STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN ex. rel. CLIVE R. ADAMS, Petitioner, vs. CITY OF MADISON EQUAL OPPORTUNITIES COMMISSION, Respondent.	MEMORANDUM DECISION Case No. 82CV1637

The question on this certiorari proceeding is whether the actions of the Madison Equal Opportunities Commission (EOC) in its consideration of the petitioner's employment discrimination claim violated his right to due process of law.

The facts are not in dispute. On October 15, 1980, petitioner filed a complaint with the EOC in which he alleged that he had been discriminated against by the Northport Packers Neighborhood Coalition, Inc., because of his sex (male), race (black and political beliefs, when the Coalition failed to hire him for a staff position. The complaint was investigated by a member of the EOC staff, who nave the parties notice that she would be holding a fact finding conference on Tuesday, December 16, 1980. The notice stated in part as follows:

> "The fact Finding conference is an investigative forum intended to define the issues, to determine which elements are disputed, to clarify issues, to obtain evidence, and to ascertain whether there is a basis for a negotiated settlement of the complaint. You are encouraged to bring to the conference only those individuals having firsthand knowledge of facts relevant to the case. The assistance of a lawyer or a personal representative is permitted, but the parties will be expected to speak for themselves. In the interest of time, it is suggested that the number of persons for each party be limited to no more than three (3) persons total. It is further suggested that the information of others not in attendance be summarize by a signed statement or affidavit."

The conference was hold and there is no record of what transpired. On February 27, 1981, the investigator issued detailed findings of fact and an "Initial Determination" that there was no probable cause to believe that the petitioner had been discriminated against with respect to the Coalition's failure to hire him. The cover letter advised petitioner that he "may appeal (the determination) directly to hearing" before an EOC hearing examiner. Petitioner appealed, making several challenges to the determination (none relating to the inadequacy of the hearing procedures). The hearing examiner issued a notice on March 30, 1981, giving the parties thirty days in which to "submit any additional written documents or . . .arguments," and stating as follows:

> "Review will be based on the Initial Determination and any additional information timely submitted by the parties.
>
> There will be no oral presentation in this matter unless you are advised otherwise lay a subsequent notice."

Petitioner and the Coalition made written submissions to the EOC, and on June 1, 1981, the examiner issued an opinion and order upholding the original determination of no probable cause.

On June 17, 1981, petitioner filed an appeal to the full commission from the examiner's order, and the EOC issued a notice inviting written arguments and stating that it did not intend to hear oral arguments in the matter. The Coalition informed the EOC that it would rest on the materials previously submitted, and petitioner requested oral argument for the following reasons:

> "Grounds for this request are: 1) My file contain erroneous facts with no verification except one or two telephone calls; 2) complete omission of contacting pertinent credible witnesses I suggested; 3) and a

> cross distortion of information submitted and a dross misinterpretation of relevant case law with respect to the issues.
>
> To remedy this situation I need oral arguments to present witnesses and call witnesses and cross examine and allow the respondent to cross examine my witness. Affividavides does not all this important crucial examination process."

The request was granted (with a copy to his attorney) on July 30, 1981, and oral arguments were heard on January 28, 1982. Petitioner appeared personally and by his attorney.

On February 26, 1982, the EOC issued its order affirming the examiner's finding of no probable cause (on a 5 4 vote).

Petitioner argues that the decision should be reversed and the matter remanded to the EOC for further hearings because the procedures used in his case did not meet minimal requirements of due process as defined in Goldberg v. Kelly, 397 U.S. 254 (1970); those being: (1) notice sufficiently in advance of the hearing so as to allow adequate preparation; (2) the right to present evidence orally; (3) the right to confront and cross examine adverse witnesses; and (4) a written, reasoned decision based on the evidence.

Due process is not a rigid, unbending concept; it is flexible and calls for such procedural rights and safeguards as may be demanded by the circumstances at hand. Morrissey v. Brewer, 408 U.S. 471 (1972). It does not depend, for example, on whether testimony is sworn or unsworn, or whether or not a formal, adversary type hearing is offered. See State v. Gerard, 57 Wis. 2d 611 (1973); Parham v. J. R., et al., 442 U.S. 584 (1979); State ex rel. Terry v. Percy, 95 Wis. 2d 476 (1980) .

Basically, due process requires that an opportunity to be heard "at a meaningful time and in a meaningful manner" be afforded to one in the petitioner's position. State ex rel. Terry v. Schuber, 74 Wis. 2d 487, 495 (1976); Matthews v. Eldridge, 424 U.S. 319 (1976); State ex rel. Matalik v. Schubert, 57 Wis. 2d 315 (1973) . The question, therefore, is whether the procedures used in the petitioner's case afforded him such an opportunity.

Petitioner places principal reliance on Kremer v. Chemical Construction Corp., ____U.S. ____, 72 L.Ed. 2d 262 (1982), a New York employment discrimination case in which the petitioner, Kremer, charged that his employer's failure to re hire him after a layoff was based on his Polish origin and his Jewish faith. The agency determined that there was no probable cause to believe that the employer had engaged in the discriminatory practices complained of. On the appeal as it eventually reached the Supreme Court, Kremer argued that while the agency proceedings and procedures were adequate under New York law, they failed to meet the "full and fair opportunity to be heard" standards under federal constitutional (due process) standards. The court, recognizing the flexibility of the concept of due process, held that the New York procedures, which afforded the right to "present, on the record, though informally," his charges including the right to submit exhibits, present testimony and to ask the agency to issue subpoenas before a determination of probable cause (or, presumably, no probable cause) could be made, were adequate, stating (72 L.Ed. at 282):

> "We have no hesitation in concluding that this panoply of procedures, complemented by administrative, as well as judicial review, is sufficient under the Due Process Clause. Only where the evidence submitted by the claimant fails, as a matter of law, to reveal any merit to the complaint may the Department make a determination of no probable cause without holding a hearing. Flah's, Inc. v. Schneider, 71 AD2d 993, 420 NYS2d 283, 284 (1979) . See note 21 supra. And before that determination may be reached, New York requires the Commission to make a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests. State Div. of Human Rights v. New York State Drug Abuse Control Commission, 59 AD, at 336, 399 NYS2d, at 544. The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy. Cf. Judice v. Vail, 430 US 327, 337, 51 L Ed 2d 376, 97 S Ct 1211 (1977)."

In the instant case, petitioner received the above quoted notice of the fact finding hearing, suggesting that he bring witnesses and present the testimony of persons unable to attend by signed statement or affidavit. The notice also states that compulsory process is available for respondents who refuse to attend the conference; and the city ordinances so provide. Petitioner did appear at the conference and did present evidence. After the investigator's initial determination of no probable cause, petitioner appealed to the EOC hearing examiner and submitted additional written statements in support of his appeal. When this appeal was decided against him, petitioner appealed to the full commission, declining an invitation to submit additional written information and requesting oral argument, stating for the first time that he wanted to call witnesses. At no time, either before the EOC or in his briefs to the court, does petitioner specify, or even refer to, the nature of the testimony sought to be presented. As indicated, he declined to file any additional submissions as suggested by the EOC.

While petitioner argues that the notification of his access to compulsory process was unclear and, without even suggesting any specifics, that he was not afforded the right to confront and cross examine the Coalition's witnesses, his major contention is that because no "record" or transcript is made of the conference, "any meaningful review" of the investigator's decision based on evidence adduced thereat, "is impossible," and the absence of a record "is fatal to (the conference's) status as a due process hearing."

The Supreme Court has recognized that some form or "comprehensible and adequate record" [of administrative proceedings] should be kept and provided for purposes of review. State v. Goulette, 65 Wis. 2d 207, 216, 222 N.W.2d 622 (1974) . In this instance, the only record is the detailed list of reasons for the investigator determination. There are several types of administrative hearings where transcripts are considered unnecessary. These include hearings on parole requests and commitments under the sex crimes statute. State v. Goulette, supra; State ex rel. Tyznik v. Department of Health & Social Services, 71 Wis. 2d 169, 171, 238 N.W.2d 66 (1976); State ex rel. Terry v. Schubert, 74 Wis. 2d 731, 502a, 297 N.W.2d 109 (1976). Also, the Court of Appeals for District IV reversed a trial court's affirmance of a decision of a prison disciplinary committee because the committee had violated the inmate's due process rights when it failed to specify which portion of the record it relied on in making its decision. The record, however, was found adequate, even though it consisted solely of a form worksheet summarizing evidence and various documents. Meeks v. Gagnon, 95 Wis. 2d 115, 122, 289 N.W. 2d 357 (Ct. App. 1980).

These cases indicate that the absence of a transcript of administrative proceedings does not necessarily deprive a litigant of his or her rights to due process of law; and I have concluded that the petitioner here was afforded minimal due process in the proceedings before the agency. Such may not be the situation in all cases, however; and it certainly would be in t1he interest of the agency, the 1itigants before it, and the public at large for some type of record to be kept.

As indicated, the absence of a transcript did not affect the petitioner's rights under the particular facts of this case. First, the scope of review on certiorari is limited to determining whether the agency's action was beyond its jurisdiction or arbitrary or unreasonable, or whether its decision was reasonably based on the evidence. State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 676, 242 N.W. 2d 689 (1976). The Coalition, in response to the investigator's request, submitted written answers to a series of questions, together with certain other documents; and the documents so submitted provide an ample basis for the investigator's determination. Petitioner chose to file none. Moreover, in his subsequent appeals he offered no specifics as to any errors made by the investigator or what evidence he might offer to contradict the documents filed by the Coalition. Nor has he suggested to the court that any statements or testimony given to the investigator would lead to the conclusion that some error was committed.

These and the other facts of record discussed earlier in this decision indicate that in this case the petitioner cannot prevail on the claims and contentions advanced. The decision will be affirmed and the city attorney may draft the appropriate order.

Dated at Madison, Wisconsin this 9th day of June, 1983.

BY THE COURT:

WILLIAM EICH
CIRCUIT JUDGE