

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED AND
MARY ANN GREGORY,

Complainants,

vs.

JOINT SCHOOL DISTRICT NO. 8, CITY OF
MADISON, VILLAGES OF MAPLE BLUFF AND
SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG, BURKE,
AND WESTPORT; THE BOARD OF EDUCATION
OF JOINT SCHOOL DISTRICT NO. 8,
CITY OF MADISON, ET. AL., 1/

Respondent.

Case XXXV
No. 19334 MP-484
Decision No. 13794-A

Appearances:

Kelly and Maus, Attorneys at Law, by Mr. Robert C. Kelly, Esq., on
behalf of the Complainant.
Mr. Gerald C. Kops, Esq., Deputy City Attorney, on behalf of the
Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Madison Teachers Incorporated and Mary Ann Gregory having filed an amended prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, Burke, and Westport; the Board of Education of Joint School District No. 8, City of Madison, et. al., have committed a prohibited practice within the meaning of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act, herein MERA; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin, on August 28 and September 29, 1975, before the Examiner; and the parties having thereafter filed briefs which were received by January 19, 1976; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Madison Teachers Incorporated, herein Complainant, is a labor organization and its affiliate, Madison Teachers Incorporated, United Substitute Organization, herein USO, is the exclusive collective bargaining representative of certain substitute teachers employed by Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, Burke and Westport; and the Board of Education of Joint School District No. 8, City of Madison, et. al.

1/ The Respondent's name has been corrected to reflect its correct designation.

2. That Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, Burke and Westport; the Board of Education of Joint School District No. 8, City of Madison, et. al., herein Respondent, constitutes a municipal employer within the meaning of Section 111.70(1)(2) of MERA; that Respondent is engaged in the providing of public education in its district with its principal office at Madison, Wisconsin; and that at all times material hereto, Maurice Sullivan and Ruth Showers have been employed by Respondent and respectively serve as Director of Employee Services and Substitute Service Secretary.

3. That Mary Ann Gregory was employed as a full-time teacher in various school districts other than Respondent's district from about 1962 through 1974; that Respondent hired Gregory as a per diem social studies substitute teacher for the 1974-75 school year; that during the 1974-75 school year, Gregory became very active on behalf of the USO; 2/ that Gregory attended an organizational meeting for USO on or about December 19, 1974; that Gregory spoke at that meeting and was there selected to be on the USO Communications Committees, which was responsible for notifying USO members as to what was transpiring within the USO; that Gregory subsequently contacted other USO members and so notified them; that Gregory also served on the USO's By-Laws Committee, and its bargaining team; that Gregory was selected as Secretary of the USO; and that Gregory discussed her union activities, including her attendance at the December 19, 1974 meeting, with Substitute Service Secretary Ruth Showers, who seemed supportive of such activities; that in those discussions Showers was curious as to whether other teachers were interested in participating in the USO and what kind of support they were giving to the USO.

4. That during the 1974-75 school year, Gregory substituted for Respondent on about 34 occasions, 3/ the last time being January 24, 1975, after which she was not asked to substitute again; that on each occasion Gregory was asked to substitute via a telephone call from Showers; that Gregory was evaluated by various school personnel at the particular schools where she taught; that about eleven such written evaluations were prepared regarding Gregory's performance for the 1974-75 school year; that the dates, ratings, and comments for each of those evaluations are as follows:

September 3, 1974	"Exceptional"	
September 19, 1974	"Strong"	"I would recommend calling this sub again!"
September 23, 1974	"Fair"	"Not very happy with a couple of classes. Had difficulty with control. May have difficulty with this age group."
September 26, 1974	"Fair-good"	"Very limited feedback. She seemed adequate. Students expressed negative feelings."
September 27, 1974	"Fair-good"	"How to measure competency? Students complained regarding

2/ The USO was certified on October 31, 1974 to represent Respondent's substitute teachers.

3/ During this period, Gregory turned down two assignments. Furthermore, the record establishes that USO officers, other than Gregory, who received favorable evaluations were offered a substantial number of teaching assignments for the entire 1974-75 school year.

her attitude and techniques. However, she followed directions quite well in . . . her tasks. . . . (ineligible)."

October 3, 1974	"Fair"	"I think she turned the pupils off a bit. She did not seem warm and friendly."
November 11, 12, 14, 18, 1974	"Strong"	
November 15, 1974	"Poor"	"Complained that all she did was babysit and didn't come across very well to the students. Also used abusive language with student teacher. Also was not qualified to teach the courses (law and accounting)."
December 3, 4, 5, 6, 1974	"Good"	
December 19, 1974	"Good"	
January 24, 1975	"Strong"	

5. That the aforementioned evaluations were occasionally made out on the same day that Gregory taught, and that in other cases the evaluations were made out days or weeks after Gregory had visited a particular school; that the evaluations were forwarded to Respondent's personnel offices, with copies to Showers; that it cannot be determined on what particular dates said evaluations were received by the personnel office or Showers; that in some instances Showers did not receive copies of the evaluations until "months" after they had been computed; that, according to Showers, said evaluations were "not particularly useful" in determining the quality of a teacher's current teaching ability; that Showers does not contact the individuals who have made out these evaluations for the purpose of checking on their accuracy; and that the record fails to establish whether anyone else on Respondent's behalf performs that function.

6. That Gregory telephonically spoke to Showers on or about February 7 or 8, 1975, at which time Gregory asked why she had not been called for assignments after January 24, 1975, and inquired as to whether she had received any adverse evaluations; that Showers replied that there was nothing wrong with Gregory's evaluations; that Gregory then stated that she would be taking a real estate course, that she temporarily wanted to be taken off the substitute list, and that she would call back Showers at a later date so as she could decide on whether she wanted to be reactivated as a substitute; that Gregory subsequently told Showers on or about March 23, 1975, that she wanted to be placed on the substitute list once again; that Gregory then asked Showers about the possibilities of being called as a substitute, to which Showers replied that fewer substitutes would be needed in the second semester than the first semester; and that Gregory did not thereafter receive any more substitute assignments for the remainder of the 1974-75 school year.

7. That Gregory subsequently visited Respondent's administrative offices on either April 24 or 25, 1975, and there observed the above noted evaluations, that among those evaluations, Gregory saw the one dated November 15, 1974, which rates her "poor"; that Gregory believed

that evaluation to be unfair because Showers that day asked her to teach bookkeeping, a subject which was outside of her field; that when asked, Gregory advised Showers that she was unqualified to teach that subject; that Showers replied that she knew that, but that no one else was available; that Gregory finally acceded to Showers' urgings; and that, because of the foregoing factors, Gregory thereafter attempted to have the November 15, 1974, evaluation removed from her file, but to no avail.

8. That Gregory on May 28, 1975, again visited the administrative offices and viewed her personnel file, wherein she found a note which read:

"Mary is a current sub who has 'bad reviews', who's still on the sub list although Mr. Sullivan has asked Ruth to just not call her for work. Thus she hasn't been called since Jan. 24.

Ruth also tells me she's one of the people on the union's bargaining committee.

No Basis For Denial.";

that this was the first occasion that Gregory learned that her employment as a substitute had in fact been terminated as of approximately January 24, 1975; that Gregory thereafter inquired of Respondent regarding her status; and that Gregory telephonically spoke to Showers on May 28, 1975, during which time Showers stated that Sullivan never told her not to offer assignments to Gregory.

9. That following that inquiry, Respondent's present Employment Supervisor, Wanda Warner, looked into the matter and thereafter on May 29, 1975, prepared a memorandum for Sullivan, which read:

"Further inquiry into the complaint by Mary A. Gregory concerning her personnel file has indicated the following information:

- (1) Ruth Showers stated that she was not directed to remove Mary Gregory from her sub list but chose simply to not call her on her own volition due to poor evaluations received.
- (2) Mary Ann Gregory called Ruth Showers and asked to be removed from the list for the period February 10, 1975 to March 25, 1975 to attend Insurance School.
- (3) Ms. Gregory applied for Unemployment Compensation on May 5, 1975.
- (4) On May 7, 1975 Dan Googins signed the Unemployment Compensation Request for Work Record. It was on this date that the note in question was typed by Phyliss Gibson, secretary to Mr. Googins.
- (5) Normal procedure calls for the Benefits Supervisor to contact the Substitute service pertaining to work records.
- (6) Ms. Gregory has worked a total of 19 full days and 16 half days for Madison Public Schools as a substitute teacher during the 1974-75 school year. She refused assignment two times."

10. That Complainant filed the instant complaint on July 3, 1975; that Respondent subsequently asked Gregory whether she wanted to substitute for the upcoming 1975-76 school year, to which Gregory replied in

the affirmative; and that Respondent placed Gregory on the 1974-76 substitute list and thereafter asked her to substitute on several occasions at the beginning of the 1975-76 school year.

11. That at all times material herein, Respondent purportedly has had a policy under which substitute teachers are not given substitute assignments if they receive 3 or 4 evaluations which are marked "poor or fair"; that if teachers do receive three or four such evaluations, Showers is supposed to notify William Gardner, Respondent's Employment Supervisor for the 1974-75 school year, of that fact so that the teacher can be removed from the substitute list; that upon receiving that notification from Showers, Gardner then notifies the teacher involved that she (or he) is being considered for removal from the substitute list and is given the reasons why that is being done; that the affected teacher then has an opportunity to respond to the evaluations in question; that here, Showers never notified Gardner that Gregory should be removed from the substitutes list; that there is no evidence to establish that, other than Gregory, Showers previous hereto has ever on her own refused to offer substitute assignments to teachers who have received several adverse recommendations; that throughout her employment, Gregory was never advised by either Showers or any of Respondent's representatives of any adverse evaluations and she was never told that her work was unsatisfactory; that in the Fall of 1974 and in February, 1975, Gregory specifically asked Showers whether she had received any adverse evaluations, to which Showers replied in the negative; and that Showers told Gregory in the Fall of 1974 that she, Gregory, was doing a good job.

12. That Respondent refused to offer substitute assignments to Gregory after January 24, 1975, to the end of the 1974-75 school year at least in part because of Gregory's union activities.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondent discriminatorily refused to offer teaching assignments to Mary Ann Gregory at least in part because of her union activities and that such a refusal constitutes a prohibited practice within Section 111.70(3)(a)1 and 3 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent, Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, Burke and Westport; the Board of Education of Joint School District No. 8, City of Madison, et. al., its officers and agent shall immediately:

1. Cease and desist from discriminating against Mary Ann Gregory, or any other employees, because of their union activities on behalf of Madison Teachers Incorporated - United Substitutes Organization, or any other labor organization.
2. Take the following affirmative action which the undersigned finds will effectuate the purpose of the MERA.

- (a) Immediately offer substitute assignments to Mary Ann Gregory on the same basis that it makes such assignments to other employees, and make Gregory whole by paying her a sum of money equal to that which she would have earned or received, but for Respondent's refusal to offer her teaching assignments during the latter part of the 1974-75 school year, in the manner described below.
- (b) Notify all employees, by posting in conspicuous places in its offices where employees are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission, in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 14~~th~~ day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

1. WE WILL offer substitute assignments to Mary Ann Gregory and we will make her whole by paying to her a sum of money which she would have earned but for our refusal to offer her teaching assignments during the latter part of the 1974-75 school year.
2. WE WILL NOT discriminate against Mary Ann Gregory, or any other employee, because of her activities on behalf of Madison Teachers Incorporated - United Substitutes Organization or any other labor organization.
3. WE WILL NOT in any other or related matter interfere with the rights of our employees, pursuant to the provision of the Municipal Employment Relations Act.

By _____

Jt. School Dist. #8, City of
Madison, Villages of Maple Bluff
and Shorewood Hills, Towns of Madison,
Blooming Grove, Fitchburg, Burke, and
Westport; the Board of Education of
Jt. School Dist. #8, City of Madison,
et. al.

Dated this _____ day of May, 1976.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant primarily contends that Respondent's refusal to offer substitute teaching assignments to Gregory from January 24, 1975 to the remainder of the 1974-75 school year was based at least in part on anti-union consideration and that, therefore, Respondent's refusal to do so was violative of Section 111.70(3)(a)1 and 3 of MERA.

Respondent, on the other hand, denies that said refusal was in any way based on Gregory's union activities. It claims, instead, that Gregory received four or five adverse evaluations, and that after receipt of said evaluations, and in accordance with its procedure, Showers decided not to offer any more assignments to Gregroy for the remainder of the 1974-75 school year. In this connection, Respondent points out that there is no record evidence of union animus on its part and, further, that its lack of animus is reflected by the fact that those USO union officers who received good recommendations were offered a substantial number of substitute assignments during the very same period that Gregory was not offered assignments.

In resolving these issues, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

Furthermore, it should be noted at the outset that it is the Complainant who has the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's refusal to offer teaching assignments to Gregory for the latter part of the 1974-75 school year was based, at least in part, on anti-union considerations. ^{4/} To prevail, Complainant must therefore establish that Gregory was active in union affairs and that Respondent had knowledge of such activities, that Respondent bore animus against Gregory because of such activities, and that, finally, Respondent's stated reason for refusing to offer teaching assignments to Gregory was pretextual in nature, and that one of the reasons for Respondent's refusal was based on the fact that Gregory had engaged in union activites.

As to the first point, the record establishes, as noted paragraph 3 of the above Findings of Fact, that Gregory was extremely active on behalf of the USO and that Showers knew of those activities. Respondent's administration also had direct knowledge of that activity, as Gregory's personnel file contained a notation which read:

"Ruth also tells me she's one of the people on the union's bargaining committee."

As to union animus, there is no direct evidence that Respondent bore any animus towards any of its employees who either formed or joined the USO. It is also true that USO officers who received favorable evaluations were offered a substantial number of substitute assignments.

4/ St. Joseph's Hospital (8787-A, B) 10/69, 12/69; Earl Wetenkamp d/o/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71 and AC Trucking Co., Inc., (11731-A) 11/73.

While this latter factor must be given some weight, it is nonetheless not dispositive of the issue herein, as it is entirely possible that an employer can signal out only one union adherent for the purpose of making an object lesson of that employee to other employees, or because the employer, for whatever reason, resents the union activity of a particular union adherent. Further, even though there is no direct evidence of Respondent's animus, such animus can be inferred if the totality of the record established that Respondent's stated reason for refusing to offer Gregory substitute assignments was pretextual in nature. For, as noted in a leading case on this subject, Shattuck Penn Mining Corp. v. NLRB, 362 F. 2d. 466, 470 (C.A. 9, 1966):

"Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

Furthermore, as noted by the Wisconsin Supreme Court in Muskego - Norway Consolidated Schools v. Wisconsin Employment Relations Board, 35 Wis. 2d. 540 (1967):

"An employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

Thus, while an employer may otherwise have valid grounds for taking certain action against an employee, it cannot do so if that action is partly grounded on anti-union considerations. With the foregoing in mind, it is necessary to examine Respondent's reasons which purportedly caused it to not employ Gregory's services.

In this connection, Respondent contends that substitute teachers who receive several adverse recommendations may not be offered substitute assignments, that Gregory received such adverse recommendations on September 23, 26, 27, October 3, and November 15, 1974, and that Showers decided not to call Gregory after receipt of said evaluations because those evaluations indicated that Gregory was not able to interact with students.

When asked about this at the hearing, Showers admitted that evaluations may not be received by her until "months" after they have been first prepared, that Gregory's evaluations for September and October, 1974, were not received by her until January, 1975, and that, because of such long delays in receiving them, the evaluations, in Showers' words, were "not particularly useful." 5/ In light of Showers' own testimony, then, there is a considerable question as to how "useful" such evaluations were in measuring Gregory's performance. Moreover, it is significant that Gregory was offered about eleven teaching assignments after the September and October, 1974, adverse evaluations in question,

sufficient to "weigh one teacher over another when you do get

and that, but for one unique situation, 6/ Gregory was listed as "strong" and "good" for all of those later teaching assignments. These facts clearly establish that Showers continued to utilize Gregory's services well after the adverse evaluations in question and that, further, Gregory apparently overcame whatever problems which led to the earlier adverse evaluations, evaluations which were limited to a ten day span of Gregory's teaching performance, from September 23 to October 3, 1974.

