UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES FUERST,

Plaintiff,

v. Case No. 04-C-0295

DAVID A. CLARKE,

Defendant.

DECISION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

This action was commenced on February 27, 2004, when the plaintiff, James Fuerst ("Fuerst"), filed a complaint in the Milwaukee County Circuit Court, pursuant to 42 U.S.C. § 1983, alleging that his constitutional rights were violated by the defendant, David Clarke ("Clarke" or "the Sheriff"), the Sheriff of Milwaukee County. On March 24, 2004, the defendant removed this action to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1441, on the basis of federal question subject matter jurisdiction. Specifically, Fuerst alleges that Clarke deprived him of his First Amendment rights of free speech and free association by denying him a promotion based upon the public statements he made that were critical of Clarke's policies.

On September 28, 2005, this court granted the defendant's motion for summary judgment and dismissed this action. On July 27, 2006, the Court of Appeals for the Seventh Circuit reversed this court's decision and remanded this action. *See Fuerst v. Clarke*, 454 F.3d 770, 773 (7th Cir. 2006). Thereafter, on November 13, 2006, the plaintiff filed a motion for summary judgment. Likewise,

on November 15, 2006, the defendant filed a motion for summary judgment. Both motions for summary judgment are now fully briefed and are ready for resolution. For the reasons which follow, the plaintiff's motion for summary judgment will be granted in part and denied in part, and the defendant's motion for summary judgment will be granted in part and denied in part.

II. FACTUAL BACKGROUND

In accordance with the provisions of Civil Local Rule 56.2(a) (E.D. Wis.), the plaintiff's motion for summary judgment was accompanied by a set of proposed findings of fact. Likewise, the defendant's motion for summary judgment was accompanied by a set of proposed findings of fact. Both the plaintiff and the defendant also filed responses to the proposed findings of fact set forth by the opposing party. A review of the parties' respective proposed findings and the responses thereto reveal that the following are the material and (except where noted) undisputed facts that are relevant to the disposition of the cross motions for summary judgment.

Fuerst is employed as a deputy sheriff in the Milwaukee County Sheriff's Department. (Pl.'s Proposed Finding of Fact ("PPFOF" ¶ 1.) Deputy Fuerst was first employed by Milwaukee County as a deputy sheriff in 1974. (PPFOF ¶ 2.) After ten years of service with the Sheriff's Department, Deputy Fuerst resigned in June of 1984, and was rehired in August of 2000. (PPFOF ¶ 3.) Fuerst has a college degree and has earned credits towards a Master's degree. (PPFOF ¶ 4.)

Clarke was, at all times pertinent hereto, the Milwaukee County Sheriff and chief administrative officer of the Milwaukee County Sheriff's Department. (PPFOF ¶ 5.) Clarke was initially appointed to the office in March of 2002 and successfully ran for office in September and November of 2002. (PPFOF ¶ 6.) At all times pertinent hereto, Sheriff Clarke carried out the duties of the Milwaukee County Sheriff and acted under color of law. (PPFOF ¶ 7.)

The Milwaukee Deputy Sheriff's Association ("MDSA") is a labor organization within the meaning of §111.70(h), Wis. Stats. (PPFOF ¶ 9.) The MDSA has, pursuant to the Wisconsin Municipal Employment Relations Act ("MERA"), §111.70, Wis. Stats., *et seq*., been recognized by Milwaukee County as the exclusive bargaining representative for certain non-supervisory and supervisory deputies of the Milwaukee County Sheriff's Department. (PPFOF ¶ 10.) The MDSA is a party to the Collective Bargaining Agreement between Milwaukee County and the MDSA. (PPFOF ¶ 11.) Deputy Fuerst ran for and was elected to the position of president of the MDSA, effective January 1, 2003, and served in that capacity until resigning from that position effective January 1, 2005. (PPFOF ¶ 12.) After January 1, 2003, Fuerst often spoke on behalf of the MDSA on issues of concern to the MDSA. (PPFOF ¶ 13.)

After the Sheriff had been appointed, but while he was seeking election, the MDSA Board approved a "No Confidence Vote" in relation to the Sheriff's pending election. (PPFOF ¶ 15.) Fuerst was involved in that vote and was in charge of publicizing the results of that vote to the community at large. (PPFOF ¶ 16.) The intention was to bring that vote to the attention of the media in order to prevent Clarke from being elected. (PPFOF ¶ 17.) On September 8, 2002, the MDSA's "No Confidence Vote" was published in the *Milwaukee Journal Sentinel*. (PPFOF ¶ 18.)

The Sheriff admitted that Fuerst had been fighting the department "every step of the way" since being elected to president of the MDSA. (PPFOF ¶ 19.) Fuerst was involved in efforts to defeat Clarke in his election campaigns. Fuerst marched in the Labor Day parade in support of Clarke's opponent. Fuerst made several appearances with the opponent and was involved in door-to-door campaigning on his behalf. (PPFOF ¶ 20.)

In the fall of 2002, the Sheriff's Department conducted an examination for the position of sergeant. (PPFOF ¶ 25.) The sergeant's examination tested operational knowledge of the sheriff's department, as well as general supervision principles. (PPFOF ¶ 26.) On January 16, 2003, Milwaukee County generated a listing which provided the raw score and ranking for each of the 105 deputies who took the sergeant's exam. (PPFOF ¶ 27.)

Sergeants in the Milwaukee County Sheriff's Department serve as first-line supervisors with the primary responsibility for overseeing the deputy sheriffs. They are responsible for instructing and training deputies. They are the line representatives of the Sheriff in terms of his dealings with deputies. (PPFOF ¶ 28.)

Fuerst scored second out of the 105 individuals taking the sergeant's examination, and was ranked second on the "Eligible List." (PPFOF ¶ 30.) Fuerst's raw score was one-half of one percent (0.005%) lower than the deputy who scored highest on the examination and was ranked first on the Eligible List. (PPFOF ¶ 31.) In Fuerst's experience, no deputy having scored as high as he did on the promotional examination had ever been passed over for promotion. Clarke notes that Fuerst had been out of law enforcement for approximately 16 years and was only back with the department for a period of 3 years prior to taking the examination and that Fuerst was not directly involved in personnel issues. (PPFOF ¶¶ 32-33.) From 1964 until Fuerst became union president in 2002, ten MDSA presidents also held the rank of sergeant while serving as union president. Six of them ultimately rose to the ranks of Lieutenant, Captain, or Inspector. (PPFOF ¶ 100.)

On March 15, 2003, Fuerst submitted a resume and cover letter to the Sheriff, seeking consideration relative to promotion to the rank of sergeant. (PPFOF ¶ 34.) Fuerst was not interviewed for or promoted to the position of sergeant. (PPFOF ¶ 35.)

At all times material, Kevin Carr ("Carr") served as Inspector for the Milwaukee County Sheriff's Department. Carr was promoted to that position by Clarke in March of 2002. Carr previously served as Deputy Inspector under the previous Sheriff, Leverett Baldwin. (PPFOF ¶ 36.) Inspector Carr is the second highest ranking officer within the Sheriff's Department, second only to the Sheriff himself. (PPFOF ¶ 37.)

Sometime between March 15, 2003, and April 1, 2003, Fuerst and the Business Agent for the MDSA, Gerald Rieder, met with Inspector Carr of the Milwaukee Sheriff's Department. (PPFOF ¶ 38.) During the meeting, Inspector Carr acknowledged that Fuerst's resume was "impressive." (PPFOF ¶ 39.) On March 28, 2003, which was 13 days after Fuerst submitted his resume and cover letter to Sheriff Clarke, Inspector Carr issued a directive requiring resumes from all deputies on the "Eligible List" by April 4, 2003. (PPFOF ¶ 40.)

