

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION
(DEPUTY SHERIFF ROLLAN PARISH), Complainant,

vs.

COUNTY OF MILWAUKEE (SHERIFF'S DEPARTMENT), Respondent.

Case 572
No. 64884
MP-4166

Decision No. 31428-A

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, by **Jonathan Cermele**, on behalf of Milwaukee County Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee County Courthouse, Milwaukee, Wisconsin 53233, on behalf of Milwaukee County.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On June 17, 2005, the Milwaukee County Deputy Sheriffs' Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that Milwaukee County Sheriff A. David Clarke, Jr. took certain actions to discourage membership in Complainant Association and which interfered with Complainant members' exercise of their rights under Sec. 111.70(2), Stats.

On August 19, 2005, the Commission appointed the undersigned, David E. Shaw of the Commission's staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On September 12, 2005, the Respondent, Milwaukee County, filed an answer wherein it admitted certain factual allegations and denied others and raised certain affirmative defenses.

On September 29, 2005, a hearing was held before the Examiner in Milwaukee, Wisconsin. A stenographic transcript was made of the proceeding and the parties completed submission of post-hearing briefs by November 29, 2005.

Having examined and considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Respondent, Milwaukee County, hereinafter the County, is a municipal employer with its principal offices located at 901 North Ninth Street, Milwaukee, Wisconsin 53233. The County is the employer of all Milwaukee County Deputy Sheriffs and Sergeants in the Milwaukee County Sheriff's Department. At all times material herein, David A. Clarke, Jr. has been Sheriff of Milwaukee County and Inspector Kevin Carr has been second in command in the Milwaukee County Sheriff's Department.

2. The Complainant Milwaukee Deputy Sheriffs' Association, hereinafter the Association, is a labor organization with its offices located at 821 West State Street, Milwaukee, Wisconsin 53233. At all times material herein, the Association is, and has been, the certified exclusive collective bargaining representative of all law enforcement employees of the Milwaukee County Sheriff's Department holding the rank of Deputy Sheriff and Deputy Sheriff Sergeant. At all times material herein, Roy Felber has been the Association President and Gerald Rieder has been the Business Agent for the Association.

3. The County and the Association are signatory to a collective bargaining agreement between the parties which sets forth the wages, hours and working conditions for all law enforcement employees of the County represented by the Association. Said Agreement contains the following provision:

3.09 TEMPORARY ASSIGNMENTS

(1) Employees may be assigned to perform duties of a higher classification for which they are qualified. When so assigned, the employee shall be paid as though promoted to the higher classification for all hours credited while in such assignment. Employees on an established eligible list for the higher classification under the same appointing authority shall be given the temporary assignment before such assignment is given to any other employees provided that:

(a) Such assignment is made in writing on the Temporary Assignment Form; provided, however, that the omission of such written assignment shall not bar a grievance requesting pay for work in the higher classification.

(b) Such employee works in the higher classification for not less than 3 consecutive scheduled working days. Paid time off shall not be included in the computation of the 3 consecutive scheduled working days but said days shall not be interrupted thereby and

(c) Such employee performs the normal duties and assumes the responsibilities of the incumbent of that position during that period.

(2) Employees who accrue compensatory time while on temporary assignment shall liquidate such time at the rate of pay of the classification to which assigned at the time of liquidation.

4. At all times material herein, Rollan Parish has been employed by the Milwaukee County Sheriff's Department as a law enforcement officer and is a member of the bargaining unit represented by the Association. Deputy Parish had taken the examination for promotion to Deputy Sheriff Sergeant in the fall of 2002 and was ranked fifth out of 105 candidates who had taken the examination. On April 22, 2004, pursuant to Order No. 721, Sheriff Clarke "temporarily promoted" Deputy Parish to the rank of Deputy Sheriff Sergeant, hereinafter Sergeant. Parish was assigned to the Airport with the duties, uniform, insignia and pay of a Sergeant. Deputy Parish remained in that position until he was removed from the position by Order No. 788 dated May 24, 2005. During the approximately 13 months he was in the Sergeant position, Deputy Parish had no disciplinary or other adverse employment action taken against him.

5. Under the County's Civil Service Rules, Rule IV, Requisition, Certification and Appointment, Section 1, Paragraphs (3)(a) and (4), the County's Department of Human Resources is responsible for administering the competitive examination for promotion and certifying the eligibility lists that result from the examinations. All those who pass the examination are placed on the certified eligibility list in the rank order of their scores. When there is a vacancy in the subject classification, the appointing authority, in this case the Sheriff, is given the top ten names to choose from. If there are additional vacancies, the appointing authority is given an additional two names for each additional vacancy.

6. On March 1, 2005, Sheriff Clarke issued the following memorandum to all of the department's sworn personnel:

DATE: March 1, 2005
TO: All Sworn Personnel
FROM: Sheriff David A. Clarke, Jr.
SUBJECT: Promotions

**PLEASE READ IN ITS ENTIRETY FOR SEVEN
CONSECUTIVE DAYS AND POST**

Thomas Jefferson wrote that, “No duty the executive has to perform is so trying as to put the right person in the right place.” It is with this in mind that I make all of my personnel decisions, including my recent promotions. As has been my experience for 27 years, these decisions no doubt will generate discussion, debate and dialog throughout the organization.

My goal is to set up this agency for long-term success. I am confident that the people I have added to my leadership team are another step toward that goal. They have volunteered to take on the tremendous responsibility that goes along with a position of leadership. As Scripture notes, “To whom much is given, much is expected.” They have my full support.

Questions always arise as to why a particular person was chosen, and I want to take some time to give you insight into how I shape my leadership team. The first step I take is to conduct a personal inventory to identify my weaknesses – and we all have them. I look for people who can complement me by staffing my weaknesses. In other words, these leaders bring some aspect to the team that is lacking; qualities that a written exam cannot identify.

I consider if the person possesses a sense of urgency, high energy, a balanced ego, and ability to put the organization’s mission above their personal needs. Another important aspect is whether the person is suited for a particular objective that I am trying to achieve. Former New York City Mayor Rudy Giuliani advises to surround yourself with great people – people better than you. Former Secretary of State Colin Powell advises to never promote someone who does not share your passion for what you are trying to accomplish, nor someone who does not share the same values that drive the administration.

Making these decisions is not an exact science. If one of them turns out to be a miscalculation, I’ll have to live with it. We all have to live with our mistakes, and I accept that responsibility.

It is part of the human condition to compare oneself to the people who recently were promoted. I am reminded of something I learned a long time ago, which has served me well. If you compare yourself to others, you may become vain or bitter because there always will be persons greater and lesser than you.

I have been promoted, and passed up for promotion. I have experienced the elation and the disappointment, and can understand fully the feelings of those who did not get promoted. How people react to disappointment will tell me whether or not they possess the character needed for future leadership roles.

David A. Clarke, Jr. /s/
David A. Clarke Jr., Sheriff

7. It was Deputy Parish's understanding that people were temporarily promoted to Sergeant from the eligibility list and served in that capacity until the individual who had been the incumbent in the position officially left the Department, at which time the individual who had been temporarily promoted was permanently moved into the position. Having been temporarily promoted for almost a year, Parish was concerned he had not yet been permanently promoted and asked to meet with Inspector Carr to discuss his situation. Parish and Carr met sometime in May of 2005, prior to May 23, 2005, and Parish inquired as to the nature of his temporary status as Sergeant and as to how long he could expect to wait for it to become permanent. Carr assured Parish that the Sheriff's office was committed to him as far as a permanent Sergeant position and then explained there was going to be an upcoming Sergeant examination, that people would again go through the testing process, and that the Sheriff's office would be requesting, on Sheriff Clarke's behalf, that the entire list be certified as the eligibility list so they could promote from the entire list. Parish was concerned that he would have to take the Sergeant examination again and also that it would no longer matter where one ranked on the list in order to be eligible for promotion.

8. Sometime prior to May 23, 2005, Sheriff Clarke requested that the Milwaukee County Civil Service Commission waive Milwaukee County Civil Service Rule IV, Section 1, Paragraphs (3)(a) and (4) to allow the County's Department of Human Resources to certify the entire list of eligible individuals for possible promotion to vacant positions at the rank of Sergeant, Lieutenant and Captain. The Association believed that the Sheriff had already bypassed the Civil Service Rules before this by promoting individuals who were last on the eligibility list or who had not even taken the examination and had done this by temporarily promoting these individuals and labeling it a temporary assignment to a higher classification (TAHC) under Section 3.09 of the parties' collective bargaining agreement. It was the Association's view that the Civil Service rules requiring a competitive examination and selection for promotion off the certified eligibility list applied to such "temporary" or "emergency" assignments to a higher classification, as well as to permanent promotions. The Association opposed the Sheriff's request for a waiver of the Civil Service Rules.

9. Sheriff Clarke's request for a waiver of the County's Civil Service Rules for promotions was placed on the County Civil Service Commission's agenda for its May 23, 2005 meeting. Inspector Carr and Minnie Linyear from the County's Human Resources Department were present to speak in support of the Sheriff's request. Association President Felber, Association Business Agent Rieder, and the Association's legal counsel, Rachel Pings, as well

as members of the Association's Board of Directors, were present on behalf of the Association. Inspector Carr and Ms. Linyear sat at a table on the right side of the room, and Attorney Pings and President Felber sat at a table on the left side of the room facing the Commission members, with Rieder and members of the Association's Board of Directors seated in a row of chairs behind Pings and Felber. Deputy Parish originally attended the meeting because of his own personal concerns about the Sheriff's request for a waiver. He was off duty and in civilian clothes and sat by himself in the third row of chairs on the right side of the room. Parish approached Felber before the meeting started and asked that he not be pointed out, as he only wanted to hear what was happening and did not want to speak.

Attorney Pings spoke to the Commission on behalf of the Association, voicing its concerns with the Sheriff's request for a waiver. Ms. Linyear and Inspector Carr spoke in support of the Sheriff's request. In the course of Inspector Carr's presentation, he informed the Commission that there was a person present who would benefit from the Sheriff's request and pointed out Parish in that regard, and noted the Sheriff's office's commitment to promoting Parish. Carr then asked that Parish be brought up to tell his side.

Parish came forward and sat at the table with Attorney Pings and Association President Felber and expressed his confusion as to his status regarding promotion to Sergeant and his concerns that Inspector Carr's request on behalf of the Sheriff would allow for promotion of individuals, regardless of where they ranked on the test, and that it would no longer be a competitive examination. Parish also voiced his concerns that the criteria that would be considered for promotion were not things that could be tested, and that even if he finished first on the test, if he did not share the Sheriff's vision for the agency, he would not necessarily be considered for promotion. These were many of the same concerns that Pings had raised on the Association's behalf.

During the time Parish spoke, Inspector Carr expressed his displeasure or disagreement by sighing or shaking his head at some of Parish's comments or interrupted him to debate the point. The debate was civil and no derogatory comments were made about the Sheriff by Parish. After the meeting ended, Parish approached Inspector Carr and asked to speak to him. Inspector Carr told Parish to wait until he was finished speaking to another person, but when he was done he walked away. Parish called out to him, but Carr continued to walk away.

10. On May 24, 2005, Inspector Carr's secretary called Deputy Parish to arrange a meeting with him on May 25, 2005. On May 25, 2005, Parish met with Carr at the latter's office in the Safety Building. Carr told Parish that the Sheriff directed him to have a meeting with Parish regarding the May 23, 2005 hearing. Carr asked Parish why he was at the hearing and Parish explained his reason for attending and reiterated the concerns he had voiced at the hearing regarding the Sheriff's proposed selection process for promotions. Carr responded that he had spoken to the Sheriff about Parish's presentation at the hearing and informed Parish that the Sheriff was unhappy with Parish's attendance there and considered Parish to be "disloyal" and "untrustworthy". Parish took issue with that characterization of him and responded he did not feel anything he had said at the hearing indicated he was trying to be

disloyal, and that in his nine years with the Department he had been anything but disloyal and untrustworthy. As the meeting progressed, Carr informed Parish that he had the option of resigning his Sergeant position or the Sheriff would make the decision for him. Parish responded that he felt he was still an effective member of the management team and was not interested in resigning.

The meeting ended and Parish returned to his personal residence, approximately a fifteen minute drive from the Safety Building. When Parish arrived at his residence there were two telephone messages on his answering machine. One message was from a Sergeant on another shift in Parish's work area and the other was from a Captain in the Department, Parish's supervisor. Both of the messages informed Parish that he had been removed from the Sergeant position and placed back in a Deputy I position.

11. On May 24, 2005, Sheriff Clarke drafted the following Order:

ORDER NO. 788

May 24, 2005

RE: Reassignment of Personnel

Effective immediately, that Portion of Order No 721 temporarily promoting Rollan Parish to the rank of sergeant is rescinded.

Deputy Rollan Parish is hereby assigned to Police Services, Airport Division.

Approved:

David A. Clarke, Jr. /s/
Sheriff David A. Clarke, Jr.

The Order was issued to the Department on May 25, 2005; a notation at the top of the Order indicating it had been faxed at 1:34 p.m. on May 25, 2005.

12. Subsequent to Deputy Parish being removed from his temporary Sergeant position, the Association's attorney, Jonathan Cermele, filed an action with the Milwaukee County Personnel Review Board claiming that Deputy Parish was improperly demoted without a due process hearing. The County's Deputy Corporation Counsel, Timothy Schoewe, appeared on behalf of Sheriff Clarke and asserted that the Board did not have jurisdiction in the case as Deputy Parish had never served a probationary period for the Sergeant position and never held the position on a permanent basis, and that as the Board derived its authority under

Sec. 63.10, Stats., and Ch. 33 of the Milwaukee County ordinances, which only grant a due process hearing to an employee in a permanent, classified position and grant no rights to employees temporarily assigned to higher classifications, the Board did not have jurisdiction to grant Parish such a hearing. Attorney Schoewe argued that such a matter fell under the purview of the County's Civil Service Commission and also that as the Association's labor agreement provided for temporary assignments to a higher classification, and that if the Association or Deputy Parish thought there was a problem with the interpretation of that provision, a grievance could be filed. The Board subsequently concluded it did not have jurisdiction over Parish's claim as there were issues as to whether he had served probationary period in the Sergeant position and as to whether he was permanently in the position, both of which are necessary in order to be entitled to a due process hearing before the Board, and that the proper forum for determining those issues was the County's Civil Service Commission. The Board also found that the grievance procedure under the labor agreement provided a forum for redress for an inappropriate use of a temporary assignment to a higher classification. Neither the Association nor Deputy Parish grieved the matter under the labor agreement or filed an action with the County's Civil Service Commission regarding Parish's removal from the Sergeant position.

13. By seating himself at the table with the Association's representatives and voicing his concerns with Sheriff Clarke's request for a waiver of the County's Civil Service Rules regarding promotions, some of which were shared and voiced by the Association, at the Civil Service Commission's May 23, 2005 meeting, Deputy Parish engaged in lawful, concerted activity. Sheriff Clarke was aware of Parish's lawful, concerted activity through Inspector Carr's attendance at the May 23, 2005 meeting, and was hostile toward that activity, and made the decision to remove Parish from his temporary Sergeant position based, at least in part, on that hostility and thereby discriminated against Parish in regard to hiring, tenure or other terms or conditions of employment, and interfered with, restrained or coerced Parish and the County's other employees represented by the Association in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

Based upon the foregoing Findings of Fact, the undersigned makes and issues the following

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to hear and decide the instant complaint of prohibited practices against Respondent Milwaukee County arising under the Municipal Employment Relations Act.

2. At all times material herein, Sheriff David A. Clarke, Jr. and Inspector Kevin Carr were acting in their capacity as officers and agents of Milwaukee County.

3. By seating himself at the table with the Association's representatives at the May 23, 2005 meeting of the Milwaukee County Civil Service Commission and voicing his concerns with Sheriff Clarke's request for a waiver of the County's Civil Service Rules regarding promotions, some of which were concerns shared and voiced by the Association, Deputy Parish exercised his rights under Sec. 111.70(2), Stats., to engage in lawful, concerted activity.

4. Respondent Milwaukee County, through its officer and agent, Sheriff David A. Clarke, Jr., discriminated against Deputy Rollan Parish in regard to hiring, tenure, or other terms or conditions of employment by removing Deputy Parish from his temporary Sergeant's position based, at least in part, on Sheriff Clarke's hostility towards Deputy Parish's having exercised his right to engage in lawful, concerted activity under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)3, Stats, and derivatively, interfered with, restrained or coerced Deputy Parish, as well as Respondent's employees represented by the Complainant Association, in the exercise of their rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes and issues the following

ORDER

That the Respondent, Milwaukee County, its officers and agents, shall immediately:

- (a) Cease and desist from interfering with, restraining or coercing Deputy Rollan Parish or any of its employees represented by the Milwaukee Deputy Sheriffs' Association in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.
- (b) Cease and desist from discriminating against Deputy Rollan Parish or any of its employees represented by the Milwaukee Deputy Sheriffs' Association for engaging in lawful, concerted activity.
- (c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - (1) Immediately reinstate Deputy Rollan Parish to his former Deputy Sergeant position under the same conditions as existed at the date of his removal, if that has not occurred in the interim, and pay him the difference in pay and benefits he would have received in the position from what he has received as a Deputy I, retroactive to the day he was removed from the position to the day he is, or was, placed in a Deputy Sergeant position, plus interest at the

rate of twelve percent (12%) per annum ¹ on said amount from the date of his removal from the position to the date of reinstatement, and treat Deputy Parish in the same manner under the County's Civil Service Rules regarding promotions as though he had not been removed from the Deputy Sergeant position with regard to permanent promotion to Deputy Sergeant.

- (2) Notify all of its employees in the Milwaukee County Sheriff's Department by posting in conspicuous places where employees are employed in that Department copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Milwaukee County Sheriff David A. Clarke, Jr., and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Milwaukee County that said notices are not altered, defaced, or covered by other material.
- (3) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 19th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

¹ The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83), citing ANDERSON V. LIRC, 111 Wis. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 Wis. 2D 623 (Ct. App. IV 1983).

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES
OF THE MILWAUKEE COUNTY SHERIFF'S DEPARTMENT**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately reinstate Deputy Rollan Parish to his former position of Deputy Sheriff Sergeant in the Milwaukee County Sheriff's Department in conformance with the Order of the Wisconsin Employment Relations Commission, and make him whole for all wages and benefits lost as a result of his removal from that position.
2. WE WILL NOT interfere with, restrain or coerce Deputy Rollan Parish or any other employees of the Milwaukee County Sheriff's Department in the exercise of their rights pursuant to the Municipal Employment Relations Act.
3. WE WILL NOT discriminate against Deputy Rollan Parish or any other employees of the Milwaukee County Sheriff's Department because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2006.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

David A. Clarke, Jr.
Milwaukee County Sheriff

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

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Association filed a complaint of prohibited practices with the Commission alleging that Deputy Rollan Parish had engaged in lawful, concerted activity in voicing his concerns regarding Sheriff Clarke's request for a waiver of the County's Civil Service Rules regarding promotions, and that:

19. The Sheriff's actions in demoting Parish were meant to discourage membership in the MDSA, interfere with MDSA members exercising their rights under §111.70(2), STATS., and coerce members into refraining from exercising those rights, by sending the message to MDSA members that they would suffer similar adverse employment consequences in the event they publicly engaged in association with their union and/or publicly espoused a union position which was at odds with that of the Sheriff.

20. The Sheriff's demotion of Parish violates §111.70(3)(a)1, Wis. Stats.

21. The Sheriff's demotion of Parish also violates §111.70(3)(a)(2)(sic)², Wis. Stats., as

- A. Parish was engaged in activity protected under §111.70(2), STATS., (sic) when he spoke before the Commission;
- B. The Sheriff was made aware of that activity;
- C. The Sheriff was hostile to such activity, and;
- D. The Sheriff's decision to demote Parish was based, at least in part, on his having engaged in such protected activity.

The Association requested the following remedy:

Declare that the Sheriff's actions constituted a demotion;

Declare that the County, by means of the Sheriff's actions, has committed the above-alleged prohibited practice;

² The Association noted and corrected this typographical error in its initial brief.

Order that the County and the Sheriff cease and desist from such violations in the future, and post a notice to that effect;

Order that the County and the Sheriff rescind Parish's demotion, remove all reference to it from the County records, and make Parish financially whole for the loss of pay and benefits he experienced by reason of the discipline.

The County filed an answer wherein it admitted the following allegations in the complaint:

3. On April 22, 2004, via Order No. 721, Rollan Parish ("Parish") was "temporarily promoted to the rank of Deputy Sheriff Sergeant", effective April 25, 2004.

4. Sometime prior to May 23, 2005, Milwaukee County Sheriff David A. Clarke, Jr., ("the Sheriff") requested that the Milwaukee County Civil Service Commission ("Commission") waive Milwaukee County Civil Service Rule ("Civil Service Rule") IV, Section 1, Paragraphs 3(a) and 4, and allow the Milwaukee County Department of Human Resources to certify the entire list of eligibles for possible promotion to vacant positions holding the rank of Sergeant, Lieutenant and Captain.

5. Without the waiver sought by the Sheriff, Civil Service Rules require that the Sheriff promote only from the "certified" list of examinees; such list being generated based upon the number of promotional vacancies available, and the individual rankings of the examinees based upon their testing results.

6. The Sheriff's request was placed on the Commission's May 23, 2005 agenda.

7. As of May 23, 2004, Parish was assigned to Police Services, Airport Division.

. . .

11. In response,³ the Department's second in command, Inspector Kevin Carr ("Inspector Carr"), publicly announced that the Department valued the supervisory abilities of all temporary promotees, and specifically identified Parish as an example, insisting that the Department had made a commitment to

³ In response to comments of Civil Service Commission members made at the May 23, 2005 meeting of the Milwaukee County Civil Service Commission.

him (in terms of promotion), and that the Sheriff had every intention of permanently promoting Parish.

12. Thereafter, Parish publicly, albeit reluctantly, supported the position being taken by the MDSA, even though he acknowledged that he, and other temporary promotees, may be adversely effected (sic) by not granting the waiver the Sheriff was requesting.

13. Inspector Carr was visibly upset that Parish would publicly take such a stance.

14. The next day, May 24, 2005, Inspector Carr advised Parish that he [Parish] could no longer be trusted, was seen by the Sheriff as disloyal, and was being given the option of either resigning his rank of Sergeant, or being demoted to the rank of Deputy.

15. Parish refused to resign his rank.

The County acknowledges Parish was removed from his Sergeant position, but asserts it was not a “demotion” within the meaning of that term as used in the County’s Civil Service Rules or Ch. 63, Stats.

The County also raised the following as affirmative defenses:

1. The complaint fails to state a claim upon which relief may be granted.
2. The complainant has had this matter disposed of by the Milwaukee County Personnel Review Board, whom the complainant asserted had final and binding jurisdiction.
3. The complainant and Parish have failed to utilize the exclusive dispute resolution mechanism of the collective bargaining agreement.
4. The WERC has no jurisdiction over the administration of the Civil Service Rules of Milwaukee County.
5. The labor agreement specifically provides that the Sheriff may temporarily assign individuals like Parish to higher classification, see §3.09.
6. Parish was never promoted via a regular appointment in the Milwaukee County civil service system to the rank of Sergeant.

7. The complaint is frivolous as that term has meaning under Wisconsin law.
8. The initiation and maintenance of the action violates the employer's rights under §111.70, Wisconsin Statutes.

POSITIONS OF THE PARTIES

Association

The Association asserts that Sheriff Clarke committed two distinct prohibited practices when he rescinded Parish's employment status as Sergeant in response to his appearance at the County's Civil Service Commission hearing on May 23, 2005. Parish's activity at that meeting falls into the category of lawful, concerted activity protected under Sec. 111.70(2), Stats. Whether the Sheriff technically "demoted" Parish is not determinative in this forum, as it only need be decided whether the Sheriff's conduct had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their protected activity under Section 111.70(3)(a)1, Stats., and/or discourage membership in the Association by discrimination under Section 111.70(3)(a)3, Stats. The record demonstrates that the Sheriff's conduct did both.

The question of whether a particular act was "concerted" is a factual inquiry involving an evaluation of whether the behavior manifested purely individual or collective concerns. CITY OF LA CROSSE, ET. AL., DEC. NO. 17084-D (WERC, 10/83). The context in which Parish's actions arose illustrates that his conduct benefited both the Association and its members, rather than Parish alone, and therefore was protected, concerted activity. The Association attended the May 23, 2005 Civil Service Commission hearing to oppose the Sheriff's request to change the promotional procedure system, as the Association desired to maintain the current procedure by which promotions would be granted. The Sheriff designated Inspector Carr to present his proposal to the Commission. While making his proposal, Inspector Carr referred to Parish personally as someone who would benefit from the Sheriff's proposal. Parish then had two choices. If he was truly motivated by purely individual concerns, Parish would have joined Inspector Carr at the table and voiced agreement with the proposed change, instead, Parish assisted the Association in educating the Commission as to how the Sheriff's proposal could affect all the Association's members. Parish physically joined the Association's President and legal counsel at their table and took the same position they had espoused. Two days later, the Sheriff stripped Parish of his Sergeant's rank. That action sent an unmistakable message to other Association members to think twice before assisting their union as Parish had, or suffer the consequences. Thus, the Sheriff's actions violated Section 111.70(3)(a)1, Stats. Whether the Sheriff actually intended to interfere with those protected rights and whether employees actually felt coerced are not determinative as to whether there was a violation of Section 111.70(3)(a)1, nor is a finding of anti-union motivation necessary to establish such a violation. CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71). The Sheriff's conduct merely had to have a reasonable tendency to interfere

with, restrain or coerce employees in the exercise of their rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). Here, the facts are plain that when an employee dared to aid his union in espousing a position adverse to the Sheriff, the employee was swiftly and severely punished. Such actions certainly had a reasonable tendency to restrain other employees from acting in a similar fashion.

The Association also asserts that the Sheriff discouraged membership in the Association by discriminating against Parish. To find a violation of Section 111.70(3)(a)3, Stats., it must be found that in addition to Parish having engaged in protected activity, the Sheriff was aware of that activity, was hostile to that activity and that the protected activity was the motivation, at least in part, for his adverse employment decision. MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (1967); EMPLOYMENT RELATIONS DEPT. v. WERC, 122 Wis. 2d 132 (1985). All such elements have been proved.

There is no doubt the Sheriff, through Inspector Carr, was aware of Parish's actions at the May 23, 2005 meeting. There is also no doubt that the Sheriff was hostile to Parish's actions at the meeting. The uncontested testimony of both Association President Felber and Parish evidenced that Inspector Carr was blatantly hostile towards Parish at and after the May 23, 2005 meeting. Further, Inspector Carr told the Sheriff about Parish's activities and told Parish the Sheriff was "unhappy" with his attendance at the meeting, and that Parish's activity was viewed as "disloyal" and "untrustworthy". However, perhaps the greatest evidence of hostility is that Parish was given the option of resigning his Sergeant position or having the Sheriff do it for him.

It is also clear that the Sheriff's action was motivated, at least in part, by hostility toward Parish's protected activity. An employer cannot subject the employee to adverse consequences when one of the motivating factors is his union activities, no matter how many other valid reasons exist for the employer's action. MUSKEGO-NORWAY, *supra*.; EMPLOYMENT RELATIONS DEPT. v. WERC, *supra*. There is no question that taking away the indicia, responsibilities, and higher pay of the Sergeant's position was adverse to Parish. There is absolutely no evidence in the record that the Sheriff rescinded the promotion for any reasons other than Parish's protected activity, rather, the record supports the allegation that the only reason for the adverse employment consequence was Parish's protected activity. Most telling is the timeline, i.e., a mere two days after Parish's protected activity the Sheriff ordered his promotion revoked, despite the fact that the Department had assured Parish that his promotion would become permanent. It was also not as though other temporary Sergeants were having their promotions revoked. The record reflects that only two previous temporary promotees have been returned to their lower rank and both such cases involved non-analogous circumstances.

The Association requests that the Examiner find that the County and its Sheriff committed the alleged prohibited practices, order the County and the Sheriff to cease and desist from such violations in the future and post a notice to that effect, order the County and the Sheriff to rescind the adverse employment action, and remove all reference to it from the

County or Sheriff's Department records and order that Parish be made financially whole for the loss of pay and benefits he incurred as a result of the violation.

County

The County asserts that the burden is on the Association. The case revolves around Parish and his removal from a temporary assignment to a higher classification. Per the labor agreement, Parish received placement as a temporary Deputy Sheriff Sergeant. There is no dispute that Parish never received a permanent or regular appointment. Parish was subsequently returned to his permanent position of Deputy Sheriff I.

As background, the Sheriff, who is not signatory to the labor agreement, asked the County's Civil Service Commission for a waiver of its rules concerning the number of names certified to him for prospective appointments off eligibility lists, consistent with how the Civil Service has handled such situations in the past. At the meeting of the Civil Service Commission, Inspector Carr, representing the Sheriff, explained the need to expand the candidate pool for what the Sheriff believed to be the best interests of the Department. The Association opposed the request and Parish individually and on his own behalf, opposed the request as well, asserting self-serving interests. The granting of such a waiver might adversely impact his chances of getting a permanent appointment. The next day, the Sheriff issued an order rescinding Parish's temporary assignment to a higher classification, thereby returning him to his old classification of Deputy Sheriff I. At all times, as both a Deputy Sheriff Sergeant and in his permanent position of Deputy Sheriff I, Parish received all pay and benefits in accord with the terms of the labor agreement.

The County asserts that the action was not a "demotion" within the meaning of Sec. 63.10, Stats. Parish, through his Association, petitioned the County's Personnel Review Board for relief, apparently, but wrongly, believing the actions of the Sheriff to be a demotion. Milwaukee County Ordinance, Section 33.01(2), establishes the Board and transfers the duties and responsibilities of the County's Civil Service Commission set forth in Sec. 63.10, Stats., to the Board. Section 63.10, Stats., governs disciplinary actions and provides that the decision of the Board shall be final. *STATE EX. REL. IUSHEWITZ V. MILWAUKEE COUNTY PERSONNEL REVIEW BOARD*, 176 Wis. 2d 706 (1993). After a hearing that both Parish and the Association requested, the Personnel Review Board issued a decision adverse to Parish's interest. Having chosen the forum, they cannot now be heard to oppose either the decision or the authority of the Personnel Review Board to render its decision. Essentially, the Board declared that since Parish never really held the job, he was not, and could not have been, demoted from it. No review of any sort of the Personnel Review Board's decision was sought. Thus, as to the putative issue of demotion, the doctrines of estoppel and preclusion make the Board's determination the settled law of the case. Parish conceded that he never held a permanent or regular appointment to the Sergeant position, that he never initiated a grievance over the issue, that the Sheriff could appoint anyone certified to him pursuant to the rules, and that he was not guaranteed a promotion to Sergeant.

The alleged violations of Chapter 111.70 must also fail. Association President Felber declared that the only Association representatives involved at the Civil Service Commission meeting were himself, Business Agent Rieder, and Association lawyer Pings. While Parish may have been an Association member, his attendance and participation in the proceeding had nothing to do with the Association. Parish conceded he was there on his own time and to serve his own self-interest and was not an Association official.

There is no evidence indicating that the Sheriff had knowledge of Parish's conduct at the Commission proceeding, that the Sheriff acted upon Parish's conversation on May 25th with Inspector Carr, or that there was any implication of the Sheriff's decision returning Parish to his permanent job having even a scintilla of connection to the Association. Even if such connection were present, it would be of no moment. In another case involving the Association, its president was not promoted to Sergeant and sued in federal court. The federal judge held that a public employer's need to trust the occupants of policy-making positions to carry out its policies with fidelity and diligence is key. The public official is under no requirement to hire or retain someone who has challenged the employer's policy positions. Here, Parish did not hold the job on a permanent basis and had no property interest in the Sergeant's position. While his criticism of the Sheriff was noted, it was not until after he had returned to his permanent position.

It should also be noted that Parish was removed from his job before he even had his supposed confrontational meeting with Inspector Carr on May 25th. Parish reverted to his permanent position of Deputy Sheriff I on May 24, 2005. No testimony indicates that the Sheriff, who was the appointing authority, ever met with Carr or even considered Parish's Commission appearance prior to ending his temporary assignment to a higher classification.

The County notes that the Association and Parish brought this matter as a prohibited practice issue, rather than a grievance. If there was any suggestion that Parish's "promotion" was implicated, that would be a matter addressed under Civil Service rules or at least a grievance under the terms of the parties' labor agreement. As Parish never grieved, the labor agreement is in no way implicated in this case and the County's Civil Service bodies have already spoken.

The County concludes that the Association has failed to satisfy its burden in that it did not show that Parish was demoted, did not show that Parish was representing the Association, nor did it establish any connection between what happened to Parish and the Association. There is no evidence of domination or attempt to dominate the Association and no showing that Parish was involved in any protected activity or that his return to his real job was connected in any way with protected activity. There is also no showing that the WERC has jurisdiction over Milwaukee County Civil Service matters. Parish and the Association went to the Civil Service Commission and Personnel Review Board forums because they thought those administrative bodies were the ones to make the authoritative determinations. The rulings of those bodies were adverse and were not reviewed, much less reversed. Thus, the complaint should be dismissed and the County made whole for defending these frivolous allegations.

Association Reply

The Association first asserts that whether or not Parish was “demoted” or whether the Sheriff simply “rescinded” his temporary promotion are irrelevant as to this complaint. Thus, any reference or argument by the County as to the County Personnel Review Board and whether or not it viewed the Sheriff’s action as a demotion under Sec. 63.10, Stats., is meaningless and only meant to “muddy the waters.” The bottom line is that, prior to the May 23, 2005 Commission hearing, Parish was a Sergeant and, according to the Sheriff’s second-in-command, a valued supervisor to whom the Sheriff was committed. However, after Parish spoke out against the Sheriff’s proposal and in support of the Association’s position on competitive examinations, the Sheriff viewed him as “disloyal” and “untrustworthy”, giving him the choice of resigning his rank or having the Sheriff do it for him. As Parish refused to resign, the Sheriff issued Order No. 788, immediately rescinding the prior order that had made Parish a temporary Sergeant. The determinative questions are whether the Sheriff’s conduct in taking such action was in response to Parish’s appearance at the Commission’s hearing, was a result of Parish having taken a position aligned with the Association, i.e., lawful, concerted activity, had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their protected activity, and/or discourage membership in the Association by discrimination.

The County’s reference to “another case involving this union” is inappropriate. If the County desires that the Examiner take notice of a decision which it believes to be precedent, it should provide legal authority and citation to support the position. Absent such reference, it is wholly inappropriate to make the type of references the County made in its brief.

Next, the Association asserts that it has established the causal connection between Parish’s lawful, concerted activities of May 23, 2005 and the Sheriff’s rescission of his temporary promotion, and thus has demonstrated a violation of Section 111.70(3)(a)1, Stats. The record demonstrates that Parish’s conduct at the meeting was concerted activity, i.e., was meant to further the Association’s collective expression. Parish was concerned about the Sheriff’s proposal because it would allow promotion regardless of an individual’s ranking on a competitive examination. The purpose of the Association’s attending the May 23, 2005 hearing was to oppose the Sheriff’s request to change the promotional procedure because promotions should be made based upon an individual’s ranking on the competitive examination, rather than some other subjective basis. Parish chose to physically join the Association’s President and its legal counsel at their table, and espoused the Association’s position, echoing the same concerns voiced by the Association. Parish and Carr then debated the merits of the Sheriff’s proposal during which time Inspector Carr was surprised and noticeably upset. When Parish approached Carr afterwards, he was rebuffed, and the next day received a call from Inspector Carr’s secretary advising him of a meeting with the Inspector on May 25, 2005. Parish attended that meeting with Inspector Carr where they discussed the concerns Parish had voiced before the Commission. It was during that meeting that Inspector Carr indicated he had spoken to the Sheriff about Parish’s comments to the Commission and told Parish that the Sheriff was “unhappy” with his attendance at the meeting. Carr explained

to Parish that he was seen by the Sheriff as “disloyal” and “untrustworthy”. Carr subsequently informed Parish that he had two choices, either resign his position as Sergeant or the Sheriff would do it for him. Parish refused to resign. By the time Parish drove home from that meeting, he had two messages on his voice mail indicating that an order had been issued rescinding his temporary promotion (Order 788, issued on May 25, 2005, but dated May 24, 2005).

The complainant’s burden does not require it to demonstrate anti-union motivation on the Sheriff’s part; rather, the burden is met as long as the Examiner finds that the Sheriff’s conduct had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights. Neither the Sheriff nor Inspector Carr attended the prohibited practices hearing to rebut the allegations set forth in the complaint. Therefore, the record is straightforward. When an employee dared to aid his union in espousing a position adverse to the Sheriff, he was swiftly and severely punished. Such action certainly had a reasonable tendency to restrain other employees from acting in a similar fashion. Thus, the Sheriff’s action interfered with, restrained and coerced the Association and its members in the exercise of their protected rights.

The Association also asserts that it established that the Sheriff’s actions were meant to discourage membership in the Association by discrimination under Section 111.70(3)(a)3, Stats. The Association asserts it has established all the necessary elements of such a violation. First, Parish was involved in “protected activity” in that he spoke in favor of the Association’s position on a matter primarily related to the conditions and terms of employment of Association members, i.e., how an individual would be promoted. Second, the Sheriff was aware of Parish’s protected activity through Inspector Carr, who personally witnessed Parish’s activity at the May 23rd Commission hearing and told the Sheriff about it. Further, Carr personally met with Parish at the Sheriff’s direction two days after the hearing for the specific purpose of discussing such activity. Third, the Sheriff was hostile to Parish’s protected activity. The testimony of both Felber and Parish demonstrates that Inspector Carr was blatantly hostile toward Parish at and after the May 23rd hearing. Fourth, the Sheriff was motivated, at least in part, by hostility toward Parish’s protected activity. Just prior to the May 23, 2005 Commission meeting, the Sheriff, through Inspector Carr, assured Parish that he was a valued supervisor and that his promotion would become permanent. However, once Parish took a position adverse to the Sheriff, in support of the Association, the Sheriff viewed Parish as disloyal and untrustworthy and gave him the choice of either resigning his rank or letting the Sheriff do it for him.

County Reply

The County asserts that the Association’s entire claim boils down to allegations that the Sheriff somehow retaliated against Deputy Parish, however, the record is not as the Association describes. Parish never met or spoke with Carr until after he was returned to his permanent classification. There is no evidence in the record demonstrating that the Sheriff had any knowledge or contact regarding Parish’s participation in the Commission proceeding.

More to the point, there is no record of the Sheriff's knowledge of the case prior to his, not Carr's, returning Parish to his permanent job one day prior to the meeting between Parish and Carr. The Association also misstates the context of that meeting. It was Parish, not Carr, who requested the meeting. At the time of the meeting, the return of Parish to his permanent status was a *fait accompli*. Thus, there is no evidence that the Sheriff had any knowledge of Parish's activities on his off time. Given the lack of any facts regarding the Sheriff, there is no showing that he was at all hostile to Parish or any purported protected activity by Parish.

The Union seeks to impose some sanction on what turns out to be a retroactive basis because Carr had an opinion of Parish; however, there is no corroboration of any intent or purported motivation by Carr, other than the singular and hearsay, self-serving comments of Parish as to what allegedly happened after the fact.

Parish acknowledged he had no justifiable expectation of permanency in the temporary Sergeant position, and also testified that his appearance at the Civil Service Commission had nothing to do with the Association, but everything to do with his understandably selfish motivation of enhancing his own candidacy. He eschewed the notion of any connection with the Association, as did Association President Felber. It was the latter who said that only he and Rieder were present for the Association, and no evidence exists to support the notion that Parish was in any way aiding the Association.

Neither the Association, nor Parish, challenged the return to his permanent rank by grieving under the terms of the labor agreement, which agreement incorporates the Civil Service rules and specifically provides for the temporary elevation of personnel to a higher classification without any promise of permanency and does not require any cause to return a temporarily elevated deputy to his or her permanent job.

Nowhere in the Agreement or the law is there provision for the WERC to intrude upon the administration of Chapter 63, Stats., the civil service law for counties. Even Parish and the Association believed that civil service laws were dispositive and approached both the Civil Service Commission and the County Personnel Review Board. Neither has sought review of the decisions of those bodies that did have jurisdiction and their decisions are now, by operation of law, final and not subject to collateral attack. Thus, the complaint should be dismissed.

DISCUSSION

The Association alleges violations of Secs. 111.70(3)(a)1 and 3, Stats., by the Sheriff's action in removing Deputy Parish from his temporary position as Deputy Sheriff Sergeant shortly after voicing his concerns with the Sheriff's request for a waiver of the County's Civil Service Rules regarding promotions at the May 23, 2005 meeting by the County's Civil Service Commission.

Jurisdiction

The County has argued that the Wisconsin Employment Relations Commission does not have jurisdiction to rule in this case on the basis that the body that had final and binding authority to rule on the propriety of Parish's removal from his Sergeant's position, i.e., the County's Personnel Review Board, did so in dismissing Parish's action before that body, and Parish is now estopped from challenging that determination. The County asserts that the issue of whether Parish was "demoted" or was removed from a "temporary assignment" involves the County's Civil Service Rules and personnel ordinances, over which the Commission has no jurisdiction, and that Parish and the Association failed to pursue his contractual remedy to grieve whether he was appropriately removed from a "temporary assignment" within the meaning of Sec. 3.09 of the parties' labor agreement.

None of the above points raised by the County restrict the Commission's jurisdiction to determine whether the municipal employer's actions constitute a prohibited practice under MERA. While they may in certain circumstances be relevant in making such a determination, they are not dispositive if the municipal employer's motive for taking an adverse employment action against an employee is motivated, at least in part, by hostility toward that employee's having engaged in lawful, concerted activity.⁴

Section 111.70(4)(a), Stats., provides:

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

Section 111.07(1), Stats., provides:

111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

Here, the Association alleges that actions of the County, through its officers and agents, Sheriff Clarke and Inspector Carr, committed prohibited practices within the meaning of

⁴ MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2d 132 (1985).

Secs. 111.70(3)(a)1 and 3, Stats. Thus, it is clear that the WERC has jurisdiction to decide whether the alleged actions by Milwaukee County constituted prohibited practices within the meaning of MERA. In making such determinations, it is sufficient to determine whether the Sheriff took an adverse employment action against the employee. It is not necessary to determine whether Parish was temporarily “promoted” or “temporarily assigned” to the Sergeant’s position, or whether his removal from the position was a “demotion” within the meaning of the County’s Civil Service Rules or Ch. 63 of the Wisconsin Statutes, rather, it is only necessary to determine whether the necessary elements to proving “interference” or “discrimination” under Secs. 111.70(3)(a)1 and (3)(a)3, respectively, are established. It is acknowledged, however, that the status of Parish’s position as Sergeant and his removal from the position under the County’s Civil Service Rules and Wisconsin Statutes may have relevance with regard to remedy.

Prohibited Practices

The Association asserts that the County, through the actions of Sheriff Clarke and Inspector Carr, has violated both Secs. 111.70(3)(a)1 and (3)(a)3, Stats.

Sec. 111.70(3)(a)1, Stats. provides that it is a prohibited practice for a municipal employer individually or in concert with others:

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

Sec. 111.70(2), stats., referred to above, states:

Municipal employees 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. . .

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent’s conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. No. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC v. EVANSVILLE, 69 Wis. 2d 140 (1975); CITY OF BROOKFIELD, DEC. No. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee’s exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. No. 25849-B (WERC, 5/91).

Sec. 111.70(3)(a)3, Stats. provides that it is a prohibited practice for a municipal employer:

“3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement.”

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements: (1) the employee was engaged in lawful and concerted activities protected by MERA; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. *MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB*, 35 Wis. 2d 540 (1967); *EMPLOYMENT RELATIONS DEPARTMENT v. WERC*, 122 Wis. 2d 132 (1985); *CITY OF MILWAUKEE, ET AL*, DEC. NO. 29270-B (WERC, 12/98).

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 #4, ET AL.*, 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 lawful, 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 lawful, concerted activity will not be encouraged or tolerated. See *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis. 2d 132, 141 (1985).

The Commission has concluded that in cases such as this, where the alleged violations are based upon alleged retaliation for engaging in lawful, concerted activity, it is appropriate to apply the traditional four-part analysis under Sec. 111.70(3)(a)3 to the alleged violation of Sec. 111.70(3)(a)1, as well:

Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1.

. . .

In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.

. . .

CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at p. 15.

In this case, the first dispute is as to whether or not Deputy Parish's actions at the May 23, 2005 meeting of the County's Civil Service Commission constituted "lawful, concerted activities" within the meaning of Sec. 111.70(2), Stats.

In VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03, at page 25), the Commission noted that determining whether activity is protected requires a case by case analysis of the "context" and reiterated its prior holding in CITY OF LA CROSSE:

"It is impossible to define 'concerted' acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern."

Citing, CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF'D, CIR. CT. CASE NO.-83-CV 821 (1985).

In STURTEVANT, the Commission went on to find that creation of a document that voiced concerns that were shared and had been discussed by the other employees, as well as by the document's creator, and which had been collectively advanced by the union, constituted "lawful, concerted activity. . .for purposes of mutual aid or protection" within the meaning of Sec. 111.70(2), Stats. STURTEVANT, at pages 25-26.

Here, the evidence is un rebutted that Parish shared many of the same concerns with the Sheriff's proposed procedure for promotions that were expressed by the Association's representatives at the May 23, 2005 meeting of the Civil Service Commission. While Parish originally intended to attend the meeting to satisfy his own curiosity as to exactly what the Sheriff was proposing because of his concern with his own promotion, and had no intention on speaking on the Association's behalf (going so far as to ask Association President Felber not to point him out), that changed when Inspector Carr pointed Parish out as an example of someone who would benefit under the Sheriff's proposed procedure and asked him to tell his side. At this point Parish chose to publicly align himself with the Association's position opposing the

Sheriff's request to alter the promotion procedures. By seating himself at the table with the Association's President and legal counsel and voicing some of the same concerns the Association had expressed at the meeting, Parish can only be viewed as speaking in support of the Association's collective position regarding the Sheriff's request.

There is also no dispute that Parish was civil and professional in voicing his concerns with the Sheriff's proposed promotion procedure and did not denigrate the Sheriff or Inspector Carr in any way or otherwise conduct himself in a manner that would cause his activity to be unprotected. Thus, it is concluded that Parish's actions at the Civil Service Commission's May 23, 2005 meeting were for the purpose of advancing collective concerns and constituted lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

Contrary to the County's assertions, the record evidence supports a conclusion that Sheriff Clarke was aware of Parish's lawful, concerted activity at the Civil Service Commission meeting. The Sheriff's second-in-command in the Department, Inspector Carr, was present at the meeting for the purpose of explaining and supporting the Sheriff's requested procedure for promotions and debated with Parish regarding the latter's concerns with the proposed procedure. The next day, Carr's secretary contacted Parish to arrange a meeting with him and Carr on May 25th.⁵ According to Parish's un rebutted testimony, at that meeting Carr informed Parish that the Sheriff directed Carr to have the meeting with Parish and then asked Parish why he had attended the Civil Service Commission meeting on May 23rd. In the course of Parish's reiterating his concerns with the Sheriff's requested promotion procedure, Carr informed Parish that the Sheriff was "unhappy" with Parish's appearance at the meeting and viewed him as "disloyal" and "untrustworthy".⁶ The Sheriff would not be unhappy with Parish for his appearance at the May 23rd meeting unless he had been made aware of Parish's appearance and his comments. Presumably, Carr had made the Sheriff aware in those regards. Such an inference is reasonable from Carr's comments to Parish regarding the Sheriff's change of feelings towards him.

As to evidence of the Sheriff's hostility towards Parish's having engaged in lawful, concerted activity at the May 23rd meeting, there are Carr's comments to Parish that the Sheriff was "unhappy" with his appearance at the meeting and viewed Parish as "disloyal" and "untrustworthy". There is also the sequence and timing of events that reasonably infer such hostility on the Sheriff's part. Parish and Carr met sometime in May of 2005 prior to the May 23rd Commission meeting, at which time Carr assured Parish the Sheriff's office was committed to promoting Parish to a permanent Sergeant position. Carr reiterated this commitment on the Sheriff's part at the May 23rd meeting when he pointed out Parish as one who would benefit under the Sheriff's proposed promotion procedure and noted the Sheriff's

⁵ It is noted that, contrary to the County's assertion that Parish requested this meeting, Parish's un rebutted testimony was that Carr's secretary called him on May 24th to set up the meeting the next day.

⁶ The County asserts Parish's testimony as to this conversation is self-serving hearsay; however, there was no objection to the testimony at hearing and in its answer, the County admitted to Paragraph 14 of the complaint regarding their conversation.

commitment to promoting Parish.⁷ However, on May 24th, the day after Parish publicly voiced his concerns regarding the Sheriff's proposed promotion procedure at the meeting, and without any intervening events and no other explanation being offered for his action, the Sheriff drafted Order No. 788 rescinding Parish's temporary promotion to Sergeant and ordered Carr to meet with Parish to give him the option of resigning his Sergeant's position or the Sheriff would make the decision for him. The Sheriff issued Order No. 788 dated May 24, 2005, but apparently not issued until May 25, 2005, only two days after Parish appeared at the Civil Service Commission's meeting.

As to motivation, as noted, the County offers no other explanation for the Sheriff's action in removing Parish from his Sergeant's position, other than to argue that it was a "temporary assignment" to a higher classification authorized by Section 3.09 of the parties' labor agreement, and that the provision does not require a reason for removal from such a temporary assignment. However, whether Order No. 721 constituted a "promotion" or a "temporary assignment" is irrelevant for the purpose of determining whether the Sheriff took this adverse employment action against Parish based upon animus toward his having engaged in lawful, concerted activity. Even if the Sheriff was authorized under the labor agreement to remove Parish from his Sergeant position for no reason whatsoever, MERA does not permit such an action, if it is motivated, at least in part, by hostility towards the employee having engaged in lawful, concerted activity. *MUSKEGO-NORWAY, supra*. Here, there is no basis in the record for finding there was any other reason for the Sheriff's adverse employment action than his hostility towards Parish's having engaged in the lawful, concerted activity at the May 23, 2005 Civil Service Commission meeting. Thus, it is concluded that the Sheriff's actions discouraged membership in the Association by discriminating against Parish with regard to hiring, tenure or other terms or conditions of employment.

Given the timing of the comments and actions of Carr and the Sheriff, and the absence of any other noted concerns with Parish's performance or any other offered basis for his removal from his Sergeant's position, Parish and the members of the bargaining unit represented by the Association could only conclude that he was being punished for having engaged in lawful, concerted activity that displeased the Sheriff. Thus, it is also concluded that the Sheriff's actions in rescinding Parish's temporary promotion to Sergeant interfered with, restrained or coerced those municipal employees in the exercise of their rights under Sec. 111.70(2), Stats., to engage in lawful, concerted activity for mutual aid or protection.

Based on the foregoing, it is concluded that the Sheriff's actions in rescinding Parish's temporary promotion to Sergeant violated Secs. 111.70(3)(a)1 and 3, Stats.

⁷ The County admitted Paragraph 11 of the complaint in this regard.

Remedy

The Examiner has ordered that Parish be reinstated to a temporary position of Sergeant to place him in the same status as when the Sheriff removed him from such a position and to make him whole as to wages and benefits he lost from the time he was removed to the time he is reinstated. As Parish's status as to whether he held the Sergeant's position in permanent status at the time he was removed was undecided and there was a dispute between the parties at the time as to whether the Sheriff's practice of temporarily promoting people, such as he had Parish, complied with the County's Civil Service Rules regarding promotions, ⁸ the Examiner finds it sufficient to place Parish in the same position he was in prior to his removal and directs the County to treat Parish with regard to a permanent promotion to Sergeant, as is appropriate under the County's Civil Service Rules, as though he had not been removed from the position. ⁹

Dated at Madison, Wisconsin, this 19th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

⁸ It is noted that the County's Personnel Review Board did not decide those issues as to Parish's permanent status, as it found that the County's Civil Service Commission, rather than the Board, had jurisdiction to decide such issues, and that until it was determined that Parish had permanent status in his Sergeant's position, the Board did not have jurisdiction to hear his claim regarding his removal from the position.

⁹ If Deputy Parish was promoted to Sergeant in the interim, the make-whole remedy would run forward only to that date.