STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS- BARRON COUNTY SHERIFF'S ORGANIZATION, Complainant, vs. BARRON COUNTY, Respondent.	Case 93 No. 44535 MP-2391 Decision No. 26706-A

Appearances:
Mr. Michael Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.
Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, 715 South Barstow Avenue, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Northwest United Educators-Barron County Sheriff's Organization filed a complaint on September 13, 1990 with the Wisconsin Employment Relations Commission alleging that Barron County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 and 5, Stats., when it promoted Tom Avery over John Wagenbach to the new patrol position created effective January 1, 1990. 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 Barron, Wisconsin on January 30, 1991 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and reply briefs whereupon the record was closed on May 31, 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.

FINDINGS OF FACT

1. That Northwest United Educators-Barron County Sheriff's Organization, hereinafter referred to as NUE, the Union or Complainant, is a labor organization with its offices located at 16 West John Street, Rice Lake, Wisconsin 54868;

and that at all times material hereto, the Complainant has been the exclusive collective bargaining representative for the full-time employes of the Barron County Sheriff's Department, including traffic officers and dispatchers.

2. That Barron County, hereinafter referred to as the County or Respondent, is a municipal employer with its offices located at 1671 18th Street, Barron, Wisconsin 54812.

3. That at all times material hereto, NUE and the County have been parties to a series of collective bargaining agreements for the County's law enforcement employes, including an agreement effective January 1, 1990 through December 31, 1990; that said agreement provided for final and binding

arbitration of unresolved grievances; and that said agreement did not contain any job posting, promotion or transfer procedures other than the following provisions:

ARTICLE II - MANAGEMENT RIGHTS

> The County possesses the sole right to operate the County government and all management rights repose in it subject to the provisions of this contract and applicable law. These rights include, but are not limited to the following:
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> . . .
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> C. To hire, promote and assign employees in positions with the County;
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> . . .
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> Whether or not the County has been reasonable in the exercise of these management rights shall be subject to the provisions of the grievance procedure.

4. That the County has established a Civil Service Commission for the Sheriff's Department; that this Commission is comprised of the County's Law Enforcement Committee and the Sheriff; that Section 5.01 of the County's Code of Ordinances sets forth the criteria and procedures to be used when filling deputy vacancies; that Section 5.01(3)(f) of this Code provides that the Commission shall establish an eligibility list for deputy positions which shall be valid for one year; that this section further provides that the deputy positions shall be filled by appointment by the Sheriff from a list of three persons for each position; and that the Sheriff has the discretion under this section to select any of the three persons certified to him on an eligibility list.

5. That Jerry Johnson became the County's Sheriff in January, 1989; that during his tenure as Sheriff, he has had the occasion to fill three patrol positions; that the first patrol vacancy occurred in February, 1989, as a result of Sheriff Johnson's promoting Richard Olson from his patrol position to the position of Chief Deputy; that pursuant to Section 5.01(3)(f), the County's Civil Service Commission conducted oral interviews and established an eligibility list for this deputy patrol position on April 5, 1989; that the candidates had undergone a written testing procedure prior to the oral interview; that the names of five persons were certified for inclusion on this

eligibility list; that the five were Dispatchers Mary Dexter, Mark Trowbridge, Jerry Larson, John Wagenbach and Tom Avery; that there is nothing in the record indicating that these five names were listed in any particular order or reflected a ranking based on test results; that there is nothing in the record regarding the relative test scores of the persons on the April 5, 1989 eligibility list; and that Sheriff Johnson awarded the patrol position to Dexter because he thought she was the best person for the position.

6. That on November 14, 1989, an additional deputy patrol position was authorized by the County Board, effective January 1, 1990; that at that time, the County Board also created the non-bargaining unit position of jail supervisor and increased the Sheriff's Department part-time secretarial position to full-time; that Sheriff Johnson decided that the priority in filling these three new positions was that the secretarial position would be filled first, the jail administrator position would be filled second and the new deputy patrol position would be filled third; that this was the order in which these positions were eventually filled; and that the secretarial position was filled January 2, 1990.

