

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**THE WISCONSIN STATE EMPLOYEES UNION
(WSEU), AFSCME, COUNCIL 24, AFL-CIO,
and LOCAL 175, Complainants,**

vs.

**STATE OF WISCONSIN
DEPARTMENT OF HEALTH AND FAMILY SERVICES, Respondent.**

Case 631
No. 63251
PP(S)-338

Decision No. 31207-A

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainants.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

**ORDER GRANTING RESPONDENT'S
MOTION TO REOPEN THE HEARING**

On January 21, 2004, Complainants filed a complaint of unfair labor practice with the Wisconsin Employment Relations Commission alleging that Respondents had violated SELRA by changing the work hours and discontinuing the unpaid meal break of certain food service workers at the Sand Ridge Secure Treatment Center. On January 11, 2005, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter. The Examiner conducted a hearing on the complaint in Mauston, Wisconsin on March 29, 2005. On April 5, 2005, Respondent filed a Notice of Motion and Motion requesting the Examiner to reopen the hearing. On April 11, 2005, Respondent filed an Affidavit in support of its motion. On April 12, 2005, Complainant's filed a response to the Motion, objecting to the reopening of the hearing. On April 14, 2005, Respondent filed a response.

Having considered the arguments of the parties, and the record as a whole, the Examiner makes and issues the following

ORDER

Respondent's Motion to reopen the hearing is granted.

Dated at Madison, Wisconsin, this 19th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

STATE OF WISCONSIN
(DEPARTMENT OF HEALTH AND FAMILY SERVICES)

MEMORANDUM ACCOMPANYING ORDER GRANTING
RESPONDENT'S MOTION TO REOPEN THE HEARING

At the hearing on March 29, 2005, Counsel for both parties indicated that they were finished with the evidentiary portion of the hearing. Thus, the Examiner considers the evidentiary portion of the hearing to be closed.

Wis. Adm. Code Section ERC 10.19, Close of Hearing provides that

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

Respondent, contrary to Complainants, argues that Respondent has shown good cause to reopen the hearing

At hearing, Complainant witness Michael Iwanowicz stated that, during his employment interview and, in the presence of Sandra Duran, Tammy Reif, the Food Service Administrator, told Iwanowicz that he would work a straight eight hours, from 11:00 a.m. to 7:00 p.m., with one meal per shift. During her rebuttal testimony, Duran stated that she did not recall participating in this interview and did not recall Reif making such statements. Respondent wishes to reopen the hearing for the purpose of admitting additional testimony and recruitment records to establish that, contrary to the testimony of Iwanowicz, Duran was not present during this employment interview.

As the Commission held in MILWAUKEE COUNTY, DEC. NO. 28754-C (1/98), the standards for reopening a hearing are set forth in SCHOOL DISTRICT OF MARINETTE, DEC. NO. 19542-A (Crowley, 5/83), and require the moving party to 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.

In support of its Motion, Respondent has submitted the Affidavit of Sandra Duran, the Management Services Director who supervises supervisors in a variety of areas, including food services. In this Affidavit, Duran acknowledges that, at the time of the hearing, she knew that it was possible that the employer had recruitment records that would establish that she was not present at Iwanowicz's employment interview, as recalled by Iwanowicz, but that she did not advise Respondent's Counsel of this fact, because she was not sure that these records existed and, additionally, she did not want to unduly delay the hearing given the fact that the Examiner had been questioning Respondent's Counsel regarding the length of Respondent's rebuttal and indicating that it had been a long day for the Examiner and the reporter.

Duran's Affidavit establishes that the records sought to be introduced were discovered after the hearing. This evidence and the testimony relating thereto is not cumulative.

In the present case, Iwanowicz was the final witness called by Complainant. Prior to Iwanowicz's testimony, Respondent would not have had a reasonable basis to know that Duran's presence, or absence, at his employment interview would have been an issue in this proceeding. At the time that Duran was recalled as a rebuttal witness, the Examiner had been questioning Respondent's Counsel regarding the length of Respondent's rebuttal and indicating that it had been a long day for the Examiner and the reporter. The Examiner considers it likely, as Duran's Affidavit indicates, that the Examiner's comments intimidated Duran and forestalled Duran from suggesting a search of the records. Under these circumstances, Respondent's failure to procure the interview records prior to the close of hearing is not negligence.

Duran's additional testimony could be used by Respondent to impeach Iwanowicz. However, as Respondent argues, it also is material to Respondent's Affirmative Defense that the schedule in dispute had been put in place by a supervisor without authority to do so and that the schedules were changed to conform to the master contract as soon as Respondent learned of the existence of a schedule that was contrary to the master contract. It is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding.

Respondent has shown good cause to reopen the hearing. Accordingly, the Examiner has granted Respondent's Motion to Reopen the Hearing.

Dated at Madison, Wisconsin, this 19th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
31207-A

