

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 742, AFFILIATED WITH  
DISTRICT COUNCIL 48, AFSCME,  
AFL-CIO and PAT MERKOVICH

Complainants,

vs.

CUDAHY PUBLIC LIBRARY

Respondent.

Case 2

No. 45561 MP-2470

Decision No. 26931-A

Appearances:

Podell, Ugent & Cross, SC, Attorneys at Law, 611 North Broadway, Milwaukee, WI 53202,  
by Ms. Monica M. Murphy, appearing on behalf of Complainants.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, WI  
53202-4108, by Messrs. Robert W. Mulcahy and John J. Prentice, appearing on  
behalf of Respondent Cudahy Public Library Board.

EXAMINER'S ORDER CONCERNING MOTION TO REOPEN RECORD

The above-named Complainants filed with the Commission a complaint on April 9, 1991  
and an amendment of that complaint on June 25, 1991, alleging that the above-named Respondent  
has violated one or more provisions of Ch. 111, Wis. Stats.

On July 11, 1991, the Commission appointed the undersigned to serve as examiner and to  
make and issue findings of fact, conclusions of law and order in the matter. Pursuant to notice, the  
Examiner convened hearing in Milwaukee on August 20, 1991. After opening statements and a  
portion of the Complainants' first witness' testimony were presented, the Examiner advised the  
parties on the record that he intended to take administrative notice of the contents of the  
Commission's closed representation election case file in City of Cudahy (Library), Case 65, No.  
43100, ME-370. [tr.27-28] Although that file was not available at the August 20 hearing, both  
parties stated on the record that they did not object to administrative notice being taken of its  
contents. [tr.28]

No. 26931-A

The evidence introduced by Respondent and received into the record on August 20, 1991, included Exhibit 20, a letter from Respondent's Counsel to the Commission concerning Case 65 and dated December 13, 1990. On its face, Exhibit 20 shows that copies were sent to Respondent's Board and Library Director but not to any agent of Complainant Union. By the conclusion of the August 20, 1991 hearing, the parties rested their cases and no party requested that the record be held open for possible submission of additional evidence following review by Counsel of the contents of the closed election file. The Examiner advised the parties on the record that the contents of that file would be considered to be evidence in this proceeding, "and that if either party has a concern about that, for some reason that we can't know now without knowing what's in that file, that they should let me know before too much time passes and certainly before the time of the initial briefing comes upon us." [tr.237]. The Examiner also stated that he would make arrangements to get the election file into the Milwaukee area for review by Counsel should they wish to do so, and that arrangements could also be made for copying portions of the file if need be. [tr.237].

The parties agreed on a briefing schedule whereby an original and one of their initial briefs would be mailed to the Examiner within 30 days of Counsel's respective receipt of the transcript. The parties also reserved the right to mail reply briefs within 10 days of Counsel's receipt of the other party's initial brief from the Examiner.

Thereafter, by letter dated August 26, 1991, the Examiner advised Counsel that he had the election file in his possession and that they could contact him to arrange an appointment to review it at the Examiner's Shorewood work location.

The Examiner received his copy of the transcript on September 26, 1991.

By separate arrangements with the Examiner, Counsel for the Respondent Library Board reviewed the contents of the closed election case file on September 19, 1991, and Counsel for Complainants reviewed that file on October 22, 1991.

On October 26, 1991, the Examiner received from Counsel for Respondent an original and one of Respondent's initial brief, which was dated October 24 1991. On October 29, 1991, the Examiner received from Counsel for Complainants, a letter dated October 26, 1991, enclosing an original and one of Complainant's initial brief, as well as the original of the instant Motion to Reopen the Record. In its Motion, Complainant requested that the record be reopened so that Complainant could introduce additional evidence relating to a post-it note attached to the election case copy of the abovenoted Exhibit 20 which note stated "Sent copy to Burnham 12-17-90 GK."

On November 9, 1991, Counsel for Respondent filed a statement in opposition to the Motion, asserting, among other things, that the Motion was not specific as to the additional evidence which Complainant sought to submit.

On October 28, 1991, the Examiner requested in writing that Complainant specify what

additional evidence it sought to submit.

On November 14, 1991, Complainant replied that it sought to present evidence, in the form of affidavits of Staff Representative Burnham and of its attorney, to the effect that searches of their respective files immediately after the August 20, 1991 hearing revealed no indication that either of them had ever received a copy of Exhibit 20 prior to the August 20, 1991 hearing.

Respondent replied on November 22, 1991, renewing its opposition to the Motion.

The Examiner has considered the Motion and statements in support and opposition, along with the related correspondence noted above. Having done so, the Examiner is satisfied that the motion should be denied for two reasons. First, Complainant knew during the August 20 hearing that Exhibit 20 had been introduced by Respondent and received into evidence, such that Complainant an opportunity to present any evidence it may then have had concerning whether it had received a copy of that document in the course of the election case processing. Second, with reasonable diligence, Complainant could have but did not do any of the following: request at the August 20 hearing that the record be held open in the event that the election file might contain information which Complainant would want to meet with additional proofs; request at the August 20 hearing that the record be held open to permit Complainant to search its records and those of its attorney to determine when and if it had ever received a copy of Exhibit 20; request a reopening of the record when, according to assertions in its Motion, it discovered immediately after the August 20 hearing that its staff representative's and attorney's files contained no indication that Complainant had received a copy of Exhibit 20 prior to the August 20, 1991 hearing; and/or arrange to review the contents of the election case file prior to receipt of the transcript or at least sufficiently before the initial briefs deadline to permit submission of a Motion for Reopening of the record prior to that deadline.

The Examiner is therefore satisfied that the Complainant's Motion to Reopen the Record should be denied. By so ruling, the Examiner is not determining the weight, if any, to be given Exhibit 20 or the post-it note or any other record evidence in this matter.

Accordingly, the Examiner issues the following:

#### ORDER

1. Complainant's abovenoted Motion to Reopen the record is denied.
2. This Order as well as the Motion and the parties' arguments and statements concerning same shall be made a part of the record in this proceeding. The Motion and Complainant's abovenoted letter specifying the additional evidence it sought to submit shall be treated as an offer of proof.
3. Unless later modified, the new reply brief deadline in this matter shall be placement of

an original and one in the mail to the Examiner's Shorewood address on or before December 10, 1991.

Dated at Shorewood, Wisconsin this 27th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/  
Marshall L. Gratz, Examiner