

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

: GENERAL DRIVERS, DAIRY EMPLOYEES :
: AND HELPERS LOCAL UNION NO. 579, :
: Complainant, : Case XLIII
: vs. : No. 32204 MP-1515
: Decision No. 21264-A
: CITY OF JANESVILLE, :
: Respondent. :
: -----

ORDER DENYING MOTION TO REOPEN
EVIDENTIARY HEARING

Complainant, General Drivers, Dairy Employees and Helpers Local Union No. 579, filed a complaint with the Wisconsin Employment Relations Commission on September 20, 1983, alleging that the City of Janesville had committed certain prohibited practices within the meaning of Sec. 111.70, Wis. Stats. On December 23, 1983, the Commission appointed William C. Houlihan, a member of its staff, to act as Examiner. Hearing on the complaint was held on January 26, 1984, in Janesville, Wisconsin. Briefs were due three weeks following receipt of the transcript of the proceedings. The transcript was mailed on February 10, 1984. The Complainant's brief was received on March 5, 1984. On March 2, 1984, Counsel for the Respondent advised both Counsel for the Complainant and the Examiner, by telephone, that she desired to reopen the record. A Motion to Reopen Hearing was received on March 15, 1984, and a statement in opposition to said Motion was received on April 2, 1984. Respondent declined to submit written argument in response to the statement in opposition. Having considered the arguments of the parties and the issues raised by the Respondent's Motion, the Examiner issues the following

ORDER

That the Motion to Reopen Hearing is denied.

Dated at Madison, Wisconsin this 1st day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO REOPEN
EVIDENTIARY HEARING

Respondent submitted an affidavit in support of its Motion to Reopen the record. The underlying basis for the Motion is set out in paragraphs 3, 4 and 5 of the affidavit, set forth below:

3. A hearing was held on this matter before Hearing Examiner William C. Houlihan on January 26, 1984. On that date, the hearing was formally closed by the Hearing Examiner following the taking of all testimony. One of the witnesses testifying at said hearing was City of Janesville Transit Superintendent David Mumma, who testified on behalf of the City.

4. Several days after January 26, 1984, your affiant was notified by Transit Superintendent Mumma that at a time after the hearing held on January 26, 1984, he became aware of facts that lead him to conclude that a portion of his testimony contained a factual inaccuracy. Your affiant was not aware of this inaccuracy until being so notified by Superintendent Mumma.

5. It is the opinion of your affiant that this factual error in the evidentiary record of this matter is a material fact that ought to be corrected in order to provide the most complete and accurate record possible upon which the decision of the Hearing Examiner can be based. It is for this reason that your affiant makes this affidavit in support of the City of Janesville's motion to reopen the record of the hearing held on January 26, 1984.

By letter received April 2, 1984, Complainant objects to reopening the hearing. The Complainant cites Sec. 805.15, Wis. Stats., as authority for the proposition that a hearing can be reopened for newly discovered evidence only if the moving party's failure to discover the evidence earlier did not arise from a lack of diligence in seeking to discover it. The Complainant contends that the affidavit does not even allege the exercise of diligence or the absence of negligence and is therefore properly denied.

Discussion:

The parties agree that the hearing has been closed. Wis. Adm. Code Section ERB 10.19 provides that a "hearing may be re-opened on good cause shown." The Commission has set forth the standard to be applied in considering a motion to reopen hearing. The moving party must show:

- (a) That the evidence is newly discovered after the hearing,
- (b) that there was no negligence in seeking to discover such evidence,
- (c) that the newly discovered evidence is material to that issue,
- (d) that the newly discovered evidence is not cumulative,
- (e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding and
- (f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses. 1/

1/ Gehl Company, (9474-G) 5/71; City of Milwaukee, (13558-A, C) 5/76; Chippewa Falls Area School District, (16011-C) 4/78; School District of Marinette, (19542-A) 5/83; Sauk County, (21128-A) 3/84.

This standard is not addressed by the Motion to Reopen Hearing and for that reason the Motion must be denied. Specifically, the question of negligence in discovering the evidence is not addressed, nor is the materiality of the evidence in question. There is no indication that the evidence will affect the disposition of the proceeding nor whether its introduction is intended solely for impeachment purposes.

For the above reasons, Respondent's Motion to Reopen the Hearing is denied.

Dated at Madison, Wisconsin this 1st day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner