STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE POLICE ASSOCIATION, Complainant, vs. CITY OF RACINE, Respondent.	Case 362 No. 45113 MP-2433 Decision No. 27020-A

Appearances:
Mr. Robert K. Weber, Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, 514 Wisconsin Avenue, Racine, WI 53403, appearing on behalf of the Associ
Mr. Scott Lewis, Assistant City Attorney, City of Racine, Racine City Hall, Room 201, 730 Washington Avenue, Racine, WI 53403, appearing on behalf

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On January 9, 1991, the Racine Police Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Racine violated Secs. 111.70(2) and (3)(a)3 of the Municipal Employment Relations Act by certain conduct relating to the promotion of Officer Michael Shelby. The Commission appointed Karen J. Mawhinney to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. The Complainant amended its Complaint on December 5, 1991, and the Respondent filed its Answer to the Amended Complaint and Motion to Dismiss Complaint on January 24, 1992. A hearing was held in Racine, Wisconsin, on February 13, 1992, and the parties completed their briefing schedule by May 6, 1992. The parties supplemented the record on May 12, 1992, by notifying the Examiner of facts occurring after the close of the hearing in the matter. The Examiner has considered the evidence and arguments of the parties, and now issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Racine Police Association, called the Complainant or the Association after this, is a labor organization with its office at 938 Hayes Avenue, Racine, WI 53405.

2. The City of Racine, called the Respondent or the City after this, is a municipal employer with its offices located at 730 Washington Avenue, Racine, WI 53403.

3. Michael J. Shelby is an officer with the Racine Police Department since 1975. He has made several efforts to obtain a promotion to the position of Investigator, a position within the bargaining unit. The collective bargaining agreement for 1989-1990 contains the following language regarding promotions:

ARTICLE XIII
Promotional Procedures

1. Promotional Procedure: Promotional appointments shall be made in accordance with Section 62.13(4), Wisconsin Statutes. An officer who is promoted within the bargaining unit shall serve a probationary period in his/her new position for twelve (12) months following the date of his/her promotion. During this probationary period the officer shall be entitled to return to his/her former position at his/her former rate of pay if he/she so decides or, if in the Police Chief's judgment the officer is not sufficiently qualified in the position to which he/she was promoted, he/she may be returned to his/her former position at his/her former rate of pay. The City may be required to show the reasonableness of such action through the grievance procedure. In the event that an officer returns to his/her former position and former rate of pay for any reason under the terms of this Section 1, the officer who filled the position from which he/she was promoted shall also automatically return to his/her former position and former rate of pay.

2. Notice of Job Assignment Vacancy or New Job Position: In the event that a vacancy exists in a job assignment within a rank within the bargaining unit, the City agrees to post a notice of that vacancy at least ten (10) days prior to the filling of the vacant position. Employees within the rank may request on a form approved by the Police Department that they may be considered to fill the vacancy and the name of the employee selected to fill the assignment shall be posted. Any vacancy in the same job assignment which arises within ninety (90) days of any posting may be filled from the names submitted to the original posting, without any reposting of the vacancy.

3. Assignment to "Acting" Position: In the event that it is necessary to assign an employee to an "acting" position which is higher than his/her regular pay grade, the employee selected for such assignment shall be that employee who stands first on the promotional eligibility list for the position to which it is necessary to assign such employee. If the employee standing first on the list refuses the "acting" assignment, the employee standing next on the list will be chosen for such assignment. In the event that an employee is assigned to an "acting" position, that employee will receive the rate of pay for the higher classification to which he/she is assigned on an "acting" basis beginning on the sixteenth (16th) calendar day following the commencement of his/her work in the higher classification. This fifteen (15) day period shall apply only once in the event of repeated "acting" assignments of an employee to a particular higher pay grade. Such "acting" position shall not be maintained for more than eighteen (18) months or it shall become a permanent position.

. . .

6. Promotion to Grade of Investigator (PH-4):

If a vacancy occurs requiring the promotion of an employee to the classification of Investigator, an employee wishing to take the written test for such promotion must have at least five (5) continuous years of experience as a police officer on the Racine Police Department. Thereafter the employee will be promoted from a promotional eligibility list set up under the terms of Paragraph 7 of this Article XIII.

7. Compilation of Promotional Eligibility Lists for Grade of Traffic Investigator (PH-3) and Investigator (PH-4): The Association recognizes that promotion to the grades of Traffic Investigator (PH-3) and Investigator (PH-4) requires specialized knowledge of police technology, administrative ability, leadership qualities and the ability to manage personnel.

The City agrees that, pursuant to Section 62.13, Wisconsin Statutes, it will recommend to the Racine Police and Fire Commission for promotion the employee who stands first on the respective eligibility list for the said position. Position on the eligibility list for the grade of Traffic Investigator (PH-3) and for the grade of Investigator (PH-4) shall be determined by the numerical composite score, such composite score being determined by the addition of the written test score and one-half (1/2) point for each complete year of continuous service since the date of appointment as an officer on the Racine Police Department. Complete continuous years of service shall be calculated to January 1 immediately prior to the administration of the written test in even numbered years.

Primary List: All officers who achieve a grade of seventy-five percent (75%) or higher on the written exam for a pay grade for which they wish to be promoted will receive a composite score consisting of the sum of their written test score and one half (1/2) point for each complete year of continuous service since the date of appointment as an officer on the Racine Police Department. Officers in this category shall then be ranked sequentially from highest to lowest based upon said composite score.

Secondary List: The next highest twenty-five percent (25%) of the officers taking the written exam but scoring less than seventy-five percent (75%) shall also receive a composite score as set forth in the previous paragraph and shall also be ranked sequentially from highest to lowest on a separate eligibility list. If the list of eligible officers score seventy-five percent (75%) or above on the exam becomes exhausted, this secondary promotional list shall then be used to award promotional opportunities which may arise.

The promotional lists described above shall remain in effect until a new list is prepared following the administration of another written examination.

8. Police and Fire Commission Interviews: The promotional candidate being recommended by the Chief for promotion may, at the option of the Commission, be interviewed by the Racine Police and Fire Commission prior to its consideration of this recommendation for promotion.

9. Written Test: The written test for each pay grade shall be prepared and scored by an independent testing agency which shall prepare the test based upon a bibliography of materials determined by the Chief of Police or his designee. The tests shall be administered during January of even numbered years. The test results shall be opened in the presence of two (2) Corporation 6/ representatives. The Chief will make reasonable efforts to provide a bibliography for promotional exams at least six (6) months in advance of the date of the exam. The parties recognize that the funding process of the Police and Fire Commission may prevent compliance with that schedule.

The contract also includes the following grievance procedure:

ARTICLE VIII

Grievance Procedure

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4. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

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6. Steps in Procedure:
Step 1.

The employee, alone or with not to exceed two (2) Corporation representatives, shall deliver his/her grievance in written form to his/her regular shift or division Commander within fourteen (14) calendar days after he/she knew or should have known the cause of his/her grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The employee's regular shift or division Commander shall, within seven (7) calendar days, inform the employee of his decision in writing.

Step 2.

If the grievance is not settled at the first

6/ The Racine Police Association's name was previously the Racine Policemen's Professional and Benevolent Corporation, and references to the Corporation are synonymous with the term Association.

step, the employee and/or the Corporation, within five (5) working days after the written decision of the shift or division Commander in Step 1, shall submit the written grievance to the Assistant Chief of Police. The Assistant Chief or his designee will review the record and further investigate the grievance. At the request of either party, a meeting will be held at this Step for the purpose of discussing possible resolution of the grievance. The participants in such a meeting shall include the aggrieved, alone or with not to exceed two (2) Corporation representatives. The Assistant Chief will inform the aggrieved employee and the Corporation in writing of his decision within fourteen (14) calendar days after receipt of the grievance.

Step 3.

If the grievance is not settled at the second step, the employee and/or the Corporation, within five (5) working days after the written decision of the Assistant Chief in Step 2, shall submit the written grievance to the Police Chief. The Chief or his designee will review the record and further investigate the grievance. The Chief will inform the aggrieved employee and the Corporation in writing of his decision within fourteen (14) calendar days after the receipt of the grievance.

Step 4.

If the grievance is not settled in the third step, the subject matter of the grievance may be appealed as follows within five (5) working days after the written decision of the Chief. If the grievance is covered by Section 62.13(5), Wisconsin Statutes, if may be appealed to the Police and Fire Commission in accordance with Section 62.13, Wisconsin Statutes. If the subject matter of the grievance does not involve the subjects set forth in the previous sentence, it may be appealed to arbitration within five (5) working days after the written decision of the Chief.

4. Shelby was promoted to the position of Investigator in February of 1985 and was demoted in November of 1985 to patrol officer for a violation of work rules. Shelby took the exam for the Investigator position again in January of 1988 and stood second on the eligibility list for promotion to Investigator. Jerry Baldukas was first on the eligibility list. When two vacancies for Investigators occurred in April of 1988, Police Chief Karl Hansen recommended Baldukas and Shelby to the Police and Fire Commission. The PFC promoted Baldukas but not Shelby. The next vacancy occurred on May 20, 1988, and Hansen did not recommend Shelby, because the PFC was made up of the same people that rejected the recommendation of Shelby the previous month. Hansen recommended the officer next in line on the eligibility list, Marty DeFatte, who was unable to serve because he was off duty and on a suspension. Hansen had also recommended to the PFC that DeFatte be terminated, but the PFC did not terminate DeFatte. The PFC rejected DeFatte for promotion and promoted the next officer on the list, Erdmann. The next vacancy occurred October 4, 1988, and Hansen recommended Fellion, who was promoted by the PFC. Hansen did not recommend Shelby, again because the makeup of the PFC remained the same as the

body that rejected him earlier that year. Other than Shelby and DeFatte, the PFC has always promoted the individual recommended by the Chief for promotion.

5. Shelby grieved his lack of promotion in 1988, and the City and Association proceeded to arbitration on the issue before Arbitrator Gil Vernon. Arbitrator Vernon denied the grievance in an award dated July 31, 1989. An appeal of Arbitrator Vernon's award was made to Circuit Court in Racine County, and Judge Emmanuel J. Vuvunas ruled on June 15, 1990, to affirm Arbitrator Vernon on the issue of the failure to promote Shelby but remanded the matter and ordered that Shelby's named be placed before the PFC on at least three occasions to compensate him for the occasions when his name should have been placed before the PFC but was not.

6. In 1989, the makeup of the PFC had changed, and Hansen recommended Shelby and DeFatte in June of 1989 for promotions. The PFC denied both of them, and promoted Officers Kuzia and Mooney to acting positions, due to the fact the City and the Association were waiting for the results of the Vernon Award which could have awarded an Investigator position to Shelby. Hansen recommended Shelby and DeFatte again on December 6, 1989, and the PFC rejected both of them and promoted Officer Payne. The list then expired in January of 1990.

7. In January of 1990, a test was given to establish an eligibility list for Investigator positions. The test was scheduled for January 10, 1990, at 9:00 a.m. in the auditorium of the Police Department. Shelby arrived late and was allowed to take the exam two days later. He placed first on the eligibility list but his name later deleted from that list after two other officers grieved the Chief's decision to allow Shelby to take the test at a later date. Shelby then grieved the removal of his name from the eligibility list, and the grievance went to arbitration before Arbitrator Richard B. Bilder, who sustained the grievance on July 23, 1991. The parties made an exhaustive record before Arbitrator Bilder, and chose not to relitigate all the facts for the record in this case. The relevant portions of the Bilder award follow:

FACTS

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> Under Article XIII, Section 9 of the Agreement between the parties, a written test for Investigator, given by an independent testing agency, will be held "during January of even-numbered years." On November 3, 1989, Karl Hansen, Chief of the Racine Police Department, posted an announcement that the next Investigator exam would be "during January of 1990." The notice was reissued and reposted on November 10, 1989, adding some additional information concerning the test for Lieutenant which would be held shortly thereafter. On November 29, 1989, the Department posted a Special Order announcing that the exam for Investigator would begin at 9:00 a.m. on Wednesday, January 10, 1990, which was a normal work day for the Department, and would last for two hours. The order remained posted until January 13, 1990. The Grievant intended to take the Investigator exam and there is no question but that the Grievant knew in advance of the exam's starting time and duration.
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> On January 9, 1990, the day before the exam, the Grievant worked his normal 7:00 a.m. to 3:00 p.m. first

shift. He additionally participated in a homicide investigation and was present at an autopsy of the murder victim which required his working later than usual. He punched out at 7:37 p.m. the evening of January 9, 1990, having worked 4.6 hours of overtime, and arrived at his home about 8:00 p.m. that evening. When the Grievant arrived home, he discovered that his basement sump pump had malfunctioned. Consequently, he spent until about 9:30 p.m. mopping or cleaning up the basement and went to bed about 10:30 or 11:00 p.m.

According to the Grievant's testimony, he got up at 5:50 a.m. on January 10, 1990, the date of the exam. He testified that, at 6:10 a.m., he called his Supervisor, Sergeant David Beranis and explained his situation regarding his basement. He says that Sergeant Beranis advised him that sufficient manpower existed so that the Grievant could finish cleaning his basement by taking several hours of comp time but that neither the Grievant nor the Sergeant mentioned the exam in that conversation. The Sergeant subsequently deposed that he had no recollection one way or the other of the incident. The Grievant testified that he had at this time completely forgot about the exam. He waited for the basement floor to finish drying and put his patrol uniform in the dryer about 9:00 a.m. and left for work at 10:00 a.m.

There is a dispute as to the exact time of the Grievant's arrival at work at the Police Department headquarters; the Grievant says it was about 10:30 a.m. and the City says it was about 10:40 to 10:45 a.m. In any event, very shortly after his arrival at the Department the Grievant saw and began chatting with another officer, Investigator Rick Ladd. Another officer, Robin Jacobsen, soon joined them and mentioned that he had just got out from the Investigator's exam. The Grievant then remembered the exam, checked the bulletin board and became upset because he realized he had forgotten and was missing it. At this point, Officer Jacobsen suggested that there might still be time for him to take the exam.

The Grievant thereupon ran down to the police auditorium where the test was being given. He arrived there at a time which is in dispute, but was certainly no earlier than 10:30 a.m. The evidence is also conflicting and not clear as to what happened next. According to the Grievant's statement, he immediately went up to the civilian exam proctor, Carol Kiefer, apologized for being late, and asked if he could take the exam in the time remaining. Ms. Kiefer said it was up to Lt. Dennis Higgins, who was helping to oversee the exam, but was momentarily absent. She left and shortly returned with Lt. Higgins and there was a discussion as to whether and, if so, where, the Grievant would be allowed to take the exam.

At some point in these discussions, the Grievant offered Ms. Kiefer and Lt. Higgins explanations of why

he was late, but there is considerable dispute as to exactly what he said. The Grievant claims that he said he had "worked late lat night on an autopsy," had had some trouble at home, had asked for comp time, and had forgotten the test was that morning. Lt. Higgins claims that he said that he had "worked all night on an autopsy." As will be indicated shortly, the Department's internal investigator, Sergeant Benn, talked, within several weeks of the incident, with Ms. Kiefer and other officers present and they variously recalled the Grievant saying that "I had forgotten the test was today" and giving a number of other reasons for coming in late including that he had worked late, been at an autopsy, overslept, and taken comp time. However, at the hearing itself, some months later, not only Lt. Higgins, but also Ms. Kiefer and Sergeant Purdy, who had taken the exam, testified that the Grievant had said that he had "worked all night on an autopsy."

In any event, there was some discussion about possibly permitting the Grievant to begin then to take the test, but this turned out not to be practicable since Ms. Kiefer had, for personal reasons, to leave promptly at 11:00 a.m., and neither the auditorium nor any other room was immediately available or practicable. Ms. Kiefer then suggested that the Grievant might be able to take the test on Friday, two days later, when she had to return to give the examination for promotion to Lieutenant. However, she indicated that she would need authority from her superiors or the Chief of the Department to reschedule the test for that time.

Lt. Higgins thereupon left the auditorium. He first called the testing agency and obtained its approval. He then went to Chief Hansen to seek his permission. Lt. Higgins testified that he told the Chief that the Grievant "had worked all night on a homicide and was not able to get there for the test." Chief Hansen then gave permission for the Grievant to take the test two days later on Friday, but asked Lt. Higgins to verify the Grievant's excuse. Lt. Higgins then called within the Department and verified the Grievant's story that he had worked late on a homicide the previous day. Lt. Higgins then returned to the auditorium and told the Grievant and the proctor, Ms. Kiefer, that the Chief had no problem with the Grievant taking the test on January 12, two days later.

That evening, January 10, 1990, the Grievant and his wife had a social dinner with officers David Smetana and Robin Jacobsen and their wives, who were social acquaintances and both of whom had taken the test that day. The dinner had been arranged previously. The Grievant testified that there was no discussion of the test, other than that it had occurred. This testimony was confirmed by these officers at the hearing.

On January 12, 1990, the Grievant took the Investigator's exam. The Grievant passed the exam (the passing grade was 75), receiving a score of 87. This score was higher than that received by any of the other officers who had taken the exam two days earlier. The Grievant's score, coupled with his seniority points, also entitled him to be ranked first on the eligibility list for promotion to the position of Investigator, pursuant to Article XIII, Section 7 of the Agreement.

The promotion eligibility list for Investigator resulting from the test was published by the Department on January 19, 1990. As required, the Grievant was ranked first on this eligibility list. As will be seen, according to the requirements set out in Article XIII, Section 7 of the Agreement, the Police Chief normally has to recommend to the Racine Police and Fire Commission promotion of the individual who stands first on the eligibility list as a result of the written examination; however, the police and Fire Commission is not required by the Agreement to accept the Chief's recommendation.

On January 12, 1990, the same day the Grievant took the test, Chief Hansen asked Lt. Higgins to further investigate the Grievant's explanation for why he had been late for the test on January 10. On January 19, 1990 (the same day the eligibility list was published), Lt. Higgins reported to the Chief that his investigation showed that the Grievant had left work at 7:37 p.m. the evening of January 9, 1990. Lt. Higgins' report concluded:

> A humanitarian decision was made in allowing this applicant an opportunity to take an examination, based on the explanation that he suffered undue hardship in "working all night" on a case. Knowing Shelby is assigned to days, the "working all night" would indicate two or more shift periods were worked and the officer would be under a great deal of mental fatigue. As it happens, other officers applied for and took the test after having actually worked the whole night long. They got little if any sleep while Shelby should have been well rested in comparison. The reasoning given was, I feel a knowingly made misrepresentation while our response was valid for the information given. I would recommend that a third person, specifically Sergeant Benn, interview Officer Geller as to his understanding of the presentation made by Shelby and possibly gain additional names of those present who may have heard what Shelby reasoning was. He, Sergeant Benn, may also wish to speak with the proctor for that examination. This would preclude any claims of false bias for or against

Shelby in the decision ultimately made.

Chief Hansen accepted Lt. Higgins' recommendation and asked Sergeant Benn, the Department's internal investigator, to further investigate this matter. On January 23, 1990, Sergeant Benn reported back to Chief Hansen on "Officer Shelby's Promotional Testing" as follows:

> Lieutenant Higgins' report is unclear about exactly what Officer Shelby told him on January 10, 1990. For this reason, I contacted Officers Geller, Waite, Prioletta, Purdy, and the test proctor, Carol Kiefer, concerning the statements that were made by Officer Shelby.
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> Officer Geller indicates he clearly recalled Officer Shelby stating, "I forgot the test was today." He then heard him say that he had worked late and gave other reasons on why he was coming in to take the test late.
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> The proctor stated the test was given between 9:00 and 11:00 a.m. and that she did not have the authority to reschedule a test without permission from her boss or the Chief of the agency.
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> Lieutenant Higgins was present during this and then made contact with the Chief and advised Officer Shelby and the proctor that the Chief indicated he did not have any problems with them rescheduling Officer Shelby on Friday.
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> Officer Purdy, when interviewed, also recalled hearing Officer Shelby state, "I forgot about the test," and then referred to taking comp time and oversleeping and being at an autopsy as a reason for being late.
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> Officers Waite and Prioletta both recalled officer Shelby coming in late, however, could not recall what comments he made about being late.
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> The proctor, Carol Kiefer, indicated that she was busy collecting exams, but recalled Officer Shelby coming in at the closing and making a comment about being late because of an autopsy. She also recalled him making a comment about calling the Chief and then about forgetting to show up for the test. She could not recall exactly in what order these comments were made. She also recalled Officer Shelby stating, "I forgot

about the test."

> After evaluating all of the statements, I feel it is clear that Officer Shelby was not lying or misrepresenting statements to the proctor or Lieutenant Higgins about taking the test. I feel it is clear that the reason he was late was that he forgot about the test. The other comments he made were to explain why he had forgotten about the test. Based on these statements, I do not feel that there is any evidence that Officer Shelby intentionally lied to gain an advantage on taking the test at a later date.
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> Lieutenant Higgins' report indicates a "humanitarian decision" was made to let Officer Shelby take the test. I feel that a "quick" decision was made without time for sufficient administrative review. I feel that there was time in this situation which would have allowed us to put Officer Shelby on hold and verify his reasons for being late and determining if they were acceptable or unacceptable.
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> In this situation, we accepted a blanket statement from Officer Shelby without verification and a decision was made immediately which did not call for immediate action.
>
> After reviewing this matter, I feel it would have been within the authority of the Chief, or Lieutenant Higgins representing him, to have denied Officer Shelby to take the test on January 10, 1990.
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> The fact of the matter is at this point in time, we have to live with the first decision. I do not feel that there is any further administration action that can be taken concerning this event.

On January 21, 1990, Officer Richard Geller, who had taken the Investigator's exam on January 10, had ranked second on the exam with a score of 84, and had ranked ninth on the January 19 promotion list, filed a grievance claiming that:

> Officer Shelby was allowed to take this promotional exam for Investigator on January 12, 1990 in direct conflict with Special Order 89-15. The date for testing for the rank of Investigator was scheduled for January 10, 1990. Special Order 89-15 was issued and posted on 11/29/89 requiring that those members interested in

> testing for Investigator would test on January 10, 1990.
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> On January 10 at about 10:30 am, Officer Shelby entered the testing site during the exam period and stated that he forgot the test was today and Shelby requested to start the exam. The test proctor advised Shelby that testing started at 0900 and concluded at 11:00 am. Shelby requested to start the exam at 10:30 am and continue over after 11;00 am. The proctor stated that there was no one available to watch Shelby during that time period. Lieutenant Higgins contacted the Chief and was, according to Higgins, advised that Shelby could take the exam on January 12, 1990. This date was different from the date that all other candidates had to test. This action afforded Shelby an unfair advantage over all the others testing for Investigator.

Officer Geller further stated that he believed this was a grievance because of "past practice and in conflict with special order 89-15 which mandated the date and time for testing for Investigator." The remedy he requested was "Remove Officer Shelby's name from the promotional list under Special Order 90-4."

On January 23, 1990, Officer Daniel Small, who had also taken the Investigator's exam on January 10, had ranked eleventh with a score of 81, and had ranked eleventh on the January 19 promotion list, filed a similar grievance similarly claiming that:

> On 1-10-90, sworn personnel eligible to take Detective Investigator promotional test were to take that test given at 9:00 a.m. On 1-12-90, Michael Shelby was allowed to take the aforementioned test, as he had arrived almost 2 hours late on 1-10-90. On 1-19-90 the promotional test score for Detective Investigator Promotional Test came out. Michael Shelby's name was on the list making him eligible for promotion to the rank of Detective Investigator.

Officer Small alleged that this was a grievance because:

> Writer feels this issue is a grievance as there was a set day and time for the promotional testing which all sworn personnel were to abide by. To give one individual an unfair advantage of not taking the test along with other sworn personnel led to Shelby's name being on the promotional list for Detective

Investigator.

Officer Small also asked as a remedy that the City "Remove Michael Shelby's name from list making him ineligible for promotion to the rank of Detective Investigator."

An Association representative advanced both the Geller and Small grievances to Step 1 of the grievance procedure under the Agreement, where the Shift Commander denied both grievances. In the meantime, on January 23, 1990, the Association's Board met to discuss both the Small and Geller grievances. The Grievant was invited to the Board meeting. There is some conflict in evidence was to whether officers Small and Geller were invited. In any event, the Association's Board voted not to support Officer Small's and Officer Geller's grievances.

However, the Association continued to process the Small and Geller grievances to Step 2 of the grievance procedure, and, on February 1, 1990, the Association's President, Officer Rick Ladd, pursuant to Step 3, processed both the Small and Geller grievances to Chief Hansen. However, Ladd at that time informed Chief Hansen that the Association was not further supporting or pressing these two grievances, and that the Association would "take care" of them.

Chief Hansen decided, nevertheless, to proceed to review and investigate Officer Small's and Officer Geller's grievances. Chief Hansen testified that he decided to accept Lieutenant Higgins' view that the Grievant had engaged in a deliberate misrepresentation, rather than that of Sergeant Benn that he had not. The Chief also sought the review of this matter by the Racine City Attorney's Office. Following this review, the Chief decided to grant Officer Small and Officer Geller the relief they sought by removing Officer Shelby from the promotion list. Consequently, on February 8, 1990, Chief Hansen forwarded a proposed Memorandum of Agreement formally settling Officer Geller's and Small's grievances to these two officers. The settlement agreement provided in relevant part:

> The undersigned parties, City of Racine (City), Racine Police Association (Union), and Richard Geller and Daniel Small (Grievants), hereby agree that the following terms and conditions shall resolve Grievances 90-2 and 90-3:
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> 1. The Union and the Grievants will withdraw Grievances 90-2 and 90-3.
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> 2. Officer Michael Shelby's name will be removed from the eligibility list for the position of Investigator on the grounds that he should not have been permitted to take the test for Investigator (PH-4) due

> to: his failure to make a timely appearance for the examination on January 10, 1990, despite clear advance notice given by Special Order 89-15, and due to his misrepresentations to Lt. Higgins as to the reasons for his untimely appearance.
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> 3. Special Order 90-4 will be amended placing Grievant Geller eighth on the eligibility list and Grievant Small tenth on the eligibility list.
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> . . .

Officers Geller and Small each signed the settlement agreement. The Agreement had a space for signature by the Association and they then took it to the Association's President, Investigator Rick Ladd, who refused to sign it.

On February 9, 1990, Association President Ladd confronted Chief Hansen, protesting the Chief's agreement to settle the Small and Geller grievances and grant them the relief sought, where the Association had specifically indicated to the Chief that it did not support the grievances. Chief Hansen's reply was that: "I said (to the Association President Ladd) that it was advanced to step three, I told him I would take the grievance route seriously, and if they advance it to step three, they better be prepared to settle it because I will do anything I can to settle it."

On February 9, 1990, the City's Attorney, Scott Lewis, sent the Association's counsel, Robert Weber, two letters articulating the City's concerns over Association President Ladd's refusal to agree to the settlement of the Geller and Small grievances, and setting forth the City's arguments why the settlement agreement was appropriate.

On February 13, 1990, the Association board met again to reconsider the merits of the Small and Geller grievances and reaffirmed its January 23, 1990 decision not to support either of them. Association President Ladd thereupon sent Chief Hansen the following memorandum:

> On January 23, 1990, the Racine Police Association Board met. Among items discussed were grievances 90-2 and 90-3. It was clear to the Board that the state's policy permitted the alternative test date. State officials are obviously convinced of the integrity of their test and that no unfair advantage is gained under these circumstances. A review of the contract reveals no language covering the factors encountered in this situation. For these reasons the Board did not

> believe the issue was grievable in the first place. After additional consideration, the consensus of the Board was that grievances 90-2 and 90-3 did not represent the best interests of the Racine Police Association as a whole. Consequently, the Board voted not to support the grievances and you were so advised on repeated occasions.
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> On February 13, 1990, the Racine Police Association board met. Grievances 90-2 and 90-3 were discussed again. This was made necessary by a "settlement offer" advanced by Scott Lewis. The memorandum of agreement is incorrectly labeled. Its contents were never discussed with the Racine Police Association Board nor its legal counsel in any form. It was not the result of a negotiated settlement. It is, in fact, contradictory with the announced position of the Racine Police Association Board. For this reason, the document was rejected by Board vote and the position taken at the January 23rd, 1990 meeting affirmed.

On March 2, 1990, Chief Hansen sent a memo to Association President Ladd and the members of the Association's Board explaining his decision. Since the memo, titled "RPA Communication Concerning Grievances 90-2 and 90-3," despite its length, appears particularly relevant to this matter, it is here set forth in full:

> Your latest communication to me regarding the grievances of Officers Geller and Small mandates a response to clear up several misapprehensions on your part and the part of the RPA Board.
>
> On February 1, 1990, you presented the third step of Grievances 90-2 and 90-3 to me. Attorney Lewis and I regarded this action as conclusively presumptive of the RPA Board's backing of the two grievances. This is especially true given that in the past, individual RPA members had to process their grievance on their own due to lack of Board support. Now I discover, via your communication, that a decision had already been secretly made as early as January 23, 1990 that the grievances were meritless. I say secretly because Officers Geller and Small, who were quite upset by the Board's actions, related to me that they were never contacted by you or any other Board member as to the Board's position that "the Board did not believe the issue was grievable in the

first place." Instead, the Board, including you, processed the grievances all the way up to the Chief's office (three steps).

You indicate that the "contents (of the settlement agreement) were never discussed with the Racine Police Association board nor its legal counsel in any form." That is not correct. I, in good faith, assumed that the Board was backing both grievances since the grievances were processed by you up to this office. Due to this action, I forwarded the grievances to City Attorney Joseph Boyle to look over. Mr. Boyle gave the grievances to Attorney Lewis. He, in turn, reviewed the grievances and the results of the subsequent investigation concerning the Investigator's examination. I had earlier asked for the investigation.

Mr. Lewis determined that Grievants Geller and Small had a valid complaint. I agreed and directed him to draft a settlement agreement. We did not initially discuss the terms of the agreement with you or the Board since - once again - we presumed that the matter of processing the grievances to the Third Step was a meaningful act, and not a sham. We asked the Grievants if the terms of the settlement were satisfactory. By letter of February 5, 1990, Mr. Lewis asked both grievants to review the settlement agreement, sign it if agreeable, and forward it to the Board for their signature. Apparently, the grievants approached you on February 8, and you refused to discuss the matter. I am unaware of any other Board member who agreed to sit down and discuss the matter with the grievants.

On February 9, you appeared in my office regarding the settlement. You indicated to me that the RPA was trying to work with this office. I pointed out the obvious fact that this is precisely what I was doing -- that is, settling two valid grievances, rather than proceeding to arbitration. In my opinion, your remarks to me were one-sided. You ended up walking out of my office. The point I am making is that on February 9, I did attempt to "discuss" the grievances and their resolution with you, but I was unable to do so.

You further indicate that the "Board voted

not to support the grievances and you (the Chief) were so advised on repeated occasions." This statement is not true. Unless, of course, you are contending that a remark made by you to me that I should "just deny these grievances and the Board will take care of it" should have been taken seriously. If that is your contention, be advised that I -- not you or the Board -- make the decision on whether to grant or deny a grievance. Further be advised that I do not enter into secret accords with the Board regarding any grievance, whether the grievance later turns out to be weak or without merit.

On February 9, Attorney Lewis sent two letters to your counsel articulating our concerns over your refusal to amicably settle the two grievances. He furnished your counsel with extensive documentation regarding our concerns. The RPA Board met once again, as your memo states, on February 13. Presumably, the Board discussed the rationale behind the agreement and its wording based on the information furnished to Attorney Weber. However, your memo to me entirely sidesteps the whole point made by Attorney Lewis' letters of February 9. The Board never approached me, or to my knowledge, anyone else mentioned in the two letters of February 9 and their supporting documentation. In essence, the Board refused to investigate the matter any further, notwithstanding the serious concerns espoused by myself and Attorney Lewis. In fact, you admit that the Board merely "affirmed" its January 23 decision. I note that January 23 is the same day that Grievant Small delivered his grievance to the RPA Board representative. It is most peculiar that the Board voted down both grievances on January 23, but the Board then proceeded to process both grievances to Step 1 the very same day (January 23). A Board representative received the Step 1 response to both grievances on January 24, and the Board then proceeded to process the grievances to Steps 2 and 3.

Be advised that this office takes the contract and the grievance process seriously. It is not a game to be toyed with. When the Board proceeds to process a grievance, particularly to Step Three, I presume the board is acting in good faith and is backing the grievances. I <u>will not</u>

> assume that contrary decisions have already been secretly made, and I will not entertain any offhand remarks from individual Board members as to the merits of any grievance or what its resolution should or should not be. If I decide to settle a grievance, I will expect the Board to be receptive to my concerns and seriously discuss the settlement. Moreover, if my decision is based on matters which have come to light after I "review the record and further investigate the grievance" pursuant to Article VIII, Section 6, Step 3, I will expect the Board to conduct its own investigation and not summarily reaffirm its earlier position.

On March 7, 1990, the Chief posted an amended promotional eligibility list for Investigator. Officer Shelby's name had been deleted, and all other candidates moved up one position.

On March 12, 1990, the Grievant filed a grievance describing extensively and in great detail his version of the previously described background of this matter culminating with the City's posting, on March 7, 1990 of an amended promotional eligibility list with his name deleted, and setting out his reasons for claiming this to be a grievance, with a number of documentary attachments, totaling some 32 pages. While the Grievant's statement in his grievance of "Why this is a Grievance" is lengthy, it again seems appropriate, in order to present his and the Association's position, to set it out here in full:

> I have been removed from consideration for promotion to Investigator, even though, by the criteria set forth in the Memorandum of Agreement, Article XIII, paragraph 9, between the City and the Corporation, I am the one who should stand first on the list. My test score is valid. My seniority points are indisputable. I am the victim of a systematic effort to sabotage my career opportunities in order to further the ambitions of two grievants who, by the definition of the contract, are less qualified, but who are more in favor with the management.
>
> It was alleged by the grievants that I had "an unfair advantage over all the others" by taking the test two days later. The State of Wisconsin says that their test is not compromised by a two day delay. Though I was late to the test, a fact that I am partially responsible for, I WAS at the site before the time expired, and I was prepared to take the test under adverse conditions. It was the City's

"humanitarian decision", not, as is alleged, to grant me an advantage, but to grant me the opportunity to compete without disadvantage.

The City now wishes to withdraw that decision. They cannot. It is impossible. I have already taken the test. My score has been tabulated by an independent agency and affirmed by the Police and Fire Commission Chairman. The City cannot turn back the clock to 1-10-90, and make me take the test under the conditions at that time. If the City had second thoughts about allowing me the makeup test, the time to voice their concerns was the time between Wednesday morning and Friday morning, not after the test scores came back.

In his first letter of 2-09-90, Scott Lewis speaks of the impact on the career paths of the two grievants, an impact that is premised on the outside possibility that nine Investigators must be promoted to impact Geller, and eleven to impact Small. The fact is, every name ahead of them impacts on their career paths, but by the terms of the contract, every name on that list deserves to be ahead of theirs; every one has a higher numerical ranking, including me. I find it reprehensible that so much concern is evinced for men who are ninth and eleventh on the list and probably won't get promoted anyway, and no consideration for the man who is first on the list and is sure of a position opening. If ever there was a blatant display of favoritism, this is it. Their favorites complain because a man they can't compete against fairly, gets a score better than theirs, and the city moves that candidate out. In fact, the City was so zealous in their desire to remove me, that they started investigating the grievances BEFORE they were even filed. The report filed by Higgins was dated 1-19-90, two days before Geller filed his grievance. The report from Sgt. Benn on his findings in this matter, is dated 1-23-90, the day before the grievances were denied at the first step. A.C. Ernst should have had this information available to him when he returned his DENIAL of the grievances on 2-01-90. Despite the obvious evidence of these dates, the City, in its correspondence, tries to maintain the appearance of acting in a responsive manner. Scott Lewis, in his 2-09-90

letter, refers to a "valid grievance" and "subsequent investigation". The Chief's letter of 3-02-90 refers to forwarding the "grievances and the results of the subsequent investigation" to the City Attorney's office, and that "Mr. Lewis determined that grievants Geller and Small had a valid complaint" and he (the chief) agreed. I would think that a man who had risen to the position of Chief of Police, and the man who made the decision to allow me to take the test in the first place, would make his own determination, especially when later in his letter he writes, "be advised that I ... make the decision on whether to grant or deny a grievance." The step 3 grievance procedure calls for the chief to "inform the aggrieved employee and the corporation in writing of his decision." Page two of Appendix "B" designates the form on which the reply is to be given. In past instances when a settlement was contemplated on a grievance, the City has contacted the Union to set up a meeting with all interested parties. Difficulties with the Day Shift Administration contacting Third Shift employees has always made this procedure the one of choice. In this instance, however, the City contacted the grievants directly, and took pains to meet with them without having a Union Representative present and without even notifying the Union of the meeting. If, as the Chief contends in his letter, the City assumed Union support of the grievances, why was the usual and logical procedure so radically altered? Obviously to prevent the Unions interference with the City's intent to forward the interests of its favorites. This is a deliberate violation of Article IV paragraph 2 wherein the city agrees not to "attempt to undermine the Corporation. Even if the chief's claimed assumptions of Union support were valid, and even if the City was acting in good faith when if offered the settlement, when the Union's position was made clear, verbally on 2-07-90 and in writing on 2-14-90, the City's "good faith" quickly disappeared. The City still made no attempt to get to the bottom of the problems. I was still not contacted by the City's investigators. The obvious inadequacies in Sgt. Benn's investigation were not re-examined. The allegations made by Geller and Small of unfair advantage were never addressed, nor were their claims of being ignorant of the Union's position. The City just decides

> that, since they can't blame their persecution of Michael Shelby on the Union, they will just do it on their own. The Chief's secretary posted amended order 90-4, and my name was removed from the eligibility list. Despite the horrendous impact on my life and career, they do not even have the common courtesy to notify me privately before posting it. They did not even slip a copy of the order in my mailbox after the posting. Punishment without due process. The equivalent of sentencing a man to prison without there even being a crime committed. The skulking manner in which this was done only underscores the City's perfidy in this entire matter.

The Grievant concluded by requesting as his desired remedy, "Restore the Investigator's promotional eligibility list to its original form as posted on 01-19-90 and promote accordingly."

It subsequently developed at the hearing that until the date of the hearing, the Association had seen only the first page of Sergeant Benn's report and not been aware of its conclusions and had thus assumed that the Report had supported Lt. Higgin's view. The evidence also indicates that, since the publication of the amended promotion eligibility list on March 7, 1990, the top seven officers appearing on that list have been promoted to Investigator.

. . .

(Deleted material includes contract and statutory provisions, as well as arguments of the parties.)

DISCUSSION

The issue in this arbitration is whether the City violated the Agreement when it removed the name of the grievant, Officer Shelby, from the promotional eligibility list for Investigator published March 7, 1990, and, if so, what is the remedy.

The parties have presented very extensive arguments on this matter, with lengthy testimony and briefs. In the Arbitrator's opinion, the issues can best be address by dividing the discussion into several subordinate questions, as follows.

1. Was the City required, prima facie, under the express terms of the Agreement, to include the Grievant's name on the promotional eligibility list for Investigative Officer published March 7, 1990?

The Agreement provides expressly and in detail the procedures applicable to promotion to the grade of Investigator. Under Article XIII(1), promotional

appointments shall be made in accordance with Section 62.13(4), Wisconsin Statutes, which mandates that certain appointments within city police departments shall be made from an eligibility list provided by examination. Article XIII(6) sets forth the qualifications for employees wishing to take the written test for promotion to Investigator and provides that: "Thereafter, the employee will be promoted from a promotional eligibility list set up under the terms of paragraph 7 of this Article XIII." Article XIII(7) establishes detailed procedures for the compilation of promotional eligibility lists for the grade of Investigator, providing, inter alia:

. . .

Article XIII(a) provides for the administration of the written tests for each pay grade, including their preparation and scoring by an independent testing agency.

It is undisputed in the evidence that a test for promotion to Investigator was prepared and administered to applicant officers at the Racine Police Department by an independent testing agency on January 10, 1990; that the Grievant, Officer Shelby, was permitted by the Department and testing agency to take that promotional test on January 12, 1990; that the independent testing agency scored his and other officers' examinations; that the Grievant's grade was over 75%; and that the Grievant's numerical composite score resulting from the scoring of his examination combined with the length of his continuous service with the Department was the highest of any officer taking that Investigator's exam.

Neither Article XIII, nor any other provision of the Agreement, expressly sets forth any requirements for inclusion in the promotional list for Investigator additional to those of length of service and examination score previously indicated. Nor does Article XIII or any other provision of the Agreement expressly provide for the removal of an officer, otherwise meeting the longevity and test score requirements for inclusion on the promotion eligibility list, from such a list.

Consequently, the Arbitrator finds that, under at least the express language of Article XIII of the Agreement, the Grievant was prima facie entitled not only to inclusion on the primary list for promotion to Investigator, but to the highest position on that list. The City appears to have acknowledged this prima facie contractual entitlement when it in fact included the Grievant's name on the initial promotional eligibility list for Investigator issued on January 19, 1991, 7/ ranking him first on that list.

7/ The year should be 1990.

2. Could the City, nevertheless, consistent with the Agreement, remove the Grievant's name from the promotional eligibility list on the ground that he had deliberately misrepresented his reasons for being late to the Investigator examination on January 10, 1991? 8/

The City argues that, despite the fact that the Grievant's examination score and longevity would normally entitled him to first place on the Investigator's promotional eligibility list, it is entitled to remove him from that list because it subsequently discovered that he deliberately misrepresented to the Department and proctor his reasons for being late to the Investigator's exam on January 10, 1991. 9/ The City contends that it was only because of these deliberate misrepresentations -- in particular, the alleged misrepresentation that he "had worked all night at an autopsy" -- that a humanitarian decision was made to allow him to take the test two days later than the regular exam date. The City also claims that because of his misrepresentation and the consequent two days delay, the grievant obtained an unfair advantage over other officers who took the test on the regularly assigned day.

The Association, on the other hand, argues that the evidence shows that the Grievant did not misrepresent his reasons for being late for the exam; that any misperception by Lt. Higgins or the Chief in this respect was the result of a misunderstanding or inaccurate reporting to the Chief and not the Grievant's fault; that he had in fact not sought any delay in taking the test but asked only to take it in the time remaining, which was his right; that the proposal that he take the test later was the proctor's idea rather than his own; that evidence does not establish that he gained any unfair advantage from the two-day delay in taking the exam; and that the Chief consequently acted arbitrarily, against the weight of the evidence and without just cause in removing his name from the promotional eligibility list for this alleged misrepresentation.

The Arbitrator is of the opinion that, under the circumstances here involved and in view of the evidence here presented, the action of the City and Chief in removing the Grievant's name from the promotional eligibility list for Investigator was not consistent with the Agreement. The Arbitrator reaches this conclusion for the following reasons.

First, as previously indicated, nothing in the Agreement expressly provides that the City may remove the name of an otherwise qualified officer from such a promotional eligibility list, either for

8/ The year should be 1990.

9/ The year should be 1990.

misrepresentation or any other reason, and, in view of the detailed provisions of Article XIII concerning promotion, any implied right to do so cannot be lightly presumed.

It is arguable, however, that the City has an implied right to remove officers from such a list at least for reasons which relate directly to the validity of the criteria expressly stated in Article XIII, such as the validity or integrity of an applicant's examination score or employment record. Thus, the City might arguably remove an individual from such a promotional eligibility list upon proof that a mistake had been made in calculating an exam score or service record, or that the person had cheated on the exam and that consequently the scores were not valid. In this case, however, the Chief's stated principal reason for removing the Grievant's name from the list was that he allegedly misrepresented his reasons for being late to the test, not that he cheated on the test. The Arbitrator notes, without deciding, that such a collateral misrepresentation, if proven, might arguably, perhaps, be a basis for separate disciplinary action, or might arguably, perhaps, be relevant to any discretionary type of evaluation otherwise involved in the overall promotional process. However, in the Arbitrator's opinion, there is nothing in the Agreement that suggest that such a collateral action, unrelated to the validity or integrity of the testing process itself, can appropriately in itself be a basis for denying an applicant officer the position on the eligibility list to which the applicant is otherwise entitled under the clear and expressly stated criteria set forth in Article XIII.

The City appears to suggest, in this connection, that, by reason of his alleged misrepresentation and the consequent delay in taking the test, the grievant may have gained an unfair advantage over other officers taking the test, either by having additional time available for study or by hearing helpful information about the exam from other officers who took it. However, the fact that the City and testing agency permitted the grievant to take the test several days later suggests that they did not believe that the integrity of the test would be compromised by such a delay; indeed, the Association itself inquired of the testing agency and was reassured on this point. While the City suggested that the grievant might have heard relevant information at a social dinner on the night of January 10 or otherwise heard something of advantage, the other officers present at the dinner testified otherwise, and the City's evidence was, in the Arbitrator's opinion, at best speculative and unpersuasive. Finally, the Grievant's high score on the exam was consistent with his high scores on previous exams for Investigator, and the City has not suggested that it was surprising or not reflective of his ability regarding such tests. Consequently, in the Arbitrator's opinion, the weight of the evidence fails

to establish the City's contention that the grievant's alleged misrepresentation, even if it occurred, by providing a delay served to give the Grievant an unfair advantage which compromised the validity or integrity of his test result.

Second, in the Arbitrator's opinion, the City and Chief could not in any event have reasonably concluded, by the weight of the evidence before it at the time the Chief removed the Grievant from the promotional eligibility list, that the Grievant had deliberately misrepresented his reasons for being late in order to secure permission to take the test at a later date. In this respect, the Arbitrator agrees with the Association that, since the removal of an otherwise qualified officer from a promotional eligibility list is in the nature of a disciplinary action, or in any case inconsistent with the express criteria stated in the Agreement, the City should carry the burden of proof in this regard.

The parties arguments and evidence on this point are extensive and conflicting. However, the Arbitrator believes that the weight of the evidence establishes at least the following points: First, the Grievant was solely at fault in being late for the exam; the Arbitrator agrees with the City that, having posted notice of the exam, it had no obligation to notify or remind the Grievant further, and he simply forgot. Second, the Grievant's tardiness in showing up for the exam was not part of any deliberate scheme on his part to secure an extension of time for taking it, but was simply because he forgot it. Third, the various occurrences of the Grievant's previous evening, including his coming home later than usual because of his participation in an autopsy investigation and the flooding of his basement, may well have helped contribute to and helped explain why the grievant forgot the exam; however, again, they do not excuse or relieve him from responsibility for forgetting it. Fourth, the Grievant showed up at the auditorium test site only when the time allotted for the test was substantially over and there was, at most, no more than 30 minutes of the allotted time remaining. Fifth, the Grievant initially requested only that he be allowed to take the test in whatever allotted time remained; the evidence indicates that the suggestion that he instead take the test two days later, at the time of the Lieutenant's exam, came from the proctor rather than the Grievant. Sixth, the Chief specifically approved the Grievant's taking the test two days later and the Chief did so after he was consulted on this question by Lt. Higgins, after the Chief expressly asked Lt. Higgins to check the Grievant's claim that he had worked on an autopsy the previous night, and after Lt. Higgins had checked and gave the Chief such confirmation. Seventh, the Chief subsequently, first, asked Lt. Higgins to further investigate the Grievant's story and then subsequently accepted Lt. Higgins recommendation that Sergeant Benn, the Department's

internal investigator, conduct such a further investigation. Finally, Sergeant Benn in fact conducted such an investigation within two weeks of the occurrence, talked with individuals present at the time including the proctor, and concluded that the grievant had not engaged in any intentional misrepresentation.

A key issue in dispute concerns, of course, the City's claim that the Grievant deliberately misrepresented to Lt. Higgins and the proctor that he had "worked all night on an autopsy," or words to that effect, in order to excuse his lateness and secure their sympathy for his predicament and help in doing something about it. However, at the time the Chief was considering this matter, the evidence that the Grievant engaged in any deliberate misrepresentation appears to have been at best uncertain and conflicting. The Grievant, with support from some other officers, has consistently maintained that he said only that he "worked late on an autopsy," which was in fact the case; the evidence is undisputed that he put in 4.6 hours overtime in connection with an autopsy. Moreover, the testimony of most of the persons present at the incident is that the Grievant clearly admitted that he had "forgot" the exam, although he added various excuses for doing so. Finally, as indicated, Sergeant Benn's investigation had specifically reached the conclusion that the Grievant had not made any intentional misrepresentation, stating that:

> "After evaluating all of the statements, I feel it is clear that Officer Shelby was not lying or misrepresenting statements to the proctor or Lieutenant Higgins about taking the test. I feel it is clear that the reason he was late was that he forgot about the test. The other comments he made were to explain why he had forgotten about the test. Based on these statements, I do not feel that there is any evidence that Officer Shelby intentionally lied to gain an advantage on taking the test at a later time."

In the Arbitrator's opinion, the Chief should reasonably have given Sergeant Benn's investigation and report great weight in his evaluation for several reasons: First, Lt. Higgins had specifically proposed such an independent investigation, apparently because he considered it important to obtain an objective evaluation separate form his own and believed that Sergeant Benn's report would be regarded as free from any bias. Second, the Chief himself accepted Lt. Higgins' suggestion and requested Benn's investigation. Third, the investigation was conducted by the Department's own internal investigator, with particular responsibility and competence for such investigations. Fourth, the investigation appears to have been carefully and responsibly done, and Sergeant Benn, in

his testimony at the hearing, appeared a competent, impartial and credible officer. Consequently, it is not clear why the Chief chose not to accept Sergeant Benn's report and conclusions. The Chief testified that he decided to rely on Lt. Higgins views, since he was in charge and present at the time. But neither the Chief nor the City have otherwise suggested any deficiency in or reason for distrusting Sergeant Benn's report and conclusions.

It was, of course, open to the Chief to have his own personal and subjective view as to events in question. The Arbitrator finds only that, once the Chief had asked Sergeant Benn to investigate the matter and received his impartial report that "it was clear that Officer Shelby was not lying or misrepresenting," this was objectively at that time the best and most weighty and credible evidence available to him. Consequently, in the Arbitrator's view, absent other new and more credible evidence, the Chief could not thereupon, reasonably and thus consistently with the Agreement, choose to ignore Sergeant Benn's conclusions and proceed instead, in effect, to penalize the Grievant for a misrepresentation Sergeant Benn expressly found did not occur.

At the hearing in this matter in late September 1990, more than eight months after the incident and Sergeant Benn's investigation, the proctor and several other officer witnesses testified that the Grievant had in fact said that he "worked all night on an autopsy." However, this was in apparent contrast with their more contemporaneous reports to Sergeant Benn during his investigation in January 1990, shortly after the occurrence, as reflected in his report and confirmed in his testimony at the hearing. It is generally considered that testimony and recollections elicited contemporaneously with an occurrence are more likely to be more accurate and credible than those made at a time more remote from an event, and therefore entitled to greater weight. Moreover, there is no showing that the Chief was aware of this more recent testimony -- such as that of the proctor -- at the time he made his decision -- presumably in February or early March of 1990 -- to remove the Grievant's name from the list. As indicated, the best evidence before him as of that time appears to have been Sergeant Been's report which reached the contrary conclusion that the Grievant had not made an intentional misrepresentation.

Finally, the City argues that, if the Grievant had not, by presenting what it regards as a misrepresentation of his reason for being late as an excuse, secured a "humanitarian" decision to take the test two days later, he would at best have been permitted to take the test in the allotted time remaining. The City contends that, in this case, however, he could not possibly have completed the exam with a passing, much less first-ranking, score; indeed, the City has presented in evidence an extensive

statistical analysis purporting to show that the Grievant must inevitably have failed. The Grievant, on the other hand, argues that he could in fact have successfully completed the exam in the time remaining and that the City's analysis is wholly speculative. Moreover, he points out that he only sought, and was entitled to, such a chance, and that it was the City's choice and decision, rather than his own, that he take the exam two days later rather than on the day it was being given. In the Arbitrator's opinion, it is impossible and unnecessary to decide what might have happened if the Grievant had been required to take the test in the time remaining rather than being allowed to take it two days later. The fact is that the proctor, rather than the Grievant, suggest the delay, and the City, even if possibly under some misapprehension or misunderstanding as to the situation, decided that he should not try to take the test in the time remaining but instead take the test two days later. It seems too late now and unfair to the Grievant to undo this decision. In this respect, the Arbitrator believes it is worth recalling Sergeant Benn's appraisal of the situation. After pointing out that a "'quick' decision was made without time for sufficient administrative view," and that the Chief or Lt. Higgins could have decided otherwise, Sergeant Benn concluded: "The fact of the matter is at this point of time, we have to live with the first decision."

3. Was the City entitled under the Agreement to remove the Grievant's name from the promotional eligibility list as an incident to its settlement of the grievances of Officers Geller and Small?

The City contends that the Chief was entitled under Article VIII of the Agreement to reach a settlement at Step 3 of Officers Geller's and Small's grievances, including a settlement which involved the deletion of Officer Shelby's name from the promotional eligibility list, and that the Chief could do so without regard to the Association's position in this respect or failure to approve such a settlement. The City argues further that the Association is precluded or "estopped" from complaining of its settlement of the Geller and Small grievances since it advanced these grievances to Step 3, and that its past conduct and present position supporting Officer Shelby's grievance and opposing the settlement of the Geller and Small grievances is not only inconsistent with its prior presentation of the Geller and Small grievances but also in breach of its duty of fair representation of Officers Geller and Small (citing, inter alia, Allen R. Holle v. Bloomer Joint School District No. 1 and Bloomer Professional Educators Association, WERC Case IX, No. 22745 MP-830, Dec. No. 16228-A (Rothstein, Exam., August 7, 1980).

The Association, on its part, contends that argument that it could remove the Grievant from the promotional eligibility list as an incident of the

City's purported settlement of the Geller and Small grievances was simply a device by which the City sought to circumvent the absence of any legal basis in the Agreement for its taking such action. The Association argues that the Chief, as well as the grievants Geller and Small, were well aware of the Association's lack of support for these two grievances; that the Association's advancement of their claims to Step 3 was, as the Chief well knew, simply a routine accommodation to its members to avoid any time-limit problems and could not have reasonably been considered by the Chief as negating the Association's contrary position which the Chief well knew; and that this settlement was in any event without legal effect since such settlements of grievances require approval by the Association. In the Association's view, the City's position presents fundamental challenges to its recognized right to represent its membership and control the grievance process in the general interests of its membership.

The issue submitted to this Arbitrator is solely whether the City violated the Agreement when it removed the Grievant, Officer Shelby, from the promotional eligibility list for Investigator. In the Arbitrator's opinion, this issue can appropriately be determined by the Arbitrator only through his analysis of the rights of the Grievant vis-a-vis the City under the Agreement. The grievances of Officers Geller and Small are not before the Arbitrator and the Arbitrator cannot appropriately rule on those grievances in themselves. As the Arbitrator has previously indicated, it is his judgment that the Grievant had met the criteria established in the Agreement for inclusion on the promotional eligibility list for Investigator, and that the City was not entitled, on the grounds of alleged misrepresentation, to remove him from that list.

To the extent that the City appears to argue that its settlement of Officer Geller's and Small's grievances provide it an independent basis under the Agreement for removing Officer Shelby from the promotional eligibility list -- that is, a basis independent of its misrepresentation claim, which the Arbitrator has not accepted -- the Arbitrator cannot agree with that position. In the Arbitrator's view, the City could not, through such a purported settlement with other officers -- a settlement in which neither the Association nor the Grievant participated and which the Association clearly opposed -- deprive the Grievant here involved, Officer Shelby, of the right to inclusion on the promotional eligibility list to which this Arbitrator has found him otherwise entitled under the Agreement. The Arbitrator's reasons for reaching this judgment are as follows:

First, the Arbitrator cannot agree with the City's contention that the Association, simply by advancing Officer Geller's and Small's claim to the third step, "equitably estopped" itself from not

continuing to support these grievances or their settlement, or that it, consequently, in effect, also waived its right to support Officer Shelby's entitlement to inclusion on the list and the present grievance. The Association presented considerable evidence that its participation in advancing the Small and Geller claims through Step 3 was simply a standard and routine accommodation to the needs of its members, particularly the need for prompt filing under the Agreement -- who had the right to pursue a grievance through Step 3 on their own -- and was neither meant, nor could be interpreted by the City, as necessarily indicating either its commitment to continuing to support the Geller and Small grievances, or as a waiver of its support of Officer Shelby's claims. The Arbitrator finds this evidence persuasive. The Arbitrator also finds persuasive the Association's evidence that, prior to its purported settlement of the Geller and Small grievances, the City and the Chief, as well as Officer Geller and Officer Small (who was married to a member of the Association's Board), were fully aware that the Association had twice voted not to support the Small and Geller grievances; indeed, Association President Ladd had specifically indicated to the City and Chief, on several occasions, that the Association did not support or expect to pursue these grievances further and did not object to the City's denying them. And, subsequently, President Ladd indicated to the City and Chief, in very clear and indeed strong terms, that the purported settlement of the Small and Geller grievances were contrary to the Association's policy and he would not sign it. Consequently, in the Arbitrator's opinion, the City and Chief could not reasonably have been under any misapprehension in this respect or had any "reliance" interest otherwise.

The City also appears to suggest that the Association's duty of fair representation of its members in some sense required it to pursue Officer Small's and Geller's grievances and to participate in their settlement, even if such settlement adversely affected Officer Shelby or was contrary to its Board's judgment as to the Association general membership's interests as a whole. In the Arbitrator's opinion, if there were any such issue of fair representation, it would presumably be one between Officers Geller and Small and the Association, rather than between the Association and the City and thus not before this Arbitrator; moreover, it is not clear how the City can appropriately invoke for its own benefit any rights of Association members vis-a-vis the Association in this respect. In any event, however, in the Arbitrator's judgment, neither the Agreement nor the general duty of fair representation require that the Association support a grievance which it believes is either without basis in a violation of the Agrement or contrary to the contractual or other rights and interests of its general membership, as was clearly the Association's position in this case. The evidence is persuasive that

the Association did in fact look into the relative merits of the competing claims of the Grievant and Officers Geller and Small; that it considered that there were difficulties in the Geller and Small grievances because they did not appear to allege a violation of the Agreement; that the Association also concluded that, on balance, it should support the Grievant's position rather than that of the other officers because of its continuing concern over the rigid requirements concerning its members taking promotion exams and its strong interest in establishing a precedent for obtaining a more flexible and convenient testing procedure for its members; and that its position in this regard was not arbitrary or unreasonable but in pursuit of what it considered the best interests of its membership.

Second, the Arbitrator cannot agree with the City's contention that the language of the Agreement -- in particular, Article VIII, paragraph 6, Step 3 -- recognizes the authority of the Chief and individual employees to settle a grievance without the participation and approval of the Association when it is aware that the Association opposes such settlement and regardless of the fact that the express intent and result of the settlement is to deprive another employee of claimed contractual entitlements which the Association supports. While the evidence is conflicting, the Association has presented considerable evidence of an established practice under which it usually participated in and signed such Step 3 settlements. It has also suggested that the Small and Geller grievances, since they did not expressly allege a contract violation, were in any event not appropriate for the grievance procedure and settlement. It is not necessary, however, for the Arbitrator here to decide the broad question whether Step 3 settlements can ever be made without express approval by the Association. It is in this case only necessary for the Arbitrator to decide that Step 3 settlements cannot validly be reached without Association's approval where, as here, they are expressly intended to affect the contractual or other interests of the Association or other employees, and the Association has expressly and clearly made its position and disapproval known.

In the Arbitrator's opinion, a requirement that the Association participate and approve such a settlement is implicit, inter alia, both in Article II of the Agreement, in which the City recognizes the Association as the exclusive bargaining agent for the regular full-time employees of the Police Department, and in Article VIII(4), entitled "Settlement of Grievance," which provides that "Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied." It seems evident that both the Association and the Grievant in this case, Officer Shelby, are "parties concerned" in any settlement of the Small and Geller grievances since this settlement would, contrary

to the Association express position and Officer Shelby's obvious interests, mandate Officer Shelby's removal from the promotional eligibility list for Investigator. And it is also evident that they are not "satisfied."

As the Association suggests, the issue involved potentially has broader ramifications. As noted in Elkouri and Elkouri, How Arbitration Works (4th ed. 1985) at p.180, n.116, arbitrators have on occasion dealt with the question of settlements between employers and employees which appear to conflict with the collective bargaining agreement. While the facts and issues are not directly in point with the instant matter, Arbitrator Schedler's comments in Bendix Corporation, 38 LA 909 (1962), are relevant in this respect. Discussing the right of an individual employee to withdraw or settle the grievance against the wishes of the Union under the particular facts and contract involved in that case, Arbitrator Schedler notes the absence of precedent but goes on to comment, inter alia (at .911):

> "... a Union is expected to represent equally, insofar as possible, the interests of all in the bargaining unit. To do this, a union must have substantial control of the grievance procedure, which is in turn an integral part of the administration of the labor agreement.
>
> . . .
>
> First, although a grievance once settled should remain settled, the instant grievance was not in fact settled as between the contracting parties to the labor agreement, under which agreement the grievance was filed. I see nothing illogical in permitting an employee to be a sort of third-party beneficiary so that he can file a grievance and at the same time refusing to let him be a sort of third-party obstructionist by settling the grievance contrary to the desires of the Union.
>
> Fourthly, it is my opinion that, in the absence of a clearly-expressed intention of the parties to repose in individual employees the full control of their own grievances, orderly administration of the contract and a broad regard for the Union's responsibility to provide uniform representation for all employees require that the Union should, at least in general, have sole control over decisions as to whether and how far to process grievances, insofar as the contract allows.

See, also, e.g., Fry's Food Store, 44 LA 431, 433-34 (Koven 1965); Driver-Harris Co., 36 LA 251 (Blumrosen 1960); Central

Franklin Process Co. , 17 LA 142, 145 (Marshall 1951).

For the above reasons, the Arbitrator concludes that the City's purported settlement with Officers Geller and Small does not change his decision that the City violated the Agreement when it removed the Grievant's name from the promotional eligibility list.

4. What is the appropriate remedy?

The Arbitrator has concluded that the City violated the Agreement when it removed the Grievant, Officer Shelby's, name from the promotional eligibility list for Investigator published March 7, 1990.

The Association requests as a remedy that the Grievant have full "make-whole" relief, that the Arbitrator require the City to waive any requirements for future promotions of the grievant from the Investigator position to higher office, and that the City provide such training as will enable him to catch up to others who were promoted ahead of him.

The Arbitrator agrees with the Association that the remedy should include the City reinstating Officer Shelby's name on the promotional eligibility list for Investigator which is currently relevant for the purpose of promotion to Investigator, as well as restoring him to the first position on that list to which his composite score initially entitled him.

The Arbitrator also agrees that, as provided in Article XVIII(7) of the Agreement, in which the City agrees that "it will recommend to the Racine Police and Fire Commission for promotion the employee who stands first on the respective eligibility list for the said position," the City must, on the next occasion when a vacancy occurs requiring the promotion of an employee to the classification of Investigator, recommend the Grievant, since he is the individual meeting that description.

The Arbitrator notes, however, the position of Arbitrator Vernon, as confirmed in the holding by Judge Vuvanas in Circuit Court Branch IV, Racine County, in another dispute involving this Grievant occurring in 1989-90 (citation in "Facts" section), that the Wisconsin Statutes and Agreements make any such recommendation, and the ultimate decision whether to promote the individual recommended by the Chief, subject to the discretion and approval of the Police and Fire Commission. In the Arbitrator's opinion, that position is correct. Consequently, the Arbitrator believes it appropriate that he order only that the City proceed to include the Grievant on the promotional eligibility list for Investigator, and, at the first opportunity, to recommend the Grievant for the position of Investigator, as required by the Agreement.

AWARD

> The grievance is sustained.
>
> The City shall restore the Grievant Officer Shelby's name to the first (highest) position on the currently applicable promotional list for Investigator, and shall, on the next occasion when a vacancy occurs requiring the promotion of an employee to the classification of Investigator, recommend the Grievant's name to the Police and Fire Commission for such promotion.

8. Shelby was on the Board of Directors of the Association and active in union affairs, including negotiations and grievance processing. On January 8, 1990, he was not reelected to the Board but became a board member again in June of 1990 due to a vacancy on the Board which is filled by the person who ran for election and had the largest number of votes but was unsuccessful. Former Association President Rick Ladd considered Shelby to be one of the more active union members even when he was not on the Board. Shelby was active in bringing computer operations to the Board's secretarial position and was the only person who was computer literate during the first part of 1990. While he was not on the Board for a few months in 1990, he remained responsible for the computer functions. The appeal of Shelby's prior grievance heard by Arbitrator Vernon was pending during the first part of 1990. Ladd served as Association President from 1988 to January of 1992, and he characterized the labor relations between the City and the Association as very strained and adversarial during the months of January and February of 1990. Chief Hansen was not aware of Shelby's absence from the Association's board of directors during 1990, and is not certain who is on the Board.

9. On February 9, 1990, Assistant City Attorney Scott Lewis sent the attorney for the Association, Robert Weber, two letters, both of which were copied to Geller and Small, who had grievances pending regarding the Chief's decision to allow Shelby to take the promotional exam two days later than originally scheduled. One letter, noting a reference to grievances 90-2 and 90-3, the Geller and Small grievances, contains the following:

> Recently, the City attempted to settle the two above referenced grievances. The Chief signed off and the two grievants signed off on the settlement. (A copy is enclosed.) However, Rick Ladd, the RPA president, refused to sign or even seriously discuss the merits of the settlement with the grievants I am told.
>
> The City is dismayed at Mr. Ladd's actions. The City has been accused of refusing to reach agreements short of arbitration in the past. We recently had started down the path of harmonious labor relations in reaching a settlement in the Tresider case and in the prohibited practice complaint concerning the civilianization of the dispatch unit. Both cases were amicably settled notwithstanding an adverse impact on some bargaining unit members.
>
> In the instant matter, both grievants have a valid case. Allowing Mike Shelby to remain on the eligibility list would impact on their career paths, especially since the list remains open for two years. The Chief admits he erred in permitting Mike Shelby to take the exam after he showed up an hour and one half

> late! We have settled many grievances previously where the decision making supervisor changed his decision in light of a valid grievance and subsequent investigation. This is nothing new. However, the instant case is even more compelling, since the Chief's good faith error was predicated on misrepresentations espoused by Mr. Shelby which subsequent investigation uncovered. Messrs. Small and Geller should not have their career paths blocked or hampered due to the willful or negligent actions of Mr. Shelby. I'm sure you will agree.
> The actions of Mr. Ladd, as related to me today by the Chief and the grievants do not evince good faith. Rather, his actions smack of cronyism especially since it was Mr. Ladd himself who processed the two grievances to the third step. If the grievances were frivolous or groundless, why were both grievances taken up so high? Where was the RPA's grievance screening committee? Why were the two grievants not notified that Mr. Ladd deemed the grievances and relief sought to be meritless? As you are aware, the Wisconsin Supreme Court in Mahnke v. WERC, 66 Wis. 2d 524, 531, 225 N.W.2d 617 (1975) has indicated that the Union breaches its fiduciary duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court speaks of "discrimination" equating with "invidious motive." Id., at 533.
>
> The City would appreciate it if you, as the RPA counsel, would investigate this matter and get back to the Chief and the undersigned. If the RPA Board has just cause in refusing to sign the settlement, we would appreciate having the RPA's position in writing. This is particularly true since the WERC has ruled that a breach of the duty of fair representation constitutes a prohibited practice against the bargaining unit member under Section 111.70(3)(b)1, Wisconsin Statutes. As such, a bargaining unit's refusal to settle a legitimate grievance with the employer may also constitute a prohibited practice in violation of Article V and Article VIII Paragraph 4, of the labor agreement, especially where the City and the grievants are all in accord as to the terms of the settlement.

The second letter of the same date, also copied to Geller and Small, contains information related to Shelby and the dispute surrounding Shelby's reasons for being late for the promotional examination.

10. During the period of time when Geller and Small filed grievances, another matter ongoing between the City and the Association involved William Chesen. Chesen, an officer with the Racine Police Department and a member of the Board of Directors of the Association, filed a grievance in 1989 for compensation for testifying as a prosecution witness. The City declined to strike arbitrators. On February 2, 1990, Assistant City Attorney Lewis sent Association Attorney Weber a letter stating the City's reasons for declining to strike arbitrators, citing procedural defects and untimeliness. On February 19, 1990, Weber notified Lewis that the Association intended to file a prohibited practice regarding the City's refusal to arbitrate Chesen's grievance. On February 20, 1990, Lewis sent the following letter to Weber:

> I am in receipt of your letter dated February 19, 1990. The City and the Chief are dismayed at this move by the RPA. We would like to have in writing the RPA's legal authority for proceeding to arbitration on the Chesen grievance notwithstanding two major contract violations as set forth in my letter to you of February 2, and the clear waiver sanction imposed for failure to follow the time requirements. Is it also the RPA's position that the holding of the Marino case is meritless? Is not the failure of the RPA to recognize and be bound by the Marino ruling and the failure of the RPA to abide by Article VIII, in and of itself a prohibited practice against the City in violation of Section 111.70(3)(b)4, Wisconsin Stats.? We are requesting this information pursuant to Article XXXI.
>
> We are also dismayed at the RPA's decision to press forward with a meritless case in light of their recent refusal to settle two plainly legitimate grievances. Are there two standards of "justice" in the RPA: one for Board members and one for the rank and file? Please advise.

Carbon copies of the above letter were sent to Chief Hansen, Rick Ladd, Rick Geller and Dan Small. On March 20, 1990, Lewis sent a four-page letter to Weber regarding the procedural aspects of the Chesen case, and concluded with the following paragraph:

> You are right when you say, "The contract says what it says." Yes, it does and the bottom line in this: if you are going to "play the game", you must play by the rules as set forth in the contract, or not play at all. I am not seeking discovery, I am only trying to fathom why the Union feels it can ignore the contract. I was seeking some factual or legal justification for the RPA's actions. As the RPA is not providing same, I am sadly left with my earlier conclusion that there are two standards in the RPA: one for "inner circle" members and one for the rank and file.

Carbon copies of the above letter were sent to Chief Hansen and RPA Board members.

11. When Ladd presented the Geller and Small grievances to the Chief at Step 3 in the grievance procedure, he told the Chief that the Association did not support these two grievances, that there was no basis for the grievances, that Geller and Small's positions were self-serving and not in the best interests of the Association, and that if the Chief would deny the grievances, the Association would deal with them officially when its grievance arbitration committee reviewed them. When the Chief decided to grant Geller and Small's grievances, he contacted the City attorney's office to draft a settlement document, and then he presented the document to Geller and Small for their signatures without a representative from the Association present. Assistant City Attorney Scott Lewis sent a memo to Geller asking to meet with him, and the two of them met and discussed Geller's grievance in the absence of a representative of the Association.

12. After Shelby's name was removed from the 1990 eligibility promotional list, seven promotions were made from that list. After Arbitrator

Bilder rendered his Award, there were no promotional vacancies that opened up between the date of the Award and December 31, 1991, when the eligibility list expired. Ladd and Chief Hansen had a conversation about keeping an open spot in the detective bureau available in the event that Shelby might prevail in the Bilder Award. Ladd suggested to the Chief that the Chief make the last promotion an acting position until the Shelby matter was resolved by Arbitrator Bilder, but the Chief told Ladd that the Association could address the matter at whatever point in the future Shelby might be awarded a promotion. When Investigator Zierten was not promoted, an acting position was maintained for approximately two years until Zierten's promotion was resolved.

13. On May 12, 1992, the parties notified the Examiner that they agreed to supplement the record in this case by noting that an opening occurred for Investigator off of the 1992 examination list, that Officer Shelby, being top on the list in terms of test score and seniority points, was recommended for promotion by new Chief of Police Richard Polzin, that the Racine Police and Fire Commission agreed that Shelby be promoted, and Shelby was promoted to Investigator on April 12, 1992.

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

CONCLUSION OF LAW

The Respondent, City of Racine, violated Sec. 111.70(3)(a)3, Stats., when it discriminated against Michael Shelby by removing his name from the 1990 Investigator promotional eligibility list, in part, because of his protected, concerted activity.

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

ORDER 5/

It is hereby ordered that:

1. The Respondent, City of Racine, its officers and agents, shall immediately cease and desist from discriminating against Officer Michael Shelby for engaging in protected, concerted activity.

(See Footnote 5/ on Page 43)

5/ 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.

2. The Respondent, City of Racine, shall take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Make Officer Michael Shelby whole by paying to him the wage rate of Investigator from the date of the first promotion made on the 1990 Investigator's promotional eligibility list to the date of his actual promotion, plus interest. 10/

b. 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.

c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 17th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

10/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission on January 9, 1991.

APPENDIX "A"

NOTICE TO CITY OF RACINE EMPLOYES REPRESENTED BY RACINE POLICE ASSOCIATION

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:

1. WE WILL NOT discriminate against Michael Shelby or any other employes on the basis of having engaged in protected, concerted activity.

2. WE WILL immediately make Officer Michael Shelby whole for loss of promotion to Investigator from the date of the first promotion on the 1990 Investigator promotional eligibility list to the date of Officer Shelby's actual promotion in 1992, together with 12 percent interest on said amounts.

By _____
City of Racine

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

CITY OF RACINE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Association:

The Association submits that the City has violated Secs. 111.70(2) and 111.70(3)(a)1 11/ and 3 by virtue of its intentional bypass of the Association in a grievance matter, its solicitation of a duty of fair representation (DFR) suit against the Association, and in its discrimination and interference regarding Officer Shelby. The Association relies on three evidentiary facts: (1) the City's unilateral and unauthorized settlement of a grievance against the express wishes of the Association; (2) references to favoritism by the Association for its "inner circle" of board members in correspondence from the City; and (3) copying disgruntled Association members who had no involvement in the referenced matter in anti-union correspondence. Also, the Association argues that the ongoing promotional bypass of Shelby since 1986 constitutes a pattern of discriminatory treatment carried out against him individually, as well as in his representative capacity. The Association points out that the pattern of conduct is dispositive, and the City's reliance on Shelby's temporary absence from the executive board on the date his name was most recently removed from the promotional eligibility list is misplaced.

The Association notes that Arbitrator Bilder clearly concluded that the bypassing of the Association in resolving the Geller-Small grievances was unwarranted, although Arbitrator Bilder did not address the implications on the issue of a MERA violation. Bypassing the certified bargaining unit representative for purposes of contract negotiations or administration has an equally deleterious effect. The City knew of the Association's position on the Geller-Small grievances, but still called Geller and Small in, without also calling in an Association representative, to work out a settlement known to be contrary to the Association's position. This conduct is prohibited individual bargaining.

The Association filed a grievance on behalf of Officer Chesen for an unpaid court appearance, and Chesen was another executive board member of the Association and the only officer not paid for that particular court appearance. While the City was within its rights to raise an objection as to the timeliness of the grievance, it committed a prohibited practice by refusing to strike arbitrators. In February and March of 1990, the City attempted to force the Association to drop the grievance in a series of threatening letters. The letter of February 20, 1990 (Assn. Ex. #11-C) refers to two plainly legitimate grievances (those of Geller and Small, even though Arbitrator Bilder had a contrary view) but even more importantly states that Board members -- such as Chesen and Shelby -- are treated better than other rank and file members. The Association asserts that this is clear evidence of the City's anti-union animus. In another letter dated March 20, 1990 (Assn. Ex. #11-F), the City refers to the inner circle of members. These letters, in conjunction with the very strained labor-management relations at the time, compel the conclusion that the City's bypass of the Association was motivated in part by anti-union animus.

Moreover, the Association contends that the letters were intended to create internal strife within the Association. The February 20, 1990 letter regarding Chesen was carbon-copied to Geller and Small, although they were not on the Board and had no interest whatsoever in Chesen's grievance. The City knew that Geller and Small were dissatisfied with the Association, and the City's conduct of copying a letter pertaining to Chesen's grievance to Geller and Small was to encourage Geller and Small to file a DFR suit. This conduct

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11/ In its amended complaint, the Association alleged violations of Secs. 111.70(2) and (3)(a)3, and has raised the additional allegation of a violation of Sec. 111.70(3)(a)1 in its brief.

has a chilling effect on the Association's right and duty to administer the labor contract and discourages individual membership in the Association.

The Chief admitted that Shelby has been litigating his loss of promotional opportunities almost continuously since 1985, and Shelby has been highly visible in this endeavor as well as in his outspoken views as an Association representative. During the hearing before Arbitrator Bilder (see Jt. Ex. #2 -p. 191), the Chief testified that he commenced the 1990 investigation against Shelby because he did not trust him, which proves the Chief's ongoing hostility toward Shelby. Also, the Chief -- for the first time -- disregarded the conclusions of his internal affairs officer who exonerated Shelby from charges of misrepresenting facts. Arbitrator Bilder stated that the Chief should have given Benn's report great weight and that the Chief and the City did not offer any reason to distrust Benn's report. The Association suggests that the personal and ongoing antagonism against Shelby is the only reason the City ignored Benn's report.

The Association believes that the City's hostility should not be surprising, given the fact that Shelby grieved his promotion denial in 1988, grieved his promotion denial in 1990, and continued to litigate the promotional issue while dozens of people lower on the eligibility list were promoted ahead of him. Nothing would justify this situation, except that Shelby was personally disliked by the chief for his ongoing grievances and generally disliked by the City for his union and grievance activities. The Association contends that the removal of Shelby's name from the eligibility list in 1990 was in retaliation for such activities.

The Association notes that retaliation against a union member is prohibited whether the retaliation is deemed interference or discrimination, although the burden of proof is not the same. Interference may be found when an employer's actions might reasonably be expected to chill the exercise of protected rights, and a finding of discrimination requires that the actions be motivated by hostility to the exercise of those rights. The City's action in this case was motivated, at least in part, by its hostility toward Shelby's exercise of his rights. There is direct and inferential evidence of unlawful motive, as well as disparate treatment demonstrated against Shelby after his name was removed from the eligibility list. Instead of following the practice of appointing officers the acting promotional positions, or of holding a position open, the Chief filled each and every one of the seven vacancies, and after Arbitrator Bilder's award, never had to recommend Shelby for promotion.

In conclusion, the Association asks that Shelby be promoted retroactive to the first Investigator promotion made in 1990, with make-whole back pay, seniority and all attendant benefits.

The City:

The City asserts that the one-year statute of limitations bars consideration of any allegedly discriminatory matters occurring before January 7, 1990. The gravamen of the Association's case is a sort of conspiracy theory wherein the Chief has been in league with the PFC since 1985 to deny Shelby access to a promotion. The Association seeks to cloak the Chief's lawful activity -- the removal from the eligibility list based on misconduct -- with a pre-1990 taint, and this is not permissible. Even if pre-1990 events are considered to shed light on the 1990 activities, the Chief and the City did nothing wrong, as the Chief recommended Shelby for promotion as required by the labor agreement. The Chief recommended both Shelby and DeFatte for promotion three times, and the PFC rejected both candidates all three times. The Chief did not recommend Shelby on May 20, 1988, because the PFC was comprised of the same five members who had rejected his recommendation only a month earlier.

While the Association apparently believes that the PFC members are agents of the City, both Arbitrator Vernon and Judge Vuvunas rejected that assertion, and Sec. 62.13, Stats., makes clear that the PFC is an independent body. The Chief has no say in the promotional process beyond his contractual duties, which he fulfilled, and the PFC has rejected his recommendations as to matters other than promotions.

The City states that there is no evidence that the PFC harbored animus toward Shelby for any of his actions, union or otherwise, and there is nothing in the record to show that the PFC was even aware that Shelby had engaged in any protected activity. Moreover, the PFC is not an "employer" within the meaning of Sec. 111.02(7), Stats., and cannot engage in any unfair labor practice. Also, Shelby and Officer DeFatte were similarly situated, and DeFatte was not active in union affairs but was rejected for promotion.

The City argues that the Examiner should defer to the Bilder arbitration award and decline jurisdiction. The City has asserted that the Bilder Award is res judicata, and under the so-call "Spielberg" and "Collyer" doctrines, the WERC should defer to the binding arbitration award. The WERC has recognized the Spielberg standards as well has the NLRB policy on deferral in the Collyer case. Under the criteria of Spielberg, the Bilder arbitration proceeding was fair and regular, neither side sought to vacate or challenge the Award, the parties agreed to be bound by the arbitration under the terms of the labor agreement, and the arbitrator's decision was not repugnant to the purposes and policies of MERA. The arbitrator granted a restricted remedy, and the Chief agreed to abide by it and recommend Shelby at the next opening in the 1990 list. The Association has already raised all the issues before Arbitrator Bilder, but did not get what it wanted and is now seeking a different route. The Association's attempt to circumvent the proper procedure set forth in Secs. 788.10 and 788.11, Stats., and refusing to recognize the terms of the Bilder Award, the Vernon Award, and the Circuit Court order, is itself repugnant to MERA. Arbitrator Bilder could have recommended retroactively to the first opening for Investigator in 1990 to make Shelby whole but chose not to do so. The Association chose not to challenge the arbitrator's order that Shelby be recommended at the next opening. Since it turned out that there were no openings between the date of the award and the end of 1991, when the eligibility list expired, the Association now seeks to overturn the Bilder Award under the guise of an unfair labor practice.

The former Union president contended that it was necessary to go to arbitration first as a condition precedent to the hearing of a prohibited practice complaint, yet arguing that it knew that the arbitrator could not grant the relief being sought. The City maintains that this argument is a sham -- the Association went to arbitration, did not get what it wanted, and now must come up with an explanation for entering into binding arbitration. There is no legal requirement that arbitration must proceed a prohibited practiced based on an allegation of discrimination. The Association raised the anti-union animus issue before Arbitrator Bilder, among other claims, and the arbitrator declined to find any animus. Allowing a prohibited practice complaint to relitigate the issues already arbitrated is tantamount to two bites at the apple.

The City asserts that if the Examiner chooses not to defer to the Bilder arbitration, the Complainant's 1990 activities should be considered de novo. While the Complainant repeatedly asserted the Arbitrator Bilder's findings are dispositive of the case at bar during the hearing on the instant matter, the Complainant cannot have it both ways, deferring at times to the Bilder Award and ignoring it at other times. The law is unclear as to how much deference an Examiner owes to the findings of a grievance arbitrator who has ruled on essentially the same case when the examiner declines to defer. But the WERC

may review an examiner's findings, conclusions and order de novo. Similarly, federal courts will conduct a de novo review of the proceedings when separate statutory offenses are alleged independent of a labor contract and an arbitrator's findings.

The City contends that it did not discriminate against Shelby in whole or in part due to his union activities. Shelby was not engaged in lawful concerted activity during the relevant period, which flows from January 7, 1990 to January 7, 1991. Even if his union activities prior to 1990 could be considered, whey they should not, these activities were not troublesome to the Chief or the City. Shelby's primary activity in 1988-89 was his litigation seeking to compel the PFC to sanction the Chief's recommended promotion. On January 8, 1990, one day into the relevant time period, Shelby was voted off the union board, and he was not engaged in any protected activity from the period of his removal from the board to the time of his removal from the promotional list on March 7, 1990. He was not back on the board until June 12, 1990, to fill a vacancy. The activity which caused his removal from the list concerned his purported reasons for showing up late for the 1990 promotional exam, and taking such an exam is not a concerted protected activity.

The City was not aware of any lawful concerted activity on the Shelby's part, as the Chief described his activities as low profile prior to 1990. The only contact that the Chief had with Shelby, other than his occasional testimony at arbitration hearings, was a single instance of grievance processing. Shelby never spoke to the Chief about union activities.

The Association asserted at the arbitration hearing (before Bilder) that it backed Shelby's grievance over the Geller and Small grievances because Shelby's grievance was to be a test case to determine if officers could take promotional exams on dates other than those originally scheduled. The City maintains that such rationale for backing Shelby's grievance is a sham. There is no evidence that the Association encouraged Shelby to show up late for the exam to set up a test case for that the Chief was ever aware that Shelby's tardiness was supposedly a test case, or a concerted union action.

The City argues that it did not harbor animus toward Shelby due to concerted activities. If the Chief harbored such animus, he could have, in his words, "slam dunked" Shelby immediately upon hearing of his late arrival at the exam and denied him the right to take a makeup test. Instead, the Chief gave Shelby the benefit of the doubt. The Chief's subsequent removal of Shelby's name from the promotional list was precipitated by two of the Association's own members who were engaged in protected activity of filing grievances. The Examiner must look for evidence of genuine hostility on the part of the Chief toward any of Shelby's union activities to establish the Chief's animus motivation, and must judge whether the Chief's action in removing Shelby's name from the list was pretextual. Although the arbitrator ruled that Shelby was not guilty of misrepresentation, that does not mean that the Chief lacked probable cause to believe that he lied, and in examining this case de novo, the Examiner will probably conclude that he did lie and that the Chief's actions were reasonable.

The City defends its conduct regarding the Geller and Small grievances by stating that the Association forwarded the grievances up the ladder to the Chief at Step 3, where the Chief has 14 days to grant or deny grievances. Upon further investigation and reflection, the Chief determined that Shelby had made misrepresentations about why he was late for the Investigator's exam, and the Chief decided to grant the precise relief sought in the Geller and Small grievances. While the Association maintained that it had already voted to turn down those grievances, such a vote was a nullity, as the grievants were not invited to such a meeting, although Shelby was. Moreover, the Association's

practice was to take a vote concerning whether to advance a grievance to arbitration only after the grievance was denied at Step 3. Since the grievances were granted, there was no need for any formal union vote.

While the City acknowledges that it does not have standing to raise the DFR issue in this case, the Association has glossed over its duty of fair representation. However, the point that was raised in letters to the Association is that when Ladd advanced the Geller and Small grievances, the Association was deemed to be supporting the grievances, and this should not be minimized. These were not individual grievances, but were being processed by the Association. When a union representative makes a decision to advance a grievance, he or she is acting on behalf of the individual grievant regarding of the personal views of the union representative advancing the grievance.

Therefore, the City argues that the Chief could rely on the DFR to ignore Ladd's comments about denying the grievances. The Chief had a sound legal basis on which to receive the Small and Geller grievances and seriously weigh them, notwithstanding Ladd's sidebar remarks. The Chief was skeptical of Ladd's remarks that the Association was against the Chief settling the grievances, because the Association president was bringing forth two grievances demanding the same relief, the Chief was aware of the legal significance of a union representative advancing the grievance, and the Association had never before voted on whether or not to support a grievance until after Step 3 if the Chief denied the grievance or let the time lapse.

The Association tried to show that the Chief negotiated with Small and Geller, but the Chief simply granted the relief sought and forwarded his decision to the grievants for their signatures and the Association's signature. Those signatures were not required, and that is why the Chief was able to remove Shelby's name from the promotional list notwithstanding the Association's refusal to sign the drafted agreement of the grievances. All signatures would have been necessary at Step 4 to resolve the grievances if the Association filed for arbitration, but since the Chief was granting the grievances at Step 3, signatures were not legally required, which is further evidence of the Chief's understanding that when the union advances a grievance, the union is deemed by way of its fiduciary duty to be supporting the grievance.

The reason for Shelby's removal from the eligibility list was clearly and expressly set forth in the second paragraph of the Chief's granting of the Geller and Small grievances, wherein he cites Shelby's failure to make a timely appearance for the examination and his misrepresentations for his untimely appearance. These grounds were not pretextual. That is why one must consider de novo whether Shelby made misrepresentations in order to take the Investigator's exam. The City does not believe that Shelby anticipated taking a makeup test two days later, but believes that in a state of panic, he lied to engender sympathy so he could take the exam during the end of the scheduled test period -- or after it.

The City asserts that the examiner must consider the evidence in the context of whether the Chief had reasonable grounds to believe that Shelby had fabricated his reasons for showing up late. The burden is on the Complainant to establish by the clear and satisfactory preponderance of the evidence that the Chief's belief that Shelby lied was pretextual, and that the real purpose in removing Shelby's name was the Chief's hostility toward Shelby's union affairs.

While the Association placed much stock in Sgt.'s Benn report, which concluded that Shelby was not lying or misrepresenting statements to the proctor or Lt. Higgins about taking the test, Benn did not interview Shelby nor

verify whether Shelby had worked late or how late. Benn was initially told by Geller, who was also not aware of the circumstances, that Geller did not think that Shelby told any lies. Shelby himself took issue with Benn's report, particularly Officer Purdy's statement which reflects that Purdy heard Shelby say that he overslept. While the Association notes that Benn's report was issued January 23, 1990 and presumably reflects immediate recollections of those involved as opposed to the allegedly "coached" remembrance of witnesses months later, Purdy's recollection is accurate as being within a short time frame. If it is true that one's memory is best served by proximity to the event, consider Higgins' representations to the Chief within minutes of Shelby's excuse, where Higgins related to the Chief that Shelby had worked all night on a homicide and was not able to get there for the test. Moreover, Higgins' report was issued days before Benn's report. Under the Association's theory, Higgins' recollections should be even more accurate than Benn's report.

