

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ARTHUR BURDICK,	:	
	:	
	:	Case II
Complainant,	:	No. 22788 MP-839
	:	Decision No. 16277-B
vs.	:	
	:	
DONALD BEATTY, WILLIAM KNUDSEN,	:	
CARMELLA MICHALSKI, LUCIAN BROWN, JR.,	:	
AND LOCAL 150, SERVICE EMPLOYEES	:	
INTERNATIONAL UNION,	:	
	:	
Respondents.	:	
	:	

ORDER GRANTING, IN PART, AND DENYING, IN PART,
MOTION TO QUASH SUBPOENAS AND SETTING HEARING DATE

Complainant filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that Respondents had committed prohibited practices within the meaning of sections 111.70(3)(b)1 and/or 111.70(3)(c) of the Municipal Employment Relations Act. Thereafter, Complainant served subpoenas duces tecum on Respondents Donald Beatty and William Knudsen and on Shirley Day, requiring them to appear and to present certain documents at the hearing scheduled in this matter for June 28, 1978. At the hearing, Respondents filed a motion to quash all the subpoenas duces tecum and the parties presented arguments and evidence in support of their respective positions of the motion to quash. The Examiner reserved ruling on the motion and adjourned the hearing. After considering the matter, the Examiner makes and issues the following

ORDER

1. That the motion to quash the subpoenas duces tecum issued to Donald Beatty, William Knudsen and Shirley Day be, and the same hereby is, denied, in part, and granted, in part, and that, therefore, the subpoenaed individuals are required to comply with the subpoenas duces tecum except that they are not required to produce: papers and documents regarding all amendments to the Local 150 Constitution and By-Laws or regarding each and every separate Constitution and By-Law that do not relate to the clause concerning maintaining membership or holding office in a rival labor organization; all minutes from January, 1976 to the present of Local 150 Executive Board meetings and general membership meetings which do not relate to the clause in the Constitution and By-Laws concerning membership and holding office in a rival labor organization, to the eligibility of candidates to run for office or to Complainant's membership status.
2. That Complainant offer witness fees in the form of cash to Donald Beatty, William Knudsen and Shirley Day prior to August 7, 1978, unless any of them have cashed the checks previously issued to them for payment of witness fees.
3. That Respondents notify the Examiner in writing with a copy to Complainant's attorney on or before July 25, 1978 of their intent in regard to compliance with the subpoenas duces tecum, as modified by this Order.

4. That the hearing in this matter is continued to August 7, 8 and 9, 1978 at 9:30 a.m. at the Racine County Courthouse, Racine, Wisconsin and that Respondents may file an answer to the complaint, as amended orally at the hearing on June 28, 1978, on or before July 31, 1978 and on the same date a copy thereof shall be served on Mr. Arthur Heitzer, Attorney at Law, Suite 300, 536 West Wisconsin Avenue, Milwaukee, Wisconsin, 53203.

Dated at Madison, Wisconsin this 17th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING ORDER GRANTING, IN PART, AND DENYING,
IN PART, MOTION TO QUASH SUBPOENAS AND SETTING HEARING DATE

A brief summary of the positions of the parties is necessary to present the context in which the Order is issued. No effort has been made to present a complete summary.

Complainant is a municipal employe who is represented for collective bargaining purposes under the Municipal Employment Relations Act (MERA) by the American Federation of State, County and Municipal Employees (AFSCME). For part of the time during which Complainant has been a municipal employe, Complainant was also employed by a private sector employer and was represented for collective bargaining purposes by Respondent Local 150 of the Service Employees International Union. Complainant was discharged by the private sector employer; the statutory propriety of his discharge is presently pending before the National Labor Relations Board. Complainant alleges that Local 150 has taken certain action against him, such as expelling him from membership, refusing his dues payment and declaring him ineligible to run for Local 150 office, because of his membership in and activity on behalf of AFSCME; this action, Complainant alleges, chills his exercise of the rights afforded him by section 111.70(2) of MERA and thus violates sections 111.70(3)(b)1 and/or (3)(c) of MERA.