Milwaukee County Civil Service Rules address the procedure to be followed relative to promotions. (PPFOF ¶ 41.) The Human Resources Department provided the Sheriff with a list of the top "dozen or so" examinees taken from the Eligible List, who were "certified" to fill the promotional positions. (PPFOF ¶ 42.)

The Sheriff is not required to pick individuals from the list dependent upon where they ranked. Fuerst disagrees with this proposition to the extent that Fuerst assets that the Sheriff is required to choose deputies from the eligibility list based upon where they are ranked, insofar as the Milwaukee County Civil Service Rules limit the number of names from which he can choose to ten names for one vacancy, and two additional names for each vacancy thereafter. (PPFOF ¶¶ 43-44.)

The examinees "certified" by Human Resources included Fuerst, but did not include Deputy Sajdowitz, who ranked 24th on the Eligible List. (PPFOF ¶ 45.) Deputy Sajdowitz was given a

temporary appointment to a higher classification. (PPFOF ¶ 46.) The Sheriff had authority to make temporary sergeant promotions pursuant to the selective service rules. (PPFOF ¶ 47.)

The Sheriff was directed by an official with the Milwaukee County Human Resources Department that promotions must be made from the names "certified" from the Eligible List. (PPFOF ¶ 48.) The Sheriff did not want to promote from Human Resources' "certified" list of names. He wanted to "break down the bureaucracy" associated with Civil Service's control over the Sheriff's Department in terms of promotions. (PPFOF ¶ 49.)

On March 7, 2003, the Sheriff promoted the following two individuals to the rank of sergeant: Deputy Patricia Boehm, who finished first on the exam and ranked first on the Eligible List, and Deputy Melissa Enos, who finished 13th on the exam and ranked 13th on the Eligible List. Deputy Enos had been serving as an acting sergeant. (PPFOF ¶ 50.) Only Deputy Enos and Deputy Boehm were promoted off the Human Resources initial list of eligible individuals. (PPFOF ¶ 51.)

On April 2, 2003, Sheriff Clarke promoted Deputy Dennis Konkel, who had scored 14th on the examination and ranked 14th on the Eligible List, to the rank of sergeant. Deputy Konkol's promotion was described as "permanent" on the order of promotion. (PPFOF ¶ 52.) On April 2, 2003, Sheriff Clarke also promoted Deputy Thomas Meverden, who scored third on the examination and ranked third on the Eligible List, and Deputy Sajdowitz, who scored 24th on the examination and ranked 24th on the Eligible List, to the rank of sergeant. Both such promotions were described as "temporary" on the order of promotion. (PPFOF ¶ 53.) Although Deputy Sajdowitz ranked 24th on the Eligible List, his name was not on Human Resources' "certified" list of promotional candidates. (PPFOF ¶ 54.)

Prior to promoting those deputies, the Sheriff interviewed Deputy Meverden (who scored third on the examination and ranked third on the Eligible List), Deputy Coleman (who scored fourth on the examination and ranked fourth on the Eligible List), Deputy Parish (who scored fifth on the examination and ranked fifth on the Eligible List), Deputy Worden (who scored tenth on the examination and ranked tenth on the Eligible List), Deputy Enos (who scored 13th on the examination and ranked 13th on the Eligible List), Deputy Konkol (who scored 14th on the examination and ranked 14th on the Eligible List), Deputy Sajdowitz (who scored 24th on the examination, was not on Human Resources initial "certified" Eligible List, and ranked 24th out of all 105 examinees). (PPFOF ¶ 55.) The Sheriff determined who would be interviewed for promotion. (PPFOF ¶ 58.) The Sheriff did not give Deputy Fuerst a chance for an interview before promoting Deputy Enos, Deputy Boehm, Deputy Konkel, Deputy Meverden, and Deputy Sajdowitz. (PPFOF ¶ 59.)

According to Inspector Carr, this was because Fuerst disagreed with the Sheriff's "vision" and "mission," and demonstrated that disagreement by fighting the administration "at every turn on everything [the administration] was trying to do." That "fight" was based on the positions taken by the MDSA, "as embodied by the president who was Fuerst." (PPFOF ¶ 60.) In making his initial promotions to sergeant, the Sheriff wanted "people who were loyal, came in the door loyal to the vision." In his words, the Sheriff needed sergeants who demonstrated "a unity of purpose [and] mission." (PPFOF ¶ 62.) Inspector Carr did not believe Fuerst could be trusted to be loyal to the Sheriff's "vision," considering the various positions taken by Fuerst on behalf of the MDSA. (PPFOF ¶ 63.)

Specifically, Inspector Carr testified that Fuerst did not disagree with Sheriff Clarke's vison, that is, to make the Milwaukee Sheriff's office the best law enforcement agency in the state, but Fuerst had "a fundamental difference of opinion about how to do it." (PPFOF ¶ 92; Carr Dep. at 31, lines 9-20.) Carr also testified that he "had no specific reason to think that [Fuerst] could not be trusted to do his job, but [he did have doubts as to] whether [Fuerst] could be trusted to be loyal to the sheriff, considering the position that [Fuerst] had taken on a number of matters pertaining to changes that [Clarke] had made in the organization and the direction that we were heading." (PPFOF ¶ 92; Carr Dep. at 44, lines 15-21.)

On March 6, 2003, the *Milwaukee Journal Sentinel* published an article written by Spivak and Bice entitled "Work piling up for sheriff's requested flack."

> Sheriff David Clarke Jr.'s bid to hire a PR guy is creating a bit of a public relations problem for the rookie officeholder.
>
> Clarke has asked the County Board for permission to eliminate a civil-service post in his office and replace it with a professional flack, who can be hired and fired at his whim, at a salary of up to $71,500 annually. The board will vote on the request later this month.
>
> This comes on the heels of Clarke's request that the county pay his confidant Michael A.K. Whitcomb $12,000 a year to provide legal advice.
>
> Noting that Clarke's name is being tossed about as a potential mayoral candidate, Deputy Sheriff's Association President Jim Fuerst was skeptical of Clarke's latest brainstorm.
>
> "Is this going to be an extension of his campaign?" Fuerst said. "We've got a $3 million deficit . . . and he wants to hire a PR person. We could certainly find better things to do with $70,000 a year."
>
> Supervisor Robert Krug, who had Clarke's request delayed one month, said Milwaukee's latest media darling is doing just fine.
>
> "I don't think Sheriff Clarke needs any assistance getting publicity," Krug said.

Clarke made clear that as far as he's concerned, his critics can take their advice, and well, you know the rest.

"How I set the office up is within my purview," he said this week. "Somebody can have an opinion, but until they become sheriff, all they can do is offer up an opinion."

Clarke repeatedly insisted that his move to bring in a personal flack is not a way to stick the taxpayers with the bill to promote his fledgling political career. Instead, he said with a straight face, this is all about marketing his vision for the department.

Yeah, right.

"If you're asking, 'Is the purpose to make me look good?' No," Clarke said. "I'll look good only if my vision, goals and objectives are what the people want."

So much for Clarke's claims that he's not just another politician.

Even though the spot has yet to be created, he's been interviewing people for months. The key qualification: Think just like the boss.

"From the minute they walk in the door, they have to believe in my vision," said Clarke, who has butted heads with the deputy sheriffs in his year as the county's top cop. "The rest of the organization I'm stuck with. I can't just bring in 600 new deputies."

Though, of course, he would like to, given that 95% of the deputies who voted in a union election cast no-confidence votes against Clarke shortly before last year's primary.

Whoever gets the job as his flack will be kept busy smoothing all the feathers that the sheriff is certainly ruffling.

Witness Clarke's reaction to Supervisor Krug's out-of-left-field resolution calling for a number of county jobs - including Clarke's - to be appointed, not elected.

The sheriff told Krug's committee that the voters were more interested in slashing the size of the County Board, something he accused the supervisors of dragging their feet on. Clarke then went off on his own tangent.

"Civil servants have been described as headless nails - once you get them in, they are impossible to get out," Clarke said. "They figure that if they are truly efficient, they will be out of work, they will not survive."

So would you like to be this guy's PR man?

(PPFOF ¶¶ 64-67; Cermele Aff., Ex. C.) Inspector Carr discussed the March 6, 2003 "Spivak and Bice" article with the Sheriff "fairly contemporaneously with its publication." (PPFOF ¶ 68.)

On April 15, 2003, Fuerst requested and was granted a "face-to-face" meeting with the Sheriff. (PPFOF ¶ 69.) The Sheriff only met with Fuerst after he requested a meeting, and after the promotions were made of deputies ranking lower on the Eligible List than he. (PPFOF ¶ 61.) Fuerst, the Sheriff, and Inspector Carr were present at the meeting. (PPFOF ¶ 70.)

During the meeting, Fuerst questioned the Sheriff as to why he was not promoted to the rank of Sergeant, given his ranking of second on the Eligible List and his prior accomplishments. (PPFOF ¶ 71.) During the meeting, Fuerst also questioned why other Deputies who scored lower on the examination and ranked lower on the Eligible List were promoted over him. (PPFOF ¶ 72.) The Sheriff stated that he did not feel he could trust Fuerst, given that he viewed Fuerst as not being "loyal" to the Sheriff's "vision." (PPFOF ¶ 73.)

During the meeting the Sheriff provided Fuerst with a copy of the March 6, 2003 "Spivak & Bice" article. The copy of the article provided to Fuerst contained yellow highlighting over that portion of the article where Fuerst was quoted as being critical of Sheriff Clarke's proposal to eliminate a civil-service position in the Sheriff's Department. Although Sheriff Clarke could not recall whether the article contained any highlighted portion, he did not deny that he provided a copy of the "Spivak & Bice" article to Fuerst during that meeting in response to Fuerst's questions as to why he had been passed over for promotion. (PPFOF ¶ 74.)

The parties dispute the explanation given during the face-to-face meeting. Fuerst states that at no time during the "face-to-face" meeting did the Sheriff advise Fuerst that his qualifications were

inadequate and that at no time did the Sheriff explain that Fuerst lacked sufficient experience, or was unqualified, to be a sergeant. The only explanation given was the March 6, 2003 "Spivak and Bice" article. Clarke disagrees that the only explanation given was the "Spivak and Bice" article. The Sheriff agrees that he did not advise Fuerst that his qualifications were inadequate, but states that he also did not directly respond to Fuerst's request for an explanation as to why he was not selected. (PPFOF ¶¶ 75-76.) The Sheriff also states that he made no oral reference to the Spivak and Bice column during their meeting. (PPFOF 77.)

During the face-to-face meeting with the Sheriff, Fuerst explained that, as a sergeant, Fuerst would carry out his orders, would act in the best interests of the Sheriff's Department, and would not do anything as a sergeant that would cause any embarrassment, harm or detriment to either the Sheriff or the Department. (PPFOF ¶ 95.) Fuerst also explained to the Sheriff that Fuerst had to wear two hats - he wore a union hat and a law enforcement hat, and understood that he had to separate those duties. (PPFOF ¶ 96.) Fuerst further explained to the Sheriff that, as union president, there would be times where he would have to speak on behalf of his members – even when he did not personally agree with them – and even though "some of those things aren't going to be pleasant." Because Fuerst had taken on that union responsibility, he would not shirk it. (PPFOF ¶ 97.)[1]

Had he been promoted, Fuerst would not have allowed his duties as MDSA President to interfere with his duties as Sergeant. Clarke disagrees. Fuerst found a number of Clarke's policies to be offensive to deputy sheriffs. And, Fuerst would not have resigned his position as president of

[1] The defendant disputes the plaintiff's proposed findings of fact ¶¶ 95-97. However, in his response, the defendant did not "include specific citations to evidentiary materials in the record which support the claim that a dispute exists," as required by Civil Local Rule 56.2(b)(1). Such being the case, the court concludes that these facts are not genuinely in dispute.

the labor union if he had been promoted to sergeant. (PPFOF ¶¶ 79-80.) If Fuerst had been selected as sergeant, in his capacity as MDSA president, he would have opposed policies maintained and formulated by Clarke that the MDSA did not like, but he would have upheld the policies that the MDSA felt were good for the department. (PPFOF ¶ 81.) Fuerst's duties as a union president included speaking out and holding press conferences to challenge policies the union was unhappy with. (DPFOF ¶ 81.)

On June 15, 2003, the Milwaukee Journal Sentinel published an article written by "Spivak and Bice," entitled "Union officer tests well, but forget stripes."

> Here's some unsolicited advice to Deputy Jim Fuerst, who longs to be sergeant: Don't invest in those stripes as long as David Clarke Jr. is your boss.
>
> Breaking with tradition, Sheriff Clarke recently promoted five cops of his own choosing, pretty much disregarding the scores on the promotional exam. The first-term sheriff dipped as low as the 24th finisher on the test to fill the sergeants' slots.
>
> Skipped over in the process was Fuerst, who finished second on the test.
>
> The veteran deputy is head of the Milwaukee Deputy Sheriffs Association and a critic of the sheriff. The union last year endorsed Clarke's opponent, Peter Misko, and OK'd a vote of no confidence for the sheriff - a vote Fuerst played a key role in organizing.
>
> Before the fall primary, Fuerst made his and the union's backing of Misko crystal clear while marching in the Labor Day parade.
>
> "Jim was right behind the sheriff, saying, "Don't vote for this guy - here's your man,'" said Joe Kuntner, secretary of the association.
>
> So why would this guy even bother taking the sergeant's exam?
>
> Because back when Clarke showed up for his endorsement interview with the union in March 2002, the sheriff vowed that he would follow the standard operating procedure of taking names off the list in numerical order when handing out stripes.

Fuerst, no doubt, felt even more confident about snagging his promotion and hefty raise - sergeant makes $20,000-plus more a year than a deputy - when Clarke tapped the No. 1 finisher on the test to fill the first vacancy.

Then the rules changed. The sheriff demanded resumes from each of the other top qualifiers and began interviewing those he eventually promoted. The other four getting the nod finished third, 13th, 14th and bring up the rear, 24th on the exam.

"There's no doubt I've been denied a promotion at this time - I have to suspect it is because of my activity with the union," Fuerst said.

He added later, "There's no a logical reason to skip over me."

Asked about this, Clarke did the unheard of for a politician. He acknowledged a flip-flop.

He said he told the union membership that he would do things by the numbers, just like the Milwaukee Police Department, where Clarke spent the vast majority of his career.

But Clarke said he has since changed his mind, concluding that only those who share his vision for the department should be bumped up the ladder."

"Since I made that statement, I have more information, number one, and, number two, this organization is at a critical position early on, and I'm trying to change the culture of this organization," said the man who's gearing up to run for mayor.

Fuerst countered that Clarke's turnaround is all personal.

"I found it ironic that the great revelation didn't take place till I was No. 1 on the list," he said.

One to seek out conflict, Fuerst didn't hesitate to go into the sheriff's office to get a face-to-face explanation about what happened.

The sheriff didn't focus on the Labor Day parade or the no-confidence vote, Fuerst said. Instead, he said, Clarke locked onto Fuerst having the gall to publicly criticize him.

