

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NWTC-FACULTY ASSOCIATION, Complainant,

vs.

NORTHEAST WISCONSIN TECHNICAL COLLEGE, Respondent.

Case 100
No. 59009
MP-3658

Decision No. 29955-B

Appearances:

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, Wisconsin 54305-1534, appearing on behalf of Northeast Wisconsin Technical College.

Attorney Laura Amundson, Associate Counsel, WEAC, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of NWTC-Faculty Association.

**ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS
OF FACT, CONCLUSION OF LAW AND ORDER**

On January 12, 2001, Examiner Sharon A Gallagher issued Findings of Fact, Conclusions (sic) of Law and Order with Accompanying Memorandum in the above matter wherein she determined that Respondent Northeast Wisconsin Technical College had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 or 4, Stats., by refusing to provide Complainant Northeast Wisconsin Technical College Faculty Association with certain information. She therefore dismissed the complaint.

On February 1, 2001, Complainant filed a petition with the Wisconsin Employment Relations Commission asking the Commission to review the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition -- the last of which was received April 9, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

Dec. No. 29955-B

ORDER

- A. Examiner Findings of Fact 1-9 are affirmed.
- B. Examiner Finding of Fact 10 is affirmed in part and modified in part to delete the scored through word as follows:

10. The parties entered into the following factual stipulation at the hearing in this case:

In October, 1999, there was an investigation. At least two employees were interviewed by College Representative Diaz, A__ and M__. A__ and M__ were then disciplined as a results (sic) of Diaz's investigation. Grievances were filed for A__ and M__, and those are now pending arbitration. On more than one occasion, the Union asked for Mr. Diaz' complete report. The District declined. Union Representative Wiegman saw ~~the~~ parts of the report which were not provided to the Union during the processing of the grievances. The Union, however, did receive three pages which are contained in this summary before the WERC in this case.

- C. Examiner Finding of Fact 11 is affirmed in part and reversed in part to read:

11. The Diaz report is 15 pages long. Association representative Wiegman reviewed a portion of the Diaz report but was not given a copy of the pages he reviewed.

- D. Examiner Findings of Fact 12-14 are set aside.
- E. Examiner Finding of Fact 15 is set aside and the following Finding is made:

12. The Diaz report is relevant and reasonably necessary to the Association's ability to administer the parties' collective bargaining agreement. The relevance of and need for the Diaz report predominates over the College's confidentiality

interests when access to a copy of the Diaz report is limited to Association representative Kundin and any legal counsel directly involved in the arbitration of the A__ and M__ grievances.

- F. Examiner Conclusion of Law is affirmed in part and reversed in part to read:

By refusing to provide Complainant Northeast Wisconsin Technical College Faculty Association with a copy of the Diaz report, Respondent Northeast Wisconsin Technical College committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., but did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats.

- G. Examiner Order is affirmed in part and reversed in part as follows:

ORDER

The portion of the complaint alleging a violation of Sec. 111.70(3)(a)2, Stats., is dismissed.

To remedy the violation of Secs. 111.70(3)(a)4 and 1, Stats., Respondent Northeast Wisconsin Technical College, its officers and agents, shall immediately take the following action that the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from violating its duty to bargain with the Northeast Wisconsin Technical College Faculty Association by refusing to provide the Association with information that is relevant and reasonably necessary to the Association's administration of the parties' collective bargaining agreement.
2. Take the following affirmative action:
 - A. Provide a copy of the Diaz report to Association representative Kundin.

- B. Notify all of the employees represented by the Association for the purposes of collective bargaining by posting, in conspicuous places on its premises where said employees work, copies of the Notice attached hereto and marked Appendix A. The Notice shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

- C. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate our duty to bargain with the Northeast Wisconsin Technical College Faculty Association by refusing to provide the Association with information that is relevant to and reasonably necessary for the Association to administer the terms of the collective bargaining agreement between the College and the Association.

WE WILL provide the Association with a copy of the Diaz report so that the Association can administer the bargaining agreement as to A__ and M__ grievances.

Northeast Wisconsin Technical College

Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

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

The Pleadings

In its complaint, the Association asserts that the College denied it access to a report that is relevant and necessary for the Association to represent two employees in pending grievance arbitration matters and thereby violated Secs. 111.70(3)(a)1, 2 and 4, Stats.

In its answer, the College admits denying the Association access to the entire report but contends that the entire report is not relevant and necessary to the Association's ability to represent the two employees and that the confidentiality of the report needs to be maintained to preserve the College's ability to effectively investigate harassment complaints in a manner that preserves the confidentiality of informants, complainants and witnesses. Thus, the College denies that it violated Secs. 111.70(3)(a)1, 2 or 4, Stats.

The Examiner's Decision

The Examiner concluded that the Association was not entitled to access the entire report because the Association had received the only portions of the report used by the College when deciding to discipline the two employees in question. In reaching her conclusion, the Examiner further determined that: (1) in the pages of the report that were provided to the Association, the two employees admitted engaging in the conduct that led to their discipline; and (2) the only issue in the pending grievance arbitration cases is the level of discipline that is appropriate.

Given her conclusion that the entire report was not relevant and reasonably necessary, the Examiner did not need to address the College's concerns about the confidentiality of the report. She did determine that the College had not waived any such concerns by distributing the report among College managers.

Given all of the foregoing, the Examiner dismissed the complaint.

POSITIONS OF THE PARTIES ON REVIEW

The Association argues that the Examiner committed errors of fact and law and thus should be reversed.

The Association contends that the entire report is relevant and necessary for it to administer the parties' collective bargaining agreement as to the A__ and M__ grievance arbitration matters. Without the entire report, the Association alleges that it cannot: (1) identify any relevant information it may need to process the grievances; (2) have full knowledge of the reasons for the employer's action and thereby be able to assess whether the employer acted appropriately; and (3) satisfy its duty of fair representation to the employees. Particularly under the "discovery-type" standard that should have been but was not applied by the Examiner, the Association argues that the report is clearly relevant and necessary.

The Association asserts that the College has not presented any legitimate confidentiality concerns that would override its right to receive the report. The Association argues that the report does not identify employees by name and notes that the identity of the complaining employee is known.

Given all of the foregoing, the Association asks that the Examiner be reversed and the report provided to it.

The College

The College urges affirmance of the Examiner.

DISCUSSION

In MORAINÉ PARK VTAE, DEC. NO. 26859-B (WERC, 8/93) and MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98), the Commission set forth the following general statement of the law applicable to the duty to furnish information:

It has long been held that a municipal employer's duty to bargain in good faith pursuant to Sec. 111.70(1)(a), Stats., includes the obligation to furnish, once a good faith demand has been made, information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. Whether information is relevant is determined under a "discovery type" standard and not a "trial type standard." The exclusive representative's right to such information is not absolute and must be determined on a case-by-case basis, as is the type of disclosure that will satisfy that right. Where information relates to wages and bargaining agent's duties such that no proofs of relevancy or necessity are needed and the burden is on the employer to justify its non-disclosure. In cases involving other types of information, the burden is on the exclusive representative in the first instance, to demonstrate the relevance and necessity of

said information to its duty to represent unit employees. The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. (footnote omitted)

Applying this general statement of law to the facts of this case, we conclude that the information sought by the Association is relevant to and reasonably necessary for the Association to administer the collective bargaining agreement as to the A__ and M__ grievances. Thus, we reverse the Examiner's determination to the contrary. We further conclude that the College's confidentiality interests do not predominate over the Association's interests in receiving the information where, as here, we have restricted access to the report to the Association's principal representatives. Therefore, we have ordered the College to provide a copy of the report to the Association.

As to the relevance of the report, the Association correctly notes that the applicable standard for relevancy is a very liberal one. Applying this liberal "discovery-type" standard to the facts of the case, the report is clearly relevant. The report contains information the employer compiled when investigating allegations of employee misconduct. Management representatives reviewed the report when determining whether misconduct occurred and what discipline was appropriate. The Association has a very real interest in enforcing the contractual protection it has bargained for the employees who are disciplined. The information in the report is not only relevant but also reasonably necessary to the Association's ability to enforce this contractual protection.

As noted above, the Examiner concluded the report was not relevant and reasonably necessary because the College relied only on A__'s and M__'s admissions of misconduct when administering discipline and because the pages of the report containing the admissions were provided to the Association. We disagree with the Examiner's conclusion for several reasons.

First, it is clear from the testimony of College management representatives that they reviewed the entire report before deciding whether and how to proceed with discipline. Thus, we disagree with the Examiner's factual premise. Second, even if the Examiner's factual premise was correct, the entire report might contain information that could be used to attack the level of discipline imposed upon the employees or would indicate that other employees also engaged in the type of conduct that led to the discipline. As the Association aptly points out, until it reviews the report, it cannot determine whether such information exists.

The College has identified confidentiality concerns and privacy interests that may be compromised if the report is provided to the Association. The Association attacks those concerns and interests by noting that the identity of the employee accuser is already known and

by pointing out that the employees are not identified by name in the report. Considering these matters, we are persuaded that where, as here, we have restricted access to the report to the Association's principal representatives, the confidentiality/privacy concerns do not predominate over the relevance and need for the Association to access the report for the purpose of representing grievants A__ and M__.

Given all of the foregoing, we conclude that the College violated Secs. 111.70(3)(a)4 and 1, Stats., by refusing to provide the Diaz report and we have reversed the Examiner's contrary conclusion. We have affirmed the Examiner's conclusion that the College's conduct did not violate Sec. 111.70(3)(a)2, Stats.

Dated at Madison, Wisconsin this 24th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner