STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 24, THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, and its affiliated LOCAL UNION NO. 178; MELDON G. ELGERSMA and DELVIN D. KUEHN,	:	
Complainants,	:	Case 250 No. 39446 PP(S)-141
vs.	:	Decision No. 25369-B
STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION,	:	
Respondents.	:	

Appearances:

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, on behalf of Complainants.

Mr. David C. Whitcomb, General Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

District Council 24, Wisconsin State Employees Union (WSEU), AFSCME, and its affiliated Local Union No. 178 and certain named individuals, Meldon G. Elgersma and Delvin D. Kuehn, hereinafter collectively referred to as Complainants, having, on October 1, 1987, filed with the Wisconsin Employment Relations Commission a complaint of unfair labor practices wherein it was alleged that the State of Wisconsin, Department of Health and Social Servicess, the Division of Corrections and the Dodge Correctional Institution, hereinafter collectively referred to as Respondents, and/or their agents or officers, had violated Secs. 111.84(1)(a) and (c), Stats., by refusing to supply Complainants with certain information; and the Complainants having, on January 20, 1988, filed an amended complaint with the Commission wherein it further alleged Complainants had filed a grievance on the matters in the original complaint and that Respondents had refused to process said grievance in violation of Sec. 111.84(1)(e), Stats.; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and the Respondent having, on May 5, 1988, filed with the Examiner a Motion to Dismiss the complaint; and the parties having subsequently agreed to postpone a hearing set for May 24, 1988; and the Complainants having, on June 17, 1988, withdrawn their amendement of the complaint filed on January 20, 1988, and requested that hearing be set on the original complaint; and Respondents having requested that the Motion to Dismiss be ruled on prior to hearing; and Complainants having, on July 22, 1988, filed written argument in response to the Motion to Dismiss; and the Examiner having, on July 29, 1988, denied the Motion to Dismiss; and hearing on the complaint having been held at Madison, Wisconsin on December 6, 1988; and the parties having completed the filing of post-hearing briefs on February 3, 1989; and the Examiner, having considered the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant WSEU is a labor organization with its offices located at 5 Odana Court, Madison, Wisconsin 53719; that Complainant Local Union No. 178 is a labor organization and is affiliated with the WSEU and is the

exclusive collective bargaining representative of the employes in the Security and Public Safety bargaining unit, which unit includes certain employes employed by the Dodge Correctional Institution; that Complainant Delvin D. Kuehn is an individual residing at 100 West Lincoln Street, Waupun, Wisconsin 53963, and at all times material herein has been the President of Local Union No. 178; and that the Complainant Meldon G. Elgersma is an individual employed by the Respondent as a Correctional Officer 2 at the Dodge Correctional Institution and is in the bargaining unit represented by Complainant Local Union No. 178, and at all times material herein has been an officer in Local Union No. 178.

2. That the Respondent State is an employer and is represented by the Department of Employment Relations (DER) in contract negotiations and contract administration and other employer functions of the State's executive branch; that DER has its offices located at 137 East Wilson Street, Madison, Wisconsin 53707-7855; that the Respondent State, through its Department of Health and Social Services (DHSS) and the Division of Corrections (DOC), manages and maintains the Dodge Correctional Institution (DCI) located in Dodge County, Wisconsin; that at all times material herein Gordon Abrahamson has been the Superintendent at DCI and, as such, the individual in charge at that institution; that at all times material herein, Jack Kestin has been the Personnel Manager at DCI and, as such, responsible for the staffing, employment relations and payroll functions at the institution and the custodian of the personnel files maintained at DCI; that at all times material herein Kathleen Nagle has been the Security Director at DCI and, as such, the direct supervisor of the Captains and Lieutenants employed at DCI; that Jerome Mullin is an individual and, at all times material herein, has been employed in the position of Lieutenant at DCI; that the position of Lieutenant is a supervisory position and is not included in the bargaining unit at DCI represented by Complainant Unions; and that at all times material herein the individuals Captain Siedschlag and Lieutenant Ponto were employed at DCI in supervisory positions.

3. That sometime in the evening hours of Saturday, February 21, 1987, Elgersma and Mullin were involved in an altercation at a tavern at Waupun, Wisconsin, as a result of which Mullin's leg was broken; that on the morning of Sunday, February 22, 1987, Nagle was informed of the altercation via conversations with Captain Siedschlag, Lieutenant Ponto and Mullin; that after being informed of the altercation Nagle telephoned Abrahamson, who was off duty, and advised him of the altercation and discussed the matter, and that Abrahamson indicated Elgersma should be suspended with pay; Nagle next telephoned Kestin, who was on-call, and informed him of the altercation and that Elgersma was to be suspended with pay pending an investigation and that Mullin was off work with a broken leg; that following his conversation with Nagle, Kestin went to DCI to meet with Elgersma; that Kestin had Elgersma, who was on duty at the time, come to the security office at approximately 10:00 a.m. on February 22, 1987, at which time Kestin informed Elgersma that he was being suspended with pay pending an investigation of the altercation and that Captain Siedschlag would be writing up a report of the matter; that at said meeting Elgersma was accompanied by Kuehn as his union representative, and in response to a question from Elgersma, Kestin told Elgersma the matter concerned an alleged violation of "Work Rule 5"; that Elgersma was suspended with pay and sent home following his meeting with Kestin on February 22, 1987; that Mullin was on paid sick leave following the altercation due to his broken leg; that on the morning of Monday, February 23, 1987, Abrahamson telephoned the Waupun Police Department, which was investigating the altercation of February 21, 1987, and was informed there would be no charges filed against either Elgersma or Mullin; that as a result of his conversation with the Waupun Police Department, Abrahamson told Kestin on February 23, 1987, that Elgersma's suspension was ended and that Kestin should contact Elgersma and inform him; that Kestin telephoned Elgersma at home on the morning of February 23, 1987 and informed him that the suspension was ended and that he had the option of returning to work that day or staying home with pay for the day as the following two days were his regular days off; that Elgersma returned to work on February 23, 1987 and was paid for the time he was suspended with pay; and that Abrahamson, in a conversation with Kuehn on February 23, 1987, told Kuehn that Mullin had not been suspended because he was on sick leave due to a broken leg he sustained in the altercation.

4. That the Waupun Police Department investigated the altercation on February 21, 1987 involving Elgersma and Mullin and compiled an investigative report on the matter, a copy of which was received by Abrahamson, Elgersma and Kuehn upon their respective requests; that there were no written reports compiled

by supervisory personnel at DCI regarding the altercation and no written record of the altercation was placed in Elgersma's personnel file; that except for a handwritten memorandum from Kestin to the payroll department noting that Elgersma was to receive his pay for the time he was off work, and the police report, there was no written record made of the altercation with regard to Elgersma; that Kestin's payroll memorandum was destroyed after Elgersma received his pay for the time he was off work suspended with pay; and that neither Elgersma nor Mullin was disciplined for their involvement in the altercation on February 21, 1987.

5. That Abrahamson sent the following memorandum to Kuehn on or about March 17, 1987:

> To Delvin D. Kuehn, President Local #178 — March 17, 1987
>
> From Gordon A. Abrahamson, Superintendent
>
> This is in response to your request dated March 16, 1987 for investigative material pertaining to the incident involving Meldon Elgersma and Lt. Jerome Mullin. There is no written material. Everything at DCI was handled verbally since the Waupun Police Department was handling the investigation. Any reports in this case should be available from the Waupun PD. When I obtained information from them on Monday morning and obtained other information about what took place, the decision was made to rescind the suspension.

6. That on or about March 31, 1987, Kuehn sent the following written request to Nagle:

> March 31, 1987
>
> TO: KATHY NAGLE, Security Director
>
> FROM: DEL KUEHN, President, Local 178
>
> I am requesting in writing all verbal communications that you had with other supervisory personnel that prompted your decision to suspend Mel Elgersma on 2/22/87.
>
> I am also requesting in writing any corrective measures or discipline taken against any individuals involved in this situation.

7. That at Abrahamson's direction, Nagle sent the following response to Kuehn's request of March 31, 1987:

> TO Del Kuehn, President - Local 178
>
> FROM Kathy Nagle, Security Director
>
> RE: Open Records Request
>
> I have reviewed your request for open records pertaining to the February 22, 1987 incident and must deny it.
>
> You first asked for a written report on the verbal communication pertaining to the incident. We do not have to create a record under the statute if one does not exist. We obviously do not have a written record of the verbal communication.
>
> You also requested a copy of any corrective or disciplinary action taken in reference to this incident. Per your union contract you have been

given a copy of the written disciplinary action affecting your represented people. Per State Statute 230.13, any disciplinary action taken against a nonrepresented employe is a closed record.

8. That on or about June 2, 1987, Kuehn sent the following request to Abrahamson on behalf of Complainant Local Union No. 178:

2 June 1987

GORDON ABRAHAMSON, Superintendent, DCI
P.O. Box 661
Waupun, WI 53963

Dear Mr. Abrahamson,

This correspondence pertains to Mel Elgersma's suspension on 22 Feb 87. It is felt by the Executive Board of Local 178 that any discipline involved of management staff in regards to this incident be revealed. The reason being, that we can therefore fairly enforce the terms of the collective bargaining agreement as it relates to discipline.

In order to substantiate this request, the following authority is shared with you: North Germany Area Council vs. FLRA, 1986-1988 PBC, Par. 34, 768 (11/21/86). This held that the Union was entitled to know not only what discipline was imposed on supervisors, but also the outcome.

The Executive Board of Local 178 also feels that the communications, verbal or otherwise, which prompted Kathleen Nagle (Security Director), to recommend Mr. Elgersma's suspension, be revealed in it's (sic) entirety.

In conclusion, the Executive Board of Local 178 maintains that we have patiently made several requests pertaining to this matter, and would appreciate your written response in cooperation with the Union.

Respectfully
Executive Board
Local 178
WSEU

9. That at Abrahamson's direction, Kestin sent the following response to Complainant Local Union No. 178's request of June 2, 1987:

June 9, 1987

TO Del Kuehn, President, Local 178

FROM Jack T. Kestin, Personnel Manager

RE: Memorandum, June 2, 1987 - Elgersma

I have reviewed your request for information based on North Germany Area Council vs. FLRA, 1986-1988 PBC, Par. 34, 768 (11/21/86). I still must deny this request.

As you know the cited material is from a Federal Labor Relations Authority (FLRA) case which does not

apply to Wisconsin. The Department still operates under statutory provision s. 230.13 that disciplinary actions are closed records.

10. That at all times material herein, the Respondent State, by its officers and agents, has refused the Complainant Unions and/or Kuehn and Elgersma access to Mullin's personnel file or documents therein; and that at all times material herein, Mullin has objected to giving Complainant Unions, their officers or agents, access to his personnel file.

11. That on October 1, 1987 the Complainants filed the instant complaint with the Commission alleging that the Respondent State had committed unfair labor practices by refusing to provide the information and documents requested by the Complainants; that on January 30, 1988, Complainants filed an amended complaint, which was withdrawn on June 17, 1988; that Respondent State filed a Motion to Dismiss with the Examiner on May 5, 1988, which was denied on July 29, 1988; and that Respondent State, on November 22, 1988, filed an answer to the instant complaint wherein it denied it had committed any unfair labor practices and raised certain affirmative defenses.

12. That Elgersma's suspension with pay was for the purpose of avoiding problems that could result from having the employes who had been involved in the altercation present at work pending investigation of the incident, and was not disciplinary in nature; that Mullin was not suspended with pay due to his being on sick leave as a result of the broken leg he sustained in the altercation; that through the conversation Kuehn had with Abrahamson on or about February 23, 1987, Kuehn and Complainant Local Union No. 178 were aware of the reason Mullin was not suspended; and that following Elgersma's return to work on February 23, 1987, Complainants were aware that Elgersma was not being disciplined as a result of the altercation; that at some point in time, although it is not clear as to when, Complainants were made aware by Respondent State's officers and agents that Mullin had not been disciplined; that the information sought by the Complainant Union from the Respondent State was not reasonably necessary to its dealings in its capacity as the exclusive bargaining representative of the employes in the bargaining unit at DCI; and that Respondent State's refusal to provide the information requested by the Complainants did not interfere with the exercise of the rights of the employes represented by the Complainant Unions and did not discriminate against those employes with regard to wages, hours or other conditions of employment.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That since Respondent State, its officers and agents, did not possess any written information and/or documents regarding the February 21, 1987 altercation between Mullin and Elgersma that the Complainants did not already possess, and since Elgersma was not disciplined as a result of the altercation, the Respondent State, its officers and agents, did not violate Secs. 111.84(1)(a) and (c), Stats., by failing to comply with the Complainants' requests for such information and/or documents.

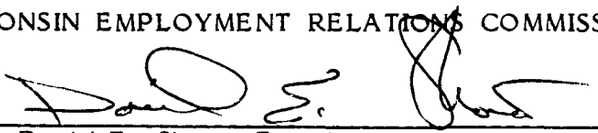
On the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

That the instant complaint of unfair labor practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 17th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

David E. Shaw, Examiner

(Footnote 1/ appears on page 6.)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint alleges that there was an off-duty altercation between Elgersma, a member of the bargaining unit, and Mullin, a supervisor, for which Elgersma was suspended with pay; that the Complainants made several requests to management at DCI "for all documents, records and materials pertaining to the February 21, 1987 altercation" and "any and all written documents, records, etc. concerning any correctional measures or discipline taken against any individuals, supervisory or otherwise, involved in the. . .altercation"; that the requests were made "in part, to ascertain the eligibility of Mr. Elgersma for Worker's Compensation benefits paid under Wisconsin law, as well as to enforce the just cause provisions and other related provisions in the collective bargaining Agreement between the State and the Union"; and that management refused to provide Complainants with the requested information.

In the answer the Respondents admitted that Complainants had requested the materials and that the requests had been denied, and raised as affirmative defenses that "the information requested as described in the June 2, 1987, letter from the Board to Abrahamson is a closed record pursuant to Sec. 230.13, Stats." and that the Respondent "is not required by the collective bargaining agreement between the State of Wisconsin and WSEU for the period December 5, 1985 to June 30, 1987, to disclosed (sic) the information requested by the Board in its June 2, 1987, letter."

POSITIONS OF THE PARTIES

Complainants

Complainants state that the instant complaint is based on Respondent State's denial of Complainants' requests for all documents, records, materials pertaining to the February 21st altercation, including the request to see Mullin's personnel file. According to Complainants, the issue in this case is whether the Respondent's refusal to turn over Mullin's personnel file violates Secs. 111.84(1)(a) and (c), Stats., and, if so, what remedy is appropriate. Complainants take the position that the personnel file of Mullin should have been made available "to the Union for inspection under controlled conditions" since the Complainant Unions "had the right and obligation to inspect the file to determine whether discipline had or had not been taken by DCI against Mullin, notwithstanding, management's assertions that it took no discipline."

In support of their position, Complainants cite numerous decisions of the courts and the National Labor Relations Board (NLRB), holding that an employer's duty to bargain under the National Labor Relations Act (NLRA) includes the duty to furnish the union with information relevant to the union's proper performance of its duties under a collective bargaining agreement. Complainants contend that the operative provisions of the federal law are a "mirror-image" of provisions of SELRA. The duty to furnish information to the union has been held to include providing an employe's discipline record for the purpose of permitting the union to determine whether another employe had been the victim of disparate treatment. Citing Salt River Valley Water Users' Association v. NLRB, 769 F.2d 639 (9th Cir., 1985).

According to Complainants, while privacy interests are implicated in cases such as this one, employment records, such as disciplinary records, involve less of an intrusion than would be the case of medical records or aptitude test results where the expectation of privacy is greater.

Complainants assert that, here as in Salt River Valley Water Users' Association, the request is to review another employe's personnel file in order to intelligently evaluate the situation so as to determine whether Elgersma had been subjected to disparate treatment. Mullin's personnel file is relevant in that regard and should be made available. The fact that it is the personnel file of a supervisory employe that is being sought does not affect its relevance. Citing United States Postal Service and Atlanta Metro Area Local American Postal Worker's Union, AFL-CIO, 1988-89 CCH, NLRB Par. 15013 (1988).

Regarding the Respondent State's reliance upon Sec. 230.13, Stats., Complainants note that the statutory provision states that:

> Except as provided in s. 103.13, the secretary and the Administrator may keep records of the following personnel matters closed to the public:
>
> . . .
>
> (5) Disciplinary actions.
>
> . . .

(Emphasis added).

Complainants assert that Sec. 230.13 gives department heads the option of denying public access to personnel files, it does not authorize the various departments to violate the collective bargaining process by denying the union access to information it needs to intelligently evaluate potential grievances. The statute is permissive in nature, not mandatory.

In reply to Respondent's arguments, Complainants reiterate their reliance on Salt River Valley Water Users' Association as applicable to this case, contending that:

> "It is an unfair limitation on the concerted activity rights of union members for an employer not to release disciplinary records of an employee relevant to the discipline of another employee the Union is representing."

Complainants also cite United States Postal Service, 289 NLRB No. 123, (1988) as a factually similar case where the NLRB rejected the employer's reliance on the federal Privacy Act as a basis for denying the union's request for information regarding the discipline imposed on supervisors.

As to Sec. 230.13, Stats., Complainants cite 74 Op. Atty. Gen. 156, 160 (1985) as opining that the authority granted by that provision is discretionary, not mandatory, and 73 Op. Atty. Gen. 20, 23 (1984) as opining that municipal grievance records are presumed accessible and a custodian must demonstrate that a need to restrict access exists. There has been no demonstration of such need made in this case. Respondents have not suggested that the Examiner make an in camera inspection of the personnel file to determine whether the records sought would "have a substantial adverse effect upon the reputation" of Mullin. Citing, 73 Op. Atty. Gen. 20 at 21.

Complainants also dispute Respondents' reliance on D.E.R. v. Wisconsin Employment Relations Commission, 122 Wis. 2d 132, 140 (1988) and Muskego-Norway School District v. W.E.R.B., 35 Wis. 2d 540 (1967) for the contention that a violation of an employe's rights cannot occur without a showing of anti-union animus. Complainants contend those cases involved discharges of employes motivated by union animus, and not per se procedural violations. Union animus is not a necessary element to prove a violation of concerted rights. Citing, Juneau County (Pleasant Acres), Dec. No. 12593-B (WERC, 1/77); NLRB v. Burnup and Sims, Inc., 379 U.S. 21 (1964).

Respondents

Respondents take the position that they have not committed any unfair labor practices within the meaning of SELRA. Regarding the alleged violation of Sec. 111.84(1)(a), Stats., Respondents note that the provision prohibits an employer from denying an employe rights guaranteed by Sec. 111.82, Stats., to form or organize a union and to bargain collectively. It is asserted that there is nothing in the record to indicate that the actions of either Respondents or Complainants were related to forming or organizing a union or to collective bargaining. Rather, this case involves requests for information that were denied. According to Respondents, "the requests were not characterized nor were they in fact part of any organizational or contract negotiation activity." The requested information related to a single incident of off-duty conduct between two employes and the incident was not related to organizational activity, negotiations or the employer/employe relationship. Regarding the allegation that the information was

requested to enforce the just cause provisions and other related provisions of the collective bargaining agreement, there is no assertion that the information was requested for organizational or negotiation activities, and only refers to enforcing provisions of the contract. Enforcing provisions of a negotiated and executed agreement is not organization or contract negotiation activities.

Respondents also note that the complaint does not allege a violation of Sec. 111.84(1)(d), Stats., relating to a refusal to bargain collectively. It is contended, however, that refusal to provide information relating to possible discipline of a non-union employe under the circumstances in this case has nothing to do with "bargaining collectively".

The allegation in the complaint that the request for the information was made to ascertain the elgibility of Elgersma for Worker's Compensation benefits has no factual basis. The information requested relating to Mullin has nothing to do with Elgersma or any injury he might have received. There is no suggestion in the record that Elgersma applied, or was entitled to, Worker's Compensation benefits. Further, Respondents did not deny Elgersma access to their records, as there were no such records made. Lastly in this regard, Complainants' rights to information under the Worker's Compensation law involve matters beyond the scope of SELRA or the Commission's jurisdiction and can only be brought before the Department of Industry, Labor, and Human Relations (DILHR).

Citing Employment Relations Department v. WERC, 122 Wis. 2d 132, 140 (1985) and Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (1976), Respondents assert that in order to establish a violation of Secs. 111.84(1)(a) and (c), Stats., it must be proven by a preponderance of the evidence that the action or decision complained of was motivated in whole or in part by "anti-union animus." It is asserted that there is no evidence in the record to support any conclusion that the decision to deny Complainants' the information requested was motivated in whole or part by anti-union hostility. Rather, Respondents' actions were based on a provision of civil service law, i.e., Sec. 230.13, Stats. as shown both by the Respondents' written denials of the requests and Kestin's unrebutted testimony that the refusal to provide the information was due to its being a closed record under that statute. Kestin further testified that the application of the statute applied to all requestors and had nothing to do with the fact that it was the Complainant Union or its officials that made the requests. The fact that the request concerned a non-union employe also had nothing to do with the refusal, since any employe's disciplinary record is closed under that statute and all employes are treated the same. Thus, the decision is derived from an agency policy founded in state statute that is applied across the board regardless of union or non-union status. It is also contended that there is nothing in the record to indicate that the policy is "anything other than long-standing or of uniform application."

Respondents note that there is no allegation of a violation of the parties' collective bargaining agreement.

Regarding the allegation that the information was sought to enforce the just cause and other provisions of the agreement, Respondents assert that the only provision that is "conceivably implicated" is the grievance procedure. However, there is nothing in the record concerning any disciplinary action or a grievance relating to any disciplinary action, the reason being there was no discipline or penalty imposed on any employe based on the altercation. While Elgersma missed a portion of two work shifts, he continued in pay status and no disciplinary record of any sort was created, nor was any record concerning Elgersma's suspension with pay maintained. It is contended by Respondents that "since Elgersma was not disciplined, there is no connection between what discipline may or may not have been imposed on Mullin and the just cause/disciplinary procedures in the collective bargaining agreement." There is also nothing in SELRA or the agreement that suggests that in administering the agreement the Complainant Union is entitled to disciplinary information relating to employes in other bargaining units or who are unrepresented. Whatever claim Complainants might make regarding such information, the privacy rights of such other employes must be given precedence since there is no other way to protect employes' privacy rights as directed by the Legislature.

In their reply brief, Respondents note that this case is brought under SELRA and asserts that the federal law cited and relied upon by Complainants is not authority for Complainants' position. This case involves the proper construction

of state statute and federal cases are immaterial. Citing, Employment Relations Department v. WERC 122 Wis.2d. 132 (1985) where it was held that the NLRB's construction of the NLRA does not control the Commission's construction of SELRA.

Complainants' assertion that access to Mullin's "P-file" was requested and denied, but should have been granted, misstates the facts. Complainants' request was for the disciplinary information relating to the altercation in the tavern and not for access to the file generally. Had the request been for access to Mullin's P-file, "the file, less those records included therein that are closed under sec. 230.13, Stats. and secs. 19.31 and et seq. and 1981 et.seq., Stats., would have been made available, pursuant to the Open Records law." Respondents' refusal related to a much narrower request for the disciplinary information and that refusal was premised on specific stautory authorization. The testimony; however, established that there were no records created regarding the tavern altercation or contained in the file.

Respondents also assert that the cases cited by Complainants do not support their claim that the material requested should have been made available for inspection. Detroit Edison Company v. NLRB, 99 S.Ct. 1123 (1976) is cited as establishing the test to be applied in determining whether an employer has a duty under the NLRA to furnish information requested by union:

> "A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under s. 8(a)(5) turns upon 'the circumstances of the particular case,'. . .and much the same may be said for the type of disclosure that will satisfy that duty.

(Citations omitted)(At 1131). That decision makes two points: (1) Under the NLRA requests for information are to be resolved on a case by case basis; and (2) union requests for information must be accompanied by a factual basis or rationale and bare assertions of relevancy do not suffice. It is contended that the "relevancy" of the requested information is a critical factor in determining whether the information must be supplied. Relevancy is a necessary condition that must be satisfied before a duty to disclose will be found. That requirement is also recognized by the Commission. Citing, Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO v. State of Wisconsin, Dec. No. 17115-B, (WERC, 1980).

The cases cited by Complainants may be divided into two groups: (1) cases relating to requests for information not relating to grievances; and (2) NLRA cases involving requests for information made subsequent to the filing of grievances challenging discipline. The first group of cases are, on their face, immaterial to the issues in this case. The second group of cases are clearly distinguishable from the instant case, since there was no discipline imposed and no grievance in this case. Thus, the information requested cannot be relevant to the processing and evaluation of employe grievances, and Respondents had no duty to disclose the requested information to Complainants.

Lastly, Respondents assert that the Complainants have misconstrued Sec. 230.13, Stats. Complainants' assertion that the privacy rights implicated by the requirement to disclose disciplinary information are superceded by the obligations under collective bargaining may be correct under certain circumstances under federal law, but not under state law. Section 230.13, Stats., authorizes the closing of disciplinary records of employes. The issue of employe right to privacy/unions' right to requested information addressed by the cases cited by Complainants did not involve the question of whether disclosure would violate a specific state law such as exists in Wisconsin. SELRA cannot be read to extinguish the privacy rights granted to employes by statute, who are not members of the union requesting the information. The information sought in this case is specifically protected under state law and "whatever general obligation the Respondent has to provide information to the Complainant does not extend a violation of the statute." Regarding Complainants' argument that "the statute does not authorize the various departments to violate the collective bargaining process by denying access to information necessary for the intelligent evaluation of potential grievances," Respondents make two replies. First, it is asserted that the Department of Employment Relations (DER) is the party at interest and although

the decision to deny the request was made at the local level, it is a decision of the Department. Secondly, the duty to disclose disciplinary information is premised on "at least actual - not a potential - grievance." Information cannot be considered relevant unless it relates to something specific, such as discipline imposed and challenged. "It is the relationship of the information requested to the specific action challenged that determines whether the information is in fact relevant. . ."

On the basis of the above the Respondents request that the complaint be dismissed.

DISCUSSION

The Commission has long and consistently held that under both MERA and SELRA:

> Intertwined with the duty to bargain in good faith is the duty on the part of an Employer to supply a labor organization representing employes, upon request, with sufficient information to enable the labor organization to understand and intelligently discuss issues raised in bargaining. . . Information requested by a labor organization must be relevant and reasonably necessary to its dealings in its capacity as the representative of the employes. 2/

Besides the duty to provide information in the context of collective bargaining, it has also been held that the duty extends to providing information that is "relevant to the representative's policing of the administration of an existing agreement" 3/ and that the information requested need not relate to a pending dispute with the employer." 4/

In this case the Complainants have asserted that their request for information and to review Mullin's disciplinary record in his personnel file, as relates to the incident, as well as all records of the Respondent relating to the incident, was made in order to ascertain Elgersma's eligibility for Worker's Compensation benefits and to "enforce the just cause provisions and other related provisions in the collective bargaining Agreement. . ." There are a number of problems with Complainant's assertion. First, Respondents' witnesses credibly testified that with the exception of the police report and the payroll memo, no record was made or kept of the incident involving Elgersma and Mullin. Complainants possessed their own copy of the police report and Kestin credibly testified that the payroll memo was destroyed after Elgersma received his pay for that payroll period that included his suspension with pay. Thus, there were no records or documents that existed regarding the incident which Respondents had a duty to provide, or which Respondents could provide, to the Complainants. Second, Abrahamson told Kuehn two days after the incident that Mullin had not been suspended like Elgersma because his leg had been broken and he would be off work due to the injury. Although the record is not clear as to when Complainants were informed by management that Mullin had not been disciplined in any manner for the incident, once Complainants were made aware of that fact, the purpose of their inquiry had been served, i.e., they could determine whether management had treated supervisor (Mullin) and employe (Elgersma) alike with regard to the incident. There was no longer a need to review Mullin's personnel file for that purpose and it is not necessary to reach what effect, if any, Sec. 230.13, Stats., has on Respondent's duty to disclose said information. Third, the record establishes that Elgersma was not disciplined for the incident and once that was clear the verbal discussions the supervisors had regarding the incident lost any relevance they might have had. Lastly, there was no evidence presented that would indicate

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2/ State of Wisconsin, Dec. No. 17115-B (Lynch, 10/80) aff'd Dec. No. 17115-C (WERC, 3/82); Milwaukee Board of School Directors Dec. No. 24729-A (Gratz, 5/88) aff'd Dec. No. 24729-B (WERC, 9/88).

3/ Ibid., Milwaukee Board of School Directors, Dec. No. 24279-A at 10, citing Milwaukee Board of School Directors, Dec. No. 15825-B aff'd by operation of law, Dec. No. 15825-C (WERC, 7/79).

4/ Ibid., Citing, J.I. Case Co. v. NLRB, 253 F.2d 149 (7th Cir., 1958).

that Elgersma suffered any injury in the incident or that he was contemplating a Worker's Compensation claim.

Based on the foregoing, it does not appear that there was any information left for Respondents to provide that was "relevant and reasonably necessary" to the Complainant Union's carrying out its role in policing the administration of the parties' labor agreement. It appears to the Examiner that, rather than being a case of refusing to provide relevant information to the union, this is an instance of poor communications and suspicion as to the employer's intentions.

For the above reasons, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 17th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner