STATE OF WISCONSIN
CIRCUIT COURT

MILWAUKEE COUNTY
BRANCH 25

MILWAUKEE COUNTY, Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

No. 97-CV-3191
Dec. No. 28063-D

To: Timothy R. Schoewe, Deputy Corporation Counsel, Office of Corporation Counsel, 901 N. Ninth St., Room 303, Milwaukee, Wisconsin 53233

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NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that a Decision and Order affirming the Commission's decision, of which a true and correct copy is hereto attached, was signed by the court on the 11th day of February, 1998, and duly entered in the Circuit Court for Milwaukee County, Wisconsin, on the 11th day of February, 1998.

Notice of entry of this Decision and Order is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 24th day of February, 1998.

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DECISION AND ORDER SUSTAINING THE COMMISSION'S DECISION

In a "complaint" filed April 16, 1997, Milwaukee County seeks judicial review of a decision by the Wisconsin Employment Relations Commission. 1/ On October 9, 1995, Examiner Jane Buffett of the Wisconsin Employment Relations Commission concluded that Milwaukee County had interfered with its employees' rights by failing to release John Kropp to conduct union business on the same basis as it released other union officers. On March 21, 1997, the Commission affirmed the Examiner's decision. Petitioner now appeals the Commission's Decision pursuant to Sec. 227.27, Stats. For the reasons set forth below, the Commission's decision is affirmed.

The petition fails to identify the nature of the claims by reference to the applicable subsections of sec. 227.57, as is required by sec. 227.53(1)(b). This failing is aggravated by petitioner's rambling and at times indecipherable supporting brief. I understand the petitioner to (1) challenge the fairness of the proceedings under sec. 227.57(4); and (2) claim that findings of fact numbered 8 through 12 are not supported by substantial evidence in the record under sec. 227.57(6).

Background

John Kropp has been employed by Milwaukee County for twenty-seven years. On May 10, 1993, while a Human Service Worker in the Department of Aging, Kropp was elected Vice President of Local 594, which is affiliated with District Council 48, AFSCME, AFL-CIO. He is currently on indefinite suspension, pending the outcome of charges filed by Milwaukee County for his dismissal.

The Examiner found that petitioner denied Kropp release time for the purpose of conducting Union business. *Examiner's Decision at 3*. On some of these occasions, Kropp decided not to attend Union meetings, on other occasions Kropp used personal leave time in order to attend. The Examiner further concluded that Milwaukee County was more restrictive in responding to Kropp's

requests for release time than in responding to similar requests from other Union officers, and that by treating Kropp differently from other Union officers, the County interfered with the employees' free choice of its representatives. *Id. at 4.*

As a remedy, the Examiner ordered the County to cease and desist from interfering in the employees' exercise of their rights under the Municipal Employment Relations Act and to release Kropp to conduct Union business on the same basis as it releases other Union officers. In addition, the Examiner also ordered that the County reimburse Kropp for all the paid leave time he used to conduct Union business. Id., *at 15.*

Standard of Review

The scope of review under Chapter 227 differs depending upon whether the issue being reviewed is a question of fact or a question of law. UNITED WAY OF GREATER MILWAUKEE V. DILHR, 105 WIS. 2D 447, 453 (CT. APP. 1981). This case involves both questions of fact and law.

The review of findings of fact is quite limited in scope, and factual findings must be upheld if reasonably based on substantial evidence in the record. See sec. 227.57(6); PRINCESS HOUSE, INC V. DILHR, 111 WIS. 2D 46, 54-55 (1983). Substantial evidence is "evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." CORNWELL PERSONNEL ASSOCS. V. LIRC, 175 WIS. 2D 537, 544 (CT. APP. 1993). A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. The Commission, not the Court, determines the credibility of the evidence, and weighs the evidence to decide what to believe. ADVANCE DIE CASTING CO. V. LIRC, 154 WIS. 2D 239, 249 (1989). E.F. BREWER CO. V. DILHR, 82 WIS. 2D 634, 636-67 (1978). R.T. MADDEN, INC. V. DILHR, 43 WIS. 2D 528, 548 (1969).

With respect to questions of law, the court is not bound by the statutory interpretations and legal conclusions of an administrative agency, but it usually must provide one of three levels of deference to such conclusions. SAUK COUNTY V. WERC, 165 WIS. 2D 406, 413-14 (1991); UFE INC. V. LIRC, 201 WIS. 2D 274, 284-88 (1996). However, the issue of whether petitioner was denied due process of law is a question of constitutional fact which must be reviewed independently without deference to the commission. HAKES V. LIRC, 187 WIS. 2D 582, 586 (1994).

Discussion

(1) The Fairness of the Proceedings Was Not Impaired by Any Material Error

Petitioner contends that it did not receive fair notice of the allegations, and was consequently denied the opportunity to properly defend itself on the issues litigated. Petitioner is correct that when the rights of a person are affected by a judicial or quasi-judicial decision, due process requires that there must be notice which reasonably conveys information about the proceedings so that the respondent can prepare a defense or made objections. SCHRAMEK V. BOHREN, 145 WIS. 2D 695, 704 (1988). To prevail, however, the petitioner must show not only that there was inadequate notice, but that petitioner was prejudiced as a result. Sec. 227.57(4); WEIBEL

V. CLARK, 87 WIS. 2D 696, 704 (1979). Petitioner has failed to show either inadequate notice or prejudice.

In this case, the Union filed its complaint on May 9, 1994. On June 2, 1994, the Commission granted Petitioner's request for a more definite and certain complaint. On June 7, 1994, the Union promptly submitted a letter listing twenty-four specific grievances filed by the Union on behalf of Mr. Kropp. On August 25, 1994, the County filed its answer which stated, among its affirmative defenses, that the Union's claims lacked specificity.

At the conclusion of the first day of the hearing on December 14, 1994, the Examiner stated, "At this point the complaint stands, and the county must respond as elucidated by the evidence put in by the Union today." *Hearing Transcript, Volume 1, at 162*. Due to scheduling problems, the hearing was adjourned for several months, until March 20, 1995, and the County presented its case at that time. In her written decision, the Examiner concluded that "the original complaint and the June 7, 1994 response were sufficient to give the County fair notice of the allegations to which it was called to respond." *Examiner's Decision, at 11.*

The complaint and subsequent list of grievances provided petitioner with ample notice of the claims against it. Moreover, petitioner has not identified how any alleged defect in the notice ultimately prejudiced the preparation or presentation of a defense. Petitioner had six months to prepare for start of the hearing, and then after the complainant had presented its case, there was a further delay of three months before the petitioner had to present evidence.

(2) The Challenged Findings of Fact Were Supported by Substantial Evidence.

Petitioner vaguely contends that findings of fact 8 through 12 were "flawed, " but presents no coherent theory as to how these findings were arguably incorrect, much less unsupported by evidence. The Examiner heard testimony from numerous witnesses regarding the County's policy for granting release time for Union officers in performing Union duties, testimony detailed in her decision and set forth in even greater detail in the respondent's brief. *See Examiner's Decision, at 3-4*. The Examiner noted that the manner in which certain officers were treated offered clear comparisons to Mr. Kropp's experience in receiving released time, determining that "in the overwhelming preponderance of occasions, union officers were granted released time for union business." *Id., at 13-14.* The Examiner found that this pattern of granting released time was "dramatically different from the restrictions imposed on Mr. Kropp *Id. at 14.* After hearing all of the evidence, the Examiner determined that this differential treatment was such that other employees would see Mr. Kropp as subject to greater restriction than other Union officers. *Id.* In this way, the County's actions interfered with the right of employees to freely choose union officers. *Id.*

The petitioner devotes considerable energy to the issue of whether the County violated some obligation to Kropp regarding release time, but this misapprehends the essence of the decision in this case. The Examiner did not find a violation of Kropp's rights, but rather found that his unequal treatment violated the fights of other employees to freely choose who will represent them in Union matters.

Conclusion

Fair notice was given to the petitioner as to the nature of the allegations and there was no violation of its procedural rights. Substantial and credible evidence exists in the record to support the findings and conclusion of the Examiner. Therefore, the decision of the Commission is affirmed.

Dated February 11, 1998.

BY THE COURT

/s/ John Franke
John Franke
Circuit Court Judge
Branch 25

ENDNOTES

1/ Although styled a "complaint" by the "plaintiff," I have used the terms "petition" and "petitioner" as contemplated by Chapter 227, and these terms are also used by the parties in the brief in response and the reply brief.