In particular, Clarke was upset with this remark that Fuerst made to us in March about the sheriff's plan to hire a $70,000-per year flack: "Is this going to be an extension of his campaign"? We've got a $3 million deficit . . . and he wants to hire a PR person. We could certainly find better things to do with $70,000 a year."

> Rather innocuous criticism, particularly from a union type.
>
> But not to Clarke.
>
> "He believes I did a disservice to this agency because I spoke out against his PR person," Fuerst said.
>
> Clarke didn't deny that the remark may have cost the deputy. "Unfortunately for him, that's a decision for the sheriff to make,' Clarke snapped.
>
> And this type of public criticism won't go unnoticed by this sheriff. "They're synonymous, trust and loyalty," Clarke said. "I'm talking about loyalty to the vision that I have."

(PPFOF ¶¶82-87; Cermele Aff., Ex. I.)

On June 8, 2004, Fuerst made a statement that appeared in the *Milwaukee Journal Sentinel*. "Clarke was piling on to score political points and often ignored punishment recommendations by his top command staff." That was the view of the MDSA and of Fuerst personally. Fuerst also stated in reference to Clarke in the same article, that "he shoots from the hip," and that his "heavy handed discipline has hurt morale." Both statements represented Fuerst's personal view as well as his view as union president. (PPFOF ¶ 89; DPFOF ¶ 83.) On June 11, 2004, Fuerst was quoted in an article in the *Milwaukee Journal Sentinel* as saying "Inmates know they have a sheriff who has their ear" in reference to inmates in the custody of Milwaukee County. (PPFOF ¶ 90.)

The Milwaukee County Civil Service Commission was created pursuant to Wis. Stat. § 63.01-13. (DPFOF ¶ 72.) The Milwaukee County Civil Service Commission maintains a framework under which persons who believe a merit system violation has occurred may file a complaint. (DPFOF ¶ 73.) Milwaukee County Civil Service Commission Rule IV Section 1(6) provides that all promotions will be made "solely with reference to merit and fitness." (DPFOF ¶ 74.) As Sheriff

and head of the Sheriff's Department, Sheriff Clarke had ultimate control over promoting employees within the Sheriff's Department, including, but not limited to, Deputy Fuerst. (PPFOF(2) ¶ 80.)[2]

III. SUMMARY JUDGMENT STANDARD

A district court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (quoting advisory committee's note to 1963 amendment of Fed. R. Civ. P. 56(e)). "Summary Judgment is not appropriate 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477

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[2] Pursuant to Civil Local Rule 56.2(b)(2), and in response to the defendant's proposed findings of fact submitted in support of his motion for summary judgment, the plaintiff set forth additional factual propositions deemed to be relevant to the defendant's motion for summary judgment. The plaintiff started numbering such propositions at paragraph 80. However, because another factual proposition submitted in support of the plaintiff's motion for summary judgment is also numbered paragraph 80, and has previously been referred to as PPFOF ¶ 80, the court will refer to the factual propositions submitted in response to the defendant's proposed findings of fact as PPFOF(2). The court also notes that the defendant did not respond to PPFOF(2) ¶ 80, and such being the case, the court finds that this fact is not genuinely in dispute.

U.S. 317, 323 (1986). A party opposing a properly supported summary judgment motion "may not rest upon the mere allegations or denials of the adverse party's pleading" but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001). To state it differently, "'[a] party will be successful in opposing summary judgment only when they present definite, competent evidence to rebut the motion.'" *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000) (quoting *Smith v. Severn*, 129 F.3d 419, 427 (7th Cir. 1997)).

To determine whether a genuine issue of material fact exists, the court must review the record, construing all facts in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Heft v. Moore*, 351 F.3d 278, 282 (7th Cir. 2003) (quoting *Anderson*, 477 U.S. at 255). "'In the light most favorable' simply means that summary judgment is not appropriate if the court must make 'a choice of inferences.'" *Draghi v. County of Cook*, 184 F.3d 689, 691 (7th Cir. 1999) (quoting *Smith*, 129 F.3d at 425). "The evidence must create more than 'some metaphysical doubt as to the material facts.'" *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (quoting *Johnson v. Univ. of Wisconsin-Eau Claire*, 70 F.3d 469, 477 (7th Cir. 1995)). A mere scintilla of evidence in support of the nonmovant's position is insufficient. *Id.* (citing *Anderson*, 477 U.S. at 252). Because the parties in this case have filed cross motions for summary judgment, the court must extend the required favorable inferences to each when considering the other's motion. *See McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 687 (7th Cir. 1991).

Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

IV. DISCUSSION

In its decision and order reversing and remanding this action, the Seventh Circuit held that "sergeants in the Milwaukee County Sheriff's Department are not policymaking officials . . . ." *Fuerst v. Clarke*, 454 F.3d 770, 773 (7th Cir. 2006). The court, however, went on to state that"[a]t least [a sergeant's] status as [a] policymaker[] is not so clear that the issue can be resolved on summary judgment." *Id.* Despite these seemingly incongruous statements, it appears that the Seventh Circuit concluded, as a matter of law, that a sergeant in the Milwaukee County Sheriff's Department is not a policymaking official. In other words, a sergeant in the Milwaukee County Sheriff's Department is not subject to the *Elrod-Branti* political patronage exception to the general prohibition against denying benefits based on a public employee's exercise of his or her First Amendment rights. On remand, neither party argues that there is a genuine issue of material fact as to whether a sergeant in the Milwaukee County Sheriff's Department is a policymaking official. Nor does either party argue that the duties and responsibilities of a sergeant in the Milwaukee County Sheriff's Department are not clearly established such that there is a question of fact regarding a sergeant's actual duties.[3]

[3] An individual's status as a policymaking employee frequently poses a fact question. However, when the duties and responsibilities of a particular position are clearly defined by law and regulations, a court may resolve this issue without the aid of a finder of fact. *See Vargas-Harrison v. Racine Unified School Dist.*, 272 F.3d 964, 972 (7th Cir. 2001).

Thus, the questions before the court on remand are: (1) with respect to the plaintiff's official capacity claim, whether Milwaukee County can be held liable for Sheriff Clarke's actions; (2) with respect to the plaintiff's individual capacity claim, whether Sheriff Clarke is entitled to qualified immunity; and (3) whether the Milwaukee County Sheriff's Department's interest in effectively and efficiently providing government services outweighs the plaintiff's First Amendment right to speak on an issue of public concern.

A. Official Capacity Claim

As previously stated, the plaintiff has sued the defendant in both his official and his individual capacity. However, a suit against an individual in his official capacity, "generally represent[s] only another way of pleading an action against an entity of which [the individual] is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotations omitted). Here, that means that an official capacity suit against Clarke is in reality a suit against the Milwaukee County Sheriff's Department. *See id.* at 166 ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Thus, the inquiry becomes whether the Milwaukee County Sheriff's Department, or, more precisely, Milwaukee County, can be held liable for the actions Clarke took as the Milwaukee County Sheriff.[4]

In *Monell v. New York City Dept. of Social Servs.*, the Supreme Court held that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S. 658, 691

[4] The parties address this issue as whether Clarke is "immune from suit in his official capacity." However, "[t]he only immunities available in an official capacity suit are those that may be asserted by the governmental entity itself (*e.g.*, Eleventh Amendment immunity or sovereign immunity)." *Killinger v. Johnson*, 389 F.3d 765, 771 (7th Cir. 2004) (internal quotations omitted).

(1978). In other words, a municipality cannot be held liable simply because one of its employees violates an individual's constitutional or federal statutory rights. Rather, the conduct complained of must result from an official municipal policy or custom in order to render the municipality liable. *See id.* In *Lawrence v. Kenosha Cty.*, the Seventh Circuit summarized the relevant Supreme Court case law and concluded that there are three ways by which a municipality may be held liable under § 1983. 391 F.3d 837, 844 (7th Cir. 2004); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 735 (7th Cir. 1994) (superceded by statute on unrelated point). "There must be: (1) an express policy that would cause a constitutional deprivation if enforced; (2) a common practice that is so widespread and well settled as to constitute a custom or usage with the force of law even though it is not authorized by written law or express policy; or (3) an allegation that a person with final policy-making authority caused the constitutional injury." *Lawrence*, 391 F.3d at 844.

Here, Fuerst argues that Sheriff Clarke, that is, a person with final policymaking authority, caused the alleged constitutional injury. To determine whether an official has final policymaking authority, the court must look to state and local law. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). Furthermore, the question is not whether the individual is a "policymaker" in some generalized sense of the term, but rather,"whether [the] governmental official[] [is the] final policymaker[] for the local government in a particular area, or on a particular issue." *McMillian v. Monroe County, Ala*, 520 U.S. 781, 785 (1997); *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (stating that the court must identify "those officials who have the power to make official policy *on a particular issue*") (emphasis added); *Praprotni*k, 485 U.S. at 123 (stating that "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business").

As the Seventh Circuit explained,

> [t]racking language in *Monell* courts often refer to the municipality's final decisionmaking authority as its "final policymaking authority." These usages are potentially misleading. It doesn't matter what *form* the action of the responsible authority that injures the plaintiff takes. It might be an ordinance, a regulation, an executive policy, or an executive act (such as firing the plaintiff). The question is whether the promulgator or the actor, as the case may be–in other words, the decision maker–was at the apex of authority for the action in question. An executive official who rather than making policy merely implements legislative policy acts merely as a delegate of the legislature, and his act is therefore not the act of the municipality itself for purposes of liability under section 1983.

Gernetzke v. Kenosha Unified Sch. District No. 1, 274 F.3d 464, 468 (7th Cir. 2001) (citations omitted) (emphasis in original). Indeed, municipal liability under § 1983 is limited "to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority." *Id.* at 469.

Thus, the court must determine, as a matter of law, whether Clarke "speak[s] with final policymaking authority for [the Milwaukee County Sheriff's Department] concerning [promotion decisions]." *McMillian*, 520 U.S. at 784-85 (1997) (internal quotations omitted); *see also Jett* , 491 U.S. at 737 (stating that the "court's task is to identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue"); *see also id.* (stating that "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge"). In so doing, the court must examine the "relevant legal materials, including state and local positive law, as well as "'custom or usage' having the force of law." *Jett*, 491 U.S. at 737 (quoting *McMillan*, 520 U.S. at 784-85).

First, turning to state law, Wisconsin Statute section 59.26, provides, in pertinent part, that:

> [w]ithin 10 days after entering upon the duties of the office of sheriff, the sheriff shall also appoint . . . deputy sheriffs for the county as follows:
>
> (a) One for each city and village in the county that has 1,000 or more inhabitants.
>
> . . .
>
> (2) Subject to sub. (10), the sheriff may appoint as many other deputies as the sheriff considers proper.
>
> (3) Subject to sub. (10), the sheriff may fill vacancies in the office of any such appointee, and he or she may appoint a person to take the place of any under-sheriff or deputy who becomes incapable of executing the duties of that office.

Wis. Stat. § 59.26. Second, the court turns to the "custom and usage" evidence presented by the parties, that is, deposition testimony, personnel manual provisions, and affidavits. *See Gelin v. Hous. Auth. of New Orleans*, 456 F.3d 525, 528 (5th Cir. 2006) (relying on deposition testimony, personnel manual provisions, and affidavits, as "custom and usage" evidence when determining who was the "final policymaker"). The Departmental Manual of the Milwaukee County Sheriff's Department ("Sheriff's Department Manual") provides that the "Sheriff will plan, organize, staff, direct, and control the personnel and resources of the Department to attain the goals and to implement the regulations and policies set forth herein." (Reider Aff., Ex. A at § 1.03.01(11).) The Sheriff's Department Manual also provides that "the Sheriff may assign, detail or transfer any member of the department whenever he feels such action is in the best interest of the organization." (Reider Aff., Ex. A at § 1.03.14(K).).

At his deposition, Clarke testified that at an MDSA meeting, approximately two weeks after he was appointed Sheriff, he was asked how he was going to handle promotion decisions, and that he responded that he would be inclined to go in the order that the names appear [on the list], and that

he would take a "look at it." (Clarke Dep. at 48-49.) Clarke further testified that as Sheriff and head of the Sheriff's Department, he had "ultimate control" over promoting employees within the Sheriff's Department, including, but not limited to, Deputy Fuerst. (PPFOF(2) ¶ 80.)[5]

Clarke also testified that Human Resources had provided him with a list of the top "dozen or so" examinees taken from the Eligible List, who were "certified" to fill the vacant sergeant positions. (PPFOF ¶ 42.) Clarke testified that he did not want to be limited to the initial "certified" list of examinees. (PPFOF ¶ 49.) Clarke wanted the entire Eligible List and he instructed Inspector Carr to get him the entire Eligible List. (Clarke Dep. at 27.) Clarke also testified that initially he was directed by an official with the Milwaukee County Human Resources Department that promotions must be made from the names "certified" from the Eligible List, that is, specifically he was told: "you only get so many openings, you only get so many names." (PPFOF ¶ 48; Clarke Dep. at 29.) Clarke testified that he "decided [he] was not going to allow the county bureaucracy to prevent [him] from putting together a leadership team. So [he] wanted all of the eligible people so [he] could go through that entire list and not just the ones they wanted to give [him] so [he] could round out this leadership team." (Clarke Dep. at 29-30.) In the end, Inspector Carr provided Sheriff Clarke with the entire Eligible List. (Clarke Dep. at 30.)

The defendant argues that the Milwaukee County Civil Service Commission has final policymaking authority regarding promotion decisions in the Milwaukee County Sheriff's Department. Pursuant to sections 63.01 to 63.13 of the Wisconsin Statutes, the Milwaukee County

[5] In his reply brief, the defendant states that he disputes plaintiff's proposed finding of facts regarding whether Clarke has final policymaking authority over promotion decisions in the Milwaukee County Sheriff's Department. (Def.'s Reply Br. at 3.) However, the defendant did not file a response to PPFOF(2) ¶ 80 pursuant to Civil Local Rule 51.2(b). As such, the court concludes that this fact is not genuinely in dispute.

Civil Service Commission conducts hearings and renders decisions on merit system violations and appeals of actions taken by the Director of Human Resources of Milwaukee County. The Milwaukee County Civil Service Commission also exercises administrative control over the merit system, including the promulgation and amendment of the merit system rules. (Milwaukee County 2007 Adopted Operating Budget Narrative *available* at http://www.county.milwaukee.gov/2007AdoptedOperating20450.htm.) Milwaukee County Civil Service Rule IV § 1(6) provides that all selections of employees from civil service lists must be made "solely with reference to merit and fitness." Likewise, Wisconsin Statute section 63.14(1) provides that "no factor or influence other than the fitness of a person to perform the duties of the position . . . to which the person is seeking appointment, shall affect the determination of . . . promotions." Wis. Stat. § 63.14(1).

In sum, the Milwaukee County Civil Service Commission promulgates rules regarding the merit system, establishes eligibility lists, and hears appeals and renders decisions regarding merit system violations. Undoubtedly, the rules established by the Civil Service Commission should influence personnel decisions made by the various "appointing authorities" in Milwaukee County. That said, I cannot say that the Civil Service Commission is the "final policymaker" regarding promotion decisions in the Milwaukee County Sheriff's Department. This is because the Civil Service Commission has simply been granted the authority to review an employment decision if an employee elects to appeal it. In other words, it is the Civil Service Commission's task to review employment decisions for conformity with applicable law and regulations, not to specifically direct the Sheriff's personnel decisions in the first instance.

The Civil Service Commission does not *finalize* personnel decisions that the Sheriff merely recommended or proposed to the Commission. *See Hitt v. Connell*, 301 F.3d 240, 248-49 (5th Cir.

2002) (holding that "the Bexar County Civil Service Commission did not assume final decisionmaking authority" because the commission "did not finalize a decision that Constable Connell had merely recommended or proposed"). Instead, it is the Sheriff who makes the final personnel decision and if an aggrieved employee so chooses, he or she may have the personnel decision reviewed by the Civil Service Commission to determine whether the decision complied with the merit system rules. *See* Milwaukee County Civil Service Rule IV, § 1(6) ("Any person aggrieved by the action of the Director of Human Resources may appeal such action to the Civil Service Commission.") Nor has the Civil Service Commission been granted express statutory authority over individual employment decisions. To be sure, it is conceivable that the Civil Service Commission could promulgate a rule that no employment decision becomes final until approved by the Commission, however, here, no such rule is present. *See Hitt*, 301 F.3d at 248-49.

The defendant further argues that, because Milwaukee County Civil Service Rule IV, § 1(6) provides that all selections of employees from civil service lists be made "solely with reference to merit and fitness," to the extent Clarke departed from that policy of selecting people purely on the basis of merit and fitness, it does not create municipal liability. I disagree. Even assuming that the Civil Service Commission is the "final policymaker" with respect to promotion decisions in the Sheriff's Department, and thus, the Civil Service Rules represent Milwaukee County's *official* policy with regard to promotions, it is undisputed that the Sheriff, in actuality, was not constrained by those *official* policies. And, such a repeated departure from *official* policy could create a new policy, or at the very least, show by way of evidence of "'custom and usage having the force of law" that final policymaking authority regarding promotion decisions in the Sheriff's Department does in fact reside with Sheriff Clarke. *See Praprotnik*, 485 U.S. 112 at 130-31.

To be sure, Milwaukee County Civil Service Rule IV(3) provides, in pertinent part, that "the Director of Human Resources may (a) certify to the appointing authority up to ten names from the appropriate list of eligibles," and Civil Service Rule IV(4) provides that "[i]f certification is made under Rule IV, Section 1(3)(a), and more than one vacancy in the same classification is to be filled, two additional names may be certified for each additional vacancy, providing there are sufficient names on the eligible list." However, as aforementioned, Sheriff Clarke was not satisfied with the initial "certified" list he was provided by Human Resources and from which he was required, that is, pursuant to the Civil Service Rules, to make his promotions to the rank of sergeant. Instead, Clarke wanted to be able to make his promotion decisions after reviewing the entire Eligible List. And, while Clarke faced some initial resistance toward his request to obtain the entire Eligible List, in the end, Clarke was *not* constrained by the Civil Service Rules when determining whom to promote to the rank of sergeant. *See Praprotnik*, 485 U.S. at 127 ("When an official's discretionary decisions are *constrained* by policies not of that official's making, those policies, rather than the [decision-maker's] departures from them, are the act of the municipality.") (emphasis added). Thus, the *actual* policy regarding promotions, at least in the Sheriff's Department, is not the policy set forth in the Civil Service Rules, and the *actual* final policymaker was the Sheriff. Simply stated, in light of both state law and the "custom and usage" evidence presented, I am persuaded that the final policymaker with respect to promotion decisions in the Sheriff's Department is the Sheriff himself.

In *Praprotnik*, Justice O'Connor explained, in response to a concern raised in Justice Brennan's concurrence, that:

> [w]e nowhere say or imply, for example, that a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts

> inconsistent with that policy. Rather, we would respect the decisions, embodied in state and local law, that allocate policymaking authority among particular individuals and bodies. *Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced.*

485 U.S. 112, at 130-31 (internal quotation marks and citation omitted) (emphasis added). Furthermore, in *Auriemma v. Rice*, the Seventh Circuit stated, in pertinent part, that:

> Even executive action in the teeth of municipal law could be called policy. It would not twist the language to say that for a long time Chicago's policy was to use public employment to reward political friends and punish political enemies, even though state and local law required merit selection for many positions. A practice undertaken by the executive power and suffered by the legislative power may be said to reflect a custom with the force of legislation.

957 F.2d 397, 399 (7th Cir.1992). "The existence of a well-established, officially-adopted policy will not insulate the municipality from liability where the policymaker herself departs from these formal rules." *Gonzalez v. Ysleta Independent School Dist.*, 996 F.2d 745, 754 (5th Cir. 1993); *see also Praprotnik*, 485 U.S. at 130-32. Similarly, here, I cannot say that the mere existence of the Civil Service Rules should insulate Milwaukee County from liability where it is undisputed that Sheriff Clarke himself elected not to comply with the Civil Service Rules.

Simply put, at least under the facts presented in this case, I am persuaded that Clarke had final policymaking authority regarding promotion decisions in the Milwaukee County Sheriff's Department. Clarke was the highest ranking law enforcement official in Milwaukee County; he was responsible for the entire Milwaukee County Sheriff's Department; and, he had ultimate responsibility for all personnel decisions made in the Milwaukee County Sheriff's Department. *See Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992) (holding that actions taken by superintendent of police in his official capacity with respect to allegedly coerced resignations of county police officers were sufficient to impose liability on county). Furthermore, Clarke "was at

the apex of authority" for the decision regarding whom to promote to the rank of sergeant. *Gernetzke*, 274 F.3d at 468. And, Clarke's authority to make the promotion decision was final, "in the special sense that there [was] no higher authority." *Id.* at 369.

In conclusion, and for all of the foregoing reasons, Sheriff Clarke possessed the authority to establish final employment policy regarding promotions for the Milwaukee County Sheriff's Department. Indeed, at the very least, Clarke had been delegated the power to establish final employment policy regarding promotions in the Sheriff's Department by the Civil Service Commission. Thus, the actions taken by Clarke in his official capacity as Milwaukee County Sheriff are sufficient to impose liability on Milwaukee County.

B. Qualified Immunity

To reiterate, the plaintiff has sued the defendant in both his official capacity as well as his individual capacity. With respect to the individual capacity claim, Clarke argues that he is entitled to qualified immunity. Specifically, Clarke argues that he is entitled to qualified immunity because it was not clearly established in April of 2003 that the position of sergeant in the Milwaukee County Sheriff's Department was not a "policymaking" position. In response, the plaintiff argues that it was not objectively reasonable for Clarke to have believed that a sergeant in the Milwaukee County Sheriff's Department was a policymaking employee. (Pl.'s Br. in Resp. to Def.'s Mot. for Summ. J. at 17.)

The court undertakes a two-part inquiry when determining whether a defendant is entitled to qualified immunity. The threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). And, "[i]f no constitutional right would have

been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* However, if the facts alleged make out a constitutional violation, then the court must determine "whether the right was clearly established." *Id.* This inquiry is a specific one: "The relevant, dispositive inquiry is whether it would be clear to a reasonable [person] that the conduct was unlawful in the situation he confronted." *Id.* at 202. A right is clearly established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The action's unlawfulness must be "apparent" from pre-existing law. *Id.*

Simply stated, I am persuaded that in April of 2003 it was not clearly established that a sergeant in the Milwaukee County Sheriff's Department did not fall within the *Elrod-Branti* policymaking exception to the general prohibition against denying benefits to government employees because of their political affiliation. Indeed, in September of 2005, this court concluded that, based upon Seventh Circuit case law holding that deputy sheriffs were policymakers in various Sheriff's Departments, a sergeant in the Milwaukee County Sheriff's Department was a "policymaking" official such that Sheriff Clarke could take into consideration the fact that Fuerst had publicly advocated positions in conflict with his superior's job-related policy viewpoints when determining whom to promote to the rank of sergeant without running afoul of the First Amendment.

In so doing, this court relied upon *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) and its progeny. In *Upton*, the Seventh Circuit concluded that "deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." 930 F.2d 1209, 1218 (7th Cir. 1991); *see also id.* at 1210 (stating that the "Sheriff's Department of Kankakee County serves a rural Illinois

community and employs between 70 and 80 deputy sheriffs" and thus concluding that the 70 to 80 deputy sheriffs were "policymaking" employees). This court also relied upon *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993) and *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993), cases in which the Seventh Circuit held that a deputy sheriff, that is, a law enforcement official ranking below the rank of sergeant, was a policymaking official. *See also Riley v. Blagojevich*, 425 F.3d 357 (7th Cir. 2005) (noting in a "summary of previous cases" that political affiliation had been held to be a permissible qualification for deputy sheriffs in *Upton* and *Dimmi*g, however, in dictum in *Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir.2000), the court commented that it was unlikely that the hundreds of deputy sheriffs in the Cook County, Illinois Sheriff's Department would be considered to be policymakers).

> Of course, in *Fuerst v. Clarke*, 454 F.3d 770, the Seventh Circuit distinguished such cases.
>
> > The defendant points to cases in which this court has held that a "deputy sheriff" is a policymaking official. *Mitchell v. Thompson*, 18 F.3d 425, 427 (7th Cir.1994), however, involved a chief deputy. In *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir.1989), the deputy sheriff was the sheriff's "alter ego." *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir.1991), and *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir.1993), do treat deputy sheriffs as policymaking officials, but *Upton* notes that "particularly in a small department, a Sheriff's core group of advisers will likely include his deputies," 930 F.2d at 1218, while here we have a large department. *Upton* notes further that "state legislatures may choose to adjust state laws to protect some level of party affiliation or participation," *id.*, which Wisconsin has done. *Upton* distinguished an earlier case on the ground that there an ordinance protected the deputy sheriff against political firing, thus indicating, like the Wisconsin statutes in the present case, that political loyalty to the sheriff was not a requirement for effective performance of the deputy's job. *Dimmig* does not indicate the nature of the deputy sheriffs' duties, but, like *Upton*, was a case in which the sheriff's department had much less hierarchy than the Milwaukee County Sheriff's Department. Deputy sheriffs in both cases may have been delegated broader powers than deputy sheriffs and sergeants in the Milwaukee department.

454 F.3d at 773-74.

That said, I am satisfied that it was not clearly established in April of 2003 that a sergeant in the Milwaukee County Sheriff's Department was not a policymaking employee. *See Carlson v. Gorecki*, 374 F.3d 461, 466 (7th Cir. 2004) (whether position is a policymaking position is relevant to determining whether the defendant is entitled to qualified immunity). Indeed, the relevant question is not whether Clarke's actions were expressly authorized by existing law, but rather, "whether they were *clearly forbidden*-i.e., whether a reasonable official would have known the actions in question were illegal." *Wernsing v. Thompson*, 432 F.3d 732, 749 (7th Cir. 2005) (emphasis added). And, "[i]n the absence of a case factually similar to the one at bar, an official is entitled to qualified immunity unless the alleged misconduct constitutes an obvious violation of a constitutional right. *Id.* Indeed, "[p]ublic officials need not predict, at their financial peril, how constitutional uncertainties will be resolved." *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005). In sum, the court concludes that with respect to the plaintiff's claim brought against Clarke in his individual capacity, Sheriff Clarke is entitled to qualified immunity.

C. Pickering Balancing

As previously stated, the next question before the court is whether the Sheriff's Department's interest in effectively and efficiently providing government services outweighs the plaintiff's First Amendment right to speak on an issue of public concern. Specifically, the defendant argues that, given Fuerst's speech, his promotion would have created the potential for disruption in the efficient operation of the Sheriff's Department. In response, the plaintiff argues that Fuerst's comments did not create the potential for disruption that would "substantially impede" the functioning of the Sheriff's Department. The plaintiff further argues that Clarke has not presented any evidence that

Clarke actually considered such potential disruptiveness when he decided not to promote Fuerst to the rank of sergeant.

It is well-established that the government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). Yet, the government "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Accordingly, the court's task, as defined in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

When considering a First Amendment retaliation claim, the court applies the *Pickering* balancing test. Under this burden-shifting test, the plaintiff initially has the burden to show by a preponderance of the evidence that he engaged in constitutionally protected activity, i.e. the plaintiff must prove that his speech involved a matter of public concern, and "that this conduct was a 'substantial factor' or . . . a 'motivating factor'" in the adverse employment decision. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002). If the plaintiff succeeds, the burden shifts to the defendant to show "by a preponderance of the evidence that [he] would have [either] reached the same decision . . . even in the absence of the protected conduct," or that the government's interest in effectively and efficiently providing government services outweighs the plaintiff's First Amendment interests. *Mt. Healthy*, 429 U.S. at 287; *Gustafson*, 290 F.3d at 906.

Here, the defendant concedes that the plaintiff has met his burden under the first prong of the *Pickering* balancing test, that is, Fuerst engaged in constitutionally protected activity and such activity was a motivating factor in Clarke's decision not to promote Fuerst to the rank of sergeant. Furthermore, Clarke does not argue that he would have made the same decision, that is, refused to promote Fuerst, even in the absence of the protected conduct. Thus, the only remaining question is whether the defendant has shown, by a preponderance of the evidence, that the government's interest in effectively and efficiently providing government services outweighed the plaintiff's First Amendment interests.

As the Seventh Circuit has explained, under *Pickering*, the court "balance[s] the employee's interest in commenting upon such matters and the employer's interest in efficient public services." *Cygan v. Wisconsin Dept. of Corrections*, 388 F.3d 1092, 1101 (7th Cir. 2004). "One very important consideration is the "potential disruptiveness" of the speech." *Id.* Other factors to consider in applying the *Pickering* balancing include:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.

Greer v. Amesqua, 212 F.3d 358, 371 (7th Cir. 2000). Furthermore, the proper balance of these competing interests is a question of law. *Wainscott v. Henry*, 315 F.3d 844, 851 (7th Cir. 2003).

Clarke's main argument is that, given Fuerst's public speech criticizing the Sheriff's proposed policy, his promotion to the rank of sergeant would have created the potential for disruption in the operations of the Sheriff's Department. Specifically, Clarke argues that "discipline and loyalty"

would have been undermined in the department if Fuerst had been promoted to the rank of sergeant. (Def.'s Br. in Resp. to Pl.'s Mot. for Summ. J. at 2.) Clarke characterizes the problem as "having a member of the management team openly opposing policies of the sheriff in a public forum." (Def.'s Br. in Resp. to Pl.'s Mot. for Summ. J. at 3.) The defendant further argues that in April of 2003, Clarke predicted that the promotion of Fuerst to the rank of sergeant would fuel disruption in the Sheriff's Department. (Def.'s Br. at 7.)

