

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DOUGLAS HAHER,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION, MILWAUKEE COUNTY,
LOCAL 882, MILWAUKEE DISTRICT
COUNCIL 48, AFSCME, AFL-CIO,

Respondents.

Case No. 98-CV-7223

[Decision No. 28525-D]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

DECISION AND ORDER

**AFFIRMING THE DECISION OF THE
WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Petitioner Douglas Hafer seeks review of a decision of the Wisconsin Employment Relations Commission that it lacked jurisdiction to examine the merits of the petitioner's claims against Milwaukee County and the respondent union. While Hafer asks that the court set aside that decision, he also implicitly requests a remand to WERC in order that he might submit additional evidence. For reasons set forth below, the request to submit additional evidence is denied and the decision of WERC is affirmed.

Factual Background

The petitioner's briefs and the underlying record in this case make reference to a bewildering array of grievances. Some are referred to as group grievances, some as grievances. Some are referred to by a grievance number, some by date, some by subject matter, and some just as grievances. In some instances, the actual grievance document is in

the record, although most are not. Mr. Hafer apparently had something to do with the filing of all or most of the referenced grievances, but that is not always clear. Nevertheless, given the nature of the Commission's ruling in this matter, it does not appear to be essential to understand precisely which grievance or grievances are being referred to at any particular point, and the essential factual background can be summarized as follows.

In 1973 petitioner took a laborer test and was placed on an eligibility list which was used to determine who would be hired by Milwaukee County for the position of "laborer." The list pertinent to the petitioner's complaint is the list as updated in 1977, and this will be referred to as the "1977 list," although it is referred to in the record in a number of different ways. From 1974 until May 1995 petitioner worked for Milwaukee County as a seasonal employee. During this time petitioner was represented for purposes of collective bargaining by the respondent union, Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO.

On an undisclosed date, "group grievances" were filed with the county claiming that the county was illegally using emergency appointees instead of people who were on the 1977 eligibility list. *Examiner's Decision*, at 2, par.4. These grievances are referred to as "Grievances 03708, 04127, et. al," but the parties do not indicate that the grievance documents are a part of the record. By a written agreement dated March 19, 1984, the county and the union settled these grievances. *Hearing, Complainant's Exh. #2*. In 1991, something called a "Collateral Agreement" was reached between the county and the union, apparently arising out of the reorganization of the County Parks Department, which makes reference to the use of the "1977 Laborers list." *Hearing, Complainant's Exh. #3*. In her findings of fact, the examiner identifies three specific grievances which were filed and acted upon between 1993 and 1996 and which reflect or relate to allegations by the petitioner that these agreements were not followed. *Examiner's Decision*, at 6-7.

On May 9, 1995, petitioner filed a complaint with WERC, contending that the 1984 and 1991 agreements were not followed with respect to his subsequent employment with the County, and alleging unfair or prohibited practices by both Milwaukee County and the union. A hearing was held on December 11, 1997 and in a written decision dated May 29, 1998, Examiner Coleen Burns found that WERC did not have jurisdiction over the petitioner's complaint against the county because the petitioner had not shown that the union violated §111.70(3)(b)1 by failing to fairly represent him. In a written decision dated August 14, 1998 the Commission affirmed the Examiner's decision.

Standard of Review

The issue of whether a union has breached its duty to fairly represent an employee presents a question of fact. *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 575 (1979). Under Chapter 227, a review of agency findings of fact is quite limited in scope, and factual findings must be upheld if reasonably based on substantial evidence in the record. See § 227.57(6) and *Princess House, Inc v. DILHR*, 111 Wis. 2d 46, 54-55 (1983). This "substantial evidence" test is not the same as preponderance of the evidence, but inquires whether, taking into account all the evidence in the record, reasonable minds could arrive at the same conclusion. *Madison Gas & Elec. Co. v. Public Service Comm'n of Wisconsin*, 109 Wis. 2d 127, 325 N.W.2d 339, 342 (1982).

A reviewing court may not "second-guess" the weight the agency places upon the evidence, but may only pass on the reasonableness of the agency's findings. *Copland v. Dept. of Taxation*, 16 Wis. 2d 543, 555, 114 N.W.2d 858, 863 (1962). The agency's decision must be sustained even if an alternative and equally reasonable view of the evidence exists. *Wisconsin Dept. of Revenue v. Lake Wisconsin Country Club*, 123 Wis. 2d 239, 242-

43, 365 N.W.2d 916, 918 (Ct. App. 1985). If two conflicting views are each supported by substantial evidence, the court is not at liberty to overrule the agency and make its own choice. *Omernick v. Department of Natural Resources*, 100 Wis. 2d 234, 250, 301 N.W.2d 437, *cert. denied*, 454 U.S. 883 (1981).

The Court's Decision

1. Petitioner's Request To Present Additional Evidence

In the very last paragraph of his brief, petitioner abruptly suggests that “this matter is the proper subject of a remand pursuant to Wis. Stats. § 227.56. This statute allows a party to seek leave to present additional evidence before the agency, and provides as follows:

If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper. . .

Petitioner's request is deficient in many respects. First, he has not shown that there was good reason for not presenting this information at the hearing. Secondly, he has not shown that the information is material.

Petitioner did not specifically move for such a remand, despite the court's suggestion that a motion would be appropriate. See the court's letter to counsel dated April 30, 1999. More importantly, at no point does petitioner specify the evidence he wishes to present. Apparently, the evidence is described in the appended affidavit of the petitioner, which suggests that certain named persons would be able to testify that petitioner filed grievances at various times, but it is impossible to discern whether and how such grievances relate to the various grievances already referred to in the record, although the grievances referred to in

paragraphs 2 and 3 of the affidavit appear to be the same or similar to those discussed by the examiner. *Examiner's Decision*, at 6-7.¹ In addition, the mere fact that a grievance was filed or requested does not show how the union failed to meet its obligations with respect to that grievance.

2. Petitioner's Request That the Commission's Decision Be Set Aside

While the factual history of grievances seems quite complicated, the essence of the Commission's decision is quite simple. The Commission first held that it would have jurisdiction over the petitioner's complaint only if a certain showing could be made:

. . . the Examiner correctly held that she should not exercise the Commission's jurisdiction...to evaluate the merits of the...claim against the Respondent County **unless** Complainant could establish that his failure to use the contractual procedure was caused by Respondent Local 882's failure to fairly represent him. *Manke v. WERC*, 66 Wis. 2d 524 (1975). [*emphasis in original*]

Commission's Decision, at 4. Petitioner does not challenge the Commission's application of *Manke* or otherwise contest the Commission's application of the law. Secondly, the Commission held that the petitioner had not made the necessary showing:

There is no persuasive evidence that during the one-year period prior to the filing of the May 9, 1995 complaint, Respondent Local 882 failed to fairly represent Complainant as to any rights he believed he had under the Settlement Agreements.

Id.

In support of its conclusion in this regard, the Commission noted that petitioner did not exercise his contractual right to file grievances raising this issue with the county and further that the union did not and could not have prevented him from doing so. The

¹ Two partially legible grievance forms are attached to the affidavit, but the petitioner states in the affidavit that neither was "the one I needed."

Commission noted that petitioner's claim that the union advised him to file a complaint with WERC was not persuasive evidence showing that the union failed to fairly represented him concerning his claim that the county breached the 1984 and 1991 settlements. The Commission found that the union *did represent* petitioner as to a number of grievances related to the use of the 1997 list. I find that there is substantial evidence to support the Commission's conclusions as to this issue of fact. Other than to suggest that there is evidence which was not in the record, petitioner has offered no basis on which to reach a contrary conclusion.

Conclusion and Order

Because the petitioner has not shown that additional evidence is available which is material and has not provided good reason why the proffered evidence was not presented at the hearing, any request to supplement the record before the agency is denied. Substantial and credible evidence exists in the record to support the findings and conclusions of the Commission and, therefore, it is ordered that the decision of the Commission is affirmed.

Dated at Milwaukee, Wisconsin, this 2nd day of December, 1999.

BY THE COURT:

/s/

John Franke
Circuit Court Judge
Branch 25