Shelby admitted that he said he worked late on an autopsy and implied that he said he worked late on an autopsy as a reason for being late to the exam, since he did not deny that portion of Purdy's recollection. Purdy and Kiefer recalled that his excuse was being late because of an autopsy. But the City asks -- what in the world did the autopsy have to do with Shelby being late for the exam? The answer -- nothing. He was finished with work at 7:37 p.m. the night before the exam. Whether he said he worked late on the autopsy or worked all night, the result is the same -- the excuse was deliberately intended to mislead. The excuse succeeded initially, until the Chief and Geller got wise to Shelby.

The Association attempts to create an inference of anti-union animus through certain exhibits, such as Exhibit 11 which concerns Chesen and has nothing to do with Shelby or his removal from the eligibility list. While the City copied grievants Geller and Small in its correspondence attempting to resolve the dispute over the Chesen matter, the Geller and Small grievances were referenced in the last paragraph of the letter. If the Association thought that copying Geller and Small was a prohibited practice, it should have brought an action against the City. Association Exhibits 12 and 13 point to the City's efforts to state the City's position and acquaint the Association with factors of which it might be unaware regarding Shelby's case. Exhibits 11, 12 and 13 point to the City attempting to clarify and build good relations with the Association. If the City harbored animus toward the Association, it would have simply given it the cold shoulder and not articulated its concerns.

Finally, the City argues that the Examiner lacks the authority to order the promotion of Shelby without PFC approval. Racine Circuit Court Judge Vuvunas has held that the PFC has the authority to independently rule on the promotional issue and may reject the Chief's recommendation. The Chief has not refused to promote Shelby, but he lacks the authority to promote. Sec. 62.13(4)(a), Stats., provides that all appointments by the Chief are "subject to approval by the board." The authority of the WERC versus the authority of the PFC in police promotional matters has never been decided, as far as the City's research can ascertain. The City maintains that the WERC can order a promotion if it finds that a prohibited practice has occurred, but the promotion is subject to approval by the PFC.

The Association's Reply:

The Association notes that the City has again argued over the Association's duty of fair representation, which is not at issue in this proceeding. It was disputed at length in the arbitration proceeding before Arbitrator Bilder, who concluded that the Association met its duties and that the Chief merely used this argument as a subterfuge for his own prohibited practices.

The Association states that the City erroneously interprets the WERC's remedial powers to enforce the provisions of MERA. Whether the PFC has independent appointment powers has nothing to do with the issue of whether the WERC can remedy the City's violations of MERA. Further, the City has ignored the issue of whether the City violated MERA by intentionally bypassing the Association in the grievance process, and in its open solicitation of a DFR suit against the Association by disgruntled members.

Arbitrator Bilder made a determination, that was not appealed by the City, that the Chief had wrongfully removed Shelby's name from the promotional eligibility list, and he ordered that Shelby's name be reinstated. Unfortunately, the damage -- several other interim promotions -- had already been done. At all pertinent times to the arbitration proceeding -- a fact that has never been grasped by the City -- an independent prohibited labor practice charge alleging specific MERA violations was pending with the WERC. The Association submits that the City discriminated against Shelby within the meaning of MERA and actively solicited a DFR charge, again in violation of MERA, against the Association. The WERC is the body charged with fashioning an appropriate remedy for such conduct.

The City did not file a reply brief.

DISCUSSION:

Deferral to Arbitration Award

The City has argued that the Bilder Arbitration Award is res judicata to the case at bar and that the Commission should defer to the Bilder Award under the standards of the seminal case of Spielberg Mfg. Co., 112 NLRB 1080 (1955).

In the Spielberg case, the NLRB ruled that recognition of an arbitration award was justified because (1) the proceedings were fair and regular; (2) all parties had agreed to be bound; and (3) the decision of the arbitration panel was not clearly repugnant to the purposes and polices of the NLRA. In a more recent and sweeping decision on deferral, the NLRB ruled in Olin Corp., 268 NLRB 573 (1984), that it would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The NLRB also required the party seeking to have the Board reject deferral and consider the merits of a given case to show that the standards for deferral had not been met.

However, the courts have been reluctant to defer to an arbitral finding where the arbitrator did not address or resolve a distinct statutory claim. The U.S. Supreme Court held in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) that an employee whose grievance was dismissed at arbitration could still bring an ERISA claim arising from the same underlying facts and assert statutory claims independent of any rights created by a collective bargaining agreement. Similarly, in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), the Supreme Court rejected the contention that arbitration of wage claims precluded a later suit under the Fair Labor Standards Act based on the same underlying facts. In McDonald v. City of West Branch, 466 U.S. 284 (1984), the high court found that an earlier arbitral finding did not preclude a civil rights action brought under 42 U.S.C. Section 1983.

The Commission has held that it has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters,

and the possibility of full relief through arbitration does not preclude it from fully adjudicating alleged noncontractual violations of the statutes which it enforces. 12/ The Commission has concluded that an employee can pursue grievance arbitration alleging a contractual violation by the employer while contemporaneously citing the same employer action as a basis for filing an unfair labor practice before the Commission. 13/

In this case, most of the facts relevant to the statutory claims were presented to Arbitrator Bilder. The events underlying the allegation that City violated Sec. 111.70(3)(a)3, Stats., by eliminating Shelby's name from the promotional list for Investigator, are the same as those considered by Arbitrator Bilder. However, the Bilder Award dealt with whether the collective bargaining agreement was violated when the City removed Shelby's name from the promotional eligibility list, and not whether the City discriminated against Shelby for his union activities. Certain facts relevant to the claim that the City discriminated against Shelby for his union activities were not relevant to the arbitration proceeding.

Accordingly, the Examiner concludes that deferral to the Bilder Award is inappropriate and that the doctrine of res judicata is not applicable in this case. There are statutory claims that have not been resolved by the prior arbitration award. The City asks that if the Examiner does not defer to the Bilder Award, then the case should be considered de novo. The Examiner has considered the entire record placed before Arbitrator Bilder, 14/ and has adopted the record as written by Arbitrator Bilder in Finding of Fact No. 7.

12/ Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

13/ Universal Foods Corp., Dec. No. 26197-B (WERC, 8/90).

14/ It should be noted for the record that both parties chose not to relitigate the entire case, but entered into the record the same exhibits presented to Arbitrator Bilder, as well as the transcripts of the hearings before Arbitrator Bilder, a deposition, and the briefs filed. Arbitrator Bilder was presented with certain credibility questions, such as those involving the testimony of Shelby, Geller, Purdy, Kiefer, and Higgins regarding the statements made by Shelby when he appeared late to take the promotional exam. The Examiner's reading of the record finds that such credibility determinations did not hinge on demeanor or live testimony characteristics before the Arbitrator, but upon the record as a whole, and the Arbitrator resolved those credibility determinations and conflicts in testimony in favor of Shelby.

Applicable Legal Standards:

Sec. 111.70(3)(a)3 provides that it is a prohibited practice for a municipal employer individually or in concert with others to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment. In referring to "other terms of employment," Sec. 111.70(3)(a)3 includes promotion opportunities. 15/ Conditions of employment are also subjects of collective bargaining protected by Secs. 111.70(2) and (3)(a)1, and the wrongful denial of promotional opportunities may be a separate violation of Sec. 111.70(3)(a)1 as well as (3)(a)3. 16/

To establish a violation of this section, the complaining party must prove each of the following factors:

(1) that employes have engaged in protected, concerted activity;
(2) that the employer was aware of such activity;
(3) that the employer was hostile to such activity;

15/ Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88); aff'd., Dec. No. 24498-B (WERC, 7/88); State of Wis. Dept. of Administration (Professional-Social Services, Dec. No. 15699-B (WERC, 11/81).

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

and
(4) that the employer's conduct was motivated, in whole or in part, by hostility toward the protected activity. 17/

It is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors for such action is the employe's protected concerted activity. 18/ 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, as an employer may not subject an employe to adverse consequences when one of the motivating factors is his union activity. 19/ Evidence of hostility and illegal motive may be direct (such as with overt statements) or, more often, inferred from the circumstances. 20/

17/ Muskego-Norway v. WERB, 35 Wis.2d 540 (1967).

18/ LaCrosse County (Hillview Nursing Home), Dec. No. 14704-B (WERC, 7/78).

19/ Muskego-Norway, supra.

20/ 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. NLRB, 362 F.2d 466, 470 (9th 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.

City's Knowledge of Protected, Concerted Activity:

The City contends that Shelby was not engaged in protected, concerted activity during the relevant period from January 7, 1990, to January 7, 1991, when the complaint was filed. The City notes that Shelby was voted off the Board of Directors of the Association on January 8, 1990, one day into the relevant time period, and was not engaged in any protected activity from the time of his removal from the Board to the time of his removal from the promotional list on March 7, 1990, and that Shelby was not back on the Board until June 12, 1990. The City further asserts that it was not aware of any lawful concerted activity on Shelby's part.

Shelby did not have to be on the Board of Directors of the Association in order to be engaged in protected, concerted activity. Shelby was an active union member whether or not he was on the Board, and the Chief was not always aware of who the Board members were. During the time period that the City asserts is the relevant time period, for purposes of statute of limitations problems, Shelby was appealing Arbitrator Vernon's Award in Circuit Court and was waiting for a decision on a promotion to Investigator through such litigation. The City was well aware of the ongoing litigation generated by Shelby, and had previously promoted a couple of patrol officers (Kuzia and Mooney) to Acting Investigator positions due to Shelby's continuing litigation. Thus, he was engaged in protected, concerted activity. Furthermore, Shelby was an active Association member, serving at times on the Board of Directors and assisting the Association at all times.

The City obviously considered Shelby to be part of the "inner circle" of Association members. On February 9, 1990, Assistant City Attorney Lewis wrote Association Attorney Weber protesting Association President Ladd's refusal to sign the settlement drafted by the City in the Geller and Small grievances. Lewis objected to allowing Shelby to remain on the eligibility list, and called Ladd's position on the issue "cronyism." On February 20, 1990, Lewis again wrote Weber, and the two relevant paragraphs from these letters are the following:

> We are also dismayed at the RPA's decision to press forward with a meritless case in light of their recent refusal to settle two plainly legitimate grievances. Are there two standards of "justice" in the RPA: one for Board members and one for the rank and file? Please advise.
>
> . . .
>
> You are right when you say, "The contract says what it says." Yes, it does and the bottom line in this: if you are going to "play the game", you must play by the rules as set forth in the contract, or not play at all. I am not seeking discovery, I am only trying to fathom why the Union feels it can ignore the contract. I was seeking some factual or legal justification for the RPA's actions. As the RPA is not providing same, I am sadly left with my earlier conclusion that there are two standards in the RPA: one for "inner circle" members and one for the rank and file.

While the Chesen grievance was the matter that generated these letters, the City was including Shelby was a member of the "inner circle" or one of those who received a higher standard of "justice" in the hands of the Association. The reference to "two plainly legitimate grievances" is a reference to the

Geller and Small grievances. Geller and Small were being considered by the City to be just part of the rank and file, while Shelby and Chesen were considered by the City to be part of the inner circle of the Association.

Thus, the Association has demonstrated that Shelby was engaged in protected, concerted activity, and that the City was aware of such activity.

Hostility and Motive:

To demonstrate that the City was hostile to such activity, the Association relies on the following: (1) the City unilaterally settled the Geller and Small grievances against the express wishes of the Association; (2) the City's references to favoritism by the Association for its "inner circle" of Board members; (3) the City's conduct in copying disgruntled Association members in anti-union correspondence, even though they had no involvement in the referenced matter; (4) the City's pattern of conduct that resulted in bypassing Shelby for promotion. The City denied that is harbored any animus toward Shelby due to his union activities, and that it removed his named from the promotional eligibility list in response to the Geller and Small grievances.

The Examiner finds that the Association has proven by a clear and satisfactory preponderance of the evidence that the City was hostile to Shelby's protected activities as well as to the Association in general, and that the City's conduct in removing Shelby's name from the promotional eligibility list was motivated in part by such hostility, due to all the circumstances surrounding the removal of Shelby's name.

The Association asserts that the City engaged in prohibited individual bargaining by calling in Geller and Small without an Association representative, by resolving their grievances without involving the Association and with full knowledge that the Association opposed those two grievances. The City has maintained that it was entitled to grant the relief sought by Geller and Small when the Association forwarded the grievances up the ladder to the Chief at Step 3. The City has asserted that the Chief could rely on the Association's duty of fair representation to presume that the Association supported the Geller and Small grievances, and to ignore Ladd's comments that the Chief should just deny them. The City has further asserted that it did not negotiate with Geller and Small but simply granted them the remedy they sought. 21/

21/ While the allegation of bypassing the Association and dealing individually could be considered a separate violation of MERA, specifically Sec. 111.70(3)(a)4 or derivatively (3)(a)1, Stats., the Examiner has concluded from the pleadings and briefs of the parties that there is no direct reference to a separate claim that bypassing the Association violated MERA. In accordance with General Electric Co. v. WERB, 3 Wis.2d 227 (1958), and Racine Unified School District, Dec. No. 20941-B (WERC, 1/85), the Examiner has concluded that the Respondent did not have clear notice that a separate violation of MERA was being alleged in the allegation of bypassing the Association. Although the Complainant has made references to bypassing the Association in its amended complaint and expanded on such in its briefs, and the Respondent made a general denial in its answer to the amended complaint, the evidence at the hearing related primarily to the discrimination against Shelby. While the Examiner is not considering the allegation as a specific violation of MERA, she is considering it as part of the City's conduct surrounding the main thrust of this case, which is the charge of discrimination against Shelby.

The record before Arbitrator Bilder contains clear evidence that the City bypassed the Association in its handling of the Geller and Small grievances. The Arbitrator's comments on this issue are as follows:

> To the extent that the City appears to argue that its settlement of Officer Geller's and Small's grievances provide it an independent basis under the Agreement for removing Officer Shelby from the promotional eligibility list -- that is, a basis independent of its misrepresentation claim, which the Arbitrator has not accepted -- the Arbitrator cannot agree with that position. In the Arbitrator's view, the City could not, through such a purported settlement with other officers -- a settlement in which neither the Association nor the Grievant participated and which the Association clearly opposed -- deprive the Grievant here involved, Officer Shelby, of the right to inclusion on the promotional eligibility list to which this Arbitrator has found him otherwise entitled under the Agreement. The Arbitrator's reasons for reaching this judgment are as follows:
>
> First, the Arbitrator cannot agree with the City's contention that the Association, simply by advancing Officer Geller's and Small's claim to the third step, "equitably estopped" itself from not continuing to support these grievances or their settlement, or that it, consequently, in effect, also waived its right to support Officer Shelby's entitlement to inclusion on the list and the present grievance. The Association presented considerable evidence that its participation in advancing the Small and Geller claims through Step 3 was simply a standard and routine accommodation to the needs of its members, particularly the need for prompt filing under the Agreement -- who had the right to pursue a grievance through Step 3 on their own -- and was neither meant, nor could be interpreted by the City, as necessarily indicating either its commitment to continuing to support the Geller and Small grievances, or as a waiver of its support of Officer Shelby's claims. The Arbitrator finds this evidence persuasive. The Arbitrator also finds persuasive the Association's evidence that, prior to its purported settlement of the Geller and Small grievances, the City and the Chief, as well as Officer Geller and Officer Small (who was married to a member of the Association's Board), were fully aware that the Association had twice voted not to support the Small and Geller grievances; indeed, Association President Ladd had specifically indicated to the City and Chief, on several occasions, that the Association did not support or expect to pursue these grievances further and did not object to the City's denying them. And, subsequently, President Ladd indicated to the City and Chief, in very clear and indeed strong terms, that the purported settlement of the Small and Geller grievances were contrary to the Association's policy and he would not sign it. Consequently, in the Arbitrator's opinion, the City and Chief could not reasonably have been under any

misapprehension in this respect or had any "reliance" interest otherwise.

