STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF BROOKFIELD, LIBRARY EMPLOYEES LOCAL 20 OF WISCONSIN COUNCIL 40, AFSCME, AFL-CIO,	:	
Complainant,	:	Case XLVII No. 30242 MP-1369
vs.	:	Decision No. 20691
CITY OF BROOKFIELD,	:	
Respondent.	:	

Appearances

Lawton & Cates, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Godfrey, Trump & Hayes, Attorneys at Law, by Mr. Tom E. Hayes, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4278, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on August 13, 1982, alleging that the above named Respondent's layoff of municipal employes was a prohibited practice within the meaning of Sections 111.70(3)(a)1, 111.70(3)(a)3 and 111.70(3)(a)4 of the Municipal Employment Relations Act; and the Commission having authorized Edmond J. Bielarczyk, Jr., a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and hearing on said Complaint having been held on November 5, 1982, before the Examiner in Brookfield, Wisconsin, and a stenographic transcript of the proceedings having been prepared; and the parties having filed post-hearing briefs and reply briefs by February 4, 1983; and the Examiner, having considered all of the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That City of Brookfield, Library Employees, Local 20 of Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices located at 2216 Allen Lane, Waukesha, Wisconsin; and, that since June 16, 1981, the Complainant has been the certified exclusive bargaining representative of all professional and non-professional employes of the City of Brookfield Public Library excluding supervisory, managerial, confidential, part-time employes working twenty (20) hours or less per week, seasonal, temporary/casual employes and volunteers. 1/

2. That the City of Brookfield, hereinafter referred to as the Respondent, is a Municipal employer having its principal offices at 2000 North Calhoun Road, Brookfield, Wisconsin; that among its various governmental functions the Respondent maintains and operates a public Library located at 1900 Calhoun Road, Brookfield, Wisconsin; that at all times material herein Mr. William Mitchell has held the elected position of Mayor of the City of Brookfield and has functioned as an agent of the Respondent; that since January 1, 1982, Mr. William J. Grady has held the position of Chairman of the Brookfield Civil Service Commission and functioned as an agent of the Respondent; and, that Ms. Sonia Bielmeier has at all times material herein been employed by the Respondent as the Director of Library Services and has functioned as an agent of the Respondent.

1/ The Union was certified as the exclusive collective bargaining representative of the above-noted bargaining unit on June 16, 1981. City of Brookfield (Library), Case XXXIII, No. 27703, ME-1986, Decision No. 18673.

3. That the operation of the Brookfield Public Library is overseen by the Library Board of Trustees; that the Brookfield Common Council determines the amount of money that will be made available for the operation of the Library, including establishing, by ordinance, the number of positions authorized in the Library and the compensation for those positions; that heretofore Library positions have been considered "civil service" positions; that the Brookfield Civil Service Commission possessed the final authority for approving changes in the status or pay of employes in the Respondent's "civil service" pursuant to the City's Civil Service Ordinance; and that said Civil Service Ordinance contains the following provisions material hereto:

> 4.10 EMPLOYEE STATUS. (1) Written notice of each appointment in the Civil Service shall be submitted by the appointing authority to the Commission within 5 days.
>
> . . .
>
> (2) No department head shall change the status of any employee in the "Civil Service" as to promotion, demotion, increase or decrease in rate of pay (except for increases or decreases fixed by the Council pursuant to law), resignation, discharge, leave of absence or any other act until he notifies the Commission in writing of such change and the reasons therefor, and receives a certification from the Commission that said action is proper.
>
> . . .
>
> 4.13 ABOLISHMENT OF POSITION. Whenever in the judgment of the Council it becomes necessary in the interest of economy or because the necessity for the position involved no longer exists the Council, by a 3/4 vote of all the members of the Council, may abolish any position or employment in the "Civil Service". Any employee holding such an abolished position or employment may be dropped from the payroll and civil service. Should such position or employment or any position involving all or any of the same duties be reinstated or created within 2 years, such employee, if complainant, shall be eligible to be appointed thereto in preference to any other qualified persons on the eligible list for such position, and such employee shall also be eligible for certification to any other open position for which he is qualified.

that on July 6, 1982, the City of Brookfield Common Council amended said Civil Service Ordinance to exclude employes within a collective bargaining unit for which there is a collective bargaining representative from said Civil Service Ordinance's application; that said change in the Civil Service Ordinance was made to remove any conflicts between agreements with existing bargaining units and the Civil Service Ordinance; that said Civil Service Ordinance is silent concerning seniority and the procedure to follow in determining which employe is to be layed off when a position is abolished; and, that no change was made in employes wages, hours or other conditions of employment.

4. That on May 2, 1979, Mayor Mitchell sent a memo to City Department Heads asking that they consider how their departments might improve efficiency through electronic data processing; that in the fall of 1979, Director Bielmeier began to research the use of an automated system in the Library for the purpose of making a preliminary report; that study of the use of an automated system in the Library continued and on October 21, 1980, Director Bielmeier gave an oral presentation to the Brookfield Common Council on the use of an automated library system and its possible application in the Brookfield Public Library; that in December of 1980, the Brookfield Common Council approved the change to an automated system in the Library and included funding for such change in the City's 1981 budget; that the Common Council approved said change on the basis that the estimated savings of an automated library system of $413,108 in employes wages and benefits over a five year period be realized and passed from the Library budget to Respondent's general fund and budget; that the actual work on the physical changeover to automation began in May of 1981; and that on February 1, 1982, the computer went "on line" in the Brookfield Public Library; and, that since at least October 21, 1980, employes

of the Library were aware of Respondent's decision to automate the Library and that said automation would result in a reduced number of positions in the Library.

5. That on June 16, 1981, the Complainant was certified as said units exclusive bargaining Representive; that on August 24, 1981, the parties exchanged their initial proposals on matters to be included in their first collective bargaining agreement; that thereafter the parties met on August 24, September 16, September 30, October 19, October 29, November 16, and November 30, 1981, and January 7, 1982 in efforts to reach an accord on a collective bargaining agreement; that at the November 16, 1981 and January 7, 1982 meetings discussions were held on layoffs and the necessity of layoffs; that on January 18, 1982, the Complainant filed a petition requesting the Commission to initiate Mediation-Arbitration pursuant to Section 111.70(4)cm 6 of the Municipal Employment Relations Act; that on February 15, March 2, and April 7, 1982, William C. Houlihan, a member of the Commission's staff, conducted an investigation which reflected that the parties were deadlocked in their negotiations; that on February 25, 1982, the Complainant submitted a final offer to the Investigator and thereafter amended said final offer on April 7, and May 10, 1982; that on February 26, 1982, the Respondent submitted a final offer to the Investigator and thereafter amended said final offer on April 1, and July 26, 1982; that on August 3, 1982, said Investigator notified the parties the investigation was closed and advised the Commission that the parties remained at impasse; that the Commission ordered Mediation-Arbitration to commence on August 24, 1982; that the Complaint's May 10, 1982, final offer contains the following provisions material hereto:

Article XI

> 11.01 The date an employee is employed or re-employed in a regular full-time positions will become his seniority date. A part-time employee shall accrue one (1) month seniority for each one hundred and sixty-two and one-half (162 1/2) hours worked.
>
> 11.02 The seniority of an employee in respect to qualification for benefits will be the date of first continuous employment or latest date of re-employment for full-time employees, and accrued seniority for part-time employees.
>
> 11.03 The service rights of an employee shall continue to accumulate during military leave, sick leave and absence because of injury in the course of employment when drawing Worker's Compensation.

. . .

Article XIII

Layoff and Recall

> 13.01 If a reduction in employee personnel becomes necessary, the least senior employee shall be the first person laid off in each of the two groups. The groups shall be defined as professional and non-professional.
>
> 13.02 The last person laid off shall be the first person re-employed (if available and desires to return, and is capable and qualified to perform the available work).
>
> 13.03 Bargaining unit work shall not be assigned to any employee outside of the bargaining unit while regular employees in the bargaining unit are on layoff.;

and, that the Respondent's April 1, 1982, final offer contains the following provision material hereto and that said provision was not amended on July 26, 1982:

ARTICLE XI

LAY-OFF RECALL

11.01 Lay-off shall be by job classification and in the reverse order of the total length of service with the City. For this purpose, length of service shall be the total length of time worked in the Library without regard for classification. The job classifications for this purpose shall be Librarian, Technician (full time), and Technician (part time).

