

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**BROWN COUNTY PROFESSIONAL LIBRARY
EMPLOYEES, LOCAL 1901-B AFSCME,
AFL-CIO, BROWN COUNTY LIBRARY
CLERK EMPLOYEES, LOCAL 1901-C
AFSCME, AFL-CIO, BROWN COUNTY
PARA-PROFESSIONAL LIBRARY
EMPLOYEES, 1901-D AFSCME, AFL-CIO, Complainants,**

vs.

BROWN COUNTY, Respondent.

Case 661
No. 61226
MP-3828

Decision No. 30393-A

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2010 Memorial Drive, #206, Green Bay, Wisconsin 54303, appearing on behalf of the Unions.

Attorney John C. Jacques, Assistant Corporation Counsel, Brown County Corporation Counsel, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of the County.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Brown County Professional Library Employees, Local 1901-B AFSCME, AFL-CIO, Brown County Library Clerk Employees, Local 1901-C AFSCME, AFL-CIO, Brown County Para-Professional Library Employees, 1901-D AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on May 20, 2002, alleging that Brown County had committed prohibited practices by refusing to implement the terms of an arbitration award issued by Arbitrator David E. Shaw on October 29, 2001. On June 21, 2002, hearing in the matter was scheduled for October 1, 2002. On July 26, 2002, Brown County filed a Motion to

No. 30393-A

Dismiss the complaint, along with supporting arguments and exhibits. On August 14, 2002, the Unions filed their response in opposition to the Motion to Dismiss. On August 19, 2002, the County filed its rebuttal arguments in response to the Unions' letter brief of August 14, 2002.

The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

ORDER

The prehearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 30th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

BROWN COUNTY

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS COMPLAINT

On July 26, 2002, Brown County filed a Motion to Dismiss the complaint, along with supporting arguments, and exhibits. Thereafter, the parties briefed the matter as noted above.

Brown County argues, in material part, that the Commission should dismiss the complaint because it fails to state a claim upon which the Unions are entitled to relief and because the Commission lacks jurisdiction over the complaint.

Lack of jurisdiction or failure of the complaint to state a cause of action are grounds to dismiss a contested case prior to hearing. COUNTY OF WAUKESHA, DEC. NO. 29477-A (Shaw, 10/98). The Commission has held:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief.

UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

The County argues in support of the above:

1. The facts of the complaint contain the incorrect legal assumption that the new Weyers-Hilliard regional branch facility is the legal equivalent of the former "Howard" branch library, which was closed in 2000 when the new facility opened. The Complainant's entire legal premise is erroneous in that Arbitration Award #MA-11308 issued on October 29, 2001 has no application whatsoever to the new regional library facility not in existence on January 1, 1999 relating to the labor contract periods at issue.

The County adds: "The two facilities are entirely different for legal purposes of the expired contract. See Arbitration Award, WERC #MA-11031 (March 7, 2001)."

However, a review of BROWN COUNTY (LIBRARY), Case 640, No. 58680, MA-11031 (Nielsen, 3/01), does not support the County's contention. On its face, BROWN COUNTY (LIBRARY) refers to the "old Howard branch" and the "new" Howard branch. BROWN COUNTY (LIBRARY), SUPRA, p. 4. In the DISCUSSION section of the Award, it refers to the "reopening

of a facility”, and the “Howard branch.” BROWN COUNTY (LIBRARY), SUPRA, pp. 9-11. The Arbitrator’s Award states: “The County did not violate the parties’ collective bargaining agreement when it transferred the Library Associate position from the Central Library to the Howard branch.” (Emphasis added). BROWN COUNTY (LIBRARY), SUPRA, p. 11. Based on the record to date, Complainants’ “entire legal premise” is correct – the new Weyers–Hilliard regional branch facility is the legal equivalent of the former “Howard” branch library. Therefore, the Examiner rejects this argument of the County.

The County also submits the following grounds for dismissal of the instant complaint:

2. The Arbitration Award #MA-11308 referred to in paragraph 1E of the Complaint was issued upon the basis of a previous fact situation of January 1, 1999 which changed materially in June, 2000 when a new regional library facility was opened whose hours of operation were unilaterally determined by the Respondent employer without labor contract limitations as to those hours of operation, and those hours of operation can be modified unilaterally without labor contract limitations, in order to determine the level of library services offered to the public.

As pointed out by the Unions in response to the County’s Motion to Dismiss, the “facts” that are alleged in the aforesaid Motion “can only be adduced through a hearing.” Therefore, the Examiner rejects this claim of Respondent.

Finally, the County argues that insofar as the Unions seek an Order directing the County to set specific hours of operation and/or bargain as to its hours of operation for the Weyers – Hilliard regional branch library, such an order would:

be in excess of, and outside the statutory authority of the Commission pursuant to Sec. 111.70(4)(a), Stats., and be contrary to the provisions of Sec. 111.70(1)(n), Stats., which specifically recognizes a municipal employer’s unilateral authority to determine the level of services it offers to the public, including the hours of operation of its public library facilities.

The County adds that the complaint, on its face, is not within the jurisdiction of the Commission “since the subject matter claimed to mandatorily bargainable (hours of operation of a new library facility) is a non-mandatory subject of bargaining and the Commission is limited to issuing a declaratory ruling to that effect under Sec. 111.70(4)(c), Stats.”

Contrary to the County’s assertions, the complaint, on its face, asserts that the County “has violated a collective bargaining agreement previously agreed upon by the parties. . .including agreements to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award. . .” The

complaint does not challenge the County's authority to determine the level of services it offers the public, or its hours of operation at Weyers-Hilliard (Howard) branch library. It also does not make a demand to bargain "the hours of operation" of the new library branch. It asks that the County comply with the Award in BROWN COUNTY, Case 651, No. 59465, MA-11308 (Shaw, 10/01). Based on the record to date, the Examiner rejects these claims of the County.

The Examiner believes that the Motion should be denied as premature since the complaint allegations set forth matters in the nature of a contested case requiring a full hearing on the pleadings. The Examiner also believes that the contrasting assertions of the parties make it clear that this is a matter where the facts are in dispute and, therefore, they must be resolved through the normal hearing process. The Examiner concludes that the issues raised by the parties can only be decided upon a full evidentiary record.

Therefore, the Examiner has denied Brown County's Motion to Dismiss on the grounds that it is premature, and because the complaint presents a contested case, WISCONSIN STATUTES, SEC. 111.07(2)(A), SEC. 111.07(4), SEC. 227, requiring a full hearing on the pleadings. MUTUAL FED. SAVING & LOAN ASSOC. V. SAVINGS & LOAN ADV. COMM.; (1968) 38 WIS.2D 381 STATE EX. REL. CITY OF LACROSSE V. ROTHWELL, (1964) 25 WIS.2D 228, REHEARING DENIED, TOWN OF ASHWAUBENON V. PUBLIC SERVICE COMMISSION, (1964) 22 WIS.2D 38, REHEARING DENIED; STATE EX. RE. BALL V. MCPHEE (1959) 6 WIS.2D 190; GENERAL ELECTRIC CO. V. WISCONSIN EMPLOYMENT RELATIONS BOARD, (1957) 3 WIS.2D 227.

In reaching the above conclusions, the Examiner rejects the County's reliance on WAUPACA COUNTY, DEC. NO. 28401-A (McLaughlin, 6/95). In that decision, the Examiner concluded: "Because the Union's reading of the disputed provisions cannot be dismissed as implausible, the County's motion to dismiss the complaint on its merits cannot be granted." WAUPACA COUNTY, SUPRA, p. 12. Likewise, the Union's claim that the County has an obligation to comply with the terms of BROWN COUNTY, Case 651, No. 59465, MA-11308, also cannot be dismissed as implausible.

The Examiner also rejects the County's reliance on TEAMSTERS LOCAL UNION NO. 695, DEC. NO. 30288-A (Jones, 3/02). In that case, the Examiner held that dismissal should be granted when, under any interpretation of the facts alleged and admitted, the Complainant would not be entitled to relief. TEAMSTERS LOCAL UNION NO. 695, SUPRA. Based upon the record to date, the Examiner does not likewise conclude that the Unions herein have failed to state a claim upon which relief can be granted.

Dated at Madison, Wisconsin, this 30th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

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