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 49 No. 31445 MP-1426
vs.	:	Decision No. 20702-B
CITY OF BROOKFIELD (LIBRARY),	:	
Respondent.	:	

Appearances:

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703 by Mr. Richard V. Graylow, and (on the brief) Kirk Strang, Law Clerk, appearing on behalf of the Complainant.

Godfrey, Trump & Hayes, Attorneys at Law, 250 East Wisconsin Avenue, Suite 1200, Milwaukee, Wisconsin 53202, by Mr. Tom E. Hayes, appearing on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Daniel J. Nielsen having issued his Findings of Fact, Conclusions of Law and Order in the above matter on July 13, 1984, wherein he concluded that the Respondent City of Brookfield committed a prohibited practice within the meaning of Secs. 111.70(3)(a)3 and (derivatively) (3)(a)1, Stats., by its refusal to grant Christina Helm's request for unpaid leave in November of 1982, and the Examiner having ordered said Respondent to cease and desist from discriminating against Helm on account of her union activities and to take certain affirmative action including notice posting and reinstatement of Helm with back pay and interest; and Respondent having filed a timely petition for Commission review on July 31, 1984; and the parties having filed sequential briefs with the Commission, the last of which was received on February 11, 1985; and the Commission having considered the record in the matter and having conferred with the Examiner concerning his impressions of the witnesses whose credibility was disputed, and being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified and affirmed as modified;

NOW, THEREFORE, it is hereby

ORDERED 1/

A. That the Examiner's Findings of Fact, Conclusions of Law and Order, as modified below, are hereby adopted by the Commission.

B. That Finding of Fact 10 is modified to read as follows by adding at the end a new clause (underlined below):

> 10. That Helm reported to work on Monday, November 15; that Helm spoke to Sonia Bielmeier when Bielmeier came into the library at approximately 12:30 p.m. and informed her of the possibility that she would be adopting a child; that Helm requested an unpaid leave of absence for 15 1/2 days in addition to her scheduled vacation of 5 1/2 days; that the requested leave was to begin on November 29, 1982 and conclude at the beginning of the work day on January 3, 1983; that Bielmeier told Helm that she would have to consult with the

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1 See Footnote 1 on Page 2.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

Mayor before granting the leave; that the following day, November 16, 1982, Bielmeier refused the request for an unpaid leave of absence citing the workload in the library; that Bielmeier further informed her that if she took the leave without approval she would be terminated; that Bielmeier told Helm that she hoped Helm understood that the refusal of the leave was not Bielmeier's doing; that Helm replied that she would like to think that it was not; and that Bielmeier responded to the effect that "after all these years I should hope you would know that it isn't"; that in those conversations with Bielmeier, Helm did not state whether or not she intended to return to work at the conclusion of the requested leave on January 3, 1983.

C. That the first of two Findings of Fact "12" (beginning on bottom of page 3 of the Examiner's Decision) shall be and hereby is renumbered "11.a." and modified to read so that the underlined portion below is added to the first clause:

11.a. That Bielmeier agreed to allow Helm to take the 5 1/2 days of accrued vacation time originally scheduled for late December beginning on November 29, 1982 and ending at 1:00 on December 6, 1982, and the idea for rescheduling in that way was initiated by Bielmeier;

D. That Finding of Fact 13 is modified to add the underlined new clause after the first clause and to modify the last two clauses as underlined so that, as modified, it shall read as follows:

13. That Christina Helm left for Iowa on November 26, 1982; that she stayed in Iowa with her newborn adopted daughter until December 9, 1982; that prior to the December 6, 1982 scheduled end of Helm's vacation, she had taken custody of the newborn infant, but she decided to remain in Iowa with the child rather than returning to Wisconsin in time to return to work at the end of her vacation; that Sonia Bielmeier called Helm's residence on December 6, 1982, the last day of her vacation; that there was no answer, that on December 7, 1982 Bielmeier again called Helm's residence and spoke to her husband who informed her that Helm was still in Iowa; that on December 10, 1982 Helm appeared in the library at approximately 4:00 p.m. with her child; that Helm requested her paycheck; that Bielmeier spoke with Roy Weed, Deputy Comptroller for the City of Brookfield, who informed her that Helm had requested her check at the Comptroller's office; he further informed her that the check would be mailed on the following Monday and would include the 11/12's vacation that Helm had earned for 1983; that Bielmeier had informed Helm of these facts; that this was the extent of the conversation between Bielmeier and Helm on that occasion, i.e., Helm did not request reinstatement or ask about the possibilities of returning to work, and Bielmeier did not offer or discuss reinstatement and did not inquire about Helm's availability to return to work.

E. That the fourth and fifth clauses of Finding of Fact 16, shall be modified to read as underlined so that the Finding, as modified shall read as follows:

16. That Christina Helm, through her membership on the Union's bargaining committee, was assisting a labor organization and engaging in collective bargaining on behalf of fellow employes; that the City of Brookfield was aware of Helm's membership on the bargaining committee and her activities on behalf of her fellow employes; that the City of Brookfield was hostile to Helm's activities on behalf of her fellow employes; that it was reasonably foreseeable that refusal to grant Helm's requested leave of absence would increase the likelihood of her failure to report to work as scheduled; and that the City did, in fact, foresee such a

result; and that the City's refusal to grant Helm's requested unpaid leave of absence in November of 1982 was in part motivated by hostility toward Helm's activities on behalf of the Union.

F. That paragraph 2.b. of the Examiner's Order is changed to read as follows:

b. Make Christina Helm whole for the losses suffered, if any, by virtue of her termination by paying to her an amount equal to all wages and benefits, if any, which she would have received but for her termination during the period from January 3, 1983 through the date of compliance with the offer-of-reinstatement requirement set forth in paragraph 2.a. of this Order, less the compensation, if any, she has received during that period which she would not have received had she not been terminated.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

CITY OF BROOKFIELD

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL HISTORY OF THE CASE

The Complaint (filed on April 13, 1983) and Answer (filed on August 15, 1983) joined the issues of whether the City committed an independent violation of Sec. 111.70(3)(a)3, Stats. (anti-union discrimination) and/or of 111.70(3)(a)1, Stats., (interference with employe rights to bargain collectively through representatives of their own choosing) by its admitted refusal to grant professional Library employe Christina Helm's November 1982 request for an unpaid leave of absence and/or by replacing Helm with part-time employes who worked too few hours to be within the certified bargaining unit description.

The Union requested declaratory relief as well as reinstatement, back pay, interest, attorneys fees and costs. The City requested dismissal of the Complaint, affirmatively alleging that the request for leave was submitted on short notice and at a time when the staff of the Library was overburdened by reason of the additional work related to conversion to computer operation, when vacation leaves had to be provided for other library employes before the end of the year, and when another employe was absent on maternity leave.

At the hearing before the Examiner on October 7, 1983, the parties stipulated: that on June 16, 1981 the Union became the certified representative of a unit of nonsupervisory professional and nonprofessional Library employes of the City working more than 20 hours per week; that the parties bargained from June of 1981 to April of 1983 without achieving an agreement; that the Union filed for mediation-arbitration on June 13, 1982; that employe Christina Helm was at all material times a member of the Union's bargaining team; that on November 15, 1982, Helm requested nonpaid leave of absence for child-rearing purposes related to the adoption of her daughter; that the requested leave was to be from 9:30 a.m. on November 29, 1982 and ending on January 3, 1983; that the City's Mayor, William Mitchell denied the requested leave; and that the City thereafter hired two part-time employes to perform the duties and responsibilities previously performed by Helm, both of whom are outside of the bargaining unit due to their working 20 hours or less. (tr. 5).

Both parties waived opening statements and proceeded with the presentation of testimony and exhibits. The Union called Helm, Deputy City Comptroller Roy Weed, Mayor William Mitchell, former professional employe of the Library Mary Wegener, Helm for additional questions, Library Director Sonia Bielmeier and then rested. The City called Bielmeier and Weed and rested. The Union presented rebuttal testimony by Union Business Representative Richard Abelson, Wegener and Helm.

Chief among several issues on which conflicting testimony was offered was the matter of whether Weed stated in the presence of Helm and Wegener that Mayor Mitchell made a statement to the effect that the Mayor intended to get rid of Helm and Elaine Farnham--the two employes on the Union bargaining team representing the Library unit--because of their union activities. The Union introduced the subject when it called and questioned Weed, who denied that he had said any such thing to the employes or that the Mayor had said any such thing to him. Weed responded, instead, that Helm and Farnham had on occasion mentioned to Weed that they believed that the Mayor was out to get them because of their union activities. The Union then called and questioned Mayor Mitchell about that and other matters. Mitchell denied that he said any such thing to Weed. The Union then called Wegener who asserted that Weed, while delivering checks to the Library employes on a Friday afternoon in the fall of 1981, had told Wegener, Helm and "possibly" Elaine Farnham, "that Mayor Mitchell wanted to get rid of Elaine and Chris because of their union activities." (tr. 63). Before it rested, the Union recalled Helm who testified that in the fall of 1981 Weed had stated in the presence of Wegener, Helm and Farnham, "the Mayor said, if there's any way he can get rid of you, that he's going to do it." (tr. 71). She further testified, "It might have been he said he's going to get rid of you if there's any way he can do it. But it's those -- it was that context." (tr. 71).

The Union contended that the City's refusal to grant Helm's request for unpaid leave was a calculated attempt on the Mayor's part to get rid of Helm because of her union activities. The Union, contrary to the City, argued that the City's unlawful motivation in that regard was proven both by Helm's and Wegener's foregoing testimony concerning Weed's statement about the Mayor's stated intentions, and by the fact that the City's explanation of its conduct was a pretext.

THE EXAMINER'S DECISION

Because the Examiner's findings have been challenged in great detail, a summary of those findings would not provide a sufficient background for the discussion of the issues raised in this review. Instead, the reader is referred to the Findings of Fact as set forth at pages 1-5 of the Examiner's decision.

Suffice it here to say that the Examiner ultimately found (in his Finding of Fact 16) that the City knew of and was hostile to Helm's membership on the Union's bargaining committee in negotiations with the City. While noting that the City had agreed to reschedule Helm's accrued vacation to begin November 29 rather than in late December, the Examiner nonetheless found that it was reasonably foreseeable that the City's refusal to grant Helm's requested leave of absence would lead to her failure to report to work upon expiration of her vacation and that the City did, in fact, foresee such a result. Finally, the Examiner found "that the City's refusal to grant Helm's requested unpaid leave of absence in November of 1982 was in part motivated by hostility towards Helm's activities on behalf of the Union."

In his principal Conclusions of Law, the Examiner stated that the City

> 4. . . . violated Section 111.70(3)(a)3, MERA, by discriminating against Helm with respect to her terms of employment and tenure of employment when it refused to grant her request for leave of absence in November of 1982; and that the City of Brookfield thereby committed a derivative violation of Section 111.70(3)(a)1, MERA, by interfering with the rights of municipal employes to engage in lawful concerted activities.
>
> 5. . . . did not commit an independent violation of Section 111.70(3)(a)1, MERA, when it employed two part-time employes not included in the collective bargaining unit to replace Helm following her termination.

He made no express conclusion of law regarding the Union's allegations that the refusal to grant the leave request constituted an independent violation of Sec. 111.70(3)(a)1 or that the hiring of the part-time replacements constituted a violation of Sec. 111.70(3)(a)3, Stats.

In his remedial Order, the Examiner ordered the City to "cease and desist from discriminating against Helm on the basis of her exercise of protected rights, with regard to hiring, tenure and terms and conditions of employment." He further ordered the City to immediately offer Helm reinstatement to the position she held as of November 26, 1982 with full seniority and to make Helm whole for all losses suffered by virtue of her termination, "by paying to her an amount equal to all wages and benefits which she would have received but for her termination during the period from January 3, 1983 through the date of compliance with this Order, less any compensation she has received during that period which she would not have received had she not been terminated"; to pay Helm interest on back pay at 12% per annum, "said interest beginning on January 3, 1983 and ending with the date of compliance with this Order"; and to post a notice and to notify the Commission regarding what steps it has taken to comply with the Order. (emphasis added).

In his accompanying Memorandum, the Examiner reviewed what he characterized as the undisputed background and the parties' arguments and then proceeded to state the rationale supporting his Findings, Conclusions and Order. Again, the reader is directed to pages 9-19 of the Examiner's decision for the Examiner's statement of the case and analysis in sufficient detail to provide the necessary background to the discussion of the parties contentions in this review.

The Examiner states (at p. 11) his understanding of the governing legal standards regarding the discrimination allegations as follows. "If it is established (by a clear and satisfactory preponderance of the evidence) that the denial of Helm's request for unpaid leave was in any part motivated by her union activities . . ." it would follow that the denial constituted an action contravening Sec. 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other term or condition of employment." Accordingly, he reasoned, Complainant needed to prove that Helm engaged in protected activities; that Respondent knew of those activities; that Respondent was hostile to those activities and that "the denial of Helm's request for leave was, at least in part, motivated by the Respondent's hostility toward Helm's participation in protected activities". "Evidence of illegal motive may be direct (overt statements of hostility) or, as is usually the case, inferred from the circumstances surrounding the discriminatory act (timing, . . . or a finding that the explanation proferred by the Employer is pretextual." (citations omitted.)

He held that the proofs clearly establish that Helm had engaged in protected activities and that the Mayor and other authorized agents of the City had knowledge of those activities.

In addition, he stated, Complainants had proven by a clear and satisfactory preponderance of the evidence that the Mayor was hostile to Helm's concerted activities and that such hostility, at least in part, motivated the denial of Helm's request for unpaid leave. In this case, the Examiner concluded that Complainant had proven hostility and motivation in two independently sufficient ways:

> (1) By proving by a clear and satisfactory preponderance of the evidence that in the Fall of 1981 Mayor Mitchell stated to Weed that he was going to do everything he could to get rid of Farnham and Helm because of their union activities; and
>
> (2) Because the circumstances surrounding Helm's request for leave and its denial prove by a clear and satisfactory preponderance of the evidence that the City was hostile to Helm's union activities.

Examiner's Analysis of the Credibility Issue

The Examiner stated in his Memorandum that he considered: "the demeanor of witnesses, the inherent probability of the competing versions, material inconsistencies in the record as a whole, and the incentive for each of the witnesses to present testimony favoring one version over another."

The Examiner reviewed the conflicting testimony by Weed and the Mayor on the one hand and by Helm and Wegener on the other. Ultimately, what the Examiner found to be Wegener's objectivity, demeanor and lack of any motive to deceive led the Examiner to credit her testimony over that of Weed and the Mayor.

In that regard, the Examiner noted that there was nothing inherently implausible in either side's version. The Mayor could have confided the alleged remark to Weed and had an opportunity to do so during nearly daily budget interactions with Weed in the fall of 1981.

The Examiner found Weed's demeanor while testifying rendered his testimony worthy of less weight than that of the other three witnesses because Helm, Wegener and Mitchell all testified confidently and were at ease on the stand, whereas "Weed appeared to be nervous while on the stand and was somewhat less than direct in his responses to Complainant's questions."

He concluded that Wegener alone among the witnesses, had no apparent interest in the outcome of the case. More specifically, he stated: "The record does not indicate any relationship between Helm and Wegener other than that of co-worker. . . ." "The comments that Weed is said to have made have no personal impact on Wegener, as she was not among the employes threatened." "The City has suggested no motive whatsoever for Wegener to lie and the Examiner can find none in the record." "Wegener is no longer employed by the City of Brookfield, having left for a better job in February of 1983."

The Examiner further noted that Wegener "was absolutely certain as to the essence of Weed's comments" and that "Wegener's testimony in response to questions from counsel was direct and thoughtful. . . ." and that her objectivity was enhanced by her testimony that the workload was very substantial whereas the Union was asserting that the backlog situation was easily managable.

Finally, (at Note 9, pp. 13-14) the Examiner rejected the City's contention that Helm and Wegener's credibility was undercut because no similar assertion about Weed recounting a hostile remark by the Mayor surfaced in Case XLVII, in which one of the allegations was that the City laid off Farnham in mid-1982 in part because of her union activities. City of Brookfield, (Case XLVII) Dec. No. 20691 (5/83) aff'd as modified -A (WERC, 2/84), reh. den. -B (WERC, 3/84). In doing so, the Examiner noted that during the hearing before him the only request for official notice of the Case XLVII transcript had been by the Union and with regard to specific portions of the Mayor's testimony in that case regarding computerization of City operations. The Examiner reasoned that granting the City's post-hearing official notice request would be prejudicial to the Complaint because "there is no opportunity for the Union to present and the Examiner to weigh the competing possible explanations and determine the true significance of Respondent's allegation." The Examiner further noted that Commission Rule ERB 12.06(2) Wis. Adm. Code limited him to the record and that the City was, in essence, requesting that he consider matters beyond the record.

The Examiner further stated that because "Wegener's credibility as a witness in this proceeding was very impressive," "Even if notice were taken of the questions never asked in prior proceedings, . . . the Examiner would still credit Wegener's testimony over that of Weed and Mitchell on the basis of relative demeanor and motive."

Examiner's Analysis of the Circumstantial Evidence of Hostility/Motivation

The Examiner reasoned that given the existence of the City's written unpaid leave policy and its historical application thereof, Helm had a right to request a leave without pay and to have her request considered on its merits without consideration of Helm's union activities. "The condition of employment which is alleged to have been the focus of the discrimination complained of herein is not the right to the leave itself, but the right to a decision granting or denying the request without consideration of Helm's protected activity." Exr. Dec. at 15.

The Examiner concluded that the reasons advanced by the City for denying Helm's leave "are a pretext", for the following reasons.

First, Bielmeier stated to Helm that the decision to deny the leave was not her doing or her choice. Helm so testified, and Bielmeier neither denied nor explained her remarks in that regard. The Examiner found Bielmeier's uncontroverted denial of responsibility at odds with City's theory of the case. In that regard, the Examiner stated:

> If Helm's leave was denied because Bielmeier judged her presence critical to Library operations, then Bielmeier, as the person in charge of the Library should hardly have disclaimed responsibility for that decision. The essence of the Respondent's version of events is that Bielmeier independently denied Helm's leave for valid business reasons, and if this were the case Bielmeier's disclaimer would make no sense. The statements made by Bielmeier are more consistent with Complainant's theory that the motive for denying Helm's request was the Mayor's desire to retaliate for her union activity. This would explain why the decision was made by the Mayor rather than Bielmeier, a fact which the Examiner infers from (sic) sequence of events.

Exr. Dec. at 15. The Examiner further noted that while Bielmeier's comments may merely have been intended to "deflect Helm's resentment and disappointment by blaming another party for the decision", the Examiner rejected that possibility because Bielmeier did not claim that to have been the case.

Second, the City advertised for part-time professionals as replacements for Helm within a week of denying Helm's request for unpaid leave. The City's apparent eagerness to secure replacements is suspicious in that Helm had not clearly indicated an intention not to return to work at the end of her vacation. While acknowledging that management caution could have led to such a precautionary advertisement, the Examiner found that in all of the circumstances of this case it adds to the impression that the City acted out of motives other than simple business considerations. Exr. Dec. at 16.

Third, the City opted to advertise for and then to hire part-time replacements for Helm rather than to allow Helm to take her requested leave and return to her job.

Fourth, the City's overall course of action was not consistent in concept or result with its stated desire to avoid a shortage of skilled manpower. The City ultimately replaced Helm with individuals without current cataloging experience, worsening rather than improving on the backlog situation because Wegener was forced to spend time training the new employes rather than staying at her own work. In the Examiner's view, the City's claimed objective would--from the start--seemingly have been far better served by exploring ways to retain Helm's services rather than by threatening her with termination if she did not return to full-time work immediately after her vacation. The Examiner acknowledges that it could have been poor planning or happenstance that the City wound up worse off than if it had granted the leave request. However, that, coupled with City's puzzling reluctance to seek a compromise with Helm, undercuts the notion that the City's overriding objective was reducing the backlog of work at the Library.

Fifth, the City's claimed need to address the large backlog of work in December of 1982 is not particularly persuasive as a business reason for its actions since the backlog condition existed since May of 1981, though it was admittedly more severe in the last six months of 1982. Only the installation of improved software, and not the application of greater manpower, were ultimately responsible for the elimination of the backlog, and the City knew the software was to be completed in late 1982 or early 1983. Finally, the Examiner noted that Bielmeier was directing her efforts to the first quarter of 1983, and had directed everyone to liquidate their accured vacation during December, suggesting something other than an overriding concern for a December 1982 assault on the backlog.

Examiner's Analysis of Interference Allegations

The Examiner concluded that there was no separate and independent interference violation on these facts "because unlawful discrimination was what leads to the conclusion that the City's actions interfered with employe rights" and because there was no evidence that the discharge and replacement of Helm could reasonably have been construed to constitute a promise of benefit or a threat of reprisal. Exr. Dec. at 17-18.

Examiner's Discussion of Remedy

The Examiner explained that he ordered reinstatement and "back pay from the date she would have returned from her unpaid leave, January 3, 1983" because "the natural and foreseeable consequence of denying Helm's request for leave was that she would be absent without leave and her employment terminated." He notes in that regard that Bielmeier's testimony shows she contemplated the possibility that Helm would not return to work after her vacation, and that, in any event, the City could reasonably forsee that an employe faced with a choice between adopting a child and reporting for work would choose the former. The Examiner further commented that Helm's failure to request reinstatement upon her visit to the Library on December 10, 1982 "cannot serve to mitigate the Respondent's liability of backpay" because Bielmeier did not broach the subject of reinstatement to Helm, because the City had theretofore informed Helm that her employment would be terminated if she failed to return at the conclusion of her vacation, and because she was told on December 10 "that her final paycheck including 11/12th of her earned vacation was going to be mailed to her on the following Monday." Exr. Dec. Note 21 at 18.

In denying Complainant's request for attorneys fees, the Examiner noted that no arguments were advanced in the briefs about that issue and that there appeared to the Examiner to be no basis in record for awarding them, citing Madison Metropolitan School District, Dec. No. 163471-D, aff'd in pertinent part, sub.nom. MTI v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

THE CITY'S PETITION FOR REVIEW

In its Petition for Review, Respondent City asserts that the Examiner's Order should be reversed and the Complaint dismissed. It asserts that the Examiner indulged in numerous assumptions unsupported by the record and invariably unfavorable to the City; did not take official notice of prior proceedings between same parties on a related issue; erred in respect to the law; and made inaccurate findings of fact and omitted essential findings of fact.

The City asserts that the Examiner erred by assuming or stating in his decision that:

- Helm was active in formulation of the Union and that Wegener was not.
- the sole purpose of Bielmeier's calendar year vacation liquidation directive was to allow a concentrated effort at backlog reduction in the first quarter of 1983.
- the City's personnel guidelines policy requirement that a leave request be in writing is unimportant.
- rescheduling Helm's vacation to accommodate her adoption plans is unimportant.
- it was improper for the Library Director to confer with the Mayor.
- that it is plausible that the Mayor would have confided anti-union hostility and intentions to Weed.
- that it is reasonable that Wegener was positive about one aspect and vague about all other aspects of the alleged conversation with Weed.
- that Wegener's corroboration of Bielmeier's assertions regarding working conditions and backlog established Wegener's veracity and objectivity on all other points.
- that a City can be presumed to have the capacity to grant unpaid leaves at any time without regard to the size of the workforce available and the amount of the work to be done.
- that the Union would have chosen to omit the use of significant evidence in an earlier hearing for strategic or practical reasons.
- that Helm was going to be ready to return to work upon expiration of her leave.
- that Helm testified confidently and was at ease on the stand.

In arguing that the Examiner erred by not taking official notice of the record in Case XLVII and of the fact that no mention is made in that record about the conversation with Weed and hostile remark by the Mayor, the City argues as follows. The Case XLVII hearing was held sooner after the claimed Weed revelation in fall of 1981 than was the hearing in the instant matter. It is inherently unlikely that a damaging admission would be overlooked shortly after it occurred but that it would then be recalled after the passage of a substantially longer period of time. Far more plausible is "the probability that some of the employes in the Library were expressing their own conclusions and fears and that rationalization over a period of time transferred the origin." Consistent with that notion, Weed testified (tr. 59) that he had heard the statements from both Farnham and Helm. Sections 902.01(2) and (6), Stats., authorize taking notice of any fact capable of accurate and ready determination at any stage of the proceeding, by resort to sources whose accuracy cannot reasonably be questioned. Resort to the Case XLVII record would have supplied a ready and accurate means of determining whether the alleged statements of Weed and the Mayor were ever referred to in the earlier proceeding. That would be a particularly important fact given the conflicting testimony in this case, the fact that Union witnesses' testimony placed Farnham in the alleged Fall 1981 conversation with Weed, the fact that Farnham did not testify herein, and the fact that Farnham did testify in Case XLVII concerning a similar charge between the same parties.

The City asserts that the Examiner committed errors of law by:

- requiring the City to take into account Helm's protected activity in deciding whether to grant Helm's leave request.

- assuming that Helm's request for a leave constituted protected activity.

- assuming that the City chose to grant Neuenfeldt maternity leave, whereas the City was required by law to do so.

- ignoring the fact that "It was not the City that removed Helm from the work force. It was Helm who did the removal, in pursuit of her personal interests."

Finally, the City asserts that the Examiner made erroneous findings or omitted essential findings in the following respects.

First, he incorrectly found that Helm in fact requested an unpaid leave of finite duration (15.5 plus scheduled vacation of 5.5 days) on November 15. On the contrary, Helm admitted that she had not decided whether to return to work on January 3 when she requested the leave and that she did not know as of the time of the hearing whether she would have returned to work on January 3 had the leave been granted. Thus (at tr. 39), Helm admitted on cross that she was trying to keep her options open so she could decide during the leave whether she would return to work at the conclusion of the leave. It is therefore inaccurate to find that Helm proposed a leave that was to end on January 3.

And second, the Examiner erred by not making a finding as to when Helm would have returned to work had the requested leave been granted. The Examiner improperly assumed that Helm would have been ready and able to return to work on January 3. There is no record evidence as to when the child was in condition to be entrusted to others and whether such assistance was ever arranged for by Helm. As it stands, the record supports only a contrary inference: Helm brought child to Library with her on December 12, 1984 and to the complaint hearing on October 7, 1983; and on December 10, 1984 Helm showed no interest whatever in employment, neither stating that she was or would be available to work nor making any inquiry about the availability of employment.

RESPONDENT CITY'S ARGUMENTS IN SUPPORT OF THE PETITION FOR REVIEW

In its initial brief, the City described the factual background, noting in part, the following:

- Negotiations for an initial agreement were unsuccessful, but by April of 1983, mediation by the mediator-arbitrator had substantially reduced the number of issues remaining in dispute.

- The bargaining unit consisted of nine or ten employes in November of 1982.

- The decision to convert library operations from a primarily manual system to an automated system based on computer was undertaken primarily to reduce costs. The transition from manual to computerized systems was difficult. The City had also reduced the staff in June and July of 1982 due to budgetary restraints.

- Near the end of 1982, the Library was struggling to meet both its ongoing workload and its conversion, but vacation selections were being honored.

- Helm learned that an infant might be available for adoption in Iowa; she confirmed that possibility over the weekend in Iowa and on Monday, November 15 requested leave commencing on November 29.

- Helm's November 15 request was vague. As a result, the City concluded that Helm merely was requesting leave until January 3, 1983, to decide whether she would return to work or be a full-time mother. The City denied the leave, but it was suggested that Helm's vacation be moved up to November 29 - December 6, and this was in fact done.

- Helm left work, adopted the child and returned to her home by at least December 9. On December 10, Helm came to the Library for her paycheck, but indicated no desire or readiness to return to work.

- On April 13, 1983, the instant complaint was filed. The Examiner decided that the City had committed a prohibited practice and ordered reinstatement with full back pay.

- On October 1, 1984, the City offered Helm immediate and unconditional reinstatement without prejudice to her claim for back wages. (In that regard, the City attached to its brief an exchange of correspondence whereby the City offered reinstatement without prejudice to continued litigation of the complaint as regards a back pay liability and the Union replied by letter dated October 4, 1984, insisting on back pay of $42,469.55 before Helm would return to work.)

The City advanced the following additional objections to the Examiner's Findings, Conclusions and Order:

- Finding 6: Liquidation of vacations during 1982 was not "to allow a concerted effort by the full staff to reduce the backlog in January, February and March of 1983" but rather was consistent with a Library practice of requiring liquidation of vacation within the calendar year; this liquidation was accomplished by notice to employes on September 20, 1982, and approval of all employes' vacation selections submitted in response to that notice.

- Finding 9: Helm did not ask for 15.5 days leave of absence (in addition to her scheduled vacation) on November 15. Helm testified that she believed she had a right to the leave; hence she was not "asking", she was "telling". Helm was not asking for a leave ending on January 3; she was asking for an option to find out if she would be successful in adopting and if so thereafter to decide whether to return to work. The 15.5 day calculation did not surface until Helm's November 23, 1982, letter, which constituted a new and more specific leave request. The City responded in writing to that request, denying it as well. Helm was very vague on November 15, 1982, as to what she wanted and she admitted in testimony that she ultimately decided to stay with her baby in Iowa rather than to return to work at the end of her vacation. (citing tr. 39).

- Finding 11: The Examiner's Finding that Helm's work assignments were changed after her request for leave was incorrect. Rather, Helm continued to do the sorts of work she did before. If anything, the record shows Helm wanted to work almost exclusively on cataloging but that Bielmeier's assignments did not accede to Helm's preference for such a change.

- Finding 12: The Examiner's Finding that Bielmeier agreed to reschedule Helm's vacation is misleading. In fact the record establishes that Bielmeier suggested the change and that Helm agreed to it.

- Finding 13: This Finding purports to relate the full December 10, 1982 conversation, but the Examiner leaves out of it the fact that Helm did not request reinstatement or ask about the possibilities thereof.

- Finding 14: This finding erroneously states that Weed informed Helm and Wegener in the fall of 1981 that the Mayor had stated his intention to get rid of Helm and Farnham because of their union activities. This is erroneous because the "because of union activities" concept was expressed only in Wegener's testimony and not in Helm's.

- Finding 15: This Finding states that the employes hired to replace Helm lacked "current cataloging experience". This is misleading because cataloging does not require "current" as compared to "prior" experience and because the Examiner failed to note that use of part-time employes adds flexibility in bridging the gap between the employes' hours and the hours the Library is staffed.

- Finding 16: This Finding erroneously asserts that Helm was engaged in protected activity at the time the leave was denied. Her activity as a Union bargaining team member was essentially nonexistent for the year preceding the disputed leave request.

Finding 16 also erroneously asserts that the City was hostile to Helm's activities on behalf of other employes. However, the City turned down only a request that was advanced on behalf of Helm as an individual whereby Helm was trying to transfer the risk in her plans for adoption and parenting to the City. The City did not hassle or otherwise act hostility toward Helm in any other respect in the year prior to the leave request or at any other time.

Finding 16 also erroneously asserts that it is foreseeable that Helm would not return to work after her vacation. On the contrary, if it turned out that the adoption could not be accomplished, then Helm would have returned to work after her vacation. It was also entirely possible that Helm would have returned to work after her vacation if she had been able to and wanted to make arrangements for the part-time care of the infant by others.

- Omitted Finding: The Examiner improperly failed to enter a specific finding as to status of work force and work in the Library on November 15, 1982, and immediately thereafter. That finding should have disclosed that the staff of eight full-time and three part-time employes was struggling between maintaining the old manual system shortly to be abandoned and installing a new automated system; that several employes had to use vacation entitlement or forfeit it; that one of the employes was pregnant with delivery anticipated from day to day; that Union business was consuming some of the work time of several employes; and that many books had been purchased for circulation but were not available to library patrons because they had not been cataloged and/or otherwise processed.

- Conclusion 4: This Conclusion asserts that Helm was engaged in lawful concerted activity in requesting a leave for herself; that the City discriminated against Helm in refusing the leave; and that the City interfered with lawful concerted activities of employes. The City asserts that these conclusions are erroneous in all respects for reasons expanded upon below.

- Order (paragraph 2.b.): The Examiner ordered that back pay continue to accumulate until his order is fully complied with. This is improper because a remedial order of this sort should, at most, require payment of back pay for a period ending when a bona fide offer of reinstatement has been made.

The City advances the following arguments in its initial brief in support of its position.

The claimed remark of Weed does not deserve the pivotal importance given it by the Examiner. The Mayor and Weed deny that the Mayor made a comment hostile to the employes. Weed denied that he said the Mayor made such a remark. Instead, Weed claims that Farnham and Helm themselves had expressed the idea (citing, tr. 59 lines 19-23). Furthermore, Wegener was more than a disinterested co-worker of Helm's; for, Wegener was reprimanded along with Helm for conducting union business on the job (citing tr. 22). Wegener's recall of the claimed conversation was remarkably/suspiciously limited except as regards Weed's damaging statement; she didn't remember who introduced the subject, who was there, what anybody else said, or if any other subject was discussed or when the conversation occurred. (citing tr. 63, 67-68). Helm's testimony is confused on the point regarding whether Weed was recounting a statement by the Mayor or an impression of Weed's about the Mayor's intentions. Helm also showed selective recall. She recalled Weed's remark in the fall of 1981 but could not recall what she was doing in the Library on the date of request for leave and did not correctly recall how many books she had to catalog at that time or how long they had been awaiting cataloging or the rate at which she cataloged books. Finally, it is unlikely that if Weed had made the statement that it would not have surfaced in Case XLVII, which was heard more contemporaneous to the date of Weed's alleged statement and in which anti-union discrimination against the other employe referred to in the remark was at issue. The interest of justice requires recourse to a comparison of the testimony in Case XLVII and this should not be prevented for highly technical reasons or because of forced arguments about strategy.

Even if the Mayor made the claimed remark in fall of 1981, that would not prove City hostility to Helm's union activities in November of 1982. Significant intervening time has passed. The fall of 1981 closely followed the organizational stage which can produce suspicious allegations and rumors. By November of 1982, the unit's contours were determined, the election was over, bargaining was at an impasse, the mediator-arbitrator had been appointed, had mediated and would shortly thereafter begin to arbitrate the matter. Thus, Helm had effectively completed her service as a bargainer by the fall of 1981.

The Examiner's effort to independently support his conclusion as to unlawful motive on the basis of circumstantial evidence is also without merit. There was nothing wrong in one manager (Bielmeier) conferring with another (the Mayor). The Mayor has a legitimate right to be concerned about the operation of the City and to insist that the Library Director confer with him before making decisions that adversely affect productivity and service. Indeed, in the instant case itself, the Mayor is being held responsible for chummy gossip of a subordinate and the shock reaction by a department head to surprising news. It is not unreasonable for him to establish the wherewithall to keep tabs on significant developments in the departments before they impact on the City. The City's brief states, "Even assuming the extreme, that the Director was inclined to grant the leave but the Mayor was not, where is the wrong? May not a decision that cannot be supported be overruled? Does Union activity dictate the form of an employer's decision making process?"

The City further contends that the Examiner wrongly concluded that the denial of the leave was because of anything other than the fact that every available library employe was needed throughout December of 1982. There can be no question that Library staffing was critical. The manual and computerized systems were operating in parallel, requiring additional work. The computer data bank was incomplete and had many known errors. A sizable vacation liability existed. Many books, some only of a current nature, had not been processed to permit circulation. And an absence for childbirth was imminent.

The Examiner unfairly characterizes the City's direct and collateral responses to Helm's adoption plans as a part of a scheme to get rid of Helm as quickly and as completely as possible. Immediately searching out possible replacements was only prudent in the circumstances. "It would have been imprudent to ignore the facts and to sit idly by in the hope that the problem would go away." The Library could not permit an employe the luxury of experimenting and pondering to determine a future course. The Library required a commitment and this was not forthcoming from Helm despite Bielmeier's repeated inquiries of Helm in that regard. The fact that leaves were sometimes granted in the past does not mean they must always be granted.

Helm was advancing self-interest, not collective interest in pursuing the leave. Helm interrupted the status quo, not the City. Helm insisted upon special consideration on very short notice. An interest in becoming a mother is not protected any more than a desire to have a special parking space. (Citing, Lake Geneva Schools, Dec. No. 17939-A (WERC, 4/82).

Back pay liability should terminate with an offer of reemployment. If the Examiner intended something different, then his order is unconventional and improper. Citing, Kheel, Labor Law Sec. 7.04(2) (Bender, 1984) (back pay period ends upon proper offer of reinstatement.) To be proper, an offer of reinstatement must merely be unequivocal and unconditional and must offer reinstatement to the exact position from which the discharge occurred. Section 111.07, Stats., contemplates reinstatement and back pay orders but does not require them to be inseparable. Otherwise, Helm might merely make a token return to work in order to collect her back pay.

Concluding its initial brief, the City contends that Bielmeier properly understood Helm to be insisting upon a chance to adopt and upon right to return if she failed, all with no intent to return if she succeeded in the adoption. This would leave the City holding the bag since it would be unable to obtain a replacement or to offer more than temporary employment to someone until after January 3. By all accounts the Library staffing situation was critical in December, 1983. Neither a stale remark of uncertain source nor a department head's consultation with the Mayor nor a remark in surprise can transform the Library crisis into a pretext. The Examiner's "house of straw" built on that remark and consultation with the Mayor must fall.

In its reply brief, the City advances the following additional arguments. Only if the Mayor is found to have made the remark claimed attributed to him by Weed could it be concluded that an unfair labor practice was committed. For, November of 1982 was not a time of high feeling and partisanship in the City-Union relationship. The unusual and unexpected development was opportunity for Helm for adoption. It hit the City at a particularly awkward time in terms of operational considerations.

If the remark was made, it was stale, preceding the adoption situation by more than one year. It is more likely that it was never made. The remark suspiciously resisted logical opportunitites to surface earlier. Moreover, it was unlikely that Mayor would confide such a remark in Weed since Weed could not help him fulfill such an intent. It is more likely that the idea of hostility came from the employes themselves that is being intentionally or unintentionally misattributed to Weed after the long passage of time.

Wegener was not neutral enough for her objectivity to control: she had been reprimanded for union business; she had complained about being overworked prior to her resignation; she had worked closely with Helm and the two were obviously friends.

Helm's own actions caused her to lose her employment, not City hostility toward her because of union activity. There were no prior incidents of discrimination or pressure of hassling concerning quality of Helm's work, etc. Helm gave no advance notice to the City that she had been trying to adopt a child. In contrast, pregnancy gives a notice of its own even if the employe does not. Because Helm believed she had an absolute right to the leave requested, she conducted herself with total indifference to the City's needs in the matter. The City was not obligated to accommodate Helm's needs and to overlook its own operational needs. Helm's initial oral application for leave was vague and uncertain. The City therefore reasonably anticipated that if the adoption went through Helm would not want to return to work. Indeed, this anticipation was confirmed by Helm's conduct after the adoption. Helm completed the adoption before her vacation was concluded. She decided on her own to be with the child full-time rather than to return to work following exhaustion of her vacation. (Citing tr. 39) Unpaid leaves were not routine occurrences in the Library. They were seldom requested and not always granted. Apart from those granted to part timers not entitled to vacation, two were granted and one denied. Granted were leaves for child birth and attendance at a European Library Seminar. Thus, "Helm was not denied that which was routinely and frequently granted." Helm had no intention of returning to work. She admitted that she made the decision to be a full-time mother rather than return to work following her vacation at the last minute of her vacation. (Citing tr. 39). She did not request the leave to enable herself to return to work.

The City acted to maintain operations. There is no evidence to support the Union's and Examiner's apparent assumptions that full-time experienced professionals need no training, are immediately available, and are most productive. Those are matters of opinion on which reasonable minds may differ. The Library needed all of its employes.

Whether an unpaid leave is to be granted depends, at least in part, on whether the employe seeking the leave can be spared. The City needed to get its acquisitions on the shelf, to get its records into the computer and to find and train a temporary and perhaps a permanent replacement for Helm. Helm's request gave the City nothing and asked everything in return.

The Commission should take official notice of its own files in related complaint proceedings between these two parties. The Commission has broad discretion to uncover facts that are beyond dispute, and should not join the Examiner in refusing to do so on a technicality. Parties' omissions can be just as meaningful as an act or statement. Three separate prohibited practice complaints have been processed regarding this unit since the organizing effort. The Memorandum in Case XLVII pointed out the need for the Union to prove hostility. "By the time of the third effort, the union had learned what was needed to support the charge and retrospective rationalization produced the 'evidence' although the recollection had to go back a year". The Case XLVII complainant and this one were all part of an effort to resist computerization and change and to obtain additional members for the Union.

In sum, the City sought to maintain operations, whereas Helm sought to act on an extraordinary opportunity (to adopt) and to preserve her job in case it did not work out. The City could not accommodate her because with a small number of employes (eight and one pregnant) the burden of allowing Helm that opportunity would be too great "because it means operating with an inadequate staff, perhaps paying the remaining employees at premium rates and for unduly long hours, training a replacement, with reduced opportunities for replacement related to the explanation that the job is only temporary." Helm was asking for special

consideration and her union connection did not entitle her to it. "The infant and motherhood raise emotional considerations. But really, from an employer's point of view, it is not much different than if an employee wished to take a flyer in the grocery business and asked the employer to shelter his job while he tried the experiment. With a large number of employes, the risk might be tolerable. With a small number, eight and one pregnant, the risk is excessive." (City reply brief at 12-13).

Accordingly, the City requests that the Commission reverse the Examiner's ultimate finding and conclusion and dismiss the Complaint in its entirety.

COMPLAINANT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR REVIEW

In its initial brief, the Union argues as follows in support of the Examiner's decision and in opposition to the Petition for Review.

Under Commission Rule ERB 12.09, the Commission's review of the Examiner's Findings of Fact is appellate in nature and limited to determining whether any of the Examiner's Findings were "clearly erroneous" or "based upon prejudicial procedural error." Those standards are not met here.

The Union responds to the City's specific challenges contained in the Petition for Review and in the City's initial brief, as follows:

- Finding 9: The City's challenge does not address the Finding. In any event, the City knew leave was for purpose of pursuing adoption at the time the leave was requested.

- Finding 10: The Finding is fully suported by the record (citing tr. 46-47 and 114-115).

- Finding 11: The challenge is not incompatible with the Finding. The City's brief (at 5-6) states that the Examiner should have found that the "Director preferred that the emphasis be on additions to the data bank", and that is essentially what the Examiner found.

- Finding 12: The Finding is accurate. At tr. 38, Helm affirms that Bielmeier told Helm that she would move Helm's vacation ahead so that Helm could go ahead with her adoption plans.

- Finding 13: The Finding accurately states what was said and it need not state what was not said to avoid error.

- Finding 14: The Examiner's Finding is supported by Wegener's testimony and by the thrust of Helm's testimony, as well (citing tr. 70-71). The Examiner credits Wegener as the sole disinterested witness and because her testimony was particularly "direct and thoughtful". The Examiner also noted that he found a wholly independent basis for finding animus in the circumstances surrounding the leave request and denial, to wit, City's reasons were pretextual in the circumstances.

- Finding 15: The City's challenge is immaterial since it would not disturb central facts found: both of the new hires required training to do the duties previously performed by Helm; both were part-time; neither worked sufficient hours to be included in the unit.

- Finding 16: The Finding is fully supported by the record as more fully discussed below.

In sum, the Examiner's Findings should not be disturbed.

There is no prejudicial error in the Examiner's refusal to accommodate the City's request that he take official notice of facts <u>not</u> established in a prior proceeding. The standards for taking official notice are: the fact is clearly established; the fact is material to the pending proceeding; and taking official notice would not be prejudicial to either party. Here, the City's request does not relate to a fact clearly established, only to a matter that is not of record in the prior proceeding one way or the other. Moreover, the City's request would prejudice Complainant by depriving Complainant of an opportunity to present proof of reasons for not adducing evidence of the Weed statement in the prior

proceeding. In any event, the Examiner's refusal to take notice could not be deemed prejudicial to the City because the Examiner expressly stated that even if he had taken the notice, he would nonetheless "credit Wegener's testimony over that of Weed and Mitchell on the basis of relative demeanor and motive."

The Examiner properly found unlawful discrimination in violation of Sec. 111.70(3)(a)3, Stats. If anti-union animus forms any part of a decision to deny a benefit or impose a sanction, it is a prohibited practice in violation of that section. Citing, Muskego Norway Schools, 33 Wis.2d 540, 562 (1967). Helm had been engaged in concerted activities--not by requesting the leave--but by serving on the Union bargaining team in negotiations with the City. The City obviously knew about that conduct.

The record supports the Examiner's finding that the City was hostile toward Helm's union activities. Helm testified she had "no doubt" about the general context of Weed's statement to her, and this is understandable since it is easier to recall threats to one's job than minutia about one's daily job performance or about the details of surrounding context. Wegener corroborated Helm's testimony by testifying that Weed stated "that Mayor Mitchell wanted to get rid of Elaine and Chris because of their Union activities" (tr. 64) and by insisting that Weed, not Farnham or Helm, made the remark (tr. 68 and 69). Helm's recall was not limited regarding the details of Weed's statement.

It was proper for the Examiner to more heavily weight Wegener's testimony because the Examiner found her impressively certain of her testimony on this point and direct and thoughtful in her responses. Furthermore, as the Examiner concluded, Wegener was not shown to have had any interest in outcome of the case: she was no longer employed at City, and there was no evidence that she was particularly active in the Union. Wegener was unbiased and objective about the size of the backlog. In contrast, Mitchell and Weed had obvious biases. The Examiner noted that Weed was nervous and evasive. (citing tr. 60 and Exr. Dec. at 13-14).

Whatever the resolution of the credibility dispute, there was no dispute as to the facts forming the basis of the Examiner's other independent basis for finding hostility and unlawful motiviation. Specifically, when Helm initially requested the leave, Bielmeier appeared happy and stated there would be no problem with the leave although she would have to talk with City Hall (the Mayor) about it. However, after discussing the matter with the Mayor, Bielmeier told Helm that the leave was denied, but added that she hoped Helm understood that the decision was not Bielmeier's "doing" and that "after all these years I should hope you would know that it isn't." (citing tr. 46 and 47).

Bielmeier's denial of responsibility is inconsistent with Respondent's claim that the decision was made for business reasons alone. If operational conditions made granting the time off requested impossible, Bielmeier could have denied the leave herself. At the very least she would not have later disclaimed responsibility for a decision which Library policy designated as hers to make. As the Examiner noted, if Bielmeier was trying to maintain good relations with Helm or was pursuing some standard policy concerning consultation about decisions expressly reserved by written policy to the Library Director, Bielmeier could have so stated in her testimony at the hearing, but she did not. Hence, the evidence warrants the Examiner's conclusion that the Mayor, not Bielmeier, decided to deny Helm's request.

The City's written policy says "leave without pay will be granted for acceptable reasons." That can only mean that employes are entitled to take the leave as a matter of right if their reasons are acceptable. In any event, the City routinely granted requests for unpaid leaves of absence, and two were granted during the time of the alleged backlog--Grimstad for 16 hours; Neuenfeldt for 9 weeks (a longer leave than Helm was requesting).

The City's practice was to use Vi Kelpin or others as temporary replacements. However, in anticipation of Helm's absence, the City departed from that practice and placed ads for permanent part-time professional positions in the Library even before Helm left for vacation, even though it had five employes on lay off status (citing tr. 17-19).

Moreover, the City advertised for part-time applicants only, foreclosing any possibility that it might find a full-time employe. Applicants for full-time employment are more likely to be experienced and skilled so as to require less training. Moreover, hiring two individuals to split Helm's hours equally would result in both being out of the unit.

The City's efforts to explain its seeking part-time replacements out of a concern for its ability to operate effectively is pretext. For, by hiring new employes instead of granting Helm the leave through January 3, the City compounded its backlog difficulties and placed itself in a worse situation than it would have been had it granted Helm's leave, since Wegener had to train the new hires in addition to continuing to perform her own work.

As the Examiner aptly noted, evidence of illegal motive can be overt or inferred from the circumstances surrounding the employer's conduct. Here the Examiner properly concluded that the Union has proven it both ways.

The Examiner's remedial order clearly and unequivocally requires payment of back pay as condition precedent to an end to the City's back pay obligation. For, the Order defines the back pay period as continuing "through date of compliance with this Order", and the Order includes the requirement that the City pay Helm back pay. An order to that effect is permissible under ERB 12.06 and Sec. 111.07, Stats., because such an Order constitutes affirmative action that furthers the purposes of the Act. The City's October 1, 1984, offer of reinstatement does not even meet the requirements of a "proper" Order in the Kheel treatise cited by the City because the offer is neither unequivocal nor unconditional. Rather, it imposes conditions precedent upon the City's compliance with the Examiner's Order and it thereby equivocates.

Accordingly, the Union requests that the Examiner's decision be affirmed in all respects.

DISCUSSION

After reviewing the record with regard to the City's numerous and detailed exceptions to the Examiner's Findings, Conclusions, Order and rationale, we have affirmed the basic thrust of Examiner's ultimate Finding of Fact 16 and have affirmed his Conclusion of Law 4 that the City has been shown herein to have violated Sec. 111.70(3)(a)3 and 1, Stats., by its denial of Helm's request for unpaid leave. However, we have significantly modified his Order and have specifically disassociated ourselves with portions of his Memorandum discussions of credibility, pretext, and remedy. We have rejected the City's contention that the Examiner committed prejudicial error by failing to take official notice of the Case XLVII transcript. We have also made certain modifications of the Examiner's Findings in response to certain of the points raised by the City which modifications, while warranted, are not outcome determinative.

We have considered all of the parties contentions even though some are not listed above and many are not specifically addressed in our DISCUSSION, below. Contentions not specifically addressed herein are rejected as either wholly without merit or without sufficient merit to warrant modification of the Examiner's Findings, Conclusions and Order and/or an expression of a rationale different from that set forth by the Examiner in his Memorandum.

Standard of Commission Review of Examiner Findings of Facts

Contrary to the Union's assertion, a Commission review of an examiner complaint decision under Sec. 111.07, Stats., is not a limited-scope appellate review but rather is an original determination of what the Commission's Findings, Conclusions and Order shall be in the matter.

Section 111.07(3), Stats., requires the party on whom the burden of proof rests ". . . to sustain such burden by a clear and satisfactory preponderance of the evidence." Such requirement is incorporated by reference in MERA by Sec. 111.70(4)(a), Stats. Here the Examiner determined that Complainant had proven by a clear and satisfactory preponderance of the evidence that she was denied the disputed unpaid leave at least in part because of her union activities. The City petitioned for review of the Examiner's decision pursuant to Sec. 111.07(5), Stats., which provides in pertinent part:

> Any party who is dissatisfied with the findings or order of . . . (an) examiner may file a written petition with the Commission as a body to review the findings or order. . . . the Commission shall either affirm, reverse, set aside or modify such findings in whole or in part. . . . Such action shall be based on the evidence submitted.

The applicable WERC administrative rule, Sec. ERB 22.09(2)(a), Wis. Adm. Code, provides that a petition for review may be filed on the basis, inter alia, that "any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner." This rule is admittedly not ideally drafted, because it uses the term "clearly erroneous"--a term which itself connotes a standard of review of factual findings. Nevertheless, the term "clearly erroneous" is defined in the rule itself as a measure of whether the examiner's finding is supported by a clear and satisfactory preponderance of the evidence. Since evidence can only preponderate either in favor of or against a particular factual finding, the rule really is no more than a paraphrase of the statute, Sec. 111.07(3), Stats. Moreover, the rule in no way limits the authority of the WERC to "reverse" or "modify" an examiner's findings if the WERC determines that the evidence preponderates in favor of a finding opposite to that made by the examiner.

In reviewing the findings and order of an examiner, the Commission "does not act as an appellate body but rather under its powers in an original proceeding. The commission is to make its own determination." See, Indianhead Truck Lines v. Industrial Comm., 17 Wis.2d 562, 567 (1962) (applying Sec. 102.18(3), Stats., which is identical to Sec. 111.07(5), Stats.) The only limitation on the Commission's plenary fact-finding authority is the requirement that if the Commission reverses an examiner's findings which are based on the credibility of witnesses, the Commission must consult with the examiner concerning the examiner's impressions of the credibility of the witnesses, and explain in a memorandum opinion its reasons for disagreeing with the examiner. Hamilton v. ILRH Dept., 94 Wis.2d 611, 621 (1980). As noted in the preface to this decision, the full Commisison met with the Examiner and consulted him concerning his impressions of the credibility of the witnesses herein.

Accordingly, we have reviewed the record and the Findings challenged by the City and have made our own determination concerning whether and in what ways those Findings should be modified. Our determinations have been based on what Findings are (or would be) supported by a clear and satisfactory preponderance of the evidence, not whether the Findings issued by the Examiner have been shown to be "clearly erroneous".

Examiner's Refusal to Take Official Notice of Record in Case XLVII

The Examiner grounded his refusal to take notice of the contents of the record in Case XLVII on Commission Rule ERB 12.06 Wis. Adm. Code, which reads:

> Findings of fact, conclusions of law and order. . . . (2) CONTENTS. The Findings of fact, and conclusions of law shall be made upon all material issues of fact and law presented on the record. . . .

The definition of the "record" in a contested case such as a Commission complaint case can be found in Sec. 227.07(6), Stats., which reads as follows:

> The record in a contested case shall include:
>
> (a) All applications, pleadings, motions, intermediate rulings and exhibits and appendices thereto.
>
> (b) Evidence received or considered, stipulations and admissions.
>
> (c) A statement of matters officially noticed.
>
> (d) Questions and offers of proof, objections and rulings thereon.

(e) Any proposed findings or decisions and exceptions.

(f) Any decision, opinion or report by the agency or hearing examiner.

In support of his refusal to waive the requirement of ERB 12.06(2), the Examiner asserted that doing so would be prejudicial to the Complainant since it would deny Complainant the opportunity to offer explanatory testimony in response to any matters contained in that record of which the Respondent would have the Examiner take notice. The Examiner's ruling in that regard is persuasively supported, if not mandated, by the following portions of Sec. 227.08, Stats.:

Evidence and official notice. In contested cases:

. . .

(2) All evidence, including records and documents in the possession of the agency or hearing examiner of which the agency or hearing examiner desires to avail himself or herself, shall be duly offered and made a part of the record in the case. Every party shall be afforded adequate opportunity to rebut or offer countervailing evidence.

(3) An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be notified either before or during the hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice.

While the Examiner could have obviated the prejudice to the Complaint by reopening the record to permit Complainant to meet the aspects of the Case XLVII on which Respondent sought to rely, that is by no means a procedure upon which Respondent would have the right to insist in the instant circumstances. Because the City's reliance on the Case XLVII record was in its brief and reply brief rather than in a separate formal post-hearing motion, it appears likely that the Examiner was first aware of the request after the parties had completed briefing in the case. His reticence to reopen the record at that point in the proceedings, especially with a request for reinstatement and back pay involved, was quite understandable and justifiable.

We therefore conclude that the Examiner did not commit prejudicial error by refusing to treat the Case XLVII record as a part of the record in the instant proceeding, and for the same reasons we decline the City's invitation to take such official notice ourselves.

As we have noted below, however, the City is entitled to consideration of the record evidence showing that Helm did not make any note of the claimed conversation with Weed and did not recall whether she contemporaneously complained to the City or contemporaneously informed the Union Staff Representative about the contents of any such conversation. (tr. 74-75). Hence, our ruling above does not deprive the City of making the same general point that reference to Case XLVII would have buttressed with greater specificity.

Review of Examiner's Findings of Facts

With regard to the above-noted errors and omissions cited by the City in the Examiner's Findings of Fact, our responses are as follows:

A. Finding 6: We find no error.

The City cites Helm's admission, (tr. 41-42) that she was aware that she was expected to use her earned vacation in 1982 or forfeit it, for the proposition that Bielmeier instructed the employes to liquidate their vacation by December 31, 1982 because of a practice of requiring liquidation of vacation within the calendar year. However, Helm might well have so testified because of Bielmeier's instructions in 1982 rather than because of an existing practice.

Indeed, when Bielmeier was specifically asked why she was trying to schedule vacations within the calendar year instead of outside the calendar year she made no reference to any established practice. Rather, she replied, "I felt a great deal of pressure about the large backlogs of work, and I wanted to cut my liabilities in the preceding year, so that we could spend all the time that we possibly could to get the Library operation back on an even keel in January, February, March." (tr. 98). This squarely supports the disputed language of the Examiner's Finding that Bielmeier chose not to permit liquidation of 1982 allotments after December 31 of that year "to allow a concerted effort by the full staff to reduce the backlog in January, February and March of 1983."

B. Finding 9: We find no error in the Finding as written, but we have made certain additions in Findings 10 and 13 to meet City concerns about Finding 9.

The City objects to the references in this Finding to the longstanding nature of the Helms' desire to adopt a child, on the grounds that the City was not notified about that fact prior to mid-November, 1982. We find no error in this regard since the Finding in no way suggests that the City had notice of those facts at any time prior to the instant request for leave.

The City also objects to the Examiner's formulation of this Finding because it conveys neither the lack of specificity of Helm's November 15 oral leave request nor Helm's lack of clarity about whether she would return to work at the conclusion of the requested leave.

The City admitted complaint allegations at outset of the hearing to the effect that on or about Monday, November 15, 1982, Helm requested a non-paid leave of absence for child-rearing purposes related to the adoption of her daughter, (which) requested leave was to commence on or about November 29, 1982, at approximately 9:30 a.m. and to conclude January 3rd of 1983. (tr. 5). In addition, the City's written response to Helm's letter did not take issue with Helm's written description of her November 15 "request for leave without pay" which also supports the disputed language of the Examiner's Finding. Finally, Bielmeier testified that, on November 15, Helm said that "she wanted a leave of absence from November 29th through January 3rd." (tr. 116).

The Examiner's Finding that Helm was asking for a leave ending on January 3 is appropriate even though Helm admitted in testimony (tr. 39) that she was, in fact, attempting to keep her options to return to work open until January 3, to find out if she would be successful in adopting and, if so, to decide thereafter whether to return to work or to be a full-time mother. Similarly, the fact that Helm ultimately decided to stay with her baby in Iowa rather than to return to work at the end of her vacation (tr. 39) does not alter the nature of Helm's request when it was submitted.

While we therefore find no error in Finding 9 as issued by the Examiner, we have added language to Finding 10 to the effect that in the November 15 and 16 conversations Helm did not express an unequivocal intent to return to work on January 3, 1983, in the event she was successful in adopting a child, and to Finding 13 to the effect that Helm chose not to return to work on December 6, 1982, even though she had taken custody of the infant by that time.

C. Finding 11: No error found.

The disputed aspect of Examiner's finding is squarely supported by Helm's testimony (tr. 13) that after her leave request was submitted, her assignment "during my off desk hours" was changed by Bielmeier from one that was mostly "professional" cataloging and relative little clerical key punching to primarily key punching, i.e., entry into computerized data base of card catalog information. The balance of the record does not squarely contradict Helm's testimony on this point.

It should be noted that neither in this Finding nor elsewhere in the decision does the Examiner assert--as Helm did--that this shift in emphasis in Helm's workload prevented Helm from completing the cataloging awaiting completion to mid-to-late November of 1982.

D. Finding 12 (bottom of page 3): Finding modified to reflect Bielmeier as initial source of idea to reschedule Helm's vacation.

The Finding as issued is not clear as to who initiated the idea of the vacation rescheduling. The record (tr. 38-39, 119-120) satisfies us that Bielmeier initiated the idea of rescheduling Helm's vacation to begin on November 29. Accordingly, we have reworded the Finding to clearly so state.

E. Finding 13 last two clauses: No error found, but additions made consistent with City's objections.

We have modified the second last clause to make it clear that Weed considered 11/12th of a 1983 vacation to be all the 1983 vacation pay to which Helm was entitled.

There is nothing inaccurate or misleading about the last clause of this Finding. Nevertheless, we see no harm in expanding upon that clause, consistent as written by the Examiner with the City's contentions, to add references to the fact that Helm did not request reinstatement or ask about possibilities thereof during her December 10, 1982, visit to the Library. For balance, however, we have also noted in the modified Finding that Bielmeier did not offer reinstatement or inquire about Helm's availability to return to work.

F. Finding 14: No error found.

We have reviewed in detail the City's attack on the Examiner's crediting of Wegener's testimony over that of Weed and Mayor Mitchell on the subject matter of this Finding. For the most part, the Examiner's Memorandum takes account of the bases on which the City has criticized the credibility decision. However, we find that the record undercuts the Examiner's characterization of Wegener as a wholly unbiased and disinterested witness in this dispute and that the record presents considerations which bear on the credibility determination besides those discussed by the Examiner in his Memorandum.

We agree with the City, contrary to the Examiner, that Wegener was not just a co-worker of Helm's. After mid-1982, they were the only two professional employes in the bargaining unit; they were the two longest service employes in the bargaining unit and had therefore worked in the same location for many years; and they had worked together in certain aspects of their work. (e.g., tr. 27, 103, 111). Helm and Wegener also shared the burdens imposed by a markedly increased workload due to computerization and layoffs. They were reprimanded together on September 22, 1982, for what Bielmeier characterized as conducting Union business on the job contrary to the City's announced policy prohibiting same. (tr. 20, 31). On that occasion, Bielmeier reprimanded the two for talking to Daryl Feeny, the Local 20 Steward of a unit of non-Library employes of the City.

We also agree with the City, contrary to the Examiner, that Wegener's reason for leaving the employ of the City in March of 1983 was not limited to the fact that she found a better job with another public library system. For, Wegener admitted on cross-examination that she had told Bielmeier in an exit interview that besides accepting a better job at another Library, her reasons for leaving included her frustration at being overworked and understaffed in the Library, compounded by the June-July 1982 layoffs and peaking with the termination of Helm and the hiring of replacements for Helm (whom Wegener viewed as "an excellent cataloger," tr. 159) with two part-time employes whom Wegener had to try to train while still attempting to do her own work and some of Helm's. (tr. 159). Thus, Wegener's attitude may, at least to some extent, have been negative toward the Mayor and the City on account of Library staff reductions and the termination of Helm, and positive toward Helm because of her competence and their shared experiences over many years.

We also agree with the City that Helm's credibility as a corroborating witness to Wegener is poor. Helm was discredited in a number of respects by the Examiner's Findings and she was shown in several other respects to have a poor memory and a willingness to exaggerate her testimony in ways she appears to have considered to be to her advantage. Thus, although Helm asserted flatly that she had not visited the Library on December 10, 1982 (tr. 36), the Examiner appropriately credited Bielmeier's detailed and contradictory description of Helm's visit on that occasion. Similarly, Helm said she thought sure that she had made a contemporaneous note of Weed's remark until she was asked to review the notes in which she asserted such a notation had been made, whereupon she acknowledged that she was mistaken. (tr. 75). Helm's estimates of book backlogs and cataloging rates were similarly shown to be inconsistent with other more

reliable evidence, as well. In sum, Wegner's testimony stands or falls on her own relative credibility; Helm's corroboration does not significantly strengthen the Union's case in that regard.

Indeed, Helm's admission that she made no written notation of Weed's claimed revelation lends at least some support to Weed's assertion that the hostility idea came from the employes rather than from Weed. So memorable and threatening a mayoral remark revealed by Weed might well have been written down and brought promptly to the attention of the Union Business Representative, and could also have become the basis for at least an informal complaint or letter to the City concerning the threat to the Union's bargaining committee members. Especially so since Helm made notes regarding the circumstances and discussion had on the occasion of the September 22, 1982, reprimand of Wegener and Helm by Bielmeier for engaging in Union business on the job. The absence of any such notation and contemporaneous complaint also cuts against the Union's case.

Despite the foregoing, however, we have affirmed the Examiner's Finding 14 as written, principally for the following reasons.

First, although Wegener was not entirely unbiased and disinterested, she was nonetheless more unbiased and disinterested than Weed, the Mayor and Helm. Moreover, the Examiner noted, Wegener was candid in her testimony about the true backlog situation even though it would have appeared that her testimony in that regard tended to undercut Helm and the Union to some extent.

Second, we are not persuaded that the conflict between Weed's and Wegener's testimony can be explained by the City's suggestion that Wegener has, over time, confused the source of the attribution of hostility to the Mayor. Wegener's testimony was so clear and certain as to the source of the idea that we can conclude that it was not factual only by concluding that Wegener consciously decided to and/or agreed to lie about the source of the idea.

Third, from our own reading of the record and our discussion with the Examiner concerning his impressions of the witnesses' relative credibility, we are unwilling to conclude that Wegener consciously decided to and/or agreed to lie about the source of the idea. The negative aspects of Weed's testimony noted by the Examiner (nervousness/evasiveness) may be explained at least in part by the fact that he was the first and only witness surprised by an inquiry about his claimed revelation of a hostile remark by the Mayor; for there is no reference to such a remark in the Complaint, there were no opening statements, and the subject did not come up in the Union's initial questioning of Helm prior to its calling Weed. However, the positive aspects of Wegener's testimony relied upon by the Examiner are in no way undercut by the balance of the record or by our discussion with the Examiner. Given the nature of that testimony, we, like the Examiner, are not inclined to conclude that she consciously lied about the nature of the conversation with Weed.

Finally, as noted with regard to Finding 16, below, hostility on the Mayor's part toward Helm's union activities better explains the City's conduct in connection with Helm's leave request than do the business reasons given by the City for that conduct. Therefore, the inconsistencies between the City's conduct and its claimed business motives for that conduct lend further support to the notion that the Mayor held an attitude consistent with the remark we have found Weed attributed to him.

G. Finding 15: No error found.

The City disputes the Examiner's characterization of the individuals hired to replace Helm as lacking "current cataloging experience". Wegener so testified (tr. 158) without contradiction, and we find no basis for altering the Finding as issued. We would note that the Finding does not state or necessarily imply that "current" as opposed to "prior" cataloging experience was essential to meeting the City's operational needs. Rather, as the Union argues, the significant point of the Finding is that the replacements required training before they were able to undertake Helm's duties independently.

H. Finding 16--protected activity: No error found.

The City contends that Helm was not, in fact, engaged in bargaining committee activity at or near the time of the denial of requested leave because, the City asserts, bargaining activity was essentially non-existent for the year preceding

the disputed leave request. Helm testified (tr. 19) without contradiction elsewhere in the record that bargaining activity was on-going during 1981 and "most of 1982". In any event, it is undisputed that Helm retained membership on the Library unit bargaining committee at all material times and that mediation by the mediator-arbitrator was ongoing in 1982 after the mediation-arbitration petition was filed in June of that year. And, there are also various other record references to ongoing Union activities during late 1982. (tr. 92, 100 and 122).

It is bargaining committee membership and activity, not the submission of the leave request itself, that the Examiner identified as the activities on behalf of fellow employes which motivated, in part, the employer's denial of the leave request.

Accordingly, we find no merit in this objection.

I. Finding 16--hostility and motivation: No error found.

The City argues that the absence of evidence of other instances of hostility to Helm, particularly in the year following the fall of 1981 time period ascribed to the disputed remark by Weed undercuts the Examiner's finding of hostility and anti-union motivation, and that the record as a whole does not warrant this critical finding.

While the absence of other instances of hostility is a factor supportive of the City's contention, we are satisfied that it is outweighed by both Wegener's testimony regarding Weed's statement to the employes in the fall of 1981 and the circumstantial evidence undercutting the City's stated reasons for its actions herein. A further discussion of our views in this regard is set forth in the discussion of Conclusion of Law 4 below.

J. Finding 16--foreseeability of Helm's non-return following vacation: Finding Modified.

We have qualified somewhat the Examiner's foreseeability findings in Finding 16. As modified, they appropriately reflect that the City could reasonably foresee and did in fact foresee that by denying the leave and requiring Helm to return to work on or about December 6, the City was reducing the likelihood that Helm would return to work as scheduled.

In those regards, Helm testified that when she initiated the leave request, there was a "definite possibility" that she could not complete the process and obtain custody of the child until "well into December" (tr. 32), and Helm communicated her uncertainty in that regard to Bielmeier in their discussions on November 15, 16 and 22. (tr. 117, 119, 120, 121, 123). That testimony supports the Examiner's finding that it was reasonably forseeable that refusal to grant Helm's requested leave of absence would reduce the likelihood of Helm's returning to work upon expiration of her vacation at or about 1:00 p.m. on December 6. In our view it was reasonably foreseeable that if forced to choose between returning to work to keep her job and remaining in Iowa to follow the adoption process to a conclusion (successful or otherwise) Helm would have chosen to stay on in Iowa to see the adoption process through to a conclusion.

That the City was in fact anticipating that Helm would probably not return to work at the end of her vacation is also supported by the record evidence. For example, Bielmeier testified that she told Helm on November 16 that Helm would be terminated if Helm did not return to work immediately after the exhaustion of her accrued vacation (tr. 119); and she further testified that management was deeply concerned and uncertain about whether Helm would be back after vacation. (tr. 119, 126).

Some of the City's anticipation and concern in those regards are no doubt attributable to Helm's non-committal responses to Bielmeier's inquiries as to her plans and to the general notion that an individual adopting a newborn might well choose to become a full-time parent. Nevertheless, the foreseeability findings, as modified, appropriately reflect that the City could reasonably foresee and did in fact foresee that by denying the leave and requiring Helm to return to work on or about December 6, the City was reducing the likelihood that Helm would return to work as scheduled.

K. Omitted Finding--re whether and when Helm would have returned: No error found.

In essence, the City asserts that the Examiner has presumed that Helm would have been ready and able to return to work on January 3, 1983. The City asserts that there is no evidence in the record to establish when the infant was in condition to be entrusted to others and whether such assistance was ever arranged by Helm. To the extent that there is evidence bearing on those questions we find that it suggests that Helm was not ready and able to work on January 3, 1983. For, Helm brought the child to Library with her on December 10, 1984 and to hearing on October 7, 1983, and Helm did not demonstrate any interest at all in regaining her Library employment during her December 10, 1984 visit, since she neither stating that she was or would be available for work nor made any inquiry about the availability of such employment.

In our view, however, the Examiner's decision does not constitute a conclusive finding that Helm was ready and able to work on January 3, 1983. Thus, the City is not foreclosed by our decision herein from disputing Helm's entitlement to any particular amount of back pay that may be claimed under the modified order.

L. Omitted Finding--Status of work force and work as of November 15, 1982: No error found.

The City argues that the Examiner inappropriately failed to make a finding as to status of work force and work in Library on November 15 and immediately thereafter.

In our view these matters are adequately dealt with in Findings 4-7. Finding 4 satisfactorily deals with existence and persistence of backlogs and has implications for the effects of those backlogs on Library consumers. Finding 5 reveals that there were 8 full-time and 3 part-time employes after the mid-year 1982 layoffs. Finding 6, as modified, deals with the subject of vacation liquidation in a manner we have determined above to be appropriate. Finding 7 notes that Darcy Neuenfeldt was granted an unpaid maternity leave from November 22, 1982 through January 26, 1983.

Additional findings could have been entered to the effect that employes were spending work time from time to time on matters related to the Union; that Vi Kelpin had been arranged for as a substitute for Neuenfeldt except for the period from Christmas through New Year's Day; and that the City appears not to have taken steps to utilize temporary replacement employes for Helm or others during the period. But because those findings can be viewed as preliminary to certain of the more basic ultimate findings issued, we have not found it necessary to fashion additional findings to those effects.

Review of Examiner's Conclusions of Law: No error found.

The only Conclusion of Law challenged in this review is Conclusion of Law 4. Since neither party has taken issue with the other Conclusions of Law including Conclusion of Law 5, and since neither has taken issue with the absence of a Conclusion of Law relating directly to the Complaint allegation that the denial of the leave requested constituted an independent violation of Sec. 111.70(3)(a)1, we have not addressed either of those issues herein.

We have affirmed Conclusion of Law 4 because, in our view, both the evidence regarding Weed's statement and the circumstantial evidence concerning the denial of the leave would suffice on their own to establish that the City's denial of the instant leave violated Sec. 111.70(3)(a)3, Stats.

We agree with and adopt the Examiner's rationale in support of Conclusion of Law 4, (under "DISCRIMINATION") except in the following respects.

First, we do not draw any inferences from the timing of the City's advertisement for replacements. Helm had informed the City that she was attempting to adopt a newborn. That alone would lead the City to be legitimately concerned that Helm might choose to be a parent full-time and not return to work. Especially coupled with Helm's non-committal and uncertain responses regarding her future plans, the City's decision to promptly freshen its applicant file while advising responding applicants that no vacancy currently existed appears to be no more than a prudent management response in the circumstances.

Second, we do not draw any inferences from the advertising for and hiring of part-time replacements for Helm. While the City's limiting of its advertising to part-time personnel is seemingly inconsistent with the City's ostensible purposes of maximizing its pool of available and qualified candidates for possible replacement of Helm in the event she did not return to work, we note that the City has historically developed at least some of its full-time employes from among individuals hired on a part-time basis to begin with. Helm is an example. (tr. 6) Moreover, the flexibility afforded by part-time personnel also is a plausible explanation for the City's preference in that regard. We also note that the exclusion from the Library unit of employes working 20 hours or less per week could only have come into effect with the Union's concurrence; it was not something that the City could unilaterally have imposed. In all of the circumstances, then, the advertising for and hiring of part-time employes does not contribute to our conclusion that the denial of the leave was discriminatorily motivated.

The remaining considerations discussed by the Examiner in support of his discrimination analysis are persuasive.

In particular, we find it significant that Bielmeier did not deny that she disclaimed responsibility for the decision to deny the leave; nor did she explain that her comments to Helm in that regard were merely an effort to maintain Helm's goodwill rather than a true reflection of her assessment of the situation. If Bielmeier thought the leave should be granted, she must have concluded, bottom line, that she could get along operationally without Helm between December 6 and January 3. There is no testimony about what the Mayor and Bielmeier said to one another when they discussed the leave request between November 15 and the 16th. Whatever it was, however, it appears to have been unpersuasive to Bielmeier, who, as the Examiner noted, was in the best position to assess her ability to operate without Helm during the period of the leave.

We also find it significant that the City did not attempt to utilize temporary employes to cover the period of Helm's proposed leave of absence. (tr. 89) This is inconsistent with the City's approach to covering for other employe absence situations in the past, (tr. 85-86) and for attacking the backlog in earnest in 1983 (tr. 145), and we are not persuaded that the operational circumstances or Helm's unwillingness to state unequivocally her future plans warranted rejection of that approach in connection with Helm's leave request. As the Examiner noted, the City could not reasonably have expected to make major progress on its backlog problems during December in any event, until the software improvements were made. Granting Helm the leave and covering with temporary employes would seemingly have offered a greater opportunity for meeting the Library's overall objectives by improving the likelihood of retaining Helm as an employe while avoiding sub-minimal staffing during the December 6-January 3 period. To be sure, the City could not know in the circumstances that Helm would in fact return to work on January 3, but the City was making it far more likely that Helm would not return to work by denying the leave request.

Another fact we find particularly significant is that on December 10, Bielmeier apparently made no effort whatever to broach the idea of reemployment to Helm. Bielmeier did not even inquire about whether Helm was interested in coming back to work. Bielmeier testified that when Helm came into the Library on that occasion, Bielmeier thought Helm would offer to return to work and that Bielmeier's problems involved in replacing Helm would be over (tr. 124). When Helm did not broach the subject, however, Bielmeier did not do so either. Bielmeier's conscious choice not to broach the subject of reemployment to Helm in those circumstances is consistent with and lends support to the idea that Bielmeier knew that the Mayor wanted to be rid of Helm.

The City would no doubt have been operationally better off having Helm's skills and experience on the job in the December 6-January 3 period than not having her working during that period, given the heavy workload and the depleted staff. But Helm's presence or absence would not have determined the City's ability to meaningfully overcome the backlog situation, and the denial of the leave only increased the likelihood that the City would be without Helm's skills and experience permanently. The backlog had been with the City quite some time and it was destined to remain a serious problem until the much delayed software improvements were ultimately installed. Therefore, we share the Examiner's conclusion that the City's explanation that it could not operationally spare Helm

was a pretext. Especially so when the City made no attempt to find temporary employes to cover for her during the requested leave period and no attempt to reacquire Helm's services on December 10 when she visited the Library to request her check.

While the City has not been shown to have been hostile to Helm on the job or in any other respect, Helm's job performance was high quality by all accounts and day-to-day hence not easily susceptible to being faulted. While the City made work scheduling accommodations in order to allow Helm to begin her vacation on November 29 and to meet various adoption-related appointments prior to that date, those appear to have been matters solely within Bielmeier's control whereas the decision to grant or deny the leave was not.

While the City may have been responding to the perceived presumptuous and selfish attitude of Helm as compared, for example, with Neuenfeldt's, the evidence does not show that the City told Helm in November of 1982 that Helm's reasons for requesting the leave were unacceptable or that her non-committal responses to inquiries as to her future plans were part of the reason the City was denying her leave request.

We do not agree with the City that the Examiner's decision has, in effect, required City to take into account Helm's protected activity in deciding whether to grant Helm's leave request. On the contrary, it is because the evidence persuades us that the City (hostilely) took Helm's activities on behalf of the Union into account that we have concluded that the City violated MERA. As noted above, we do not understand the Examiner to have considered Helm's leave request as the protected activity on account of which the City discriminated herein.

The City also argues that the Examiner erred by assuming that the City granted Neuenfeldt unpaid maternity leave when in fact the City was required by law to do so. It is our understanding that the City would have been obligated by law to treat Neuenfeldt's maternity leave request no differently than it treated any other request for leave on account of disability. The record contains reference to the application of a City sick leave guideline to in Neuenfeldt's case (tr. 90-91), but it is not entirely clear that the sick leave guideline or the law required the City to grant the unpaid portion of the leave it granted to Neuenfeldt. For example, when Bielmeier made a point of comparing the uncertainties associated with Helm's leave request with Neuenfeldt's, Bielmeier gave the impression that Neuenfeldt's lengthy advance notice, established plans for child care and unequivocal assurances of a desire to return to work--as opposed to a legal obligation on the City's part--led the City to, in Bielmeier's words, "make some accommodation for Mrs. Neuenfeldt". (tr. 121-22). In any event, if we assume that the law required the City to grant the unpaid as well as the paid portion of Neuenfeldt's leave, our overall Findings, Conclusions and Order in this matter would not change.

Finally, the City contends that the Examiner erred by ignoring the fact that Helm's personal interest in adoption led to her loss of her employment, rather than any change in Helm's status initiated by the City. Thus, the City argues, "It was not the City that removed Helm from the work force. It was Helm who did the removal, in pursuit of her personal interests." This contention is without merit, in our view. If an employe's pursuit of personal interest were universally fatal to a discrimination complaint, it would render Sec. 111.70(3)(a)3, Stats., virtually ineffectual in cases of unlawfully motivated denials of unpaid leaves. For, in each such case the employe is pursuing his or her personal interest in requesting the leave. If that fact alone is sufficient to defeat a claim, then the City and all other municipal employers could discriminate in such matters based on anti-union animus with impunity without committing a violation and without being subjected to an appropriate remedy. We also reject that above-quoted City argument if it is to the effect that Helm chose not to return to work on December 6 even though she had custody of the child at that time and did not identify any reason why she could not have done so other than personal preference to remain with the child on a full-time basis. For, the City's denial of the leave deprived Helm of the time she was asking for, in part, to adjust to parenthood and to make decisions and arrangements regarding her employment. Because the City denied her those opportunities, in part, for unlawful reasons, the City cannot avoid the conclusion that its denial of the leave was unlawful. However, as noted in our disucssion of the Order, below, whether and to what extent the City can undercut Helm's claim to have lost compensation as a result of the denial of the leave remains for compliance discussions and possible compliance proceedings to determine.

For all of the foregoing reasons, then, we agree with the Examiner's Conclusion of Law 4 that the City has been shown herein to have committed a Sec. 111.70(3)(a)3, Stats., violation by its denial of the leave request herein.

Review of Examiner's Order

We agree with the City that the Examiner's Order was inappropriate as regards the stated end point of potential back pay liability. Paragraph 2.b. of the Examiner's Order defined that period as "from January 3, 1983 through the date of compliance with this Order". In our view, the conventional and proper order should have stated "from January 3, 1983 through the date of compliance with the reinstatement requirement in paragraph 2.a. of this Order.

The further requirement imposed by the Examiner--that the City comply with the entire Order including full payment of back pay--is not necessary for fulfullment of the underlying purposes of the Act. Our modifications of the Examiner's Order in that regard better serve the purposes of the Act by encouraging partial compliance (reinstatement) rather than imposing disincentives to partial compliance. Moreover, since an employe's unjustified failure to accept equivalent employment from another employer would become a basis for a set off against back pay on failure-to-mitigate grounds, it would be anomalous to deny the Respondent the same defense if it offered the employment by way of a reinstatement offer of its own.

Thus, while we consider the Examiner's Order paragraph 2.c. to have properly indicated that the City's interest obligation will continue until the City has fulfilled its back pay obligations under the Order, we have modified the Examiner's Order to provide that the City's back pay liability shall not extend beyond the time at which the City has complied with the reinstatement requirement set forth in paragraph 2.a. of the Order.

Such is, in our view, the conventional limitation on back pay liability in remedial orders under MERA, and there appears to be no reason to deviate from that approach generally or in the circumstances of this case.

Several aspects of the Examiner's Memorandum discussion of his reinstatement and back pay remedies require comment and modification. We agree with the Examiner that an order of reinstatement to an equivalent position with full seniority is appropriate in this case, as is an order that the City make Helm whole with interest for any loss of pay she experienced during the period beginning with January 3, 1983, by reason of the City's unlawful conduct. As noted above, however, we have found unnecessary and inappropriate the Examiner's requirement that the City's meet its back pay obligation under the Order in order to end the accumulation of back pay due under paragraph 2.b. of the Order.

We have affirmed the Examiner's inclusion in the Order of reinstatement and back pay from and after January 3, 1983. However, our affirmance of the Order as modified should not be understood as foreclosing the City from claiming that Helm has failed to mitigate the damages in such a way as to reduce or eliminate the City's back pay liability under that Order.

Moreover, our affirmance of the Order as modified is not intended to represent a determination of the effect (if any) of the parties' October 1984 exchange of correspondence regarding reinstatement, on the City's reinstatement and back pay obligations under the Modified Order herein. That correspondence is referred to in the summary of the Respondent's position, above.

Rather, we leave those and all other questions related to past, present or future compliance with the Order and with the Modified Order to the parties in the first instance, with informal or formal Commission compliance proceedings available to resolve any disputes the parties are unable to resolve between themselves.

In that regard, we disassociate ourselves from the Examiner's comment at Note 21 p. 18 which reads:

> 21/ Bielmeier suggested in her testimony that Helm could have been reinstated on December 10, 1982 had she requested it during her visit to the Library with her new child. Transcript, page 124. This was not communicated to Helm in any way on

that occasion. Helm was told that her final paycheck, including 11/12ths of her earned vacation was going to be mailed to her on the following Monday. Inasmuch as Helm had already been informed that her employment would be terminated, this unspoken offer of reinstatement cannot serve to mitigate the Respondent's liability for backpay.

While we agree with the Examiner that the December 10, 1982, events recounted in that footnote could not amount to an offer of reinstatement on the part of the City, we do not necessarily agree with a further possible implication of that footnote to the effect that Helm's December 10, 1982, conduct cannot have any bearing on her entitlement to back pay. Instead, it is our view the events of December 10, 1982, may be relevant to a City claim that Helm has failed to mitigate the harm done her by her termination.

Dated at Madison, Wisconsin this 10th day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner