STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON MUNICIPAL EMPLOYEES LOCAL 60, AFSCME, AFL-CIO, Complainant, vs. CITY OF SUN PRAIRIE and DONALD N. FOULKE, MAYOR, Respondents.	Case 10 No. 32156 MP-1506 Decision No. 21067-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of the Complainant.

DeWitt, Sundby, Huggett & Schumacher, S.C., by Mr. Robert D. Sundby, 121 South Pinckney Street, P.O. Box 2509, Madison, Wisconsin 53701, appearing on behalf of Respondents.

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

Examiner Christopher Honeyman having, on April 10, 1984, issued his Findings of Fact, Conclusions of Law and Order, with accompanying memorandum, in the above-entitled proceeding, wherein he concluded that the above-named Respondents committed a prohibited practice within the meaning of the Municipal Employment Relations Act when they unilaterally cut the normal hours of work of certain City employes and refused to bargain with Complainant over said decision; and Complainant thereafter filed a petition for review, along with accompanying affidavit from its attorney, Bruce Ehlke, citing as error the Examiner's refusal to grant any back pay as part of the remedy for said prohibited practice and further citing as erroneous certain findings and conclusions upon which that aspect of the Examiner's decision rested; and Respondents having filed a statement in opposition to the petition and a motion to strike the Ehlke affidavit; and both parties having submitted briefs and reply briefs the last of which was received on July 12, 1984; and the Commission having reviewed the record in this matter, including the petition for review and the written arguments of Counsel, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed in their entirety;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Respondent's Motion to Strike Affidavit is hereby denied; provided, however, that the post-hearing affidavits of Counsel are treated as argument and offers of proof, not as additional evidence of record.

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.

(Footnote 1 continued on Page 2)

2. That the Union's request to reopen the record for submission of additional evidence is hereby denied.

3. That Examiner Honeyman's Findings of Fact, Conclusions of Law and Order issued in the above-entitled matter are hereby affirmed and adopted as the Commission's Findings of Fact, Conclusions of Law and Order.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

1/ (Continued)

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.

CITY OF SUN PRAIRIE

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

BACKGROUND

The Union initiated this proceeding on September 16, 1983, when a complaint was filed on its behalf by Union Staff Representative Darold Lowe, alleging that the Respondents had violated Sec. 111.70(2),(3)(a), and (4), Stats., by unilaterally changing the normal work hours of certain employes and by refusing to bargain with the Union concerning the decision to implement that change and the impact of that change on wages, hours and conditions of employment of the employes involved. The complaint contained the following request for relief:

> Wherefore, the Union hopes and prays that the WERC enter its order declaring the aforesaid actions of the City and the Mayor to be prohibited practices in violation of Section 111.70, Wisconsin Statutes ordering the City and the Mayor to cease and desist immediately and forthwith this unlawful conduct; ordering the City and the Mayor to bargain the decision and the impact of the reduction in work hours with the Union; ordering the City to post appropriate notices in conspicuous places in all buildings maintained by the City; ordering the City to reimburse to the Union the costs and attorney fees of this action; and ordering other and further relief as may be appropriate.

Respondents, in their answer filed on November 25, 1983, denied the allegation that their conduct constituted a prohibited practice and alleged as one of several affirmative defenses that ". . . the attorneys for the complainant and the city stipulated that if the executive order was rescinded the Union would drop its complaint and the employees would make no claim for lost wages" and that the complaint is moot because the employes have been restored to full employment.

The hearing in this matter was conducted by the Examiner on December 9, 1983.

Prior to that hearing, on December 6, 1983, the Examiner received a letter from Robert D. Sundby, Counsel for the Respondents, showing that copies thereof were sent to, among others, Lowe and Attorney Bruce F. Ehlke, expressing concern about whether Sundby would be permitted to both represent the Respondents at the hearing and testify as a witness for the Respondents in the matter. Enclosed with that letter was an affidavit by Sundby in support of various matters set forth in the Respondents' answer including assertions that, during a September 13, 1983, telephone conversation, Sundby had offered on behalf of the City, and Ehlke had accepted on behalf of the Union, a proposal pursuant to which the mayor would immediately withdraw his order reducing the affected employes' hours, the Union would drop its then pending circuit court action concerning the matter and the Union and the employes would make no claim for back wages for the hours lost between the time of the mayor's executive order and September 14, 1983; and that on the same day Respondents had rescinded the executive order on the basis of that agreement.

The Examiner wrote Sundby and Lowe a letter dated December 7, 1983, reciting the essence of a telephone conversation the Examiner had initiated with Sundby concerning the latter's above-noted affidavit. The Examiner noted that Sundby had advised the Examiner that the Respondents were not requesting a postponement of the hearing and that Sundby intended to offer testimony and subject himself to cross-examination concerning same as well as to serve as counsel for the Respondents in the matter.

At the hearing, Lowe, a non-lawyer, appeared for the Union and Attorney Sundby appeared for the Respondents. Following presentation of the Union's case-in-chief, as a part of the Respondents' case-in-chief, Sundby offered into evidence his personal statement concerning the matters asserted in his above-noted affidavit. He offered either to testify in narrative form and be cross-examined or to have the affidavit taken as his direct testimony and be cross-examined. Lowe acknowledged on the record (tr.43) that he had received Sundby's above-noted

letter concerning the affidavit, but Lowe objected that in affidavit or testimony form Sundby's assertions about conversations he had with Ehlke would be inadmissible hearsay.

Sundby countered, "I can testify to my conversations with someone else, and that's not hearsay."

Lowe replied, "Well, you're stating that at the time my offer on behalf of the city, and Mr. Ehlke accepted, I mean, the fact that Mr. -- you put that in an affidavit in fact it's hearsay. There's nothing in the record that Ehlke accepted your affidavit, that Ehlke even had a conversation with you, and all that he accepted." (tr.43-44)

There followed an off-the-record discussion, after which Sundby began offering sworn narrative testimony to the same effects as were contained in his affidavit. Lowe interrupted and moved to strike Sundby's testimony to the effect that Sundby made a certain offer to Ehlke and that Ehlke accepted same. Lowe argued that such "is hearsay evidence. It's a proposal, appears to be a proposal made by Sundby, and in fact he had testified to what Ehlke accepted and in fact is in my opinion hearsay and not proper." (tr.45)

Sundby argued the testimony was not hearsay or, if hearsay, was admissible as an admission against interest "because at the time Mr. Ehlke was representing the Union in the litigation."

Lowe renewed his objection on grounds of hearsay. The Examiner responded, "All right. Now, I have difficulties with this testimony but not for the reasons that have been being discussed. I don't find it to be inadmissible on the grounds of hearsay. I do, however, have a concern, first of all, to the word acceptance as conclusionary. Secondly . . . I am in some doubt as to whether there's any reason for me to be hearing about offers of settlement." (tr.45-46)

Lowe thereupon expressly clarified the grounds of his objection to include the ground that Sundby was offering testimony concerning "proposals of settlement." Sundby responded that he would corroborate the existence of a Union acceptance by means of a letter from Ehlke to Judge Bardwell and that while mere offers of settlement would be inadmissible, "when the offer is accepted, that then becomes admissible testimony."

Thereafter, the Examiner stated, "I have some concern that this matter, (sic) not as a matter of law, be admissible. However, in order to preserve the record, I will hear the testimony, and I will defer a ruling on the Union's objection until I write the decision." (tr.48) Sundby thereupon completed his narrative direct testimony and offered as corroboration of the conversation the Ehlke letter to Judge Bardwell he had referred to previously. The Examiner similarly reserved ruling concerning the admissibility of the letter.

Lowe then stated, "As long as his testimony was allowed in, I'm permitted to cross examine, correct?" The Examiner replied "yes," and Lowe proceeded to cross-examine Sundby.

At the conclusion of Sundby's testimony, Lowe stated that, although he considered it to be sufficiently requested in the complaint, the record should show that the Union was requesting back pay for the workers whose hours were reduced. Sundby objected that the amendment was untimely in that the Union had rested its case-in-chief. The Examiner stated that in his view, "the Complaint was in fact broad enough to cover that in the first place." (tr.53)

Finally, in response to the Examiner's inquiry, Sundby and Lowe both stated that the party they represented had nothing further to present in the matter and the Examiner announced that "The record is closed."

THE EXAMINER'S DECISION

In his decision (p.7, n.6) Examiner Honeyman formally admitted Sundby's testimony, reasoning that "it does not involve an offer of settlement which could prejudice the merits of the case, but rather a completed settlement, which affects the remedy obtainable." The Examiner accepted Sundby's account of the telephone conversation as accurate, and made a finding that Ehlke had agreed on behalf of

the Union that the Union would not claim back pay in connection with the reduction in hours. In that regard the Examiner noted that "Complainant was on notice that this was a major element in Respondents' defense, but Complainant presented no evidence to contradict Sundby's testimony." He further noted, "An affidavit by Sundby containing essentially the same evidence was filed three days before the hearing, with a copy to Complainant" and, "There is no evidence that Ehlke's authority as attorney for Complainant was in any way limited or was exceeded by his agreement with Sundby." (Examiner's decision p.7 nn.7-8).

The Examiner's Finding of Fact 7 read as follows:

> 7. In or about late August or early September, 1983, Complainant Union filed a request in Dane County Circuit Court for a temporary restraining order to restrain Respondent City from implementing the cut in hours. This motion was scheduled for hearing on September 14, 1983 before Judge Richard W. Bardwell. On or about September 13, Complainant Union's attorney, Bruce Ehlke, discussed with Respondent's attorney, Robert Sundby, the possible settlement of that matter. The record shows that the attorneys arrived at an agreement by which the City was to restore the hours to their former level, in exchange for the Union holding in abeyance its request for a temporary restraining order and abandoning any claim for back pay. On the same day, Ehlke wrote to Judge Bardwell as follows:
>
> > This letter will serve to confirm that I have been advised by Attorney Robert Sundby, who represents the City, that the City will restore the employees' work hours per week to their original level, effective as of September 14, 1983, and at least until the parties have been able to sit down to discuss this matter further. Accordingly, there is no need to proceed with the Motion for Temporary Injunction scheduled to be heard by you on September 14, 1983, at 3:00 P.M., and that hearing has been taken off your calendar. We would appreciate it if the Court would defer further proceedings in this matter until further notice from the parties.
>
> On September 14, the City restored the hours of all employes to forty per week.

The Examiner's Conclusions of Law read as follows:

> 1. The decision to reduce the hours of employes for economic reasons was a mandatory subject of bargaining as of the time Complainant Union received a majority of votes in the election held on August 23, 1983. By unilaterally reducing those hours and refusing to bargain concerning same until the formal certification was issued by the WERC, Respondents therefore violated Sec. 111.70(3)(a)1 and 4, Wis. Stats.
>
> 2. In the September 13, 1983 agreement between the parties' attorneys by which Respondent restored working hours to their former level, Complainant Union agreed to forego any claim for back pay. That agreement was a collective bargaining agreement within the meaning of Sec. 111.70(3)(b)4, Wis. Stats., and therefore it does not effectuate the purposes and policies of the Municipal Employment Relations Act to require the payment of back pay as part of the remedy herein.

The Examiner's remedial order provided for cease and desist and notice posting by the City but did not call for back pay. The Examiner based his non-provision for back pay on his above-noted finding that Ehlke had agreed that the Union would not pursue such relief.

THE PETITION FOR REVIEW AND POSITIONS OF THE PARTIES CONCERNING SAME

In its Petition for Review filed by Attorney Ehlke, the Union asserts that the Examiner erred in finding and concluding that Ehlke had agreed during a September 13 telephone conversation with Sundby that the Union would not pursue back pay relief for the affected employes. The Union specifically cites as erroneous the portions of Finding of Fact 7 and Conclusion of Law 2 concerning the existence of such an agreement and the failure of the Examiner to include back pay as a part of his remedial order. The Union's petition further asserts, "In fact there was no such agreement between the parties' attorneys regarding the Union's abandonment of a back pay claim and . . . it was misleading and prejudicial procedural error for the Examiner to receive into the record hearsay evidence regarding such an alleged agreement. . . ."

Thereafter, on May 3, 1984, Ehlke filed with the Commission a five-page affidavit wherein he asserted facts from his own personal knowledge and records in support of the Union's assertion that Ehlke at no time agreed to waive back pay for the affected employes.

On May 22, 1984, Ehlke filed the Union's initial brief to the Commission in support of the Petition for Review. On June 18, 1984, the Respondents filed a motion to strike Ehlke's affidavit on the basis that the Commission's authority to act on a petition for review is limited by law to the evidence in the record, making the additional assertions of fact contained in the affidavit unavailable for Commission consideration in the matter. Also on June 18, 1984, Sundby filed the Respondents' initial brief to the Commission. That brief included assertions of additional facts not of record which were offered as a matter of "personal privilege" in response to Ehlke's affidavit but not as an attempt to offer further evidence for Commission consideration on the merits of the case. Ehlke filed the Union's reply brief on June 29 and supplemented same on July 2, 1984. Sundby submitted an additional response letter on July 11, 1984, to which Ehlke replied by letter filed July 12, 1984.

Union Arguments

The Union's position can be summarized as follows.

The Examiner's finding that Ehlke waived the Union's right to claim back pay is erroneous. Sundby's testimony, if it is considered at all, is inherently inconsistent with various other facts of record, and should not have been credited. Specifically, the balance of the record evidence shows:

1. Ehlke's letter to Bardwell refers only to an agreement concerning the injunction proceeding, not the prohibited practice proceeding, and it makes no reference to a Union waiver of a claim for back pay. If the parties had agreed on a Union waiver of back pay it would have been incorporated in that letter or some other writing but was not.

2. That letter states that the City had only agreed to reinstate the old hours until the parties have had an opportunity to sit down and discuss the hours reduction matter at the bargaining table. It should be obvious that the Union would not have waived a viable claim for back pay in return for such a limited-in-time commitment on the part of the City.

3. The Union at all times acted consistent with there having been no back pay waiver; it pressed the prohibited practices charge and asked for back pay.

4. The October 13, 1984, letter from City Councilperson Sargent to the Union referred to the reduced hours and that the attorneys "may have found some definitive resolution." It makes no reference whatever to a back pay waiver. Sargent would have surely referred to the waiver if the Union had in fact agreed to one.

Thus, the facts presently of record support the Union's view that at most there has been a misunderstanding between the attorneys as to whether back pay has been waived by the Union. An apparent misunderstanding does not constitute the requisite clear and unmistakable evidence of waiver of the Union's rights to pursue a back pay remedy in this matter. On that basis the Commission should

reverse the Examiner's finding of an agreement to waive back pay and modify his order to provide that additional and necessary remedial element.

In the alternative, the Commission should conclude that the Examiner denied the Union due process by failing to tell Lowe (a non-lawyer) that Sundby's testimony, if received into evidence, would likely be given controlling weight on the question of whether Ehlke waived the Union's right to claim back pay. In that regard the Union argues (brief filed May 22, 1984, at 2) as follows:

> . . . where, as here, the lay representative clearly misunderstood the evidence in question and the significance of the Examiner's resolution of the same, and where the evidence at issue went to the heart of the remedy being asked for by the Union, the Examiner should have made an effort to explain to him what was happening. The Examiner's failure to do so at the time (Tr. 48) effectively denied the Union a fair hearing and the due process of law.

The Commission should therefore at least reopen the record and remand the matter for the taking of further evidence on the question such as that contained in Ehlke's affidavit.

Respondents' Arguments

The Respondents argue that the Examiner's findings, conclusions and order should be affirmed in their entirety. Their contentions in that regard can be summarized as follows.

The Union's failure to present evidence in an attempt to rebut Sundby's testimony is the Union's own doing and not the fault of the Examiner. Long before the hearing, the Respondents' answer put the Union on notice of the Respondents' contention that there was an Ehlke agreement not to claim back pay for the affected employes. Back pay was not even specifically requested in the Union's complaint though attorneys' fees were specifically requested therein. The pre-hearing correspondence also put the Union on notice that Sundby intended to testify at the hearing and to subject himself to cross-examination. While the Union did cross-examine Sundby, it was an extremely sketchy cross-examination. Furthermore, the Union chose not to present countervailing testimony to that by Sundby which Lowe and Ehlke knew in advance the Respondents intended to present. In the circumstances, the record has been properly closed and the Union has not shown good cause for not presenting any rebuttal evidence they might have had at the time of the hearing.

The Commission can only act on the record made before the Examiner. The other record evidence cited by the Union does not support the Union's assertion that there was no agreement not to pursue back pay. The reference in the letter to Judge Bardwell to plans for the parties to "sit down and discuss this matter" referred only to the question of whether the reduction in hours might be reinstated.

Accordingly, Ehlke's affidavit should be stricken and the Examiner affirmed in all respects.

DISCUSSION

Disposition of Undisputed Portions of Examiner's Decision

The Examiner's Conclusion of Law 1 and the findings and order related thereto are not challenged in this review and therefore we have not undertaken a detailed review of those aspects of this case. Given the absence of any challenge of or dispute between the parties concerning those aspects of the case, we are affirming as to them without comment.

We are left, then, only with the question of whether it was appropriate for the Examiner not to order back pay as a part of his remedial order. In that regard, we consider below the status of the post-hearing affidavits, the propriety of the Examiner's disputed findings and conclusion in light of the currently existing record, and the Union's claim that the record should be reopened on account of procedural error by the Examiner.

Post-Hearing Affidavits and Motion to Strike

We are treating the Ehlke affidavit and what amounts to a counter-affidavit by Sundby in the Respondents' brief as argument and, to the extent that they refer to matters not in the record, as offers of proof for the Commission's consideration as regards the Union's alternative request for reopening of the hearing. Thus, while we are not considering the affidavits as record evidence for purposes of this review, we are technically not striking these affidavits from consideration for the limited purposes noted above.

Propriety of Disputed Findings and Conclusion on Current Record

We have reviewed the record evidence and are satisfied that the Examiner's Finding of Fact 7 and Conclusion of Law 2 are not erroneous on the record developed at the hearing.

As the Union argues, there are some aspects of the current record evidence that are at least indirectly supportive of the Union's assertion that there was, at best, a misunderstanding between Sundby and Ehlke as to whether back pay was being waived by the Union. Ehlke's letter to Judge Bardwell makes no mention of a waiver of back pay. After receiving a copy of that letter Sundby did not cause the agreement he claims to have reached to be reduced to writing. Evidence was introduced without objection that the City Council offered to allow the employes to earn back the monies lost at time-and-one half, and that its bargaining committee even recommended that it pay back the monies lost by the employes without any work being performed in return.

On the other hand, none of those factors alone nor all of them and the balance of the record taken together appear to us sufficient to overcome the unrebutted first-hand sworn testimony of the Respondents' attorney that Ehlke agreed not to pursue back pay as part of the consideration for the Respondents' immediate restoration of the employe's previously existing normal hours of work. Especially so where, as here, the Union was on notice well in advance of the hearing that the Respondents were arguing, among other things, that the attorneys had reached an agreement as a part of which the employes would make no claim for lost wages. The Union could have produced Ehlke as a witness or it could have requested a postponement until a date on which Ehlke could be present if he were unavailable for that purpose. It did neither.

For the foregoing reasons, then, we conclude that the record as it currently exists fully supports and warrants the Examiner's Finding of Fact 7 and Conclusion of Law 2.

Request for Reopening of Hearing Based on Alleged Procedural Error

We agree with the Respondents that the Union had a full and fair opportunity to rebut Sundby's testimony.

It is true that the Examiner reserved ruling on admissibility of Sundby's testimony. However, even before doing so, the Examiner clearly stated that he did not find the testimony to be inadmissible on grounds of hearsay and was concerned, instead, about whether it was inadmissible as an offer of settlement. The Examiner's ultimate admission of Sundby's testimony was proper under the applicable standards in Secs. 111.07(3) and 227.08(1), Stats., under which the agency and hearing examiner are not bound by common law or statutory rules of evidence. The testimony was as to an agreement rather than to a mere offer to settle. It was clearly of reasonable probative value, was neither immaterial, irrelevant or unduly repetitious, and was not privileged. See, Sec. 227.08(1), Stats. 2/ The Union had, and took advantage of an opportunity to cross-examine Sundby at the hearing. It also had an opportunity to offer any rebuttal evidence that it had, but it did not do so.

2/ Sundby's testimony would also have been admissible under common law or statutory rules of evidence. For, technically, Sundby testified that the statements were made by Ehlke--as evidence of an agreement--rather than as to the truth of Ehlke's out-of-forum statements, rendering Sundby's description of the telephone conversation non-hearsay. Even if it were deemed hearsay, Sundy's testimony concerning Ehlke's agreement on behalf of the Union would be admissable as an admission against interest by Ehlke as an agent of the Union.

The Union's failure to offer evidence directly rebutting Sundby's testimony at the hearing cannot be attributed to any procedural error on the Examiner's part. The Examiner asked if the Union had anything further to offer before the hearing came to an end. The Examiner did not deny the Union due process or a fair hearing by not expressly warning Lowe that his failure to present rebuttal evidence would leave Sundby's testimony virtually unrebutted if it were ultimately admitted by the Examiner. The Union had every right to rest either on its objection or on other evidence in the record that it has argued herein is inconsistent with Sundby's testimony. In any event, it should have been obvious to Lowe, regardless of the fact that he is not a lawyer, that if the Union did not offer rebuttal evidence at the hearing it was possible that Sundby's testimony would be admitted and credited by the Examiner. Without need of the Examiner's advice or warning, the Union knew or should have known of the existence of Ehlke's version of the telephone agreement and related matters and of the relevance of such matters to the question of availability of back pay as an element of remedy in the matter.

The Union's arguments based on Lowe's lack of training in the law seem particularly unpersuasive when it is noted that the Union chose to be represented by Lowe in the matter from the beginning and stayed with that choice after learning of the Respondents' affirmative defenses and of Sundby's intention to offer his own statements into evidence in the matter.

In short, we are satisfied that the Union has not been denied a fair hearing in the circumstances, and that there is no basis herein upon which to reopen the record for the taking of further evidence. With reasonable diligence the Union could have brought forward the rebuttal evidence it now offers, at the hearing before the Examiner on December 9, 1983. We find no basis on which to excuse its failure to do so at that time, and we have therefore denied the Union's request for reopening the record for purposes of receipt of such additional evidence.

For the foregoing reasons, we have affirmed the Examiner's Findings, Conclusions and Order in all respects.

Dated at Madison, Wisconsin this 3rd day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner