STATE OF WISCONSIN * CIRCUIT COURT * MILWAUKEE COUNTY
Branch #2
Civil Division

CITY OF MILWAUKEE,
a municipal corporation,

Petitioner,

-vs- Case No. 422-731

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 12805

Respondent.

MEMORANDUM DECISION

The City of Milwaukee has filed a petition for judicial review of a decision from the Wisconsin Employment Relations Commission, the respondent herein, dated July 17, 1974, at which time the Commission certified the International Association of Machinists and Aerospace Workers (hereinafter referred to as International) as the appropriate bargaining representative for the 20 full-time employees in the Repair Division of the Fire Department of the City of Milwaukee.

None of the material facts appear to be in dispute; however, the ultimate decision of the Commission has been challenged by the Petitioner on numerous grounds, one of which calls for a determination by this Court whether the procedural requirements of Chapter 227 are applicable to this proceeding, and, if so, were they complied with by the Respondent Commission.

A brief chronology underlying the Commission's ultimate certification of International as the appropriate bargaining unit is necessary in order to intelligently discuss and resolve the procedural issue presented. Some time prior to March 26, 1974, the Commission excluded the 20 fire equipment employees from the unit represented by Local 215, Milwaukee Professional Fire Fighters Association, which had been the exclusive bargaining representative for firemen of the Milwaukee Fire Department. On this date, International filed a petition with the Commission asking for an election and certification of the fire mechanics as a separate unit to be represented by them.

On March 29, 1974, the Commission Chairman, Morris Slavney, in a letter to Mr. Joseph Spehert, business representative of International, acknowledged receipt of the petition and advised him that the Commission was in the process of assigning the case to one of its staff members, and that the matter would be set for hearing in the near future. This letter is made a part of the transcript of record before this Court. A copy of this letter was sent to Mr. James J. Mortier, chief labor negotiator for the Petitioner, City of Milwaukee.

Subsequently, the Petitioner and other concerned parties received a formal notice of hearing to be hald on May 2, 1974. This notice was signed by one Stanley Michelstetter, the hearing officer assigned to this case. The notice in part stated:

> "The purpose of the hearing is to determine whether the unit described in the petition is an appropriate unit. . ."

On the return date a hearing was held before Mr. Michelstetter in which the City Attorney of Milwaukee appeared for the Petitioner; Mr. Joseph Spehert appeared for International; Local 215 was represented by Mr. Joseph Ruditys; and District Council 48, AFSCME, AFL-CIO, appeared by Mr. Kenneth Mandt. District Council 48 was permitted to intervene and appear on the basis of its claim to represent the 20 employees of the Fire Department. The hearing was tape recorded, and each party was given the opportunity to call witnesses and introduce documentary evidence. The right of cross examination was afforded by the hearing officer and oral arguments followed the hearing.

The Petitioner now contends on review, among other things, that because the provisions of Section 227.12, Wis. Stats., were not complied with that it has been aggrieved and that the decision of the Commission cannot stand. In support of this contention, the Petitioner points out in its Memorandum Brief to the Court that prior to the enactment of Chapter 191 of the Laws of 1965, this statute provided that whenever it is impractical for members of an agency who participate in the decision of a contested case to hear or read all the evidence, the final decision shall not be made until a summary of the evidence prepared by the hearing officer, together with his recommendations as to the findings of fact and the decision in the proceedings has been furnished to each party and each party has had a reasonable opportunity to file written exceptions thereto and to argue with respect to them orally (See Section 227.12, Wis. Stats. (1963).)

Petitioner further points out that in 1965 by virtue of Chapter 191 this statute was amended by making the section applicable not only to contested cases but also where a hearing has been ordered. While contending that this is a contested case, as defined by 227.01 subparagraph (2), the Petitioner now takes the position that whether it is a contested case or not, the requirements of Section 227.12 applies with equal force to non-contested cases where there has been a hearing ordered.

The Respondent all but concedes in its brief to this Court that there has been total non-compliance with the requirements of this statute, but in doing so, urges this Court to find that the statute has no application to the present proceeding because it is not a contested case, nor has there been a hearing ordered by the Respondent. We do not agree.

We conclude from an examination of this record and a careful reading of the applicable statutes that because the Commission determined that proceedings were warranted under ERB 11.05 notice of hearing, that the provisions of Section 227.12, Wis. Stats., must be complied with in all respects. We say this because we are of the view that Respondent is too narrowly construing the import of Section 227.12 by contending that no hearing was ordered here. What the Respondent is really saying is that because a hearing was only noticed and not ordered, the requirements of this statute need not be met. This, in our opinion, is a distinction without a difference. It is a clever but specious argument.

We say this because a reading of other sections in Chapter 227 clearly demonstrate that when hearings are required by law as set forth in Section 227.02, the hearings are properly noticed under 227.021 by written notices of hearing to all interested parties. We find no provision for an "order for hearing". We conclude from this that once an agency determines that a hearing is warranted and sends out a written notice to all interested parties advising them of the hearing date, that this is tantamount to ordering a hearing and that the requirements of 227.12 have application to the proceedings whether contested or not.

This Court will recall that at a chamber conference in December, 1974, at which all parties were present, the Petitioner's Attorney, Mr. Thomas Hayes, Assistant City Attorney of Milwaukee, advised this Court that there was no transcript of the proceedings made available to him to assist this Court in reviewing the Commission's decision. This, of course, was consistent with the Respondent's position that no transcript was necessary because the hearing afforded by the Commission in May of 1974 was a gratuitous hearing.

It is agreed that the proceedings in May of 1974 were taken down by a tape recorder but never transcribed. At Mr. Hayes' request, however, the State agreed to furnish a transcript of the proceedings to this Court and all interested parties and this was accomplished on December 20, 1974, by a certificate of the Chairman of the Commission attached to a full transcript of the proceedings.

It is apparent from this chronology of events and from an absence in the record of any indication that the testimony of those who appeared at the hearing was ever summarized by Mr. Michelstetter that the Respondent, in rendering the decision that it did, was in no way enlightened by an analysis of the evidence of the hearing officer, or findings of fact made by him. It is further apparent

to this Court that Petitioner had no opportunity to except to the hearing officer's summation of the evidence, to file written exceptions thereto, propose findings of its own, or to argue before all members who participated in the decision, all of which are clear and unequivocal mandates of Section 227.12.

In view of the above, we do not reach many of the other issues presented in the Petitioner's brief for the simple reason that we consider these procedural deficiencies, pointed out above, to be of a substantial character and of sufficient gravity to warrant a remand to the Commission for compliance with all of the mandatory requirements of Section 227.12.

To be more succinct, we conclude that the substantial rights of the Petitioner have been prejudiced in that the decision of the Commission was made or promulgated upon unlawful procedure as set forth in Section 227.20 subparagraph (C) of the Wisconsin Statutes. The rationale of this decision is somewhat analogous to the recent case of Edmonds v. Board of Fire and Police Commissioners, 66 Wis. (2d), 337, in which our Supreme Court remanded the record to the Board of Fire and Police Commissioners of the City of Milwaukee on the grounds that findings of fact and conclusions of law made by it were insufficient and tantamount to a denial of procedural due process. This very concept, in the Court's opinion, is the heart of Section 227.12 of the Wisconsin Statutes.

Counsel for the Petitioner, City of Milwaukee, shall prepare an order remanding the entire record back to the Wisconsin Employment Relations Commission for proceedings consistent with this opinion.

BY THE COURT

George A. Burns, Jr. /s/
CIRCUIT JUDGE

Dated at Milwaukee, Wisconsin,
this 5th day of March, 1975.