STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, MILWAUKEE DISTRICT COUNCIL 48, AND ITS AFFILIATED LOCAL 567, Complainant,

vs.

MILWAUKEE COUNTY (SHERIFF'S OFFICE), Respondent.

Case 683
No. 68771
MP-4492

Decision No. 32728-A

Appearances:

Teresa C. Mambu-Rasch, Law Offices of Mark Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, for the Complainant.

Timothy R. Schoewe, Assistant Corporation Counsel, Milwaukee County, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the Respondent

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 1, 2009, Local 567, AFSCME, AFL-CIO, affiliated with Milwaukee District Council 48, filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County had committed unfair labor practices within the meaning of Sec. 111.70(3)(a) 1. and 4., Wis. Stats., by failing and refusing to bargain collectively with the exclusive representative of its employees. On May 28, 2009, the Commission appointed Stuart D. Levitan, a member of its staff, to conduct a hearing on the complaint and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Wis. Stats. Hearing in the matter was held on June 9, 2009, with a stenographic transcript being available to the parties by June 23, 2009. The parties filed written arguments and replies, the last of which was received on August 10, 2009. The undersigned Examiner hereby makes and issues the following

FINDINGS OF FACT

1. Complainant Local 567, AFSCME, AFL-CIO, affiliated with Milwaukee District Council 48, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent Milwaukee County is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. AFSCME District Council 48 and its Appropriate Affiliated Locals, including Local 567, and Milwaukee County have been parties to a series of collective bargaining agreements, the most recent of which covered the period 2005-2008.

4. On August 27, 2008, Correctional Officer DM, a member and former president of Local 567, was escorting an inmate to a medical clinic when the inmate escaped.

5. On or about November 20, 2008, following an initial hearing in September and a further hearing about six to eight weeks later, Milwaukee County, by its House of Corrections Human Resources Coordinator Ara Garcia, imposed on DM a ten-day unpaid suspension for violating Civil Service Rule VII, Sec. 4 (1), by allowing the inmate to escape. The County also took away DM's ability to carry a weapon while on duty.

6. In January, 2009, the Milwaukee County Sheriff assumed responsibility as the appointing authority for the House of Corrections, replacing the HOC Superintendent in that regard.

7. Suspensions such as DM's are not subject to the grievance procedure, but may be appealed to arbitration. On or about March 13, 2009, following affirmative votes by both its grievance committee and executive committee, the union asked the county's Director of Labor Relations to schedule an arbitration regarding DM's suspension. On March 17, the county notified arbitrator Herman Torosian that hearing in the matter had been set for March 30.

8. Another House of Corrections employee, Correctional Officer MN, had previously been disciplined for also allowing an inmate to escape while on a clinic run. MN was given a three-day suspension, and still allowed to carry a weapon on duty. To evaluate whether or not MN's discipline showed disparate treatment, in that DM suffered far more severe discipline than MN did for conduct that was seemingly similar, but possibly not as egregious, the union and its attorney on March 20, 2009, sent separate written requests to the Sheriff's Office and Corporation Counsel, respectively, seeking the following information:

1. The discipline history for Correctional Officer {MN}.

2. All "92s" for Correctional Officer {MN}, and corresponding IAD Investigation and Interview documents and materials.

3. All "92s" for Correctional Officer {DM}, and corresponding IAD Investigation and Interview documents and materials.

9. The union did not discuss its request with MN, who was informed of it by Garcia. MN told Garcia not to release any such information without MN's consent, which MN did not give.

10. On March 25, Garcia wrote union staff representative Penni Secore as follows:

> We receipt (sic) your request regarding Correction Officer {MN}, however, in accordance with Section 4.04 of the MOA, we need a written request from {MN} authorizing the release of personnel/confidential information.

11. The union did not provide a written request from either MN or DM authorizing the release of the requested information.

12. The county provided the information the union requested concerning DM, but has not provided the information which the Union requested regarding MN.

13. The collective bargaining agreement between the parties contains the following section:

> 4.04 PERSONNEL FILES
>
> (1) Employees or their designee shall have the right to examine the employee's personnel file and related documents at reasonable times in the office where such files are maintained. Upon receipt of an employee's request to examine these documents, the appropriate department head shall arrange a time and place where such examination may be made. In the event the department maintains more than one file or set of documents on an individual employee, all such files shall be made available to the employee at the time and place designated by the department head in the office where the file is maintained.
>
> (2) Examination of employee's files shall be conditioned upon the following:
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> (a) Neither the employee nor any person on his/her behalf shall remove the file or any documents contained herein (sic) from the office in which the inspection is conducted.

(b) Upon written request of the employee made upon forms furnished by the County, the department in which the employee's files are kept shall provide a photostatic copy or other reproduction of matters contained therein on the following conditions:

1. The documents to be copied shall be specifically identified on the request form.

2. Such documents shall be relevant to the purpose of the inspection which shall be stated on the request form.

3. Such copies shall be made available to the employee or his/her designee within 48 hours from the time of the request.

(c) Such inspection shall be conducted as expeditiously as possible and in a manner which does not interrupt the normal work of the department.

(3) Any correspondence made in writing to the appropriate department head concerning matters contained in such file shall be made a part thereof.

(4) Access to personnel files as stated above shall be limited to persons designated by the County to have access to the files. This is understood to exclude the public except as governed by Wisconsin statutory authority.

(5) Notice of an employee's participation in the grievance procedure shall not be placed in their personnel file.

14. Milwaukee County House of Correction has promulgated a form implementing section 4.04 of the collective bargaining agreement, as follows:

ACCESS AND DISCLOSURE OF PERSONNEL DOCUMENTS

Requestor's Name
Name of Employee's File(s) to Examine

Pursuant to Section 4.04 of the District Council 48 Contract, an employee or designee shall have the right to examine the employee's personnel record and related documents upon receipt of an employee's request.

Section to be completed by the employee:

Employee: Review of my Personnel File
Review of my Confidential File

Designee Only: I hereby consent _____ to the examination of my personnel file.
I hereby consent _____ to the examination of my confidential file.

Copies requested:

Pursuant to section 4.04 of the District Council 48 contract. An employee or designee shall have the right to receive copies of specific documents identified on the request form. The documents shall be relevant to the purpose of inspection, which shall be stated below, and these copies will be available within 48 hours.

Purpose: (reason why?)

Signature of Requestor

HOC USE ONLY
Date request received:
Date/time scheduled for examination:
Date copies submitted to employee or designee:
Name of payroll person(s) involved with examination:

15. In seeking material from employee personnel files, Complainant and its representatives have over the years routinely submitted written requests from the affected employees, on both county-supplied forms and ones it created.

16. On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

1. Because the Complainant's need for Correctional Officer MN's disciplinary files outweighed Respondent's legitimate need for confidentiality and/or privacy, Respondent violated Sec. 111.70(3)(a) 4., and, derivatively, Sec. 111.70(3)(a) 1., Wis. Stats., by refusing the Complainant's requests for such files to assist in its challenge to DM's discipline.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

1. To effectuate the purposes of the State Employment Labor Relations Act, it is ORDERED that the Respondent, Milwaukee County Sheriff's Office, immediately take the following affirmative actions:

A. Provide to Complainant a copy of the disciplinary files for Correctional Officer MN, including all "92's" and corresponding IAD Investigation and interview documents and materials.

B. Post, in conspicuous places in the offices where employees represented by Local 567 are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Sheriff or the Sheriff's designee, posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Respondent shall take reasonable steps to insure that this Notice is not altered, defaced or covered by other material;

C. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

2. It is further ORDERED that upon the conclusion of its challenge to DM's suspension, Complainant shall return the material to the Respondent, retaining no copies of the documents.

Dated at Madison, Wisconsin this 17th day of September, 2009

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES IN BARGAINING UNITS REPRESENTED BY THE
LOCAL 567, MILWAUKEE DISTRICT COUNCIL 48

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

> WE WILL NOT INTERFERE with the right of Local 567 members and their representatives to engage in lawful concerted activity for the purpose of mutual aid and protection by refusing to provide information and material reasonably relevant and necessary for Local 567 to fulfill its duty to administer the collective bargaining agreement between it and Milwaukee County.

Dated this _____ day of _____, 2009

By _____
Milwaukee County Sheriff (or designee)

MILWAUKEE COUNTY (SHERIFF'S OFFICE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The complainant labor organization asserts and avers as follows:

The county's failure to provide the requested necessary and relevant information violates MERA's well-established requirements. The county's position that the requirement under MERA must be harmonized with a separate statute relating to personnel files is flawed, in that such harmonization is neither relevant nor demanded by MERA. That the union did not provide authorization from {MN} is not relevant to whether the county had a duty to provide the requested information. The union understands it does not have total access to all documents in MN's file, and thus did not make an unlimited request, seeking instead only to inspect necessary and relevant documents to enable it to represent member DM in what may be a case of disparate treatment.

Accordingly, the complaint should be sustained and relief granted, including but not limited to the disclosure of the information sought, an order directing the county to cease and desist its illegal activities, the posting of appropriate notices, reimbursement to the union for all expenses including reasonable attorney fees, and such other remedial actions reasonable and necessary to ensure future compliance with MERA.

The respondent municipal employer asserts and avers as follows:

The dispute resolution mechanism relevant to this dispute is the referral to arbitration of certain disciplinary suspensions not determined via the Milwaukee County Personnel Review Board. The union request did not concern wages and benefits; thus, there is no presumed relevancy and necessity. Since its attempt to invade another employee's personnel file involved other types of information, the burden is on the union to demonstrate the relevance and necessity of obtaining the information. But when making the request, the union made no such showing.

The union is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. Here, such concerns and privacy interests exist. This brings into play a longstanding past practice as to how unions might access personnel files, attested to by the union's own witnesses.

Thus, there is no grievance, no contract negotiation, and no contract administration involved. The process the county uses was entirely consistent with the terms of the collective bargaining agreement. No action under the agreement was ever initiated to pursue relief under the grievance process.

The union's action is odd in that it repudiates a process established under the collective bargaining agreement. It was the union that did not follow file access provisions, and the union that did not seek any form of contractual relief. It was the union that did not conform to a process that was known, mutual and of longstanding.

In response, the union further posits as follows:

Contrary to the employer's assertion, the union has established that the information it sought was narrowly tailored, relevant, and necessary to representing DM. The union cannot effectively advance an argument based on disparate treatment without written documentation that the two employees were similarly situated, yet treated vastly differently.

The county further failed to expound on its statement about the existence of concerns over privacy and confidentiality. The record is deplete of any testimony as to any promises to the other employee about confidentiality. Employees also have lowered expectations of privacy regarding their disciplinary records.

The county further errs when it contends the matter does not fall under contract administration, even though it admittedly does not concern a grievance or contract negotiation. In requesting this information, the union is seeking to enforce the contractual clause relating to arbitration of disputed suspensions of ten days or less. The matter does concern contract administration, and the union thus has a statutory right to the requested information.

In response, the county posits further as follows:

The union's request is really more of a demand. It presumes that whatever is sought must be provided without limitation. This is not so.

The union has failed to address, but admits, that the underlying case was not even a grievance. Nor does the union address that the underlying contract was not extant when the demand was made.

The union's right to such information is not absolute and must be determined on a case-by-case basis. In cases involving information other than that relating to wages and fringe benefits, the burden is on the union to demonstrate the

relevance and necessity of the information. The union is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees.

The process of union access to personnel files was well documented, as were the facts that the practice has longstanding existence, is known and accepted as mutually understood and followed. That process is entirely consistent with the collective bargaining agreement. Yet the union failed to follow this practice and obtain the other employee's participation in access to her records.

The Commission should defer to the process the parties have agreed to and dismiss the complaint.

DISCUSSION

The complainant labor organization alleges that by refusing to provide the information it has sought concerning the discipline imposed on correctional officer MN, the employer has refused to bargain in good faith and thus violated sections 111.70(3)(a) 4. and 1., Wis. Stats. [1] I agree, and have ordered the County to provide the information.

It is well-settled that a municipal employer's duty to bargain in good faith 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. [2] As Commissioner Torosian summarized in his concurrence and dissent in MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93):

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[1] The statutes at issue provide:

> 111.70 (2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall also have the right to refrain from any or all of such activities....
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> 111.70 (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is prohibited practice for a municipal employer individually or in concert with others:
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> 1. To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in sub. (2)
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> . . .
>
> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit ....

[2] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88), affirmed DEC. NO. 24729-B (WERC, 9/88); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23094-A (Crowley, 6/86), *aff'd by operation of law*, DEC. NO. 23094-B (WERC, 7/86); OUTAGAMIE COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 17393-B (Yaeger,

> 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 fringe benefits, it is presumptively relevant and necessary to carrying out the 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 employes. The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employes. The employer is not required to furnish information in the exact form requested by the exclusive representative and it is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining. (Internal citations omitted).

In a case brought under the companion statute affecting state employees, the commission recently reversed the undersigned examiner and held that the employer's duty to bargain in good faith includes furnishing investigative materials relating to employee misconduct, prior to the imposition of discipline, at the point where the employer has decided there is enough evidence to require the employee to attend a pre-disciplinary hearing to respond to the charges. UNIVERSITY OF WISCONSIN SYSTEM, DEC. NO. 32239-B (WERC, 8/10/09). Although Respondent State of Wisconsin has appealed that decision to Circuit Court, the commission's analysis is relevant to the instant complaint:

> It is also well-settled that the "relevant and reasonably necessary" criteria are construed liberally, akin to a discovery standard. See generally MMSD, *supra*. In practice it has come to mean information that will be "useful" to the union in representing its members. In particular, it has already been established, contrary to the State's argument here, that a union's entitlement to information is not tied to the ripening of a grievance or grievable event. In MILWAUKEE BOARD OF SCHOOL DIRECTORS, the employer had tried to impose a policy whereby information responding to individual employee inquiries about their wages, seniority status, sick leave accrual, etc., would be provided to the union only if the union could establish that a "complaint" on the part of the employee about the employer's response to the employee's inquiry. Examiner Gratz held, with the approval of the Commission, "As noted above, it has long been held that it is not necessary that the information requested relate to a particular grievance, dispute, complaint or a previously expressed employee dissatisfaction." Id. at 10. On the other hand, the Commission has also long acknowledged that the right to information is not absolute. MMSD, *supra*, at 7. "The exclusive

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4/80), *aff'd by operation of law*, DEC. NO. 17394-C (WERC, 4/80).

> representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees." Id. at 7-8. That case sets forth the basic paradigm for analyzing cases like the instant one. The first inquiry is whether the union has met its burden to establish that the requested information meets the liberal contours of the "relevant and reasonably necessary" standard. If the union meets this prima facie standard, the Commission will then consider whether the employer has established legitimate and actual privacy or confidentiality concerns. At that point, the Commission looks more closely at the degree of the union's need for the information to determine whether it outweighs the employer's demonstrated legitimate concerns. As in any balancing test, access to the information will be limited only to the extent necessary to protect the employer's interests. Dec. No. 32239-B, at 8-9. (Internal citations omitted)

The initial stage of the duty-to-furnish-information inquiry is an evaluation of whether the requested materials are "relevant and reasonably necessary." As the Commission has instructed, "a union is entitled to information that will be *useful,* if … it relates on its face to bargaining unit members' working conditions…." DEC. NO. 32239-B at 12.

Among the Commission's "longstanding principles" is that a particular dispute need not have ripened to the point of a grievable event for the union's right to information vest. "Consonant with its legal duty to represent the interests of the entire bargaining unit," the Commission held, a labor organization "has an interest in the overall fairness and equity of the State's investigatory and disciplinary procedures. Overseeing the equitable administration of discipline is clearly related to the Union's duties in 'contract administration'." Ibid. at 10-11.

The union's theory of its challenge to DM's suspension was that his conduct was substantially equivalent to MN's, in that each let an inmate escape on a "clinic run," but that DM received a disproportionately severe punishment, especially given that DM had properly placed the inmate in restraints, while MN purportedly did not. Certainly, disparate discipline for substantially equivalent conduct is a legitimate basis for a grievance or appeal. Thus, the factual and analytical basis for MN's discipline is "relevant and reasonably necessary" for the union to have in pursuing DM's appeal to arbitration.

Having found that the requested information is "relevant and reasonably necessary" for the union to challenge DM's ten-day suspension on a theory of disparate discipline, I turn to the issues of confidentiality and privacy.

The county is correct that the labor organization is not entitled to relevant information "where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees." However, rather than actually *demonstrate* what those confidentiality concerns and/or privacy interests are, the county merely proclaims the conclusory statement: "In the instant case such concerns and privacy interests exist." Such an uncorroborated assertion falls short of the evidence-based analysis needed to rebut the union's

prima facie case. Indeed, confidentiality concerns and a privacy interests are separate and distinct considerations, and the county does not even indicate on which concept it is relying.

Moreover, the evidence at hearing indicates the employer would be hard-pressed to make a successful argument based on MN's privacy interest, inasmuch as the union was already aware of the situation, because it represented MN during that earlier episode. Indeed, the union witness in the instant matter had apparently been MN's representative in that matter. However, to ensure that the union does not use the material from MN's file for reasons other than challenging DM's discipline, I have also ordered that it return the material to the county and not retain any copies.

Also, I do not see how the employer can successfully cite "confidentiality concerns" as a reason to not provide documents pertaining to an investigation long after it was completed and discipline imposed, especially in light of the commission's decision in DEC. NO. 32239-B, in which it ordered the release of investigative files *prior to completion of the investigation and before the imposition of any discipline* [3]

The county maintains that it only provides material from personnel files in response to a written request from the employee involved. However, its actions are inconsistent with its insistence, in that it provided the material concerning DM, even though it never received the supposedly necessary written authorization.

Despite the county's rhetoric about the union "attempting to invade an employee's personnel file," the union here is only seeking specific documents directly related to the legal issues underlying its challenge to DM's suspension. The union request is narrowly tailored to its need.

The county also errs in relying on a purported past practice and related contract language. The fact that the union in previous situations submitted a written authorization from an affected employee does not bind it to doing so in all cases. And any waiver of statutory rights must be clear and unmistakable. [4] Here, neither the practice of the parties nor the language of the collective bargaining agreement constitutes the requisite clear and unmistakable evidence that the Union has waived its statutory rights in this regard.

The county also raised a number of procedural issues in its answer, but did not pursue these claims at hearing or in its written arguments. Accordingly, they are considered waived.

Documents about one employee's discipline which the union reasonably believes would show disparate treatment in another employee's discipline are relevant and reasonably necessary for the union to exercise its duty to fulfill its statutory responsibilities regarding

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3 It is important to note that this decision does not rest on Dec. 32239-B.

[4] CITY OF BROOKFIELD, DEC. NO. 11406-A (Bellman, 7/73), *aff'd by operation of law*, DEC. NO. 11406-B (WERC, 9/73).

collective bargaining and contract administration. The county has not demonstrated any valid

good faith concerns about confidentiality or privacy interests of MN to justify withholding the information the union has requested.

Accordingly, I have ordered the county to provide to the Complainant all necessary and relevant information regarding Correctional Officer MN's discipline, and to post the normal notice.

Dated at Madison, Wisconsin this 17th day of September, 2009

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

SDL/gjc
32728-A