

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE COMMISSIONER OF VETERANS AFFAIRS

Henry G. Hanson,
Petitioner,

ORDER ALLOWING DISCOVERY

vs.

AND

Itasca County,
Respondent

PROTECTIVE ORDER

This matter came before Administrative Law Judge Steve M. Mihalchick by telephone conference on July 13, 2004, on a motion by the County for a protective order. Michael J. Haig, Assistant Itasca County Attorney, 123 NE 4th St., Grand Rapids, MN 55744, appeared on behalf of Itasca County. Ellen Tholen, Attorney at Law, 525 Itasca St., Grand Rapids, MN 55744, appeared on behalf of Henry G. Hanson.

Petitioner seeks discovery of a file maintained by the County in its ongoing investigation of a threat of violence incident report filed by Petitioner on December 15, 2003. The County Attorney, as authorized by Minn. Stat. § 13.39, subd. 1, has determined the investigation to be a "pending civil legal action." Therefore, the data in the file are "confidential data" governed by the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13. The County opposes release of the data to Petitioner.

The Minnesota Government Data Practices Act provides for a special two-part test when discovery disputes like this occur. Under Minn. Stat. § 13.03, subd. 6, the two-part test is as follows:

The presiding officer shall first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action.

If the data are discoverable the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data.

The two-part analysis is mandatory and requires an *in camera* review of the contested data by the presiding officer.^[1] Therefore, during the telephone conference, the Administrative Law Judge ordered the County to fax the contested data to the Administrative Law Judge, which the County promptly did. The data consists of two forms completed by Petitioner regarding an incident of October 20, 2003, in which he alleges that Superintendent Joe Miskovich threatened him and mentions some other

threats and intimidating actions; typed notes by the County's investigator of her interview and subsequent conversations with Bill Bruce, who witnessed the October 20, 2003, incident; and handwritten notes by the investigator of her interview of Joe Miskovich.

Under the discovery rules of the Office of Administrative Hearings, a party must disclose, upon demand, any relevant written or recorded statements of a party or witness. Further, any means of discovery under the Minnesota Rules of Civil Procedure is allowed, but the party seeking discover must show that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and the issues or amounts in controversy are significant enough to warrant the discovery.^[2]

Having reviewed the documents, the Administrative Law Judge finds that all four of them are discoverable. One issue in this case is Petitioner's argument that Miskovich's threat demonstrates that the County's placing of him on a medical leave of absence was a subterfuge for removing him for improper reasons. Miskovich and Bruce will be asked to testify on the circumstances of the incident, as will Petitioner. All their statements and notes of statements to the investigator are relevant to a significant issue and important to Petitioner's presentation of his case.

The Administrative Law Judge also finds that disclosure of the data to Petitioner outweighs any harm to the confidentiality and privacy interests of the County and individuals concerned, and that no further notice to agencies or persons is required. The County primarily argues that Petitioner has never set forth his view of the incident in specific detail, so he may be able to tailor his testimony in this case and later to fit the statements of Miskovich and Bruce. Petitioner described the October incident in fair detail in his December 15, 2003, Incident Report and in his Petition to the Department of Veterans Affairs. He didn't submit the Complaint Form until today, and he did not provide any details on that form, but there is no indication by the investigator that she requested an interview of Petitioner that he declined, nor is there any indication that the County requested any discovery of Petitioner in this matter asking that he set forth his claim in greater detail. Nothing in the documents provides any cues as to investigation tactics that might impair the investigation. It appears that the investigator prepares for the interviews ahead of time, asks appropriate and predictable questions, follows up with good questions, and notes the responses in detail. There is no harm to Petitioner in revealing the forms that he completed. Nor is there any harm to Miskovich or Bruce. Both will be witnesses and it will be entirely appropriate to ask them about prior statements they have made about the incident.

NOW, THEREFORE, the Administrative Law Judge makes the following:

ORDER

1. The County shall provide copies of the four documents provided to the Administrative Law Judge to Petitioner's counsel by 12:00 noon, July 14, 2004. The County shall advise Miskovich and Bruce that the notes of their statements to the investigator are being provided to Petitioner's counsel.

2. Disclosure of not public data pursuant to this Order is limited to parties, counsel of record, and employees assisting counsel, to the extent necessary to prepare and present claims and defenses;

3. The data encompassed by this Order may be used only in this proceeding and not for any other purpose. No copies shall be made.

4. Upon completion of this proceeding and any appeals, all disclosed data shall be returned to the County.

5. The hearing in this matter shall be public, but shall be closed temporarily if it is necessary to discuss the not public data in the disclosed documents and the record thereof shall be maintained as not public data.

Dated July 13, 2004

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

^[1] *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987); *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990).

^[2] Minn. R. 1400.6700.