7. That NUE Executive Director Michael Burke appeared at the January 15, 1990 Law Enforcement Committee meeting wherein he indicated that it was NUE's position that the newly-created deputy patrol position should be filled from the April 5, 1989 eligibility list; that Burke appeared at this meeting with Mark Trowbridge, one of the candidates on the April 5, 1989 eligibility list; that the Law Enforcement Committee decided to address the filling of the newly-created patrol position at their next monthly meeting; that at their February, 1990 meeting, the Law Enforcement Committee passed a motion directing Sheriff Johnson to write NUE and indicate that the County would fill the newly-created patrol position in an orderly fashion, but that (in doing so) it may go beyond the April 5, 1990 certification deadline; that on February 14, 1990 Sheriff Johnson wrote Burke a letter repeating the wording of the aforementioned Law Enforcement Committee motion; and that subsequent Law Enforcement Committee minutes indicate that this motion was intended to extend the April 5, 1989 eligibility list beyond its April 5, 1990 expiration date.

8. That the new jail supervisor position was filled in March, 1990; that Dispatcher Jerry Larson was promoted to the position; and that although Larson did not have the highest score of the three persons on the eligibility list for that position, Sheriff Johnson selected Larson for the position because he thought Larson was the best qualified.

9. That about this same time, the State awarded the County additional drug experiment monies; that these additional monies enabled the County to fund a full-time drug unit coordinator position; that as a result, the County decided to expand Investigator Bob Scow's existing drug unit position from part-time to full-time; that the movement of Scow to the full-time drug unit coordinator position created a vacant investigator position which the Law Enforcement Committee directed be filled from the patrol staff; that five employes posted for the non-bargaining unit investigator vacancy and were tested on April 27, 1990; and that as a result of the testing, the Commission awarded the investigator position to David Strohmeyer, who had been a patrolman in the department.

10. That after Strohmeyer was promoted to the investigator position, the County decided to fill his vacant patrol position; that in doing so, the Law Enforcement Committee decided not to use the normal procedure of submitting three names to the Sheriff for him to pick one; that the reason the Law Enforcement Committee deviated from the normal procedure in this instance was that it decided that existing vacancies in the department were not being filled fast enough; that at the time, there were two vacant dispatcher positions and a

vacant patrol position to be filled; that the Committee therefore decided that although the April 5, 1989 eligibility list had technically lapsed April 5, 1990, it would use that list to fill Strohmeyer's vacant patrol position; that when this decision was made on April 27, 1990, there were still three candidates left on the April 5, 1989 list; that Sheriff Johnson recommended that Mark Trowbridge, one of the individuals on that eligibility list, be appointed to the vacant patrol position; that Sheriff Johnson recommended Trowbridge for the position because he thought Trowbridge was qualified for same; that the Law Enforcement Committee approved this recommendation; and that this was the second deputy patrol position filled by Sheriff Johnson.

11. That as of late April, 1990, the new patrol position created effective January 1, 1990 remained unfilled; that by that time, only two names (Wagenbach and Avery) were left on the April 5, 1989 eligibility list because the others on that list (Dexter, Larson and Trowbridge) had assumed other positions with the department; that the Law Enforcement Committee decided to compile a new eligibility list for the new patrol position; that the applicants for the position were tested on June 2 and interviewed on June 28, 1990; that afterwards, the following three candidates were certified to Sheriff Johnson: non-bargaining unit employe Brian Rose and Dispatchers John Wagenbach and Tom Avery; that there is nothing in the record regarding the relative test scores of the three persons on this eligibility list; that pursuant to Section 5.01 of the County Code, Sheriff Johnson had the authority and the discretion to select any of these three for the new patrol position; that on July 17, 1990, the Law Enforcement Committee was advised that Sheriff Johnson had selected Avery for the new patrol position; that Sheriff Johnson awarded the position to Avery because he thought Avery was the best person for the position; and that this was the third patrol position filled by Sheriff Johnson.

12. That no grievance was ever filed concerning the County's failure to promote John Wagenbach to the patrol position created January 1, 1990 and filled on or about July 17, 1990.