11.02 When the work hours of a particular employee within a classification are to be reduced, the employee involved shall be given the opportunity to work the reduced schedule. If the particular employee does not elect to accept the reduced schedule, the particular employee shall be on lay-off, in which case an employee of lesser length of service may be placed on the reduced work schedule.

11.03 In the event that a vacancy occurs in the classification of an employee on lay-off within one (1) year of lay-off, the employee on lay-off shall be offered an opportunity to fill the vacancy. Such offer shall be in writing to the last known address of the employee on lay-off. An employee receiving such offer shall respond within ten (10) calendar days of receipt and should be ready, willing and able for work within thirty (30) calendar days of receipt of such notice of vacancy.

6. That on June 14, 1982, Bielmeier sent the Complainant's Staff Representative, Richard Abelson, the following letter:

Mr. Richard Abelson:

Please be advised that all library employees with employment dates on and after October 1, 1979 will be laid off on July 1, 1982.

This reduction in staff is necessary to keep personnel expense within the appropriation made by the Common Council.

Sonia Bielmeier, Director Library Services

that on June 15, 1983, Abelson sent the following letter to Beilmeier:

Dear Ms. Bielmeier:

I am in receipt of your letter of Monday, June 14, 1982, relative to the layoff of employees with employment dates on and after October 1, 1979 and the layoff scheduled for July 1, 1982.

Please be advised that the reduction of staff at this stage of the negotiation process is a unilateral alteration of wages, hours and working conditions, and constitutes a prohibited practice under Section 111.70, Wisconsin Statutes. The Union demands that the impending layoff not take place. Further, please be further advised that while not waiving the demand that the layoff not take place, the Union reminds you that there is currently no layoff or recall provision negotiated between the parties. Therefore, the Union demands that the parties meet in immediate collective bargaining in order to negotiate the impact of the layoff proposal referred to in your June 14, 1982 letter, upon bargaining unit employees.

Further, the Union has filed a petition to accrete the employees working twenty (20) hours per week or less. Therefore, to alter any of those employees wages, hours, or working conditions is also illegal at this time.

Please contact the undersigned at your earliest possible convenience.

Very truly yours,

Richard W. Abelson
Representative; 2/

that on June 16, 1982, Bielmeier sent the following letter to employe Elaine Farnham:

Dear Elaine,

Pleased be advised that as of July 1, 1982 all employees with employment dates on or after October 1, 1979 will be laid off. We regret that it is necessary to inform you of this decision by letter, as the announcement was made personally to the other staff members affected on Thursday, June 17, while you were on vacation. This reduction in staff is necessary to keep personnel expense within the appropriation made by the Brookfield Common Council.

We would like you to report to work as scheduled June 21; we expect your cooperation during this period.

Sincerely,

Sonia Bielmeier, Director Library Services

that on June 17, 1982, Mitchell sent the following letter to Abelson:

Dear Mr. Abelson:

Library Director, Sonia Bielmeier has referred to me your letter of June 15, 1982, about the proposed lay-off of library employees with employment dates on and after October 1, 1979.

Your contention that the layoff is a prohibited practice under Sec 111.70 is contrary to the State Supreme Court's decision in City of Brookfield v. WERC, 87 Wis 2d 819 (1978), Gabe v. Lake, 271 Wis 391, cited in 88 ALR (3rd) 1165.

Attorney Tom Hayes has advised me that the layoffs are not negotiable, but the effects of the layoffs are negotiable and will be negotiated.

Mr. Hayes is vacationing with Mrs. Hayes in Europe for some ten (10) days, and I suggest you confer with him on his return.

Sincerely,

William A. Michell, Jr.
MAYOR
CITY OF BROOKFIELD;

2/ On June 15, 1982, the Complainant filed a petition with the Commission to clarify and amend said bargaining unit to include all regular part-time employes regardless of the number of hours worked per week. On August 18, 1982, the Complainant requested to withdraw the petition. Said petition was dismissed on August 26, 1982. City of Brookfield (Library), Decision No. 1986.

that the Respondent delayed Farnham's layoff from July 1, 1982 to July 7, 1982, because of the Union's demand to bargain the impact of its layoff decision; and, that there is no evidence in the record that Abelson ever attempted to contact the Respondent's attorney, Tom Hayes, to negotiate the impact of the Respondent's decision to lay off employes.

7. That as of June 30, 1982, the following employes worked in the following positions at the following hours per week and had the following employment dates:

NAME	Employment Date	Job Title	Working Hours
Erna Stegelman	2-26-69	P.T. Para Professional	30 /wk.
Mary Wegener	9-17-73	Technical Services Lib.	37 1/2/wk.
Kerstin Kusic	6-14-76	Library - Part Time	32 /wk.
Christina Helm	7-26-76	Adult Services Librarian	37 1/2/wk.
Jean Reinemann	3-7-77	Library - Part Time	25 /wk.
Darcy Neuenfeldt	8-17-77	Library - Part Time	28 /wk.
Patricia Collins	11-7-78	Technical Asst. II	37 1/2/wk.
Joanne Ihn	6-4-79	Technical Asst. I	37 1/2/wk.
Beth Grimstad	7-24-79	Part-time	18 /wk.
Elaine Farnham	10-8-79	Librarian Asst.	37 1/2/wk.
Carol Coppersmith	1-7-80	Tech. Asst. (P.T.)	16 /wk.
Suzanne Clark	1-30-80	Part Time	7 1/2/wk.
Lorraine Wandsnider	10-21-81	Library - Part Time	25 /wk.
Donell Nash	3-30-82	Tech. Asst. II (P.T.)	19 /wk.

that as of June 30, 1982, the Respondent also employed seven pages working twenty hours or less per work; that on July 30, 1982, the Respondent laid off employes Coppersmith, Clark, Wandsnider and Nash; and, that Farnham was the only full-time employe laid off.

8. That the Respondent had appropriated $164,037 for Library personnel for 1982; that the Respondent starting in January, 1982, delayed layoff's on a month to month basis awaiting an agreement with the Complainant on a collective bargaining agreement; that in May 1982, the Mayor determined that by June 30, 1982, the Library would have expenditures of $89,094 for Library personnel and that a reduction of $14,151 was needed in the rate of salary expenditures for the second half of 1982 to remain within appropriation; that the Mayor directed Bielmeier to make layoffs in order to remain within appropriations and directed Bielmeier to make the layoffs in accordance with reverse order of seniority; that on November 1, 1982, the Library had expenditures of $141,311 for Library personnel; and, that on November 5, 1982, Director Bielmeier estimated that the Library would have expenditures for Library personnel in November and December 1982 of $22,800 resulting in an overexpenditure of $74 on December 31, 1982.

10. That prior to the instant matter, all reductions in staff made by the Respondent were done by attrition; that in January 1981 there were the equivalent of 14.2 full-time positions; and, that in January 1982 there were the equivalent of 11.2 full-time positions.

11. That Farnham has served as a permanent member of the Complainant's two person bargaining team since the commencement of the parties negotiations on a initial collective bargaining agreement; that the City's representatives, including Mitchell, had knowledge of the fact; that there is no evidence that the Complainant was aware prior to its decision to lay off part-time employes that Respondent sought inclusion of part-time employes working twenty (20) hours or

less in said bargaining unit; and, that the decision of Mayor Mitchell to layoff employes in reverse order of seniority was not motivated by any anti-union animus.

12. That there is no evidence in the record that Respondent's decision on July 6, 1982, to amend said Civil Service Ordinance to exclude employes within a collective bargaining unit for which there is a collective bargaining representative was motivated by any anti-union animus; and, that there is no evidence that the Union ever requested to bargain the Respondent's July 6, 1982 decision to exclude employes within a collective bargaining agreement for which there is a collective bargaining representative from application of said civil service ordinance.

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

CONCLUSIONS OF LAW

1. The Respondent, by unilaterally laying off full-time employe Farnham and part-time employes Coppersmith, Clark, Wandsnider, and Nash, and by amending the Civil Service Ordinance to exclude employes within a collective bargaining unit for which there is a collective bargaining representative, did not interfere with, restrain or coerce those municipal employes in the exercise of their rights guaranteed in Section 111.70(2) of the Municipal Employment Relations Act, and therefore, Respondent did not violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. The Respondent, by unilaterally laying off full-time employe Farnham and part-time employes Coppersmith, Clark, Wandsnider, and Nash and amending the Civil Service Ordinance to exclude employes within a collective bargaining unit for which there is a bargaining representative, did not discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment, and therefore, did not violate Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

3. The Respondent, by unilaterally laying off full-time employe Farnham and part-time employes Coppersmith, Clark, Wandsnider, and Nash and amending the Civil Service Ordinance to exclude employes within a collective bargaining unit for which there is a bargaining representative, did not refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit, and therefore, did not violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

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

ORDER

It is ORDERED, that the Complaint filed herein be, and the same hereby is, dismissed in its entirety. 3/

Dated at Madison, Wisconsin this 20th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr., Examiner

3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no

(Continued on Page eight)

3/ (Continued)

petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant filed the instant complaint on August 13, 1982, alleging that Respondent's actions of laying off municipal employes and amending the Civil Service Ordinance to exclude employes represented by the Complainant was a unilateral alteration of wages, hours and conditions of employment. The Complainant further alleged that the Respondent's actions were a violation of Respondent's duty to bargain in good faith, and that they discriminated against municipal employes, and interfered, restrained, or coerced municipal employes in the exercise of their rights. In its brief, the Complainant argues that the City refused to bargain in good faith and thereby restrained and coerced employe Farnham and discriminated against her. The Complainant further argued that the unilateral repudiation of the Civil Service Ordinance prior to the time Respondent submitted its last, final offer is a violation of the duty to bargain in good faith. The Complainant also argues that the Respondent's laying off of Farnham was a partial implementation of its final offer, which it thereafter amended, and that said action was a unilateral change in wages, hours and conditions of employment. The Complainant also contends that, although the Commission has not determined the rights, duties, and obligations of the parties' during the pendency of a petition to initiate Mediation-Arbitration, an employer is barred from unilateral changes in terms and conditions of employment prior to the exhaustion of impasse procedures.

The Respondent makes a number of arguments in response to Complainant's allegations. First, Respondent contends that the record is totally devoid of any evidence of anti-union animus. Further, that the layoff was a result of a labor saving innovation which pre-dated protected activities, and not for any unlawful reason. The Respondent points out that it used attrition to meet the labor saving goals established prior to the Complainant's organizational drive, and only when there was no other feasible alternative to meet these goals did the employer finally decide to layoff.

Secondly, the Respondent contends it went far beyond good faith to reach an agreement with the Complainant. Respondent points out that it notified the Complainant in November of 1981, of the pendency of layoffs and argues that the Union never made any proposals about the impact of layoffs except in Complainant's final offer. Further, Respondent argues that when the Complainant demanded to bargain impact in June of 1982, the Respondent answered it was willing to bargain. The Respondent argues that after said answer it delayed Farnham's layoff from July 1, 1982 to July 7, 1982, and that the Union never attempted to schedule a meeting. Thus, Respondent contends that the Complainant waived its right to bargain.

Third, the Respondent contends that the existence of a petition for Mediation-Arbitration has no impact in the instant matter. The Respondent's theory is that the Complainant's timing of the filing of the petition has no effect under Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

Fourth, the Respondent contends that it made no prohibited unilateral changes. The Respondent argues that while it did amend the Civil Service Ordinance on July 6, 1982, it continued to apply the wages, hours, and working conditions to Library employes. Further, the Respondent argues that the section of this ordinance which the Complainant alleges to apply to this matter, 4.10, pertains to the selection of an agent for a purely supervisory activity and thus is not a working condition.

Finally, the Respondent contends that its actions did not interfere with employe's exercise of protected rights. The Respondent points out that it began its automation of the Library long before the advent of the union. Further, the Respondent argues that the petition to include part-time employes working twenty hours or less in the instant bargaining unit was filed after employes were given their notice of layoff and therefore the Complainant's position is without merit.

Interference

The Complainant has alleged that Respondent violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act (MERA), by laying off municipal employes and amending the Respondent's Civil Service Ordinance during the pendency of a petition for Mediation/Arbitration. In this connection, Section 111.70(3)(a)1 provides that it is a prohibited practice for a municipal employer: "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub (2)." In order for the Complainant to prevail on its complaint of interference with employe rights, it must demonstrate by a clear and satisfactory preponderance of the evidence that Respondent's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with employes exercise of rights guaranteed by MERA. 4/ It is not necessary to demonstrate that Respondent intended the conduct to have the effect of interfering with those rights. 5/

On May 2, 1979, Mayor Mitchell requested City Department Heads to consider how automation could improve efficiency in their Departments. On October 21, 1980, Library Director Bielmeier gave an oral presentation to the City's Common Council on the use and application of automation in the City's Library. The Common Council approved the change to automation in December of 1980, significantly prior to the Complainant's filing of an election petition on March 26, 1981. Furthermore, that the Respondent advised the Complainant of the necessity of layoff's prior to the Complainant's filing of a Mediation/Arbitration petition on January 18, 1982. It was undisputed that the Respondent delayed implementation of the layoff decision on a month to month basis as the parties were attempting to negotiate their first collective bargaining agreement. The Respondent did not implement layoffs until July, 1982, when it became evident the Library could not remain within its budget allocation unless layoffs occurred. Prior to the layoffs, on June 14, 1982, Library Director Bielmeier sent Respondent's Bargaining Representative Abelson a letter stating staff reductions would take place on July 1, 1982. In response to Abelson's letter of June 15, 1982, Mayor Mitchell replied in his letter of June 17, 1982 that the "...the layoffs are not negotiable, but the effects of the layoffs are negotiable and will be negotiated." And it was undisputed that the Complainant delayed implementing Farnham's layoff for one week in response to Abelson's letter.

In this connection, the Wisconsin Supreme Court has held:

> "...that economically motivated lay offs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government." 6/

The Wisconsin Supreme Court has also held that the effects of a layoff are a mandatory subject of bargaining. 7/ In the instant matter the record demonstrates that unless layoffs occured the Respondent would overpend its 1982 budget appropriations by $14,151. Thus, the layoffs were economically motivated and a result of budgetary restraints. The Respondent informed the Complainant of the decision to implement layoffs. Complainant replied with a demand the layoffs not take place and a demand to bargain. However, there is no record that the Complainant ever responded to Mayor Mitchell's June 17, 1982 letter, except for the filing of the instant petition.

4/ City of Brookfield (Library), (19367-A) 11/82; Western Wisconsin V.T.A.E. District, (17714-B) 6/81; Drummond Jt. School District No. 1, (15909-A); Ashwaubenon School District, (14774-A) 10/77/.

5/ City of Evansville, (9440-C) 3/71.

6/ City of Brookfield v. WERC, Decision No. 11489-B and 11500-B 8/78.

7/ City of Brookfield v. WERC, supra.

The record demonstrates that two bargaining unit employes, Farnham and Wandsnider, and three non-bargaining unit employes, Coppersmith, Clark and Nash, were laid off. Of said five employes, only Farnham, a member of Complainant's negotiations team, is a full-time employe with the other four employes working part-time. However, the Respondent has been able to present credible evidence that its decision to lay off said five employes was based on legitimate basis, i.e., to remain within budgeted appropriation.

Therefore, given the context in which the Respondent's actions occurred: (1) the lack of any anti-union animus with which those actions could be connected by the employes; (2) the fact that employes were aware of the decision to automate the Library before Complainant's arrival and that said decision would result in a reduced number of personnel; (3) the fact that Respondent informed the Complainant of the necessity for layoffs in November of 1981, and January of 1982; (4) the fact that the Respondent delayed Farnham's layoff; (5) the failure of Complainant to respond to Mayor Mitchell's June 17, 1982 letter; and (6) the fact that there was no demand to bargain the change of the civil service ordinance; it is concluded that Respondent's complained of actions did not contain an express or implied threat of reprisal or promise of benefit that tended to interfere with the guaranteed rights of the employes to gain or support a union.

There is no evidence in the record that the Respondent was aware prior to Abelson's June 15, 1982 letter, that the Complainant was seeking to include regular part-time employes working twenty hours or less into the bargaining unit represented by the Complainant. Further, Complainant requested to withdraw its petition seeking to include said part-time employes on August 18, 1982. Thus, it is also concluded that Respondent's complained of action against employes working twenty (20) hours or less did not contain an express or implied threat of reprisal or promises of benefit that tended to interfere with the guaranteed rights of the employes to gain or support a union.

Discrimination

The Complainant also alleges that Respondent's complained of actions discriminated against municipal employes and violated Section 111.70(3)(a)3 of MERA, and in its brief, specifically argues that said actions discriminate against employe Farnham. Said section of MERA provides that it is a prohibited practice for a municipal employer: "To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair share agreement."

In order to prevail on its complaint, the Complainant must demonstrate, by a clear and satisfactory preponderance of the evidence, that employes were engaged in protected concerted activity, that Respondent and/or its agents were aware of such activity, and that the laying off of employes and amending the Civil Service Ordinance was motivated at least in part by anti-union considerations. 8/

There is no evidence that either Coppersmith, Clark, Wandsnider, or Nash participated in any protected concerted activity during the pertinent period of time. Similarily, there is no evidence that the Respondent's agents had any knowledge of such activity and that they were hostile toward it. There is evidence that Farnham, as a member of Complainant's negotiations team, was engaged in a protected concerted activity and that Respondent's agents had knowledge of her activity. However, there is no evidence that Respondent's agents were hostile towards her activity. Evidence as to the timing of the layoff and the amendment of the Civil Service Ordinance are probative as to whether the complained of actions were unlawfully motivated. In the instant matter, the record establishes that the decision to lay off employes not represented by the Complainant was made prior to the filing of the petition to include them in the unit. There is no evidence in the record that the Respondents' agents were aware that the Complainant intended to seek their inclusion in the unit.

8/ City of Brookfield, supra; Milwaukee Board of School Directors, (17176-A) 4/81; Milwaukee Board of School Directors, (17651-A) 2/81; Village of Union Grove, (15541-A) 2/78.

The record also demonstrates that the decision to lay off and procedure followed were made by Mayor Mitchell. There is no evidence in the record that Mitchell was aware of the hiring dates of employes, including Farnham's, thus Mitchell was unaware of which employes the layoff decision would impart on. Further, as noted above, the Respondent has presented credible evidence that its decision to lay off employes had a legitimate basis.

Therefore, it is concluded that the Complainant has failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that the Respondent's actions violated Section 111.70(3)(a)3 of MERA.

Failure to Bargain Collectively

The Complainant also alleges that Respondent violated Section 111.70(3)(a)4 of MERA by unilaterally altering the wages, hours and working conditions of its employes during the pendency of a Mediation/Arbitration petition, and by refusing to bargain with the Complainant, upon demand, regarding wages, hours and working conditions.

Section 111.70(3)(a)4 of the MERA provides in relevant part that it is unlawful for a municipal employer: "To refuse to bargain collectively with a representative of its employes in an appropriate collective bargaining unit."

In the instant matter, as noted above, the Respondent made the decision to automate the Library prior to the Complainant's filing of an election petition and employes were aware that said decision would result in reduced staff. The Respondent informed the Complainant of the necessity for layoffs in November of 1981 and January of 1982. Both parties had submitted final offers containing layoff proposals to Investigator Houlihan. The Union submitted its last amended final offer to the Investigator on May 10, 1982. From May 10 to June 15, 1982, when Abelson sent his letter to the Respondent demanding to bargain the impact of the Respondent's decision to layoff employes, there is no evidence that the Complainant ever informed the Respondent it was willing to move from its position concerning seniority and layoffs. Furthermore, Mayor Mitchell's response to the Complainant on June 17, 1982, states: ". . . the effects of the layoffs are negotiable and will be negotiated," and suggested that Abelson confer with Respondent's attorney upon said attorneys return from vacation in ten days. Thus, Mitchell's response indicates that the Complainant's demand to bargain the impact was not futile. Thereafter, the Respondent delayed Farnham's layoff to July 7, 1982, because of the Complainant's demand to bargain the layoffs and in hope of reaching an accommodation with the Complainant. However, the record contains no evidence that the Complainant, other than the filing of the instant petition, took any action after receipt of Mayor Mitchell's letter to bargain the impact of the layoff decision. As noted above, economically motivated layoff of public employes resulting from budgetary constraints is a matter primarily related to the exercise of municipal powers. Further, the Commission has held that a municipal employer has a right to implement a decision which primarily relates to the formulation and implementation of public policy, and thus a non-mandatory subject of bargaining, without first bargaining the impact of the decision. 9/ Here, however, the Respondent offered to bargain the impact of its decision to layoff employes and the Complainant did not respond to said offer. Thus, it is concluded that the Respondent did not refuse to bargain the impact of its decision.

Nor is there any evidence in the record that the Complainant, other than filing the instant petition, ever demanded to bargain the impact of the Respondent's decision to amend its Civil Service Ordinance to exclude employes represented by the Complainant from application of the Ordinance. The Complainant specifically alleged that the removal of the Civil Service Commission from approving layoffs, an act that affects the status of an employe not in a collective bargaining unit, was a unilateral change in wages, hours and working conditions. Assuming, arguendo that the Civil Service Commission's approval of a layoff of an employe is a mandatory subject of bargaining, Complainant's failure to demand bargaining over the subject cannot be construed as a refusal by the Respondent to bargain the subject.

9/ City of Appleton, Decision No. 17034-D, 5/80.

The Complainant cites two cases in its brief which it claims are on point in the instant matter. However, both cases can be distinguished from the instant matter. The first, Weymouth School Committee and National Association of Government Employes, Local R-162, Case No. MUP-4293, July 2, 1982; is a Massachusetts Labor Relations Commission (MLRC) decision. In Weymouth said School Committee made a request to the Town of Weymouth Board of Selectmen to authorize the revocation of Civil Service law protection from employes hired in the future. The Union, when it became aware of the revocation, demanded to bargain the original decision to seek revocation and the impact and implementation of revocation if approved. Said School Committee never responded to said request. The MLRC held that the School Committee did not have a duty to bargain the decision to seek revocation, but the MLRC also held that the School Committee had a duty to bargain the impact of the revocation on employes' working conditions. The MLRC ordered the School Committee to bargain with the Union on all terms of employment eliminated as a result of the revocation. In the instant matter, however, Respondent's reply to the demand to bargain the impact of the decision to layoff was that the subject was negotiable and suggests that the Complainant contact Respondent's attorney. Further, the record is devoid of any request to demand to bargain the impact of the decision to amend the Civil Service Ordinance or of any action taken by the Complainant after receipt of Mayor Mitchell's letter except for the filing of the instant petition.

The second case, Moreno Valley Educators Association v. Moreno Valley Unified School District, Case No. LA-CE-398, PERB Decision No. 206, April 30, 1982, is a California Public Employment Relations Board (PERB) decision. Moreno Valley involved three issues: (1) unilateral implementation of changes in matters within the scope of representation after declaration of impasse has occurred, but prior to exhaustion of statutory impasse procedures; (2) reduction or deletion of proposals during the course of good faith negotiations; and (3) refusal to engage in advisory arbitration after the expiration of a contract containing such a procedure. In Moreno Valley, the PERB found that the unilateral implementation of changes within the scope of representation after declaration of impasse has occurred but prior to the exhaustion of statutory impasse procedures was an unfair labor practice. The PERB also found that the changes in proposals and refusal to participate in advisory arbitration were not unfair labor practices. The PERB in finding the employer committed said unfair labor practice held that an employer may not implement a unilateral change, absent a valid defense, until completion of statutory impasse procedures. The PERB also held that the defense raised by the employer, financial uncertainty, was unconvincing and therefore was not a valid defense. Here, it is true that impasse had been declared by the Complainant and that the statutory impasse procedures have not been completed. However, Respondent has demonstrated that its decision to layoff employes was based upon a financial certainty, as the Respondent was unable to remain within its budget allocation at the staffing levels existing on June 30, 1982.

Thus, the issues raised by the Complainant in the instant matter are determined on very narrow grounds: (1) the Respondent's decision to layoff employes occurred after it informed the Complainant of the necessity of layoffs; (2) the decision to automate the Library predated the arrival of the Complainant; (3) it was clear the Respondent could not remain within its budget appropriation with existing staffing levels; (4) the response of Mayor Mitchell on June 17, 1982, cannot be construed as a refusal to bargain; (5) the Respondent delayed Farnham's layoff in the hope of reaching an accomodation with the Complainant; and, (6) the failure of the Complainant to take any action other than filing of the instant petition after receiving the Mitchell letter.

Therefore, based upon the above and foregoing, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr.
Edmond J. Bielarczyk, Jr., Examiner