. The four voting members of this management team were Lt. Johnson, Lt. LaRosa and Lt. Bemke. Additionally, Captain Perlak served as a voting proxy member substituting for Lt. Sankey, who was about to retire. Before the evaluations started, Schmidt held a half-hour briefing session for the management team members wherein he explained the evaluation process, described the bell curve used for ratings and identified what criteria they were to use in making their performance, personal record and suitability evaluations for each of the thirteen candidates. He also admonished the management team members to not consider union activity in making their evaluations. The exact scores/ratings which each of the four supervisors gave to each of the thirteen candidates for each category is not contained in the record. After the evaluations were completed, Schmidt tallied the evaluators' collective scores for the thirteen candidates. On the performance evaluation,

Buermesch was rated fourth with a score of 87.5, Eggleston was in a tie for sixth with a score of 84.5, Dowling was rated ninth with a score of 83 and Kratzke was rated eleventh with a score of 79.5. On the personal record evaluation, Buermesch was rated second with a score of 87.5, Eggleston was in a tie for seventh with a score of 82.5, Kratzke was rated tenth with a score of 80.5 and Dowling was rated thirteenth with a score of 77.5. On the suitability evaluation, Buermesch was in a tie for fifth with a score of 81.5, Dowling was rated seventh with a score of 81, Eggleston was in a tie for eighth with a score of 79.5 and Kratzke was rated eleventh with a score of 76. These scores were then tallied with the scores from the written examination and the oral interviews for a final ranking. After this was done, Dowling was ranked third overall with a score of 85, Buermesch was ranked fifth overall with a score of 83.5, Eggleston was ranked sixth overall with a score of 83 and Kratzke was tied for eighth overall with a score of 81.5. The final order of ranking for all thirteen candidates for promotion was:

1. R. Carlson
2. R. Barge
3. J. Dowling
4. R. Voelker
5. J. Buermesch
6. E. Eggleston
7. J. Benz
8. (tie) R. Kaczmarek/D. Kratzke/R. Zdroik
11. M. Meronek
12. D. Mommaerts
13. R. Lommis

15. In November, 1988, two corporal vacancies existed in the Department. After the decision was made to fill them, Captain Schmidt took the top six ranking officers from the foregoing list, arranged their names alphabetically and submitted the following list to Chief Fandre:

- R. Barge
- J. Buermesch
- R. Carlson
- J. Dowling
- E. Eggleston
- R. Voelker

All of the candidates on the foregoing list were qualified for promotion and any two could have been selected. Before making his selections, Fandre did not review any of the candidates annual evaluations.

16. Fandre selected Barge and Carlson from the foregoing list for promotion to corporal on November 11, 1988. The Police and Fire Commission approved both promotions. Fandre indicated he selected Barge for the following reasons: 1) his communicative skills with people, 2) his dealings with the public, 3) his working well with co-workers, 4) his attendance at training schools and 5) his work in improving the Department's evidence room.

Fandre indicated he selected Carlson for the following reasons: 1) his communicative skills with the public and co-workers, and 2) his doing, in Fandre's opinion, an excellent job in developing the Department's Neighborhood Watch program.

17. In May, 1989, one corporal vacancy existed in the Department. After the decision was made to fill it, Captain Schmidt took the top four ranking officers from the list referenced in Finding of Fact 14 (excluding Carlson and Barge because they had already been promoted), arranged their names alphabetically and submitted the following list to Chief Fandre:

J. Buermesch
J. Dowling
E. Eggleston
R. Voelker

18. Fandre selected Voelker from the foregoing list for promotion to corporal. Fandre indicated he selected Voelker for the following reasons: 1) he (Fandre) felt Voelker was adaptable to handling the public and 2) he (Fandre) felt Voelker would represent the Department well as a first line supervisor. After selecting Voelker, Fandre wrote the Police and Fire Commission the following letter dated May 4, 1989 concerning same:

Police and Fire Commission
City of Stevens Point
1515 Strongs Avenue
Stevens Point, WI 54481

Dear Commissioners:

In accordance with existing Department promotional policies as outlined in Department Directive number 80-3, I hereby recommend for promotion the following named Officers.

. . .

Officer Ronald L. Voelker to Corporal of Police. Officer Voelker started his career with our Department on October 1, 1981 and is assigned to the Line Division as a Patrol Officer. Officer Voelker has demonstrated his ability to perform all duties assigned him in a highly professional manner and also relates very well to the public whom he serves.

I respectfully request your approval of these promotions, as I feel that these two Officers will contribute very much to the quality type leadership that is expected of our Supervisors within the Police Department. Thank you for your cooperation.

Respectfully submitted,

Joseph P. Fandre
Chief of Police

The Police and Fire Commission approved Fandre's recommendation on May 8, 1989.

19. On May 14, 1989, the Association filed the following grievance concerning the above-noted promotion:

TO: Captain Perlak
FROM: Stevens Point Police Officer's
Organization
SUBJECT: Grievance

On May 8, 1989, a promotion to the grade of Corporal was made. Officer Dowling, a member of this organization, who had placed third in the selection process and whose name moved to the top of the rankings following the promotion of the first and second ranked candidates, was not promoted. Instead, he was passed over in violation of Article 30 of the labor agreement between the City of Stevens Point and the Organization.

The Organization requests that Officer Dowling be promoted to the grade of Corporal retroactive to May 8, 1989 and that he be granted the appropriate seniority placement among Corporals (behind Cpl. Carlson and above Cpl. Voelker) who was promoted May 8, 1989).

John D. Burmesch
Vice President

Fandre responded to the grievance in writing May 19, 1989:

TO: Officer James E. Dowling
FROM: Chief of Police Joseph P. Fandre
SUBJECT: Promotional Grievance

Dear Officer Dowling:

In accordance with the current labor contract agreement, article 22, step 3, I am hereby responding to your grievance communication dated May 19, 1989 regarding the recent promotion of Corporal Rank within the Department. If you will review the current Department Directive Number 80-3, sub (g), you will note that the Chief of Police has the prerogative to select from the names appearing on final promotion list, not knowing the actual grade point of each Candidate. The selection is based on who the Chief feels is most suitable for promotion to the rank available in the best interest of the Department as a whole.

I have set a meeting date to discuss this matter with you on Wednesday, May 24, 1989 at 3:00 P.M. in my Office.

Yours truly,

Joseph P. Fandre
Chief of Police

The record does not indicate whether the meeting referenced above occurred. On July 12, 1989, Dowling's grievance was discussed by the Police and Fire Commission but was not resolved. On July 23, 1989, Dowling sent the following letter to Pat Woodka, Chair of the Police and Fire Commission:

Pat Woodka
2825 Simonis Street
Stevens Point, WI 54481

Dear Pat,

We have received your reply to the grievance which was presented at the Police and Fire Commission meeting of July 12, 1989. By this letter, we are informing you of our intention to process the grievance to arbitration.

At the meeting of July 12th, Chief Fandre made reference to negative reports I had written about my supervisors, negative reports which my supervisors wrote about me, and various citizen complaints. Our attorney would like to review these materials and we therefore ask that the Commission obtain them from the Chief and provide the Organization with copies. Since we are concerned primarily with the most recent testing process, only materials from 1988 and 1989 will suffice to meet our request. Additionally, we would like a copy of the tape recording which was made at the meeting and would also ask for copies of anything from the personnel files of Officer John Burmesch and Officer Ed Eggleston which the Chief considers to be of a negative nature. Again, only materials from 1988 to 1989 will suffice.

We also ask to be provided with any and all written records of the most recent testing and promotion process, including but not limited to the following: test scores, final placements, written notes, evaluations done on officers in the process by any management or non-management personnel, and any written recommendations which Chief Fandre referred to at the meeting of July 12, 1989.

I am enclosing written authorization for release of the test scores which have been signed by all competing officers with the exception of Bob Barge and Jim Benz. We do feel that the Organization has a compelling interest in the testing process and results and therefore have the right to obtain the requested materials even without individual authorization. We have included signatures only to facilitate the process.

Upon receiving and reviewing the materials, we will write to the Wisconsin Employment Relations Commission to request a list of arbitrators.

Yours truly,

James E. Dowling
President

Dowling received the following reply on August 25, 1989:

Mr. James E. Dowling
Police Officer
Stevens Point Police Department
1515 Strongs Ave.
Stevens Point, WI 54481

Dear Officer Dowling:

This communication is in reply to your letter to Commissioner Patricia Woodka dated July 23, 1989 requesting data from your personnel file relative to the recent Department promotions.

I have nothing to submit to you in accordance with the time frame as outlined in your letter for the years 1988 and 1989. I have personal memo's (sic) from my Management people that are confidential and which provide guidance consideration only for my final decision on whom to promote from the list provided to me from the promotion interview board. These memo's (sic) are not part of any employee's file.

Yours truly,

Joseph P. Fandre
Chief of Police

Dowling responded with the following letter dated October 2, 1989:

Police and Fire Commission
1515 Strongs Ave.
Stevens Point, WI 54481

ATTN: Pat Woodka

Dear Pat:

In an Organization letter to you dated July 23, 1989, the Organization made a request for information concerning the promotion grievance which was filed and heard by the Commission at the meeting of July 12, 1989.

Among the materials requested were the following: negative reports written by me about my supervisors and by my supervisors about me, the tape recording made at the meeting of July 12, 1989, test scores and final placements, written notes and evaluations done on officers by any management or non-management personnel in the course of the process and any recommendations for promotion which the Chief referred to at the meeting of July 12, 1989.

As of this date the only information received is a copy of the final test scores and placements of 11 of the 13 competing officers and a letter from Chief Fandre acknowledging that he has none of the negative written reports that he claimed to possess. The Chief did however refer to possession of "confidential personal memos from my management people. . ."

The Organization again asks that the Commission provide any of the above requested materials which have not as yet been provided so that we may file for arbitration. This request includes the memos to which the Chief referred.

As you have requested, a copy of this letter will be sent to the City Attorney.

Yours truly,

James E. Dowling
President

On November 2, 1989, Dowling sent Woodka the following letter:

Stevens Point Police and Fire Commission
1515 Strongs Ave.
Stevens Point, WI 54481

ATTN: Pat Woodka

Dear Pat:

Having requested, in letters dated July 23, 1989 and October 2, 1989, documents related to the promotion grievance filed by the Organization on May 13, 1989, and having not received those documents, it is apparent that the City chooses not to comply with our request.

Therefore, the Organization now requests that the Police and Fire Commission obtain and hold the requested materials to prevent their loss or destruction until such time as they may be made available to us.

Yours truly,

James E. Dowling
President

20. In July, 1989, one corporal vacancy existed in the Department. After the decision was made to fill it, Captain Schmidt took the top four ranking officers from the list referenced in Finding of Fact 14 (excluding Carlson, Barge and Voelker because they had already been promoted), arranged their names alphabetically and submitted the following list to Chief Fandre:

J. Benz
J. Buermesch
J. Dowling

E. Eggleston

21. Fandre selected Benz from the foregoing list for promotion to corporal. Fandre indicated he selected Benz for the following reasons: 1) his talent in dealing with the public, 2) his attendance at training schools and 3) his being an expert in truck regulation and truck weight. After selecting Benz, Fandre wrote the Police and Fire Commission the following letter dated July 12, 1989 concerning same:

Police and Fire Commission
City of Stevens Point
1515 Strongs Ave.
Stevens Point, Wisconsin 54481

Dear Commissioners:

In accordance with existing Department Promotional Policies as outlined in Department Directive number 80-3, I hereby recommend for promotion the following named Officers:

. . .

Officer James C. Benz to Corporal of Police. Officer Benz started his career with our Department on August 11, 1969 and is assigned to the Line Division as a Patrol Officer. Officer Benz has demonstrated his ability to perform all duties assigned him in a highly professional manner and also relates very well to the public whom he serves.

I respectfully request your approval of these promotions, as I feel that these two Officers will contribute very much to the quality type leadership that is expected of our Supervisors within the Police Department. Thank you for your consideration.

Respectfully submitted,

Joseph P. Fandre /s/
Joseph P. Fandre
Chief of Police

The Police and Fire Commission approved Fandre's recommendation on July 12, 1989.

22. Sometime in late 1989, Mayor Scott Schultz called Roger Bullis, the President of the Police and Fire Commission, at the request of incoming Police Chief Bob Keeson and asked Bullis if the Police and Fire Commission would hold off making the corporal promotion planned for later that year so that Keeson could make it. Fandre and the Police and Fire Commission did not honor Schultz's request to defer the corporal promotion for the new incoming Chief.

23. In November, 1989, one corporal vacancy existed in the Department. After the decision was made to fill it, Captain Schmidt took the top four ranking positions from the list referenced in Finding of Fact 14 (excluding Carlson, Barge, Voelker and Benz because they had already been promoted), arranged their names alphabetically and submitted the following list to Chief

Fandre:

J. Buermesch
J. Dowling
E. Eggleston
P. Kaczmarek
D. Kratzke
R. Zdroik

There were seven names on this list because Kaczmarek, Kratzke and Zdroik were all tied in their overall order of ranking.

24. Fandre selected Zdroik from the foregoing list for promotion to corporal on November 8, 1989. The Police and Fire Commission approved his promotion. Fandre indicated he selected Zdroik for the following reasons: 1) his communicative skills with people, 2) his dealings with the public, 3) his working well with co-workers and 4) his ability, in Fandre's opinion, to command during stressful situations.

25. Buermesch resigned as a police officer from the Department on January 5 or 6, 1990. His stated reason for resigning was that he disagreed with the (corporal) promotions that had been made in the Department.

26. The record indicates that Fandre promoted Doug Carpenter in 1983 from corporal to sergeant while he (Carpenter) was local union president and that Fandre promoted Kurt Helminiak in 1983 from patrol officer to corporal while he (Helminiak) was local union vice-president. The record also indicates that Robert Barge, who was promoted from patrol officer to corporal in the promotion referenced in Finding of Fact 16, was local union vice-president in 1987. The record also indicates that Ron Voelker, who was promoted from patrol officer to corporal in the promotion referenced in Finding of Fact 18, was once a member of the Association's bargaining committee but was not a member of the Association's Executive Board.

27. There is nothing in the record indicating that Fandre always promoted the highest ranking officer on the eligibility list.

28. There is nothing in the record indicating that Dowling's grievance regarding the May 8, 1989 promotion was appealed to arbitration.

29. Fandre's 1989 corporal promotion decisions were unlawfully tainted, insofar as who he selected, because his failure to select any of the Complainants for any of three separate corporal vacancies was motivated, at least in part, by his (Fandre's) hostility toward their past union activity.

30. Fandre's not promoting Complainants Dowling, Buermesch, Eggleston and/or Kratzke to any of three separate corporal vacancies in 1989 had a reasonable tendency to interfere with the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The City of Stevens Point and the Stevens Point Police and Fire Commission, through Chief Fandre, discriminated against Complainants James Dowling, John Buermesch, Edward Eggleston and David Kratzke in violation of Sec. 111.70(3)(a)3, Stats., when one or more of the Complainants were not selected for any of three separate corporal vacancies in 1989, in part, because of their past union activity. The City of Stevens Point and the Stevens Point Police and Fire Commission thereby committed a derivative violation of Sec. 111.70(3)(a)1, Stats., by interfering with the rights of municipal employees to engage in lawful, concerted activity.

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

ORDER 2/

IT IS ORDERED that the Respondents, City of Stevens Point and the Stevens Point Police and Fire Commission, its officers and agents shall immediately:

1. Cease and desist from:
 - a. Interfering with the Complainants or any other employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.
 - b. Discriminating against the Complainants or any other employes for engaging in protected concerted activity.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of MERA:
 - a. Immediately vacate the corporal position filled May 8, 1989 by Ronald Voelker.
 - b. Immediately select between John Buermesch, James Dowling or Edward Eggleston to fill that corporal

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 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.

position.

- c. After that selection is made, make the individual selected whole by adjusting their pay rate accordingly and paying him back pay retroactive to May 8, 1989, plus interest at the rate of twelve percent (12%) per year 3/ on that amount.
- d. Notify all employes by posting in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". That Notice shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said Notice is not altered, defaced, or covered by other material.
- e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order regarding what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 6th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL immediately vacate the corporal position filled May 8, 1989 by Ronald Voelker.

WE WILL immediately select between John Buermesch, James Dowling or Edward Eggleston to fill that corporal position.

WE WILL immediately make the individual selected whole by adjusting their pay rate accordingly and paying him backpay retroactive to May 8, 1989, plus

2/ The applicable interest rate set forth in Sec. 814.04(4), Stats.

interest at the rate of twelve percent (12%) per year on that amount.

WE WILL NOT discriminate against Complainants James Dowling, John Buermesch, Edward Eggleston and David Kratzke or any other employes on the basis of their engaging in protected concerted activity.

WE WILL NOT in any other or related matter interfere with the rights of our employes pursuant to the provisions of the Municipal Employment Relations Act.

CITY OF STEVENS POINT AND
STEVENS POINT POLICE AND FIRE COMMISSION

By _____

Dated this 6th day of February, 1992.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CITY OF STEVENS POINT
(POLICE AND FIRE COMMISSION)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating this proceeding, the Association alleged that the City violated Sec. 111.70(3)(a)1 and 3, Stats., when it failed to promote any of the individually named Complainants to a corporal position on May 8, 1989 because of their past union activities. At the hearing, the Association amended its complaint to make the same allegations concerning corporal promotions which occurred November 11, 1988, July 12, 1989 and November 8, 1989. A total of five separate corporal promotions were made on these four occasions. The City answered the complaint as amended denying that it had committed any prohibited practices in making the five promotions.

PARTIES' POSITIONS

It is the Association's position that Chief Fandre bypassed the four individually named Complainants for promotion on four separate occasions, despite their being well-qualified for same and having immediate credentials, because of their past union activities. In the Association's view, there is no logical explanation for Fandre's failure to promote any of them except for their prolific, productive and successful union activities. The Association

acknowledges that while there are four named individual Complainants, the complaint centers on one - Officer Dowling. The reason for this, according to the Association, is that he headed and lead the Union and acted as its chief spokesman for much of Fandre's term as Chief. It characterizes Dowling as an active, demanding and effective union leader who clashed often and hard with Fandre. In the Association's view, open warfare existed between Fandre and the Association which was fought before arbitrators, the courts, various commissions, at bargaining sessions and from time to time, in the media. In this regard, the Association cites the Association's, particularly Dowling's, involvement in the following "battles": 1) Dowling's discipline in 1983 and experience with two department trial boards, 2) the arbitration of the Audrey Reeves promotion grievance, 3) the Dennis Koehler disciplinary matter, 4) the Dawn Cyran discharge matter, 5) the 1988 health insurance matter, and 6) the processing of Dowling's grievance relating to the May 8, 1989 promotion. The Association contends that given these past "battles", it is not surprising that there was hostility by Fandre and other supervisors in the Department, particularly Lt. Johnson, against the individually named Complainants and the Association. The Association asserts that this hostility and animus was not forgotten over time by them but instead showed itself when the instant promotional opportunities came along and none of the complainant union officers were selected for promotion. The Association opines that this was not a mere coincidence. Instead, according to the Association all the Complainants were passed over for promotion because of their past union activities. The Association argues that these four promotion pass-overs are all the more egregious when one considers that Fandre's past practice was to promote the number one rated officer on the promotion list, but that he (Fandre) deviated from that practice when Dowling happened to be the number one rated officer on the second, third and fourth promotion lists. The Association argues that these promotion pass-overs violated MERA because they were based, in part, on anti-union animus. As a remedy for these alleged prohibited practices, the Association requests the Examiner to order appropriate remedial relief.

The City initially submits that the statute of limitations has expired on the third and fourth promotions in issue here, namely those which occurred on July 12 and November 8, 1989, so those portions of the complaint should be summarily dismissed. This argument is based on the premise that the statute of limitations for those promotions runs from the date the complaint was amended to raise them as issues (i.e. January 7, 1991), and not the date the complaint was filed (May 4, 1990). With regard to the merits, the City acknowledges that it cannot take an employe's union activity into account when making a promotion. It argues that here, though, the Association failed to present clear, satisfactory and convincing evidence that any of the Complainants were not promoted because of their past union activities. According to the City, there was no conspiracy to deny any of the Complainants' promotions. The City asserts that while there are four individually named Complainants in this action, this case principally revolves around just one - Dowling. The City acknowledges that Dowling has been active in the union and in that capacity, has had confrontations with Department management. It notes though that other union presidents have had confrontations with management too. As a result, it reasons that Dowling was no different from other union presidents in that regard. Additionally, the City reviews other promotions which occurred during Fandre's tenure as Chief. Specifically, it notes that Doug Carpenter was promoted in 1983 from corporal to sergeant while he was union president, that Kurt Helminiak was promoted in 1983 to corporal while he was union vice-president and that Robert Barge, who was promoted to corporal in the first promotion involved here (i.e. the November 11, 1988 promotion) was union vice president in 1987. In the City's view, these examples show that Fandre did not have a history of denying promotions to union activists but, to the contrary, had a track record of promoting them. Next, the City reviews the various grievances relied upon by the Association for the proposition that these

matters show that animosity existed between Fandre and the Association. However, after reviewing same the City reaches the opposite conclusion, namely that those events do not show anti-union animus or hostility by Fandre against the Complainants. Finally, with regard to the promotions that were made, the City notes that the promotional procedure gives the Chief the right to select any of the individuals on the eligibility list which is submitted to him. It asserts that there is nothing in the promotion procedure itself, the labor contract or past practice that limits the Chief's selection to just the top rated individual on the list. As a result, it is the City's view that the Chief can select whomever he wants for promotion off the eligibility list. In the five promotions involved here Fandre selected those individuals whom he felt were the most qualified and he explained in detail why he selected them. In the City's view, the selection of the individuals chosen by Fandre was not tainted by the Complainants' past union activity. With regard to Dowling's non-selection for any of the five promotions, the City does not claim that Dowling or any of the other Complainants were grossly insubordinate. However, it does rely on the testimony of Department supervisors Lt. Johnson and Lt. LaRosa for the proposition that Dowling's attitude toward both management and the public was not receptive to promotion. It opines that if Dowling's attitude toward the general public and his supervisors was that which reflects a good officer, he (Dowling) would have undoubtedly been promoted years ago. The City therefore requests that the complaint be dismissed.

DISCUSSION

Timeliness

The original complaint was filed with the Commission on May 4, 1990. It alleged that the four individually named Complainants were passed over for a corporal promotion on May 8, 1989 due to their past union activity. At the first day of hearing, January 7, 1991, the complaint was amended to make the same allegation concerning three other corporal promotions which occurred November 11, 1988, July 12, 1989 and November 8, 1989. A total of five separate corporal promotions were made on these four occasions. Since the City asserts that some of these promotions occurred outside the pertinent statute of limitations, it is necessary to determine if such is, in fact, the case.

Section 111.07(14), Stats., which is incorporated by reference in Sec. 111.70 prohibited practice proceedings by Sec. 111.70(4)(a), Stats., provides:

The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

This of course means that if the alleged prohibited practice occurred on a date more than one year preceding the date on which the complaint was filed, the charge is outside the statute of limitations. The timeliness of these four charges will now be reviewed.

Attention is focused initially on the promotion referenced in the original complaint (i.e. the May 8, 1989 promotion). As previously noted, the complaint was filed May 4, 1990. Since this challenged promotion occurred within one year of the date on which the complaint was filed, the charge was timely filed. As a result, the Complainants are not time-barred from receiving relief pertaining to this promotion if it is ultimately found to constitute a prohibited practice.

Next, attention is turned to the other three promotions in issue, namely those which occurred on November 11, 1988, July 12, 1989 and November 8, 1989.

As previously noted, these promotions were not referenced in the original complaint but were instead added by amendment at the hearing.

The November 11, 1988 promotion occurred more than one year preceding both the date on which the complaint was filed (i.e. May 4, 1990) and the date on which the complaint was amended to add this charge as an alleged prohibited practice (i.e. January 7, 1991). That being so, this charge was untimely filed whether the applicable date for statute of limitation purposes is the date the complaint was filed or the date the complaint was amended to add this charge. This means the Complainants are time-barred from receiving any relief pertaining to this promotion.

The remaining two promotions present a closer call. This is because both the July 12 and November 8, 1989 promotions occurred within one year of the date on which the complaint was filed (i.e. May 4, 1990), but more than one year from the date on which the complaint was amended to add these promotions as alleged prohibited practices (i.e. January 7, 1991). Given the foregoing, the question presented here is whether the amendment to the complaint adding these two promotions as independent prohibited practices relates back to the filing of the complaint. If it does, then these two charges are timely filed. If not, the charges are untimely.

Prior Commission decisions have held that when an amendment to a complaint raises a new cause of action, the statute of limitations runs from the date of the amendment; not the date of the original complaint. 4/ The basis for this holding was the Wisconsin Supreme Court's decision that a "new cause of action" (in the case of an amended pleading) refers, *inter alia*, to "new facts out of which liability arises." 5/ Applying this holding here, the Examiner finds that the amendment challenging three promotions not mentioned in the original complaint raises "new facts out of which liability (allegedly) arises." That being so, the amendment in question raises a new cause of action. This finding means that the statute of limitations for the three promotions referenced in the amendment runs from the date the amendment was made (January 7, 1991), and not the date the complaint was originally filed (May 4, 1990). Said another way, the amendment made at the hearing does not relate back to the date the complaint was filed. Since all three of the promotions referenced in the amendment occurred prior to January 7, 1990, it follows that all three involve conduct which occurred more than one year prior to the date these matters were raised (i.e. January 7, 1991). Consequently, the Complainants are time-barred from receiving any relief pertaining to these three promotions.

Having so held, it is noted that the above conclusions do not prevent the Examiner from considering evidence relating to events which transpired prior to the one year limitations period if doing so would illuminate events which occurred within the limitations period. 6/ In other words, evidence as to events which occurred prior to limitation period "may be utilized to shed light on the true character of matters occurring within the limitations period." 7/

4/ Cooperative Educational Service Agency #4, et al., Dec. No. 13100-E (Yaffe, 12/77), aff'd, Dec. No. 13100-G (WERC, 5/79).

5/ Fredrickson v. Kabat, 264 Wis. 545, 59 N.W. 2d 484 (1953).

6/ Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co., 362 US 411 (1960), 45 LRRM 3212; Moraine Park Technical College, Dec. No. 25747-B, (McLaughlin, 3/89), aff'd, Dec. No. 25747-C (WERC, 9/89).

7/ Bryan, supra, 45 LRRM at 3214-3215.

As a result, the Examiner will be reviewing the November 11, 1988 promotion for this express purpose. Inasmuch as it is permissible to look at such anterior events, the converse must be true and subsequent events also reviewable. Consequently, the Examiner will also be reviewing the July 12 and November 8, 1989 promotions for this same purpose (i.e. "to shed light on the true character of matters occurring within the limitations period.")

The Legal Framework for (3)(a)1 and (3)(a)3

The legal standards for complaint cases alleging interference and discrimination are well-settled. Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer, individually or in concert with others, to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed them in Sec. 111.70(2), Stats. Section 111.70(2) guarantees municipal employes the right to engage in "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 8/ Nor is it necessary to prove that an employer intended to interfere with employes or that there was actual inference. 9/ The statute prohibits conduct which has a reasonable tendency to interfere with the exercise of lawful concerted activities. 10/ Interference may be proved by demonstrating by a clear and satisfactory preponderance of the evidence that the employer's conduct contained either a threat of reprisal or a promise of benefit which would tend to interfere with the rights of employes guaranteed them under Sec. 111.70(2), Stats. 11/ The wrongful denial of promotional opportunities may constitute a violation of this section. 12/

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. By its explicit reference to "other terms or conditions of employment," Section (3)(a)3 has been held to include promotional opportunities. 13/ Therefore, not promoting an employe because of his/her union activity falls within this proscription. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employes were engaged in protected activities; and

8/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

9/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

10/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87).

11/ Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 6/81) aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Drummond Jt. School District No. 1, Dec. No. 15909-A (Davis, 3/78) aff'd by operation of law, Dec. No. 15909-A (WERC, 4/78); Ashwaubenon School District, Dec. No. 14774-A (WERC, 10/77).

12/ City of Milwaukee, Dec. No. 26728-A (Levitan, 11/91), aff'd by operation of law, Dec. No. 26728-B (WERC, 12/91).

13/ Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88); aff'd., Dec. No. 24498-B (WERC, 7/88).

2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 14/

It is well-settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 15/ 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. 16/ An employer may not subject an employe to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 17/ If it is established that an adverse (personnel) consequence was in any part motivated by the employe's union activity, then the Examiner is obligated to grant relief in the form of remedial and affirmative orders.

The Employer relies on German v. City of Kansas City, 18/ a case involving facts similar to those here, to support its argument that no illegal discrimination occurred. In that case, a fire department captain who also was the local union president, claimed that his constitutional rights under the first and fourteenth amendments were violated by the Chief in not promoting him because of his union activities. The Court held that German's federal constitutional rights were not violated when he was denied promotion. Based on the following rationale, the Examiner finds that the City's reliance on German misses the mark. Here, none of the individually-named Complainants asserts a federal constitutionally-protected right or claims that their federal constitutional rights were violated. Instead, they assert a statutory right, namely the right guaranteed by Sec. 111.70(2), Stats., "to engage in lawful, concerted activities" and claim that this right was violated. Since the claim involved here alleges that a state right was violated, it follows that state law applies. This of course means that the German case is inapplicable here because it did not deal with Wisconsin statutory rights but rather with federal constitutional rights.

Application of the Legal Framework To the Facts

Applied to the facts involved here, the above-noted Section (3)(a)3 test

-
- 14/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).
 - 15/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540 (1967); Employment Relations Department v. WERC, 122 Wis.2d 132 (1985).
 - 16/ Ibid.
 - 17/ Muskego-Norway, supra, at p. 562.
 - 18/ 776 F2d 761 (8th Cir., 1985), 120 LRRM 3178.

requires that the Complainants demonstrate that their activity as Association Executive Board officers was protected by Sec. 111.70(2); that the City knew of the Complainants union activity; that the City was hostile to it; and that the City's decision to not promote any of the Complainants to any of five corporal vacancies in 1988 and 1989 was based, at least in part, upon said hostility.

Elements one and two are not in dispute. It is undisputed that all of the Complainants engaged in lawful, concerted activity as Association Executive Board officers by processing union grievances and that the City (specifically Chief Fandre) had knowledge of their protected activity. Elements three and four are in issue though, with the City denying hostility towards that union activity and also denying that the Complainants' union activity played any part in making the promotions involved here.

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements) or, as is usually the case, inferred from the circumstances. 19/ Here, the record will be reviewed for evidence of both types. If direct evidence of hostility or illegal motive is found lacking, the Examiner will then look to 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 support such an inference. 20/

In support of its assertion that there was hostility between Fandre, et. al. and the Association, the Complainants cite the Association's, particularly Dowling's, involvement in the following six grievance matters: 1) Dowling's 1983 letter of reprimand and experience with two department trial boards, 2) the arbitration of the Audrey Reeves promotion grievance, 3) the Dennis Koehler disciplinary matter, 4) the Dawn Cyran discharge, 5) the 1988 health insurance matter, and 6) the processing of Dowling's grievance relating to the May 8, 1989 promotion.

There is no question that the Association and Department management clashed on occasion when dealing with the foregoing matters. It is common for the processing of grievances to generate the angry expression of strong differences of opinion over the merits of a grievance. When this happens, such anger cannot necessarily be equated with hostility towards an employe's

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

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

20/ CESA # 4, supra.

protected right to file or process grievances. 21/

The Examiner finds that in two of the foregoing matters, namely the Dennis Koehler and the Dawn Cyran matters, the exchanges between Department management and employes moved beyond anger generated by the merits of a grievance into the realm of hostility toward grievance activity itself.

Attention is focused first on the Koehler matter. Finding of Fact 7 contains the letters Dowling sent to Fandre at the start of this dispute. A month later, Dowling went public with his views concerning same in a newspaper story entitled "Koehler matter isn't resolved: union head". Two months later, another article appearing in the local newspaper entitled: "Concerned about police, fire conflicts and morale: mayor" (i.e. Finding of Fact 9). One of the mayor's "concerns" referenced in that headline was the Koehler matter. In that newspaper article, Fandre is characterized as resenting the fact that some officers went to the mayor with their complaints and did not go through police department channels. While Fandre does not name the officers whose actions he resents, it is apparent that one of them was Dowling because later in the article Dowling defends the Union's going to the mayor. Fandre also is quoted in this same article as saying:

"I have no problem with these requests as presented if they (originated) from the Police and Fire Commission," he said. "I do, however, object if some malcontents within the organized structure of the Police Department violated existing rules and regulations by not following the chain of command afforded to them by making their complaints or suggestions known to management."

While Fandre does not identify by name which "malcontents" in the Department he had in mind, it is apparent from the remainder of the article that he was referring to Dowling. This is because Dowling was the only officer named and quoted in the article. Fandre did not dispute the accuracy of the quote attributed to him. As a result, this means that Fandre publicly called Dowling a "malcontent" and said that he resented Dowling's actions in going to the mayor with his complaints. Since Fandre was publicly critical of Dowling in this article, it stands to reason that Fandre was contemptuous of Dowling. The Examiner further finds that although it is not publicly expressed in the foregoing article, Dowling was also contemptuous of Fandre. Insofar as the record shows, this mutual animosity between them was a consequence of forceful representation of opposing interests and strong differences of opinion over the merits of past grievances.

The next chapter in the Koehler matter occurred months later when Dowling expressed his views concerning same in plain, albeit vigorous, language in a letter to the editor of the local newspaper. The letter itself is traceable to Dowling's representation of his union on this hotly disputed matter. After Fandre read Dowling's letter, he was inflamed to the point that he sought out Association Executive Board members Helminiak and Mlodik, asked them whether they had authorized Dowling's letter, and upon receiving an affirmative answer told them he was going to sue them, along with everybody on the (Association) Executive Board for defamation. While Fandre never told Dowling personally that he was going to sue him for the content of his letter, as he did Helminiak and Mlodik, there is no question that Fandre meant his threat to also apply to Dowling. This is because Dowling wrote and signed the letter that was the

21/ State of Wisconsin (Department of Employment Relations), Dec. No. 25284-C (WERC, 11/90).

subject of Fandre's ire and Fandre's threat was to sue the entire Association Executive Board, of which Dowling was a member and, for all practical purposes, front man. Fandre's threat to sue the Association Executive Board over Dowling's letter to the editor constitutes direct evidence of hostility within the meaning of the third element of the above-noted (3)(a)3 test.

Attention is now turned to the Dawn Cyran matter. As noted in Finding of Fact 11, Lt. Johnson told officer Ron Voelker that anyone siding with Cyran (in her fight with the Department concerning her discharge) would be on his (Johnson's) "black list" or "shit list". Johnson viewed Dowling as siding with Cyran in her fight with the Department concerning her discharge. Threatening to put a union officer on a "black list" or "shit list" for processing a grievance, whether meritorious or not, constitutes direct evidence of hostility against that union activity. As a result, this conduct also satisfies the third element of the above-noted (3)(a)3 test.

Having found evidence of direct hostility by Fandre and Johnson toward Dowling and the 1985 Association Executive Board, this still leaves the question of whether there was hostility towards the other named Complainants (i.e., Buermesch, Eggleston and Kratzke). The Examiner finds that there is no direct evidence of hostility by Fandre or any other Department supervisor against Buermesch, Eggleston and Kratzke. This finding does not end the matter though because the Examiner cannot overlook Fandre's threat to sue the Association Executive Board over Dowling's letter to the editor. In that instance Fandre took out his anger with Dowling (for writing the letter) on the entire Association Executive Board. He lumped everyone on that Board together and made no distinction between Dowling and the others who simply happened to be serving on the Executive Board at the time. In Fandre's view, one was just as guilty as the next. Since Fandre held hostility against the entire Executive Board in 1985, it does not require a great leap in logic to conclude that he could have felt the same way about the Association Executive Board in 1988 and 1989, even though there were some different individuals serving on the Board. Based on the foregoing then, the Examiner infers that Fandre was hostile towards Complainants Buermesch, Eggleston and Kratzke because all were Association Executive Board members.

The focus now turns to the fourth and final element necessary to prove a (3)(a)3 claim, namely illegal motive. As previously noted, this element involves the question of whether the Employer's conduct in passing over any or all of the Complainants for promotion to any of five separate corporal vacancies in 1988 and 1989 was motivated, in whole or in part, by hostility towards the Complainants' union activity. In analyzing this question, the conduct of Fandre and Johnson will be reviewed separately.

Johnson's conduct pertinent to the disputed promotions is addressed first. As noted in Finding of Fact 14, Johnson's sole involvement with the disputed promotions was that he was one of the four department supervisors that evaluated all thirteen candidates for promotion on the grounds of their performance, personal record and suitability. The scores which each of the four supervisors gave to the thirteen candidates for each of the three categories are not contained in the record. As a result, it is unknown what Johnson rated Dowling in the three areas. Collectively, though, the four supervisors rated Dowling relatively low in all three areas. In fact, on the personal record evaluation, he (Dowling) was rated dead last (thirteen out of thirteen). However, since the complete scores which the supervisors gave to the candidates are not in the record, no comparison can be made of Johnson's scores against the other three supervisors' scores. That being the case, it is not possible to determine if Johnson rated Dowling or any of the other Complainants significantly lower than the other supervisors. Had that happened, this would have had the effect of pulling down the candidate's

overall score and lessening the candidate's chances of making it to the eligibility list. However, even if Johnson did rate Dowling low because of hard feelings/bad blood from the Dawn Cyran matter, it cannot be overlooked that Dowling, as well as Buermesch and Eggleston, still scored high enough overall on the five components that they were included on all four eligibility lists that were submitted to the Chief of Police. As a result, it is found that Johnson's conduct in the disputed promotions does not constitute a (3)(a)3 violation.

Attention is now turned to Fandre's conduct in the disputed promotions. After the corporal eligibility lists were submitted to him four separate times in 1988 and 1989, Fandre selected five individuals off the lists for promotion. None of the Complainants were selected for any of these five promotions.

Fandre flatly denied passing over any of the Complainants for promotion because of their past union activities. Additionally, so far as the record shows, Fandre never told anyone that union activity would preclude a candidate from being promoted. That being the case, there is no direct evidence that Fandre failed to promote any of the candidates because of their union activities.

The Association contends that even though there is no direct evidence that Fandre failed to promote any of the Complainants because of their union activities, an inference can still be drawn from the total circumstances of the record that this is what occurred.

First, the Association asserts that Fandre always promoted the highest-ranking officer on the eligibility list, but that he failed to do so when the highest-ranking officer was Dowling. Said another way, the Union alleges that Fandre had a past practice of always promoting the highest-rated candidate, but that he deviated from this practice when Dowling happened to be the highest-rated candidate. The problem with this contention though is that the record evidence does not establish that there is, in fact, such a practice. Other than the rankings and promotions referenced in the Findings of Fact, there are no other rankings and promotions contained in the record. That being so, there is no objective evidence upon which to substantiate the Union's bald assertion that Fandre's past practice was to always promote the highest-ranked candidate.

What the record shows is that the Chief can select whomever he wants off the eligibility list. This list is alphabetically arranged and the Chief is not told of the candidates overall rankings. While the Chief may end up selecting the highest-ranked candidate, he may also select a lower-ranked candidate. In light of the foregoing then, it is held that no past practice was shown to exist that Fandre always promoted the highest-ranked candidate on the eligibility list. Having so found, it logically follows that the Examiner cannot rely on a practice that does not exist in order to determine if it was deviated from here.

Next, the Association contends that since the Complainants were not selected for any of five separate corporal promotions in 1988 and 1989, an inference can be drawn that all were victimized and passed over for promotion because of their past union activities. This contention is addressed below.

At the outset, it is noted that prior to the promotions involved here, Fandre had promoted several local union activists in the past. Specifically, he promoted Doug Carpenter in 1983 from corporal to sergeant while he (Carpenter) was local union president and Kurt Helminiak in 1983 from patrol officer to corporal while he (Helminiak) was local union vice-president.

These two promotions occurred at the very beginning of Fandre's tenure as Chief. Insofar as the record shows, these promotions occurred before Fandre

had any major confrontations with the Association. Most importantly though, these promotions occurred before the watershed event of Fandre threatening to sue the Association Executive Board over Dowling's letter to the editor concerning the Koehler matter. That being so, these two promotions in 1983 do not automatically foreclose Fandre from a (3)(a)3 charge.

In 1988 and 1989, five corporal vacancies in the Department were filled from four eligibility lists. These eligibility lists were compiled pursuant to Department Directive 80-3 after thirteen patrol officers completed a five-factor testing and evaluation process. Each eligibility list consisted of the top-ranked candidates available.

In the first promotion which occurred on November 11, 1988, Fandre was presented the following alphabetically-arranged eligibility list:

R. Barge
J. Buermesch
R. Carlson
J. Dowling
E. Eggleston
R. Voelker

There were six names on this list because Department Directive 80-3 requires this number when there are two vacancies to fill and such was the case here. Fandre selected Barge and Carlson from this list. Barge was the local union vice-president in 1987. Of the individuals not chosen from this list, all except Voelker (i.e. Buermesch, Dowling and Eggleston) were sitting officers of the Association and members of its Executive Board.

In the second promotion which occurred on May 8, 1989, Fandre was presented the following alphabetically-arranged eligibility list:

J. Buermesch
J. Dowling
E. Eggleston
R. Voelker

Fandre selected Voelker from this list. Voelker was once a member of the Association's bargaining committee but was never a member of the Association's Executive Board. All of the individuals not chosen from this list (i.e. Buermesch, Dowling and Eggleston) were sitting officers of the Association and members of its Executive Board.

In the third promotion which occurred on July 12, 1989, Fandre was presented the following alphabetically-arranged eligibility list:

J. Benz
J. Buermesch
J. Dowling
E. Eggleston

Fandre selected Benz from this list. Benz was not an activist in union matters and was not a member of the Association Executive Board. All the individuals not chosen from this list (i.e. Buermesch, Dowling and Eggleston) were sitting officers of the Association and members of its Executive Board.

In the fourth promotion which occurred on November 8, 1989, Fandre was presented with the following alphabetically-arranged eligibility list:

J. Buermesch
J. Dowling
E. Eggleston
P. Kaczmarek

D. Kratzke
R. Zdroik

Pursuant to Department Directive 80-3, there were seven names on this list because Kaczmarek, Kratzke and Zdroik were all tied in their overall order of ranking. Fandre selected Zdroik from this list. Zdroik was not an activist in union matters and was not a member of the Association Executive Board. Of the individuals not chosen from this list, all except Kaczmarek (i.e. Buermesch, Dowling, Eggleston and Kratzke) were sitting officers of the Association and members of its Executive Board.

In the opinion of the Examiner, there is nothing suspicious about Fandre's selections in the first promotion. He was given a list of six names, three of which were union officers and three of which were not. It so happened that two of the non-officers were selected.

Beginning with the second promotion though a suspicious pattern begins to emerge. Stated simply, the pattern was that the union officers on the eligibility list were not selected for promotion while the non-officers were. In the second promotion there were three union officers and one non-officer (Voelker) on the list. The non-officer was selected.

The same thing occurred in the third promotion where there were three union officers and one non-officer (Benz) on the list. Once again, the non-officer was selected.

Virtually the same thing happened in the fourth promotion where there were four union officers and two non-officers (Kaczmarek and Zdroik) on the list. Once again, one of the non-officers (Zdroik) was selected.

The foregoing demonstrates that in the second and third promotions, the only non-officer on the list was selected. Virtually the same thing occurred in the fourth promotion where all four union officers were not selected for promotion while one of the two non-officers was selected.

As previously noted, Fandre could select anyone he wanted off the eligibility list submitted to him. Of course, this discretion in making promotion decisions cannot be used as a mask for decisions which interfere or discriminate under the Municipal Employment Relations Act. Specifically, Fandre could not legally pass-over any candidate on those lists or fail to promote them, in part, because of their union activities. Here, there is no direct evidence that Fandre did that (i.e. pass over any candidate because of their union activities). Nevertheless, the Examiner is convinced the pattern just identified of Fandre not promoting union officers to any of three separate corporal vacancies in 1989 was not just happenstance or a coincidence. Rather, it was intentional. Given the foregoing pattern and considering the total circumstances presented by the instant record, especially Fandre's threat to sue the Association Executive Board in 1985 over Dowling's letter to the editor, the Examiner draws the inference that one or more of the Complainants were not selected for any of three separate corporal vacancies in 1989 because of their past union activity. Said another way, the inference drawn by the Examiner from the record as a whole is that the Complainants' union activity cost one or more of them a promotion. Were the Examiner to overlook the string of promotional strike-outs suffered by the Union's entire leadership, the unmistakable message to the Stevens Point police officers would be that if an employe is active in union affairs, then his/her chances of promotion are nil.

In so finding, the Examiner is not saying that the reasons given for the selection of those who were promoted were pretextual. Instead, the Examiner finds that Fandre's 1989 corporal promotion decisions were unlawfully tainted,

insofar as who he selected, because his failure to select any of the Complainants for any of three separate corporal vacancies was motivated, at least in part, by his (Fandre's) hostility toward their past union activity. This is precisely the sort of mixed-motive that the "in-part" test of Muskego-Norway seeks to address. As a result, it is concluded that Fandre's actions violated Sec. 111.70(3)(a)3, Stats. Having found such a violation, a derivative Sec. 111.70(3)(a)1 violation is also found.

Remedy

Given the foregoing finding that one or more of the Complainants were passed over for promotion to corporal in 1989, in part, because of their past union activity, the Examiner is obligated to rectify that misconduct by granting relief in the form of remedial and affirmative orders. In crafting remedies, the Examiner is to order that relief necessary to restore the status quo ante and effectuate the purposes of MERA. Generally speaking, such remedies are designed to cure, not to punish. These remedies are not intended to place the affected employe in a better position than what they were in prior to the employer's unlawful conduct. Remedies for employer discrimination are tailored to the unique kind of discrimination involved. 22/

As noted in the Timeliness section, this remedy will be limited to just the second promotion in issue (i.e. the one occurring May 8, 1989). The other three promotions in issue were found to have occurred outside the statute of limitations. As a result, no remedy can be imposed for those three promotions.

Attention is focused first on the class of individuals who qualify for a remedy.

Complainant Kratzke was only on the fourth promotion list (i.e. the one filled November 8, 1989). Since inclusion on the second list (i.e. the one filled May 8, 1989) is a prerequisite for being in the class of individuals eligible for the remedy, and Kratzke was not, it follows that he is not eligible for inclusion in the class of individuals eligible for the remedy awarded below.

Complainants Dowling and Eggleston were on the second promotion list. That being the case, it is apparent they qualify for inclusion in the remedy awarded here.

Complainant Buermesch was also on the second eligibility list so it stands to reason that he should be included in the class of individuals eligible for the remedy for the same reason as Dowling and Eggleston. In so finding, the Examiner is well aware of the fact that Buermesch resigned his employment from the City in January, 1990. Thus, he has not worked for the City for over two years. In the Examiner's opinion though, this fact does not preclude him from sharing in the remedy. Were the Examiner to find that Buermesch could not participate in the remedy because he no longer works for the City would be to totally ignore the reason Buermesch resigned. That reason, of course, was that he disagreed with the instant (corporal) promotions that were made. He felt strongly enough about the promotion decisions Fandre made to resign in protest. Certainly his resignation shows the depth of his conviction over the matter. The Examiner has therefore decided to keep Buermesch in the class of individuals eligible for the remedy awarded here even though he no longer works for the City.

22/ City of Evansville, Dec. No. 24246-A (Jones, 3/88), aff'd., Dec. No. 24246-B (WERC, 9/88).

Having so found, the focus now turns to the appropriate remedy. A common remedy when a promotion is found defective is to vacate the promotion in question. 23/ In accordance therewith, the corporal position filled May 8, 1989 by Ronald Voelker is hereby vacated since that promotion decision was unlawfully tainted by Fandre's anti-union animus.

Oftentimes the next part of a remedy in this type of case (after the defective promotion is vacated) would be an order to place the discriminatee in the position in question. Here, that remedy is impossible because there are multiple discriminatees but there is only one corporal position to be filled. This of course means that all the discriminatees cannot be promoted to corporal in order to remedy the City's unlawful conduct. Rather, just one person can be promoted.

Typically, the next part of a remedy in this type of case would be an order to rerun the defective promotion selection process, this time without any anti-union animus. However, the Examiner has considered this possible remedy and found it deficient. In the Examiner's opinion, the status quo ante cannot be restored here by having the City reselect again from among the four candidates on the May 8, 1989 eligibility list. This is because certain changes have occurred since then which make it impossible to recreate the same factual situation that existed May 8, 1989 (when the original promotion decision was made). First, Voelker has been a corporal with the Department for almost three years. As a result, he now has that work experience as a corporal which the other three candidates on the list (Buermesch, Dowling and Eggleston) do not. This experience would no doubt be weighed if the City were simply ordered to pick again from among the four candidates on the May 8, 1989 eligibility list. Second, there is now a strong financial incentive to not select any of the three Complainants (Buermesch, Dowling and Eggleston). That incentive is that if either Buermesch, Dowling or Eggleston were selected for the corporal position, the City would, consistent with this award, have to pay the one selected almost three years of backpay. In contrast, no backpay would be owed to Voelker if he were reselected because he has presumably been receiving corporal pay all this time. Obviously, these two changes are not conducive to creating a level playing field for selection purposes. Instead, these changes favor Voelker over Buermesch, Dowling and Eggleston.

Since the Examiner cannot recreate the factual situation that existed on May 8, 1989 because of the intervening factors noted above, the Examiner has decided that in order for an acceptable remedy to be accorded here, it is necessary to leave Voelker off the list of candidates from which the selection shall be made. In so finding, the Examiner is well aware that this decision adversely affects Voelker, an admittedly innocent party in this matter. Nevertheless, leaving Voelker on the list leaves Buermesch, Dowling and Eggleston without any real remedy for the City's unlawful conduct. Such an outcome is totally unacceptable because they are entitled to a remedy which, as much as possible, restores the status quo ante.

Consistent with the above, the City is directed to select between Buermesch, Dowling and Eggleston for the corporal position which was originally filled May 8, 1989. After that selection is made, the individual selected shall receive backpay to May 8, 1989, with interest.

Dated at Madison, Wisconsin this 6th day of February, 1992.

23/ Hill & Sinicropi, Remedies in Arbitration (BNA Books, 1991), p. 417.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