Showers' testimony is also noteworthy in that it contains innumerable internal inconsistencies on certain crucial issues. For example, Showers initially claimed on August 28, 1975, the first day of the hearing, that she in fact "didn't decide not to call" Gregory, 7/ that it was not deliberate "I'm not calling her"; 8/ and that Gregory "could have been called." 9/ But, one month later, at the reconvened hearing held on September 29, 1975, Showers answered that she in fact decided not to call Gregory anymore, 10/ a point which is reflected in the note which was found in Gregory's personnel file which stated, inter alia, that Gregory "hasn't been called since January 24." Similarly, Showers first testified that it was standard procedure for her to inform Respondent's then Employment Supervisor, William Gardner, of several adverse evaluations and that, in accord with that procedure when so notified Gardner of Gregory's evaluations. 11/ One month later, Showers testified that she in fact never contacted Gardner on this subject. 12/ In the same vein, Showers first asserted that she was

6/ As noted in paragraph 7 of the above Findings of Fact, Showers insisted that Gregory teach bookkeeping on November 15, 1974, despite the fact that Showers knew that Gregory was totally unqualified to teach that subject. That being so, it certainly seems that Gregory was not really expected to teach that day, but rather, that she in effect was asked to serve only as a babysitter, until such time as a qualified teacher could return to the classes involved. In such circumstances, where Gregory was unable to utilize her professional skills, it is not surprising that Gregory may have been unable to teach as effectively as she normally could, that she was unhappy in that role, and that she reflected that unhappiness.

7/ TR 82.

8/ TR 83.

9/ TR 83.

10/ TR 109, 114, 115.

11/ TR 81.

12/ TR 108 and 118.

not concerned about Gregory's evaluations in January, 1975. 13/ Shortly thereafter, Showers claimed that she received all of Gregory's adverse evaluations between January 27 to February of 1975, and that she then contacted Gardner because she was concerned about those evaluations. 14/ Elsewhere, Showers contradicted herself again when she alleged that she became concerned about Gregory's evaluations in April or May, 1975 and that she then contacted Gardner, 15/ Showers also initially testified that there were "probably" other teachers other than Gregory who she, Showers, decided not to call for substitute assignments. 16/ Going on, however, Showers was able to identify only one such teacher, Linda Berler, 17/ and Showers finally admitted later on that she in fact did not know who made the decision not to call Berler. 18/ Furthermore, although Showers supposedly had all of Gregory's adverse evaluations by February 8, 1975, at which time she allegedly became concerned about those evaluations, 19/ Showers offered no credible explanation as to why she told Gregory on or about February 8, 1975 that nothing was wrong with Gregory's evaluations. 20/

The foregoing major inconsistencies in Showers' own testimony must also be considered alongside the testimony offered by Respondent's witnesses who testified on the note found in Gregory's file which stated:

"Mary is a current sub who has 'bad reviews' who's still on the sub list although Mr. Sullivan has asked Ruth to just not call her to work. Thus, she hasn't been called since Jan. 24.

Ruth also tells me she's one of the people on the union's bargaining committee.

No Basis For Denial."

Showers and Sullivan both denied at the hearing that Sullivan in fact had directed Showers not to call Gregory. But, if that is so, Respondent has offered no credible explanation as to why the note says the contrary. Rather, Respondent claims only that part of the note was prepared by Phyliss Gibson, secretary to Respondent. For her part, Gibson answered that she did not have "a present recollection" 21/

13/ TR 81.

14/ TR 97.

15/ TR 81.

16/ TR 109. Inasmuch as Showers did not identify any teachers, other than Berler, who supposedly were not offered substitute assignments because of adverse evaluations, and since no objective evidence has been offered to support this claim, this part of Showers' testimony is specifically discredited.

17/ TR 116.

18/ TR 121.

19/ TR 97.

20/ TR 46.

21/ TR 141, 146.

of the note and she was unable to testify as to why the note referred to Mr. Sullivan. As to the note's reference to Gregory's presence on the union's bargaining team, Gibson testified that Showers probably advised her of that fact. 22/ Showers, on the other hand, refused to admit that she passed on that information to Gibson because, in her words, "It would be very much out of context for me to discuss that with Phyllis." 23/ Additionally, Respondent has failed to establish why the note even refers to Gregory's status on the bargaining team, as Gibson, who supposedly wrote the major part of that note, claimed that she was unable to remember the particulars of that note. 24/

Reviewing the above, the record therefore establishes that Gregory did receive several adverse evaluations, 25/ that there is no direct evidence that Respondent resented such activities, that Showers seemed supportive of Gregory's union activities, and that there is no evidence that Respondent discriminated against any other union adherents. Standing alone, such factors support Respondent's defense.

But, the foregoing factors do not stand in isolation but rather, must be considered alongside other pertinent record facts. Thus, it is significant that Showers herself acknowledged that the evaluations were "not particularly useful" that Showers continued to utilize Gregory's services well after the initial adverse evaluations had been compiled in September and October, 1974, and that Gregory received favorable evaluations on ten of the eleven assignments that she received after those initial adverse evaluations. 26/ The record also establishes that Showers told Gregory in November, 1974 that she was doing a good job, that Respondent never advised Gregory of any purported work derelictions, and that Showers told Gregory in February, 1975, that there was no problem over Gregory's evaluations. Furthermore, Showers failed to notify Gardner of Gregory's adverse evaluations, as she was required to do under Respondent's procedures. Additionally, Respondent has failed to establish that Showers previous hereto has ever exercised the kind of independent judgment that she purportedly exercised herein when she allegedly decided that Gregory should not be called as frequently as before. Thus, based upon the facts presented, it appears that this is the first time that any substitute teacher has been refused teaching assignments in the manner herein. Moreover, it is obvious that Showers' testimony is inherently implausible and that it was marred by many internal inconsistencies on major issues, inconsistencies which indicate that Showers' version as to what happened, when and why is a total fabrication. Lastly, it is most significant that Gregory received about 33 teaching assignments up to and including December 19, 1974, when she attended a union meeting on that date and where she spoke on behalf of the USO. After discussing that meeting with Showers, and after having actively started working for the USO, it is uncontroverted that Gregory was thereafter only offered one assignment for the remaining duration of the school year.

22/ TR 145, 146.

23/ TR 86.

24/ It is unclear as to what date that note was prepared.

25/ While the evaluations are hearsay, Complainant has made no claim that they should be rejected on that basis. Accordingly, it is proper to consider their contents.

26/ As noted above, these factors show that Gregory overcame whatever problems which led to the earlier adverse evaluations. Furthermore, and contrary to her testimony, the Examiner finds it inherently implausible that Showers did not know of at least some of those favorable evaluations when she supposedly decided not to call Gregory.

Based upon these latter factors, the Examiner concludes that the preponderance of the evidence establishes that Gregory has been subjected to disparate treatment and that Respondent, through the contorted, inherently implausible testimony of its own witnesses, has attempted to hide its true motivation as to why it refused to call Gregory. Here, since Respondent has offered no credible explanation as to why the note in Gregory's personnel file mentioned Gregory's union activities and there stated that Sullivan had directed Showers not to call Gregory, and inasmuch Gregory was offered but one assignment after she became active on behalf of the USO on December 19, 1974, it can be inferred, and I so find, that the totality of the record establishes that Respondent's refusal to call Gregory was based at last in part on discriminatory anti-union considerations which are violative of Section 111.70(3)(a)1 and 3 of MERA.

To rectify that conduct, Respondent is directed to take the remedial action noted above. Here, it is unclear as to precisely how many times Gregory would have been called in the latter part of the 1974-75 school year, but for Respondent's unlawful refusal to utilize her services. Accordingly, this record does not establish exactly how much backpay Gregory should receive. Nonetheless, the record does show that Gregory was offered about 34 assignments 27/ during the first part of the school year. When the total number of available assignments in Gregory's field during the same period are computed (a figure not reflected in this record), it is possible to determine what percentage of total assignments Gregory received from the beginning of school to January 24, 1975, the last day that she was called. 28/ Absent any other evidence as to how many times Gregory would have been called, it is therefore reasonable to assume that Gregory would have been offered the same percentage of assignments from January 25, 1975 to the remainder of the school year. When that percentage is applied to the total number of assignments in Gregory's field from January 25, 1975 to the end of the school year, it is possible to ascertain how many days Gregory should have been called during that period. As backpay, Gregory is to therefore receive her per diem (or hourly) rate, multiplied by those days, (or hours), minus the number of days that Gregory was unavailable to teach from February 9 to March 23, 1975.

Dated at Madison, Wisconsin this 14th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Amedeo Greco
Amedeo Greco, Examiner

27/ Omitted herein are the two assignments which Gregory turned down.

28/ Since some of Gregory's assignments were for less than full days, it may be necessary to make this computation on an hourly, instead of a daily, basis.