

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION and MICHAEL DURFEE, Complainants,

vs.

**THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION, and
THE BOARD OF FIRE AND POLICE COMMISSIONERS FOR THE
CITY OF MILWAUKEE**, Respondents.

Case 433
No. 55026
MP-3286

Decision No. 29270-B

Appearances:

Mr. Thomas J. Beamish, Assistant City Attorney, City of Milwaukee, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Milwaukee and the Board of Fire and Police Commissioners for the City of Milwaukee.

Eggert & Edmonds, S.C., by **Attorney Laurie A. Eggert**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association and Michael Durfee.

**ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT
AND AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S CONCLUSIONS OF LAW AND ORDER**

On June 22, 1998, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 or 3, Stats. by failing to promote Complainant Durfee to the position of Lieutenant of Detectives. He therefore dismissed the complaint.

Complainants timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received August 27, 1998.

No. 29270-B

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

- A. Examiner's Findings of Fact are affirmed.
- B. Examiner's Conclusions of Law 1 and 2 are affirmed.
- C. Examiner's Conclusion of Law 3 is reversed and the following Conclusion of Law is made:

3. When the Board of Fire and Police Commissioners asked Complainant Durfee about his filing of grievances, Respondents interfered with, restrained and coerced Complainant Durfee in the exercise of a right guaranteed by Sec. 111.70 (2), Stats. and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

D. Examiner's Order is affirmed to the extent it dismissed the alleged violation of Sec. 111.70(3)(a) 3, Stats. and the derivative alleged violation of Sec. 111.70(3)(a)1, Stats.

E. Examiner's Order is reversed to the extent it dismissed the alleged independent violation of Sec. 111.70(3)(a)1, Stats. and the following Order is made:

ORDER

Respondents City of Milwaukee and Board of Fire and Police Commissioners, their officers and agents, shall immediately:

- 1. Cease and desist from interfering with, restraining and coercing employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats.
- 2. Take the following affirmative action:
 - A. Notify all of its employees represented for the purposes of collective bargaining by the Milwaukee Police Association by posting, in conspicuous places on its premises where said employees work, copies of

the Notice attached hereto and marked Appendix "A". The Notice shall be signed by an official of the City of Milwaukee and an official of the Board of Fire and Police Commissioners and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

B. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

I concur in part and dissent in part.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

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 employees that:

1. WE WILL NOT interfere with, restrain or coerce employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats. by consideration of employee grievance activity during the promotional process.

City of Milwaukee Date

Board of Fire and Police Date
Commissioners

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

**CITY OF MILWAUKEE (BOARD OF FIRE AND POLICE
COMMISSIONERS)**

**MEMORANDUM ACCOMPANYING ORDER AFFIRMING
EXAMINER'S FINDINGS OF FACT AND AFFIRMING IN PART
AND REVERSING IN PART EXAMINER'S
CONCLUSIONS OF LAW AND ORDER**

THE PLEADINGS

In their March 26, 1997 complaint, Complainants allege that Respondents violated Sec. 111.70 (3)(a) 1, Stats. by denying Complainant Durfee representation at a disciplinary hearing and violated Secs. 111.70(3)(a) 1 and 3, Stats. by refusing to promote Durfee, at least in part, because of his use of sick leave and his filing of grievances.

In their answer, Respondents deny having committed any prohibited practices and contend that the complaint is untimely to the extent the alleged violations occurred more than one year prior to the filing of the complaint.

THE EXAMINER'S DECISION

The Examiner dismissed the allegation regarding denial of representation because the event in question occurred more than one year prior to the filing of the complaint.

As to the alleged violations of Secs. 111.70(3)(a)1 and 3, Stats, the Examiner concluded that no prohibited practices had been committed. He reasoned:

Discrimination and Interference

Complainants ask that the Examiner find that Respondents violated Sec. 111.70(3)(a)1 and 3, Stats., when the Board rejected Durfee's promotion, in part, on the basis of his use of sick leave, and because of his filing of grievances.

The Examiner first looks at the alleged violation of Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to “encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment.” To prove a violation of this section the Complainants must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainants were engaged in protected activities;
and
2. Respondents were aware of those activities; and
3. Respondents were hostile to those activities; and
4. Respondents’ conduct was motivated, in whole or in part, by hostility toward the protected activities. 1/

1/ The “in-part” test was applied by the Wisconsin Supreme Court to MERA cases in MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB, 35 WIS.2D 540 (1967) and is discussed at length in EMPLOYMENT RELATIONS DEPT. v. WERC, 122 WIS.2D 132 (1985).

It is undisputed that Durfee was engaged in protected activity when he filed grievances, and that Respondents were aware of those activities. Complainants argue that Respondents were hostile to those activities. The record certainly supports a finding that Inspector of Detectives Vincent Partipilo was hostile to this activity. In this regard, the Examiner notes Partipilo’s disparaging comments about Durfee’s many “frivolous” grievance filings which were contained in a report to Chief of Police Arreola from Partipilo dated May 17, 1994. In particular, Partipilo complained that Durfee’s use of the grievance procedure demonstrated “a seemingly constant resistance to authority.” The Examiner is also of the opinion that Chief of Police Arreola was hostile to this protected activity. In this regard, the Examiner points out that following Partipilo’s report to Chief of Police Arreola wherein he recommended that Arreola oppose Durfee’s promotion Arreola wrote to the Board objecting to Durfee’s promotion to the position of Lieutenant of Detectives based in part on “his lack of respect for authority.” Thereafter, Chief of Police Arreola provided additional information to the Board of the Fire and Police Commission relative to the proposed promotion of Durfee which consisted of the Partipilo report in its entirety.

The record, however, does not support a finding that the Board of Fire and Police Commission was hostile to Durfee's protected activity. It is true, as pointed out by Complainants, that Commissioner Ziolkowski asked Durfee about his attendance record, use of sick leave, his filing of grievances and his ability to relate to supervisors. It is also true, as pointed out by Complainants, that these were issues raised in Partipilo's report which the Commission had a copy of. (Chief Arreola's cover letter dated August 18, 1994, bears the Commission's date stamp (Jt. Ex. No. 5). Commissioner Ziolkowski acknowledged that he would have received the Partipilo memo for the purposes of considering Durfee's promotion (Tr. 107). However, Commissioner Ziolkowski emphatically denies that either Durfee's use of sick leave or filing of grievances played any role in his decision to reject Durfee's promotion (Tr. 103). Ziolkowski clearly stated that Durfee's filing of grievances was "an exercise of his rights and meant nothing to me." Ziolkowski testified persuasively that his vote to reject Durfee's promotion was based solely on the incident on the bus that was the subject of Durfee's prior discipline (Tr. 104).

Complainants accurately point out that if Commissioner Ziolkowski's explanation of the factors that motivated his decision are accepted, it took the vote of at least one more Commissioner to reject Durfee's promotion. However, instead of introducing evidence to support their contention that the other Commissioners who voted to reject Durfee's promotion were hostile to his protected activity Complainants attack Respondents' failure to call another Commissioner to testify instead of Kenneth Munson, the Executive Director of the Commission. The problem with this approach is that both Munson and Commissioner Ziolkowski testified, unrefuted by Complainants, that no Commissioner stated that they should deny Durfee his promotion based on his use of sick leave or filing of grievances. (Tr. 86-87, 102-104). Munson did not indicate that any of the Commissioners bore any hostility toward Durfee because of his protected activity.

However, assuming *arguendo* that there was hostility toward Durfee's protected activities, Respondents' conduct would have to be motivated by said hostility. Motive is difficult to determine as usually there is no direct evidence so it must be determined from the total circumstances. Complainants argue that Partipilo's memo resulting in Chief Arreola's objection to Durfee's promotion led to the questions raised by Commissioner Ziolkowski regarding Durfee's use of sick leave and filing of grievances. That may be. However, as noted above,

Commissioner Ziolkowski recognized Durfee's right to file grievances. He also testified persuasively that this played no role in his decision to reject Durfee's promotion. Complainants offered no evidence that any other Commissioner voted to reject Durfee's promotion based on their hostility toward Durfee's protected activity. Based on same, and all of the foregoing, as well as the totality of the circumstances, the Examiner finds that the evidence simply fails to show that Respondents' actions were motivated by hostility. Thus, the allegation of Sec. 111.70(3)(a)3, Stats., violations has been dismissed.

Complainants have alleged a violation of Sec. 111.70(3)(a)1, Stats. Inasmuch as there is no Sec. 111.70(3)(a)3, Stats., violation, there is no derivative Sec. 111.70(3)(a)1, Stats., violation.

As far as an independent violation, Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

(2) RIGHTS OF MUNICIPAL EMPLOYEES.
Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. *WERC v. EVANSVILLE*, 69 WIS.2D 140 (1995). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. *BEAVER DAM UNIFIED SCHOOL DISTRICT*, DEC. NO. 20283-B (*WERC*, 5/84); *CITY OF BROOKFIELD*, DEC.

NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

Employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28846-A (CROWLEY, 5/97) AFF'D DEC. NO. 28846-D (WERC, 12/97). Here, based on all of the foregoing, the Examiner finds no conduct by Respondents that would have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights.

In this regard, the Examiner rejects Complainants' argument that simply asking about Durfee's filing of grievances and his use of sick leave in conjunction with a promotional hearing has a chilling effect on the exercise of the rights afforded Durfee by the collective bargaining agreement and the Statute. Absent some other showing, the Examiner is not persuaded that by such limited conduct Respondents interfered with, restrained or coerced Durfee in his exercise of his Sec. 111.70(2), Stats., rights. However, assuming *arguendo* that there is such conduct, the Examiner finds that the Respondents had valid business reasons for their actions. In this regard, the Examiner notes that Durfee was eligible for promotion to a high supervisory rank in the Police Department. In this context, the Examiner is of the opinion that it would be appropriate for the Commissioners to obtain Durfee's response to the questions asked. In addition, as pointed out by Respondents, the Board decided not to promote Durfee based on his lack of qualifications for the position. As Commissioner Ziolkowski noted, "the incident on the bus reflected his level of judgment and self control, his lack of professionalism, and in my mind the qualifications so necessary for promotion." (Tr. at 102). Ziolkowski added:

. . . if he had been promoted, it would have sent a signal I think not only to the community but to the officers on the Department that we were in essence overlooking that kind of conduct, which I personally could not tolerate.

Based on all of the above, the Examiner finds that the evidence failed to prove any violation of Sec. 111.70(3)(a)1, Stats., and therefore, that charge has also been dismissed.

POSITIONS OF THE PARTIES ON REVIEW

Complainants

Complainants contend the Examiner erred when he concluded that Respondents did not violate Secs. 111.70 (3)(a) 1 or 3, Stats. by failing to promote Complainant Durfee. Complainants argue that the proof presented was clearly sufficient to warrant a conclusion that the Board of Fire and Police Commissioners was hostile toward Durfee because of his protected activity and that the Commission was motivated, at least in part, by this illicit hostility.

Complainant asserts that where, as here, (1) the decision-makers are presented with written recommendations which are premised on illegal considerations (the filing of grievances and the use a contractual benefit-sick leave) and where, as here, (2) those illegal considerations are discussed with the employe (Durfee) by the decision-makers prior to their taking action on the tainted recommendation, strong inferences are present that the decision-makers were improperly motivated and thereby violated Sec. 111.70(3)(a) 1 and 3, Stats. Particularly where, as here, the Commissioners do not affirmatively reject the illicit basis for the management recommendation against Complainant Durfee and merely rubber stamp the management recommendation, Complainants assert they have met their burden of proof.

Complainants also allege that the illicitly motivated recommendations, the discussion of sick leave usage and grievance filing with the Commissioners, and the ultimate denial of the promotion clearly have the effect of chilling the exercise of rights protected by Sec. 111.70(2), Stats. by Complainant Durfee and other employes. Complainants ask that the Examiner's contrary conclusion be overturned. Complainants also assert that there can be no valid business reason which can excuse such chilling conduct. Thus, Complainants contend that the Commission should reverse the Examiner and find an additional violation of Sec. 111.70(3)(a) 1, Stats.

By way of remedy, Complainants ask that Respondents be ordered to promote Complainant Durfee to Lieutenant of Detectives and to make him whole. In the alternative, should it be concluded that Complainant Durfee's discipline played a role in the decision to deny his promotion, Complainants ask that the Commission fashion an appropriate remedy which sanctions the improper conduct but need not award Complainant Durfee the promotion or back pay.

Respondents

Respondents urge affirmance of the Examiner's decision.

Respondents contend the Examiner correctly concluded that Complainants had failed to meet their burden of proof. Respondents assert that by Complainant Durfee's own testimony, he only received a single question from one Board member about grievances and sick leave. Particularly where, as here, the Examiner had the opportunity to assess the demeanor and credibility of all of the witnesses, the Examiner's fact finding should be honored. Respondents further argue that a single question about concerted activities does not chill the exercise of that right.

Given the foregoing, Respondents contend the Examiner properly dismissed the complaint in its entirety.

DISCUSSION

Looking first at the issue of whether the denial of Complainant Durfee's promotion was based at least in part on hostility toward the exercise of rights guaranteed by Sec. 111.70(2), Stats., we find this to be a close question. Complainants correctly argue that the Board's receipt of the Partipilo report and the Board's question to Durfee about his grievances create a strong inference that the Board's decision to deny Complainant Durfee a promotion was based at least in part on Durfee's grievance activity. 1/ However, on balance, particularly in light of Commissioner Ziolkowski's

1/ Complainants also cite criticism of and questioning about Durfee's attendance record in support of the alleged discrimination. While Complainants correctly argue that legitimate use of contractual benefits is a right guaranteed by Sec. 111.70(2), Stats., we view the record as establishing concern by Partipilo and the Board about Durfee's attendance record -- a legitimate inquiry in light of an employer's need to have work performed -- but not hostility toward the use of contractual benefits. Thus, our analysis of the discrimination allegation excludes the attendance issue. However, in any event, as a factual matter, we are persuaded the attendance issue did not play a role in the Board's decision.

credible testimony as to his motivation when voting to deny the promotion and as to the very limited amount of time which was devoted to the grievance issue during the promotional interview, we conclude that the Board's decision was not based even in part on Durfee's exercise of his protected right to file grievances against his employer.

Turning to the issue of interference, we conclude that the Board's questioning of Durfee about filing grievances did violate Sec. 111.70(3)(a)1, Stats. Thus, we reverse the Examiner's contrary conclusion. Unlike the Examiner, we are persuaded that questioning an employe during a promotional interview about the grievances the employe has filed—even where that questioning is very limited—has a reasonable tendency to chill employe exercise of this protected right. From such questioning, an employe can reasonably infer that promotional opportunities will be improved if he refrains from engaging in such activity. Thus, although we have found that the Board did not in fact deny Durfee's promotion in whole or in part because of his filing of grievances, it is nonetheless clear that the questioning of Durfee had a reasonable tendency to interfere with, restrain or coerce him (and other employes) in the exercise of the protected right to file grievances.

To remedy the violation of Sec. 111.70(3)(a)1, Stats., we have ordered the Respondents to cease and desist from such conduct and to post a notice. Because we are persuaded that the denial of the promotion was not based on illicit considerations, we have concluded that it is not appropriate to order that Durfee be promoted or receive any back pay.

Dated at Madison, Wisconsin this 16th day of December, 1998.

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

**CITY OF MILWAUKEE (BOARD OF FIRE AND POLICE
COMMISSIONERS)**

Concurrence/Dissent of Commissioner A. Henry Hempe

My colleagues in the majority and I are in agreement that a prohibited practice took place. Unlike the majority, however, I also conclude that the Board's decision to deny Detective Durfee a promotion was based, in part, on its receipt and inevitable consideration of a memo that included a critical, untruthful characterization of Durfee's grievance activities and an apparently unfounded accusation of sick leave abuse.

Given this difference in perspective, I also differ from the majority as to remedy.

The record indicates that Michael Durfee has been a City of Milwaukee police officer for almost 30 years. Officer Durfee has ably served as a detective for slightly more than 20 of those years. In August 1993, Detective Durfee became eligible for promotion to lieutenant by virtue of having scored sufficiently well on the department's exam, on which he ranked fourth.

In early 1996 there was contact between Michael Durfee and the Board of Fire and Police Commissioners on two occasions within an approximate three-month span. In the winter of 1996, following an appeal by Durfee and subsequent hearing, the Board reduced a 15-day disciplinary suspension to 8 days. On March 7, 1996, three members of the Board interviewed Durfee in connection with a prospective promotion to the rank of lieutenant. The interview was prompted by the objection of then-Police Chief Phillip Areola to Durfee's prospective promotion. Although Durfee had been accompanied to the interview by his attorney, Michael Guerin, and the President of the Milwaukee Police Association, Bradley DeBraska, neither representative was permitted to be present for the interview between Durfee and the Commission.

Commissioner Leonard Ziolkowski was one of the Commissioners present. Commissioner Ziolkowski is a retired member of the Milwaukee Police Department, where his distinguished career spanned a thirty-six year period. He retired as an Inspector – one of the top five positions in the department. He served nine years on the Board of Fire and Police Commissioners and chaired it for five years, including the period during which the Commission had contact with Durfee.

According to Detective Durfee, during the interview with the Board members in connection with his prospective promotion to lieutenant he was asked by Chairman Ziolkowski to tell the Commissioners about the frivolous grievances Durfee had filed. Durfee also testified that Chairman Ziolkowski asked him about Durfee's abuse of sick leave. Although unprepared for these questions, Durfee responded as best he could.

Durfee did not receive the promotion he sought. Significantly, not only the three candidates who ranked ahead of him on the eligibility list were promoted, but five who ranked below him were also promoted.

My colleagues in the majority accept Detective Durfee's recollection that the subjects of Durfee's grievance activity and sick leave absences were initiated by Chairman Ziolkowski, as do I. The majority concludes that the inquiry as to grievance activity constituted a prohibited practice contrary to the provisions of s. 111.70(3)(a) 3, as do I.

However, I also believe that a prohibited practice began to occur well before Chairman Ziolkowski made the objectionable inquiry. Not only did these preliminary actions ultimately lead to the prohibited practice identified by the majority, but to the tainting of the remaining Board members as well (and a separate violation).

For the record demonstrates that Chairman Ziolkowski's grievance inquiry did not occur in a vacuum. It was in fact precipitated by a memo from Police Inspector of Detectives Vincent Partipilo to then Police Chief Arreola. Arreola forwarded the memo to the Board of Fire and Police Commissioners in support of his objection to Durfee's promotion.

The Partipilo memo was highly critical of Detective Durfee. It alleged, *inter alia*, that Durfee was a sick leave abuser, that he is well-known to file grievances against management decisions, most of which are frivolous, that his report writing suffers from a purposefully loquacious style that is intentionally designed to confound or embarrass the reader, that he lacks sensitivity, and that he demonstrates a seemingly constant resistance to authority. Durfee was unaware of the Partipilo memo until after his interview with the three Commission members.

Not only does the record fail to support the Partipilo memo, it disproves it. As to Durfee's grievance record, we learn from the record that during the course of his 30-year career with the Milwaukee Police Department, Durfee filed a total of *three* grievances.

All went to arbitration, and Durfee prevailed in two of them. 2/ Three grievances filed over a 30-year career of which the grievant won two doesn't come close to qualifying Durfee as a well-known filer of grievances " . . .most of which are frivolous."

2/ As to sick leave abuse, the record indicates that while Durfee had experienced some health problems, he had never been disciplined or warned about abusing sick leave. It should also be noted that none of the evaluation reports on Detective Durfee (beginning with the period ending June 30, 1992) submitted into evidence suggest any of the criticisms contained in the Partipilo Memo. On the contrary, it is fair to say that the evaluations are consistent in offering high praise for Durfee's performance.

In fact, the only apparent blemish on Durfee's service record with the Milwaukee Police Department is the incident for which he was disciplined with a Board-reduced eight-day suspension. 3/ From Durfee's standpoint, the worst thing about the incident appears to be its timing (or, perhaps more accurately, the timing of subsequent, related events). For Durfee's appeal from his original 15-day suspension was apparently decided by the Board less than two months prior to the Board's consideration of his promotion.

3/ The incident involved Durfee's off-duty apprehension of several juveniles on a school bus, one of whom had thrown a small object that had struck Durfee's car. Durfee was accused of using excessive force and inappropriate language. In reducing his suspension from 15 to 8 days, the Commission wrote: "To Detective Durfee's credit, it would appear he soon recognized his mistake and took appropriate action to mitigate the problem that existed. . .Durfee exercised mature and responsible judgment in seeking advice from a counselor, prior to any indication that disciplinary action was pending. Detective Durfee has more than 20 years with the Milwaukee Police Department, and the record reflects above average evaluations."

Based on this record, I find Chairman Ziolkowski's question a relatively minor transgression when compared to the conduct of first Inspector Partipilo and then Chief Areola. Partipilo, of course, was the author of the memo that falsely accused Durfee of filing frivolous grievances and other improprieties as evidence of his unfitness for promotion. But no less at fault was the Chief, for it was Chief Arreola who promulgated the memo to the Board *as justification for the Chief's objection to Durfee's promotion.*

By distributing the Partipilo Memo with his endorsement to Board members, in effect the Chief was advising them not only that Durfee exercised poor judgment, but that Durfee's alleged grievance activities and sick leave abuse constituted credible evidence of this conclusion. Absent extraordinary action by the Board to extricate itself at that point, 4/ I believe that the Chief's action inevitably poisoned the well and tainted the Board members. Not only is it likely that Durfee was unfairly maligned in Board members' eyes, but by failing to disavow and distance themselves from the objectionable portion(s) of the memo, the Board members themselves became unwitting participants in the prohibited practice.

4/ Such action could have included: 1) a memo to the Chief from the Board (or its attorney) indicating that inasmuch as grievance activities are statutorily protected and authorized sick leave a contractual right, the Board neither should, could, nor would look at either area; 2) sending a copy of the Partipilo Memo to Durfee; 3) allowing Durfee's attorney and/or Police Association representative into the interview. Almost needless to add, no questions concerning Durfee's grievance activities should have been put to him during his interview with the Board.

Board members failed one final opportunity to cleanse the process (though in fairness they probably didn't recognize that it had been sullied). Detective Durfee testified that he learned of the Chief's letter and Partipilo Memo after the March 7, 1996 interview, but before the Board's decision rejecting Durfee's promotion in early April. At that point Durfee understood the basis for Chairman Ziolkowski's "frivolous grievance-filing" and sick leave questions. Through his attorney, Michael Guerin, Durfee attempted to meet again with the Board and explain Partipilo's apparent bias against him. The Board, however, refused to grant Durfee any further opportunity to meet with it. Tr. 59-61.

Chairman Ziolkowski, of course, testified that he was not influenced by any of Durfee's grievance activities or sick leave absences in making a promotion decision

adverse to Durfee. Though his testimony is predictably self-serving, the hearing examiner found it credible. I agree with that finding. 5/

5/ My agreement is bolstered by a brief consultation I had with the Hearing Examiner in this matter, Dennis McGilligan, as to his impressions of the witness demeanor of Chairman Ziolkowski.

It seems to me, however, that common sense allows, perhaps compels, the inference that most Fire and Police Commission Board members give serious consideration to a memo authored and endorsed by two of the department's highest-ranking officers (one of whom was the Chief). Under that circumstance I believe that distribution of the offending memo in this case to Board members creates a presumption that its contents played a part in their respective, subsequent decision.

That presumption is yet to be rebutted, except as to Chairman Ziolkowski. The Chairman did not presume to speak for the other Commissioners. Surely his individual justification of his own vote on the matter cannot serve as a cleansing blanket of justification for each of the remaining commissioners, apparently all of whom read the offending Partipilo Memo, but none of whom testified.

This is not to say that there is not credible evidence that could have supported the Board's promotion denial, apart from the improper, false grievance and sick leave abuse allegations. The school bus incident offers that.

But absent credible testimony or evidence to the contrary, in my opinion the presumption that the Partipilo Memo played a role in the decision to deny promotion to Durfee of the Board members who did not testify remains intact. On this basis, I am satisfied that consideration of Durfee's grievance-filing activities as alleged in the Memo was a factor in the individual decisions of Board members to deny Durfee his promotion.

For these reasons, I join my colleagues in determining that the question of Chairman Ziolkowski as to Durfee's grievance-filing activities had a chilling effect on the exercise of rights protected by sec. 111.70(2). Departing from my colleagues, I further conclude that the employer, by its agents, Inspector Partipilo and Chief Arreola, was hostile to Detective Durfee as a result of Durfee's participation in protected activity contrary to the provisions of sec. 111.70(3)(a) 3 and derivatively sec. 111.70(3)(a) 1. Finally, I believe that the employer's Board members (except for Chairman Ziolkowski) were influenced and motivated, in part, by this hostility when they voted to deny Durfee promotion to the rank of lieutenant.

Thus, I find the majority's remedy incomplete. In effect, Inspector Partipilo, who originated the illicit memo, and Chief Arreola, who relayed the same memo to the Board members, are both rewarded for their improper actions, for they achieved their desired result. Chairman Ziolkowski, who through no initial fault of his own, was placed in a legally perilous position by the improper actions of these two men, ends up taking all of the blame, which he simply does not deserve. I see little, if any deterrent value in merely causing a 30-day notice to be posted in which the Board of Commissioners promises not to question employees "...about filing grievances during promotional interviews."

At the same time, I do not propose to second-guess Board members whose reasons for denying Durfee his promotion may well have included sincere concerns about the school bus incident.

Under the law, this agency is entitled to exercise its sound discretion in fashioning an appropriate remedy. See *DER v. WERC*, 122 Wis. 2d 132, 143 (1985). Based on the foregoing discussion and the entire record herein the remedy I find most appropriate would require: 1) public posting of the usual *mea culpa* notice that includes acknowledgement of the objectionable memo of the Inspector of Detectives (as well as its subsequent endorsement and distribution by the department chief) and a statement of intent to avoid similar conduct in the future; 2) as suggested by the Association, reinstatement of Durfee to enable him to retire at the top step of the pay scale for detective lieutenants, but without any back pay award.

Dated at Madison, Wisconsin this 16th day of December, 1998.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

