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-B

Appearances:

Schneidman, Myers & Gendlin, Attorneys at Law, Suite 1200, Continental Bank Building, 735 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, by Mr. Howard N. Myers, appearing on behalf of the Complainant.

Mr. Patrick J. Foster, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Stephen Pieroni having, on February 14, 1980, issued his Findings of Fact, Conclusion of Law and Order in the above entitled matter, wherein he found that the above named Respondent (herein referred to as the County), by its conduct of refusing to release certain medical records to the Complainant without the lawful order of a Court of Record issued pursuant to Section 51.30(2)(f), Wis. Stats. (1975) 1/ had not committed a prohibited practice within the meaning of Section 111.70(3)(a)1., 4. or 5., of the Municipal Employment Relations Act (MERA) and wherein he dismissed the complaint; and thereafter, on March 4, 1980, the above named Complainant (herein referred to as the Union) having filed a timely petition for Commission review of the Examiner's order pursuant to Section 111.07(5), Stats.; and the parties having filed briefs in the matter, the last of which was received by the Commission on May 14, 1980; and the Commission having reviewed the record in the matter, including the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order be affirmed,

NOW, THEREFORE, it is

1/ Section 51.30(2)(f), Stats. (1975) was repealed and recreated as Section 51.30(4)(b)4., Stats. (1977) by Chapter 428, Laws of 1977, Section 67.

ORDERED

That the Examiner's Findings of Fact, Conclusion of Law and Order in the above entitled matter be and the same hereby is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The facts in this proceeding are not in dispute. By letter dated September 6, 1979, the Union sought to obtain certain information to be utilized in its preparation for a pending grievance arbitration involving the 5 day disciplinary suspension of an employe. Although the County initially refused the request, much of the information requested was ultimately provided. However the County has refused to supply certain information contained in the treatment records of a patient who was being cared for by the grievant. 2/ In this proceeding the County does not argue that the records in question are irrelevant to the issues in the grievance arbitration. Instead the County argues that since the patient and the patient's counsel have refused the Union's request for a release, it cannot and will not release the information sought except pursuant to the lawful order of a court of record as required by Section 51.30(4)(b)4., Wis. Stats. (1977) 3/

In his decision the Examiner first noted that in general the duty to bargain collectively imposed by Section 111.70(3)(a)4. of MERA includes a duty to provide relevant information necessary for the processing of grievances. He also noted that this duty is not absolute and that the duty to provide the information depends upon the facts in a given case including nature of the information requested and the manner in which it is to be used.

2/ The requested information which was not supplied consisted of the following:

1. The complete medical records of patient . . ., 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.

. . . .

5. Any written orders prepared by Dr. . . . 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.

. . . .

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

3/ Section 51.30(4)(b)4. (Formerly Section 51.30(2)(f)) reads in context as follows:

(4) ACCESS TO REGISTRATION AND TREATMENT RECORDS. (a) Confidentiality of records. Except as otherwise provided in this chapter and ss. 905.03 and 905.04, all treatment records shall remain confidential and are privileged to the subject individual. Such records may be released only the persons designated in this chapter or s. 905.03 and 905.04, or to other designated persons with the informed

3/ (Continued)

written consent of the subject individual as provided in this section. This restriction applies to elected officials and to members of boards established under s. 51.42 or 51.437.

(b) Access without informed written consent. Notwithstanding par. (a), treatment records of an individual may be released without informed written consent in the following circumstances, except as restricted under par. (c): . . .

4. Pursuant to lawful order of a court of record.

The Examiner then described the issue presented at page 4 of his memo:

> "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. 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. 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. (FOOTNOTES OMITTED)"

The Examiner then concluded, based on his analysis of the statutory provisions in question and existing case law, that the provisions of Section 111.70(3)(a)4 MERA, which vests the Commission with the primary jurisdiction to determine the parameters of the duty to supply requested information, could not be interpreted to require the County to supply the requested information absent a court order releasing the information. The Examiner relied on the following elements in his analysis:

(1) Section 51.30(4)(b)4., Wis. Stats., conditions the release of the requested information upon the "lawful order of a court of record".

(2) "Court of record" cannot be interpreted to refer to an administrative agency and therfore there is a potential conflict between the general provisions of Section 111.70(3)(a)4. of MERA and the specific provisions of Section 51.30(4)(b)4., Wis. Stats.

(3) The two statutes should be harmonized if possible to avoid this potential conflict and the following principles support the County's position in achieving that harmony.

   a. Section 51.30(4)(b)4., Wis. Stats., was enacted after Section 111.70(3)(a)4. of MERA and it must be presumed that the legislature was aware of that fact.

   b. Harmony between the two statutes can be achieved by requiring that the Union ask a court of record to determine the proper accommodation between the confidential nature of the records and the duty to provide relevant information under Section 111.70(3)(a)4., of MERA;

   c. Statutes establishing the jurisdiction of administrative agencies are generally construed narrowly in order to preclude the exercise of powers not expressly granted.

In addition to his conclusion that the County could not be required by the Commission, as opposed to a court of record, to provide the requested information, the Examiner also found no evidence that would warrant a finding of a violation of Section 111.70(3)(a)1 or 5 of MERA when the County refused to provide the requested information.

Union's Position

In its initial brief filed with the Examiner the Union stated its position that Section 51.30(4)(b)4., Wis. Stats., merely created an "alternative forum" for pursuit of its request for information. Based on that theory the Union argued that the Commission, because of its expertise in dealing with the duty to supply information as part of the duty to bargain in good faith, was a more appropriate forum for striking the necessary balance between such duty and the confidential nature of the information requested. According to the Union any order from the Commission compelling disclosure of such information could then be reviewed by a court which would then have the benefit of such expertise.

In its brief in support of its petition for review the Union makes the following additional arguments:

(1) Contrary to the Examiner's reasoning, the issue presented here is not one of conflicting statutory provisions; rather it relates to the appropriate choice of forums.

(2) If in fact a conflict exists between the provisions of MERA and Section 51.30(4)(b)4., Wis. Stats., federal labor policy must govern.

(3) The Examiner erred when he reasoned that a court of record was the only available forum to strike the balance required.

(4) The Examiner erred when he reasoned that the Commission does not have express or implied jurisdiction to grant the order requested.

(5) The reasoning of the Wisconsin Supreme Court in the Glendale case 4/ supports a conclusion that the statutes can be harmonized in a way that avoids an interpretation that "authorizes a violation of law" since the Union has offered to let the employer delete names and take other precautions to protect the confidential nature of the information.

(6) The Commission's reasoning in the City of Sparta case 5/ supports an accommodation of the alleged conflict based on the Union's offer to take reasonable steps to preserve the confidential nature of the records sought.

4/ Glendale Professional Policemen's Association v. City of Glendale, 83 Wis 2d 90 (1978).

5/ Decision No. 14520 (1976).

County's Position

The County takes the position that the sole issue presented by the Union's petition for review is whether the Commission has the authority under the provisions of MERA to order the Respondent to turn over certain patient records, committed to it by Chapter 51 of the Wisconsin Statutes, to the Union.

The County points out that under the provisions of Sec. 51.30(4)(b)4., Wis. Stats., such information cannot be disclosed except by the "lawful order of a court of record" and that under the provisions of Section 51.61 it may be subject to damages for unauthorized disclosure.

The County concedes that there may be a conflict between Section 51.30 (4)(b)4., Wis. Stats., and the provisions of MERA but contends that only a court of record can determine the respective rights of the parties involved, i.e., the Union, the County and the patient(s).

Discussion

We agree with the Examiner that, because of the provisions of Section 51.30(4)(b)4., Wis. Stats., the County may not be required to provide the requested information absent an order of a court of record. However, unlike the Examiner we do not reach such a conclusion based on jurisdiction on the premise that there is a potential conflict between the provisions of Section 111.70(3)(a)4. of MERA and the provisions of Section 51.30(b)4., Wis. Stats. Rather, we see the provisions of Section 51.30(b)4. as affording the County a valid affirmative defense to its admitted failure to provide the requested information. In the same sense, the Union's failure to obtain a release from the patient or the patient's attorney constitutes a valid affirmative defense for the Countys' failure to provide the requested information.

The Union would have the Commission hold that it is an "alternative forum" with authority to order the release of the information and argues that this result is compelled by the supremacy of federal labor law. We are not persuaded by this argument for three reasons. First of all, since the County is a subdivision of the state of Wisconsin, federal labor law policy is inapplicable to this case. Secondly, such an interpretation would, as the Examiner noted, fly in the fact of the wording in Section 51.30(b)4., Wis. Stats. And finally, even if federal labor law policy were applicable, the availability of an alternative Wisconsin forum (i.e., a court of record) would preclude the need for an interpretation overriding the express intent of the Wisconsin legislature.

We agree with the Union that the Commission had jurisdiction to order the County to disclose relevant information for purposes of insuring that the Union is able to meet its bargaining obligation and related representational obligations in presenting grievances in arbitration. However, in exercising that jurisdiction the Commission may not find a violation of the County's duty to supply information where the County has asserted a valid affirmative defense for its admitted refusal to do so.

Finally, while the precautions that the Union has offered to take to help preserve the confidential nature of the information sought tend

to make its position on the merits appear more appealing, those precautions do not overcome the statutory requirement that the Union must either obtain an order from a court of record or comply with one of the other exceptions set out in Chapter 51 in order to obtain the release of the information sought.

In the City of Sparta case, relied upon by the Union, we first concluded that the provisions of Chapter 19 of the Wisconsin Statutes did not permit the City to insist that collective bargaining occur in public meetings before we suggested that a reasonable accommodation of the competing public policy considerations was required under the provisions of MERA. Here it is not possible for the Commission to seek to establish such a compromise of the competing public policy considerations, since the provisions of Chapter 51 constitute a valid defense to any MERA obligation the County might otherwise have to provide the Union with the information sought.

For the above and foregoing reasons we have affirmed the Examiner's Findings of Fact, Conclusion of Law and Order.

Dated at Madison, Wisconsin this 25th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner