STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO Complainant, vs. STATE OF WISCONSIN, Respondent.	:	Case CXXXIII No. 24823 PP(S)-61 Decision No. 17115-B

Appearances:

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703 by Mr. Richard V. Graylow appearing on behalf of Complainant.

Mr. Sanford N. Cogas, Attorney at Law, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

JAMES D. LYNCH, EXAMINER: A complaint was filed with the Wisconsin Employment Relations Commission on June 25, 1979 alleging that Respondent had committed certain prohibited practices within the meaning of Section 111.84, Wis. Stats.; thereafter the Commission appointed Marshall L. Gratz to make and issue Findings of Fact, Conclusions of Law and Order; however, due to the unavailability of Examiner Gratz, the Commission on December 13, 1979 issued an order substituting Examiner in which it appointed James D. Lynch to act as Examiner in this matter; this matter was heard pursuant to notice on February 11, 1980 at the Commission's office in Madison, Wisconsin; post-hearing briefs were filed with the Examiner by March 27, 1980; and being fully advised in the premises, having considered the evidence and arguments of counsel, the Examiner hereby makes the following Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 111.81(9), Wis. Stats. The Union is the exclusive bargaining representative of some approximately 25,000 employes of the State of Wisconsin in the blue collar building trades, the technical security and public safety, clerical and related, professional research statistics and analysis bargaining units. Mr. Thomas King is the Union's Executive Director and was at all times material hereto the Union's chief spokesperson for the purposes of collective bargaining.

2. The State of Wisconsin, hereinafter referred to as the State, is an Employer within the meaning of Section 111.81(16), Wis. Stats. Mr. James Phillips is employed by the State as its Chief Negotiator and Deputy Administrator in its Division of Collective Bargaining, Department of Employment Relations. Mr. Phillips was, at all times material hereto, the Employer's chief spokesperson for the purposes of collective bargaining.

3. The Union and the Employer were signatories to a collective bargaining agreement covering the wages, hours and working conditions of the employes referred to in Finding of Fact No. 1, supra. This agreement by its terms was to and did expire on June 30, 1979.

4. During June of 1979, among other times, the Union and the Employer were engaged in negotiations for a successor collective bargaining agreement to replace the then extant collective bargaining agreement which was due to expire on June 30, 1979.

5. On June 11, 1979, during the course of the bargaining described above, the Employer through Mr. Phillips tendered to the Union "for its consideration" an initial wage proposal of approximately 6 percent per annum for the fiscal years 1979 and 1980. The Union, through Mr. King, then inquired of Mr. Phillips for an explanation of how the State had arrived at the 6 percent figure for its wage offer as one "that was fair and equitable and justifiable in line with the current economy."

6. In response to Mr. King's inquiry above Mr. Phillips stated that ". . . we had looked at similar jobs in the public and private sector and their levels of compensation, that we had looked at levels of settlement in the private and public sector, that we had looked at wage and price controls and the results and settlements under those, that we had looked at various settlements that had been made available that was information available to us at that time."

7. This information was derived from newspapers, the Bureau of National Affairs subscription service and from a survey of both private and public sector employers.

8. The Union then made a formal request that the Employer make available to it all information, documents and materials which the Employer had used in formulating its initial six percent wage offer.

9. The Employer, by Mr. Phillips, refused to provide such information alleging that the State had no obligation to present any information which they had used to reach their conclusion that six percent was justified.

10. The Union thereafter refused the Employer's first wage proposal as inadequate but made no specific counterproposal in response thereto.

11. On June 14, 1979, the Employer tendered to the Union a second wage proposal of approximately six and one-half percent per annum for fiscal years 1979 and 1980.

12. The Union again made a formal request for information asking specifically upon what additional information was the Employer relying as justification for increasing its wage offer one-half percent in each year.

13. The Employer thereafter refused to provide such information contending that it was under no obligation to do so.

Upon the basis of the above and foregoing Findings of Fact, the Examiner herein makes and renders the following

CONCLUSION OF LAW

1. The Respondent, State of Wisconsin, by its failure to divulge certain information requested by Complainant during the course of

bargaining in June 1979 did not commit prohibited practices within the meaning of Sections 111.84(1)(a) and (d).

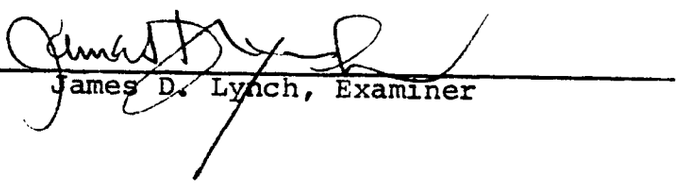
Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner hereby makes and enters the following

ORDER

That the complaint filed herein shall be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Facts

The facts herein are simple and undisputed. 1/ In June of 1979 the Union and the Employer were engaged in collective bargaining for a successo labor agreement to the agreement existing between them which was to expire on June 30, 1979. On June 11, 1979, the Employer tendered to the Union an initial wage offer of approximately 6% per annum for the fiscal years 1979 and 1980. The Union asked the Employer for an explantation of how the Employer had arrived at the 6% wage figure as one "that was fair and equitable and justifiable in line with the current economy." The Employer responded that it " . . . had looked at similar jobs in the public and private sectors and their levels of compensation, that we had looked at levels of settlement in the private and public sector, that we had looked at wage and price controls and the results and settlements under those, that we had looked at various settlements that had been made available that was information available to us at that time." The Union then made a formal request of the Employer to be provided with all information documents and materials which the Employer had used in formulating said offer. The Employer refused to provide such information stating that it was under no obligation to so do. The Union thereafter rejected the Employer's wage offer. On June 14, 1979, the Employer made a second wage offer of 6 1/2% per annum for the fiscal years 1979 and 1980. The Union again made its request for information similar to that which it had earlier requested and the Employer made a similar refusal. At a later date the parties entered into a collective bargaining agreement addressing, among other items, the issue of wages.

Position of the Union

The Union contends that it is entitled to the requested information because it is relevant and necessary to it in its capacity as bargaining agent in considering the wage issue presented during negotiations with the State. The Union argues that in order to meaningfully evaluate the fairness of the Employer's offer it must have access to the information upon which the Employer relied when it formulated its wage proposals. The Union denies that the subsequent bargaining agreement covering wages among other issues acts to moot the instant controversy.

Position of the Employer

The Employer contends that it was under no legal obligation to provide the requested information and, thus, has not committed a prohibited practice by its refusal to so provide. The Employer argues that to require disclosure of the reasons upon which initial bargaining proposals are premised would contravene the realities of the collective bargaining process. It argues that adoption of such an approach as that urged by the Union would mandate a system in which each side could only present an offer which could be "statistically supported as the best and fairest." Lastly, the Employer argues that this action is moot in view of the successor bargaining agreement reached between the parties covering wages subsequent to the complained of refusal.

1/ A more detailed recitation of the facts herein is contained in the Findings of Fact.

DISCUSSION

Mootness

Initially, the Employer's defense that this matter is moot by virtue of successor agreement subsequently reached between the parties encompassing the issue of wages is without merit. 2/

Duty to Disclose Information

The applicable recital of the law in this area is as follows:

> "Intertwined with the duty to bargain in good faith is a 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. 3/

The origin of this duty is derived from the duty to bargain with its stated goal of encouraging the voluntary settlement of labor disputes through collective bargaining by means of full, frank and honest discussion of the issues between the parties. 4/

While the scope of this duty has been characterized variously as involving a discovery type standard 5/ not unlike that prevailing under modern procedural codes, 6/ a review of the cases construing the duty establishes that it arises where the Employer has placed a matter in issue at the bargaining table, such as an alleged inability

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2/ See Watkins v. DILHR 69 Wis. 2d 782 (1975); and Siegel Co. v. NLRB 58 LRRM 2182 (2d Cir. 1965) wherein the court stated:

> "When the issue has been pressed throughout, the party unable to force the other to bargain or to include an agreed provision in the written contract does not "waive" a completed refusal to bargain simply by signing up for the best it can get. It would seriously contravene the basic objective of industrial peace to place such a party in the predicament where it could make a valid charge of an unfair labor practice only if it forewent a contract altogether." at 2183.

3/ Sheboygan Education Association v. Board of Education Joint School District No. 1, City of Sheboygan, et al, No. 11990-A (10/74); aff'd in relevant part No. 11990-B (1/76).

4/ Id; NLRB v. Truitt Mfg. Co., 351 US 149, 38 LRRM 2042 (1956); General Electric Co. v. NLRB, 81 LRRM 2303 (6th Cir. 1972); See also Section 111.80(4), Wis. Stats., which provides in pertinent part:

> "It is the policy of this state, in order to preserve and promote the interest of the public, the state employe and the state as an employer alike, to encourage the practices and procedures of collective bargaining in state employment . . . ."

5/ NLRB v. Acme Industrial Co., 385 US 432, 64 LRRM 2069 2071 (1967)

6/ NLRB v. Yawman & Erbe Mfg. Co., 27 LRRM 2524 2525 (2d Cir. 1951).

to pay 7/ or an alleged competitive disadvantage 8/, such that the employer is under a duty to disclose information to the union in order that it may substantiate the employer's claim. The Examiner is unaware of any reported cases factually similar to this instant one in which the union has sought to place in issue the underlying basis for an employer's initial wage proposal in the absence of an employer's claim making it pertinent. 9/

Policy Considerations

Therefore, in order to determine whether this information must be disclosed to the Union, the impact of requiring such disclosure upon the bargaining process must be considered. For, if bargaining would be fostered by release of this information then the broad policy favoring collective bargaining as a dispute resolution mechanism would dictate that the information be disclosed. A brief restatement of the arguments regarding the applicable policy considerations may serve to better define the focus of this inquiry. The Union's argument is, simply, that in order to fullfill its obligation as bargaining agent in assessing the reasonableness of the Employer's wage offer, it must have the opportunity to inspect the information upon which the Employer relied in formulating its wage proposal. The Employer's argument is that the Union is seeking to compel disclosure of information by attempting to place the reasonableness of its wage offer in issue so that the Union might gain tactical advantage which it can then exploit in the bargaining process. The Employer argues that the compromise and incremental adjustment at the very heart of the bargaining process would be jeopardized by requiring it to submit the data upon which it based its initial wage proposals.

There can be no doubt that the information requested would be helpful to the Union. 10/ However, there can be no doubt that to mandate disclosure of this information in the absence of any Employer claim making it pertinent would call into dispute the bases for initial wage offers at a particular critical juncture in the bargaining process when strategic considerations are rife. Such mandated

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7/ Truitt, supra n.4.

8/ NLRB v. Western Wirebound Box Co, 61 LRRM 2218 (9th Cir. 1966).

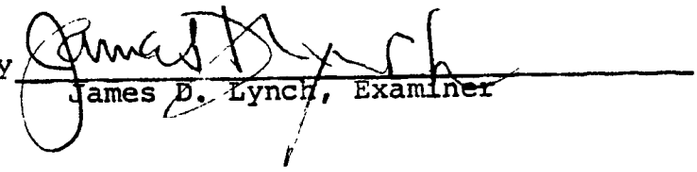
9/ Complainant cites Curtiss-Wright Corp v. NLRB, 347 F. 2d 61, 59 LRRM 2433 (3rd Cir. 1965) for the proposition that wage surveys are per se relevant information which must be disclosed upon request to the Union. Curtiss-Wright, however, was concerned with a factual situation in which the Employer had an established policy of tying its wage structure to the average level of wage payments it derived from the results of such surveys. In that situation, the court enforced a NLRB order requiring the Employer to provide such wage survey information to the Union so that it might verify the accuracy of the Employer's wage structure . As the record herein fails to establish a similar pattern or practice by the Employer with respect to its method of determining a wage structure, Complainant's reliance upon Curtiss-Wright as support for the view that an Employer must divulge all wage survey information is misplaced.

10/ Cf. International Woodworkers of America v. NLRB, 43 LRRM 2462 (D.C. Cir. 1959) (production and sales data need not be disgorged in absence of an employer claim making it pertinent merely because it would be helpful to the Union in bargaining).

disclosure would strip the Employer of its ability to bargain as that term is commonly understood. This fact, coupled with the fact that there is no showing that the information is relevant and necessary, as opposed to merely helpful, requires the conclusion that no valid purpose would be served by the production of said information. Therefore, the Employer, by its refusal to provide said information has not committed prohibited practices. Accordingly, the complaint filed herein shall be, and thereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner