

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STAFF NURSES COUNCIL OF MILWAUKEE
WISCONSIN FEDERATION OF NURSES AND
HEALTH PROFESSIONALS, AMERICAN
FEDERATION OF TEACHERS, AFL-CIO,

Complainant

vs.

MILWAUKEE COUNTY,

Respondent.

Case CXXII

No. 25186 MP-1037

Decision No. 17314-A

Appearances:

Schneidman, Myers & Gendlin, Attorneys at Law, by Mr. Howard N. Myers, appearing on behalf of the Complainant.

Mr. Patrick J. Foster, Principal Assistant Corporation Counsel, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Staff Nurses Council of Milwaukee, Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO having filed a complaint on October 3, 1979 with the Wisconsin Employment Relations Commission alleging that Milwaukee County had committed prohibited practices within the meaning of Sections 111.70 (3) (a) (1), (4) and (5) of the Municipal Employment Relations Act; and the Commission having appointed Stephen Pieroni, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wis. Stats.; and hearing on said complaint having been waived by the parties hereto; and a stipulation of facts having been submitted along with briefs by November 29, 1979; and the Examiner having considered the arguments and evidence and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant Staff Nurses Council of Milwaukee, Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO is a labor organization having its principal office located at 7635 West Blue Mound Road, Suite 101, Milwaukee, Wisconsin. At all times material hereto said Complainant was the certified collective bargaining representative for the Registered Nurses employed by Milwaukee County.

2. That Respondent is a Municipal Employer and a Municipal Corporation organized and operated under the laws of the State of Wisconsin. Respondent maintains its principal offices at the Milwaukee County Courthouse, Milwaukee, Wisconsin.

3. That at all times material hereto Complainant and Respondent were parties to a collective bargaining agreement covering wages, hours and conditions of employment for employees covered by such agreement.

4. That pursuant to said collective bargaining agreement, Complainant requested arbitration to resolve a dispute pending between the parties regarding a 5 day disciplinary suspension imposed upon a bargaining unit member for alleged patient abuse. That an arbitrator was appointed by the Wisconsin Employment Relations Commission to hear said dispute which was scheduled for hearing on October 17, 1979.

5. That on September 6 and September 11, 1979, Complainant requested of Respondent certain information which Complainant asserted was necessary to intelligently prepare for the above-mentioned arbitration matter. A copy of the two written requests are attached hereto and identified as Exhibit A and Exhibit B. respectively. Initially the Respondent refused to supply the requested information. Subsequent to the filing of the instant complaint, the Respondent agreed to make available all of the requested information except that which is requested in paragraph 1, 5 and 8 of Exhibit A. Said information pretains to the individual patient who was allegedly mistreated by the grievant.

6. That Respondent's refusal to release said records is based upon the Respondent's good faith belief that said records are privileged medical treatment records pursuant to Section 51.30 Wis. Stats. and that the only appropriate mechanism for release of said records is pursuant to a lawful order of a court of record as provided for in Section 51.30 (2)(f) Wis. Stats.

7. That chapter 430, Laws of 1975 created Section 51.30 Records which states in pertinent part as follows:

(2) Access to Treatment Records

. . .

(b) Except as otherwise provided in this section and ss. 905.03 and 905.04 the registration and all other records of treatment facilities shall remain confidential and are privileged to the patient. Access to treatment records by the patient during treatment may be restricted by the director of a treatment facility.

. . .

(f) Nothing in this section prohibits the release of information pursuant to the lawful order of a court of record.

8. That Respondent's action herein does not evince an intent to violate Section 11.70(3)(a) 1, 4 or 5 Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSION OF LAW

1. That Respondent by its conduct of refusing to release the above-mentioned medical records to the Complainant without the lawful order of a court of record, pursuant to Section 51.30(2)(f) Wis. Stats., did not commit a prohibited practice within the meaning of Section 11.70(3)(a) 1, 4 or 5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this *16/80* day of February, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stephen Pieroni
Stephen Pieroni, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

Introduction

The facts giving rise to this case are not in dispute. Contrary to the Respondent, the Complainant contends that Respondent violated Section 111.70 (3)(a)1, 4 and 5 of MERA by refusing to release the information requested in paragraphs 1, 5 and 8 of Exhibit A (attached hereto). Said information was to be used in preparation for an arbitration hearing involving a 5 day suspension of an employee for alleged patient abuse. For the reasons discussed below, the Examiner finds insufficient evidence in the record to support Complainant's allegations.

Position of the Parties

The Complainant's argument is bottomed on the contention that Section 111.70(3)(a)4 imposes an obligation upon the Respondent to furnish upon request all information which is relevant and necessary for the proper performance of the Union's duty to engage in collective bargaining and contract administration, including the processing of grievances. There is no real dispute about the probable relevance of the information requested. The Union seeks to demonstrate by use of said information at the arbitration hearing that the pattern of the patient's conduct warranted the treatment in question.

Recognizing the Respondent's concern for patient confidentiality, the Union would allow the medical institution the discretion to excise any potentially patient-identifying information from the records requested. In the alternative, the Complainant suggests that the Examiner could order the Arbitrator to hold a closed hearing on the merits and to prohibit publication of the case. In this way the competing interest of each party could be suitably reconciled. To hold otherwise would allow the Respondent to hide behind the medical records privilege, thereby denying the grievant access to information relevant and necessary for an adequate defense.

Lastly, the Complainant asserts that despite the statutory exception providing for the release of said information pursuant to the lawful order of a court of record (Section 51.30(2)(f)Wis. Stats.), the Wisconsin Employment Relations Commission is the proper agency to resolve the issue of whether the requested information is necessary to allow the Complainant to satisfy its duty of grievance representation.

Respondent, on the other hand, avers that Section 51.30(2)(f) unambiguously conditions the release of said information upon the "lawful order of a court of record." Implicit in Respondent's argument is the contention that the Wisconsin Employment Relations Commission is not a "court of record" and is therefore without jurisdiction to release medical records pursuant to Section 51.30 Wis. Stats.

Discussion

There is little dispute that the duty to bargain collectively imposed upon an employer by Section 111.70(3)(a)4 of MERA includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees bargaining representative, including grievance processing. Horicon Education Association vs. Jt. School District No. 10 Decision No. 13765-B 1/78; aff'd Dane County District Court Case No. 161-363 11/78. See also NLRB vs. Truitt Mfg. Co. 351 US 149, 38LRM2042(1956) and NLRB vs. Acme Ind'l Co. 385 US 432, 64LRM2069(1967). However, a Union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all of the information in the manner requested.

Detroit Edison Co. vs. NLRB US , 100 LRRM 2728(1979). The duty to supply information under Section 111.70(3)(a)4 depends upon the particular circumstances of each case.

In the instant matter the Commission is neither asked to determine the probable relevancy of the information requested nor the manner of disclosure. This is so since, for the purpose of this case, the Respondent does not question the potential relevancy of said information. 1/ Nor does the Union claim that Respondent has fabricated concern for patient confidentiality in order to frustrate the Union in its defense of the pending grievance arbitration. Indeed, Respondent does not take the position that it will never turn over said information, rather it will do so only pursuant to a lawful order of a court of record. 2/ Hence, this case presents the threshold jurisdictional issue of whether the Commission or a "court of record" should decide whether privileged medical records within the meaning of Section 51.30 Stats. should be released on the basis of the instant facts.

In order to effectuate the labor policy enunciated in Section 111.70(6) Declaration of Policy, the state legislature has committed primary responsibility to the Wisconsin Employment Relations Commission. In carrying out this responsibility the Commission has often been called upon to balance conflicting legitimate interests. 3/ In the ordinary course of events, the Commission may be called upon to rule on such issues as the probable relevancy of requested information relating to matters of collective bargaining, the manner of disclosure, or whether the reasons advanced by an employer for denying same are outweighed by the Union's right to obtain said information for purposes of collective bargaining. Absent explicit statutory restrictions, the Commission would have the authority to determine whether confidentiality considerations should prevail in the circumstances of this case.

However, Section 51.30(2)(f) appears to specifically condition the release of said information upon the "lawful order of a court of record." The undersigned is unable to find any authority in the reported cases or in the Statutes which would permit the examiner to construe the phrase "court of record" to include an administrative agency such as the Commission. Indeed, it could well be argued that said phrase is a "term of art" having a special meaning which does not embrace the quasi-judicial proceedings of an administrative agency.

The Examiner concludes that Section 51.30(2)(f) is in conflict with Section 111.70(3)(a)4 to the extent that 51.30(2)(f) explicitly reserves to a court of record the determination to release the information in question. Noteworthy is the fact that Section 51.30 was enacted in 1975, after Section 111.70(3)4. In terms of statutory construction, the cases are legion which hold that when the legislature enacts a statute, it is presumed to act with full knowledge of the existing statutes. Hence, the legislature is presumed to have enacted Section 51.30 with full knowledge of the provisions of Section 111.70(3). Jt. School District No. 8 vs Wisconsin Employment Relations Board 37 Wis. 2d 83, 155 NW 2d 78 (1967). Construction of statutes should be done

1/ The Complainant also points out that said information is relevant because the outcome of the pending grievance may have some effect on felony criminal charges which could be preferred against the grievant pursuant to Section 940.29 Wis. Stats. Abuse of an Inmate of an Institution.

2/ Respondent risks civil damages for unauthorized disclosure of said information pursuant to Section 51.61(1977) Wis. Stats.

3/ Eg Glendale Professional Policeman's Association vs. City of Glendale 83 Wis. 2d 90, 264 NW 2d 594 (1978).

in a way which harmonizes the whole system of law and any conflict should be reconciled if possible. Muskego-Norway Consolidated Schools Jt. School District No. 9 vs WERB 35 Wis. 2d 540, 556, 151 NW 2d 617 (1967). In order to harmonize the Statutes in question, the undersigned believes that a court of record is the appropriate forum, in this case, to fashion an appropriate accomodation between confidentiality considerations and the Union's right to obtain said information in order to present an adequate case in arbitration.

This conclusion is buttressed by the rule which states that statutes creating agencies or boards are generally strictly construed to preclude exercise of power which is not expressly granted. Browne vs. Milwaukee Board of School Directors 83 Wis. 2d 316, 333, 265 NW 2d 559 (1978). Here, the Examiner believes that in this instance, the power which the Union urges the Commission to exercise is expressly reserved to a "court of record."

Having so concluded, the undersigned also notes that the record is devoid of any substantial evidence which would warrant a finding of a violation of Section 111.70(3)(a)1 or 5 Wis. Stats. Therefore, allegations in that regard have also been dismissed.

Dated at Madison, Wisconsin this 11th day of February, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

SHNEIDMAN, MYERS, & GENDLIN
Attorneys at Law
735 W. Wisconsin Ave. Suite 1200
Milwaukee, WI 53233

September 6, 1979

EXHIBIT A

Office of Corporation Counsel
Attn: Patrick J. Foster,
Principal Assistant
Corporation Counsel
Room 303 Courthouse
901 N. 9 Street
Milwaukee, WI 53233

RE: Staff Nurses Council vs. Milwaukee County
Suspension of Joy Anderson

Dear Mr. Foster:

In order to intelligently prepare for the above captioned hearing scheduled for October 17, 1979, the Staff Nurses Council hereby requests the following information:

1. The complete medical records of patient Pat Dietz, including the restraint and seclusion records, nurses' notes, standing and daily orders, physician diagnostic reports, medication orders from initial date of admission up and through March 1, 1979.
2. Patients' census for Catchment Area 1, Ward 1, North Division for the Milwaukee County Medical Complex for the period of February 1, 1979 through March 1, 1979.
3. The latest Joint Commission of Accreditation Report issued for the Mental Health Complex-North Division including all wards.
4. Any and all written policies or memoranda for the utilization of Geriatric chairs at the Mental Health Center-North Division for any and all wards.
5. Any written orders prepared by Dr. Rhoda Lorton pertaining to seclusion and restraints from January 1, 1979 up and through March 1, 1979 regarding patient treatment at North Division-Mental Health Complex, Milwaukee County.
6. Any and all policies or memoranda pertaining to patient abuse.

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7. Any and all policies or memoranda pertaining to registered nurses' rights and responsibilities with violent or physical uncontrollable patients.

8. The twenty-four hour or shift report for February 21, 22 and 23, 1979.

This office would appreciate this material at your earliest convenience so as to prepare for the above captioned arbitration hearing.

Thank you very much for your attention in this matter.

Very truly yours,

SHNEIDMAN, MYERS & GENDLIN

By _____
Howard N. Myers

HNH:bj

CC: Candice Owley
c/o Staff Nurses Council
7635 W. Bluemound Rd., Suite 101
Milwaukee, WI 53213

SHNEIDMAN, MYERS & GENDLIN
Attorneys at Law
735 W. Wisconsin Ave. Suite 1200
Milwaukee, WI 53233

September 11, 1979

EXHIBIT B

Office of Corporation Counsel
Attn: Patrick J. Foster
Principal Assistant
Corporation Counsel
Room 303 Courthouse
901 N. 9 Street
Milwaukee, WI 53233

RE: Staff Nurses Council (Suspension of Joy Anderson vs.
Milwaukee County)

Dear Mr. Foster:

In addition to the information I requested in my letter of September 6, 1979, I would appreciate the following:

1. A copy of the communication prepared by Margaret Winslow dated May 24, 1979 pursuant to the request of Betty Ford.

I need this information as well as the other information to properly prepare for the forthcoming hearing scheduled for October 17, 1979.

Thank you very much for your attention in this matter.

Very truly yours,

SHNEIDMAN, MYERS & GENDLIN

By _____
Howard N. Myers

HNH:bg

CC: Candice Owley
c/o Staff Nurses Council
7635 W. Bluemound Road
Suite 101
Milwaukee, WI 53213