The City also appears to suggest that the Association's duty of fair representation of its members in some sense required it to pursue Officer Small's and Geller's grievances and to participate in their settlement, even if such settlement adversely affected Officer Shelby or was contrary to its Board's judgment as to the Association general membership's interests as a whole. In the Arbitrator's opinion, if there were any such issue of fair representation, it would presumably be one between Officers Geller and Small and the Association, rather than between the Association and the City and thus not before this Arbitrator; moreover, it is not clear how the City can appropriately invoke for its own benefit any rights of Association members vis-a-vis the Association in this respect. In any event, however, in the Arbitrator's judgment, neither the Agreement nor the general duty of fair representation require that the Association support a grievance which it believes is either without basis in a violation of the Agrement or contrary to the contractual or other rights and interests of its general membership, as was clearly the Association's position in this case. The evidence is persuasive that the Association did in fact look into the relative merits of the competing claims of the Grievant and Officers Geller and Small; that it considered that there were difficulties in the Geller and Small grievances because they did not appear to allege a violation of the Agreement; that the Association also concluded that, on balance, it should support the Grievant's position rather than that of the other officers because of its continuing concern over the rigid requirements concerning its members taking promotion exams and its strong interest in establishing a precedent for obtaining a more flexible and convenient testing procedure for its members; and that its position in this regard was not arbitrary or unreasonable but in pursuit of what it considered the best interests of its membership.

Second, the Arbitrator cannot agree with the City's contention that the language of the Agreement -- in particular, Article VIII, paragraph 6, Step 3 -- recognizes the authority of the Chief and individual employees to settle a grievance without the participation and approval of the Association when it is aware that the Association opposes such settlement and regardless of the fact that the express intent and result of the settlement is to deprive another employee of claimed contractual entitlements which the Association supports. While the evidence is conflicting, the Association has presented considerable evidence of an established practice under which it usually participated in and signed such Step 3 settlements. It has also suggested that the Small and Geller grievances, since they did not expressly allege a contract violation, were in any event not appropriate

> for the grievance procedure and settlement. It is not necessary, however, for the Arbitrator here to decide the broad question whether Step 3 settlements can ever be made without express approval by the Association. It is in this case only necessary for the Arbitrator to decide that Step 3 settlements cannot validly be reached without Association's approval where, as here, they are expressly intended to affect the contractual or other interests of the Association or other employees, and the Association has expressly and clearly made its position and disapproval known.
>
> In the Arbitrator's opinion, a requirement that the Association participate and approve such a settlement is implicit, inter alia, both in Article II of the Agreement, in which the City recognizes the Association as the exclusive bargaining agent for the regular full-time employees of the Police Department, and in Article VIII(4), entitled "Settlement of Grievance," which provides that "Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied." It seems evident that both the Association and the Grievant in this case, Officer Shelby, are "parties concerned" in any settlement of the Small and Geller grievances since this settlement would, contrary to the Association express position and Officer Shelby's obvious interests, mandate Officer Shelby's removal from the promotional eligibility list for Investigator. And it is also evident that they are not "satisfied."

In addition to Arbitrator Bilder's findings noted above, there are other facts showing that the City intentionally bypassed the Association in handling of the Geller and Small grievances. Assistant City Attorney Lewis contacted Geller prior to the settlement of his grievance and the two met without a representative of the Association present. According to Geller's uncontradicted testimony, Lewis sent a memorandum to Geller and met with him. 22/ Hansen also talked with Geller and Small about their grievances without union representation. 23/ In Ladd's experience as President of the Association, a settlement had never before been worked out without the involvement of the Association. 24/ Chief Hansen granted Geller and Small the relief they sought in their grievances on February 8, 1990. On March 2, 1990, Hansen sent a memo to Association President Ladd which notes in part:

> Mr. Lewis determined that Grievants Geller and Small had a valid complaint. I agreed and directed him to draft a settlement agreement. We did not initially discuss the terms of the agreement with you or the Board since -- once against -- we presumed that the matter of processing the grievances to the Third Step was a meaningful act, and not a sham. We asked the

22/ Jt. Ex. #2 - p. 119.

23/ Jt. Ex. #2 - p. 216.

24/ Jt. Ex. #3 - pages 7, 8, 9, 18

> Grievants if they terms of the settlement were satisfactory. By letter of February 5, 1990, Mr. Lewis asked both grievants to review the settlement agreement, sign it if agreeable, and forward it to the Board for their signature. Apparently, the grievants approached you on February 8, and you refused to discuss the matter.

Thus, it is clear that the Association was bypassed when the City dealt with Geller and Small, that the City was not entitled by the collective bargaining agreement to make such a settlement without the participation of the Association, and that the City and the Chief, as well as Geller and Small, had advance knowledge that the Association did not support those grievances. While the City claims that it did not bargain individually with Geller and Small and only granted them the relief they asked for in their grievances, the City's conduct in not affording the Association an opportunity to be present is tantamount to individually dealing and bypassing the Association.

It is unlikely that the City would have had any interest in granting the grievances of Geller and Small except that it saw a chance to remove Shelby's name from the promotional eligibility list. Geller and Small had grieved the Chief's discretionary action in allowing Shelby to take the promotional exam two days later than originally scheduled. They were not grieving a specific section of contract language which they believe to have been violated by the City. Association President Ladd noted in a memo to Chief Hansen that the Association had reviewed the labor contract, and there was no language in the contract covering this situation. The Association correctly assessed the merits of the grievances and concluded that the likelihood of success was slim, given the fact that the contract did not cover the situation. Would the City had so happily granted any other grievance which was not covered by contract and which grieved a discretionary action of a top supervisor? Not likely.

The City's hostility toward Shelby's concerted, protected efforts to gain a promotion and toward the Association in general are underscored not only by the City's granting of the relief requested by Geller and Small while knowing that the Association opposed such a move, but also by the City's conduct in soliciting Geller and Small to file a duty of fair representation suit against the Association. The City positioned Geller and Small against Shelby, the Association, and its Board of Directors, pitting union members against union members.

On February 9, 1990, Lewis sent two letters to Weber, both of which were copied to Geller and Small. One contained the following:

> The actions of Mr. Ladd, as related to me today by the Chief and the grievants do not evince good faith. Rather, his actions smack of cronyism especially since it was Mr. Ladd himself who processed the two grievances to the third step. If the grievances were frivolous or groundless, why were both grievances taken up so high? Where was the RPA's grievance screening committee? Why were the two grievants not notified that Mr. Ladd deemed the grievances and relief sought to be meritless? As you are aware, the Wisconsin Supreme Court in Mahnke v. WERC, 66 Wis. 2d 524, 531, 225 N.W.2d 617 (1975) has indicated that the Union breaches its fiduciary duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court speaks of "discrimination" equating

with "invidious motive." Id., at 533.

> The City would appreciate it if you, as the RPA counsel, would investigate this matter and get back to the Chief and the undersigned. If the RPA Board has just cause in refusing to sign the settlement, we would appreciate having the RPA's position in writing. This is particularly true since the WERC has ruled that a breach of the duty of fair representation constitutes a prohibited practice against the bargaining unit member under Section 111.70(3)(b)1, Wisconsin Statutes. As such, a bargaining unit's refusal to settle a legitimate grievance with the employer may also constitute a prohibited practice in violation of Article V and Article VIII Paragraph 4, of the labor agreement, especially where the City and the grievants are all in accord as to the terms of the settlement.

The City sent a copy of another letter to Geller and Small, even though this letter dealt only with the Chesen grievance and was of no concern to Geller and Small. The relevant portion is:

> We are also dismayed at the RPA's decision to press forward with a meritless case in light of their recent refusal to settle two plainly legitimate grievances. Are there two standards of "justice" in the RPA: one for Board members and one for the rank and file? Please advise.

Suits against unions for breaches of the duty of fair representation are uncommon, and not within the ordinary experience of union members. The City educated the two disgruntled union members the possibility of bringing a DFR suit against the Association, effectively enough for Geller to bring it to Ladd's attention. Such conduct is further evidence of the City's hostility and motive in removing Shelby's name from the promotional eligibility list. Either in the process of talking to the City about their own grievances or through the copies of the above letters, Geller and Small had become aware of the duty of fair representation that a union owes to its members. When Geller and Small approached Ladd and asked him to sign the settlement that the City had drafted, which struck Shelby's name from the list, Ladd refused to sign. Geller then asked Ladd if he was familiar with the term "breach of fair representation." 25/ Small could not recall the phrase "duty of fair representation" until his memory was refreshed by the use of the term during the arbitration hearing. 26/

The City has maintained that the Chief relied on the Association's duty of fair representation to ignore Ladd's comments to deny the Geller and Small grievances and to consider that those grievances were forwarded in good faith. It is disingenuous for the City to claim that it relied on the Association's duty of fair representation in processing grievances, and therefore "settled" the grievances that it knew the Association opposed. The City's defenses for

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25/ Jt. Ex. #2 - p. 106.

26/ Jt. Ex. #2 - p. 144.

its conduct are pretextual.

If the Chief's hostility toward Shelby had been personal and not connected with the union activity, the Chief could have, as he put it, "slam-dunked" Shelby on January 10, 1990, when Shelby turned up late for the exam. The Chief also could have prevented Shelby from taking the make-up exam at any time during the next two days. It would not have taken more than two days to determine that Shelby worked 4.6 hours of overtime and had not worked all night. Instead, Shelby was allowed to take the exam, he scored first on the exam, his name was placed first on the promotional eligibility list, and it stood first on that list until the Chief and the City decided to remove his name on the pretext that in doing so, they were settling the grievances of two other officers.

While the record might be read as the Chief having some personal animosity or distrust toward Shelby rather than having some animosity toward his union activity, the fact that the Chief and the City acted to strike Shelby's name from the promotional list once they had been engaged in activity such as bypassing the Association, soliciting a DFR suit against the Association, and entering into a purported settlement with Geller and Small known to be opposed by the Association, all goes to demonstrate that the City's motive in striking Shelby's name was based in part on anti-union animus. In light of the fact that the City considered Shelby to be part of the "inner circle" of the Association, the City's conduct toward Shelby discriminated against him for his Association activities.

Arbitrator Bilder noted that the Chief should have given great weight to Sergeant Benn's investigation which concluded that Shelby was not lying or making any misrepresentations when Shelby appeared late to take the promotional exam. The Arbitrator was puzzled as to why the Chief chose not to accept Benn's report, particularly after the Chief accepted Higgins' request that Benn investigate the matter. After the Department's own internal investigator concluded that Shelby was not lying, the Chief and the City continued to claim that he was lying and that his lying was the reason his name was removed from the promotional eligibility list. Even if that were indeed part of the motivation behind the action against Shelby, the other part of the motivation was the anti-union animus, as demonstrated by the bypassing of the Association and the solicitation of the DFR suit against the Association.

There is a lack of an objective basis for the City's action in removing Shelby's name from the promotional eligibility list. The Chief had two days -- from January 10 to January 12, 1990 -- to determine whether Shelby misrepresented his plight of being late for the exam, if he were concerned that Shelby misstated his situation. The Chief had Benn's report in hand concluding that Shelby had not lied on January 23, 1990. Yet the Chief removed Shelby's name on March 7, 1990, all in the pretext of granting the Geller and Small grievances. If the Chief's motivation was truly one of distrust of Shelby, he could have acted much sooner, rather than waiting for the opportunity that arose later.

Moreover, the City did nothing to hold an Investigator's position open while waiting for Arbitrator Bilder's decision. In contrast, the City promoted two officers to positions as Acting Investigators when it awaited the Vernon Award on Shelby's promotion, as well as maintained an acting position for approximately two years until Zierten's promotion was resolved. The City promoted seven officers from the 1990 eligibility list that originally listed Shelby at the top, kept no positions open for him, made none of the promotions temporary or acting positions, and made no effort as it had in the past to accommodate an open position for Shelby in the event Arbitrator Bilder awarded him an Investigator's position. Arbitrator Bilder fashioned a limited remedy in light of his understanding of the Vernon Award and the ruling by Judge Vuvunas that any ultimate decision to promote is subject to the discretion and

approval of the PFC. Rather than ordering that Shelby's name be placed first on the 1990 promotional eligibility list where it stood when struck by the City, Arbitrator Bilder only ordered that the City place his name on the first position and recommend him for promotion when a vacancy occurs. No vacancy occurred between the time of the Bilder Award on July 23, 1991, and December 31, 1991, when the list expired. Despite the contract violation, the remedy was elusive.

The City violated Sec. 111.70(3)(a)3 by discriminating against Shelby for his concerted and protected activities when on March 7, 1990, the Chief posted the amended promotional eligibility list that deleted his name and all the other candidates moved up one position. The seven officers below Shelby on the list were in fact promoted to Investigators. If the Chief had left Shelby's name on the list and recommended him for the first available slot of Investigator, it is not known whether or not the PFC would have promoted him. However, the only times that the PFC had failed to promote an officer to the position of Investigator once recommended by the Chief were the times in 1988 and 1989 when the PFC did not accept the Chief's recommendation of Shelby and the recommendation of DeFatte. It is easy to understand the PFC's rejection of DeFatte, since the Chief was also recommending that DeFatte be terminated at the same time he was obligated by contract to recommend DeFatte for promotion. The PFC did, in fact, promote Shelby to Investigator on April 12, 1992, after Shelby again took the Investigator's promotional exam and stood first on the list in 1992. The PFC had no opportunity to consider Shelby's name for promotion during all of 1990 and 1991, due to the City's discriminatory conduct in removing his name. Shelby is entitled to make-whole relief as best as can be reconstructed under these circumstances.

The record does not show the date of the first promotion to Investigator in 1990. Shelby suffered a potential loss in pay between the first promotion of Investigator in 1990 and April 12, 1992, the date of his actual promotion, due to the City's discrimination against him. The Association asks that any back pay should be retroactive to January 30, 1990. Generally speaking, remedial orders are designed to cure, not to punish, and are not intended to place the affected employe in a better position than what he was in prior to the employer's unlawful conduct. 27/ The Examiner finds that the appropriate date for an award of back pay is the date the first officer was promoted to Investigator in 1990. Shelby suffered no monetary loss until that date, and a make-whole remedy will properly restore him for the difference in what he earned as a patrol officer and what he could have earned as an Investigator between the first promotion of Investigator in 1990 to his actual promotion on April 12, 1992, but for the City's discriminatory conduct against him.

Dated at Madison, Wisconsin this 17th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

27/ City of Stevens Point, et al., Dec. No. 26525-A (Jones, 2/92), aff'd by operation of law, (WERC, 3/92)