STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MAYVILLE EDUCATION ASSOCIATION and LOUISE MACIEJEWSKI, PRESIDENT, MAYVILLE EDUCATION ASSOCIATION,		
Complainants,	:	Case 17 No. 39952 MP-2052
vs.	:	Decision No. 25144-A
MAYVILLE SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE MAYVILLE SCHOOL DISTRICT,		
Respondents.		

Appearances:

Ms. Ellen Henningsen, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708, on behalf of the Complainants.

Mulcahy and Wherry, S.C., by Mr. Edward J. Williams, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54902, on behalf of the Respondents.

ORDER GRANTING RESPONDENT'S MOTION TO REOPEN THE RECORD CONCERNING REGULATORY AUTHORITY OF THE COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN

Respondents filed the above-mentioned Motion on October 16, 1989 "to reopen the record for the limited purpose of receiving newly disclosed evidence concerning the regulatory authority over public sector self-insurance plans by the Office of the Commissioner of Insurance."

The evidence proffered is an October 2, 1989 letter from Attorney Robert Luck of the Legal Unit of the Office of the Commissioner of Insurance to Norbert F. Kalinosky, Superintendent of the Southwestern Wisconsin Community School District, stating, inter alia, that "the goal of our office is to secure compliance

with the statutes which we enforce"; that the District had to either provide certain information and/or discontinue its self-funded health care benefit plan; and that if it failed to do so, "our office must consider appropriate administrative action to secure compliance with the statute."

In support of said Motion, Respondents contend that said letter came to its notice after the hearing and closing of the record; that its failure to discover the evidence earlier did not arise from lack of diligence; and that the evidence is material and not cumulative. 1/

Complainants on October 19, 1989, opposed said Motion on the ground that while "the document itself did not exist until recently, the general subject was certainly 'discoverable', if you will, well before the hearing"; "that Respondents should not at this late stage be allowed to make up for their failure to ask certain questions at the hearing"; that receipt of said letter will be prejudicial because they will not have the opportunity to question its sender; and that the letter's value to the proceeding is immaterial. Complainants further assert that if the record is going to be reopened, they should be permitted to introduce newly created evidence regarding certain problems with claims adjudication, particularly late payment.

1/ Respondents' Motion was filed before the briefing schedule was closed on December 11, 1989.

ERB 10.19, entitled, 'Close of Hearing", provides that:

> "A hearing shall be deemed closed when the evidence is closed and when any period fixed for filing briefs, presentation of oral argument, if any, or both, has expired. The hearing may be reopened for good cause shown."

The Commission in Kenosha County (Sheriff's Department), Dec. No. 21909 (WERC, 8/84), has ruled that good cause is shown when the evidence is newly discovered after the hearing; when there was no negligence in seeking to discover such evidence; when the evidence is material to the issue at hand; where it is not cumulative; when it is reasonably possible that the newly - discovered evidence will affect the disposition of the proceeding; and when the evidence is not being introduced solely for the purpose of impeaching a witness.

Here, one of the major issues in dispute is whether self-funded insurance plans are regulated by the Office of the Commissioner of Insurance with the Respondents claiming, and Complainants denying, that they are. Since the October 2, 1989 letter goes directly to that issue, it is material to the regulatory oversight provided by the Office of the Commissioner of Insurance over the self-funded insurance plan maintained by the Respondents. Accordingly, and along with other evidence in the record, it may be dispositive of that issue.

Accordingly, and because all of the other factors listed in Kenosha County are present here, I find that good cause exists for reopening the record to receive said letter and Respondent's Motion to that effect is hereby granted.

However, Complainants rightly note that they should have the opportunity to cross-examine the letter's sender regarding its contents. As a result, Complainants shall be given that opportunity to do so if they so desire and they shall notify the undersigned by March 28, 1990 whether they want to call its sender as a witness, with any such reopened hearing solely restricted to taking his testimony.

At the same time, there is no merit to Complainant's request to reopen the record to take evidence regarding the alleged

continuing problems with claims adjudication. The record is already replete with such evidence and any more would merely be cumulative at this point. Accordingly, the request to do so is hereby denied.

Dated at Madison, Wisconsin this 19th day of March, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

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No. 25144-A