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

CONCLUSION OF LAW

That when the County failed to promote John Wagenbach to the new patrol position created effective January 1, 1990 and filled on or about July 17, 1990, it did not (1) interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed under Section 111.70(2), Stats.; (2) initiate, create, dominate or interfere with the formation or administration of a labor organization; (3) unilaterally change the existing promotional procedure; or (4) violate the parties' collective bargaining agreement; and consequently, it did not violate Secs. 111.70(3)(a)1, 2, 4 or 5, Stats.

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

ORDER 1/

It is ordered that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 27th day of August, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

(Footnote 1/ appears on the next page.)

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

Section 111.07(5), Stats.

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

BARRON COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, NUE alleged that the County committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2 and 5, Stats., when it promoted Tom Avery over John Wagenbach to the new patrol position created effective January 1, 1990. At the hearing, NUE amended its complaint to also allege that these same facts violated Sec. 111.70(3)(a)4, Stats. The County denies it committed any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

NUE's position is that the County's actions herein violated Wagenbach's contractual and statutory rights. First, addressing the matter of the choice of forum, it submits that this case is appropriately before the Examiner as a prohibited practice complaint even though the parties' contract contains a grievance procedure. It notes that while one of its allegations is that the County violated the collective bargaining agreement, this case also involves allegations of interference with protected rights as well as a unilateral change in a mandatory subject of bargaining (i.e. the promotional procedure). In the Union's view, the key to this case is whether the April 5, 1989 test results should have been applied in filling the new patrol position which was created January 1, 1990. It submits that an analysis of this issue goes well beyond the four corners of the parties' collective bargaining agreement, so it is properly presented as a statutory prohibited practice complaint. With regard to the alleged contractual violation, the Union acknowledges that Article II of the contract (the Management Rights clause) gives the County great discretion in promotion decisions with the only limitation being that the County's decisions must be reasonable. According to the Union, the County's actions in this case were not reasonable because in February, 1990, it agreed to extend the April 5, 1989 eligibility list past its April 5, 1990 expiration date to fill one patrol position, but later it decided not to use that same eligibility list to fill another patrol position, namely the new position created effective January 1, 1990. Thus, in the Union's view, the new patrol position should have been filled from the April 5, 1989 eligibility list. Additionally, at the hearing, the Union contended that the aforementioned management rights language had been defined over the years by the parties' past practice, and that their past practice was that promotions were made from the eligibility list in order of test results. The Union argues that this practice was not followed here. While this contention is contractual in nature, the Union argues that the instant facts also constitute an unlawful unilateral change. It believes that the County was obligated to fill the new patrol position created effective January 1, 1990 from the April 5, 1989 eligibility list. It notes that did not happen though; instead the County retested and reinterviewed for the new patrol position. The Union submits that while the County did fill the new patrol position from within, it should have utilized the April 5, 1989 list, not a new list, in doing so. Additionally, it is the Union's view that the fact that the person ultimately selected for the position (Avery) was also on the April 5, 1989 eligibility list does not excuse the County's decision to retest and reinterview for the position. NUE therefore contends that the County unilaterally changed the existing promotional procedure during the course of filling the new patrol position created effective January 1, 1990 because it awarded Trowbridge a patrol position based on the April 5, 1989 eligibility list but denied Wagenbach the same rights. Finally, it argues that these same facts (i.e. extending the April 5, 1989

eligibility list for Trowbridge but not for Wagenbach) also constitute unlawful interference. In order to remedy the County's alleged unlawful promotional decision, the Union requests that Wagenbach be awarded the patrol position filled by Avery and made whole.

The County's position is that its actions herein did not constitute a prohibited practice. First, it argues that its decision to promote Avery rather than Wagenbach to the newly-created patrol position was consistent with its contractual reserved management rights. It notes in this regard that the contract does not contain any job posting, promotion or transfer provisions. Thus, in its view, the County has reserved great authority regarding promotions. It further notes that although the new patrol position in question was created effective January 1, 1990, there is nothing in the contract requiring the Sheriff to fill that position by a certain date, or at all for that matter. Next, it submits that its decision to promote Avery rather than Wagenbach to that position was also consistent with both the County's Civil Service Code and statutory provisions and therefore that decision must stand. In the County's view, it was not obligated to extend the April 5, 1989 eligibility list to fill the new patrol position. The County acknowledges in this regard that it extended the April 5, 1989 eligibility list for Trowbridge. However, it notes that when it did so (i.e. late April, 1990), there were still three names left on the eligibility list whereas by June, 1990 (when the new deputy position was filled), there were only two names left from the April 5, 1989 eligibility list because the others had assumed alternate positions with the department. Since both County ordinance and statutory provisions require that the Sheriff appoint from a list of three names, the County argues it could not use an eligibility list containing just two names. Third, the County contends that there is no past practice which supports the Union's position. The County expressly challenges the Union's allegation that there is a past practice of promoting persons from the eligibility list in order of their test results. According to the County, there is nothing in the record supporting the existence of a practice which obligated the County to award the new patrol position to Wagenbach or to support the Union's allegation that the County unlawfully changed an existing past practice. Finally, the County submits that the Union failed to meet its burden of proof in proving any violation of the Municipal Employment Relations Act. It therefore requests that the complaint be dismissed.

DISCUSSION

Alleged Violation of Sec. 111.70(3)(a)5, Stats.

The Union contends that the Employer's actions herein constitute a violation of the parties' collective bargaining agreement (i.e. a breach of contract). Section 111.70(3)(a)5, Stats., provides that it is a prohibited practice for an employer "to violate any collective bargaining agreement previously agreed upon by the parties. . ." Normally, the Commission will not exercise its jurisdiction to resolve contractual questions where, such as here, the parties have agreed to submit unresolved disputes to arbitration. 2/ One exception to this policy is when the parties waive the arbitration provision. 3/ Here, although the Union never even filed a grievance or requested

2/ Lake Mills Jt. School District, Dec. No. 11529-A (Fleischli, 7/73), affd., Dec. No. 11529-B (WERC, 8/73).

3/ City of Appleton, Dec. No. 14615-C (WERC, 1/78); Superior Joint School District No. 1, Dec. No. 12174-A, (Greco, 5/74), affd., Dec. No. 12174-B (WERC, 5/75).

arbitration over the filling of the new patrol position, the parties fully litigated the merits of this contractual claim as part of their overall case. At no time did either party take the position that the Examiner should refuse to assert jurisdiction over the contractual claim or defer it to arbitration. That being so, the parties implicitly submitted the contractual claim to the Examiner and waived the arbitration provision in their agreement with respect thereto. 4/ Accordingly, the Examiner will address and decide the contractual claim on its merits.

The first component of the contractual claim is whether the County's decision to promote Tom Avery rather than John Wagenbach to the new patrol position violated an express provision in the parties' collective bargaining agreement. Usually, promotional procedures and the filling of job vacancies are topics that are addressed in great detail in labor agreements. Here, though, it is undisputed that the instant contract does not contain any job posting, promotion or transfer provisions other than that portion of the Management Rights clause which specifically grants the Employer the sole right "to hire, promote and assign employes in positions with the County." Given this language, it is apparent that the County possesses great discretion and latitude in promotion and transfer decisions (i.e. filling vacant or new positions). The only contractual limitation on this discretion is that the County be "reasonable in the exercise of (this) management right." Application of that limitation here means that in order to pass muster, the County's promotion and/or transfer decision must be reasonable.

Based on the following rationale, the undersigned finds that the instant promotion decision was reasonable and therefore passes muster. To begin with, just because the County did not fill the new patrol position from the April 5, 1989 eligibility list does not make the County's promotional decision per se unreasonable. Implicit in the Union's contention that the County should have filled the new patrol position from the April 5, 1989 eligibility list is that the County was somehow obligated to fill a position created effective January 1, 1990 on a certain timetable. The problem with this contention is that there is no contractual requirement that the County fill a newly-created position by a certain date. Instead, as previously noted, whether and when positions are filled is a matter the County has reserved to itself under the contractual Management Rights clause.

Next, the County went to great lengths at the hearing to show why a new patrol position created effective January 1, 1990 was not actually filled until July, 1990. The record indicates in this regard that numerous existing departmental positions were vacated in 1989 and early 1990 that needed to be filled (i.e. a chief deputy position, two patrol positions, an investigator position and two dispatcher positions). In addition to these positions, three new departmental positions were created effective January 1, 1990: a secretarial position, a jail administrator position and a patrol position. Sheriff Johnson decided that these newly-created positions would be filled after the vacancies for the existing positions. Said another way, the Sheriff decided to fill existing positions before new positions were filled. That is what occurred. Afterwards, attention was turned to three new positions created effective January 1, 1990 which the Sheriff decided to fill in the following order: the secretarial position first, the jail administrator position second and the patrol position third. While the position involved here (i.e. the new patrol position) was placed last in terms of priority in filling, and was in fact the last of the new positions to be filled, that was the County's call to make. Nevertheless, this decision (to delay filling the new patrol position

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

until after the other new positions and existing vacancies were filled) caused Wagenbach to believe that the Law Enforcement Committee was not satisfied with the names remaining on the April 5, 1989 eligibility list (of which he was one), so it deliberately waited to fill the new patrol position until after the April 5, 1989 eligibility list had expired in April, 1990. There is no record evidence that such was the case however. That being so, the undersigned is persuaded that the County was not intentionally dilatory in filling either the new patrol position or any of the other vacancies which preceded it, but instead filled those vacancies in an orderly and reasonably expeditious manner.

Finally, with regard to the procedure used to fill the new patrol position, it is noted that the County followed the procedure set forth in Sec. 5.01 of the County Code in filling the newly-created patrol position. Specifically, applicants for the position were tested and interviewed. Afterwards, the Law Enforcement Committee certified an eligibility list of three people (Brian Rose, Tom Avery and John Wagenbach) to the Sheriff. Pursuant to the discretion granted him, the Sheriff selected Avery over the other two candidates on the list. Inasmuch as the Union does not allege that the County failed to comply with the provisions of the County's Civil Service Code, and the contract does not establish any other procedure for filling vacancies, there is no reason for finding that the method used by the County to fill the new patrol position was unreasonable. As a result, it is held that the County's promotion of Avery to the new patrol position was reasonable within the meaning of the Management Rights clause. Consequently, no express contractual violation has been found.

The second component of the contractual claim involves whether a past practice exists concerning promotions and, if so, whether it was followed here. While the Union alleges that there is a past practice of promoting persons from eligibility lists in order of their test results, the record evidence does not establish that such is, in fact, the case. First of all, there is nothing in the record to support this allegation. Second, Sheriff Johnson testified without contradiction that he is not obligated to select the person with the highest score for a position. Instead, pursuant to Sec. 5.01 of the County Code, he has the discretion to select any of the three persons certified by the Civil Service Commission. This of course means that the Sheriff can pick whomever he wants off the eligibility list regardless of their test results. Third, the record contains an instance where the test scores were known to the Sheriff and he did not pick the highest scoring person for the position, namely the promotion of Jerry Larson to the jail supervisor position. In light of the foregoing then, it is held that no past practice was shown to exist that the County promotes persons from the eligibility list in the order of their test results. Having so found, it logically follows that the County cannot be held to have failed to comply with a practice that does not exist. The alleged violation of Sec. 111.70(3)(a)5, Stats., has therefore been dismissed.

Alleged Violation of Sec. 111.70(3)(a)1, Stats.

The Union also claims that the County's actions here interfered with Wagenbach's protected rights. Section 111.70(3)(a)1, Stats. makes it unlawful for a municipal employer to "interfere, restrain or coerce" an employee in the exercise of rights under Section 111.70(2), Stats. The question in a Sec. 111.70(3)(a)1 complaint is whether the alleged employer conduct would reasonably tend to chill or to interfere with employee rights protected by Section 111.70(2), Stats. 5/ To sustain its burden of proof, the Union must demonstrate by a clear and satisfactory preponderance of the evidence that the

5/ Milwaukee Board of School Directors, Dec. No. 16231-E (McGilligan, 10/81), aff'd by operation of law, Dec. No. 16231-F (WERC, 10/81).

employer's statements or conduct contained a threat of reprisal or a promise of benefit which would reasonably tend to interfere with a protected employee's right. 6/

In this case, there are neither any employer statements nor conduct which fit this proscription. With regard to Employer statements, there is no evidence whatsoever in the record of any statement by management representatives to Wagenbach which contained a threat of a reprisal or a promise of benefit. Instead, all the record shows in this regard is that Sheriff Johnson testified that he had not had any great problems with Wagenbach and Wagenbach agreed that he had not really had any disputes with Sheriff Johnson. Next, with regard to the Employer's conduct, the record will not support the conclusion that the Employer deliberately waited to fill the new patrol position until after the April 5, 1989 eligibility list expired in April, 1990. As noted in the discussion of the Sec. 111.70(3)(a)5, Stats., claim, numerous departmental vacancies for existing and new positions were filled in 1989 and early 1990. As was his right, Sheriff Johnson prioritized the filling of these vacancies. In so doing, he decided to fill other departmental vacancies before he filled the new patrol position. The end result of this prioritizing was that it was June, 1990 before attention was turned to filling the new patrol position. Nor will the record support the conclusion that the Employer's conduct in not filling the new patrol position from the April 5, 1989 eligibility list constituted unlawful interference. By the time the County turned its attention to filling the new patrol position (i.e. June, 1990), the April 5, 1989 eligibility list had expired. The Union correctly notes that the County nevertheless extended the April 5, 1989 eligibility list when it used it to fill a vacant patrol position in late April, 1990, and selected Mark Trowbridge from the list. Since the Employer extended the list in April the Union argues, why not extend it again in June when the new patrol position was filled. The reason is simple; there were still three names left on the April 5, 1989 eligibility list at the time Trowbridge was selected. However, after Trowbridge was selected this left only two names on that list: Avery and Wagenbach. Since the County Code requires that the Sheriff be provided a list of three persons for each deputy sheriff vacancy, the County was required to do what it did, namely create a new eligibility list containing at least three names (rather than simply picking one of the two names remaining on the April 5, 1989 list). Given the aforementioned findings, there is no basis to conclude that the County, by either its statements or its conduct, interfered with Wagenbach's Sec. 111.70(2), Stats. rights. Accordingly, the alleged violation of this section has been dismissed.

Alleged Violation of Sec. 111.70(3)(a)2, Stats.

NUE also contends that the Employer's actions here violated Sec. 111.70(3)(a)2, Stats. That section makes it a prohibitive practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization. . ." "Domination" involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. 7/ In this case, there is no evidence that the County took control of the local union as an entity, nor is there any evidence that the County

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6/ Western Wisconsin Vocational District, Dec. No. 17714-B (Pieroni, 6/81), affd. by operation of law, Dec. No. 17714-C (WERC, 7/81).

7/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

asserted such control as to impair the Union's independence as the employe's chosen representative. That being so, there is no behavior in the record which threatens the independence of NUE as the representative of employe interests. Accordingly, no violation of Sec. 111.70(3)(a)2, Stats., has been found.

Alleged Violation of Sec. 111.70(3)(a)4, Stats.

Finally, the Union contends that the County unilaterally changed the existing promotion procedure during the course of filling the new patrol position in violation of Sec. 111.70(3)(a)4, Stats. That section makes it unlawful for a municipal employer "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit." Absent a valid defense, a unilateral change in existing wages, hours, or conditions of employment is a per se violation of the MERA duty to bargain. 8/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 9/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 10/

As a practical matter, the conclusion reached on the second component of the contractual claim (i.e. the alleged past practice) disposes of the unilateral change claim. This is because having held that no past practice was shown to exist that the City promotes persons from the eligibility list in the order of their test results, there can be no basis for finding an unlawful unilateral change in filling the newly created patrol position. As a result, the alleged violation of Sec. 111.70(3)(a)4, Stats., has also been dismissed.

In summary then, it is concluded that the County did not act unlawfully when it promoted Tom Avery to the new patrol position created effective January 1, 1990 and filled on or about July 17, 1990. Consequently, the County did not violate Secs. 111.70(3)(a)1, 2, 4 or 5, Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 27th day of August, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

8/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

9/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12 and Green County, Dec. No. 20308-B (WERC, 11/84) at 18-19.

10/ School District of Wisconsin Rapids, Supra.