STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of	:	
	:	Case 188
MILWAUKEE TEACHERS' EDUCATION ASSOCIATION	:	No. 37450 DR(M)-407 Decision No. 24106-A
Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and	:	Case 190 No. 37544 DR(M)-410 Decision No. 24107-A
	:	Case 191
MILWAUKEE BOARD OF SCHOOL DIRECTORS	:	No. 37618 DR(M)-411 Decision No. 24108-A

Appearances:

Perry, First, Lerner, and Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, Wisconsin 53202-2770, appearing on behalf of the Milwaukee Teachers Education Association.

Mr. Grant Langley, City Attorney, by Mr. Stuart S. Mukamal, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee Teachers Education Association, herein the MTEA, having filed petitions with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a proposal made by the Milwaukee Board of School Directors, herein the Board, during collective bargaining was a mandatory subject of bargaining; and hearing having been held in Milwaukee, Wisconsin on December 10, 1986, before Peter G. Davis, a member of the Commission's staff; and written argument having been submitted by the parties on January 8 and 9, 1987; and Commission having reviewed the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors is a municipal employer operating a public school system in Milwaukee, Wisconsin and having its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

2. That the Milwaukee Teachers Education Association is a labor organization functioning as the collective bargaining representative of certain employes of the Board and having its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That during collective bargaining between the Board and the MTEA over successor agreements to the 1982-1985 substitute teacher, aide and accountant contracts, a dispute arose between the parties as to whether the following Board proposal was a mandatory subject of bargaining:

> As a condition of eligibility to receive health insurance benefits, each participant (including the subscriber on his/her own behalf and on behalf of his/her dependents under the age of 18 and subscriber's dependents over 18) agrees to execute a waiver of confidentiality to the employer which authorizes the employer to examine for auditing purposes only, all individual claims documentation, excluding treatment records and operative reports prepared by the provider. Auditing procedures will be conducted in a manner which

maintains the confidentiality of parties' medical record(s) and condition(s).

4. That the disputed proposal set forth in Finding of Fact 3 expressly conflicts with a statutory right.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the disputed proposal set forth in Finding of Fact 3 is a prohibited subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

That the Board and the MTEA have no duty to bargain under Sec. 111.70(1)(d), Stats., about the disputed proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) 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.

(a) 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.

(Footnote 1/ Continued on Page 3)

1/ (Footnote 1/ Continued)

Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Before entering into a specific consideration of the proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved. Section 111.70(1)(d), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, ... the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . . ." (emphasis added)

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily", "fundamentally", "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school management and operation" or the "'management and direction' of the school system." Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979). Of course, a finding that a proposal is mandatory and thus subject to collective bargaining and, if necessary, to interest arbitration does not compel either party to agree to include the proposal in a collective bargaining agreement and does not represent a Commission opinion regarding the merits of the proposal under the statutory interest arbitration criteria.

When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, the Court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will be found to be a prohibited subject of bargaining. Board of Education v. WERB, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977).

The disputed proposal states:

> As a condition of eligibility to receive health insurance benefits, each participant (including the subscriber on his/her own behalf and on behalf of his/her dependents under the age of 18 and subscriber's dependents over 18) agrees to execute a waiver of confidentiality to the employer which authorizes the employer to examine for auditing purposes only, all individual claims documentation, excluding treatment records and operative reports prepared by the provider. Auditing procedures will be conducted in a manner which maintains the confidentiality of parties' medical record(s) and condition(s).

The MTEA asserts that this proposal is a prohibited subject of bargaining because the MTEA cannot waive employes' statutory rights concerning the confidentiality of medical records. The MTEA contends that the records to which the Board wants access are clearly confidential under Sec. 146.81, Stats., and that the Board is not one of the statutorily identified entities permitted access to confidential records without informed consent. The MTEA further argues that the blanket waiver proposed by the Board does not meet the requirements of informed consent established by Sec. 146.81(2), Stats. The MTEA argues it is "ridiculous and preposterous" for the Board to assert that employes are not required to waive because employes need only waive if they want health insurance benefits. The MTEA alleges that such an analysis is akin to having employes waive their constitutional right to free speech if they want to enjoy a contractual benefit.

The Board counters by asserting that the proposal is either mandatory because of a primary relationship to insurance benefits (as an eligibility requirement) or permissive because of a primary relationship to the Board's fiscal and managerial prerogatives (as a needed component of a valid audit of the "cost plus" health insurance plan). The Board denies that the proposal is prohibited asserting that applicable statutory provisions do not preclude the possibility that "informed consent" be sought through collective bargaining. In this regard the Board notes that "harmonization" of statutory provisions is to occur wherever possible to avoid the finding that a proposal is a prohibited subject of bargaining.

The Board further argues that the very philosophy of the statutes (Secs. 146.81-146.83, Stats.), cited by the MTEA establishes the legality of the audit clause proposal. The Board asserts that these statutory provisions explicitly recognize the legality and practical necessity of the auditing process. Thus the Board avers that its proposal's purpose falls directly within the scope of one of the circumstances for which informed consent is not even required. Indeed, the Board notes that Sec. 120.13(2)(f), Stats., explicitly requires an annual audit for districts who self insure. The Board further argues that it is by no means clear the "individual claims documentation" referenced in the Board proposal qualify as "patient health care records." The Board also notes that employes can choose not to give their "informed consent" and thereby either elect to waive health insurance benefits or to receive same through existant HMO's.

The Board asserts that the foregoing analysis demonstrates the proposal does not violate any express statutory command or public policy and thus is not a prohibited subject of bargaining. The Board requests that the Commission find the proposal either mandatory or one which can be unilaterally implemented by the Board.

We are satisfied from our review of the record and of Sec. 146.81(4), Stats., that the records to which the Board seeks access through this proposal for auditing purposes are "patient health care records" under Sec. 146.81(4), Stats. 2/ Pursuant to Sec. 146.82, Stats., access to such records can be achieved only with "informed consent of the patient or of a person authorized by the patient" or if certain statutorily enumerated exceptions exist. 3/ While the Board

---

2/ Sec. 146.81(4), Stats., provides:

> (4) "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, but not those records subject to s. 51.30, reports collected under s. 69.186 or records of tests administered under s. 343.305.

3/ Sec. 146.82, Stats., provides in part:

> 146.82 Confidentiality of patient health care records. (1) CONFIDENTIALITY. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.
>
> (2) ACCESS WITHOUT INFORMED CONSENT. (a) Notwithstanding sub.(1), patient health care records shall be released upon request without informed consent in the following circumstances:
>
> 1. To health care facility staff committees, or accrediation or health care services review organizations for the purposes of conducting management audits, financial audits, program monitoring and evaluation, health care services reviews or accrediation.
>
> . . .

is correct that one such exception applies to the performance of audits in certain circumstances, it is clear that the Board is not one of the auditing entities referenced in Sec. 146.82(a)(1), Stats. Thus the Board needs "informed consent" 4/ to gain access to the records it seeks for its audit.

The proposal before us seeks to have the MTEA agree that employes wishing to receive health insurance benefits from a source other than the contractually available HMO's will give the Board "informed consent" to allow access by Board auditors to confidential patient health care records. Because we conclude that the MTEA's status as the collective bargaining representative of employes does not empower it to obligate employes to give the Board "informed consent" as a condition of benefit eligibility, we agree with the MTEA's contention that this proposal is a prohibited subject of bargaining. Under our reading of the applicable statutes, the right of confidentiality is clearly an individual patient right which can be waived only by the patient (i.e. employe) or a "person authorized by the patient." 5/ As it is clear that there has been no authorization from the employe to allow the MTEA (assuming that the MTEA is a "person" under Sec. 146.81(5), Stats.), to provide "informed consent", the proposal seeks authorization the MTEA is in no position to legally provide. As the proposal would thus be void as a matter of law, we conclude that it is a prohibited subject of bargaining. WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977), Racine Unified School District, Dec. No. 20652-A (WERC, 1/84), at 20-21.

Dated at Madison, Wisconsin this 5th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

4/ Sec. 146.81(2), Stats., provides:

> (2) "Informed consent" means written consent to the disclosure of information from patient health care records to an individual, agency or organization containing the name of the patient whose record is being disclosed, the purpose of the disclosure, the type of information to be disclosed, the individual, agency or organization to which disclosure may be made, the types of health care providers making the disclosure, the signature of the patient or the person authorized by the patient, the date on which the consent is signed and the time period during which the consent is effective.

5/ Sec. 146.81(5), Stats., provides:

> (5) "Person authorized by the patient" means the parent, guardian or legal custodian of a minor patient, as defined in s. 48.02 (8) and (11), the guardian of a patient adjudged incompetent, as defined in s. 880.01 (3) and (4), the personal representative or spouse of a deceased patient or any person authorized in writing by the patient. If no spouse survives a deceased patient, "person authorized by the patient" also means an adult member of the deceased patient's immediate family, as defined in s. 632.895 (1)(d). A court may appoint a temporary guardian for a patient believed incompetent to consent to the release of records under this section as the person authorized by the patient to decide upon the release of records, if no guardian has been appointed for the patient.