Respondents deny violating MERA and further deny that any action was taken against Complainant due to his relationship with AFSCME. Instead, Respondents rely on two U. S. Department of Labor determinations, issued pursuant to its authority to investigate alleged violations of section 401 of the Labor-Management Reporting and Disclosure Act, which found that Complainant had been ruled ineligible to run for Local 150 office because of his failure to pay membership dues and which further found that this was a lawful reason. Respondents also interposed in its answer the following affirmative defenses: The Commission lacks subject-matter jurisdiction because the Labor-Management Relations Act and Titles I and IV of the Labor-Management Reporting and Disclosure Act preempt state jurisdiction; the complaint fails to state a claim upon which relief can be granted under section 111.70(3)(b)1 of MERA; the complaint fails to state a claim upon which relief can be granted because the Commission lacks the authority to intrude into the internal affairs of a labor organization; the complaint fails to state a claim upon which relief can be granted because the complaint fails to allege that Complainant has exhausted his internal remedies provided for by the Constitution and By-Laws of the Service Employees International Union; and, finally, the Department of Labor determinations concerning Complainant's eligibility to run for Local 150 office are res judicata in the proceeding before the Commission. In addition, Respondents filed a Motion to Dismiss or to Stay Proceedings because Complainant had allegedly not exhausted his internal remedies; ruling was reserved by the Examiner on the Motion to Dismiss and the Motion to Stay was denied. 1/

Complainant has subpoenaed three officers of Local 150, two of whom are named as Respondents, requiring them to appear as witnesses and to produce certain documents. Respondents moved to quash all subpoenas for four reasons. First, the lateness of the service in relation to the hearing date made it impossible to comply with the request to bring

1/ Local 150, SEIU, AFL-CIO (16277-A) 6/78.

the specified documents. Second, the subpoenas were not served with witness fees prepaid in cash as required by section 885.06, Wis. Stats. Third, Respondents allege that the Commission lacks subject-matter jurisdiction over the complaint and that Complainant has failed to state a claim on which relief can be granted and that, therefore, the subpoenas are a nullity. Fourth, the scope of the requested documents is unreasonable, unduly burdensome and irrelevant to any issues properly before the Examiner. The Examiner will discuss each basis for the motion in turn.

Respondents' attorney stated on June 28, 1978 that he estimated that it would take a week to compile the documents requested in the subpoena. The Examiner has rescheduled the hearing in this matter for August 7, 8 and 9, 1978. Without determining whether the subpoenaed persons had sufficient time prior to June 28, 1978, the first day of hearing, to compile the requested documents, they now have sufficient time prior to the next hearing dates to compile the materials. Therefore, the motion to quash is denied on that basis.

Concerning the alleged failure to prepay witness fees, the subpoenaed witnesses were given either the personal or business check of Complainant's attorney as payment for witness fees. Respondents claim cash is the only permissible form of payment.

Section 111.07(2)(d), Wis. Stats., which governs prohibited practice proceedings, provides, in relevant part, that:

"Each witness who appears before the commission as a result of an order or subpoena issued by the commission at the request of a party shall receive for his or her attendance the fees and mileage as provided for witnesses in civil cases in courts of record, which shall be paid by the party requesting the order or subpoena in advance of the time set in the order or subpoena for attendance."

Section 885.06, Wis. Stats., sets forth the prepayment requirement that applies to civil cases in courts of record. That statute provides that:

"885.06 WITNESS' FEES, PREPAYMENT. (1) Except when subpoenaed on behalf of the state or on behalf of a municipality in forfeiture actions no person shall be obliged to attend as a witness in any civil action, matter or proceeding unless his fees are paid or tendered to him for one day's attendance and for travel; provided that tender of witness fees in the form of a check drawn by the state, a political subdivision of the state, a municipal corporation of the state or a department or officer of any of them which is payable to bearer or payable to the order of the person named in such subpoena shall oblige the person named in such subpoena to attend as a witness in accordance with the lawful requirements of such subpoena.

(2) No witness on behalf of the state in any civil action, matter or proceeding, or in any criminal action or proceeding, on behalf of either party, or on behalf of a municipality in forfeiture actions shall be entitled to any fee in advance, but shall be obliged to attend upon the service of a subpoena as therein lawfully required."

Section 111.07(2)(d) requires the party requesting the subpoena to pay witness fees in advance of the time that the subpoenaed individual is to appear. In this case, Complainant's attorney was the requesting party and, thus, he was required to prepay witness fees. Section 885.06 also requires prepayment of witness fees unless the individual has been subpoenaed on behalf of the state (the additional exception is not

applicable here). Although the subpoenas involved in this case are Wisconsin Employment Relations Commission subpoenas which were issued to Complainant's attorney and signed by this Examiner, the individuals subpoenaed were subpoenaed on behalf of the Complainant, not the state. Thus, both sections 111.07(2)(d) and 885.06, Wis. Stats. require that fees be paid by the person requesting the subpoena prior to attendance. In addition, the Examiner interprets the statutes as requiring payment in the form of cash, not a personal or business check. 2/ This is so because the sentence in section 885.06(1), which in effect provides that a check drawn by the state or other specified governmental entity or officer amounts to payment of witness fees, indicates that a check which is not drawn by the government does not amount to payment of fees. Therefore, service has not been perfected on the three subpoenaed individuals unless any of them have waived their right to be paid in cash. Apparently none of the three refused the checks but physical receipt does not amount to a waiver. At the hearing on June 28, 1978, the Examiner was given the check issued to Shirley Day while the other two checks were not accounted for. The only evidence that could establish a waiver is evidence of cashing the checks and thus the absence of the two checks does not amount to a waiver. Testimony was heard that Donald Beatty had stated to Complainant and his attorney that the cancelled check would serve as their receipt but this statement does not indicate any intent to cash the check nor does it indicate that the check has in fact been cashed. Therefore, based on the evidence presented at the hearing, none of the subpoenaed individuals have waived their right to be paid cash and service has not been perfected. The Examiner declines to quash the subpoenas on this basis since to do so would only postpone, but not avoid, a decision as to whether the subpoenas are a nullity or whether the requests are unreasonable, burdensome or irrelevant. Complainant or his attorney is required, however, to offer the appropriate amount of cash to the subpoenaed witnesses prior to the required date of attendance, unless any of them have cashed the checks prior to that time. Should the witnesses not have received cash by that time, the Examiner will quash the subpoenas. 3/

Respondents have also moved to quash the subpoenas duces tecum because they argue that the Commission is without jurisdiction in this matter, thus causing the subpoenas to be a nullity. Respondents are, in effect, requesting the Examiner to rule on its affirmative defenses and motion to dismiss prior to an evidentiary hearing on the merits of Complainant's claim. The Examiner will not quash the subpoenas on jurisdictional grounds nor rule on the affirmative defenses and motion to dismiss at this time because a decision on the defenses and motion can best be made after hearing all the evidence and arguments in this case.

Finally, Respondents moved to quash the subpoenas on the basis that the scope of the requested documents is unreasonable, unduly burdensome and irrelevant to any issues properly before the Examiner. Since the subpoenas request production of nearly identical documents by all three witnesses, the Examiner will combine the discussion of the three subpoenas. The subpoenaed documents are described as follows:

2/ The Examiner makes no determination as to whether a certified check is equivalent to cash.

3/ On July 6, 1978, the Examiner received photocopies of both sides of the checks issued to Donald Beatty and William Knudsen; the copies indicate that both checks have been cashed.

"1. Regarding [Complainant], including but not limited to all records from September 1974 to the present regarding his membership status and any changes therein, his payment of dues and the acceptance or rejection of such payments, disciplinary action taken or contemplated against him including all charges and investigations, his nomination and election rights, and specifically including any papers and documents related to the reasons for taking any actions against or regarding him or his status as a member of Local 150 and of the Service Employees International Union, by you or by any officers, staff members or body of Local 150.

2. In addition, all papers and documents as set forth above regarding all purported amendment to the Local 150 Constitution and By-Laws since September 1974, including but not limited to all documents related to the reason for the purported insertion of a clause barring from eligibility for nomination or election as a Local Union officer 'persons maintaining membership or holding office in a rival labor organization,' and all documents and papers related to the acceptance or rejection of such amendments, including any evidence or approval by the International Union of such amendments, plus a copy of each and every separate Local 150 Constitution and By-Laws validly in effect since September 1974, and full copies of each IM-2 form filed by the Local or its officers from 1974 to the present, including information related to constitutional changes.

3. All papers and documents as set forth above related to the actual, contemplated, or attempted application of this purported eligibility requirement pertaining to 'persons maintaining membership or holding office in a rival labor organization, including but not limited to the method of enforcing this requirement, all investigations and inquiries regarding it, and all papers or documents stating or related to definitions relied on by any or all of the respondents herein as to what constitutes 'a rival labor organization'.

4. In addition, all documents and papers as set forth above related to the possible existence of a rivalry between Local 310, American Federation of State, County and Municipal Employees, and Local 150, Service Employees International Union, as well as any and all agreements between either of these Locals or either's bodies related to 'no-raiding' agreements with any other labor organization within or without the structure of the AFL-CIO.

5. In addition, all papers and documents as set forth above constituting records of any kind of the Local 150 Election Committee from September 1974 to the present, including but not limited to those related to 'dual unionism' and the purported clause of the Local Constitution and By-Laws requirement regarding membership or officeholding in 'a rival labor organization.'

6. All such papers and documents as set forth above pertaining to membership by any other candidates for Local 150 office since September 1974 in any other labor organization, within or without the AFL-CIO, including the affiliation of Donald Beatty with any such organization other than Local 150 SEIU.

7. All such papers and documents as set forth above purporting to record or indicate the dues payments and payment dates from at least September 1974 to the present for every nominee for the Local's 1977 elections, and for the current Local Vice-President.

8. All minutes from January 1976 to the present of Local 150 Executive Board meetings and of Local 150 general membership meetings.

9. The withdrawal card sent to and returned by Arthur Burdick in March 1978, and several blank withdrawal cards from Local 150, SEIU."

In general, Respondents argue that the requested information is not relevant to this proceeding because the Department of Labor has disposed of the issue of Complainant's eligibility to run for office, that the requests are overbroad since they ask for documents which relate to people other than Complainant and because, in some cases, they do not specify which particular documents are being sought, and that, due to the one-year statute of limitations, only documents which pre-date the filing of the complaint by a year can be subpoenaed. 4/ Complainant argues that all requested documents are relevant because the reason for Respondents' actions against Complainant is disputed and the subpoenaed documents, including those that relate to others, are relevant to a resolution of that issue. In addition, September, 1974 is a relevant starting date for collection of materials because Complainant first became a member of Local 150 during that month.

Concerning item 1, the Examiner concludes that the documents requested may be relevant and thus the subpoenaed individuals are required to produce them.

Item 2 could be relevant insofar as it requests materials relating to the clause in the Constitution and By-Laws concerning maintaining membership or holding office in a rival labor organization and the subpoenaed individuals are required to supply them. The subpoenaed individuals need not supply documents concerning any other clause. Because the LM-2 reports are public documents which Local 150 is required to make available to its members, 5/ the subpoenaed individuals are required to supply them.

Items 3, 4, 5, 6 and 7 in their entirety could be relevant to this proceeding and the subpoenaed individuals are required to supply the documents requested therein.

Item 8 would be relevant only insofar as the documents relate to the clause concerning membership or holding office in a rival labor organization, to the eligibility of candidates to run for office, or to Complainant's membership status.

Respondents have agreed to provide Complainant's withdrawal card which was requested in item 9 and they are also required to produce a blank card.

4/ Section 111.07(14), Wis. Stats., provides that: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

5/ 29 C.F.R. section 431(c).

The Examiner's determinations that certain documents could be relevant should not be construed as prohibiting Respondents from raising a relevancy objection to the admission into the record of any such documents nor should they be construed as indicating how the Examiner would rule on any such objection, if raised.

Respondents asserted, but did not adduce evidence, that the subpoenas duces tecum are unduly burdensome and unreasonable. In the absence of such proof and in light of the Examiner's determinations that certain documents could be relevant in this proceeding, the Examiner denies the motion to quash on that basis.

For the above reasons, the motion to quash the subpoenas duces tecum is denied, in part, and granted, in part.

Dated at Madison, Wisconsin this 17th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner