

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL WARREN,

Complainant,

vs.

TOWN OF CALEDONIA,

Respondent.

Case 57
No. 54079 MP-3171
Decision No. 28737-A

Appearances:

Mr. Robert K. Weber, Weber & Cafferty, S.C., 2932 Northwestern Avenue, Racine, WI 53404, appearing on behalf of the Complainant.

Mr. William R. Halsey, Attorney at Law, Long & Halsey Associates, Inc., 8338 Corporate Drive, Suite 500, Racine, WI 53406, appearing on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Daniel Warren, a police officer employed by the Town of Caledonia, filed a complaint on May 7, 1996, with the Wisconsin Employment Relations Commission alleging that the Town of Caledonia had committed a prohibited practice within the meaning of Sec. 111.70(2) and 111.70(3)(a)3, Stats., when it bypassed him for a promotional position to sergeant because of his union activity. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Caledonia, Wisconsin, on July 11, 1996, and the parties agreed to submit the remaining portion of the record by means of affidavits, the last of which was received on March 12, 1997, and the parties completed filing briefs by March 12, 1997. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Daniel Warren is an individual whose address is 5719 San-Dell Way, Racine, Wisconsin 53402. Warren had been employed as a police officer by the Town of Caledonia since 1987.
2. The Town of Caledonia is a municipal employer with its address at 6922 Nicholson

Road, Caledonia, Wisconsin 53108. The Chief of Police is Jeffrey Meier. He became the Police Chief in 1989. There are 26 sworn officers and administrators in the Town of Caledonia's Police Department.

3. Before the Caledonia Police and Fire Commission (PFC) was established in 1990, the Town Board had a Police and Fire committee. When the PFC was set up as a new entity, it was involved with all hiring of new candidates and all promotions in both the Police and Fire Departments. The PFC also tried to help both the Police Chief and Fire Chief with organizational structure. The five PFC members involved in the promotional process at issue in this case were John McNulty, Ray Ludka, Terrance Kallenbach, Frank Tomacheck, and Howard Johnson, who served as the president of the PFC. There were problems between the Fire Department and the PFC regarding what McNulty called "questionable" promotions, and the Town Board had promulgated some rules in the form of an ordinance. McNulty found out that Attorney Roger Walsh was the author of the rules that were integrated into the ordinance. In February of 1996, McNulty hired Attorney Roger Walsh, at McNulty's own expense, to come to an open hearing to explain the do's and don't's of police and fire commissions. The Chairman of the Town Board, Michael Kroes, stated in an affidavit that no member of the PFC, including McNulty, asked for or received approval from the Board to hire any attorney, including Attorney Walsh, to meet with the PFC. The Town Board abolished the PFC on May 6, 1996. The Board tried to abolish the PFC on April 1, 1996 but its attempt was premature because of late notice putting the matter on the agenda. McNulty raised some concerns about the way the PFC was abolished, and complained to the Racine County District Attorney who found that the Board violated the Open Meetings Law at its April 1st meeting because it added the discussion of the PFC at the last minute to its agenda. McNulty also publicly voiced his concerns, telling a newspaper reporter that abolishing the PFC was a trampling of democracy, eliminating a vital element in a system of checks and balances.

4. Warren was certified as a law enforcement officer in 1987 by the Police Academy at Milwaukee Area Technical College and started working for the Town of Caledonia in November of 1987. He was a part-time police officer for the UW-Parkside while attending school. He obtained a B.A. degree in political science-administration of criminal justice from the University of Wisconsin in December of 1989. Warren has had in-service training while on the Caledonia force, and has received training in intoxilyzer operations, evidence technician, SWAT, field training officer, and accident investigator. He has received letters of commendation and recognition, but no discipline. Warren has received very positive performance evaluations, consistently ranked toward the high end of the achievement scale. Warren has been the primary field training officer for the Department since about 1993 and a little earlier. Despite the fact that some of the new officers being trained by him get credit for arrests or activity, Warren's activity levels are above average. According to a manual that prepares officers for the sergeant's examination, the sergeant is the most important person in the training process. Chief Meier acknowledged that Warren is a very good officer and field training officer, as further verified by officers who received such training from Warren.

5. Sergeants were previously included in the collective bargaining unit represented by the Caledonia Professional Policemen's Association (herein called Association). A sergeant's position was posted in October of 1990, and the posting indicated that an officer would have to have three years of law enforcement and the rank of Patrolman I with the Department. Warren officially started working for the Town on December 7, 1987. He talked to the Chief and explained that he had part-time police experience prior to the three years needed to take the sergeant's exam, but the Patrolman I position is reached when one finishes three years with the Department. Warren asked Chief Meier about the cut-off date for needing three years or Patrolman I ranking, and the Chief replied that if Warren were allowed to take the sergeant's exam, the Association could grieve it because he did not meet the Patrolman I qualification. Chief Meier told Warren that he could contact the Association and get its interpretation regarding the qualification requirement, and if the Association agreed to waive that qualification, it would have to be in writing.

6. Terry Mayne was president of the Association in 1990 when Warren approached him and asked if the Association would waive the section of the collective bargaining agreement that provided for a minimum of three years police experience. Section 32.04 of the 1990-91 collective bargaining agreement provided:

To be eligible to compete for promotional advancement, candidates must have completed one year probation as a police officer with the Town of Caledonia and reach the rank of Patrolman I, and have a minimum of three years police experience.

Mayne contacted the other Association members, who agreed that Warren could take the test for sergeant and the Association would waive the three-year requirement. On October 14, 1990, Mayne sent the following letter to Assistant Chief Barnes:

Recently I was approached by Officer Daniel Warren who told me he would like to be eligible to take the upcoming Sergeant exam. He told me that he discussed this with you and it was agreed that if the Caledonia Police Association would drop Patrolman I status as required in the contract's promotional policy, he could compete for the Sergeant position.

A majority of the Association agree to make the Sergeant test available for non-class I patrolmen who meet all of the other requirements. Therefore, the Caledonia Police Association agrees to the following:

For the Sergeant test posted 10-01-90, the Caledonia Police Association agrees to drop the "Patrol Officer I Class" as in the 1991-1992 contract.

All other provisions of the promotion policy are applicable and this exception is for the Sergeant test posted on 10-01-90, only.

Chief Meier did not find the above letter acceptable and asked that it be re-written. Mayne recalled that the Chief said the Union should be asking more politely for such an exception for Warren. Mayne wrote a second letter on October 16, 1990, which stated:

Recently I was approached by Officer Daniel Warren who advised me he would like to be eligible to take the upcoming Sergeants exam. He advised me that he discussed this with you and it is possible that if the Caledonia Police Association would drop Patrolman I status as required in the contract's promotional policy, he could compete for the Sergeant position.

A majority of the Association agrees to make the Sergeant test available for non-class I patrolmen who meet all of the other requirements. Therefore, the Caledonia Police Association would request and agree to the following.

1. For the Sergeant test posted 10-01-90, the Caledonia Police Association agrees to drop the "Patrol Officer I" class as in the 1990-1991 contract.

2. All other provisions of the promotional policy are applicable.

7. Warren received notice to take the sergeant's exam in Kenosha and took the exam. About two weeks after the test, other officers had received their results but Warren had not received the results of his exam and he wanted to find out how he did. Warren approached Chief Meier, who told him that the letter from Mayne (noted above) was not acceptable the way it was written, and therefore, he had contacted the state to cancel his test. Chief Meier did not get the conditions he wanted in the waiver from the Association. During this conversation, Chief Meier told Warren, "If you stay away from the Association, you will go far in the Department."

8. Warren became Association president in January of 1992. During his tenure as president, he processed grievances and headed the Association's collective bargaining effort for successor labor agreements. Warren had to process one high profile case involving an officer, Louis Salimes, who was discharged from the Town. Chief Meier approached Warren and asked him about a discussion he heard regarding Officer Salimes' compilation of 40 plus complaints against the police administration and Chief Meier in particular. The Chief had heard that the Association had not endorsed the document compiled by Salimes and would not take it to the PFC,

and he asked Warren if he would sign something to the effect that the Association did not endorse Salimes' complaint. Warren refused. The Association had not endorsed the Salimes' complaint because Salimes had hired a private investigator on his own and completed the list of complaints and then asked the Association to pay for it. The Association did not want to incur the cost where Salimes was acting outside the scope of the Association. Warren was also involved in a disciplinary action against Officer Miller.

9. Warren became concerned about retaliation from the Assistant Chief, John Barnes, during the time he was Association president. Officer Collins and Assistant Chief Barnes had a verbal and physical confrontation. Warren made an attempt to mediate the dispute before it went to a grievance, but the officer chose to pursue it as a grievance, and the end result was that the Assistant Chief was ordered to seek aggression counseling. The Assistant Chief was embarrassed within the Department and the incident was reported in the newspaper. Warren also had difficulty working with the Assistant Chief over scheduling for seniority and assignments of shifts and overtime. Warren went to the Chief over the matter, who assured him that it would be worked out without any problem. Warren found that problems continued in scheduling officers. Once Warren ended his term as Association president, he felt that the pressure was off him. While Warren was a negotiator for the Association, the parties took the sergeants out of the bargaining unit.

10. On February 28, 1995, Chief Meier posted a promotional notice and procedure, which stated:

I have been authorized to start the process of establishing an eligibility list for the position of POLICE SERGEANT. At the present time, there is one Police Sergeant vacancy within the ranks of the Caledonia Police Department.

The following guidelines will be used:

POSTING: For a period of ten (10) days.

ELIGIBILITY: To be eligible to compete for promotional advancement, candidates must have completed their probationary period as a police officer with the Caledonia Police Department, and reached the rank of Patrolman I, and have a minimum of three years police experience.

POSITION: Police Sergeant

WAGES & BENEFITS: As listed in the 1994-95 Agreement between the Town of Caledonia and the Police Department Sergeants.

SHIFT/ASSIGNMENT: To Be Determined By Chief Of Police.

PROBATION PERIOD: One (1) Year

ESTIMATED EFFECTIVE DATE: As Soon As Practical

PROMOTIONAL EVALUATION: Evaluation of officers competing for promotion will be accomplished by the administration of a written exam and an oral interview before the Police and Fire Commission, assisted by the Chief of Police. The written exam will be furnished and scored by the Wisconsin Department of Employment Relations -- Wisconsin City & County Testing Service. The written exam will be job related for the position of Police Sergeant. To be eligible for further consideration, the officer must have attained a minimum of 70% of the maximum written exam score. Candidates successfully attaining 70% or better on the written exam will have the opportunity of being interviewed by the Police and Fire Commission, who will evaluate each candidate by criteria established by the Commission. The Police and Fire Commission will score numerically each candidate by a scoring system established by the Commission.

