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## **Promotional Rights and Procedures**

### **Part Three: Reverse Discrimination Claims**

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This is the third of a multi-part article on the law of promotions in public safety agencies. [Part One](#) discussed vacancies; Part Two addressed grading issues. Part Four will focus on miscellaneous claims.

#### **❖ Introduction**

Should management pass over a candidate because citizen activists or neighborhood leaders complain that he is unacceptable to their community? What if the candidate challenges a decision to reject him for promotion?

Some political leaders want to assuage minority groups, recognizing that dissatisfaction can translate into empowerment of opposition candidates on Election Day. Police officer associations are less likely to be intimidated by voter blocs, and will vigorously support their members.

#### **❖ Judicial deference to management rule**

In Syracuse, NY, a white officer named Larkin responded to a robbery call. He fatally shot

a black youth. Larkin was absolved of any wrongdoing. Ten years later, the police chief promoted sixteen officers to sergeant. Although Larkin was number six on the eligibility list, he was not chosen.

Larkin filed suit in state court. The trial judge ruled for him and the city appealed. A five-judge appellate panel reversed, relying on the evidentiary record.

1. The chief of police had testified that the shooting was a continuing cause of ill will in the black community against the Syracuse Police Department.
2. The chief asserted that Larkin had not “exercised good professional judgment or maturity” in the 1970 shooting.
3. In the chief’s opinion, Larkin had not matured since that time.
4. The chief expressed concern that Larkin’s judgment as a supervisor might be affected by the trauma of the 1970 incident.
5. He observed that Larkin’s ability to function as a superior officer in predominantly black neighborhoods would be impaired, resulting in a need for alternative assignments.

Noting that “police work is of an especially sensitive nature,” Larkin’s rejection had “a rational basis... and bore directly upon [his] prior conduct as a police officer.” [\*Larkin v. Sardino\*](#), 79 A.D.2d 1096, 435 N.Y.S.2d 843 (N.Y. App. Div. 4th Dept. 1981).

#### ❖ **Jury finding of discriminatory treatment**

In a nine-year period, Cleveland police officer Paskvan was involved in nine line-of-duty shootings of minorities. The police department found his actions were justified in each shooting; criminal charges were never brought against him. In 1985 he fatally wounded a man who pointed a BB gun.

Following department procedure, Paskvan was assigned to the police gym for ninety days in order to “relieve stress.” Paskvan was regarded by his critics as an “Exterminator.” Several citizen groups held a march and demonstration to protest the last two shootings. A publicity flyer targeted Paskvan and proclaimed:

“Don’t miss this chance to join this giant demonstration against these outrageous killings ...”

Meanwhile, Paskvan sought promotion to sergeant. Under the “rule of three,” management could fill each position with the three top-ranked individuals for that position. In September 1988, the public safety director promoted 18 top-ranked officers – except for Paskvan. Over time, 49 officers – ranked 1 to 50 were promoted – but not Paskvan.

Paskvan filed suit in federal court. A jury found that he was passed over for sergeant because he is white. A three-judge appeals panel affirmed, writing:

“We think the jury could reasonably infer from the evidence that, because he is white, Paskvan was offered as the sacrificial lamb to appease the protesting minority organizations. ... The jury could reasonably infer that [the defendants] refused to promote Paskvan, in part, because he is white.”

[Paskvan v. City of Cleveland](#), #94-3593, 1995 U.S. App. Lexis 35535 (Unpub. 6th Cir.).

#### ❖ **Effect of bargaining agreements**

A Detroit police officer named Brown had fatally shot three people and wounded six others during a six-year period.

In 2001, the chief recommended Brown for promotion to sergeant. The Board, on its own initiative, failed to promote him. The union filed a grievance claiming that the Board’s failure to promote Brown violated the bargaining agreement.

An umpire-arbitrator found the dispute was arbitrable, and upheld the grievance. The Board challenged the award, and a trial court overturned it. On appeal, a three-judge panel reinstated the award, reversing the lower court.

The panel reasoned that the bargaining agreement “conferred authority on the arbitrator to interpret the terms of the CBA.” Therefore, the trial court “exceeded the scope of permissible review when it addressed whether the arbitrator’s interpretation was right or wrong.” [Detroit Police Officers Assn. v. City of Detroit](#), # 241574, 2003 Mich. App. Lexis 2850 (Unpub.).

While the promotion issue was under appeal, the estate of a man killed by Brown prosecuted a civil action in state court. A jury awarded the estate \$4 million, plus costs, interest and attorneys’ fees.

Brown appealed, claiming that he was deprived of a fair trial because the plaintiff's counsel:

1. Injected race into the proceedings.
2. Portrayed police officers as a group as untruthful and protective of each other.
3. Urged the jury to discount the truthfulness of an officer's testimony because she had invoked her Fifth Amendment privilege against self-incrimination.
4. Ignored a pretrial stipulation of the parties by introducing evidence that the deceased was a law-abiding individual who had great respect for police.
5. Used inflammatory language to influence the jury.

The three-judge appellate panel rejected these, noting that the record demonstrated that the actions of the plaintiff's counsel were not egregious or repetitive.

The panel wrote there was evidence that, after the first and second rounds of shooting, Brown again shot the deceased as he lay on the ground. Moreover, there were inconsistencies between the officers' trial testimony, their prior statements, and the physical evidence. These could have induced the jury to disbelieve the officers' version of events. [\*Grable v. Brown\*](#), #256215, 2005 Mich. App. Lexis 3173 (Unpub.).

- A news article revealed that the City of Detroit settled a second lawsuit against Brown for \$3 million.

## ❖ Conclusion

Police officers confront danger by circumstance, not choice. Suspects have been killed or wounded under a mistaken belief they were armed and dangerous. Often the evidence is disputed, and activists insist that officers are racially biased, untruthful and predisposed to violent behavior.

Passing over a promotional candidate because of community sentiment is likely to provoke a grievance – leading to arbitration – or a judicial challenge.

Management is on firm ground if a recent shooting violated policy or training protocols. As time passes, it is more difficult to lawfully reject a promotional candidate. Has the officer matured?

- In some cases, management has publicly opted for a political solution with the tacit knowledge that the courts or an arbitrator will reverse the decision to reject the candidate.

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