

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LaCROSSE COUNTY TELECOMMUNICATORS
ASSOCIATION,

Complainant,

vs.

COUNTY OF LaCROSSE,

Respondent.

Case 141

No. 50371 MP-2849

Decision No. 28074-A

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Gordon McQuillen, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Mr. David Lange, Assistant Corporation Counsel, LaCrosse County, 200 Main Street, Suite 220, P. O. Box 2937, LaCrosse, Wisconsin 54602-2937, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as WPPA/LEER, filed a complaint on January 10, 1994, with the Wisconsin Employment Relations Commission alleging that LaCrosse County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., when it failed to promote Lori Peterson, the Association President, to the new telecommunicator supervisor position because of her past union activities. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On July 13, 1994, the County filed an answer to the complaint and a motion to dismiss. The motion to dismiss was premised on the contention that the incorrect party had been named as Complainant. On July 15, 1994, the Complainant responded to the motion to dismiss by modifying the name of the Complainant from WPPA/LEER to the LaCrosse County Telecommunicators Association. On July 22, 1994, the Examiner denied the Respondent's motion to dismiss in a telephone conference call. A hearing on the complaint was scheduled for July 29,

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1994, but no hearing was held that day because the parties engaged in settlement efforts which ultimately were unsuccessful. On November 16, 1994, the complaint was formally amended to indicate that the Complainant is the LaCrosse County Telecommunicators Association, rather than WPPA/LEER. A hearing was held in LaCrosse, Wisconsin, on November 29, 1994, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and reply briefs whereupon the record was closed March 1, 1995. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The LaCrosse County Telecommunicators Association, hereinafter referred to as the Complainant or Association, is a labor organization with its principal offices at 7 North Pinckney Street, No. 220, Madison, Wisconsin 53703. It has been an affiliate of WPPA/LEER since about 1989. Prior to that it was an unaffiliated and independent labor organization. At all times material hereto, the Association has been the exclusive collective bargaining representative for all regular full-time and regular part-time telecommunicators employed by the County.

2. LaCrosse County, hereinafter referred to as the Respondent or County, is a municipal employer which among its many functions operates the LaCrosse Emergency Dispatch Center. As the name implies, this Center dispatches police, fire and emergency medical services for agencies in LaCrosse and the surrounding area. The telecommunicators who work there, who are also known as dispatchers, receive emergency calls from citizens and route those calls to the appropriate entity for response. Jeannette Lenser is the Administrator for the Dispatch Center and is responsible for the administration of the Department. As Administrator, she is empowered to make the ultimate decision on supervisory promotions. Under the County's labor agreement with the Association, written grievances are filed directly with Lenser. Lenser works the first shift (i.e. days).

3. Underneath Lenser in the Department's chain of command are the telecommunicator supervisors. This position is excluded from the telecommunicators' bargaining unit. The supervisors meet weekly with Lenser to discuss management policies and procedures. They try to work together in implementing same. Prior to 1993, there were three telecommunicator supervisors in the Department: Jay Loeffler, Joseph O'Keefe and Allen Blencoe. All three were dispatchers in the Department prior to being promoted supervisors. Loeffler became a supervisor in 1984, O'Keefe in 1989 and Blencoe in 1989. O'Keefe and Blencoe were promoted by Lenser. Loeffler was promoted by Lenser's predecessor. When O'Keefe and Blencoe were promoted in 1989, they were selected over other candidates who also vied for those positions. Prior to the promotion involved here, there had not been a supervisory promotion in the department since 1989.

4. Before being promoted, all three of the supervisors referenced in Finding of Fact 3 served as president of the Association. Loeffler was president for one year between 1983-84 and was president at the time he was promoted to supervisor. During the time he served as Association president, no grievances were filed with the County. O'Keefe was president for one year between 1985-86. During the time he served as Association president, no grievances were filed with the County. Blencoe was Association president for three years between 1986-89. Blencoe considered himself an active union president. During his term he initiated the Association's affiliation with WPPA. With regard to contract negotiations, two labor agreements and a contract reopener were voluntarily settled by the parties during the time frame that Blencoe was union president. With regard to grievances, about one grievance was filed per year during the time frame that Blencoe was union president. These grievances mainly involved overtime and scheduling matters. None of these grievances involved high profile matters. While Blencoe was union president, one grievance went to grievance arbitration (the Rendler and Sevallius overtime grievance) which the Association won. Insofar as the record shows, all the other grievances filed while Blencoe was union president were settled. The record does not indicate how far these (settled) grievances progressed before they were resolved. While Blencoe was union president, he met at least quarterly with Lenser to discuss concerns and/or problems.

5. The current president of the Association is Lori Peterson. She has been president since 1989. Peterson considers herself more active as union president than her predecessors. She did not continue Blencoe's practice of meeting at least quarterly with Lenser to discuss concerns and/or problems. With regard to contract negotiations, three labor agreements have been voluntarily settled by the parties during the time frame that Peterson has been union president. With regard to grievances, one and one-half grievances (on average) have been filed per year during the time frame that Peterson has been union president. These grievances have involved the following topics: absenteeism, vacation scheduling, call-in pay, overtime and shift differential. Peterson described all these grievances as "routine." None of them involved high profile matters and none made the newspapers. All these grievances are similar to the types of grievances filed when Blencoe was union president. While Peterson has been union president, one grievance has gone to grievance arbitration (the Sevallius and Radtke overtime grievance) which the Association won. Insofar as the record shows, all the other grievances filed while Peterson has been union president have been settled. The record does not indicate how far these (settled) grievances progressed before they were resolved. The absenteeism grievance noted above involved Peterson. What happened there was that Peterson received a written warning in 1989 for absenteeism which she grieved. The grievance was settled when the Employer removed the warning letter from Peterson's personnel file. Other than dealing with each other on these grievances and seeing each other at staff meetings, Lenser and Peterson had little personal contact with one another. This was partially attributable to the fact that they worked different shifts; Peterson worked the third shift and Lenser the first shift. Lenser indicated that when grievances arose, she certainly was not happy about it nor did she enjoy dealing with them. Lenser indicated that she nevertheless dealt with them because it was part of her job as department administrator to do so. When Lenser and Peterson discussed these grievances, they often disagreed with each other's position. Insofar as the record

shows, none of their disagreements rose to the level of shouting or heated arguments. In November, 1992, a grievance arose concerning the County's apparent failure to offer overtime work to an employe. Afterwards, Lenser sent Peterson the following letter concerning same:

November 12, 1992

Lori Peterson
La Crosse County Telecommunicators Association

RE: Grievance dated 11/06/92

This grievance mirrors the grievance filed on 10/30/91.

As a result to settle the grievance I would agree to the same provisions.

Michael Sevallius would be paid four hours straight-time at the rate of \$11.94 per hour for a total payment of \$47.76.

Please advise if this is acceptable with the Association.

Jeanette Lenser /s/

Jeanette A. Lenser
Administrator

The Association apparently disagreed with Lenser's contention that a previous grievance settlement covered the then-pending grievance. Consequently, the Association would not accept the settlement terms Lenser proposed. However, insofar as the record shows, Peterson did not respond to Lenser's letter of November 12. This non-response prompted Lenser to write the following memo which was posted on a bulletin board in the Dispatch Center:

November 17, 1992

RE: Grievance 92-210

My proposal to settle this grievance was based on the same proposal which was accepted by the Association in April of 1992.

I find it difficult to understand why this is no longer an acceptable settlement for a situation which was an unintentional oversight.

Please advise me when the Association voted to deny this proposal to settle the grievance.

I would also like to be informed of who has been designated as the Association Grievance Officer, the Grievance Committee, and the Board of Directors.

Thank you.

Jeanette Lenser /s/

Jeanette A. Lenser
Administrator

This memo was not addressed to anyone. Lenser indicated she wrote the memo because she was puzzled why the earlier grievance settlement regarding overtime was not acceptable in this case as well. Lenser also indicated that the reason she publicly posted the memo was because bargaining unit employees had raised questions to her that indicated, in her view, that they were not aware of the grievance or the fact that the Association was seeking a remedy in Grievance 92-210 that differed from the remedy the Association accepted in another case that Lenser considered identical.

6. Peterson is a telecommunicator in the department and has been employed as such for nine and one-half years. She works on the third shift and has since 1987. From about 1991 till 1993, Peterson was the lead telecommunicator on her shift. The lead telecommunicator functions as acting supervisor when no supervisor is present. Peterson was selected to be the lead telecommunicator by her supervisor, Blencoe. Peterson has no disciplinary action in her personnel file. On March 16, 1993, Lenser wrote Peterson the following note on a memo that was distributed to all dispatch personnel concerning the Employer's CAD (computer) system:

Lori - although I don't observe your hands-on usage of the CAD, I am sure your high standards of job performance are carried over. I truly appreciate your commitment.

Jeanette /s/

Through the years Peterson has been evaluated by supervisors numerous times. Specifically, Loeffler evaluated her six times between 1985-88, O'Keefe evaluated her once in 1990, and Blencoe evaluated her three times between 1991-94. The supervisors evaluated Peterson by completing a pre-printed form which contained numerous categories and five possible performance rankings which ranged from poor to exceptional. The supervisors checked one of the five boxes in each category. Overall, Peterson has received good ratings in these evaluations. Between 1985 and 1990, the evaluation form which was utilized had one line for written comments. The following comments are illustrative examples of those contained in that one line on Peterson's evaluations between 1985 and 1990: "Lori is a very quick learner and with more experience will be a good dispatcher"; "Lori is doing a good job, especially considering the short time she has been here"; and "Lori is a very competent dispatcher." In 1991, the Employer used a different pre-printed evaluation form than it had used previously. This new form still contained numerous categories and five possible performance rankings, but it also contained a line for written comments in each category. When Blencoe evaluated Peterson in 1991 with the new form, he did not write comments on each of the lines. Thus, he left all the "comment" lines blank.

7. Nancy Losching is also a telecommunicator in the department. The record does not indicate how long she has been so employed. She works on the third shift. She has never served as a lead telecommunicator. None of her evaluations are contained in the record. She has never filed a grievance with the County. In addition to her regular dispatch work, Losching worked out problems the Department was having with its CAD (computer) system. Lenser was aware of Losching's work on the CAD system because she (Lenser) received memos from Losching concerning same.

8. One of Supervisor Loeffler's job responsibilities is to handle the scheduling of staff in the department. On several occasions, Loeffler and Peterson have disagreed about scheduling matters. These disagreements occurred when Peterson wanted time off and Loeffler did not want to give it to her because of scheduling conflicts. As a result of these disagreements over scheduling matters, Loeffler did not consider Peterson to be a "team player" because in his view she put her scheduling needs ahead of the Dispatcher Center as a whole.

9. Blencoe has been Peterson's supervisor on the third shift since 1990. In this capacity he has worked daily with Peterson and overseen her work. Blencoe considers Peterson a very good and competent dispatcher. He also considers her to have a negative attitude toward the department's management in general and little personal rapport with Lenser. Blencoe has counseled Peterson on several occasions regarding her attitude toward management and her relationship with Lenser. Specifically, Blencoe has urged Peterson to be more flexible in dealing with Lenser and other supervisors, to try to accommodate Lenser, and to see things from Lenser's perspective. Peterson admits to having negative feelings towards Lenser. Peterson believes that Lenser does not like her either. Prior to evaluating the employees under his direction in 1993, Blencoe issued a questionnaire for them to complete. One of the questions on that questionnaire was: "What do you consider to be your most important accomplishment since your last evaluation?" Peterson wrote the

following in response to that question: "Haven't gotten in trouble. Haven't smashed the computer." Because of his previous dealings with Peterson, Blencoe understood that Peterson intended her response to the foregoing question to be lighthearted. After receiving this written comment from Peterson, Blencoe evaluated her. As in previous years, Blencoe completed a pre-printed evaluation form by checking one of five boxes in each category. He also made written comments on the "Comments" line in nine of the eleven categories. In the category entitled "Job Knowledge" Blencoe wrote: "Keeps up with changes and always knows the procedure." In the category entitled "Use of Time" Blencoe wrote: "Lori doesn't make mistakes." In the category entitled "Initiative" Blencoe wrote: "She finds a way to do what is needed." In the category entitled "Attendance" Blencoe wrote: "Quite dependable." In the category entitled "Learning Ability" Blencoe wrote: "Doesn't need things explained more than once." In the category entitled "Public Contact/Interaction With Others" Blencoe wrote: "Treats the public well and keeps radio/phone work professional." In the category entitled "Constructive/Independent Thinking" Blencoe wrote: "Lori often has good, valid suggestions although they are sometimes presented as a challenge." In the category entitled "Behavior Toward Authority/Work" Blencoe wrote: "Has never been a problem although she seems skeptical of employer at times." Blencoe's final comments on the evaluation were as follows: "Lori is a steady performer. Always represents the department well and adds a certain energy to the third shift." Blencoe gave Peterson an overall performance rating of "outstanding performance" which was the next to the highest rating (fourth out of five). In February, 1994, Blencoe again evaluated Peterson. The evaluation form which he utilized was the same as the previous year, but there was one change. The change was that the numbers one through five were inserted in the boxes for the various categories listed. Prior to this, there were no numbers in these categories. Like he had done in 1993, Blencoe made written comments on the "Comments" line in nine of the eleven categories. In the category entitled "Job Knowledge" Blencoe wrote: "The only time Lori doesn't know is when it has been poorly presented or documented for her. She knows what to do." In the category entitled "Use of Time" Blencoe wrote: "Could make better use of some slow periods. Although has not gotten much guidance or expectation from supervisor." In the category entitled "Quality of Work" Blencoe wrote: "It is not necessary to double check. She does it right." In the category entitled "Initiative" Blencoe wrote: "Always gets 'it' done." In the category entitled "Attendance" Blencoe wrote: "Continues to be dependable." In the category entitled "Learning Ability" Blencoe wrote: "Seldom needs any special explanation. Picks things up quickly." In the category entitled "Public Contact/Interaction with Others" Blencoe wrote: "Consistently courteous and professional." In the category entitled "Constructive/Independent Thinking" Blencoe wrote: "Continues to provide good ideas. Makes suggestions by challenge; doesn't seem to feel supervision will give her ideas much thought." In the category entitled "Behavior Toward Authority/Work" Blencoe wrote: "Generally good. She does occasionally seem at odds with the County leadership." Blencoe's final comments on the evaluation were as follows: "Continues to be dependable, consistent and professional. I would like to see her neutralize some of her feelings toward the County and let herself grow." The boxes which Blencoe checked on this evaluation form in the eleven areas gave Peterson a mathematical score of 35. Blencoe gave Peterson an overall performance rating of "outstanding performance." The mathematical score that accompanies the "outstanding performance" rating is 37 - 48. After

Blencoe completed Peterson's evaluation, he submitted it to Lenser for her review. Lenser changed Peterson's overall performance rating on this evaluation from the next to the highest ranking ("outstanding performance") to the middle ranking of "performs in a consistent and satisfactory manner." The mathematical score that accompanies this rating is 25 - 36. This was the first time Lenser ever changed an employe's overall performance rating on an evaluation. This was the only change Lenser made to Peterson's 1994 evaluation. Lenser indicated the reason she changed Peterson's overall performance rating downward was that the numerical scores on Peterson's evaluation (which totaled 35) were not high enough to warrant inclusion in the "outstanding performance" category (which is 37 or higher), so she changed Peterson's rating to reflect a numerical score of 35. Lenser also indicated that the revised evaluation forms had been discussed at a department head meeting and that department heads had been specifically advised to pay close attention to the categories on the evaluation form and the placement of the marks in the proper categories. Other County administrators besides Lenser have changed employe evaluations.

10. In addition to dealing with Peterson when processing grievances, Lenser also gleaned information about Peterson from other sources, namely her evaluations, what she learned from the supervisors, and what she heard Peterson say at the department's regular staff meetings. With regard to evaluations, Lenser has signed each of Peterson's ten evaluations going back to 1985. With regard to what she learned from the supervisors, Lenser was aware of the disagreements Loeffler and Peterson had over scheduling matters. Lenser was also aware that Blencoe had counseled Peterson regarding her attitude toward management. With regard to what she had heard Peterson say at staff meetings, Lenser felt that some of Peterson's statements at staff meetings showed a negative attitude toward management's policies and procedures. Insofar as the record shows, the topics addressed at staff meetings did not involve union activity, but rather department policies and procedures.

11. In early 1993, the County created a new (and fourth) telecommunicator supervisor position at the Dispatch Center. The three existing supervisors (Loeffler, O'Keefe and Blencoe) were not involved in the Employer's decision making process to fill the new supervisory position. The new supervisory position was posted on March 4, 1993. Blencoe encouraged Peterson to apply for the position. The posting indicated that applicants would be required to pass written and oral examination(s). Three bargaining unit employes ultimately posted for the position: Lori Peterson, Nancy Losching and Mike Sevallius. Peterson was the most senior of the three applicants.

12. The first step of the supervisor selection process involved a written test. All three applicants took a written test which was administered by the State's City/County Testing Service. Afterwards, they were informed by letter of their score on the test. Of the three test takers, the applicant who scored the highest was Peterson. Her score was 77 percent. The record does not indicate the score of the other test takers. Sevallius though did not score high enough on the written test to continue, so he was eliminated from the process. Thus, the only applicants who advanced to the next step of the selection process were Peterson and Losching.

13. The second step of the supervisor selection process was for Peterson and Losching to be interviewed by a three-person panel. The panel consisted of LaCrosse County Assistant District Attorney Lora Lee Clark, Captain Schmidt from the City of LaCrosse Police Department and LaCrosse County Assistant Personnel Director Mary Marco. Lenser sat in on the panel interview but did not ask questions of the candidates. It is not uncommon in LaCrosse County for a department head to sit in on the panel interview portion of the promotion process. With one exception, the record does not identify what questions were asked of the applicants during the panel interview. The exception is as follows. During the panel interview, Peterson was asked how she would deal with an employe who when asked to perform the job task of vacuuming the office responds that the task is not in his or her job description. Peterson thought it suspicious that this particular question would be raised during the panel interview because she had once discussed this very same topic with a supervisor. In that previous discussion, Peterson had contended that the task of vacuuming was not in her job description. The record does not indicate whether the panel members rated each candidate or assigned them a mathematical score. The interview panel did not recommend one candidate over the other. Sometime after the panel interview was over, someone told Peterson that the panel members picked up on her "negative attitude" during the interview.

14. The third and final step in the selection process was a one-on-one oral interview with Lenser. Peterson and Losching were interviewed separately by Lenser on May 19, 1993. Prior to the interview, Lenser prepared the following interview questions:

1. As you know, this position will primarily swing between third shift and second shift. The first day of the work pattern frequently will begin on third shift and end with a second shift. What shift do you prefer and why?
2. Tell me what you like about working for La Crosse County. Tell me what you dislike.
3. What are your long-range career goals?
4. What do you feel is the MOST important function of the Dispatch Center?
5. What would you like to see improved in the Center? How would you propose accomplishing it?
6. Tell me your views regarding an employee's obligation to the employer.

7. Tell me your views regarding an employer's obligation to the employees.

8. Tell me two things you would like to improve about yourself and why.

Lenser asked these questions of both Losching and Peterson during their interviews. Lenser did not take written notes during the interviews. She indicated the reason she did not take notes was because both candidates were not outsiders to the department; rather, she already knew both candidates. Lenser indicated that Losching's interview lasted longer than Peterson's because Losching expounded on the questions in detail while Peterson's answers were short and brief. During Peterson's interview, Lenser and Peterson discussed the fact that they had disagreed on matters in the past that involved both grievances and policies, and that if Peterson became a supervisor they would need to work together better. Lenser did not give Losching or Peterson a numerical rating after the interview.

15. Under the County's existing supervisory promotion procedure, Lenser could select either of the candidates whom she interviewed for the supervisor position. Lenser did not consult with the existing supervisors before making her decision. As a result, she did not ask the three existing supervisors whom they thought should be promoted. Lenser selected Losching for the new supervisor position. Lenser indicated she selected Losching for the following reasons: 1) She (Lenser) felt that Losching did better than Peterson in their one-on-one interview because Losching's answers to questions were positive, specific and people oriented, whereas Peterson's answers during the interview were brief, evasive and did not articulate long-range goals; 2) Lenser thought that she and Losching were on the same "wave length" and had similar goals for the department; 3) Lenser felt that she could develop a trusting relationship with Losching; 4) Lenser felt Losching had shown leadership skills by working on the department's computer on her own motion; 5) Lenser felt that Losching had demonstrated scheduling flexibility in the past, and this was important to Lenser because she and the other supervisors have to get together at agreeable times for supervisory meetings; 6) Lenser thought Peterson had exhibited a negative attitude at staff meetings toward management's policies and procedures, and in Lenser's view, Peterson never had positive ideas to add; and 7) Lenser thought that Peterson had problems dealing with her and the other supervisors.

16. After Lenser made her selection, she wrote letters to both Losching and Peterson informing them of her decision. These letters were apparently put in their respective mail boxes at work. Losching got her letter before Peterson got hers. Losching and Peterson later talked about the supervisor selection process. During their conversation, Losching expressed surprise to Peterson that she (Losching) had been selected as supervisor. Losching also told Peterson that she (Losching) did not expect to be selected, but rather had applied to get the experience of applying. Losching also told Peterson that she thought the notification process which had been utilized to

advise each of the final decision was "bullshit."

17. The record adduced herein does not establish by a clear and satisfactory preponderance of the evidence that Lenser's failure to select Peterson for the new

telecommunicator supervisor's position was motivated in any part by anti-union considerations, and/or by the exercise of Peterson's right to engage in lawful concerted activity on behalf of the Association and/or its membership.

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

CONCLUSION OF LAW

The County's failure to promote Lori Peterson to the new telecommunicator supervisor's position was not due to animus toward Peterson's past union activities. Consequently, the County's non-selection of Peterson for that supervisory position did not violate Sec. 111.70(3)(a)3, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

The Association's complaint of prohibited practices is dismissed.

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written

(continued on page 12)

Dated at Madison, Wisconsin, this 31st day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

1/ (continued from Page 11)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

LaCROSSE COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Association alleged that the County violated Sec. 111.70(3)(a)3, Stats., by failing to promote Association President Peterson to the new telecommunicator supervisor position because of her past union activities. The County answered the complaint by denying that it had committed any prohibited practice.

POSITIONS OF THE PARTIES

The Association

It is the Association's position that the County's failure to promote Peterson, the Association president, to the new supervisory position violated MERA because it was based in part on anti-union animus, namely the County's hostility toward Peterson and her past union activity. According to the Association, it established all the elements required for a finding that the County violated Sec. 111.70(3)(a)3 when it failed to promote Peterson. Specifically, it asserts that the record establishes that Peterson engaged in lawful, concerted activity; that the County was aware of that activity; that Lenser was hostile toward that activity; and that Lenser's failure to promote Peterson to the new telecommunicator supervisor position was based, at least in part, on that hostility.

The Association contends that Lenser's hostility to the Association in general and Peterson in particular is established by the following evidence. First, it cites Lenser's conduct following the Association's November, 1992 rejection of her offer to settle Grievance No. 92-210. What happened there was that Lenser posted a memo which expressed her dissatisfaction and annoyance with the Association's decision to reject her settlement offer, demanded to be informed of when the Association voted to reject her offer, and demanded to be informed of the identities of Association officials. According to the Association, this memo was intended to go over Peterson's head to the entire bargaining unit with regard to the rejected settlement offer. The Association also views Lenser's demand to be informed of internal Association business as an unwarranted intrusion into the Association's internal practices. Second, it cites Peterson's testimony that after she became Association president in 1989, Lenser's attitude towards her changed. Third, it notes that Peterson's 1993 evaluation contained the following criticisms: "Lori often has good, valid suggestions although they are sometimes presented as a challenge," and "Has never been a problem although she seems skeptical of employer at times." The Association asserts that in all of Peterson's previous

annual evaluations, she had never received similar criticisms. The Association argues that the presence of these criticisms in this evaluation reflects the animosity the County held against her based upon her past union activities. Fourth, the Association cites one of the questions which was posed to Peterson during her panel interview, namely when she was asked how she would deal with an employe who when asked to perform the job task of vacuuming the office responds that the task is not in his or her job description. The Association asserts that question was directly related to a conversation Peterson had previously had with a supervisor. According to the Association, this conversation involved union activity, namely the propriety of employes performing maintenance-type tasks. In the Association's opinion, the fact that this specific event was referred to in a question posed during the panel interview illustrates the animosity that Lenser held against Peterson for her past activities as union president. Finally, responding to the County's assertion that all three supervisors had previously been union presidents before they were promoted, the Association contends that Peterson was more active as union president than her predecessors. The Association submits that the existing supervisors were promoted because of their conciliatory relationship with the County, which the Association contrasts with Peterson's non-conciliatory approach to management.

Next, the Association contends that the following evidence establishes that Lenser's failure to promote Peterson was based in part on Lenser's hostility towards Peterson's past union activities. First, it cites Losching's reaction to the news that she had been selected for the position, namely that Losching was "really surprised" that Peterson did not get the job and that Losching did not expect to be selected but rather applied to get the experience of applying. It also asserts that Losching used the term "bullshit" to describe how the County treated Peterson during the application process. Second, the Association cites Peterson's testimony that after the panel interview was over, someone told her that the panel members picked up on her "negative attitude" during the interview. According to the Association, this was a reference to her union activities. The Association submits that the panel relied on same "to lower her score." Third, the Association asserts that the criticisms contained in Peterson's 1993 evaluation referred to her activities as Association president. Finally, the Association argues that animus was demonstrated toward Peterson at her interviews, and this animus contributed to Lenser's decision not to promote Peterson.

Finally, the Association asserts that the County failed to articulate convincing reasons for failing to promote Peterson. In its view, the reasons cited by the Employer in their brief are not plausible or valid reasons. First, with regard to Lenser's assertion that Losching had a positive attitude, the Association contends that Lenser allowed herself to be persuaded by Losching's "conciliatory approach" as opposed to Peterson's "union oriented approach." Second, with regard to Losching's alleged superior leadership skills, the Association notes that Peterson was the lead telecommunicator on her shift. In the Association's opinion this fact conclusively establishes that she had the leadership qualities and ability to be the supervisor. Third, the Association argues that contrary to the Employer's assertion, Peterson did not have trouble dealing with Lenser or any of the other supervisors. Next, the Association argues that the "negative attitude" that Lenser referenced

dealt with Peterson's activities as Association president. Last, with regard to the scheduling flexibility that Lenser referenced, the Association submits that there is nothing in the record which would suggest that Peterson would have trouble with the scheduling demands of the supervisor's position.

The Association argues that Peterson should have been promoted to the supervisor position because she had the highest score among the candidates on the written test, had been the lead dispatcher, had received high performance evaluations, had no disciplinary action imposed against her and had more experience and seniority than Losching. In the Association's view, there is no logical explanation for Lenser's failure to promote Peterson except for her union activities.

In order to remedy the alleged promotion discrimination suffered by Peterson, the Association seeks an order promoting Peterson to the position of telecommunicator supervisor and making her whole for lost back pay.

The County

It is the County's position that its conduct herein did not constitute a prohibited practice. The County acknowledges that it cannot take an employe's union activity into account when making a promotion. It argues that here, though, the Association failed to present clear and convincing evidence that the County's action in selecting a person other than the union president for supervisor was motivated in any way by hostility toward her (Peterson's) past union activities.

The County also acknowledges that Peterson has been active in the union and in that capacity has filed and processed grievances. It notes that her predecessor as union president, Blencoe, was active too. Additionally, the County notes that all three of management's supervisors had been union presidents prior to their selection by Lenser as supervisor. In the County's view, these prior promotions show that Lenser did not have a history of denying promotions to union presidents but, to the contrary, had a track record of promoting them.

Next, the County reviews the various incidents relied upon by the Association for the proposition that these matters show that hostility existed between Lenser and Peterson. However, after reviewing same, the County reaches the opposite conclusion, namely that those events do not show hostility by Lenser towards Peterson. First, with regard to Lenser's changing Peterson's ranking in her 1994 evaluation, the County asserts that this was not significant because the change Lenser made simply conformed the ranking with the actual numbers used. The County notes that department heads had been specifically directed to look more carefully at the scores when completing evaluations. Second, with regard to the 1992 memo which Lenser wrote and posted concerning a then-pending grievance, the County contends that Lenser explained why she did so (namely she was puzzled why an earlier settlement regarding the same type of situation was not acceptable and also because of questions raised to her by employes indicating they were not aware of the grievance or the rejected settlement offer.) Third, with regard to the Association's contention that Lenser was hostile to Peterson's union activity, the County views this as an exaggeration of

Peterson's testimony. According to the County there were certainly disagreements between Peterson and Lenser concerning grievances, but none of their discussions became heated, were outside the norm, or were non-routine. Fourth, with regard to Peterson's 1993 evaluation by Blencoe, the County makes the following points. To begin with, it notes that it was Lenser who made the decision to promote Losching and not Blencoe. Next, it notes that Blencoe encouraged Peterson to apply for the supervisory position. Next, it asserts that the criticisms contained on that evaluation do not refer to Peterson's union activities. Instead, it submits that the references to "presenting suggestions as a challenge" and "seeming skeptical of employer" are attitudes or actions which could manifest themselves during the work day or at staff meetings. Given the foregoing, the County contends the Association did not show the third factor needed to prove a (3)(a)3 violation, namely hostility to the Association.

The County also argues that the District did not show the fourth factor needed to prove a (3)(a)3 violation, namely that Lenser's failure to promote Peterson was based in part on Lenser's hostility towards Peterson's past union activities. First, with regard to Losching's reaction to the promotion, the County asserts that the fact that she may have been surprised by her selection does not prove anything. Second, with regard to Peterson's testimony that she heard after the panel interview that the panel picked up on her "bad attitude," the County submits that a "bad attitude" is not synonymous with union activities. Moreover, it asserts that this observation supports Lenser's and Blencoe's observations that Peterson's non-selection was due to Peterson's hostile attitude toward the County. Third, with regard to Peterson's 1993 evaluation by Blencoe, the County again notes that there is nothing in those criticisms that reference Peterson's union activities. Fourth, with regard to the Association's contention that Peterson's interviews were tainted, the County argues there is no evidence to support that contention.

Finally, the County believes Lenser offered valid reasons justifying her selection of Losching over Peterson. Among those reasons were the following: 1) Lenser thought she and Losching had similar goals for the department; 2) Lenser felt Peterson had trouble dealing with her and the other supervisors, whereas she thought she could develop a trusting relationship with Losching; 3) Lenser felt Losching had leadership skills which she had exhibited by working on the Employer's computer system; 4) Lenser thought Losching had demonstrated scheduling flexibility in the past, and in Lenser's view this attribute was important for planning supervisor meetings; and 5) Lenser thought Peterson had exhibited a negative attitude at staff meetings towards management's policies. According to Lenser, this consideration was important because the person selected as supervisor implements department policies.

In conclusion, the County argues that Peterson's non-selection as supervisor was not tainted by her past union activity. It therefore requests that the complaint be dismissed.

DISCUSSION

The Legal Framework for (3)(a)3

The legal standards for complaint cases alleging discrimination are well-settled. Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." By its explicit reference to "other terms or conditions of employment," Section (3)(a)3 has been held to include promotional opportunities.^{2/} Therefore, not promoting an employe because of his/her union activity falls within this proscription. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employes were engaged in protected activities; and
2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and

^{2/} Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88); aff'd, Dec. No. 24498-B (WERC, 7/88).

4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 3/

It is well-settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 4/ 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. 5/ An employer may not subject an employee to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 6/ If it is established that an adverse (personnel) consequence was in any part motivated by the employee's union activity, then the Examiner is obligated to grant relief in the form of remedial and affirmative orders.

3/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

4/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967); Employment Relations Department v. WERC, 122 Wis.2d 132 (1985).

5/ Ibid.

6/ Muskego-Norway, supra, at p. 562.

Application of the Legal Framework to the Facts

Applied to the facts involved here, the above-noted Section (3)(a)3 test requires that the Complainant demonstrate that Peterson engaged in protected activities; that the County had knowledge of those activities; that the County was hostile towards those activities; and that the County's decision to not promote Peterson to the new telecommunicator supervisor position was based, at least in part, upon said hostility.

Elements one and two above are not in dispute here. The parties stipulated that Peterson engaged in lawful, concerted activities as union president and that the County had knowledge of Peterson's protected activities. Elements three and four are in issue though, with the County denying hostility towards those union activities and also denying that Peterson's union activities played any part in the supervisor promotion involved here.

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. 7/ Here, the record will be reviewed for evidence of both types. If direct evidence of hostility or illegal motive is found lacking, the Examiner will then look to the total circumstances of the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. 8/

That said, the focus now turns to the third element necessary to prove a (3)(a)3 claim,

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

". . . it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, Shattuck Denn Mining Corp. v. N.L.R.B., 362 F 2d, 466, 470 (9 Cir., 1966):

"Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

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

namely hostility toward union activities.

There is no direct evidence in the record that Lenser was hostile to the Association in general or Peterson's union activities in particular. For example, when grievances were being processed, Lenser never exhibited any outright anger or hostility toward grievance activity itself. While certainly there were differences of opinion between Lenser and Peterson over the merits of various grievances, that is to be expected. However, insofar as the record shows, none of the disagreements between Lenser and Peterson ever involved major confrontations, shouting matches, or any type of watershed event. That being the case, no direct evidence of hostility exists.

The Association contends that even though there is no direct evidence that Lenser was hostile toward the Association in general and Peterson's union activities in particular, an inference can still be drawn from the total circumstances of the record that this is what occurred.

In support of this assertion, the Association cites the following matters: 1) Peterson's contention that she was more active as union president than her predecessors; Lenser's 1992 memo following the Association's rejection of her offer to settle Grievance No. 92-210; 3) Peterson's testimony that after she became Association President in 1989, Lenser's attitude toward her "changed"; 4) the fact that Peterson's 1993 evaluation contained various criticisms; 5) the fact that Lenser changed Peterson's ranking in her 1994 evaluation; and 6) the fact that one of the questions posed to Peterson during her panel interview (namely the vacuum question) dealt with a conversation Peterson had previously had with a supervisor. Each of these matters is reviewed below.

The Association initially asserts that the County and Lenser were hostile to Peterson because she was more active and more militant as union president than her predecessors. The discussion on this point compares Peterson to Blencoe, her immediate predecessor as union president. First, it was Blencoe who initiated the Association's affiliation with WPPA. Second, with regard to contract negotiations, Blencoe and Peterson each negotiated about the same number of labor agreements with the County. All these agreements were settled voluntarily short of interest arbitration. Third, with regard to grievances, the number of grievances filed while Peterson was president increased from what was filed during Blencoe's term. The increase was not dramatic though. Specifically, it went from about one grievance per year during Blencoe's term to one and a half grievances (on average) per year during Peterson's term. The grievances filed while Peterson was president were similar to the type of grievances filed when Blencoe was union president. Peterson herself described the grievances filed while she was president as "routine." None involved high profile matters and none made the newspapers. Just one grievance filed while Peterson was president went to arbitration; the rest settled. This figure mirrors that of Blencoe when he served as union president. While the Association asserts that Blencoe's grievances "rarely went beyond the first step of the grievance process," and that Peterson was "less willing to settle grievances in that matter," there is simply not enough detail on this point in the record to allow a finding to be made concerning same. This is because the record does not indicate how far (settled) grievances

progressed before they were resolved. When the foregoing evidence is considered as a whole, it does not establish that Peterson was "more active" or "more militant" as union president than Blencoe.

The Association also contends that a 1992 memo Lenser wrote and posted establishes hostility toward Peterson and the Association. Lenser wrote the memo after the Association rejected her offer to settle Grievance 92-210. The memo, which was not addressed to anyone, reads as follows:

RE: Grievance 92-210

My proposal to settle this grievance was based on the same proposal which was accepted by the Association in April of 1992.

I find it difficult to understand why this is no longer an acceptable settlement for a situation which was an unintentional oversight.

Please advise me when the Association voted to deny this proposal to settle the grievance.

I would also like to be informed of who has been designated as the Association Grievance Officer, the Grievance Committee, and the Board of Directors.

Thank you.

Jeanette Lenser /s/

Jeanette A. Lenser
Administrator

The Association reads much into this memo. First, it contends this memo was intended to go over Peterson's head to the entire bargaining unit with regard to the rejected settlement offer. The Examiner surmises that may indeed have been Lenser's intention in posting the memo publicly. Certainly Lenser was irritated that the Association rejected her settlement offer. That is why she wrote and posted the memo. Second, the Association views Lenser's request that she be supplied with certain information as an "unwarranted intrusion into internal Association" matters. Whatever Lenser's intent was in asking for this information, it is apparent that Lenser could have easily obtained the requested information from Peterson, who Lenser knew was union president. Asking

for this information via a memo which was not addressed to anyone in particular certainly seems a circuitous way to get the requested information. The foregoing comments notwithstanding, the Examiner reads Lenser's memo to primarily express irritation and annoyance with the Association for rejecting the settlement offer on Grievance 92-210. Irritation and annoyance however are not matters proscribed by (3)(a)3. Instead, what is proscribed conduct is hostility toward grievance activity itself. Lenser's memo does not show hostility toward grievance activity itself, either on its face or when reading between the proverbial lines.

Next, attention is turned to the Association's contention that after Peterson became union president in 1989, Lenser's attitude toward her "changed." Other than making this bald assertion though, the Association does not show what "changed" after 1989. There is nothing in the record which documents any examples of changed behavior between Lenser and Peterson. As a result, there is no evidence to support the Association's contention that Lenser's attitude toward Peterson "changed" after Peterson became union president.

The Association also contends that the criticisms contained in Peterson's 1993 evaluation establish hostility towards Peterson's union activities. Specifically, the Association cites the following comments: "Lori often has good, valid suggestions although they are sometimes presented as a challenge" and "has never been a problem although she seems skeptical of employer at times." While the Association submits that these comments reference Peterson's past union activities, the plain meaning does not support such a reading of same. On their face, these comments do not reference union activity at all. Instead, these comments refer to conduct which the evaluator (Blencoe) felt Peterson exhibited while doing her job as telecommunicator. It is therefore held that the above-noted comments on Peterson's 1993 evaluation do not show hostility towards Peterson's past union activities.

Next, the Association contends that the fact that Lenser changed Peterson's overall ranking on her 1994 evaluation shows her hostility toward Peterson. The record indicates that when Blencoe rated Peterson in 1994, he marked boxes which gave Peterson a mathematical score of 35. He then went on to give her an overall ranking in a category where the mathematical score is 37 - 48. Since Peterson did not get a mathematical score of 37 or higher, it is apparent that Blencoe checked the wrong overall category. He should have checked the category that corresponds with a mathematical score of 35. When Lenser reviewed Peterson's evaluation, she caught this mistake and corrected it by giving Peterson a rating which reflected a score of 35. The Examiner finds nothing sinister in this action. In my view, this change in Peterson's ranking on her 1994 evaluation was both understandable and justifiable under the circumstances. Consequently, it does not establish hostility.

Finally, the Association cites the fact that one of the questions posed to Peterson during her panel interview (namely the question concerning the task of vacuuming) dealt with a discussion Peterson had previously had with a supervisor. It is noted at the outset that questions of "how would you deal with the following scenario" are commonly asked at promotion interviews. Generally speaking, such questions are considered a legitimate line of inquiry. Here, Peterson was asked such a question in her panel interview. Oftentimes such questions involve hypothetical

situations. Here, though, the situation was not hypothetical but had, in fact, previously occurred. This certainly was no accident. The question was no doubt asked because this very matter had previously arisen. However, the fact that there was some underlying history to the topic does not somehow taint the question or preclude the Employer from asking about it. Moreover, while the Association contends that Peterson's previous discussion with a supervisor concerning whether vacuuming was or was not in her job description involved union activity, there is nothing in the record that substantiates this contention. Accordingly, it is held that the fact that Peterson was asked a question during her panel interview which dealt with a discussion she had previously had with a supervisor concerning the task of vacuuming does not show hostility toward union activity.

After considering the foregoing matters individually and collectively, the Examiner finds they are insufficient to infer hostility by Lenser or the County toward the Association in general or Peterson's union activities in particular.

This finding that the Association has not proved the third element of their (3)(a)3 claim technically ends this case. However, for purposes of completing the record, the Examiner has decided to review the Association's contentions regarding the fourth element necessary to prove a (3)(a)3 claim, namely illegal motive. As previously noted, this element involves the question of whether the Employer's non-selection of Peterson for the supervisor position was motivated, in part, by hostility towards Peterson's union activities.

There is no direct evidence in the record that Lenser did not select Peterson for promotion because of her past union activities. For example, Lenser flatly denied not selecting Peterson because of her past union activities. Additionally, Lenser never told anyone that Peterson's past union activities precluded her from being promoted. That being the case, no direct evidence of illegal motive exists.

The Association contends that even though there is no direct evidence that Lenser failed to select Peterson because of her past union activities, an inference can still be drawn from the total circumstances of the record that this is what occurred.

In support of this assertion, the Association cites the following matters: 1) "the reaction of her (Peterson's) co-workers and supervisors to the news that she had not been promoted"; 2) Peterson's testimony that she heard that the panel members picked up on her "negative attitude" during the interview; 3) the criticisms contained in Peterson's 1993 evaluation; and 4) Peterson's interviews in general. Each of these matters is reviewed below.

Attention is focused first on the reaction of Peterson's supervisors and co-workers to Losching's selection. The record indicates that collectively speaking, the supervisors were not surprised that Losching was selected. Just one of Peterson's co-worker's reaction is documented in the record, and that was Losching's. Losching told Peterson she was surprised she had been selected. In and of itself though, Losching's surprise at her selection proves nothing. Additionally, while the Association asserts that Losching "used the term 'bullshit' to describe how the County treated Peterson during the application process," a close reading of the record indicates that

Losching's use of that term applied to the way she and Peterson had been notified who was selected; not the application process itself.

Next, the Association cites Peterson's testimony that she heard after the panel interview that the panel members picked up on her "negative attitude" during the interview. Assuming for the sake of discussion that the panel did sense a "negative attitude" in Peterson, that does not somehow turn the panel interview from a legitimate process into an illegitimate one. Moreover, while the Association asserts that the phrase "negative attitude" is "an obvious reference to her union activities," there is nothing in the record that makes such a connection "obvious." It is certainly possible for an employe to have "negative attitude" independent of union activities, and the Employer asserts that such was the case with Peterson. Finally, while the Association contends that Peterson's alleged "negative attitude" was utilized by the interview panel to give her a low score on the interview, the record does not indicate that the panel gave scores to either of the candidates interviewed. Even if they did though, Peterson's score was still high enough that she was able to proceed to the second oral interview, namely the one-on-one interview with Lenser.

Next, the Association again cites the criticisms contained in Peterson's 1993 evaluation and connects that evaluation to her non-selection. My discussion on this point begins with the following overview of Peterson's previous evaluations. Prior to 1993, Peterson's evaluations contained just one written comment per evaluation. There was no space on the pre-printed form for additional comments. In 1991, the Employer used a revised evaluation form which contained a line for comments in each category, but Blencoe chose not to make comments on each of those lines. In 1993, Blencoe made written comments in the "Comments" line in nine categories. Seven of the nine comments can be characterized as favorable and complimentary. Two of the nine comments can be characterized as criticisms. It is the latter two that the Association focuses on. As previously noted, the two criticisms (i.e. "suggestions . . . presented as a challenge" and "seems skeptical of employer") do not refer to Peterson's union activity; instead, they refer to certain attitudes which Blencoe felt Peterson exhibited. Moreover, those criticisms were written by Blencoe, and he had no input into who was selected supervisor; Lenser made that call herself. Insofar as the record shows, Lenser did not make her selection based on the candidate's 1993 evaluation.

Finally, the Association argues that animus was demonstrated toward Peterson at her interviews. Other than making this bald assertion though, the Association did not cite any evidence to support this contention. The matter of the vacuum question which was asked at the panel interview has already been addressed so no additional comment is necessary. After reviewing the record, the Examiner finds no evidence that either of Peterson's interviews were tainted. Specifically, no suspect questions were asked and no unlawful inquiries were made of Peterson at either interview. Instead, the questions asked and the topics covered dealt with Peterson's ability to perform the supervisor's job. It was certainly appropriate under the circumstances for the two to discuss how they would work together in the future if Peterson became a supervisor, given their past disagreements on grievances and department policies.

Furthermore, the evidence falls short of demonstrating that the reasons given for Losching's promotion were pretextual. In so finding, it is noted at the outset that there are some things about Losching's selection, and Peterson's non-selection, that make it appear suspicious. For example, Peterson was the senior candidate, a lead telecommunicator, had received the highest score on the written test, had received overall good performance evaluations, and was considered by her direct supervisor to be a good, competent telecommunicator. For purposes of comparison, it is noted that the person who was selected (Losching) had less experience (than Peterson), was not a lead telecommunicator, and did not receive the highest score on the written exam. Losching's evaluations are not in the record so comparisons based on evaluations cannot be made between her and Peterson. Additionally, the record does not indicate whether Losching was considered by her direct supervisor to be a good, competent telecommunicator. Finally, there is the obvious fact that Peterson was union president and has filed grievances, while Losching was not union president and has not filed grievances.

Be that as it may, the explanations offered by Lenser for Losching's selection and Peterson's non-selection cannot reasonably be found to be pretextual. As noted in the Findings of Fact, Lenser knew about Peterson from a variety of sources: the evaluations she had signed for Peterson since 1985; what the supervisors had told her about encounters they had with Peterson; what she (Lenser) had heard Peterson say at staff meetings; and the encounters they had in processing and resolving grievances. Given the foregoing, it is apparent that Lenser was familiar with Peterson prior to their one-on-one interview. Following their interview, Lenser felt that Losching did better in the interview than Peterson did. Lenser also felt that she could work better with, and had a better personal rapport with, Losching than Peterson. Finally, Lenser felt that Losching had a more positive attitude than Peterson. It was Lenser's opinion then that Losching was the better of the two candidates for the job of telecommunicator supervisor. Certainly it can be argued that Lenser played favorites when making her selection, or was mistaken about Losching's ability, or that Peterson was the better qualified candidate. However, even if proved, that would not be a sufficient basis for the Examiner to infer that the reasons cited by Lenser for Losching's selection were pretextual and that Lenser did not select Peterson because of her past union activities. Thus, there simply is not sufficient evidence to infer anti-union animus.

In summary then, the Examiner did not find a reasonable basis to infer that the County was hostile towards Peterson's past union activities or that Peterson was not promoted, even in part, because of hostility towards her past union activities. Consequently, it is held that the County's non-selection of Peterson for the supervisor position involved here did not violate Sec. 111.70(3)(a)3.

Although the instant complaint did not plead a (3)(a)1 claim, nor did the Association make such a claim at hearing, the Association's briefs contain a passing reference to same. If the Association intended this reference to raise an interference claim, the Examiner finds it was intended as a derivative of the (3)(a)3 claim. As such, it has been subsumed into the analysis

above. Thus, no (3)(a)1 violation has been shown. Accordingly then, the complaint has been dismissed.

Dated at Madison, Wisconsin, this 31st day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner