

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED and :
MARY ANN GREGORY, :
 :
Complainants, : Case XXXV
 : No. 19334 MP-484
vs. : Decision No. 13794-B
 :
MADISON METROPOLITAN SCHOOL DISTRICT, :
 :
Respondent. :

ORDER REVISING FINDINGS OF FACT, REVERSING CONCLUSION
OF LAW, REVERSING ORDER AND DISMISSING COMPLAINT

The respondent having petitioned the commission pursuant to sec. 111.07(5), Stats., to review the findings of fact, conclusion of law and order made and filed by the examiner in this case on May 14, 1976; and the commission having reviewed the record and the briefs of counsel for the parties and being fully advised in the premises:

IT IS ORDERED:

A. That the examiner's findings of fact shall be, and hereby are, adopted as the commission's findings of fact, except that paragraphs 5, 6, 11 and 12 thereto are hereby revised to provide as follows:

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; and that in some instances Showers did not receive copies of the evaluations until "months" after they had been computed.

6. That Gregory telephonically spoke to Showers on or about February 7 or 8, 1975, during which conversation Gregory stated that she temporarily wanted to be taken off the substitute list because she would be selling life insurance, and that she would call back Showers at a later date; 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.

11. That at all times material herein, respondent 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 previously on her own had 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, Gregory specifically asked Showers whether she had received any adverse evaluations, to which Showers replied in the negative; that at said time Showers was unaware of any adverse evaluations and Showers told Gregory 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 because other persons who did not have such adverse evaluations as did Gregory were available for such assignments.

B. That the conclusion of law of the examiner is hereby reversed and the same shall be as follows:

That respondent's decision not to offer substitute teaching assignments to complainant Gregory after January 24, 1975, to the end of the 1974-75 school year did not violate sec. 111.70(3)(a)1 or 3, of the Municipal Employment Relations Act.

C. That the examiner's order is hereby reversed and the complaint herein shall be, and hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING ORDER REVISING FINDINGS OF FACT, REVERSING
CONCLUSION OF LAW, REVERSING ORDER AND DISMISSING COMPLAINT

Nature of the case and the examiner's decision

This case concerns the respondent employer's allegedly discriminatory motivation in deciding not to award substitute teaching assignment work opportunities during part of 1975 to the complainant Mary Ann Gregory. The examiner imputed anti-union animus to the respondent. Among other matter, the examiner relied on the evidence of a note written by a secretary quoting Ruth Ann Showers, a bargaining unit secretary with virtually absolute power to make assignments, as saying Gregory was on the negotiating team for the complainant labor organization representing substitute teachers.

In finding that anti-union animus partially motivated the decision not to give Gregory substitute teaching assignment opportunities, the examiner relied on the totality of the record, his resolution of conflicts therein, and specifically on the following considerations:

- (1) Showers admitted that the written evaluations of substitutes by school principals, on which she claimed to rely in deciding against further assignments for Gregory, were not particularly useful in evaluating teachers;
- (2) Showers continued to give Gregory work assignments "well after the initial adverse evaluations had been complied" [sic] in September and October, 1974, the last assignment being January 24, 1975;
- (3) Gregory received favorable evaluations on two of the eleven assignments taken after the initial adverse evaluations, demonstrating that Gregory had overcome the problems causing the earlier adverse evaluations;
- (4) Showers told Gregory in November 1974 and February 1975 that there was no problem with Gregory's evaluations;
- (5) Showers failed to notify William Gardner, respondent's employment supervisor, of Gregory's adverse evaluations as Showers was required to do under respondent's policy;
- (6) This was the first time Showers had exercised her authority to withhold assignments on the basis of adverse evaluations;
- (7) Showers' testimonial inconsistencies on major issues show that her "version as to what happened, when and why is a total fabrication;"
- (8) Gregory received only one assignment after she had spoken on behalf of the union for substitute teachers and after actively starting her activity on behalf of the union;
- (9) Respondent offered no credible explanation as to why the note in Gregory's personnel file mentioned her union "activities" and stated that Maurice Sullivan, respondent's director of employe services, had directed Showers not to assign Gregory.

In addition to the foregoing, the examiner also considered the fact that Showers seemed supportive of union activities by substitute teachers. Further, he considered the fact that other union officers who received favorable evaluations received a substantial number of assignments. He also agreed that Gregory did receive several adverse evaluations and that there is no direct evidence suggesting that

respondent resented union activities. The examiner, however, did not consider 1/ the uncontradicted evidence that (a) the secretary who wrote the note relating to Gregory's union activity dealt with unemployment compensation matters, wherein it was important to know an employe's availability for work; (b) Gregory had filed an unemployment compensation claim; and (c) Gregory's involvement in labor negotiations had at least once prevented her from taking an assignment.

Having found anti-union animus and having concluded the same violated the Municipal Employment Relations Act, the examiner ordered, inter alia, that respondent cease and desist from discriminating against Gregory "or any other employes," and that it make Gregory whole.

Positions of the parties on review

Respondent, in its petition for review filed on June 10, 1976, argues that the examiner erred by: (1) finding that Gregory was terminated as a substitute; (2) finding that said termination resulted from Showers' anti-union animus; (3) finding that the testimony of respondent's witnesses was materially inconsistent and inherently improbable; (4) finding that Showers' testimony was a total fabrication; and (5) making a remedial order which, in respect to "any other employes" and in the absence of appropriate findings, is unduly broad.

The complainants, in their response filed on July 13, 1976, support the examiner's findings and conclusions. In addition, they say the commission sits in an appellate capacity and should defer to the examiner's factual resolutions because of his opportunity to view the witnesses. Complainants further emphasize that the evidence from the respondent's own files establishes that Sullivan, who actively represented the respondent in labor relations, including a prolonged opposition to organizing by substitute teachers, directed Showers not to assign Gregory to additional assignments. Finally, complainants believe the remedial order is not unduly broad since it merely directs respondent to obey the law as it is.

Discussion of the examiner's reasoning

The claimed reliability of the principals' evaluations of teachers

The examiner stated that Showers, who had claimed to rely on the school principals' evaluations of Gregory in deciding against giving her further assignments, also testified that such evaluations were not particularly useful.

Showers statement in this regard does not support a finding of animus or pretextual motivation. Her statement that the evaluations were not particularly useful arose in the context of their utility during the hiatus between the time the teacher performed and the time Showers and the respondent's personnel department received the evaluation of that performance, which could be a period of weeks or months, during which period a poor teacher could continue to teach. 2/ Further,

1/ The examiner stated, memorandum, p. 8: ". . . [A]ny failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has." Said statement fails to supply the requisite detail required of a fact finder for meaningful review of his decision. See: Edmonds v. Board of Fire & Police Commrs., 66 Wis. 2d 337, 348, 224 N.W. 2d 575, 581 (1974), and Stas v. Milwaukee County Civil Service Comm., 75 Wis. 2d 465, 249 N.W. 2d 764, 768-769 (1977).

2/ Tr. 77.

Showers later testified that, notwithstanding the reduced value of the evaluations during the hiatus, "they're enough to weigh one teacher over another when you do get them." 3/

The examiner rejected this latter assertion of the value of evaluations apparently on the ground that the evaluations did not arrive on Showers' desk all at once. 4/ The examiner's concern, however, at most shows infirmity in the methodology of ascertaining relative teacher qualifications, not the falsity of Shower's claim that she relied on such methodology. Accordingly, we do not accept this basis of the examiner's decision.

The giving of further assignments after adverse evaluations

The examiner found that Gregory received approximately eleven assignments after the adverse evaluations in September and October, 1974, had been compiled. There is no evidence, however, that Showers knew of said adverse evaluations at the time they were compiled by the principals. Indeed, the contrary is true as the examiner himself stated in paragraph 5 of his findings: ". . . [I]t cannot be determined on what particular dates said evaluations were received by the personnel office or Showers [and] . . . in some instances Showers did not receive copies of the evaluations until 'months' after they had been computed." Showers testified that, although she did not know when she received the evaluations, 5/ she believed she received some of them between January 27 and February 7, 1975. 6/ That testimony squares with the fact that Gregory received no assignments after January 24. Therefore, the fact that Gregory continued to receive assignments after receiving adverse evaluations does not establish that Showers was aware of such evaluations at the time of said assignments.

Gregory's improved performance

The examiner found that Gregory received favorable evaluations on ten of the eleven assignments taken after the initial adverse evaluations, demonstrating that she had overcome the problems causing the earlier adverse evaluations.

This point must be accorded minimal weight. First, the record fails to show at what point in time Showers learned of the favorable evaluations. Second, the record is totally silent as to whether, despite some favorable evaluations, Gregory nevertheless had a poorer or better set of evaluations overall, as compared to other substitute teachers who received assignments Gregory otherwise could have received. Third, Showers testified that it was not the fact of receiving a poor evaluation so much as it was the underlying reason therefor which caused her to withhold assignments from Gregory. For example, Showers placed weight on the reports of principals that students expressed negative feelings about Gregory and that Gregory had used abusive language toward a student teacher. 7/ Fourth, the examiner's

3/ Tr. 93.

4/ Examiner's memorandum, p. 9, note 5.

5/ Tr. 79.

6/ Tr. 97.

7/ Tr. 106, 123, 124.

opinion that the subsequent more favorable evaluations establishes that Gregory had overcome problems, as opposed to showing that Gregory could function well only in a limited area in which assignment opportunities had become minimal, is unsupported by testimonial or other evidence of record.

Showers' statements that Gregory had no adverse evaluations

The examiner stated that Showers told Gregory in November 1974 and again in February 1975 there was no problem with Gregory's evaluations.

Gregory testified that sometime in the fall, perhaps between October 16 and November 11, 1974, she called Showers to inquire why she was receiving no assignments; at that time she asked Showers if she had been receiving poor evaluations; Showers assured her nothing was the matter, but that there had been no positions available; about February 7 or 8 she called Showers to remove her name from the list as she was going to try to earn more money selling life insurance, and during this conversation Showers again assured her of no adverse evaluations, stating that again there were no positions available; on March 23 she called Showers to be reinstated on the list, during which conversation there was no discussion of evaluations or performance, although Showers stated that chances for work might not be good. 8/ Showers testified that at the time she told Gregory there were no unfavorable evaluations, such statement was true; she never told Gregory she had unfavorable evaluations; when Gregory called to be taken off the list she was questioning her usage as a substitute; she became concerned in April or May about Gregory's ratings; she probably decided in February not to call Gregory again "because . . . it's that period that she called in and told me she wouldn't be available." 9/

The testimonial conflict, therefore, is that, according to Gregory, Showers assured her on about February 7 or 8, 1975, of no adverse evaluations, whereas according to Showers she had received such adverse evaluations about this time and was questioning whether Gregory should continue to receive substitute assignments. The examiner did not explain why he credited Gregory's version over Showers' in respect to this testimonial conflict. 10/ We credit Showers' version, since: (1) it is somewhat unlikely that Gregory would inquire whether her evaluations were poor in the same telephone conversation in which she asked to be removed from the list to begin work in the field of life insurance; and (2) Gregory contradicted herself as to whether there was such a conversation at that time, it being very probable she

8/ Tr. 14, 16, 17, 46, 47.

9/ Tr. 81, 82, 83-84, 114-115.

10/ See note 1, supra.

confused the conversation in the fall of 1974 with that in February of 1975. 11/

Accordingly, we have reversed the examiner's finding that Showers told Gregory in February that there were no adverse evaluations, and we discount this reason in assessing the examiner's ultimate conclusion of anti-union animus.

Showers' failure to notify Gardner of adverse evaluations

The examiner stated that Showers failed to notify William Gardner, respondent's employment supervisor, of Gregory's adverse evaluations, although Showers was required to do so under the respondent's practices and procedures. This finding is supported by ample evidence. 12/

11/ "Q Okay. Then there's the period from January 24th until February 7th you were not called as a substitute, am I correct?

"A That's correct.

"Q Did you have occasion to call Mrs. Showers and ask her why you weren't being called as a substitute at that time?

"A I could have, but I don't remember exactly whether I did or not. * * *

"Q Now, you remember other conversations with her as late as May of '75, and . . . as early as the fall of '74, but you don't recall any conversation in between?

"A I don't recall a specific conversation. I don't recall the time I called her to ask why I was not being employed. [Emphasis added.]

"Q * * *[Y]ou were calling her on February 7th being asked to be removed from the substitute list?

"A 7th or 8th; yes, I did.

"Q At that time did you have occasion to ask her why you were not assigned from January 24th?

"A Yes.

"Q What did she tell you?

"A I specifically asked again if there was anything with my -- wrong with my evaluations. She said no.

"Q What did she tell you was the explanation?

"A That the positions were not there. She was sorry. She knew I needed the work." Tr. 46.

Also Gregory testified: "I called Ruth [Showers] once that I know of" Tr. 45 [Emphasis added.]

12/ Tr. 27, 118-119, 127.

Its probative value in finding animus, however, is virtually nil. At most, taken together with other possibly inculpatory circumstances, this fact suggests that Showers treated Gregory differently by not reporting her adverse evaluations to Gardner. Failing to report them to Gardner, however, who had the power to remove Gregory from the substitute list because of such adverse evaluations, was not contrary to Gregory's interests. There has been no showing, for example, that Gardner probably would have instructed Showers that the evaluations were not adverse and to treat them as reflecting favorably on Gregory's suitability as a substitute teacher. The union's case here is not that the evaluations really were not adverse, but that the reason for not giving Gregory teaching assignments was, at least in part, because of her union activity. Furthermore, Gardner eventually was replaced in his position by Warner, and Gardner was leaving about the time Showers otherwise would have presented him with the adverse evaluations. 13/

The single case of Showers' withholding assignments on her own volition

The examiner found that this was the only occasion that Showers decided not to give teaching assignments to a person because of adverse evaluations. The examiner drew this inference from the inability of respondent's witnesses to cite examples to the contrary, and we find this inference to be reasonable. Furthermore, we agree with the examiner that the uniqueness of this decision is relevant to the question of animus, but the evidence must be weighed against the uncontradicted evidence that Showers had the authority to make such a decision.

Showers' testimonial inconsistency

The examiner stated, memorandum, p. 12:

"* * * 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."

The examiner failed to state what was inherently implausible about Showers' testimony. We find no inherent implausibility in any of her testimony, and therefore cannot accept the examiner's rationale in this regard.

The examiner cited examples of Showers' testimonial inconsistencies. First, he said that during the first hearing Showers indicated she had made no decision not to call Gregory, but at the second hearing she stated she did decide not to call Gregory. We think the examiner misunderstood Showers' testimony, and that she said that at no time did she decide Gregory would never again be called but that she did decide, on the basis of the adverse evaluations, that Gregory would be placed at or near the bottom of the list, and that the assignments would be given to others, of whom there were plenty, with better evaluations. For example, even in the first hearing, where the examiner said Showers indicated she had made no decision not to call Gregory, Showers testified:

13/ Tr. 81.

"Q Did you ever determine not to employ Mary Ann Gregory?

"A Yes.

"Q When did you decide that?

"A It was exactly -- actually I was questioning her seriously when she called -- I was questioning her usage as a substitute when she called and asked to be taken off the list, and I assumed that would take care of it. Then when she called and asked to be put back on the list, I explained to her that there were not a great many calls. At that point she probably wouldn't be getting much work. I didn't decide not to call her at all, but I did evaluate that we had better qualified people during the remaining period when she was on the list.

" * * *

"A I didn't decide not to call her. It's just she went in with every one else, and other people were more qualified, and they did not have the poor ratings that she had." Tr. 81-82.

The examiner's second example of testimonial inconsistency is that Showers in the first hearing said she had informed Gardner of Gregory's adverse evaluations, but in the second hearing she said she did not so inform Gardner. We disagree and believe the record establishes that Showers said she thought she had so advised Gardner but apparently had not done so since she could not find a record of it. 14/

The examiner cites as a third example Showers' testimony as to when she became concerned about Gregory's evaluations, and when she contacted Gardner relative to that concern, in light of her having received all evaluations between January 27 and February. As noted, Showers specifically refrained from stating she knew she had contacted Gardner about Gregory's adverse evaluations. 15/ Further, contrary to the examiner, Showers did not testify that she had received all of Gregory's adverse evaluations between January 27 and February: she knew she had received some of them by about February 7. 16/ Showers' testimony was that about February 7 she was questioning Gregory's use as a substitute teacher; that about March 23, when Gregory asked to be reinstated on the list, she had decided there were better people and told Gregory her chances were not good; and that she became concerned about the evaluations in April or May. 17/ This time sequence presents no substantial testimonial inconsistency. There was no need on February 7 for Showers to become especially concerned since Gregory had removed herself from the list. It was near the end of March, when Gregory asked to be reinstated on the list, that Showers did become more concerned. In any event, we do not regard any uncertainty in this testimony as to dates particularly significant, since the key fact is that Gregory received no assignments after Showers received some of Gregory's adverse evaluations.

14/ Tr. 81, 108, 118.

15/ Tr. 81, 97.

16/ Tr. 78, 97, 115.

17/ Tr. 81, 115.

As a fourth example of testimonial inconsistency, the examiner stated that Showers testified probably there were other teachers in addition to Gregory whom Showers decided not to call, but she could identify only one by name, Linda Berler, and later admitted she did not know who made the decision not to call Berler. We already have agreed that the inability to name teachers not called warranted the examiner's inference that this was the first time Showers had done so on the basis of evaluations. However, her credibility is not significantly impeached by such inability since her statement was only that "probably" there had been other similar instances. Certainly there is no testimonial inconsistency involved. Moreover, Showers never testified that she had decided not to call Berler because of poor ratings. 18/

Finally, the examiner stated that about February 8 Showers told Gregory she had no adverse evaluations at a time when Showers had received adverse evaluations. As noted, above, however, we have concluded that Showers on about February 8 did not tell Gregory she had no adverse evaluations; therefore, there is no testimonial conflict in this respect.

On the basis of the foregoing, therefore, the commission cannot agree with the examiner that Showers' testimony in this case is a total fabrication.

The timing of events

The examiner stated that Gregory received only one assignment after she had spoken on behalf of the union for teacher substitutes and after actively starting her work for the union.

The record, however, shows that Gregory received between three and seven assignments subsequent to Showers' knowledge of Gregory's union activity. On or after December 9, but before December 19, Gregory told Showers she planned to attend a December 19 union meeting, if at all possible. 19/ Gregory received assignments on December 12, 17, 18 and 19 and January 9, 15 and 24. 20/ It was at the December 19 meeting that Gregory spoke and was selected to be a member of the by-laws committee. 21/ Showers and Gregory had a subsequent conversation about the results of the December 19 meeting but the date of that conversation is uncertain and could have been as late as March 23 (Tr. 37).

Thus, the timing of events, as described by the examiner, fails to support the finding of animus. Further, we are unable to find any other basis in the timing of events. Although there were no assignments between December 19 and January 9, Christmas vacation intervened. Although there were no assignments between January 24 and about February 7 or 8, when Gregory asked to be removed from the list, there had been a longer period of no work between October 16 and November 11 22/,

18/ Tr. 116-117, 120-121.

19/ Tr. 44-45.

20/ Ex. 2.

21/ Tr. 34-35.

22/ Ex. 2.

which period preceded any union activity on Gregory's part. 23/ Finally, although there were no assignments after March 23 when Gregory asked to be reinstated, opportunities had diminished as of about April; 24/ Gregory's adverse evaluations were well known; others without adverse evaluations were available; 25/ and others with equal commitment to union activity continued to receive assignments through Showers. 26/

The note in Gregory's personnel file

Gibson, the secretary for Mr. Googins, the benefits supervisor, could not remember writing the note. The note stated:

"Mary [Gregory] 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."

The examiner stated that there was no credible explanation for the note's mention of Gregory's union activities and its statement that Sullivan had instructed Showers not to call Gregory for work assignments.

Contrariwise, we think there is a credible explanation once the note is considered in the context in which it was written. In regard thereto, we note the following: (1) the grievant filed for unemployment compensation on or about May 7, 1977; (2) it was said claim by Gregory which prompted a call from Gibson to Showers and the writing of the note; (3) the purpose of the call was to obtain information pertinent to Gregory's unemployment compensation claim; (4) the note's reference to union activity did not refer to Gregory's union proclivities generally, but specifically to her membership on the bargaining team; (5) Gibson testified without contradiction that such information would be probative of an employe's availability for work for unemployment compensation purposes; (6) in the past, teachers on the negotiating team have been unavailable for work due to negotiations; (7) the note itself was attached to Gregory's unemployment compensation claim; and (8) the note states the reason for not calling Gregory was due to bad reviews and that the reference to Gregory's membership on the union's bargaining committee appears in a separate paragraph in the nature of additional information.

Further the commission notes that Gregory did not become a member of the bargaining team until late March. The failure to have called her as of January 24, therefore, cannot be tied directly to such activity, as one must do if the terms of the note itself are to supply the nexus to union animus. In considering the specific circumstances surrounding the note as outlined above, a credible explanation for

23/ Showers' union activity commenced for the first time in December. Tr. 44, 100.

24/ Tr. 47, 82.

25/ Tr. 82. 104.

26/ Tr. 51, 102, 104-105, 121.

the note's existence is that it resulted from Gibson's investigation into Gregory's unemployment compensation claim and that the reference to Gregory's membership on the union's bargaining committee was information relevant to her availability as a substitute teacher.

We share the examiner's puzzlement, however, with the note's statement that Sullivan had instructed Showers not to call Gregory. The source of the puzzlement is that all witnesses to contemporaneous conversations deny that Sullivan issued such an instruction. In this regard Gregory testifies he could not remember writing the note; Sullivan denied instructing Showers not to call Gregory to work; and Showers denied any such conversation with Sullivan. Since the note ordinarily would be inadmissible as hearsay, except as it might constitute an admission by a party opponent, and since the note's author cannot recall writing the note or otherwise explain it, we believe the note should be given little weight, and that credit should be accorded to said contemporaneous testimony. 27/

Complainant contends the note itself establishes that Sullivan, who actively represented the respondent in labor relations, including a prolonged opposition to organizing by substitute teachers, directed Showers not to assign Gregory to additional assignments. Frankly, the commission feels the testimony of Sullivan, Gibson, and Showers does not adequately explain Sullivan's alleged statement to Showers, especially in light of the short time lapse between the writing of the note and the hearing. However, even if the commission was to consider the note, to the exclusion of the hearsay rule, the commission is of the opinion that complainant has not established by a satisfactory preponderance of the evidence that Sullivan or Showers were motivated by anti-union animus. While the record as a whole creates some doubt, the commission would have to speculate, rather than draw a reasonable inference, to reach the conclusion argued by the complainants.

Discussion of the positions of the parties

The respondent has excepted from the examiner's finding that Showers terminated Gregory as a substitute. We will not upset the examiner's finding, although we agree that Gregory never was removed from the list of eligible substitutes. While conceivably an unexpected demand for substitute teachers with Gregory's qualifications might have caused Showers to call her, the undisputed fact is that Showers treated Gregory differently in respect to job opportunities and, despite the possibility for recall to further assignments, constructively terminated her.

Respondent further objects to the finding that the termination resulted from anti-union animus. Complainants, on the other hand, point to the involvement of Sullivan, who was actively involved in negotiations on behalf of the respondent; rely on the examiner's reasoning; and emphasize that the commission sits in an appellate capacity and should defer to the examiner.

The commission does not sit in an appellate capacity; it is the fact finder. Although the commission frequently defers to the inferences and credibility resolutions of its examiners, particularly on close questions, the commission is not free to disregard the statutory scheme under which the commission shall affirm or reverse an examiner

27/ Section 908.01(4)(b), Stats. The reliability of the note is further diminished since its attribution to Sullivan is hearsay within hearsay.

on the basis of its review of the evidence and the absence of any statutory qualification as by the imposition of any standards to govern such review. See sec. 111.07(5), Stats.

The discussion herein of the examiner's reasoning shows that the commission does not accept his rationale in finding animus. Complainants' assertion that Sullivan's involvement supports the finding of animus lacks persuasive record support.

We conclude that Showers was not motivated by anti-union animus in her treatment of Gregory. In addition to the reasons stated in connection with the discussion of the positions of the parties and the decision of the examiner, we also state our belief that on this record it must be said Showers was sympathetic to the activity of substitute teachers. 28/ Gregory herself described Showers as very warm and friendly, having great sympathy and being supportive of union efforts. 29/ The organization of substitute teachers had become a topic of conversation generally, and it was natural for Showers in her regular conversations with substitutes to make inquiry into the progress of those efforts. The genuineness of her interest may have originated in concern for the future of her own job, 30/ and her genuine support for the organizing effort is evidenced by the fact that she received an invitation to attend one of the early informational-organizational meetings by an officer of the substitutes' organization. 3 Complainants have failed to adduce sufficient evidence to persuade us that Showers' concern was dissimulative. Particularly impressive to us is that Showers continued to give assignments to persons equally active in union affairs as Gregory. While in certain circumstances we would agree with the examiner that anti-union animus can be aimed at one person only, we are persuaded this is not such a case.

Because of our disposition of this case, we need not discuss the respondent's argument that the examiner's remedial order was overbroad.

Conclusions

On the basis of the foregoing discussion we today have entered an order which dismisses the complaint. In addition, we have changed the examiner's conclusion of law to show no violation.

We have made a number of changes in the examiner's findings of fact. We have deleted the following in paragraph 5:

"that, according to Showers, said evaluations were 'not particularly useful' in determining the quality of a teacher's current teaching ability."

28/ Tr. 57.

28/ Tr. 37 45 52 55 57.

This finding might suggest that Showers did not rely on Gregory's evaluations in deciding not to call her for assignments. We believe otherwise and have changed the finding in paragraph 12 to say so, even though we agree that the lapse of time between a teacher's performance and Showers' receipt of an evaluation thereof prevented said evaluations from being current.

Also in paragraph 5 the examiner found that neither Showers nor any other agent of the respondent contacted the affected teacher to determine the accuracy of an evaluation. This finding is true, but we delete it because it is not material. No argument is made that Gregory did not receive or deserve adverse evaluations. 32/

We have revised the first part of paragraph 6 and a small portion of paragraph 11 of the findings to reflect our conclusions discussed herein that Showers did not in February assure Gregory she had no adverse evaluations. Further, the examiner erroneously found that Gregory asked to be removed from the substitute list in order to take a real estate course; Gregory was leaving to sell life insurance. 33/ Further, we have revised paragraph 11 to show that at the time Showers advised Gregory there were no adverse evaluations Showers was unaware of any adverse evaluations.

CERTIFICATION OF CONSULTATION WITH EXAMINER

This is to affirmatively certify, pursuant to the requirement of the supreme court, 34/ that, as to the commission's findings of fact involving determinations contrary to those of the examiner which also involved credibility resolutions, the full commission, before issuing its final decision, met with the examiner, consulted with him, and discussed with him his personal impressions of the witnesses in respect to their credibility. Further, the reasons for departing from the examiner's findings are explained in the memorandum in the instant decision.

Dated at Madison, Wisconsin this 10th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

32/ There is one exception for the November 15 assignment of Gregory to an area in which she was not qualified. Showers, however, took that into account in weighing that evaluation.

33/ Tr. 16.

34/ See Appleton v. ILHR Department (1975), 67 Wis. 2d 162, 169-172, 226 N.W. 2d 497.