STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILLIAM OAKLEY, Complainant,

vs.

COUNTY OF DOOR, Respondent.

Case 148
No. 64370
MP-4128

Decision No. 31281-F

COUNTY OF DOOR, Complainant,

vs.

WILLIAM OAKLEY, Respondent.

Case 149
No. 64486
MP-4129

Decision No. 31282-G

Appearances:

Aaron N. Halstead, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appeared on behalf of William Oakley at hearing. **Nola J. Hitchcock Cross,** Cross Law Firm, S.C., Attorneys at Law, 845 North 11th Street, Milwaukee, WI 53233 substituted as counsel after hearing and filed the briefs for William Oakley after hearing.

Grant P. Thomas, Door County Corporation Counsel, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin 54235-0670, appeared on behalf of Door County.

Thomas J. Parins, Jr., Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, appeared on behalf of Door County Deputy Sheriff's Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

January 13, 2005, Complainant William Oakley (herein "Employee") filed a complaint (herein "Case 148") with the Wisconsin Employment Relations Commission, (herein "Commission") on January 13, 2005, later amended, alleging that the County of Door (herein "Employer") committed prohibited practices within the meaning of Section 111.70(3)(a)1, 4 and 5, Stats, essentially by retaliating against him for exercising his rights protected under Sec. 111.70(2), Stats.[1] On February 9, 2005, Door County filed a motion to dismiss the complaint in Case 148 and, in the alternative, its answer and "counter claims" (now Case 149) which, as amended, allege that the claims by Complainant Oakley in Case 148 have been resolved by virtue of an arbitration award by Arbitrator Levitan in Case 141 and that the employee's failure to abide by the terms of the award constitute a prohibited practice within the meaning of Section 111.70(3)(b)(4) and (6), Stats. The WERC by order dated March 22, 2005, consolidated Cases 148 and 149 for hearing. On May 9, 2006, the Commission appointed Steve Morrison, a member of its staff, as Hearing Examiner to make and issue Findings of Fact, Conclusions of Law and Orders. Examiner Morrison held a hearing in the matter on September 20, 2006 in Sturgeon Bay, Wisconsin. Thereafter, the Commission substituted Stanley H. Michelstetter, as Hearing Examiner by Order dated August 29, 2008. The Examiner has considered the evidence and arguments of the parties and now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Door County (herein "Employer") is a municipal employer, which provides law enforcement services through its Sheriff's Department. It has its principal offices at 421 Nebraska Avenue, in the City of Sturgeon Bay, Wisconsin. At all material times, the elected Sheriff of Door County was the chief executive officer of the Door County Sheriff's Department.

2. The Door County Deputy Sheriffs Association (herein "Association") is the collective bargaining representative of all regular full-time and all regular part-time employees of the Employer with the power of arrest. The bargaining unit includes all sergeants, but excludes lieutenants. The Association and the Employer have been party to successive collective bargaining agreements, of which the most recent one expired December 18, 2004. There was a hiatus between that agreement and its successor. The expired collective bargaining agreement contained a procedure for resolving grievances and a provision for arbitrating unresolved grievances. The Jail Lieutenant does not participate in the grievance procedure.

[1] The long procedural history of this and related cases is stated in the Memorandum.

3. Complainant William Oakley (herein "Employee") has been employed by the Employer as a sworn sheriff's deputy since at least 1995. At all material times, the Employee has been a Sergeant and a member of the bargaining unit represented by the Association.

4. The Employee became the Jail Sergeant in 1999 and remained in that position at all times thereafter. Until the changes listed in the Findings of Fact below, the Jail Sergeant was the person directly responsible for the daily operation of the jail. Until those changes, the Jail Sergeant was responsible for the training, scheduling and direction of the jail deputies (herein "correction officers") and the communication deputies. There were nine full-time correction officers and ten part-time correction officers. He was responsible to insure that there was at least one female correction officer on duty whenever there was a female prisoner in the jail. He was responsible for the proper admission of inmates, including their identification and other documentation. He maintained records relating to Maximum Security and inmates granted Huber law privileges and insured prisoners were transported as required. He also ordered law enforcement supplies and insured that there was an adequate supply on hand at all times. He did not have the authority to independently discipline employees under his command. Until the changes listed in the Findings of Fact below, the Jail Sergeant reported to the Chief Deputy, who at all material times was Gary Behling. Chief Deputy Behling was responsible for the overall administration of the Sheriff's Department. Chief Deputy Behling reported solely to the Sheriff and Employer officials outside the Sheriff's Department. Until the changes listed below, the Jail Sergeant did not directly perform security duties related to the care and control of inmates or even sporadically take a shift in the "rotation" of corrections officers directly supervising inmates.[2] The Jail Sergeant had historically been allowed a limited right to have flexible hours and to leave the jail during his lunch hour, provided he kept a pager with him at all times. At all material times the other divisions of the Sheriff's Department were the support division, patrol, investigative. The Investigative Division has always been headed by a Sergeant who reported to the Chief Deputy.[3] The Employee essentially operated the jail with little direct supervision until the changes specified in the Findings of Fact, below.

5. Over the years, the average population of inmates of the jail grew substantially. Throughout the relevant period there has been frequent turnover among corrections officers. The Employer made the decision to build a new jail (herein "new Jail"). The Employer was engaged in planning for the new jail at all material times after January, 2001. The new jail neared completion as of the circumstances in dispute. The new facility was larger and required a larger staff.

6. Former Sheriff Charles Braun retired. Gary Vogel who had continuously served with the Department for at least 30 years was elected to the office and began his term on January 7, 2003. He remained Sheriff at all material times thereafter.

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[2] These duties are referred to herein as "working the floor."

[3] The table of organization shows an intervening vacant position of Administrative Lieutenant. This position remained unfilled at all relevant times.

7. On January 8, 2003, Sheriff Vogel directed the Employee to work from 8:00 a.m. until 4:00 p.m. on a fixed schedule. He directed that the Employee not leave the jail during his lunch hours. He told the Employee that henceforth he would be required to work the floor to fill in for corrections officers, particularly to avoid paying others to do so on overtime. Sheriff Vogel's motivation for doing so related solely to factors other than the Employee's activities protected under Section 111.70(2), Stats.

8. Prior to 2002, Sheriff Braun had agreed to reimburse the Employee for the tuition and books for certain educational courses provided that the Employee received a grade of "C" or better. The Employee completed an approved educational course at the end of 2002, with a grade of "C" or better. On January 17, 2003, the Employee presented his grades and requested that Sheriff Vogel approve the distribution of funds to make that reimbursement. Sheriff Vogel declined to authorize the reimbursement on the basis that he should have discussed the matter before taking the class and that the funds were needed for other training which Sheriff Vogel planned to have conducted later in 2003. The Employee responded to Sheriff Vogel's denial by explaining that he had discussed the matter with Sheriff Braun before he took the class, but that Sheriff Braun had required him to obtain a grade of "C" or better. Sheriff Vogel persisted in his refusal in a conversation with the Employee on January 20, 2003.

9. The Association filed a grievance protesting the changes specified in Finding of Fact 7, above, on January 22, 2003. The grievance was processed to arbitration and the parties filed a request for arbitration with respect thereto with the WERC on October 10, 2004. Sheriff Vogel was an active participant on behalf of the Employer at all phases of processing the grievance.

10. On February 4, 2003, the Association filed another grievance with Sheriff Vogel concerning the reimbursement specified in Finding of Fact 8, above. The Association and Sheriff Vogel met with respect to the grievance on February 20, 2003, and Sheriff Vogel agreed to make the disputed payment. Sheriff Vogel was an active participant on behalf of the Employer at all phases of processing the grievance.

11. The Association demanded by letter dated March 14, 2003, that Sheriff Vogel and the Employer bargain with respect to the matters in Finding of Fact 7 above because they allegedly constituted changes in the wages, hours and working conditions of the bargaining unit.

12. On September 30, 2003, the Door County Board adopted a resolution authorizing the creation of two full-time deputy sheriff positions and one lieutenant position to be effective in calendar 2004. The lieutenant position was designated by the Sheriff to be a Jail Lieutenant. The Jail Lieutenant position was to perform duties formerly performed by the Jail Sergeant overseeing the current and new jail and to lead the planning team for the transition to the new jail. The Jail Lieutenant, unlike the Jail Sergeant, was to have the authority to

independently hire or effectively recommend the hiring, discipline and/or discharge of subordinates. The Jail Lieutenant had the responsibility to interpret the orders and policies of the Sheriff's Department and to develop new standardized training and operating procedures for the jail. The Jail Lieutenant supervised the Jail Sergeant. The creation of this position entailed the significant downgrading of the independence, authority and responsibilities of the Jail Sergeant.

13. Thereafter, but before February, 2004, the Employer conducted a selection process to fill the position of Jail Lieutenant. The Employee, Sergeant Jeff Farley and one other person applied for the position. Sheriff Vogel selected Farley. Lieutenant Farley had one year's prior experience with administration of the jail about thirteen years before he was selected and no prior supervisory experience. The Employee resented the fact that he was not selected for the position as Jail Lieutenant. Lieutenant Farley commenced work in the position of Jail Lieutenant on February 1, 2004. He spent most of his time in the planning for the new jail and a small portion of his time in the old jail. A dispute arose between Lt. Farley and the Employer as to his wage rate. On February 18, 2004 at 8:05 a.m. Lt. Farley requested that he be returned to his former position. Sheriff Vogel directed him to remain in the position through February 24, 2004. As of February 26, 2004, Lt. Farley was still seeking to return to his former position. He ultimately withdrew the request and remained in the Jail Lieutenant position.

14. On February 17, 2004, the Employer electronically notified unit employees that it posted the vacancy for Lt. Farley's former position as Sergeant of the Investigative Division for applications from unit employees. The Employee physically applied for the position by signing it within 40 minutes of when it was posted. The posting was withdrawn less than an hour later. The Employee met the minimum qualifications for the position as of the time of the posting.

15. Thereafter, but before February 19, 2004, Sheriff Vogel met with Chief Deputy Behling to discuss the posting. The posting was modified to add a minimum requirement for two years' investigative experience. The Employee did not have two years of investigative experience. Sheriff Vogel's purposes for adding the minimum requirement was both to obtain more qualified candidates and also to insure that the Employee would not qualify.

16. On March 2, 2004, the position was reposted with the added experience requirement. The Employee signed the posting but was never awarded the position. On March 18, 2004, the Association filed grievance number 2004-01 concerning the posting alleging that the posting unilaterally changed the job requirements and changed the job to a position serving at the will of the Sheriff. On the same date it filed grievance number 2004-02 protesting the same job posting alleging that it violated the alleged past practice of allowing Sergeants to transfer into another open Sergeant position and requesting that the posting be corrected and reposted as corrected. Both grievances were processed to the arbitration stage. The matter was scheduled for Arbitration before Commissioner Susan Bauman, but was

resolved before it was heard by Arbitrator Bauman. The agreement of the parties was memorialized in a letter dated January 11, 2005, from Attorney Parins to the Employer which provided that grievance 2004-01 was withdrawn with prejudice. The agreement also provided that grievance 2004-02 was resolved on the following bases:

> Grievance # 2004-02.
>
> Sergeants, provided they meet the qualifications of the position, will be given first opportunity to post for vacant Sergeant positions.
>
> If no Sergeant is qualified or posts, vacant Sergeant positions will be posted in accordance with the collective bargaining agreement.
>
> County retains the right to determine whether a vacancy exists, and whether and when to fill a vacancy.
>
> County retains the right to determine whether an employee meets the qualifications of a position.

17. The Employee had received good evaluations in at least the two years prior to Sheriff Vogel taking office. Prior to the creation of the Jail Lieutenant position, the Employee reported to Lieutenant Larson. Lieutenant Larson had wide ranging administrative responsibilities and did not spend a significant amount of time supervising the Employee or the jail. On February 23, 2004, Lt. Larson issued an annual performance evaluation of the Employee rating him average or above average in every respect and stating:

> Sgt. Oakley has been able to maintain the workings of the jail despite a constant turnover in jail staff. The day to day operations of the jail have continued to function with little disruption, in no small part due to Sgt. Oakley. The responsibility of scheduling prisoner transports was transferred to Sgt. Oakley, and he along with the transport officer have been able to schedule those efficiently. Sgt. Oakley's relationship with the full time jail staff is satisfactory and his performance throughout the year has been at an acceptable level, which he undoubtedly will improve upon in the upcoming year.

The Employee has no record of discipline prior to the circumstances in this case.

18. Arbitrator Stuart Levitan held a hearing with respect to the grievance specified in Finding of Fact 8 on March 23, 2004, at which the Employee and Sheriff Vogel both testified. On August 26, 2004, Arbitrator Levitan concluded that the Employer violated the collective bargaining agreement by changing the Employee's lunch break, but did not otherwise violate the collective bargaining agreement by it change of his hours of work and work assignment.

19. On April 19, 2004, Lt. Farley issued a "30-day" evaluation report of the Employee which was issued essentially to place the Employee on a performance improvement plan. It rated him as poor or unacceptable with respect to quality of work, quantity of work, judgment and knowledge and initiative. It rated his personal appearance as above average. The written comments stated as follows:

> I want a sergeant that is a leader to the officers that serve under him. One that sets the standards for others to follow. Sets a good example, aggressively working the floor and assisting the jail staff when ever (sic) and were ever (sic) possible. One that takes an interest in his position. At this time your performance is lacking. You need to be told what to do, lacking initiative. Small details such as opening up of the mail, you pass it onto someone else to take care of. It is difficult for me to determine the difference between your light duty assignment compared to when you were on normal duty. Complaints have been received that you are refusing to perform minor tasks such as answering the 2418 jail extension number. You are not setting the proper example, improvement is needed. Sergeant will complete a daily activity log and evaluations will be performed every thirty days until further notice.

At the same time Lt. Farley required the Employee to complete daily activities reports as part of a performance improvement plan which was discontinued on May 27, 2004, on the basis that the Employee had successfully improved his performance.

20 On May 3, 2004, the Association filed a grievance with Sheriff Vogel protesting the evaluation referenced in Finding of Fact 19. Sheriff Vogel was an active participant on behalf of the Employer at all phases of processing the grievance.

21. On May 13, 2004, Sheriff Vogel denied the grievance referenced in Finding of Fact 20. The grievance was processed normally, except at its final stages when it was heard by the Administrative Committee of the Door County Board because the Personnel Committee of the Door County Board deadlocked after hearing the grievance.

22. On May 17, 2004, the Employer named Deputy Sternard as a member of its committee to plan the transition to the new jail. The Employee was never named to that committee.

23. On September 24, 2004, The Administrative Committee of the Door County Board upheld the grievance specified in Finding of Fact 20 on the grounds:

> Sergeant Oakley was not afforded sufficient notice and opportunity to correct. Therefore the written evaluation may be viewed as being undeservedly poor.

24. In October, 2004, an issue arose concerning the Employee's level of responsibility for ordering Taser cartridges. Prior to this occurrence, Lt. Farley had notified all jail personnel that no one was to purchase any item for the jail without his approval. Lieutenant Larson sent the Employee to obtain approval for ordering cartridges needed in the jail to Chief Deputy Behling who dismissively verbally told the Employee in front of a fellow employee:

> What are we talking about, a couple of hundred dollars? It is not like we are talking thousands. I think you can handle this.

The Employee then sought approval from Lt. Farley on October 19, 2004, for the purchase of 36 Taser cartridges without specifying the specific type or the purchase price. By e-mail dated October 20, 2004, Lt. Farley tersely declined to approve the purchase order because the type and price were not specified in the request. Thereafter, but on October 20, 2004, the Employee wrote an e-mail to Lt. Larson and Chief Deputy Behling attaching Lt. Farely's e-mail and protesting:

> " . . . . I found this comment to be degrading, especially since it was said in front of a subordinate . . . . I retrieved the e-mail from Lt. Farley had sent to the Jail Staff in which he ordered the Staff not to order any product without his approval. I showed this e-mail to Behling so he might understand why I asked him for direction. I am bringing this issue to your attention because <u>you</u> asked me to order cartridges. For whatever reason a simple task has grown into a frustrating incident which has offended me. Please read the response I received from Farley and let me know how you would like to proceed. Thank you in advance.

Part of the Employee's reason for writing the foregoing e-mail was to undermine the relationship between Lt. Farley and his superiors. On October 20, 2004, the Employee complained to Deputy Tammy Sternard about the comment from Chief Deputy Behling noted above. Deputy Sternard is a subordinate of the Employee, personal friend and has acted as a Association Steward. She was not acting in her capacity of Association Steward during this conversation, nor did the Employee believe that she was acting in that capacity. Deputy Sternard complained to management that the Employee had complained to her about this incident. The Employee also discussed the matter with other fellow employees.

25. On October 21, 2004, Chief Deputy Behling called the Employee to an investigative meeting. Also present were Sheriff Vogel, and Lt. Farley. The Employee requested to have a Union representative present, namely Attorney Parins. The Employer responded to that request by calling Sgt. Grondin, then Union President, to be present to represent the Employee, and Sgt. Grondin then came to the meeting and represented the Employee. The selection of Sgt. Grondin was in accordance with the practice of the Association and the Employer. The Association has never complained to anyone that Sgt.

Grondin was not an appropriate Union representative for disciplinary purposes. A second meeting was held December 6, 2004, with the same people present. The Employee asked that that meeting be postponed until Attorney Parins who was on vacation then could be present. Employer again refused to postpone the December meeting and the meeting was held with the same participants. The Employer never imposed any discipline on the Employee with respect to the matters in Finding of Fact 23 or 24.

26. In October, 2004, at least three female employees complained that the Employee was handling business interactions in a way that they thought was not appropriate and some jail employees indicated that they no longer wanted to work the day shift with the Employee. Other employees made complaints to the Sheriff about the Employee's handling of scheduling and other matters during the period material to this dispute.

27. At all material times after Lt. Farley was selected for his position, the Employee was resentful of Lt. Farley and engaged in actions with fellow employees meant to undermine Lt. Farley. At all relevant times, Lt. Farley believed that the Employee was trying to make Lt. Farley's job difficult to do and his working conditions and relationships unpleasant.

28. Under the collective bargaining agreement and past practice, the Jail Sergeant was not counted for staffing levels in the jail. Prior to the circumstances in dispute, the Employer never sought to collectively bargain with the Union concerning changes necessary to achieve its goal of having the Jail Sergeant performing more work on the floor. In late November, 2004, the Employee called Lt. Farley late on two successive nights to announce that he needed to take vacation the next day to continue working on his house. Lieutenant Farley believed that the Employee should have made the request sooner both as a courtesy to him and so that Lt. Farley could achieve adequate staffing levels in the jail. Lieutenant Farley believed that one of the reasons that the Employee made the request in this manner is that he intended to make Lt. Farley's job more difficult. Lieutenant Farley requested that Sheriff Vogel formally discipline the Employee for this conduct.

29. Prior to December 2, 2004, Sheriff Vogel caused the Employee to be notified of a formal investigation of a disciplinary incident as stated in Finding of Fact 28. The Employee requested representation by the Association and was represented by Deputy Sternard. The meeting was conducted with Sheriff Vogel, the Employee, Chief Deputy Behling, Lt. Farley and Deputy Sternard in her capacity as Association Steward. The investigation was conducted, but no discipline was imposed.

30. On December 28, 2004, Lt. Farley sent a directive to the Employee which stated in relevant part:

> With the anticipated change in staff structure, I want you to become more involved in daily routine. To accomplish this, I want at a minimum of twice per week for you to book someone into jail from the start to the finish. I want you

> to assist in the serving of the noon meals at least three times per week which includes the washing of the dishes afterwards.

Lieutenant Farley's sole reason for making this order was because the Employee had not sufficiently voluntarily accepted more responsibility for work on the floor

31. At least a month and half prior to January 13, 2005, Lt. Farley instructed Deputy Sternard to have others perform some of her work so that she could devote more attention to her work on the committee planning the transition to the new jail. She requested that the Employee perform ministerial duties formerly regularly performed by Deputy Sternard and repeatedly showed him how to do it. These duties included timely closing jail bookings. The Employee intentionally failed to close any bookings thereafter because this was work previously done by his subordinates. The Employee never told Lt. Farley or anyone else that he had failed to perform that duty. Deputy Sternard and Lt. Farley learned that these had not been completed on January 13, 2004. Lieutenant Farley wrote a letter to Sheriff Vogel reporting the matter and requesting that Sheriff Vogel ". . . strongly consider disciplinary action against Sgt. Oakley."

32. On March 14, 2005, Sheriff Vogel conducted a formal investigation as to why the Employee had allegedly failed to meet weekly with probationary corrections officers as per the corrections training program and had failed to close bookings as specified in Finding of Fact 31. The Employee was represented by the Association in that meeting. Sheriff Vogel took no disciplinary action with respect thereto.

33. On May 10, 2005, Lt. Farley sent a letter to Sheriff Vogel requesting that Sheriff Vogel take formal disciplinary action against the Employee concerning an allegation that the Employee had failed to timely perform evaluations of subordinates as previously directed by Sheriff Vogel, for improperly accounting for money in the cash drawer, and having authorized a female corrections officer's vacation request without giving adequate notice to female substitutes. The Employee had timely completed the evaluations and had placed them in Sheriff Vogel's mailbox rather than Lt. Farley's because Lt. Farley was on vacation. The cash drawer issue was minor and Lt. Farley had not sought formal discipline of other employees who had made similar errors. The sole reason for Lt. Farley's request was his belief that the Employee was deliberately undermining Lt. Farley's job performance and the operation of the jail. Sheriff Vogel conducted a formal investigation with respect to those allegations on June 3, 2005. The Association represented the Employee at that meeting. Sheriff Vogel did not discipline the Employee with respect to these incidents.

34. The sole reasons that Sheriff Vogel conducted formal investigations as specified in Findings of Fact 25, 29, 31 and 32 were that the investigations were requested by Lt. Farley and that Sheriff Vogel believed that the Employee was intentionally creating a hostile atmosphere for subordinates and Lt. Farley and undermining Lt. Farley's effectiveness.

35. On March 7, 2005 and again on April 15, 2005, Lt. Farley made and issued written appraisals of the Employee's performance which contained critical comments and negative ratings, but which provided overall ratings of minimally meeting standards. The Employee complained that these ratings were unduly low. Lieutenant Farley's reasons for the evaluation and the one in Finding of Fact 19 were solely his evaluation of the Employee's performance and his belief that the Employee was intentionally making Lt. Farley's work difficult.

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

CONCLUSONS OF LAW

1. The Employee is an employee within the meaning of Section 111.70(1)(i), Stats.

2. The Employer is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The Association is a labor organization within the meaning of Section 111.70(1)(h), Stats.

4. The Employer has failed to state of cause of action under Section 111.70(3)(b)6, Stats.

5. The Employee, by filing the instant complaint in Case 148, did not fail or refuse to accept an arbitration award as final within the meaning of Section 111.70(3)(b)4, Stats.

6. The Employer by engaging in the conduct specified in the Findings of Fact 7, 16, 19, 24, 25, 28, 29, 30, 31, 32, and 33 above, the did not commit discrimination prohibited by Section 111.70(3)(a)3, Stats.

7. The Employer by engaging the conduct specified in the Findings of Fact 7, 16, 19, 24, 25, 28, 29, 30, 31, 32 and 33, above, did not interfere with or restrain the Employee within the meaning of Section 111.70(3)(a)1, Stats, in the exercise of rights protected under Section 111.70(2), Stats.

8. The Examiner refuses to assert the jurisdiction of the Commission over the allegations of the Employee's complaint under Sections 111.70(3)(a)4 and 111.70(3)(a)5, Stats, because there was an exclusive grievance procedure in effect at all material times.

Based upon the above and forgoing Findings of Fact and Conclusions of Law, the Examiner makes and files the following

ORDER

1. The Examiner dismisses the Employee's allegations of violation of collective bargaining agreement under Section 111.70(3)(a)5, Stats.

2. The Examiner dismisses the Employee's allegations refusal to bargain/unilateral change under Sec. 111.70(3)(a)4, Stats.

3. The Complaint filed herein by the Employer is dismissed.

4. The Complaint filed herein by the Employee is dismissed.

Dated at Madison, Wisconsin, this 10th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

COUNTY OF DOOR and WILLIAM OAKLEY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

1. PROCEEDINGS

The procedural history of these two complaints is related to another one filed by the Association. On October 10, 2003, The Association filed a complaint in case 140 in conjunction with the facts and the grievance specified in Finding of Fact 7 and 9. The complaint alleged that the Employer committed prohibited practices within the meaning of Section 111.70(3)(a) 4, 5, Stats, by unilaterally changed working conditions of the position of Jail Sergeant/Administrator by:

1. Not allowing the Jail Sergeant/Administrator (Oakley) to have flexible hours and assigning him to a set shift.

2. Changing the Jail Sergeant/Administrator's (Oakley's) lunch hour by refusing to allow him to leave the jail during his lunch hour.

3. Assigning the Jail Sergeant/Administrator (Oakley) to take shifts working on the jail floor on a regular basis which allegedly was never part of his duties.

On October 20, 2003, the Employer filed a motion to dismiss the complaint because the matter had been submitted as a grievance which the parties were then processing and that the matter was not filed timely pursuant to Sec. 111.07, Stats. The grievance was submitted to arbitration before Arbitrator Stuart Levitan, a member of the Commission's staff as specified in Findings of Fact 9, and 18. That complaint was dismissed by agreement of the parties without a substantive decision by the Commission.

On January 13, 2005, the Employee filed Case 148. The complaint, as amended, alleged that the Employer committed prohibited practices within the meaning of Section 111.70(3)(a)1, 4 and 5, Stats, by:

1. Intentionally changing a job description on or about March 2, 2004, for the position of Investigative Sergeant for the purpose of precluding the Employee from transferring into that position on the account of his exercise of protected rights, namely, filing grievances.

2. In April, 2004, issued a written job evaluation which allegedly did not accurately reflect his performance as Jail Sergeant.

3. On December 1, 2004, ordered the Employee to appear for an investigatory interview and that the Employer refused to postpone the investigatory meeting so that the attorney representing the Association could be present.

4. On December 28, 2004, the Employer added onerous or menial duties to Complainant's position as Jail Sergeant, namely serving meals to inmates three times per week and washing their dishes.

5. Engaged in other unlawful actions which include unduly harsh evaluations on April 19, 2004, March 7, 2005, and April 15, 2005.

6. Engaged in other actions which included inappropriately subjecting the Employee to investigatory and pre-disciplinary meetings on October 21, 2004, December 6, 2004, March 14, 2005 and June 3, 2005.[4]

On February 9, 2005, the Employer filed a motion to dismiss the complaint in Case 148 and, in the alternative, its answer and "counter claims" which were later amended on June 20, 2005. As amended, they allege that the claims by the Employee in Case 148 have been resolved by virtue of the arbitration award by Arbitrator Levitan and that his failure to abide by the terms of the award constitute a prohibited practice within the meaning of Section 111.70(3)(b)(4) and (6), Stats. The latter "counter claim" became Case 149. The WERC by order dated March 22, 2005, consolidated Cases 148 and 149 for hearing. On May 17, 2005, Examiner McLaughlin held a telephonic pre-hearing conference call in which the Employee, Employer and Association participated. The Association consented to the dismissal of the Case 140 and the Association sought to intervene in Cases 148 and 149 as a party-in-interest to, at a minimum, observe the proceedings. Examiner McLaughlin noted that the Association and Employer agreed that at that time, they were in negotiations for a successor to the collective bargaining agreement in dispute herein. He directed that should the Association choose to assert party-in-interest status it would have to file an answer to both complaints. The Association ultimately submitted an "Amended Motion to Intervene and Response to Pleadings which alleged as follows. In answer to the Employee's complaint, the Association admitted the Employee's factual allegations including, but not limited to, the Employee's assertion that sergeants had the right to transfer laterally into other sergeant positions provided they met the qualifications of the position and that they were notified that the Sheriff changed the position description for Investigative Sergeant, but the Association did not take a position as to whether the Sheriff was aware the Employee wanted to apply for the position or that he knew that the Employee did not met the added two year experience requirement or that he was motivated by the Employee's protected activity in changing the position description. The Association took no position with respect to the Employee's other

[4] The Examiner will refer to these allegations by these numbers in the discussion below.

allegations which the Employee had alleged under Sections 111.70(3)(a)1, 3, 4, and 5, Stats, namely:

1. The Sheriff issued an evaluation in April 2004, which did not accurately reflect the Employee's performance.

2. On December 1, 2004, Sheriff Vogel refused to adjourn an investigatory interview of the Employee so that the Association's counsel could be present.

3. Sheriff Vogel restructured the Employee's duties on December 28, 2004, to require him to serve inmate meals at least three times per week and wash their dishes.

4. The Employer issued evaluations of April 19, 2004, March 7, 2005, and April 15, 2005, and subjected the Employee to investigatory and pre-investigatory meetings on October 21, 2004, December 6, 2004, March 14, 2005, and June 3, 2005 regarding the Employee's conduct which did not merit those actions.

The Association responded to the Employer's complaint by denying that the issues and claims asserted by the Employee have been in any part resolved by Arbitrator Levitan's arbitration award and affirmatively asserted that the issue of retaliation was not part of the arbitration award. It admitted that the issue concerning the lateral transfer ability of sergeants was the subject of a grievance (Finding of Fact 20) and that grievance was completely resolved by the agreement set forth in Attorney Thomas' letter of January 11, 2005 and denied that the agreement resolved any individual issues involving the Employee. It admitted that the grievance underlying the arbitration award by Arbitrator Levitan have been fully resolved. It denied that the "WERC should refuse to assert jurisdiction here and affirmatively asserted that there is no mechanism set forth in the contract to adequately resolve the issues set forth in William Oakley's complaint."[5] It alleged that the Employer's right to change a job description is solely a management prerogative and put the Employer to its proof as to the instant change in the investigative Sergeant's job description was a valid exercise of Employer rights reserved to it under the collective bargaining agreement. The Association took no position as to the remaining substantive issues as to retaliatory acts.

The Association appeared at the hearing, but did not examine witnesses or otherwise offer evidence. It did not make any argument after litigating the motion to intervene.

[5] The Examiner construes this to be solely a reference to the allegations of a violation of Sec. 111.70(3)(a)3 and not Sec. 111.70(3)(a)4, 5, Stats. The Association admitted that all grievances are subject to resolution in the grievance procedure.

2. MOTION TO DISMISS COUNTER-CLAIM AND MOTION TO DISMISS EMPLOYEE'S COMPLAINT

a. Positions on Motions

Employee

The Employer's motion to dismiss the complaint based upon its position that the act of filing a complaint with the WERC is itself a prohibited practice should be dismissed because the act of filing a complaint is itself privileged. There is no basis in statute or WERC precedent to support the Employer's theory. Alternatively, the Employer's theory is that the Employee refused to accept an arbitration award is without merit because the Employee was not a party to the arbitration. The arbitration involved the management rights of the Employer, but the case herein involves using those rights in an unlawful way. The Employer's motion addressed to Section 111.70(3)(b)6 is entirely without merit. The Employer's motion to dismiss the Employee's complaint should be denied.

Employer

The Employer concedes that its motion as to Section 111.70(3)(b)6 is misdirected The Employee's complaint is a thinly veiled effort to modify or reverse the arbitration award. The award provided that the Sheriff had the exclusive right to set the hours for the jail and the assignments for the Jail Sergeant. If the Employee claims he is not out to modify or reverse the arbitration award what relief could he seek? Similarly, the settlement prior to arbitration as to the posting case resolved that the Sheriff could set the qualifications for posted positions and determine qualifications. The allegations of the complaint as they relate to determining the qualifications for the position or whether a vacancy existed were settled by that settlement. The issues as to the performance evaluation dated April 19, 2004, were resolved by the Employer's administrative committee and the Employer does not believe those are in dispute anymore. The Employee did not avail himself of the grievance procedure as to the remaining evaluation and those allegations should be dismissed for deferral purposes and because those disputes were cognizable under Sec. 103.13, Stats. The Employee's complaints under Sec. 111.70(3)(a)5, Stats, should be deferred to the grievance procedure. The Employer is willing to submit disputes of contract violation occurring in the hiatus between contracts to the grievance procedure and those allegations under Sec. 111.70(3)(a)4, Stats, should accordingly be dismissed.

b. Discussion as to Motions

The WERC will entertain pre-hearing motions to dismiss complaints based upon an allegation that a complaint filed under Section 111.70(3), Stats, fails to state a cause of action. See, WAUSAU INSURANCE COMPANY, DEC. NO. 30018-C (WERC, 10/03). The limits on

WERC motion practice are well stated in DAIRYLAND GREYHOUND PARK, DEC. NO. 28134-B (McLaughlin, 10/95). See, also, BLACKHAWK VOCATIONAL AND TECHNICAL COLLEGE, DEC. NO. 30023-C (Levitan, 5/03), p. 19 et. seq. The WERC has stated in WAUSAU INSURANCE, *supra*, the following standards for deciding pre-hearing motions to dismiss for failure to state a cause of action:

> When considering a pre-hearing motion to dismiss, the Commission has adopted the following standard:
>
> > Because of the drastic consequences of denying an evidentiary hearing on a motion to dismiss, the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra, with final authority for WERC, 12/77).

Motion to Dismiss Counter-Claim

Both parties agree that the counter-claim complaint fails to state a claim under Sec. 111.70(3)(b)6, Stats, as no interest arbitration award is named in the complaint or involved in this case. The Examiner concludes that dismissal of the counter-claim complaint on the basis of the pre-trial motion to dismiss as to Sec. 111.70(3)(b)4, Stats, is inappropriate. The amended Employee complaint alleges, among other things, at paragraph 8 -11 that Sheriff Vogel changed the job description for the posting for Investigative Sergeant to preclude the Employee from successfully bidding on the position. It alleges at paragraph 15 that this conduct violates the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. Employer exhibits 8 and 9 establish that the Union filed two grievances concerning the change. Grievance 04-01 alleged that the March 2, 2004, posting unilaterally changed the job requirements and unilaterally changed the job to an "at-will" job, all in violation of the applicable collective bargaining agreement. The remedy requested was that the disputed sections be removed from the posting and that it be reposted. Grievance 04-02 alleges the posting violates the alleged past practice of allowing sergeants to laterally transfer into a position before it is posted. The remedy requested was that the posting be taken down and that existing sergeants be allowed to transfer into the position. The Association and the Employer entered into a settlement that grievance 04-01 be withdrawn with prejudice and that grievance 04-02 be resolved with a procedure by which sergeants are given the first opportunity to "post" for a vacant sergeant position and that the Employer retains the right to determine whether an employee meets the qualifications of a position. The WERC has long held that an employee and his labor organization can waive claims arising under a collective bargaining agreement and that an agreement to do the same is a collective bargaining agreement. Although the Court of Appeals ruled that the waiver of federal statutory claims in that context should not be analyzed under Sec. 111.70(3)(b)4, Stats, it carefully distinguished the situation

in which an employee participated in a waiver of his or her rights under a collective bargaining agreement. See THOMPSON V. WERC, 234 Wis. 2D 494, 522 (Ct. App, 2000). The Employer's pre-hearing motion must on this point must be denied because the WERC must determine on the basis of a full and complete record whether the Employee participated in the settlement and, if so, whether the employee agreed to not pursue a complaint for violation of collective bargaining agreement under Sec. 111.70(3)(a)5, Stats.

Motions to Dismiss Employee Complaint

The Employer moved to dismiss the complaint on the following bases:

1. That the amended complaint fails to state a cause of action.

2. That the issues raised and claims asserted have, in whole or in part, been definitively resolved by the arbitration award issued by Arbitrator Levitan.

3. That the issues raised in paragraph 7 of the amended complaint (that sergeants had the right to transfer into other vacant sergeant positions for which they met the minimum qualifications) have been resolved through the grievance procedure with preclusive effect as to that allegation.

4. That the WERC should refuse to assert jurisdiction and ought to defer to the collective bargaining agreement's dispute resolution procedure all remaining issues.

The Examiner addresses item 4, first and bases his decision on the record as whole. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. It is the long-standing policy of the WERC that where a collective bargaining agreement contains an exclusive grievance procedure for the resolution of disputes, whether it culminates in final and binding arbitration or not, the WERC will refuse to assert its jurisdiction under Sec. 111.70(3)(a)5, Stats, unless the individual employee establishes that he or she has either exhausted the grievance procedure or has been frustrated in doing so by his or her collective bargaining representative's violation of its duty of fair representation.[6] The Employee never attempted to file a grievance with respect to his allegations 3-6 above. Accordingly, the Examiner refuses to assert the jurisdiction of the WERC over them. The Employee's allegation 2 above was resolved in his favor in the Employer's appeal procedure. The Examiner does not understand the Employee to seek a finding under Sec. 111.70(3)(a)5, Stats, with respect to that matter. The Employee's allegations with respect to 1 were subject to a grievance which was settled short of arbitration.

[6] American Motors Corporation,, Dec. No 8585 2/68; Lake Mills School District Dec. No. 11529 A, B (WEC 8/73);

There is a dispute in the record as to whether that settlement precludes further processing under the collective bargaining agreement by the individual employee. Where a grievance has been resolved in the grievance procedure, the WERC will not assert its jurisdiction to determine its merits unless the employee establishes that his representative violated its duty of fair representation.[7] There is no evidence that the Employee ever sought to pursue any other right with respect to issue 1 in a separate grievance and, therefore, to the extent that there is some independent right in the grievance procedure related to issue 1 the Examiner refuses to assert the jurisdiction of the WERC pursuant to Sec.111.70(3)(a)5, Stats, to determine whether there was a violation of the collective bargaining agreement pursuant to issue 1.

The Employee also alleged that the conduct listed above violated Sec. 111.70(3)(a)4, Stats. The Union took no position with respect to these allegations.[8] The Employee did not, and could not, allege that the Employer had any duty to collectively bargain with him individually. His assertion of a violation of Sec. 111.70(3)(a)4, Stats, solely derives from his allegations that the conduct listed in items 1-6 violated the parties last comprehensive collective bargaining agreement.

In BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83) the Commission discussed the principles of deferral of complaints of prohibited practice under, inter *alia*, Secs. 111.70(3)(a)3,4, Stats. as follows:

> The Commission has previously stated that Sec. 111.70(3)(a)4 refusal to bargain allegations will be deferred to the contract grievance arbitration forum in appropriate cases . . . in which the Respondent objects to the Commission exercise of jurisdiction in the matter. Such deferral advances the statutory purpose of encouraging voluntary agreements . . . by not under-cutting the method of dispute resolution agreed upon by the parties in their collective bargaining agreement. Indeed, if the Commission were to indiscriminately hear and decide every claim that a party's alleged deviation from a contractually specific standard is an unlawful unilateral change refusal to bargain, it would undermine the Commission's longstanding policy of ordinarily refusing to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction absent exhaustion of contractual grievance procedures. In sum, because Respondent has consistently urged WERC deferral of the disputed claim of unlawful unilateral change in overtime assignment procedures to the contract grievance arbitration procedure and because there is a substantial probability that submission of the merits of that dispute to that arbitral forum will resolve the claim in a manner not repugnant to MERA, deferral is appropriate in this aspect of the case . . .

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[7] As noted above, there is some ambiguity as to whether the allegation of violation of collective bargaining was resolved by the settlement.

[8] See note 3, above.

The Commission has established the following three criteria as necessary to indicate the requisite substantial probability that deferral to arbitration will resolve the merits of the dispute in a manner not repugnant to the underlying purposes of MERA:

> (1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
>
> (2) The collective bargaining agreement must clearly address itself to the dispute; and
>
> (3) The dispute must not involve important issues of law or policy.

E.g., CENTRAL HIGH SCHOOL OF WESTOSHA, DEC. NO. 29671-A (Mawhinney, 8/99), citing SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94). As to allegations maintained by individual employees under Sec. 111.70(3)(a)4, Stats, which are based solely upon the application of a collective bargaining agreement, the better view is to defer to the grievance procedure under the standards enunciated above with respect to Sec. 111.70(3)(a)5, Stats. Accordingly, the Employee's allegations under Sec. 111.70(3)(a)4, Stats. are dismissed for deferral purposes.

The Employer's motion to defer the Employee's allegations under Sec. 111.70(3)(a)3, Stats, to the agreements' grievance and arbitration procedures is herewith denied. The Association has denied that there is a provision in the expired agreement which deals with the employee's claims of discrimination under Sec. 111.70(3)(a)3, Stats, to regulation under the expired agreement. The Employer has not pointed to any. Further the Association has never, and does not now, join in the employee's allegations under Sec. 111.70(3)(a)3, Stats. It has not offered to process these allegations in arbitration, nor has it offered to let the Employee pursue these in arbitration independently. The Examiner is satisfied that any argument under the agreement would be subject to a substantive arbitrability objection. The Employer has not waived its right to challenge substantive arbitrability. The Examiner finds that it is unlikely that the allegations under Sect. 111.70(3)(a)3 will be addressed on their merits in arbitration.[9]

3. RETALIATION PROHIBITED BY SECTION 111.70(3)(a)3, STATS.

Section. 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer:

> To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment. . .

[9] In view of the result herein, it is not necessary to address the Employer's motion with respect to issue preclusion.

The Employee must establish, by a clear and satisfactory preponderance of the evidence, under Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats., each of the following elements in order to establish a violation under Sec. 111.70(3)(a)4, Stats:

1. Municipal employee exercise of lawful, concerted activity protected by Sec. 111.70(2), Stats.; and

2. Municipal employer awareness of that activity; and

3. Municipal employer hostility to that activity; and

4. Municipal employer conduct motivated, in whole or it part, by hostility toward the protected activity.

MUSKEGO-NORWAY C.S.J.S.D NO. 9 V. WERB, 35 Wis. 2D 540 (1967). Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or, as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See, COOPERATIVE EDUCATION SERVICE AGENCY, DEC. NO. 13100-E (Yaffe, 12/77), *aff'd*, DEC. NO. 13100-G (WERC, 5/79). It is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. See, LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 Wis. 2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis. 2D 132, 141 (1985).

Several elements of the MUSKEGO-NORWAY test are not in dispute. The Employee has alleged that he engaged in protected concerted activity of filing the disputed grievances. The Employee has not cited any other protected conduct of which the Employer was aware or which could conceivably had led to the retaliation which is the subject of this complaint. The first grievance was filed on or about January 17, 2003. The second grievance was filed January 22, 2003. The Employer has not denied that "it" was aware of the grievances when they were filed. Sheriff Vogel was the recipient of that grievance and was deeply involved in the grievance processing of that and subsequent grievances. However, I do not attribute that

knowledge to Lt. Farley. Lt. Farley's limited knowledge of protected activity is discussed below.

The Employee relies upon the timing of various occurrences to meet his burden with respect to the second and third elements. While timing is often strong circumstantial evidence supporting an inference of cause and effect, it can be outweighed by other factors. The timing of events does not clearly support the Employee and other factors make it likely that the timing of the disputed events *vis-a vis* his exercise of protected rights is co-incidental.

Sheriff Vogel took office in January, 2003, after many long years of service in this same department. There is some indication in the record that the relationship between the Employee and Sheriff Vogel was not good. Sergeant Grondin credibly testified at tr. pp. 148 and 149 that it was common knowledge in the department that the relationship between the two was not good. It was his belief that the relationship deteriorated after Sheriff Vogel took office. The Examiner concludes that Sheriff Vogel had some degree of dislike or hostility from before he took office. In this regard, the second day after Sheriff Vogel took office, he ordered the Employee to take his lunch at the jail. He also told him that he would not have the freedom to flex his hours and that it was the Sheriff's intention to change his job to include routine assignment to the jail floor[10] even though the Employeel was not counted in the staffing of the jail and had historically been free to leave the jail during his lunch hour. This occurred before the Employee exercised any of his rights under Sec. 111.70(2), Stats, which are the subject of the retaliation claim. Shortly, thereafter, he inexplicably refused to reimburse the Employee for a tuition expense conditionally approved by the prior sheriff and required under the collective bargaining agreement. Both actions can be rationalized by mistake or legitimate management concern over jail staffing, but the better view is that they were deliberately provocative toward the Employee.

This is not to say that all of Sheriff' Vogel's actions were personally motivated against the Employee. Sheriff Vogel had a significantly different view of what the Employee's role as jail administrative sergeant should be from that of his predecessor. At the time Sheriff Vogel took office, the Employer had experienced substantial growth in its jail population and was in the process of building a new jail. The choice to revise the Employee's position from solely administrative to include rank and file work is a lawful consideration and one the Examiner recognizes would not be an uncommon objective of management under similar circumstances.[11] It is beyond dispute the Employee resented Sheriff Vogel's attempt to downgrade him from solely administrative to performing at least some rank and file security work. This dispute led to the grievance ultimately arbitrated by Arbitrator Levitan.

The then-new Sheriff was faced with making choices as to how to manage the increase in the old jail population, how to plan for the changes for the new jail and how to structure the

[10] Levitan arbitration award, page 7.
[11] The motivation is not unlawfully discriminatory, even if it was executed in a way which it partially violated the collective bargaining agreement.

management team for the new jail. The Employee assumed that because he had been the *de facto* chief executive officer of the jail that he would be the primary person to lead the changes. Sheriff Vogel had other ideas. The Examiner is satisfied that the main reasons for the Sheriff's actions were:

1. He wanted to increase the responsibility of the jail administrator to include more planning functions and more responsibility for the hiring and discipline of unit employees.

2. He wanted to downgrade the Employee's position from that of solely being chief operating officer of the jail to being a working lead person in the old jail.

3. He wanted the management of the jail to serve at his discretion.

The fact that the County Board concurred in the Sheriff's recommendation and created the Jail Lieutenant position in September, 2003, indicates that they concurred in these objectives.

Then Sergeant Farley was selected over the Employee for the position of Jail Lieutenant. That selection is not in dispute herein; however, it is the focal point of the interaction between Sheriff Vogel and the Employee. Sheriff Vogel testified that he did not select the Employee for the position because the Employee had not demonstrated adequate leadership. The Examiner is satisfied from the Employee's testimony and conduct that there was substantial evidence to support that view. The Employee's testimony indicated that his view was that he should have been selected for this position because he had greater experience in operating the existing jail. This view failed to recognize that the new position involved planning for the new jail including, but not limited to, changes in the way the jail was supervised and managed.[12] The Employee failed to demonstrate an understanding that the new position required a higher level of responsibility in directing and disciplining unit employees. Sheriff Vogel disagreed with the Employee about concepts of leadership. Sheriff Vogel viewed that as a Sergeant, the Employee should have historically been willing to pitch in and do some of the floor work. He viewed that as a hall mark of leadership. The Employee did not. Some of the Employee's unprotected conduct after Lt. Farley took command of the jail, particularly the fact that he chose to walk away from the Sheriff every time he entered the jail, indicates a lack of judgment in one who would be a part of a management team. The Examiner is satisfied that Sheriff Vogel is entirely credible in his testimony that he viewed that the Employee as not manifesting adequate leadership skills throughout the disputed period. The Examiner is satisfied that this was Sheriff Vogel's primary reason for the disputed actions.

[12] Sheriff Vogel did not include The Employee on the team to plan for the transition to the new jail. He selected a subordinate of The Employee instead

The Examiner also notes that the decision to create a Jail Lieutenant position superseding the Employee's sole managerial role in the jail essentially changed the circumstances underlying the Employee's former position and led to an inevitable conflict between the two as Sheriff Vogel worked to downgrade the Employee's responsibilities and the Employee sought to resist those changes.

The Examiner next turns to the specific allegations of the Case 148 complaint. The Employee alleges that the Sheriff intentionally changed the job description on or about March 2, 2004, for the position of Investigative Sergeant for the purpose of precluding Complainant from transferring into that position on the account of his exercise of protected rights, namely, filing grievances. The Examiner concludes that the Sheriff changed the job description for the purpose of precluding the Employee from obtaining that position. First, the position was posted the first time without changes having been made. The Examiner finds that if the motivation for increasing the experience requirement had been legitimate, the changes would have been made prior to the first posting. The Examiner has reviewed the testimony of Lt. Larson and concludes that this testimony is deliberately evasive. The Examiner finds the testimony of Sgt. Grondin[13] credible and infers that Lt. Larson acting on behalf of the Employer offered to make the Investigative Sergeant position available to him irrespective of the terms of the posting. He also made an admission against the Employer's interest to Sgt. Grondin that the change was being made to exclude the Employee from the job. Under these circumstances, the Examiner concludes that the change in the terms of the posting was primarily to preclude the Employee from getting this position.

The Examiner concludes that the evidence is insufficient to demonstrate by a clear and satisfactory preponderance of the evidence that this was in any way connected with the filing of the grievances in issue. It is far more likely that Sheriff's motivation related more to his view that the Employee was neither highly motivated, nor a person with good leadership skills. By contrast, the Employee's attempt to associate this action with his grievance concerning his lunch break and job duties is tenuous at best. The grievance over the tuition reimbursement was granted February 20, 2003, a year earlier. The other relevant grievance was the one concerning taking lunch outside the jail, etc. This grievance was filed January 23, 2003. Arbitration was requested in October, 2003 and a protective prohibited practice complaint was filed at the same time. There is no indication that anything of significance occurred thereafter until the parties prepared for the hearing. The hearing was held March 23, 2004, well after the posting situation. If the Sheriff were significantly annoyed by the pending arbitration and not concerned about the Employee's leadership skills it would have been simple to avoid the arbitration by allowing him to post out of the disputed position. The Examiner concludes that there is no significant nexus between the grievances and the changed posting.

Next, the Employee alleges that the Employer issued a written job evaluation in April, 2004, which allegedly did not accurately reflect his performance as Jail Sergeant. The

[13] Mainly tr. p. 138-140.

Examiner concludes that this is unrelated to any of the Employee's protected activity. The evaluation in question was written and issued by Lt. Farley shortly after he became the Jail Lieutenant in February, 2004. Sheriff Vogel did not participate in writing the evaluation. The assumption underlying the Employee's allegation in this and in other respects is that Lt. Farley conspired or cooperated with the Sheriff in an effort to retaliate against him. The Examiner finds this highly unlikely. Lieutenant Farley was requesting that the Union and Employer agree to have him return to his old Sergeant's position as of, at least, March, 2004. Part of this was over a pay dispute. However, the other part is that he believed that the Employee was trying to make life miserable for him.[14] At tr. p. 229 he credibly testified that he ultimately stayed because the Sheriff had asked him to stick it out. It is highly unlikely under these circumstances that he would conspire with the Sheriff to retaliate against the Employee over minor grievances. The Employee has also failed to show that Lt. Farley was even aware of the existence of the disputed grievances which were in existence at that time, the one over the Employee's noon hour and the grievances over the job posting for his former position. He had no independent interest in retaliating against the Employee for those grievances.

Lieutenant Farley's evaluation indicates that he believed that the Employee was not exhibiting leadership and that he believed the Employee should be "aggressively working the floor." As noted above, the issue of working the floor was something that the Employee was resisting because it was work he had not been required to do under the former Sheriff. Lieutenant Farley may have had only a few days working with the Employee and the evaluation appears to be made on the basis of statements from fellow employees. The evaluation refers to complaints that were made about Oakley by fellow employees. The evidence indicates that there had been some complaints. The Examiner is satisfied that the evaluation was negative on these points because Lt. Farley and the Employee disagreed about what the Employee's job was going to be in the new hierarchy and because Lt. Farley was attempting to assert his authority over the Employee early in Lt. Farley's tenure in the new position as a warning. The Examiner is satisfied that the evaluation was motivated solely by lawful considerations.

The Examiner now turns to the remaining evaluations, March, 2005, and April, 2005. Lieutenant Farley did these evaluations. There is no evidence that he did so at the behest of Sheriff Vogel. There is no evidence Lieutenant Farley participated in any of the grievances in dispute except the one concerning the April, 2004, evaluation. Since the disputed evaluation which had been done in April, 2004 was done before the grievance was filed and was similar to the 2005, evaluations, there is a strong indication in the timing that the latter evaluations were not retaliatory.[15] Lieutenant Farley's reason for making these evaluations is that he

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[14] For the reasons discussed below, I conclude that this testimony is correct both because he honestly believed that The Employee was deliberately making life difficult for him and it is credible that The Employee was doing things which had the effect of making Lt. Farley's job more difficult than necessary. See, tr. p. 230. These points are discussed more below.

[15] Although the evaluations were critical of The Employee, they were minimally satisfactory. There is no evidence they could have formed the basis for discipline. In view of the result herein, the Examiner has not

believed that the Employee was resisting the Employer's attempt to have him perform more work on the floor and deliberately undermining Lt. Farley. The Examiner is satisfied that these were the sole reasons for these evaluations. The Examiner is satisfied that the Employee engaged in resisting working the floor throughout this period.[16] He also resisted doing other work which he had delegated to subordinates in the past such as opening the mail, answering the telephone. The evidence concerning a specific incident, when the Employee called Lt. Farley at the last minute to tell him he was taking vacation, is sufficient to support Lt. Farley's perception that the Employee was trying to make Lt. Farley's job difficult. While the Employee is correct that he had no obligation under the agreement to notify Lt. Farley, the choice to not do so clearly made Lt. Farley's work more difficult. There were also a number of complaints that subordinates made about the Employee to management during this period. The number and type are indicative of a disgruntled supervisor making the workplace difficult. The Examiner would be remiss if he did not note that some of the Employer's perception was based on erroneous interpretation of circumstances. Nonetheless, these were the result of honest error on the part of the Employer.

Next, the Examiner turns to the use of formal disciplinary procedures. The position of the Employee is that he was treated more harshly by Sheriff Vogel than other employees. He testified that he would have expected that Sheriff Vogel would have talked to him informally instead of using more formal procedures.[17] The Examiner concludes that the use of the formal procedures was deliberately heavy-handed, but not based in any part on the Employee's protected activity. The impetus for the use of formal procedures came from Lt. Farley. Lieutenant Farley credibly testified that he believed that the Employee was trying to undermine him. Those charges were, in turn, based upon circumstances which had a basis in fact even though there was a dispute about whether they were, in fact, misconduct or serious. For the reasons discussed above, the Examiner concludes that Lt. Farley's actions were not unlawfully motivated. Where Lt. Farley sought formal discipline, the Sheriff's response to conduct a formal investigation was appropriate. In any event, Sheriff Vogel credibly testified that the Employee had failed to maintain an appropriate business relationship with him. When Sheriff Vogel visited the jail, the Employee would walk away rather than speak to him.[18] Under the circumstances, the Employee had, himself, made informal communication unlikely. The Employee has failed to show by a clear and satisfactory preponderance of the evidence that the use of any of the disputed formal investigations was motivated in any part by unlawful considerations even though they were heavy-handed.

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addressed the issue of whether they are a "term or condition of employment" within the meaning of Sec. 111.70(3)(a)3, Stats. Even if they are not a "term or condition of employment" repeated humiliation in any form which has the effect of interfering with protected rights may potentially violate Sec. 111.70(3)(a)1, Stats.

[16] The Employee alleges that under past practice and the collective bargaining agreement he was not to be counted for jail staffing. The Employer may have failed to properly deal with the Association in making changes to the agreement resulting from the impact of the creation of the Jail Lieutenant position. Once that position was created a likely effect was to have the sergeant position do work on the floor. However, the issue addressed here is not the propriety of the Employer's actions, but its motivation. The motivation was solely lawful.

[17] See, for example, tr.104.

[18] Tr. p. 170.

Finally, the Examiner addresses the Lt. Farley's direction to the Employee of December 28, 2004, to book prisoners, serve noon meals and wash prisoners' dishes. The Examiner concludes that the dish washing was a classic "dirty work" assignment designed by Lt. Farley to humiliate the Employee in front of his former subordinates. Dirty work assignments are intended to make an employee want to quit. The Examiner finds this assignment was a product of the conflict between the Employee and Lt. Farley over the Employee's foot dragging in doing work on the floor. The motivation for this action was not related to the Employee's protected activity, but solely as to conflict over what work he would do The Examiner neither expresses, nor implies, any determination as to whether or not this conduct violated the collective bargaining agreement's "just cause" provision.

In summary, the Examiner concludes that the Employer did not violate Sec. 111.70(3)(a)3, Stats.

4. INTERFERENCE

The Employee's claims under Sec. 111.70(3)(a)1, Stats are derivative and not the focus of the issues in this case. One of his claims is an allegation of an independent violation of Sec. 111.70(3)(a)1, Stats, that the Sheriff refused to postpone investigatory meeting on December 6, 2004, so that the attorney representing the Association could be present.[19] The Commission has recognized under that statute the individual right of an employee to have union representation at a meeting with his or her employer which he reasonably believes may result in discipline. Examiner Jones succinctly summarized the legal frame work in MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 30265-A (11/07) as follows:

> The legal basis for a Wisconsin municipal employee's right to union representation in an employer-employee interaction is found in Sec. 111.70(2) of the Municipal Employment Relations Act (MERA). The pertinent portion of the statute is the part which says that "municipal employees shall have the right . . .to engage in lawful, concerted activities for the purpose of . . .mutual aid or protection." The Commission has held that a municipal employer interferes with a municipal employee's rights under Sec. 111.70(2), Stats., when it compels a municipal employee to appear at a pre-discipline investigatory meeting, which the employee reasonably believes could result in his being disciplined, without union representation where the employee has expressly requested such representation at the meeting. CITY OF MILWAUKEE, DEC. NO. 14873-B, 14875-B, 14899-B (WERC, 8/80); WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78), AFF'D DEC. NO. 14662-B (WERC, 3/78). . . .

[19] It is unclear on the record whether Sheriff Vogel conducted a disciplinary investigation on December 2, 2004, and a separate one on December 6, 2004. Compare transcript 57-59 with exhibits 29-31. The evidence is insufficient to resolve this conflict. The Examiner is satisfied that these two facts are not material to the issue of the refusal to postpone a disciplinary interview.

The evidence is somewhat confused as the specific facts on this aspect of the dispute. It was not a main focus of the matters in dispute. The Employee testified that he had requested Attorney Parins presence for the December 6 disciplinary meeting See transcript pages 57-58, Employee exhibits 29, 30 and 31. The Employer's records show that a similar incident occurred in the October 21, 2004 meeting. The better view appears to be that there were two meetings and issues arose as to Attorney Parins' presence at both. There is also some ambiguity in the Employee's testimony as to whether he had Association representation at all in the December 6 meeting, but the Employee did admit that the meeting on December 6 was repetitious of the October 21 meeting. The Examiner finds it likely that Sgt. Grondin was there on behalf of the Association. The Employer has never denied the Employee representation. The issue which arose was solely as to whether the Employer had to accede to the Employee's request to have Attorney Parins attend. The Examiner is satisfied that the Employer followed the parties' practice of how Association representatives were selected. The Association did complain to the Employer about how the representative was selected. The Association did not join in the Employee's allegation about this issue. Although the right to have a representative in an investigatory interview is an individual right under the Commission's precedent, once an employee chooses to have his union represent him, it is the union who selects the representative. If the parties have an established practice or procedure, the Employer must follow that procedure. See, STATE OF WISCONSIN (UNIVERSITY OF WISCONSIN-MILWAUKEE), WERC DEC. NO. 31527-B (WERC, 2/08). The Examiner concludes that the Employer did not violate Sec. 111.70(3)(a)1, Stats, by refusing to postpone the disputed interview.

5. SUMMARY

For the above and foregoing reasons, the Examiner concludes that the Employee's allegations of violation of collective bargaining agreement and unilateral change under Sections 111.70(3)(a)5 and 111.70(3)(a)4, Stats, should be deferred to the grievance procedure. In all other respects the motions of both parties are properly denied. The Examiner concludes that the Employer did not violate Sec. 111.70(3)(a)3, Stats, with respect to the allegations disputed herein. The Examiner also concludes that the Employer did not violate Section 111.70(3)(a)1, Stats. The Examiner has, therefore, dismissed the complaint.

Dated at Madison, Wisconsin, this 10th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner
SHM/gjc
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