Once this eligibility list is complete, the Police and Fire Commission will determine the length of time that this eligibility list will be valid.

The Chief of Police will review the work record of the candidates successfully completing the interview process. In the selection process, the Chief of Police may consider the job performance, education, seniority, and professional competency of the officer candidate.

The top three candidates will participate in a psychological evaluation for front line supervisor as part of the selection process.

When a vacancy occurs and the Chief of Police elects to fill said vacancy, the Police Chief will then select a candidate from the three highest composite scores and recommend that candidate to the Police and Fire Commission for confirmation. The Police and Fire Commission may confirm or reject the nomination in writing. In the event the candidate is rejected, the Police Chief may recommend another candidate for confirmation.

In the event that there are less than three names on the eligibility list, the Chief of Police may direct that a new test be administered and a new eligibility list created.

Appointment of the successful candidate may be made consistent with the needs of the Police Department as determined by the Chief of Police. An officer promoted under this procedure shall serve a probationary period of one (1) year following the date of appointment. The Police and Fire Commission reserves the right to change and/or modify this procedure as the need may arise, and by recommendation of the Chief of Police.

Attached to this posting is the position description of Police Sergeant on the Caledonia Police Department. 1/ All candidates are urged to review this position description.

All candidates wishing to participate in this promotional process for the position of Police Sergeant are to submit a typewritten summary of no more than two pages, as to what you feel your qualifications are for this position. Address this summary to the Chief of Police, and include your full name, complete address, and Social Security Number. This will serve as notice of your intent to participate in this promotion process.

At the time of the above posting, only one sergeant's position was expected to be filled, but two sergeants' positions became open in the spring of 1995, referred to as sergeant four and five, or the sergeant for the patrol unit and the sergeant for the detective unit.

11. Following the posting noted above, Warren presented the Chief with his resume as part of the application process for the sergeant's position. On the second page of his resume, he listed under "Professional Organizations" the Caledonia Professional Policemen's Association and noted that he was president during 1992 and 1993, a negotiator in 1992 and a member since 1987. Warren asked the Chief to review the document to see if it was complete, and the Chief stated: "President, that looks real good." Warren told him that his time as president was one of the less strained times he had among the other presidents, and the Chief agreed with him. Warren did not make too much of the Chief's comment at the time.

12. Five candidates passed the written examination for the sergeant's position, including Warren, who scored the highest score of those five. Lisa Seils and Keith Stannis, also members of the Caledonia Police Department, scored below Warren. Seils had been with the Department for more than 12 years and had been an investigator since 1990. Stannis had been there more than 20 years and had recently returned from a position with the Racine County Metro Drug Enforcement Unit.

13. John McNulty and Ray Ludka were the PFC commissioners on the Personnel Committee when the promotions were being considered. McNulty and Ludka interviewed all the candidates seeking promotions. Chief Meier was also present during the oral interviews for

1/ The position description is not reprinted for this case, as it has no bearing on this decision.

technical advise to the PFC members. The format of the oral interview was to have candidates answer identical questions from a list that was put together by the Chief and the PFC. Then the PFC members would score the answers and try to quantify the answers by assigning a numeric value to them. Warren received a composite score of number one on the oral interview. Seils' composite score was only two points below Warren's composite score.

14. Following the oral interview, Warren heard that two sergeant positions were open and knowing that the other two candidates for the position were investigators, he assumed that he would not get the sergeant's position. He called Chief Meier at his house, and the Chief told him that the decision still needed to be approved by the PFC. Warren met with the Chief to urge him to consider his qualifications and resume and degree. The Chief told him that he might be right for a training sergeant's position if the Chief could get such a position, or that if Sergeants Stauss or Kiddle went out on back disabilities, he might have one of those positions. Warren told the Chief he did not want his career to be dependent on other peoples' injuries. He asked why Seils would not be waiting around for Sergeant Stauss' back to go out. Warren believed that Stannis would get the position of sergeant in charge of the Detective Bureau, since Stannis had been a detective for a number of years. According to Chief Meier, Warren stated that if the Chief would promote him, Warren would tell him anything the Chief wanted to know about anybody in the Department because he had made book on everybody in the Department. Warren testified that he did not offer to give the Chief information against other officers, and that the Chief's comments were taken out of context.

15. Since there were two sergeants' positions open and Warren was the number one candidate on the eligibility list, the Commission members thought that if he did not get one position, he would get the other. The Chief was responsible for identifying two top qualifiers, and the Chief could present either one to the PFC. If the PFC did not ratify the Chief's first choice, the Chief was obliged to present the second top qualifier. On June 22, 1995, the PFC met to discuss the promotions for the sergeants' positions. PFC members McNulty, Ludka, Johnson and Kallenbach were present. Chief Meier recommended that Seils and Stannis be promoted, not Warren. McNulty asked why Warren was not presented to the PFC for promotion, since he was clearly ranked number one by the PFC on the composite score. Chief Meier told McNulty, "Well, he was president of the Union." McNulty asked, "What the hell does that have to do with anything?" Chief Meier denied making any comment to McNulty or anyone else at that meeting that he did not promote Warren because of his Union activities. The Chief testified that McNulty may have raised the issue that Warren was a Union president but not in a negative context. The PFC members then spent a long time with Chief Meier, asking him to explain why he was bypassing Warren for the promotion. McNulty told the Chief that nothing the Chief was saying made any sense, and the Chief told McNulty that other people had more seniority than Warren. McNulty asked whether the other candidates had college degrees, and the Chief replied that they did not. McNulty pointed out that if one added Warren's four years of college to his seven years of service, he would have 11 years, and that the Chief was allowing two years of seniority to override a four-year degree in criminal justice. McNulty told the Chief that he was making a mistake. At

that point, Kallenbach was tired and the PFC members wanted to conclude the meeting. McNulty seconded the motion to promote Seils and Stannis, after spending much time arguing with the Chief. The Chief told the PFC members that there was currently a sergeant who might not return to work and that the Chief would guarantee that the next sergeant's opening would go to Warren. The Chief has sought funding for an administrative sergeant or additional patrol sergeant's position for two years from the Town. He would recommend Warren for an administrative sergeant's position. The closed session of the PFC on June 22, 1995 lasted for about 50 minutes, according to everyone's recollection and the minutes of the closed session. Kallenbach was present, and in a sworn affidavit, stated that the Chief never made any remarks to the PFC regarding the Union activities or status of Warren, and that the Chief never stated that: "Well, you know, he was president of the Union." Johnson was present, and submitted a letter for the purposes of this case stating that Chief Meier did not say anything negative about Warren, that he had no recollection that the Chief ever said anything about Union matters at any time during Johnson's tenure on the PFC.

17. Seils was promoted to the third shift patrol sergeant and Stannis was promoted to sergeant in charge of the Detective Bureau. At the time of their promotions, neither had been involved with patrol duties. Seils had been an investigator since 1990 and has had no day-to-day road experience or training since 1989. Stannis has a disciplinary record with the Department, and had been charged twice with domestic abuse at the time of the promotion. Stannis was arrested again in November of 1996 on charges of domestic abuse and battery and placed on administrative leave. Chief Meier stated that the seniority and experience of Seils and Stannis were factors in his selection of them for promotions. He considered Stannis' seven years in the metro drug unit and thought that he was the best candidate to oversee the operations of the Detective Bureau. He thought that Seils was a good leader, that she could motivate people, that she had been a very good investigator and had been a police officer with the City of Milwaukee before coming to Caledonia. The Chief considered Seils and Warren to be very close in their ability to do the job of sergeant of patrol, and he testified that he made his decision on the basis that Seils had more seniority and experience than Warren.

17. Frank Tomacheck is a former police chief from the Town of Caledonia and has served on both the Police and Fire Committee and the Police and Fire Commission. Tomacheck was not present when the promotions were made on June 22, 1995. After the PFC was abolished, Tomacheck learned from Warren that Warren had been ranked the top candidate for a sergeant's promotion by the PFC. Tomacheck said that if Warren were the number one candidate, he would have voted to promote him, and his Union affiliation would not have made any difference. Tomacheck was aware of some complaints filed by former police officers against the police administration and attempted to investigate those complaints by having exit interviews. Former officer Bev Boeck called Tomacheck and he tried to arrange an exit interview with her but was told by the Town Board that he was not allowed to do that.

18. Thomas Simons, a police officer employed by the Town of Caledonia for 16 years, became the Association president in November of 1995. On May 6, 1996, Simons was called into

the Detective Bureau after posting a notice on the Union bulletin board. Two investigators asked him about a newspaper article that appeared in The Journal Times newspaper on May 5, 1996. The article dealt with the controversy over abolishing the PFC in the Town, and the article stated that Simons had expressed concern that there was favoritism in the Police Department, especially against presidents of the Union. Simons was quoted as saying that he believes that Warren was passed over for sergeant and another officer suspended because of their Union activity, that turnover is high and morale is low, among other things. When the investigators questioned Simons about his statements and involvement with the newspaper article, the conversation became heated and Simons was called some names, forced out of the office

with the door slammed in his face. Simons received a reprimand from Chief Meier for this incident, and he was told that the other officer was also reprimanded. Simons believes that his presence at the Department headquarters is scrutinized because of his involvement with the Association. He is currently assigned to the metro drug unit, and he believes this assignment was an attempt to separate him from the Association members. In an article in The Journal Times dated May 25, 1996, Chief Meier was quoted as saying that criticisms by Simons and others were not doing the Department or community any good. Chief Meier is further quoted as saying that Simons was spoken to about urging a woman to file a complaint about another officer.

19. Other past presidents of the Association also feel they had difficulties on the job because of their position in the Association. Former Association president Mayne believed that he was singled out for his Union activities. Mayne had planned on going to a SWAT training school for six months. He wrote a letter to the Chief regarding a sergeant who had some days off when he was supposed to be working on a Thursday, and the next day he was canceled from going to the training and another officer went to the school which started the following Monday. Officer Robert Lochowitz was president of the Association during 1994-1995. Lochowitz found that the Chief and the administration took grievances personally and tried to make the Association members look like whiners and complainers. He believed his work was more scrutinized than others while he was the Association president, and he received a two-day suspension when the Chief saw him at an ice cream store while he was on sick leave, and he was supposed to call in if he left his house while on sick leave. The suspension was also in part for watching a football game at the fire station while on duty. Lochowitz resigned as president before finishing his term because of what he called undue scrutiny or pressure due to the position.

20. Officer William Bogs was a former Association president and was promoted to the rank of investigator. Stannis was also a former Association president and was promoted to the rank of sergeant in charge of the Detective Bureau. Seils was once the secretary of the Association and was promoted to investigator and sergeant of Patrol.

21. Brian Wall, a police officer with the Town, spoke with the Town Administrator Barbara Blumenfield on January 24, 1997. In Wall's affidavit, he stated that during his

conversation with Blumenfield, he noted that Warren was taking legal action in part because of statements allegedly made by Chief Meier, and Blumenfield responded by stating that there was nothing to the case, that it was a "bunch of crap."

22. Warren submitted an affidavit dated February 17, 1997, which noted that he received his annual performance review from his supervisor, Sergeant Stauss, on January 22, 1997. Stauss told Warren that when he submitted the performance review to Assistant Chief Barnes, Barnes told Stauss to reduce the ranking in the "Human Relations Skills" area. Stauss had marked it "above standards" and it was then marked down to "meets standards." In affidavits

dated March 11, 1997, Chief Meier stated that when he was the assistant chief, he periodically made changes to evaluations given to him for review, and Barnes stated that he has been authorized to make changes in performance evaluations, which at times involves lower evaluation components and at times raising those components.

23. Chief Meier's action in not recommending to the Police and Fire Commission the Complainant, Daniel Warren, for the promotion for one of two sergeants' positions open in 1995 had a reasonable tendency to interfere with the exercise of his rights guaranteed by Sec. 111.70(2).

24. Chief Meier's action in not recommending Warren for promotion was motivated, at least in part, by Meier's hostility toward Warren's past union activity.

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

CONCLUSION OF LAW

The Respondent, the Town of Caledonia, violated Sec. 111.70(3)(a)3, Stats., when it discriminated against Daniel Warren by not promoting him to the position of sergeant, 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 2/

It is hereby ordered that:

1. The Respondent, Town of Caledonia, and its officers and agents, shall immediately cease and desist from discriminating against Daniel Warren for engaging in protected, concerted activity.
2. The Respondent, Town of Caledonia, shall take the following affirmative action which the Examiner finds will effectuate the

2/ Footnote found on page 13.

policies of the Municipal Employment Relations Act:

- a. Immediately vacate either one of the two sergeants' positions occupied by Lisa Seils and Keith Stannis and promote Daniel Warren to fill one of those sergeants' positions.
- b. Make Daniel Warren whole by paying to him the difference in his rate of pay and the wage rate of sergeant from the date in 1995 that Seils and Stannis were promoted to the date of his actual promotion, plus interest. 3/
- c. 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.
- d. 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 Elkhorn, Wisconsin this ___ day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

3/ Footnote found on page 13.

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- 2/ 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.

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

- 3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed with the Commission on May 7, 1996.

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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 Daniel Warren or any other employe on the basis of having engaged in protected, concerted activity.
2. WE WILL immediately vacate one of the two sergeants' positions filled in 1995 by Lisa Seils and Keith Stannis and promote Daniel Warren to fill that sergeant's position.
3. WE WILL immediately make Daniel Warren whole by paying to him the difference in his rate of pay and the rate of pay of a sergeant from the date that Lisa Seils and Keith Stannis were promoted to the date of his actual promotion, together with 12 percent interest on that amount.

By _____
Town of Caledonia

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

TOWN OF CALEDONIA

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Complainant:

The Complainant has engaged in protected activity. Warren served as Association president during the 1992 and 1993 calendar years. During that time, he was involved with a situation involving Officer Salimes who ultimately filed charges against the Chief with the District Attorney. Warren refused, when asked by the Chief, to sign a letter of support from the Association. He also attempted to intervene in a mediation capacity between Officer Collins and the Assistant Chief, who apparently took exception to Warren's role in the matter and thereafter disregarded seniority when making shift assignments, causing Warren to repeatedly go over his head to the Chief. The Association and the Chief continue to battle internally and publicly.

The Chief knew of Warren's protected, concerted activity. The Complainant points out that it is not necessary for an employee to be serving a labor organization in an official capacity at the time he is denied an employment benefit in order to be engaged in lawful concerted activity within the meaning of MERA. Chief Meier commented on the fact that Warren listed "union president" on the resume he turned into the Chief with his application for a promotional position. Warren had been previously told by the Chief that he would go far in the Department if he stayed away from the Union. Warren's testimony on those points is undisputed in the record. There are only 19 sworn officers in the Department and the Chief is obviously aware of their current and past Association roles and is still actively engaged in public debates with Association officials.

The Complainant submits that this case has its genesis in 1990 when Warren wanted to apply for the sergeant's position and needed a waiver of the three-year requirement to do so. The Chief agreed to waive the requirement on the condition precedent that the Association would also waive the requirement, which it did by letter, although then president Mayne was told that the waiver letters were not sufficiently respectful. After Warren took the exam for sergeant and could not find out his test results, he was told by the Chief that the Union's letters were not satisfactory and that he would go far in the Department if he stayed away from the Union.

However, Warren did not heed that 1990 warning and became president of the Association. The Chief is hostile toward Association activity -- he takes grievances personally, he retaliates against Union officials who have the temerity to question command, and he has intimidated officers from going to their Union representatives with grievances.

The Complainant deems significant the fact that the PFC itself was abolished by the Town after the PFC tried to investigate the resignations of Officers Boeck and Zientek. Also, former Association presidents Simons, Mayne, Lochowitz and Warren all felt undue pressure from the Chief when serving as Association president. While the Town offered the affidavits of Stannis, Seils and Boggs to counter the Association's evidence, those self-serving declarations of loyalty to the Chief are unsurprising and irrelevant. However, the affidavit of Stannis is significant in one respect -- he states that he felt he was denied promotion and expected that kind of treatment because he was a strong Union advocate. Thus, Stannis unwittingly supports the Association's position that Union leadership results in promotional retribution.

The Complainant asserts that it has adduced direct evidence of union animus and motive through the testimony of McNulty, who testified that the Chief noted that Warren was president of the Union when asked why the Chief was not recommending him for promotion, despite the fact that he was ranked first by the PFC. The Town failed to adduce any purpose or motive for McNulty to step forward on behalf of Warren other than to tell the truth.

While the Town infers that the bypass of Warren had something to do with the other applicants' seniority, it is significant to note that the Chief considered Seil's previous police work experience but did not consider Warren's. Length of service is only one of four criteria set out in the promotional notice -- the others are job performance, education and professional competency. Warren's other credentials are so overwhelming that it compels the conclusion that the Chief had some other motive for selecting Seils and Stannis. Stannis is known to have disciplinary entries in his file and has now been charged a third time with domestic abuse. Stannis did not have a two-year degree from Gateway Technical School when the promotions were made, and Seils still does not have a two-year degree let alone a college diploma. Warren was the long-time primary field training officer for new patrol recruits, while Seils had not been on road patrol for at least six years.

The Chief clearly had Stannis pegged for the detective sergeant and Seils for the patrol sergeant and never considered Seils for the detective positions. Both eligibility lists ranked Warren, Seils and Stannis in that order. Meier picked the number three person over the number one person for the detective sergeant position. The Complainant suggests that the Chief did so because he knew that if he had made Seils the detective sergeant, he could never have justified making Stannis the patrol sergeant. The Chief ultimately made his picks in spite of the clear rankings, and coupled with his 1990 statement about staying away from the Union, his 1995 remark about Union president on the resume, and his 1995 remark to the PFC about Warren's presidency of the Association, the reason for the bypass is clear. Warren failed to heed the Chief's advice about staying away from the Union and was still too closely associated with the ongoing Salimes matter to be a safe choice for patrol sergeant.

The Complaint submits that the facts in this case are similar to those in City of Malden, Case No. MUP-3017 (3/30/79, Mass. Labor Relations Comm.). In fact, the facts here are even

stronger, where Warren had higher test scores, better education and superior job performance than his competitors.

The Respondent:

The Town points out that because the contract allows the Chief to recommend promotions from the top three names on the eligibility list, the Union must establish that the Chief's action was based on anti-union animus. The question then becomes what was the motivation of Chief Meier in making the promotions. The Town argues that the promotion of Stannis should not be subject to challenge, because even Warren admitted that he could see how Stannis would get the sergeant for the Detective Bureau's position. Warren recognized the fact that Stannis had been a detective, and his testimony agrees with Chief Meier's rationale. Meier testified that seniority and experience had a factor in his decision to recommend promoting Stannis, that Stannis had extensive training with the metro drug unit.

The Town notes that an employer's action should be overturned when the evidence established that the employer's motives included anti-union animus, and a claim of anti-union hostility or animus cannot be based solely on conjecture. The Town notes that a leading case dealing with the issue of inferring motivation is Employment Relations Dept. v. WERC, 122 Wis.2d 132, 361 N.W.2d 660 (1985), where the Wisconsin Supreme Court held:

As the key element of proof involves the motivation of the employer and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decision maker, the employee must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that the employer need not demonstrate just cause for its action. However, to the extent that the employer can establish reasons for its actions which do not relate to hostility toward an employee's protected concerted activity, it weakens the strength of the inferences which the employee asks the WERC to draw.

The Town asserts that the employe has the initial burden of showing that the actions complained of were taken in part because of anti-union animus. The first task is to examine the evidence of anti-union activity in promoting Seils rather than Warren.

Warren testified that this complaint was filed based on McNulty's statement to him that the Chief said Warren was not being recommended for promotion because he was the Union president. McNulty testified that the Chief said that Warren was Union president, but his testimony has been directly controverted by three individuals present at the meeting when the remark was alleged to have been made. Chief Meier denied that he made that remark and testified that McNulty may have

raised that issue. The affidavit of Kallenbach specifically denies that the Chief ever made the remarks attributed to him by McNulty. The letter of Johnson, admitted into the record in lieu of his sworn testimony, also specifically denies that the Chief ever made any remarks about union activities or Warren.

There is no reason for Kallenbach and Johnson to come forward on behalf of the Town and the Chief, and newspaper articles in the record indicate problems between the PFC and the Town. However, McNulty's animosity toward the Town is evident from Association Exhibit #7, where McNulty has publicly admitted his desire to seek legal action against the Town for voting to abolish the PFC. McNulty also testified that he arranged with the Town Board's permission and the PFC to have an open hearing where Attorney Roger Walsh would come and explain the do's and don't's of police and fire commissions. But the Town Board Chairman's affidavit states that McNulty never sought nor gained approval of the Town Board to hire Attorney Walsh.

Thus, the Town submits, in a case where motive is an important issue, the record supports a finding that the motive for filing this complaint is McNulty's displeasure with the actions of the Town Board in abolishing the Commission. The only evidence of anti-union animus affecting Warren comes from McNulty. The Town notes that it defies logic to explain why McNulty would vote to second the motion to approve the Chief's recommended promotions. The Chief's testimony was not challenged by anyone other than McNulty.

Warren testified that his term as Union president was not a period of strained relationships with the Chief. The Chief attempted to help him compete for a promotion in 1990, and he would not have made that effort if he had a bad relationship with Warren at that time. While Warren had some problems working with Assistant Chief Barnes, Chief Meier was always available to meet with him and intervened in trying to resolve the scheduling issues.

Simons' testimony does not establish any basis for finding anti-union animus toward the Union as a whole or Warren individually. The affidavit of Boggs also supports the absence of hostility toward the Union by the Chief. The Chief testified that he wants to put Warren in a new administrative sergeant's position if he gets funding for that position. The Chief felt that the choice between Warren and Seils for patrol sergeant was a close one, and her additional years of departmental seniority led to the decision to recommend her.

In conclusion, the Town asserts that the Complainant and Union have failed to establish that the failure to recommend Warren for promotion was based in part on anti-union animus, and the Town has shown legitimate reasons for the promotions of Stannis and Seils. The motivation for this complaint is the displeasure toward the Town by a former member of the PFC, and the political dispute between the Town and one PFC member cannot be the basis for overturning the promotions in question.

The Complainant's Reply:

The Complainant notes that the Respondent has attempted to discredit McNulty's testimony, but such a defense is not supported by the record. Even if McNulty were unhappy with the dissolution of the PFC, Chief Meier himself recalled a comment about Warren's Union presidency during the promotional meeting of the PFC, although he attributed it to McNulty. The Complainant asserts that the matter was obviously discussed and the affidavits of Johnson and Kallenbach to the contrary are incorrect. Moreover, the Respondent's assertion that the only evidence of anti-union animus toward Warren came from McNulty, since other facts -- the Chief's derogatory statement regarding Warren's application listing his former Union office, his warning to Warren in 1990 to stay away from the Union, and his assistant chief's scheduling retribution -- all show such targeted animus.

However, the Complainant need only demonstrate that Warren's promotional bypass was based, at least in part, on the Respondent's animus toward the Union itself. The record shows that past and present Union presidents all felt the hostility toward the Union. The Chief admitted to the existence of mutual, ongoing hostility, as does Stannis in his affidavit. Supplementary affidavits dated February 17, 1997, demonstrate the ongoing hostility toward the Union. Warren's most recent evaluation was downgraded based on the directive of the assistant chief, and his complaint was referred to as "crap" by the Town Administrator in conversation with a co-worker.

The Complainant also takes issue with the Respondent's brief regarding the Chief's willingness in 1990 to help Warren compete for a promotion. Warren asked for a waiver, the Chief set the ground rules for a waiver, the Union complied with the Chief's rules, and then the Chief refused to consider Warren's test scores without even telling him.

The Respondent's Reply:

While the Complainant has argued that this case had its genesis in 1990 when Chief Meier exhibited anti-union animus in how Warren was treated when he wished to compete for a sergeant's position, the Respondent finds the 1990 incident strong evidence of Chief Meier's attempts to be fair and help Warren. The Chief agreed to allow him to compete for a position even though he was not eligible for the sergeant's position. Neither the Union nor Warren challenged the 1990 events through the grievance procedure or by filing other actions.

The Respondent also states that every witness agreed that there has been very little litigation between the parties while Meier has been Chief, and the only specific example of the alleged hostility offered was the Salimes case. The recommendation to discharge one police officer is not evidence of anti-union animus. The action of the Town Board in abolishing the PFC is not evidence of Chief Meier's anti-union feelings, and he did not recommend that it be abolished. He testified that the problems existed between the Fire Department and the PFC.

The parties agreed that the Town's case would be entered into the record by affidavits and

the written statement of Johnson, and the Complainant was given every opportunity to schedule testimony of these witnesses but chose not to have them appear either through a continued hearing or through depositions. The Respondent makes the inference that the Complainant could not help his case after reviewing these statements. The Respondent also takes issue with the Complainant's suggestion that McNulty's testimony should be taken as the most reliable information in the record. McNulty's testimony is suspect as to accurateness, he misstated facts as to how an attorney was hired, and the Complainant's exhibits show that he had motivation to color his testimony. McNulty was vehemently opposed to the actions of the Town Board in abolishing the PFC, and there is no reason for this action to be filed when it was other than to help McNulty's challenge to the Town's action.

DISCUSSION:

The Legal Framework:

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. In referring to "other terms of employment," Section 111.70(3)(a)3 includes promotional opportunities. 4/ Conditions of employment are also subjects of collective bargaining protected by Secs. 111.70(2) and (3)(a)1, and the wrongful denial of a promotional opportunity may be a separate violation of Section 111.70(3)(a)1 as well as (3)(a)3. 5/

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. the employer was aware of such activity;
3. the employer was hostile to such activity; and
4. the employer's conduct was motivated, in whole or in part, by hostility toward the protected activity. 6/

4/ 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).

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

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

It is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors for such action is the employee's protected concerted activity. 7/ 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 employee to adverse consequences when one of the motivating factors is his union activity. 8/ Evidence of hostility and illegal motive may be direct (such as with overt statements) or, more often, inferred from the circumstances. 9/

Applying the Framework to This Case:

There is no dispute that the Complainant, Daniel Warren, was engaged in protected, concerted activity and that the Respondent Employer was aware of such activity. Warren was told by Chief Meier to stay away from the Union, but he did not. In fact, he became the president of the Association and was involved with grievances in that capacity. Warren refused a request from Chief Meier to sign a letter of support from the Association in a highly publicized case involving Officer Salimes who was discharged from the Department and compiled a list of several complaints against the Chief.

There is also little doubt that the Employer was hostile to such Union activity. Warren was warned by Chief Meier to stay away from the Union, that he would go far in the Department if he stayed away from the Union. The Chief also made a sarcastic remark about Warren listing his

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

8/ Muskego-Norway, *supra*.

9/ 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.

Union presidency on his resume when he was applying for the current promotion at issue here. Other past presidents of the Association felt the heat from the Chief or felt undue pressure while serving as president of the Association.

The only real question in this case is whether the Employer's conduct was motivated, in whole or in part, by hostility toward the protected activity -- or rather, was the bypassing of Warren, who stood first in composite scores for the two sergeants' positions, motivated by the Chief's hostility toward Warren's Union activity? The answer to this question centers on the discussion at the PFC meeting on June 22, 1995, when the Chief recommended that Stannis and Seils, and not Warren, be promoted, and his reasoning for such a recommendation.

According to McNulty, the Chief stated, when asked why he would not recommend the person ranked first, that Warren was the Union president. McNulty asked him, "What the hell does that have to do with anything?" The Chief denied making this statement, but admitted that something had been said about Warren being Union president, and attributed the remark to McNulty.

The Examiner finds McNulty to be the more credible witness in this case, and it is a rather easy determination. McNulty was a most impressive witness, testifying with precision, detail, sincerity, honesty, and thoughtfulness. McNulty recalled his statements in response to the Chief, and matters that he brought up such as Warren's educational background, as well as the Chief's response to McNulty's questions. In contrast, the Chief was vague and evasive. For example, this exchange took place at the hearing, with Attorney Weber adversely examining the Chief:

Q. He (Warren) did show up and take the test and was graded on the test; was he not?

A. He may have but we never received the score here.

Q. Why was that?

A. I believe his name was canceled from the registration.

Q. You did that; did you not?

A. If it was done, I would have done it, yes. 10/

Moreover, the Chief's statement that he never said anything about Warren being the Association president is self-serving, and his attempt to credit such a remark to McNulty is not

10/ Transcript, page 93.

believable. McNulty clearly thought Warren should have been promoted to one of the open sergeant positions, as did PFC member Tomacheck, although he was not present at the June 22, 1995 meeting of the PFC.

The fact that Johnson and Kallenbach, two other PFC members present on June 22, 1995, did not recall that the Chief said that Warren had been a Union president, does nothing to damage McNulty's credibility. The meeting lasted about 50 minutes, and not everyone who attends any meeting will recall everything that was said. The minutes do not reflect detailed conversation. The Chief and McNulty recall this incident, however, and McNulty was concerned enough about it to eventually repeat it to Warren. During the meeting, McNulty kept questioning the Chief about bypassing Warren, pointing out Warren's superior educational background. There was obvious concern on McNulty's part that the person the PFC had clearly ranked as number one was being bypassed, not once, but twice, and not being recommended by the Chief for either sergeants' position.

The Town argues that McNulty's animosity toward the Town is evident from newspaper articles where he has admitted his desire to seek legal action against the Town for abolishing the PFC. It does not logically follow that McNulty would somehow seek revenge against the Chief personally or the Police Department. McNulty's dispute is with the way the Town Board abolished the PFC without giving proper notice on the agenda, violating open meetings laws. Also, the PFC had more problems with the Fire Department than the Police Department. The Town further attacks McNulty's credibility by Town Board Chairman's affidavit that states that McNulty never had the approval of the Town Board to hire Attorney Walsh. But the Chairman misses the mark -- McNulty testified that he sought out Attorney Walsh and hired him at his own expense.

Even if the Chief had rational reasons to promote Seils and Stannis, his conduct in bypassing Warren for promotion was based in part on his hostility to Warren's presidency of the Association. The Chief told him not to become involved with the Union, but Warren did and paid a price for it. The Chief's statement to the PFC is clear evidence of that price.

The Complainant has shown, by clear and convincing evidence on the record, that the Employer has discriminated against him in violation of Sec. 111.70(3)(a)3, Stats., in its conduct in bypassing him for promotion, where the Police Chief's recommendation not to promote him was based in part on his hostility toward the Complainant's protected concerted activity.

Dated at Elkhorn, Wisconsin this 19th day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner