STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT HUEMPFNER,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 97-0106-PC-ER

RULING ON MOTION FOR PROTECTIVE ORDER

This matter is before the Commission on respondent's motion for protective order, filed February 27, 1998. This motion seeks a protective order which would prevent complainant's discovery of a mental status report regarding complainant. Both parties have filed briefs. The findings which follow are based on the parties' briefs and supporting documents and appear to be undisputed. These findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. Complainant's employment with respondent was terminated on October 1, 1996.

2. This termination was grieved under the collective bargaining agreement.

3. On April 10, 1997, complainant voluntarily underwent an examination by Dr. Eric Hummell, Ph.D., at the request and expense of respondent, and in connection with the aforementioned grievance proceeding. The letter to complainant regarding the examination stated as follows:

> I [Jo Winston, Employment Relations Specialist] am in the process of considering your second step grievance request to rescind your termination and return to work. In order to evaluate the possibility of your return to work as a correctional officer, the Department requires an independent medical opinion regarding your fitness for duty.

4. Dr. Hummell prepared a mental status report on complainant dated May 16, 1997.

5. On July 11, 1997, complainant filed this complaint with this Commission. This complaint alleges discrimination on the bases of age and handicap (depression) with respect to discharge.

6. Respondent has advised it has not yet decided whether to call Dr. Hummell as a witness in either the now-pending arbitration or the hearing before this commission.

7. Complainant has attempted unsuccessfully to obtain a copy of the May 16, 1997, mental status report, through prehearing discovery.

DISCUSSION

Respondent objects to the discovery of the May 16, 1997, mental status report on the bases of lack of relevance and privilege. Respondent's relevance argument is based on the fact that the mental status report was prepared about seven months after complainant's discharge.

Pursuant to §PC 4.03, Wis. Adm. Code, the Commission has in effect incorporated by reference the provisions of Chapter 804, Stats. (Civil Procedure-Depositions and Discovery). Section 804.01 (2)(a), Stats., provides, *inter alia*:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

At this stage of this proceeding, and on this record, the fact that a mental status report was prepared about seven months after termination has enough inherent indicia of relevance to a discrimination complaint of this nature that it satisfies the criteria set forth in §804.01 (2)(a): "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Respondent also bases its objection to the discovery of this report on the ground of privilege. Respondent specifically cites §804.01 (2)(d) 2., Stats, which provides:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial *only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means*. (emphasis added)

Respondent contends that its use of Dr. Hummell's report fits into the category described in this section, and therefore complainant must make a showing of exceptional circumstances to obtain the report, which he hasn't done.

However, complainant relies on and categorizes this issue under the heading of §804.10, Stats., which provides as follows:

> **804.10 Physical and mental examination of parties; inspection of medical documents. (1)** When the mental or physical condition, including the blood group or the ability to pursue a vocation, of a party is in issue, the court in which the action is pending may order the party to submit to physical, mental or vocational examination. The order may be made on motion for cause shown and upon notice to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.
>
> **(2)** In any action brought to recover damages for personal injuries, the court shall also order the claimant, upon such terms as are just, to give to the other party or any physician named in the order, within a specified time, consent and the right to inspect any X-ray photograph taken in the course of the diagnosis or treatment of the claimant. The court shall also order the claimant to give consent and the right to inspect and copy any hospital, medical or other records and reports that are within the scope of discovery under s. 804.01 (2).
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> **(3)** (a) No evidence obtained by an adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other party or attorney not later than 10 days after reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a

> true copy of all reports of each person who has examined or treated the claimant with respect to the injuries for which damages are claimed.
>
> (b) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with any other statute.
>
> **(4)** Upon receipt of written authorization and consent signed by a person who has been the subject of medical care or treatment, or in case of the death of such person, signed by the personal representative or by the beneficiary of an insurance policy on the person's life, the physician or other person having custody of any medical or hospital records or reports concerning such care or treatment, shall forthwith permit the person designated in such authorization to inspect and copy such records and reports. Any person having custody of such records and reports who unreasonably refuses to comply with such authorization shall be liable to the party seeking the records or reports for the reasonable and necessary costs of enforcing the party's right to discover.

If Dr. Hummell's report is subject to §804.10, then §804.10 (3)(a), Stats., arguably requires respondent to provide complainant a copy of the report.

However, respondent contends that §804.10, Stats., is not applicable to this situation:

> Sec. 804.10 (1) authorizes a court to order a party to submit to a medical exam, on motion. This is not the situation here.
>
> Sec. 804.10 (2) applies in a personal injury action. This is not a personal injury action.
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> Sec. 804.10 (3) refers to examinations ordered under (1) or (2), and is therefore inapplicable.
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> Sec. 804.10 (4) authorizes the custodian of a medical report to release that report upon proper authorization by the subject of the report, but clearly the only reports covered are records relating to "medical care or treatment." Dr. Hummel was not a treating physician of Mr. Huempfner nor did he render medical care to Mr. Huempfner; he simply provided an expert opinion in anticipation of arbitration of Mr. Huempfner's grievance. Although this statutory section comes closest to the situation here in dispute, it does not apply because the disputed

> report is not a record relating to "medical care or treatment." (Respondent's reply brief, p. 3)

In the Commission's opinion, §804.10 does apply to the instant situation. While Dr. Hummell's examination was not made pursuant to an order, §804.10 (3)(b) specifically provides that "[t]his subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise." Based on this record, it appears that the examination was essentially done by mutual agreement—i.e., respondent told complainant it needed "an independent medical opinion regarding your fitness for duty" in order to evaluate the possibility of complainant returning to work in connection with a contractual grievance, and complainant complied with respondent's request and submitted to an examination. *See 8 Wisconsin Practice-Civil Discovery*, Grenig & Kinsler, §10.16, p. 298 (1996): "The exchange requirement applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise." (footnote omitted)

However, the application of §804.10 (3), Stats., does not resolve the question of whether respondent must produce the report. This section is unlike the Federal Rules of Civil Procedure, which explicitly provide that a party who has been examined pursuant to an order or agreement has an absolute right to a copy of the report on request:

> If requested by the party against whom an order [for examination] is made under Rule 35 (a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner. Rule 35 (b)(1), F.R. Civ. P.

Section 804.10 (3)(a), Stats., arguably gives the party procuring the report the option of withholding the report if the procuring party decides it does not want to enter evidence relating to the report at trial:

> No evidence obtained by an adverse party by a court-ordered examination under sub.(1) . . . shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination . . . and received by such adverse party have been delivered to the other party.

However, the Supreme Court has interpreted this subsection as embodying a directive to provide such reports to the adverse party, along with a prescribed penalty (prevention from using evidence related to the report at trial) for non-compliance.

Kablitz v. Hoeft, 25 Wis.2d 518, 522, 131 N.W. 2d 346 (1964), was decided under §269.57, Stats. (1961), the predecessor to the current §804.10, Stats. (1995-96). The material provisions of both sections are essentially the same. *See Judicial Council Committee's Note-1974*, which states that "[§804.10 (3)(a)] is derived from §269.57 (3)." *Kablitz* addresses the question of whether the trial court erred in allowing the plaintiff to call adversely the doctor who had examined the plaintiff at the defendants' request. The opinion addresses the discoverability of the medical report as follows:

> Respondent contends that unless he is able to call appellants' doctor adversely under sec. 325.14, Stats., the only way he will be able to learn the results of the examination is to call the doctor on direct and take the chances that go with making him his own witness. Respondent overlooks the fact that discovery examination may be conducted of the doctor (even though not an agent) prior to trial under sec. 326.12, and that *the defendant may be compelled to supply the plaintiff with a copy of the doctor's report under the provisions of sec. 269.57.* (footnote omitted)

Also *see 8 Wisconsin Practice-Civil Discovery*, Grenig & Kinsler (1996), §10.16, pp. 296-97:

> W.S.A. 804.10 (1) does not require an examiner to prepare a report of the court-ordered physical or mental examination. However, if the adverse party receives a report from the examiner, W.S.A. 804.10 (3)(a) also provides sanctions for failure to meet that [sic] the disclosure requirements. (footnote omitted)

Another question is whether §804.10 (3)(a) applies to non-personal injury actions. This subsection does use the term "injuries for which damages are claimed." However, this phrase is found only in the second sentence of this subsection, which

sets forth the injured party's obligation to exchange reports once he or she has received a copy of the court-ordered examination (or examination made by agreement):

> (3) (a) No evidence obtained by an adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other party or attorney not later than 10 days after the reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a true copy of all reports of each person who has examined or treated the claimant with respect to the *injuries for which damages are claimed.* (emphasis added)

Therefore, it appears that any limitation of §804.10 (3)(a) to personal injury actions applies only to the requirement that the person claiming damages provide copies of medical reports to the party causing the examination to be made, in exchange for a copy of the latter examination report:

> [T]he examining party must provide copies of reports of court-ordered examinations to the claimant in all cases under the first sentence of W.S.A. 804.10 (3), but the examining party is only entitled to exchange copies of such reports for copies of reports in the possession of the examinee if (1) the action is a personal injury action, or (2) there is an agreement under W.S.A. 804.04. However, [t]he failure of W.S.A. 804.10 (3)(a) to provide for an exchange of reports in non-personal injury actions is mitigated by the second sentence of W.S.A. 804.10 (3)(b), which provides that W.S.A. 804.10 (3) does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with any other statute. *Id.*, at 297-98. (footnote omitted)

Because of the conclusion that complainant is entitled to a copy of Dr. Hummel's report, respondent's motion for a protective order must be denied. Complainant has requested attorney's fees and costs in connection with this motion. Pursuant to *Dept. of Transp. v. Wis. Personnel Comm.*, 176 Wis.2d 731, 500 N.W. 2d 664 (1993), this Commission lacks the authority to order a state agency to pay

attorney's fees and costs related to a discovery motion, and therefore this request must be denied.

ORDER

1. Respondent's motion for a protective order, filed February 27, 1998, is denied.

2. Complainant's request for attorney's fees and costs with respect to said motion is denied.

3. Respondent is to provide a copy of said report to complainant within 20 days of the entry of this order.

Dated: May 6, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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