

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WINNEBAGO COUNTY (SHERIFF'S DEPARTMENT)

and

**WINNEBAGO COUNTY SHERIFF'S PROFESSIONAL POLICE ASSOCIATION,
LOCAL 107, LAW**

Case 353
No. 61600
MA-11999

(Promotion Grievance)

Appearances:

Mr. John A. Bodnar, Corporation Counsel, Winnebago County, 448 Algoma Boulevard., P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of Winnebago County

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, WI 54915, on behalf of Local 107.

ARBITRATION AWARD

According to the terms of the 2001-03 labor agreement between Winnebago County (hereafter County) and Winnebago County Sheriff's Professional Police Association (hereafter Association), the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding the promotion to Sergeant in the Jail Division of the Sheriff's Department of Mark Habeck over Grievant Roger Peters. Hearing was scheduled and conducted at Oshkosh, Wisconsin, on March 19, 2003. A stenographic transcript of the proceedings was made and received on April 14, 2003. The parties agreed to exchange their briefs directly with each other postmarked May 30, 2003, with a copy to the Arbitrator. The parties reserved the right to file reply briefs. On June 3, 2003, the Association advised it would not file a reply.

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

ISSUES

The parties stipulated that the Arbitrator should resolve the following issues in this case:

Did the County violate the collective bargaining agreement when it promoted Mark Habeck to the rank of Sergeant? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

1998-2000

APPENDIX B

PROMOTIONAL PROCEDURE

Persons selected for placement into any rank above that of Police Officer/Corrections Officer shall be selected from a list of the three candidates who score highest in the competitive written examination for named ranks administered by the State of Wisconsin or appropriate alternate source. This written exam shall be appropriate to the position. (In the event that tie scores in the competitive exam result in more than three finalists, the number of finalists shall be increased to include all finalists having the same score as the third highest finalist.)

In order to be eligible to write the competitive exams for promotion, candidates must meet or exceed the following minimum length of service requirements for the respective ranks at the time of examination:

1. Corporal Exam - 2 years of service for the Jail Division or 3.5 years for the Patrol Division in the department.
2. Detective Exam - 3.5 years of service in the department and a minimum of 2 years in patrol.
3. Sergeant Exam - 5 years of service in the Department.

In addition to meeting the length of service requirements, actual promotion shall be contingent upon the candidate's meeting or exceeding the following minimum time-in-grade requirements for the respective ranks:

1. Corporal - 1 year experience in the division in which the vacancy exists.
2. Sergeant - 1 year experience in the division in which the vacancy exists. (This provision does not apply to positions within the Support Services Division).

Upon completion of the examination process, the results shall be posted by social security number, and the Association shall be provided with a copy. The results shall remain valid for a period not to exceed two years. In the event that the list of eligibles contains less than the names of three individuals having passing scores, a new test shall be conducted and a new list prepared.

Once a vacancy occurs, the names of the top three candidates for promotion shall be presented to the Sheriff. In the event that the first person selected turns down the offer of promotion, the Sheriff shall be given a new list of three names excluding the name of the individual who turned down the offer of promotion. In the event of vacancies in more than one rank, the vacancy in the highest rank shall be filled first.

STIPULATIONS OF THE PARTIES

1. Appendix B governs the promotional procedure for promotion from the ranks to Corporal, Sergeant and Detective in the Winnebago County Sheriff's Department.
2. At the time that the test procedure was administered relevant to this grievance, Appendix B contained in the 1998-2000 contract was in effect.
3. The Association agreed that the remedy for not allowing Habeck to take the test in February, 2001, was to allow Habeck, Cianciolo and Vendola-Messer to take the test in June, 2001. Originally, the Association had only suggested and desired that Habeck take the test in June, 2001.
4. A single promotional test was given in February and the same single test was given in June, 2001, for both the Sergeant and Corporal position openings in the Department.
5. Roger Peters filed a sex discrimination lawsuit against the County with the State ILHR Department wherein Peters alleged that he was not given light duty following a disability leave while a female officer had been given such duty. The lawsuit was later settled by the parties.

BACKGROUND

Sheriff Michael Brooks has been the County Sheriff for approximately the past nine years. During Brooks' tenure, the Department has consistently given a single examination (the same exam) every two years for all Corporal and Sergeant openings. After each exam was graded, a single eligibility list was generated of all test takers, listing them from highest to lowest score. This single list was then posted in the Department as the eligibility list for all

future openings in the Corporal and Sergeant positions. 1/ Human Resources would then give the Sheriff a list of the top three scoring employees for his consideration whenever an opening in the Corporal or Sergeant positions became available.

1/ The County has Corporal and Sergeant positions in both the Jail and Patrol Divisions of the Department.

During his nine year tenure as Sheriff, Brooks announced to Department employees on several occasions that it would be his policy to promote the person who receives the highest test score to Corporal and Sergeant openings and that he would then go down the eligibility list for later promotions to Corporal and Sergeant vacancies. However, on three occasions during his tenure as Sheriff, Brooks passed over the highest scoring employees (Mike Woods, Chris Keller and Gregg Cianciolo) to promote one of the two next highest scoring employees on the Corporal/Sergeant exam. Brooks stated that he did this due to prior disciplinary actions taken against the highest scoring employees in those cases. The Association did not file any grievances over these promotions.

In addition, the Association has filed no grievances over the Department's use of the same promotional test for both Corporal and Sergeant openings. Nor has the Association grieved the fact that the Department maintains one eligibility list (ranking employees who tested by their scores) for both Corporal and Sergeant positions.

FACTS

The Grievant, Roger Peters, has been employed by the County in its Sheriff's Department for the past approximately 12 years. Peters was hired into the Jail in 1991 where he was promoted to Corporal (after having taken a Corporal/Sergeant exam) in 1993. Peters remained employed as a Corporal in the Jail Division until 1994 when he took a position as a Patrol Officer (a cut in pay). Peters is currently employed as a Patrol Officer in the Department. On January 18, 2001, the Human Resources Department of the County posted the following promotional test announcement:

SERGEANT/CORPORAL

The Winnebago County Human Resources Department, on behalf of the Sheriff's Department, will be conducting promotional testing on February 22, 2001 for both Sergeant and Corporal positions. Per the collective bargaining agreement, you are invited to participate in this testing process if you meet or exceed the following minimum length of service requirements and minimum time-in-grade requirements for the respective rank at the time of examination:

Sergeant Exam: 5 years of service in the Department; 1 year experience in the Division in which the vacancy exists.

Corporal Exam: 2 years of service for the Jail Division or 3.5 years for the Patrol Division in-the Department; 1 year experience in the Division in which the vacancy exists.

Please notify the Human Resources Office by telephone (236-4747) by Friday, February 9, 2001, if you wish to participate. You will be noted by letter prior to the exam with the rest of the necessary exam details. This test will generate a new eligibility list for future promotions within the Sheriff's Department. All previous eligibility lists for promotion will no longer be valid.

Per the testing company source, the following information was provided as materials that can be obtained to study for the test:

1. ICMA Effective Supervisory Practices. 1995 3rd edition
ICMA--International City/County Management Association
--available from: ICMA Professional Development Institute
777 N Capitol NE #500
Washington DC 20002
ISBN 0-87326-074-0
2. For the Record, Report Writing in Law Enforcement, 4th edition by
Karen Hess and Henry M. Wroblewski
--available from: Innovative Systems
9001 Poplar Bridge Road
Bloomington, MN 55437
1-800-772-6592
ISBN 0-940309-08-4

There were 35 employees of the Department who took the test on February 22, 2001. Todd Christie received the highest score (78.7) on the exam and Peters scored 78.1, scoring second. The day after the exam results were posted, Sheriff Brooks called Peters and offered him the job of Corporal in the Jail. Peters declined to take the promotion. (At this time, there was no Sergeant opening available.) After Peters declined the Corporal opening, a Sergeant opening became available and the Sheriff offered this opportunity to Todd Christie, the officer who had tested first on the February 22, 2001 exam. Christie took that promotion. At the time the exam was given on February 22, 2001, both Christie and Peters had five or more years of service in the Department and at least one year experience in the Division in which the vacancies existed.

On February 12, 2001, Mark Habeck was supposed to receive a letter inviting him to test for the Corporal/Sergeant exam on February 22, 2001. 2/ However, Habeck never received that letter. On February 22, 2001, when Habeck arrived at work, his co-workers were discussing having taken the 9:00 a.m. exam for Corporal/Sergeant that day. Habeck then spoke to Chief Deputy Goggins regarding why he (Habeck) had not been invited to take the exam. Goggins explained that Habeck did not have the years of service required by Appendix B of the 1998-2000 labor agreement to take the exam. On February 23, 2001, Habeck received a letter confirming his lack of eligibility to take the promotional Corporal/Sergeant test "because you don't meet the minimum qualifications as set out in the collective bargaining agreement."

2/ Habeck had been hired as an officer in the Jail on January 16, 1997, where he was employed until September 8, 1998, when he transferred into a patrol officer position.

Thereafter, Habeck approached Union President Tim Schuster and then Union Vice President Ken Daniels. Habeck explained that he believed that the language of Appendix B should have allowed him to take the examination for Corporal. Habeck and these Union representatives then went to Chief Deputy Goggins and discussed the matter. After these discussions occurred, the Sheriff agreed with the interpretation of the labor agreement put forth by Habeck: that he only needed to have two years of service in the Department and one year of service in the Division in which the vacancy existed in order to be eligible to take the Corporal examination.

At this time, no one anticipated that Habeck would be considered during the pendency of the new eligibility list for the position of Sergeant, as he did not possess the time in the Department or the time in the Division necessary to be promoted to a Sergeant position. On Habeck's behalf, the Association argued that the Sheriff should allow Habeck to take the promotional exam for Corporal and be placed on the eligibility list good for the two-year period then in force. The Sheriff took the position that anyone who was in the same position as Habeck should also be allowed to take a make-up exam.

Therefore, on March 20, 2001, Sheriff Brooks sent Union President Schuster the following letter regarding who should properly take a second exam:

. . .

I received your letter dated March 14, 2001. I appreciate the WCSPPA Board of Directors input into the issues surrounding the recent Corporal/Sergeant Promotional Exam. The dilemma that I have at this point is ensuring fairness to all employees of the Winnebago County Sheriffs Office. Because we agree that

the wording could be interpreted in a couple of ways, I believe it is also reasonable to expect that other members of your association may have read the contract, and arrived at the same conclusion as management. Therefore, the question is how do I deal fairly with those individuals who also incorrectly interpreted the contract? Which brings me to the question of, "Who should be allowed to take the test?" "Do I only allow those individuals who read the contract correctly and then came forward, and in effect, disadvantaged [sic] those individuals who didn't?" or "In the name of fairness offer it to all those individuals, that when the contract is correctly interpreted, would have been eligible to take the test?"

Now that the contract has been correctly interpreted, I believe it is my responsibility to make sure that all members of the Winnebago County Sheriff's Office, not just one, receive equal and fair treatment. Therefore, it is my intention to allow anybody who was eligible to take the test in February, and did not sign up to take the test, the opportunity to take a makeup test that will be offered sometime in April of 2001.

...

On May 10, 2001, Officers Habeck, Vendola-Messer and Cianciolo received letters inviting them to test on June 14, 2001, at 9:00 a.m. "for both Sergeant and Corporal positions." The letter indicated that "as a result of the recent promotional test situation with the Union and qualifications, we will be re-conducting for a select few people that didn't get the opportunity to test in February of this year." Habeck, Vendola-Messer and Cianciolo took the exam on June 14, 2001. 3/ Vendola-Messer and Habeck received scores of 78.7 and Cianciolo received a score of 73.5 on the June 14th promotional exam. This resulted in a three-way tie for highest score, between Vendola-Messer, Habeck and Christie, while Peters score remained the second highest score. At the time of the test, Habeck had four years and five months of service to the department (dating from his date of hire to June 14, 2001).

3/ The exam given to these three officers was the identical exam to the one given on February 22, 2001.

Sheriff Brooks stated herein that even if Peters had been the highest scoring employee on the examination, he (Brooks) would not have offered Peters the Jail Sergeant position because of Peters' attitude over the last several years — comments Peters made to the public about his work ethic, implying that he is on the graveyard shift because he wanted to do as little work as possible, comments Peters has made to Lieutenant Matz regarding the way he

would supervise employees were he promoted. Brooks also pointed out that Peters has had “numerous counseling sessions” and has been disciplined on at least two occasions. 4/ Brooks stated that Peters is not a leader, cannot supervise and would not have been a good example to employees working under him; that Peters has not displayed the leadership qualities necessary for a Sergeant position. (Tr. 126). In addition, the Sheriff noted that in 2000, an arbitrator issued an award stating that Peters had misused sick leave in 1999. 5/

4/ The County entered the written memorialization of an oral reprimand dated November 10, 1999, issued to Peters regarding his failure to turn in reports by the end of his shift. Another reprimand was issued to Peters but was apparently withdrawn regarding in Peters’ alleged failure to wash his squad car regularly. This was the only record evidence of Peters’ disciplinary record.

5/ WINNEBAGO COUNTY (SHERIFF’S DEPARTMENT), CASE 324, No. 58537, MA-10983 (BIELARCZYK, 10/00).

On cross-examination, the Sheriff admitted that he has not helped Peters with directions how to improve his work, work ethic or attitude and he has not offered Peters any training to get him on a promotion track again. Brooks stated herein that although he offered Peters the Corporal position in the Jail immediately after the February 22, 2001 exam, he now feels this was a mistake; that Peters’ continued bad attitude and comments to Lieutenant Matz and Captain Tedlie and comments to “joint friends” bring into question Peters’ work ethic. As the Sergeant position is a much less structured job, Brooks felt Peters would not be capable of performing it. (Tr. 134).

At the time of his promotion to Sergeant in the Jail Division in August, 2002, Habeck had five years and seven months service in the Department, just under four years of service in the Patrol Division and one year and eight months service in the Jail Division. The Sheriff stated that he felt that Habeck was the best candidate for the Jail Sergeant position and one of the two highest scores on the exam and this is the reason that he promoted Habeck.

It is undisputed that at the time they took the test, Habeck, Vendola-Messer and Cianciolo did not have five years of service in the Sheriff’s Department. It is also undisputed that at the time they took the promotional exam in February, 2001, both Todd Christie and Roger Peters had more than five years service in the Sheriff’s Department and more than one year experience in the division where the openings existed.

The following is a list of employees who received the top score on the Corporal/Sergeant exam and were then promoted by Sheriff Brooks to the positions listed next to their names:

John Matz – Sergeant
Trisha Liethen – Sergeant
Todd Christopherson – Sergeant
Todd Christie – Sergeant
Mark Habeck – Sergeant

Tony Mann – Corporal
Dennis Zarling – Corporal
Tracy Handy – Corporal
Kristen Lemke - Corporal
Lyle Clayton – Corporal
Steven Krueger Jr. - Corporal

On August 5, 2002, Peters filed the instant grievance, arguing that Habeck, Vendola-Messer and Cianciolo were wrongly allowed to take a promotional exam in June, 2001; that Habeck was promoted to Sergeant of Patrol on August 5, 2002, in violation of Appendix B of the labor agreement as he did not have five years of service in the Department at the time he took the examination on June 14, 2001.

Peters sought an award ordering the County to cease and desist from violating the terms of the labor agreement; that he (Peters) be promoted effective August 5, 2002, to the rank of Jail Sergeant; and that Habeck be removed from that position. In its September 4, 2002 answer, the County stated as follows:

. . . In the grievance, Mr. Peters contends that Officer Habeck was ineligible to write the promotional examination for rank of Sergeant at the time that he wrote it.

The promotional examination for the ranks of Corporal and Sergeant are the same examination. At the time that Officer Habeck wrote the examination, he was eligible to write the examination for the position of Corporal and attained one of the three highest grades applicable to either rank. He subsequently met the necessary experience requirements for the ranks of both Sergeant and Corporal and was thereafter appointed to the rank of Sergeant.

The Sheriff's Department advised me that Officer Habeck, along with two other officers, was tested subsequent to the formal testing session in response to an Association request that he be tested because he was originally improperly disqualified from testing by the Sheriffs Department based upon the Sergeant experience criteria. All three did, however, meet the Corporal experience criteria.

Based upon the test results, the ranking of test scores at the time of appointment, and the fact that several candidates met the experience requirement for the rank of Sergeant at the time of appointment, Mr. Habeck was found to be the best qualified of the eligible candidates.

POSITIONS OF THE PARTIES

The Association

The Association urged that the clear language of Appendix B states specifically all requirements for candidates to be eligible for promotion. In this regard, the Association noted that Appendix B states that all candidates must have a minimum length of service for the respective ranks to which they wish to be promoted “at the time of the exam” and that in addition to the length of service requirement, Appendix B requires that “actual promotion shall be contingent upon” the candidate meeting or exceeding the minimum time-in-grade requirements listed therein. In addition, the Association noted that the promotional testing notice repeated both the length of service and time-in-grade requirement as stated in the collective bargaining agreement at Appendix B. Furthermore in prior promotional exams, the language of the contract had been applied by the Department.

The Association argued that the promotional procedure contained in Appendix B was intended to produce separate eligibility lists for each rank. Even if one were to find that only one list was intended by the parties, the Association asserted that it is clear that the parties agreed to treat candidates as being listed separately for promotional purposes to the separate ranks. Furthermore, the Association proposed language for the 2001-03 agreement which, although it was not agreed to by the parties, showed the parties’ intent and the change would have clarified Appendix B and made clear that the promotional procedures should work as the Association claims herein.

Furthermore, the Association noted that H.R. Specialist Cori Post admitted that she took the promotional testing notice language directly from the collective bargaining agreement and that it was her belief that the Sheriff’s interpretation of Appendix B reached prior to Habeck’s promotion violated the language of the labor agreement. In addition, Post stated herein that she prepares separate lists of the top three scoring candidates for the Sheriff to consider for each promotional opportunity from the single eligibility list generated by the testing.

The Association asserted that the Grievant met all criteria at the time of his examination for the Sergeant position but that Habeck did not meet all criteria at the time of his examination for consideration for a Sergeant position. In this regard, the Association noted that Habeck admitted that at the time he took the June examination, he thought he was only eligible for the Corporal exam/promotion and that he had only four years five months in the Department at the time he took the examination.

The Association urged that the parties’ reasons and/or intent for separating the length of service and time-in-grade requirements are irrelevant to this case, making its reliance on the straight-forward language of the agreement appropriate. In addition, the Association noted that the 2001-03 labor agreement does not alter the requirement that length of service be met at the time of the examination by a candidate for a promotion to one of the ranks listed therein.

The Association noted that the Sheriff has traditionally selected employees for promotion from the top of the eligibility list moving down for each respective rank, a fact confirmed by the Sheriff herein. In this regard, the Association pointed out that the last six Corporal promotions and the last five Sergeant promotions have been given to the employee receiving the highest score on the examination. Therefore, the Association urged that Peters should have been promoted to Sergeant rather than Habeck.

The Association observed that the Sheriff admitted herein that he has no intention of ever promoting the Grievant. In this regard, the Association noted that the Sheriff stated that Peters had been disciplined previously and this was part of the reason why Peters was not promoted. However, the Association pointed out that other employees have been promoted who were disciplined for more serious offenses than Peters. In addition, the Association urged that the Sheriff admitted herein that there were no disciplinary notices in Peters' personnel file before he filed his sex discrimination lawsuit.

Therefore, the Association asserted that the County has discriminated against Roger Peters by failing to promote him while promoting a less senior employee, Mark Habeck, to the Patrol Sergeant position. The Association requested a cease and desist order, that Peters be promoted to Sergeant effective August 5, 2002, that Peters be made whole from August 5, 2002, forward and that he be credited with time-in-grade as a Sergeant from August 5, 2002.

The County

The County argued that it did not violate the labor agreement by promoting Mark Habeck to Sergeant of Patrol. The County urged that the issue before the Arbitrator is one of contract interpretation only and that there is no dispute regarding many of the facts in this case. Thus, the County noted that the following facts were not disputed between the parties:

1. Only one examination has been given for both the Corporal and Sergeant positions for many years;
2. Test results are listed together for all ranks, from the highest to the lowest scores on each test;
3. The Sheriff is given the top three test scores for each promotional opportunity;
4. The Sheriff can select from any one of the top three scoring employees for the promotion;
5. The results of each test are good for two years; and
6. The job duties for Corporal and Sergeant are very similar.

The County argued that Mark Habeck met all of the requirements for promotion to Sergeant of Patrol at the time of his promotion. The County noted that Habeck had the highest score and was the best candidate for the Sergeant position. The County urged that it would serve no useful purpose to keep someone like Habeck from being promoted because he did not have the necessary length of service at the time of his examination.

Even if one assumes that Habeck was wrongly promoted, the County urged that this does not mean that Peters must be promoted to Sergeant. Here, the contract says that the Sheriff can select from among the top three scorers on the exam and by past practice the Sheriff has not always taken the highest scoring individual. Peters' past discipline swayed the Sheriff against him. As no evidence was presented that the Sheriff acted arbitrarily or capriciously in refusing to select Peters, Peters should not receive the promotion pursuant to this Award.

The grievance should be denied. However, if the Arbitrator rules in favor of the Union, the Award should state that the Sheriff has discretion to decide who to promote, pursuant to the clear language of the agreement. If the Arbitrator determines that Peters should be placed in the Sergeant position, back pay should be limited to the difference between the Corporal pay (which position Peters refused prior to the promotion for Sergeant becoming open) and Sergeant's pay.

DISCUSSION

The first question that must be answered in this case is how best to interpret the applicable language of Appendix B. In my view, Appendix B unambiguously provides for a two-step process. First, officers must meet or exceed a length of service requirement before they are eligible to take an examination for promotion to a particular rank. Second, in order to actually be promoted, the candidate who has already met the length of service requirement for a particular rank, must meet or exceed the time-in-grade requirement listed. The minimum length of service requirements, 2 years in the Jail Division or 3.5 years in the Patrol Division, must be achieved before a candidate may write the "Corporal Exam" and 5 years of service is necessary in the Department before a candidate may write the "Sergeant Exam." The above length of service requirements must be met by each candidate on the day of the examination. Under the clear language of paragraph 2 of Appendix B, this first length of service requirement must be met before the next paragraph (paragraph 3) of Appendix B comes into play.

Paragraph 3 of Appendix B clearly states that "actual promotion shall be contingent upon the candidate's meeting or exceeding the . . . minimum time-in-grade for the respective ranks. . ." listed. The time-in-grade requirement for a Corporal promotion is 1 year experience in the Division of the vacancy; for a Sergeant promotion it is 1 year experience in the Division of the vacancy. In my view, it is clear that the length of service requirement must be met at the time the exam is taken, while the time-in-grade requirement must be met at the time the candidate is actually considered for a promotion to an open position.

The County has argued that it would serve no useful purpose to deny candidates promotions because they lack the necessary length of service at the time they took their examinations. This argument must fail. The parties agreed to the clear language of Appendix B which requires that before officers could be eligible to test, they have to meet the applicable length of service requirement for the rank listed. How or why the parties arrived at this agreement is irrelevant. The length of service requirement must be met before a candidate may take the “Corporal Exam” or the “Sergeant Exam.”

The Association has argued that Appendix B requires the Department to separate exams for promotions into positions in each of the respective ranks. Although Appendix B refers to “the competitive written examination for named ranks,” and to “the competitive exams for promotion,” nowhere in the language of Appendix B does it state that the County must give separate exams for each named rank. Rather, Appendix B merely states that “this written exam shall be appropriate to the position.” This language allows the County to give the same examination for two or more named ranks if the same exam could be considered “appropriate” for both ranks. In fact, the record in this case shows that the County has given the same examination for corporal and sergeant promotions for many years in the past and that the Association has never grieved this fact.

The Association has also argued that Appendix B requires the County to maintain separate eligibility lists for promotions to each of the names ranks. I disagree. Appendix B states that “the result (of the exam) (s) shall be posted by social security number. . . .” This list of results then essentially becomes the eligibility list valid for up to two years. Thus, there is no contractual language requiring the County to make and maintain separate seniority lists for the different ranks. However, the procedural language of paragraphs 2 and 3 of Appendix B clearly requires that the candidates for promotion be treated separately for consideration to the separate named rank promotions. 6/

6/ The fact that the Association proposed to amend the language of Appendix B for the 2001-03 contract does not, in my view, have any relevance to this case, as the parties did not agree upon any amendment thereto.

Once a vacancy occurs, Appendix B makes clear that the Sheriff is to be given a list of the names of the top three candidates for the vacancy. Ms. Post confirmed it has been her practice to bring a list of the top three scoring candidates for each open position to the Sheriff for his consideration. Appendix B also clearly states that the Sheriff has the right to select any one of the top three listed candidates for promotion into the vacancy. Although Sheriff Brooks has made it clear during his nine-year tenure that it would be his policy and/or intention to select the highest scoring candidate for each opening, Brooks has deviated from this policy/intention on three occasions, and has selected one of the other two lower scoring candidates due to the top scorer’s disciplinary record. I note that the Association did not grieve these policy deviations or otherwise object to them.

As the language of Appendix B grants the Sheriff the right to select from the among the top three candidates for each vacancy, I do not believe the record evidence regarding Brooks' intentions/policy would foreclose him from using his Appendix B discretion as he has on three prior occasions, to promote a person who did not score the highest, so long as the one promoted first meets the length of service and time-in-grade requirements of Appendix B and is one of the top three scorers.

However, the fact that Mark Habeck was not eligible to take the Sergeant's exam in June, 2002, and therefore was not eligible to be considered for promotion to Sergeant in August, 2002, does not mean that the Grievant should automatically receive a promotion to the Sergeant of Patrol position. In this regard, it is unclear from this record exactly what the list of top three candidates would look like if those who did not have five or more years of service in the Department on the day they took their Sergeant's exam were removed from the list.

This record contains evidence regarding the Sheriff's attitude toward Peters and Peters' prior disciplinary record. In my view, this evidence is insufficient as proffered in this case to prove that the Sheriff acted arbitrarily and capriciously in failing and refusing to promote Peters. On this point, I note that it was at the Association's request that Habeck be allowed to take the Corporal/Sergeant test. Although there is no specific evidence regarding the terms of the agreement reached between the Sheriff and the Association, it is clear that Habeck and the Association believed that Habeck would only be eligible to take the Corporal exam for later consideration for a promotion to Corporal due to Habeck's length of service at the time he took the examination in June, 2001. It is also apparent from this case that the Sheriff reached a different conclusion through the process of settling Habeck's grievance because he promoted Habeck in violation of the labor agreement. In addition, it is undisputed that the Association has never brought a grievance regarding the proper interpretation of Appendix B before an arbitrator.

Based upon this record and the clear language of Appendix B, it would be premature and inappropriate to order the Sheriff to select someone in particular and place them in the disputed position, as Sheriff Brooks did not have a clear ruling regarding the proper interpretation of Appendix B when he passed over Peters. 7/ The Sheriff has a clear right under the contract to select one of the top three Sergeant candidates and I issue the following

7/ The evidence offered by the Union herein regarding Peters' disciplinary record, the 1999 Arbitration Award, the Sheriff's statements herein concerning Peters' attitude, etc., may become relevant following the Sheriff's selection of a new candidate for the Sergeant on Patrol position pursuant to this Award, if the Sheriff fails to select Peters. But this evidence is not relevant in this case.

AWARD

The County violated the collective bargaining agreement when it promoted Mark Habeck to the rank of Sergeant. Therefore, the County is ordered to remove Habeck from the Sergeant position and to create a new list of the top three scoring candidates who had the required length of service on the day of their examination to be eligible to test for a Sergeant's position. This new list must then be submitted to the Sheriff for his consideration. The Sheriff is ordered to select one of the top three scoring candidates and place him/her in the Sergeant of Patrol position and if Peters is selected, the County shall place Peters in the position with full backpay and benefits from August 5, 2002, forward. 8/

8/ The County argued that if Peters were the chosen candidate he should receive the difference between Corporal pay and Sergeant's pay because Peters declined the Corporal promotion on February 23, 2001. The fact that Peters declined the Corporal promotion (which he had every right to do) is not relevant to this grievance and cannot form a basis for mitigation of any backpay that may be due him. I will retain jurisdiction of the remedy only in this case in order to assist the parties in implementing the Award.

Dated in Oshkosh, Wisconsin, this 25th day of June, 2003.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/arl