As previously stated, the potential disruption of working relationships caused by an officer's speech is a legitimate factor for the government employer to consider. *McGreal v. Ostrov*, 368 F.3d 657, 678 (7th Cir. 2004). "A public employer is not required to wait until working relationships are actually damaged if immediate action might prevent the harm from occurring." *Id.* And, "when close working relationships are essential to fulfilling public responsibilities, deference to the employer's judgment [is] appropriate, especially in the context of a law enforcement setting." *Id.* Furthermore, a court should give "substantial weight to government employers' reasonable predictions of disruption." *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

However, here, the defendant has not pointed to *any* evidence even suggesting that in April of 2003, that is, when Clarke made his decision not to promote Fuerst to the rank of sergeant, Clarke was actually concerned about the potential disruption that Fuerst's promotion may have caused to the Sheriff's Department's operations. The defendant argues that in April of 2003, Clarke predicted that the promotion of Fuerst, a "bitter political enemy," to the rank of sergeant, would fuel disruption in the operations of the Sheriff's Department. (Def.'s Br. at 7.) Yet, at his deposition Clarke did not testify that even one of the reasons why he decided not to promote Fuerst to the rank of sergeant was because he feared that, given Fuerst's speech, such a promotion would have caused disruption in the

operations of the Sheriff's Department. Nor did Clarke testify that, given Fuerst's speech, he feared that promoting Fuerst to the rank of sergeant would undermine the efficiency or morale of the Sheriff's Department. Simply put, the defendant has not pointed to *any* evidence suggesting that Clarke *ever* articulated a belief that, given Fuerst's speech, his promotion to the rank of sergeant would have had the potential to be disruptive to the operations, efficiency, or morale of the Sheriff's Department. Nor is there any evidence in the record from which a reasonable inference could be drawn that Clarke was actually concerned about the disruptive effects of promoting Fuerst.

As the Seventh Circuit has explained,

> [the] *Pickering* balancing is not an exercise in judicial speculation. . . . We are not entitled to speculate as to what the employer might have considered the facts to be and what concerns about operational efficiencies it might have had, once the record shows what those concerns really were. To put the point another way, this is not like 'rational basis' review of state legislation, under which it is enough to imagine any rational underpinning for the law the legislature chose to enact. *First Amendment rights cannot be trampled based on hypothetical concerns that a governmental employer never expressed.*

Gustafson, 290 F.3d at 909-10 (emphasis added). In *Gustafson*, police officers brought a First Amendment retaliation claim alleging that they were transferred to less favorable positions after they had made statements to fellow officers and to their union president expressing their concerns regarding an order made by the deputy inspector of the City of Milwaukee Police Department. A jury found in favor of the officers and the police chief and deputy inspector appealed. On appeal, the defendants argued for the first time that they were entitled to transfer the officers based upon the "potential disruptiveness" of their speech. *Id.* at 910. However, the Seventh Circuit noted that,

> [e]ven accepting the proposition that a police department is a paramilitary organization built on relationships of trust and loyalty, and as such the judgment of police officials regarding the disruptive nature of an officer's speech is entitled to

> considerable–although by no means complete deference, [the defendants] offered no evidence at trial even hinting that they were punishing the officers for their speech. . . . [N]or is there evidence that, despite the absence of any actual disruption, [the defendants] reasonably believed it would have future disruptive consequences.

Id.

In distinguishing *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999), the court stated that,

> the critical difference is that *Kokkinis* did not rely on a story told for the first time on appeal; it rested instead on a proper summary judgment record that contained testimonial evidence from the chief of police that he was concerned about the efficiency and morale of the police department, as well as on the testimony of other officers that supported the reasonableness of the chief's beliefs. . . . In the end, this is a case of failure of proof, and should be taken as no more than that. The defendants did not meet their burden of proving by a preponderance of the evidence that any of the first three elements of the *Pickering* balancing test supported restricting the officers' speech.

Id. at 911.

A similar result is compelled here. This is because the defendant has failed to point to any evidence even hinting that the defendant reasonably believed that, given Fuerst's speech, promoting Deputy Fuerst to the rank of sergeant would have future disruptive consequences to the operations of the Sheriff's Department. To reiterate, the defendant has the burden to show by a preponderance of the evidence that a governmental interest outweighs the plaintiff's interest in speaking on an issue of public concern. Simply put, the defendant has failed to meet his burden of proof. I am not persuaded that a potential threat to discipline or harmony would have existed in the Sheriff's Department if Fuerst were promoted to the rank of sergeant.

Furthermore, other elements of the *Pickering* balancing test also weigh in favor of the plaintiff. As previously stated, one of the *Pickering* factors is "whether the matter [on which the individual spoke] was one on which debate was vital to informed decision-making." *Greer*, 212 F.3d at 371. Clarke argues that Fuerst's comments to Spivak & Bice were nothing more than "political

attacks" that were not "vital to informed decision-making." (Def.'s Br. in Supp. of Def.'s Mot. for Summ. J. at 6.) Clarke further argues that "[w]hether a department of hundreds of employees has an additional position is hardly the type of issue that would summon the attention of the public." (Def.'s Br. in Supp. of Def.'s Mot. for Summ. J. at 6.)

Simply put, I am persuaded that the issue upon which Fuerst spoke, that is, whether the taxpayers of Milwaukee County should pay for the newly elected Sheriff's community relations specialist when the County was facing an alleged $3 million deficit is a matter on which debate was vital to informed decision-making. Fuerst's comments raised the issue as to whether the newly elected Sheriff was simply trying to get some extra PR for his then-rumored run for Mayor of the City of Milwaukee. Furthermore, Fuerst's comments brought to the public's attention that this might not be the best way to spend the taxpayers' money when Milwaukee County was facing an alleged $3 million deficit. Of course, Clarke's comments, in the same article, refute such a characterization, and instead make clear that the community relations specialist would simply have helped to promote Clarke's vision for the Milwaukee County Sheriff's Department and the position would be anything but a PR person. To be sure, issues involving the proper allocation of law enforcement resources are questions of serious public import, "that one would usually expect to benefit from a full airing in the public marketplace of ideas and opinions." *Campbell v. Towse*, 99 F.3d 820, 828 (7th Cir. 1996) (internal quotations omitted). And, in order to outweigh the need for such speech, the defendant must present evidence of a strong municipal interest. As previously stated, in this case, the defendant has not done so.

For all of the foregoing reasons, I find that the defendant has failed to meet his burden of proving by a preponderance of the evidence that a governmental interest outweighed the plaintiff's

interest in speaking on an issue of public concern. Thus, the court concludes that Clarke violated Fuerst's First Amendment right to freedom of speech when he refused to promote him to the rank of sergeant. Given that free speech claims and free assembly claims are evaluated under the same analysis, the court also concludes that Clarke violated Fuerst's First Amendment right to freedom of association when he refused to promote him to the position of sergeant based upon the critical statements he made, as MDSA president, regarding the Sheriff's policies. *See Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 972 n.16 (7th Cir. 2000). Such being the case, the defendant's motion for summary judgment will be denied, at least in part, and the plaintiff's motion for summary judgment will be granted, at least in part.

NOW THEREFORE IT IS ORDERED that the defendant's motion for summary judgment be and hereby is **GRANTED IN PART AND DENIED IN PART**;

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment be and hereby is **GRANTED IN PART AND DENIED IN PART**;

IT IS FURTHER ORDERED that a scheduling conference be conducted on Thursday, April 12, at 9:00 a.m. in Room 253 of the U.S. Courthouse, 517 E. Wisconsin Avenue, Milwaukee, WI 53202. At that time the court will discuss with the parties the steps necessary to bring this case to final resolution.

SO ORDERED this 29th day of March 2007, at Milwaukee, Wisconsin.

/s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge