

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

LISA ANDERSON

Involving Certain Employees of

CITY OF NEW BERLIN (PUBLIC LIBRARY)

Case 15

No. 52642 ME-3471

Decision No. 13173-E

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, for the Union.

Ms. Lisa Anderson, 116 North 117th Street, Wauwatosa, Wisconsin 53226, on her own behalf.

Mr. Lowell Clapp, Director of Human Resources, 16300 West National Avenue, New Berlin, Wisconsin 53151, for the City of New Berlin.

Ms. Moira J. Kelly, Vice-President, New Berlin Library Board, 5830 South Martin, New Berlin, Wisconsin 53146, for the Library Board of Trustees for the City of New Berlin.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Lisa Anderson, Reference Librarian, filed a petition on May 21, 1995 with the Wisconsin Employment Relations Commission requesting that an election be held among fifteen employees at the New Berlin Public Library to determine whether they wished to continue to be represented by New Berlin Public Employees Local 2676, AFSCME, AFL-CIO. Anderson asserts that New Berlin Library Board, not the City of New Berlin, is the municipal employer of the Library employees. Local 2676 and the Library Board of Trustees for the City of New Berlin contend the City is the municipal employer of the Library employees. The City took no position as to whether the City or the Library Board is the municipal employer.

Hearing was held in New Berlin, Wisconsin on August 24, 1995 before Commission Examiner Jane B. Buffett. A transcript of the hearing was provided to the Examiner on September 5, 1995. No party filed a brief and the record was closed on October 5, 1995.

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The Commission, having considered the record evidence and the parties' arguments and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization which has its offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903.

2. Lisa Anderson, referred to below as the Petitioner, is employed as a Reference Librarian at the City of New Berlin Public Library.

3. The City of New Berlin, referred to below as the City, is a municipal employer which has its offices located at City Hall, 16300 West National Avenue, New Berlin, WI 53151.

4. The New Berlin Library Board, referred to below as the Library Board or the Board, is located at 14750 West Cleveland Avenue, New Berlin, Wisconsin 53151.

5. On January 6, 1975, following an election, the Commission certified the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO as the exclusive bargaining representative of City employees in the following appropriate bargaining unit:

All regular full-time and regular part-time office, clerical, technical and related occupational positions, professional library employees and craft employees but excluding professional engineers, elected officials, department heads, supervisors, confidential employees, managerial employees, seasonal employees, and employees employed in previously certified bargaining units. 2/

The current bargaining agreement between the City and the New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO expired December 31, 1995, and contains the following recognition clause:

The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all regular full-time and regular part-time office clerical, technical and related occupational positions, professional library employees and craft employees, but excluding professional engineers, elected officials, department heads, supervisors,

2/ Decision No. 13173.

confidential employees, managerial employees, seasonal employees, student co-op employees, temporary employees, employees employed in previously certified bargaining units, for the purpose of collective bargaining on matters concerning wages, hours and all other conditions of employment as certified by the Wisconsin Employment Relations Commission under the date of January 6, 1975, Decision No. 13173, and amended by the Wisconsin Employment Relations Commission under date of May 29, 1991, Decision No. 13173D.

At the time of the hearing, there were approximately eighty (80) employees in the bargaining unit.

6. On May 21, 1995, Anderson filed a petition requesting an election among fifteen employees at the New Berlin Public Library, currently members of the bargaining unit described at Finding of Fact 5 above, contending that the Library Board is their actual municipal employer not the City of New Berlin. The Union and Library Board contend that the City is the municipal employer. The City took no position.

7. In the event the Commission concludes the City is the employer, the Union, the Petitioner, the City and the Library Board stipulated to an election among the professional library employees to determine if the employees wish to be separate from the unit described at Finding of Fact 5, and, if so, whether they wish to be represented by the Union. The parties stipulated that five library positions are professional, which positions are currently held by Carolyn Ashton, Barbara Draeger, Lisa Anderson, and Margaret Schellin and one, formerly held by Ms. Fox, which was vacant at the time hearing was conducted.

8. The Library Board is composed of nine individuals appointed by the Mayor and confirmed by the Common Council. One Library Board member is also a member of the Common Council, one seat is reserved for the Superintendent of Schools or his/her designee and the others are members at large.

9. The Library Board is established pursuant to Chapter 43 of the Wisconsin Statutes and under New Berlin Ordinance. The powers granted to Library Boards set forth in Sec. 43.58, Stats., are, in pertinent part, as follows:

43.58. Powers and duties

(1) The library board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund, and of the purchase of a site and the erection of the library building whenever authorized. The library board also shall

have exclusive charge, control and custody of all lands, buildings, money or other property devised, bequeathed, given or granted to, or otherwise acquired or leased by, the municipality for library purposes.

(2) The library board shall audit and approve all vouchers for the expenditures of the public library and forward the vouchers or schedules covering the same, setting forth the names of claimants, the amounts of each claim and the purpose for which expended, to the appropriate municipal or county financial officer or, in the case of a school district, the school district clerk, with a statement thereon, signed by the library board secretary or other designee of the library board, that the expenditure has been incurred and that the library board has audited and approved the bill. The municipal, county or school district governing body shall then pay the bill as others are paid.

(3) Any person having a claim or demand against the municipality or county growing out of any act or omission of the library board shall file with the library board a written statement thereof. If the claim or demand or any part thereof is disallowed, the claimant may bring an action against the municipality or county.

(4) Notwithstanding ss. 59.031(2)(br) and 59.033(2)(b), the library board shall supervise the administration of the public library and shall appoint a librarian, who shall appoint such other assistants and employees as the library board deems necessary, and prescribe their duties and compensation.

The New Berlin Ordinance Sec. 1.06 reads in part as follows:

(6) LIBRARY BOARD. (a) Membership. (Am. #903) The Library Board shall consist of 7 citizen members, the school administrator of one of the school districts of the City or his representative and one member of the Council. The school administrator or his representative shall be appointed by the Mayor, subject to confirmation by the Council for a 3 year term commencing on July 1. The 7 citizen members shall be City residents appointed by the Mayor, subject to confirmation by the Council, for 3 year terms commencing on July 1. The citizen members shall be appointed for terms so staggered that not more than 3 members are appointed in any one year. The Council member of the Library

Board shall be appointed by the Council President for a term of one year commencing May 1.

(b) Organization. The Board shall annually within 30 days after July 1 organize by the election from their membership of a president and a secretary and such other officers as may be deemed necessary. A majority of the Board shall constitute a quorum to transact business of the Board.

(c) Expenditures. The Board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund and of the purchase of a site and the erection of a library building whenever authorized, and exclusive charge, control and custody of all lands, buildings, moneys or other property devised, bequeathed, given or granted to or otherwise acquired or leased by the City for library purposes. The Board shall audit and approve all vouchers for expenditures and forward such vouchers or schedules covering the same, setting forth the names of claimants, the amounts of each claim, and the purpose for which expended, to the City Clerk with a statement thereon, signed by the secretary, that the expenditure has been incurred and that the Library Board has audited and approved the bill. The City Clerk shall thereupon draw his order upon the Treasurer and the same shall be paid as other municipal orders are paid under ss. 66.042, Wis. Stats.

(d) Personnel. The Board may appoint a librarian and other such assistants and employees as they may deem necessary and prescribe their duties and compensation.

(e) Lecturers. The Board may employ competent persons to deliver lectures upon scientific, literary, historical or educational subjects, and may cooperate with the University of Wisconsin, the State Historical Society, other State agencies, and Boards of Education, to secure such lecturers or by other means to foster and encourage the wider use of books and literature upon scientific, historical, economic, literary, educational and other useful subjects.

(f) Claims. Any person having a claim against the City growing out of any action or omission of the Library Board shall file with the Board a written statement thereof, and if such claim or part thereof be disallowed, the claimant may bring an action against the

City in the manner that an action may be brought after disallowance of a claim by the Common Council.

(g) Rules and Regulations. The Library Board may establish rules and regulations for the conduct of its business consistent with this section and State statutes, and shall have such other powers and duties as prescribed by Ch. 43, Wis. Stats.

10. In New Berlin, the Library Board hires the Library Director, outlines the Director's major objectives, and sets policy for the Library's direction.

11. The majority of the Library revenue comes from a City tax although it has some revenue from book fines. The Library Board prepares a budget and submits it to the Mayor. The Mayor reviews the budget and submits it to the Common Council for approval or modification. The Library budget has been modified by the Mayor/Common Council in the past. After the budget is passed, the Library Board can take money from one line item and apply it elsewhere on its own motion. City department heads have this same line item authority. However, in contrast to the Board, if a City department heads were to overrun a line item, they would discuss it first with the Mayor.

12. The Library building and property is owned by the City. The Library's bathrooms were renovated pursuant to an ADA grant, the application for which was made and approved by the New Berlin Common Council. City employees cut grass, plow snow and do the electrical and plumbing work at the library. There is no billing to the Library for this work. Since July 1, 1995, the Library has contracted for the custodial cleaning work. The Library Director signed the contract without need for City approval.

13. The City performs financial record keeping for the Library, including preparing the payroll and paying its regular bills. The City administers all Library employee benefits, such as insurance, retirement, sick leave, and vacation. The Library Board is not billed for these services. Library employees participate in the same insurance and retirement programs as do City employees. The City and the Library Board have one employer number. Personnel records are kept on Library employees by both the City and the Library Board. The bargaining agreement currently covering Library employees provides for City-wide transfer and seniority rights. The Library uses the same City established personnel policies for Library employees as the City does for other City of New Berlin employees.

14. Sitting as a committee of the whole, the City Common Council bargains the labor agreement for the Local 2676 unit. The Library Board does not take any official or unofficial action to ratify the terms of the Local 2676 collective bargaining agreement. The Library Board does not participate in the City's contract negotiations for the Local 2676 bargaining unit but may provide input into the negotiations on specific Library issues. The Library does is not billed for the City's

performance of contract negotiations.

15. Once a position is created or there is a vacancy at the Library, the City posts the position and advertises in the newspaper. The interviewing for professional positions at the Library is done by the Library Director and her hiring recommendation is sent to the Library Board for approval. The City does not act to approve the hire. Similarly, the Library Director's Assistant conducts interviews for support staff positions and will make a recommendation to the Library Board for hire without subsequent City approval. After an applicant has accepted a Library position, the City conducts any applicable drug tests and prepares the tax and personnel forms.

City department heads may also fill approved positions without further Common Council action.

The Library Director can discipline employees, including imposing a suspension, without official action by the Library Board or the City, although the discipline imposed can be adjusted by the Library Board at the second step of the grievance procedure and by the City's Human Resources Department at the third step. The first step of the grievance procedure is to the Library Director. The Library Director has on three or four occasions issued reprimands, both written and verbal during her tenure. She has afterward sent a copy of the reprimand to the City. City department heads generally consult with the City Human Resources Department before they issue written or verbal reprimands. No suspensions or terminations of represented employees have occurred during the tenure of the current Library Director and the Library Director would consult with City prior to imposing such discipline because of the collective bargaining agreement. The Library Director or the Library Board has the independent authority to terminate any non-represented employee, with the Human Resources Department only playing a consultive role. There have been no terminations of unrepresented employees during the tenure of the Library Director. If a grievance is not resolved by the City at the third step, the matter goes to arbitration where the City represents the Library Board, without charge to the Library Board. The City performs exit interviews with terminated Library employees.

16. The Library Director and Administrative Assistant's salary and fringe benefits are set by the Library Board.

17. The statutory personnel authority of the Library Board is circumscribed by the City's exercise and control of the bargaining process and administration of the Local 2676 bargaining agreement, which is undertaken by the City with the approval or acquiescence of the Library Board. Therefore, the Library Board does not exercise sufficient autonomous power as to the wages, hours and conditions of employment of employees in the Local 2676 unit to be their municipal employer.

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

CONCLUSIONS OF LAW

1. The City of New Berlin, and not the New Berlin Public Library Board, is the municipal employer within the meaning of Sec. 111.70(1)(j), Stats. of Library employees currently included in the Local 2676 bargaining unit.

2. It is appropriate under Sec. 111.70(4)(d)2.a., Stats. to conduct an election among the five professional Library employees for the purposes identified in Finding of Fact 7.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

1. The Petitioner's petition for an election among all employees of the City of New Berlin Public Library is hereby dismissed.

2. An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Order in a voting group consisting of all regular full-time and regular part-time professional library employees of the City of New Berlin, excluding supervisory, managerial and confidential employees, who were employed on February 23, 1996, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining (1) whether a majority of the employees in said voting group desire to continue to be included in the existing bargaining unit and, if not, (2) whether a majority of such employees voting desire to be represented by the New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, in a separate bargaining unit for the purposes of collective bargaining with the City of New Berlin on questions of wages, hours and conditions of employment, or whether such employees desire not to be so represented by said labor organization.

Given under our hands and seal at the City of Madison, Wisconsin,
this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/

Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

CITY OF NEW BERLIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This proceeding was initiated by an election petition filed by Lisa Anderson, a librarian, asking that the Commission direct an election among fifteen employees of the City of New Berlin Public Library currently in an eighty member City bargaining unit described in Finding of Fact 5 and represented by the Union. The Petitioner asserts that under Chapter 43 of the Wisconsin Statutes, the Library Board is the "legal employer and regulator of the library" and therefore that the Library employees should constitute a separate bargaining unit. She seeks an election to determine whether the Library employees wish to continue to be represented by the Union. The Union maintains that the Library employees are employed by the City. At the hearing, the City and the Library Board took neutral positions. The Library Board subsequently indicated in a post-hearing letter that it did not believe it was a municipal employer.

At hearing, all parties stipulated that if it is determined that the City is the municipal employer of the Library employees, the Commission should conduct an election among the professional Library employees to determine whether they wish to continue to be included in the existing City unit and, if not, whether they wish to continue to be represented by the Union.

DISCUSSION

The question presented is whether the Library Board or the City is the municipal employer of the Library employees under Sec. 111.70(1)(j), Stats. The New Berlin Library Board was created pursuant to Chapter 43, Wis. Stats. and an ordinance of the New Berlin Common Council. The nine member Board is appointed by the Mayor and confirmed by the Common Council.

The fact that the governing body of a public entity is appointed by the elected officials of the parent municipality does not preclude a finding that the appointed body is the municipal employer. Indeed, there is no doubt the statute creating library boards empowers a Board to exercise sufficient autonomous control to enable it to operate as a separate municipal employer, and in some previous cases we have found them to be so. 3/ On the other hand, we have determined that the Board's parent municipality was the municipal employer where the powers exercised by the Library Board, especially with regard to employee wages, hours and conditions of employment were

3/ City of Cudahy, Dec. No. 21887 (WERC, 10/84); City of Cudahy (Library), Dec. No. 26680 (WERC, 11/90); Hales Corners Library Board, Dec. No. 15229-A (WERC, 4/78);

limited. 4/ In the instant case, the Library Board's authority is not insignificant. However, in the final analysis, we conclude that the City is the municipal employer of the Library employees.

Traditionally, in determining whether an entity was a municipal employer, separate and distinct from another, we have examined the following factors: an independent source of revenue, 5/ control over the budget, 6/ a requirement that approval be granted from another body to administer its responsibilities 7/, rent or other payment to the parent authority for services provided to it 8/, intermixing of personnel and transfer rights for employment vacancies among the entities 9/, its creating statute and/or ordinance 10/ control over the employees' wages, hours and conditions of employment. 11/ Of all of these factors, the last has been of paramount significance. 12/

We note at the outset that because of the unique statutory existence of library boards, many of the above noted factors of analysis are not meaningful determiners of separate employer status in library cases. For instance, in New Berlin, the City provides the Library with bill payment services, and the Board does not reimburse the City for these services. However, that the bill payment functions are undertaken by the City for the Library without reimbursement may be understood by reference to Sec. 43.58(2), Stats., which states that:

- (2) The library board shall audit and approve all vouchers for the expenditure of the public library and forward the vouchers...to the appropriate municipal or county financial officer..with a statement ... that the expenditure has been

4/ City of Superior (Public Library), Dec. No. 23318-A (WERC, 2/86); City of Wauwatosa, Dec. No. 21145 (WERC, 1/83).

5/ City of Waukesha (Street and Parks Department), Dec. No. 21034 (WERC, 10/83); City of Sparta (Water Utility), Dec. No. 12912 (WERC, 1/74).

6/ Ibid.

7/ Ibid.

8/ Ibid.

9/ City of Superior (Public Library), supra. at 3.

10/ Dane County Housing Authority, Dec. No. 17130 (WERC, 7/79).

11/ City of Cudahy, supra., at 2; City of Cudahy (Library), supra., at 2, and City of Superior (Public Library), supra., at 3.

12/ City of Superior (Public Library), supra. at 3.

incurred and that the library board has audited and approved the bill. The municipal, county or school district governing body shall then pay the bill as others are paid.

Thus, this evidence is of no particular significance herein.

The New Berlin Public Library occupies a City owned building and it sits on land controlled by the City Parks department. A recent building renovation was executed with an ADA grant applied for and granted to the City. City employees perform most routine maintenance, as well as grounds care and snow plowing. The Library Board does not reimburse the City for rent or services. On the other hand, the Library Board has contracted for building custodial cleaning services without City involvement or approval. However, ultimately, the Library Board's control or lack thereof over the building does not figure prominently in our determination. As was true for the bill paying function, library boards have been found by this Commission to be separate employers whether they do or do not have substantial building control.

The major source of revenue for the Library comes from a City levied tax, although the Library generates some income from library fines and other sources. After the Library Board prepares its budget, both the Mayor and the Common Council have the opportunity to make adjustments and have in the past significantly reduced the Board's budget. Dependency on an outside revenue source has not barred us from recognizing library boards as a separate employers where the library board exercises, along with other significant labor relations powers, autonomous control over the money allocated after the budget amount is approved.^{13/} Here, the Library Board does exercise meaningful control after the budget allotment is made. Although the budget is submitted through line items, the amount allocated to each item is discretionary with the library both before and after Common Council action. After the budget is passed by the Council, the Library Board may move items from one line item to another without returning to the Council. Thus, if the Council decreases the Library budget submitted to it, the Library Board ultimately determines where the decrease is to be taken from. Therefore, the Library Board exercises more independence in the expenditure of revenues than was exhibited by the board in Superior supra, where we found the City to be the municipal employer. However, as noted earlier, the most significant area for our analysis is the exercise of control over wages, hours and conditions of employment. We proceed to a consideration of the record as to this critical factor.

It is undisputed that the Library Board hired the Director and that the Director or her Assistant have interviewed and hired the other employees. This is undertaken without prior or

13/ City of Cudahy and City of Cudahy (Public Library), supra, at 2.

subsequent approval of the City, although the City handles the tax and employee forms. The collective bargaining agreement provides for City-wide transfer rights and seniority, however, and the Director's autonomy to hire is thus circumscribed by the collective bargaining agreement.

The Director/Board has issued verbal and written disciplinary warnings without prior approval of the City. However, under the existing collective bargaining agreement, Library employees have access to a grievance arbitration procedure and both third step grievances and arbitrations are handled by the City. Thus, ultimately, the City has veto power over all Library employee discipline.

The compensation for all Library employees (save the Director and the Assistant) is bargained by the City as part of its negotiations for a City-wide unit that has included Library personnel since 1976. The City Common Council also establishes personnel policies which are followed by the Library Board.

The Director testified at hearing that the ultimate authority over the employees rests with the Library Board, that the bargaining is conducted by the City for the Board's convenience, and that the Board has elected to adopt and follow the City established personnel policies applicable to union and unrepresented personnel. Although there is no evidence at hearing that a specific resolution had been passed by the Board delegating to the City the bargaining responsibilities and the authority it confers (as was done by the Library Board in Superior, supra.) the record establishes that the Board has assented to the current arrangement. At hearing, Moira Kelly, a Library Board Trustee stated that the bargaining has been conducted by the City for the Library "for I believe forever." Furthermore, after the hearing, the Board met, voted, and indicated to this Commission that it was not the municipal employer. 14/ By waiving or delegating the statutory power to establish compensation and conditions of employment, including the ultimate authority over discipline and discharge, the Board has sufficiently removed itself from such meaningful exercise of employer discretion that it is not the municipal employer.

14/ The facts here are therefore distinguishable from those presented to us in Hales Corners, supra. where upon notice, the Library Board appeared and objected to the exercise of municipal employer powers by the City over its employees whose wages and working conditions had been historically established, autonomously, by the Library Board.

We therefore find that the City of New Berlin is the municipal employer. However, pursuant to the parties' stipulation, we have directed an election among professional City Library employees.

Dated at Madison, Wisconsin this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, Commissioner