

**STATE OF WISCONSIN  
CIRCUIT COURT: BRANCH 43  
MILWAUKEE COUNTY**

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**MILWAUKEE POLICE ASSOCIATION  
LOCAL #21, IUPA, AFL-CIO,**

**And**

**MICHAEL DURFEE,**

**Petitioners,  
v.**

**WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,**

**Respondent.**

**Case No. 99-CV-000284**

[Decision No. 29270-C]

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

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**DECISION AND ORDER**

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**BACKGROUND**

In 1994, the Milwaukee Police Department denied the petitioner, Michael Durfee (“Durfee”), a promotion to Lieutenant of Detectives. He and his union, the Milwaukee Police Association (“MPA”), appealed the decision to the Board of Milwaukee Fire and Police Commissioners (MFPC) asserting that, contrary to section 111.70(3) Stats.,<sup>1</sup> the Milwaukee Police Department discriminated against Durfee because, in the past, he filed grievances through the MPA. On March 7, 1996, Durfee appeared at a special session of the MFPC, convened to consider the possibility of promoting Durfee. On April 4, 1996, the MFPC voted to sustain the denial of Durfee’s promotion. On March 24, 1997, MPA filed a complaint with the Wisconsin

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<sup>1</sup> Under Section 111.70(2), municipal employees have the right to become members and participate in unions. It is a violation of section 111.70(3)(a)(3) to, “encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . .”



Employment Relations Commission (“WERC”), on Durfee’s behalf, alleging that the MFPC engaged in prohibited practices when it decided to sustain the denial of Durfee’s promotion. On December 16, 1998, WERC affirmed the denial of Durfee’s promotion. The MPA and Durfee now appear before the circuit court seeking review of WERC’s decision.

Petitioner mailed notice of the appeal on January 14, 1999, through ordinary, first-class mail. On March 9, 1999, WERC filed a motion to dismiss, asserting that Petitioners failed to properly notify WERC of the appeal because they did not send notice of the petition through certified mail, as required by section 227.53(1)(a) stats. Petitioners contend that because WERC does not dispute either the timeliness of service, or having actual notice of the appeal, sending notice of the petition through ordinary, first-class mail complied with the notice provisions of section 227.53(1)(a) Stats., and therefore, this matter should not be dismissed.

### **ANALYSIS**

In 519 Corp.v. Dept of Transportation, 92 Wis. 2d 276, 284 N.W.2d 643 (1979), the Supreme Court addressed the issue of whether ordinary mail may be substituted for the requirement that certified mail be used to serve an opposing party with notice of an appeal’s commencement. It held that notice provisions are to be followed strictly; therefore, use of ordinary mail is not acceptable where the statute requires use of certified mail.

Although the Court recognized that the respondents had actual notice of the appeal, and were not harmed by the appellant’s use of ordinary first-class mail, it held that use of ordinary mail did not satisfy the notice requirements. 519 Corp. v. Dept. of Transportation, 92 Wis. 2d 276, 288, 284 N.W.2d 643 (1979). Strict compliance with procedural statutes such as section 227.53(1)(c) is necessary, “because the key purpose of procedural provisions . . . is to maintain a simple orderly, and uniform way of conducting legal business in our courts. Uniformity,

consistency, and compliance with procedural rules are important aspects of the administration of justice. If the statutory proscriptions are to be meaningful, they must be unbending.” Id.

As noted by Petitioner, the Supreme Court was not interpreting section 227.53 Stats., but was instead examine the service requirements for proceeding with an appeal from a condemnation hearing. Id. at 284-285, 284 N.W.2d 643. However, the methods of service permitted by the statutes were the same; service had to be given personally or through certified mail<sup>2</sup>.

Further, the facts of 519 Corp. are similar to the facts currently before the court. Like the petitioners in the case at hand, the appellants in 519 Corp. served the respondents in a timely fashion, but used ordinary, first-class mail, instead of certified mail. The appellants in 519 Corp. also made a similar argument to that of the Petitioners’, by forwarding the position that use of ordinary, first-class mail was sufficient where actual delivery could be proved. Thus, given the factual similarities and the identity of the legal issues, the Court’s holding in 519 Corp. is applicable to the case at hand.

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<sup>2</sup> Section 32.05(10)(a) Stats. 1975 reads in relevant part:

(10) APPEAL FROM COMMISSION’S AWARD TO CIRCUIT COURT. (a) Within 60 days after the date of filing of the commission’s award, any party to the proceeding before the commission may appeal to the circuit court of the county wherein the property is located. Notice of such appeal shall be given to the clerk of the circuit court and to all persons other than the appellant who were parties to the proceeding before the commissioners. *Notice of appeal may be given by certified mail or by personal service . . .*

Section 227.53(1)(a) reads in relevant part:

Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof, as provided in this chapter...*Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. (emphasis added).*

It is Petitioners' contention that interpretation of section 227.53(1)(c) stats., should be flexible so that every appellant has an opportunity to be heard. Petitioners argue that the purpose behind section 227.53(1)(c) Stats., is to ensure notice to an adverse party that an appeal has been made. Thus, even though Petitioners did not serve WERC personally or through certified mail, their service by ordinary mail fulfilled the purpose of section 227.53(1)(c) Stats., because WERC admits to timely receipt of the petition.

In support of these propositions, Petitioners cite Patterson v. Board of Regents, 103 Wis. 2d 358, 309 N.W.2d 3 (Ct. App. 1981). However, Petitioners misinterpret the holding in Patterson. While the court in Patterson did imply that some flexibility in the service requirements of chapter 227 was permissible, it did not state that regular mail was an appropriate method of service. Patterson at 360, 309 N.W.2d 3.

The purpose of requiring the use of certified mail is, "to ensure delivery and to easily determine the date of delivery." Id. The Patterson court deemed the use of *registered mail* an acceptable deviation from the notice provisions of section 227.53(1)(c) Stats., reasoning that registered mail fulfills the purpose of requiring certified mail to an even greater degree because registered mail requires a receipt of delivery, which is optional when certified mail is used. Id.

The Peterson court reconciled its holding with that of the Supreme Court's decision in 519 Corp. v. Dept. of Transportation, 92 Wis. 2d 276, 284 N.W.2d 643 (1979), by distinguishing ordinary mail from registered mail, noting that ordinary mail, unlike registered mail, does not provide a return receipt. Id. Therefore, ordinary mail, unlike registered mail, does not fulfill the purpose behind requiring the use of certified mail. Consequently, Patterson lends no support to Petitioners' claim that its service by ordinary mail satisfied the notice requirements of section 227.53 Stats.

## CONCLUSION

“Dismissal may be a harsh penalty for failure to comply with statutory service requirements, but uniformity, consistency and compliance with procedural rules are necessary to maintain a simple, orderly and uniform system of conducting business in courts.” Weisensel v. DHSS, 179 Wis. 2d 637, 647, 508 N.W.2d 33 (Ct. App. 1993).

The language of section 227.53(1)(c) Stats., clearly states that service must be made personally or through certified mail. “Strict compliance with the service requirements of sec. 227.53(1)(c) Stats., is essential to the circuit court’s subject matter jurisdiction.” County of Milwaukee v. LIRC, 142 Wis. 2d 307, 312, 418 N.W.2d 35 (Ct. App. 1987). Service via ordinary, first-class mail does not meet the requirements of section 227.53(1)(c) Stats. Id.

Because petitioners did not send notice of the appeal through certified mail, this court lacks subject matter jurisdiction over this case.

THEREFORE, it is hereby ordered that this action is DISMISSED.

Dated in Milwaukee Wisconsin this 25<sup>th</sup> day of May, 1999.

Diane Sykes /s/  
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Diane Sykes  
Circuit Court Judge  
Branch 43