STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANESVILLE PUBLIC EMPLOYEES' UNION, LOCAL 523, AFSCME, AFL-CIO, Complainant, vs. CITY OF JANESVILLE, Respondent.	Case 47 No. 35446 MP-1746 Decision No. 22943-A

Appearances:

Mr. David Ahrens, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin, appearing on behalf of Complainant.

Ms. Berta S. Hoesly, City Attorney, City of Janesville, City Hall, 18 North Jackson Street, Janesville, Wisconsin, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 24, 1985, Janesville Public Employees' Union, Local 523, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission, in which the Union alleged that the City of Janesville had committed prohibited practices within the meaning of the Municipal Employment Relations Act by refusing, upon oral and written requests of the Union, to release 1985 performance evaluations for all bargaining unit employes. On October 1, 1985, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes. Hearing on the matter was held on October 23, 1985 at Janesville, Wisconsin. A transcript of the proceeding was issued on November 15, 1985 and the parties filed briefs which were received by December 19, 1985.

Having considered the argumnents and the record, the Examiner makes and issues the following

FINDINGS OF FACT

1. That Janesville Public Employees' Union, Local 523, AFSCME, AFL-CIO (the Union) is an affiliate of Wisconsin Council 40, AFSCME, AFL-CIO and is a labor organization which has offices located at 5 Odana Court, Madison, Wisconsin 53719.

2. That the City of Janesville (the City) is a municipal employer which has offices located at City Hall, 18 North Jefferson Street, Janesville, Wisconsin 53545.

3. That for many years the City has regularly performed performance evaluations on all administrative (unrepresented) employes in May or June each year and has traditionally issued merit increases to employes based upon these evaluations in amounts ranging from -1% to 3% of salary, given in one percent increments.

4. That generally after annual evaluations are completed, the employe's immediate supervisor meets with the employe concerning the evaluation; and that employes are not told, either at the conference with their supervisor regarding their evaluations nor at any other time, that employe evaluations are and will be held strictly confidential.

5. That from eight to nine clerical and that managerial and/or supervisory City employes see and process evaluation forms; that they have not been cautioned to keep the contents of the forms confidential; and that employes discuss their evaluations with other City employes.

6. That in May and June, 1985, the City completed performance evaluations for its then-administrative Police Department employes.

7. That on June 6, 1985, the Wisconsin Employment Relations Commission conducted an election pursuant to a petition filed by Wisconsin Council 40, AFSCME, AFL-CIO, among employes in the following appropriate unit:

> all regular full-time and regular part-time employes without the power of arrest employed at the City of Janesville Police Department, excluding confidential, supervisory and managerial employes and employes with the power of arrest.

8. That on June 19, 1985, the Wisconsin Employment Relations Commission certified Wisconsin Council 40, AFSCME, AFL-CIO as the exclusive collective bargaining representative of the employes in the unit described in Finding No. 7 above.

9. That by letter dated July 2, 1985, the City informed the Union that it intended to process and distribute merit increases to some employes (in the unit described above) on the August 9, 1985 employe paycheck, making the increase retroactive to July 1, 1985, unless the Union objected thereto in writing by August 5, 1985.

10. That by letter dated July 5, 1985 the Union sought a July 18 meeting with the City for the initial exchange of bargaining proposals and a July 31 first negotiation session and the Union also requested the names of all employes in the unit described above who were to receive a merit increase, the amount of each increase and the "1985 evaluation for all individuals in the bargaining unit."

11. That by letter dated July 8, 1985, the City agreed to the July 18 and July 31 meetings sought by the Union and listed the names of all unit employes who would be receiving merit pay along with the percentage increase for each person, but refused to release the 1985 evaluations on the ground that "the City is not required to provide this information."

12. That by letter dated July 9, 1985, the Union threatened to charge the City with a violation of Sec. 19.21, Wis. Stats., for refusing to release the 1985 performance evaluations of all unit employes; and that by letter dated July 11, 1985, the City responded that it considered the requested performance evaluations to be confidential personnel documents, exempt from disclosure under Sec. 19.21, Wis. Stats., and that certain prerequisites would have to be met before the City would release them: (a) if the Union made a request to bargain about the implementation of merit pay increases or (b) if employes gave the Union permission to receive copies thereof then they would be released.

14. That by letter dated July 31, 1985, the Union informed the City that it concurred with implementation of merit increases for unit employes but stated that by doing so, the Union did not necessarily concur with the "methods used to determine wages levels" nor did it thereby waive its right to bargain "for additional raises to correct inequities not addressed by or perhaps created by this retroactive (merit) increase."

15. That the City granted merit pay increases, retroactive to July 1, 1985, to employes who had been found meritorious thereof on their August 9, 1985 paychecks.

16. That from July 18 to the date of hearing (October 23, 1985) neither the Union nor the City made any proposals or engaged in any negotiation regarding the merit pay evaluation system, the content of evaluation forms or the amount of increases granted in 1985, although the Union renewed its request for 1985 evaluations at the July 18 meeting in order to fashion a wage proposal.

17. That performance evaluations have a direct and integral relationship to the amount of merit pay received by employes and that the City intends to cost merit pay increases (granted effective July 1, 1985) into the total economic package offered by the City to unit employes; and that the requested evaluations are relevant to the Union's role and responsibilities as exclusive collective bargaining representative of the employes in the unit described in Finding No. 7 above.

18. That to date, the parties have not reached agreement on an initial contract for the above-described bargaining unit.

CONCLUSIONS OF LAW

1. That the information requested by Complainant Union--all 1985 performance evaluation forms for employes in the above unit--is relevant and reasonably necessary to the Union's fulfillment of its responsibilities as exclusive bargaining agent for the above-described bargaining unit; that Respondent City of Janesville, by its agents, refused to bargain collectively in good faith within the meaning of the Municipal Employment Relations Act with Janesville Public Employees' Union, Local 523, AFSCME, AFL-CIO, as the collective bargaining representative of certain of its employes, by refusing to furnish said labor organization with the 1985 performance evaluations for all bargaining unit employes, used or relied upon or to be used or relied upon by Respondent during collective bargaining with said labor organization to support its wage offers for an initial contract, and that, therefore, City of Janesville, by it agents, committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

2. That Respondent City of Janesville, has interfered with, restrained and coerced municipal employes by, refusing to release unit employes' 1985 performance evaluations to the Union within the meaning of Sec. 111.70(3)(a)(1) of the Municipal Employment Relations Act.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Respondent City of Janesville, its officers and agents, shall immediately:

1. Cease and desist from

(a) refusing to bargain collectively with Janesville Public Employees' Union, Local 523, AFSCME, AFL-CIO, as the exclusive collective bargaining representative of certain employes of Respondent City of Janesville, by refusing to furnish said labor organization, when requested to do so, with information which is relevant and reasonably necessary to said labor organization's duty and responsibility as said collective bargaining representative, including all 1985 performance evaluations for all bargaining unit employes which Respondent has used or relied upon or will use or rely upon in support of wage and salary offers made or to be made by it during collective bargaining.

(b) In any like or related manner interfering with, restraining or coercing employes in the exercise of rights guaranteed under Sec. 111.70(2), Stats.

2. Take the following affirmative action which the Examiner finds will effectuate the purpose of the Municipal Employment Relations Act:

(a) upon request, timely furnish the Complainant Janesville Public Employees' Union, Local 523, AFSCME, AFL-CIO with information relevant and necessary to collective bargaining.

(b) notify all employes in the unit described above in Finding No. 7, represented by Complainant, of its intent to comply with the Order herein by posting in conspicuous places on its premises where notices to employes are usually posted, copies of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by the City's Chief Negotiator and shall be posted upon receipt of a copy of this Order. Such Notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.

ORDER 1a/

. . .

1a/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

(c) notify the Wisconsin Employment Relations Commission, in writing within twenty (20) calendar days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 4th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher
Sharon A. Gallagher, Examiner

APPENDIX A

Notice to Employes Represented by the Janesville
Public Employees' Union, Local 523, AFSCME, AFL-CIO

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 all employes, that:

WE WILL upon request timely furnish to the Union all information it seeks that is relevant and necessary to enable it to bargain collectively, including all 1985 performance evaluations for employes in the unit described below for which the Union is the duly authorized collective bargaining agent:

all regular full-time and regular part-time employes without the power of arrest employed at the City of Janesville Police Department, excluding confidential, supervisory and managerial employes and employes with the power of arrest.

WE WILL refrain from all other forms of interference, restraint and coercion of employes in the above-described unit in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this _____ day of _____, 1986.

By_____
Chief Negotiator
City of Janesville

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL

CITY OF JANESVILLE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the City violated Sec. 111.70(3)(a)4 and 1 by refusing since July 18, 1985, to release 1985 performance evaluations for all employes in the newly-certified bargaining unit represented by the Union. 1/ The facts are essentially undisputed in this case. The dispute between the parties involves applicable law.

POSITIONS OF THE PARTIES

The Union argues that where a labor organization representing employes makes a request for information, it is not necessary to have a current contract or a pending grievance regarding the subject matter of the requested information. Rather, the Union argues, its right to information is a broad one, if the information requested is relevant to negotiations. Second, the Union asserts that employers must bargain concerning mandatory subjects of bargaining which include wages and merit pay. In addition, the Union asserts that wages and merit pay are not distinguished under the Wisconsin Employment Relations Commission's decision in Board of School Directors of Milwaukee, Dec. No. 15825-B (Yaeger, 6/79); that the procedures used in evaluating public employes as well as the consistency of the evaluation methods used are mandatory subjects of bargaining under the case law (citing Beloit Education Association v. W.E.R.C., 73 Wis.2d 43, 55-6 (1976) and School District of Janesville, Dec. No. 21466 (WERC, 3/84)). Thus, the Union argues that the information it requested--all 1985 performance evaluations--is information relating to mandatory subjects of bargaining. Since the Union has requested this information in order to bargain wage levels, the information should be released to the Union under Secs. 111.70(3)(a)1 and 4, Stats., without the need for the Union to gain employe permission, to file a grievance on the subject or to make a specific proposal regarding merit pay or the evaluation system.

In contrast, the City argues that Sections 19.21, 19.35 and 19.85, Stats., control this case and allow the City to refuse to release employe performance evaluations, in these circumstances. The statutory sections cited refer to the duties of public officials regarding the release of records and consideration of records in official meetings in the State of Wisconsin. The City essentially argues that based upon these statutory provisions, the City could treat performance evaluations as confidential information not to be released to the "public"; that the City could treat the Union as merely part of the "public" since the Union's status as collective bargaining representative of unit employes gives it no special priveleges vis a vis these documents. The City further argues that the Union has not shown that the requested information was needed or that it would be used in negotiations. The City points out that the Union's statement that it needed the performance evaluations in order to fashion a wage proposal is insufficient to show the relevance and necessity of the evaluation forms in negotiations. Further, the City asserts that if a grievance were pending or if the Union had requested to bargain regarding the increases granted or the evaluation system itself, or if employes had given their permission for release of these documents to the Union, then the City would release the evaluations to the Union. However, none of these contingencies has been met and the City asserts that the Union has failed to prove its case. The City requests that the complaint be dismissed as MERA does not apply to this case and, in any event, there has been no refusal to bargain and no interference restraint or coercion of employes under MERA. The City asserts that the Union is in the wrong forum; that its claim arises, if at all, under Sec. 19.97, Stats., and that the Wisconsin Employment Relations Commission lacks subject matter jurisdiction of the Union's claims.

1/ The Union represents City employes in other bargaining units. The only unit involved herein is that described above in Finding No. 7.

DISCUSSION

An employer has a duty to provide relevant and reasonably necessary information, upon request by the collective bargaining representative of the employer's employes under Wisconsin law. This duty is enforced by application of Sec. 111.70(3)(a)4, Stats., to situations where an employer has refused to release such information. Thus, to refuse to release such information itself constitutes a refusal to bargain, a prohibited practice within the meaning of Sec. 111.70(3)(a)4 and 1. See, e.g. Board of School Directors of Milwaukee, Dec. No. 15825-B (Yaeger, 6/79); Sheboygan Schools, Dec. No. 11990-A (Schurke, 1/76) cited with approval in State of Wisconsin, Dec. No. 17115-C (WERC, 3/82). However, the duty to provide information only extends to information which is both relevant and necessary to the bargaining agent's discharge of its duty to represent employes.

The duty to provide information was aptly summarized by Examiner Yaeger in Board of School Directors of Milwaukee, Dec. No. 15825-B (Yaeger, 6/79):

> . . . This duty exists as to requests or demands for information relevant to the bargaining agent's negotiation with the employer for a collective bargaining agreement as well as that relevant to its policing the administration of an existing agreement. Information relative to wages and fringe benefits is presumptively relevant to carrying out the bargaining agent's duties, there being no need to make a case by case determination of the relevancy of such requests. However, this presumption has not been applied to other information sought, and the burden thus falls initially upon the bargaining agent to demonstrate the relevancy of said information to its duty to represent unit employes.
>
> The duty to furnish relevant information upon request is footed in the belief that the bargaining agent would be unable to carry out its duties and, thus, bargaining could not take place. Consequently, failure to provide the information is as much of a breach of the duty to bargain as if the Employer failed to meet and confer with the Union in good faith. Once a good faith demand has been made, it is incumbent upon the Employer to make the information available promptly and failure to do so will be equated with refusal. (Footnotes omitted)

In addition, a refusal to release relevant and necessary information derivatively violates Sec. 111.70(3)(a)1, Stats., because a refusal to bargain by refusing to release relevant and necessary information necessarily interferes with, restrains and coerces municipal employes. Id. See also Sheboygan Schools, Dec. No. 11990-A (Schurke, 10/74) (rev'd on other grounds).

Based upon the above, I find that the City's reliance upon Sections 19.21, 19.35 and 19.85, Stats., is misplaced. These sections of Chapter 19 were designed to ensure employer-employe confidentiality in certain circumstances as well as to preserve that the public's "right to know" about some of the functions of government. These sections must be harmonized with the clear mandates of MERA. But Chapter 19 may not and does not override MERA rights to information. Thus, where matters either arise under a collective bargaining agreement or have to do with bargaining, grievance handling or litigation, information regarding such matters becomes necessary for an exclusive bargaining representative to properly perform its functions and responsibilites. The Union, therefore, stands in the shoes of the employes it represents and has the same right to information, upon request, that the employes would have. Neither the tests established under MERA nor the precedent include any recognition of a privilege of confidentiality or right of privacy which can be asserted by an employer on behalf of bargaining unit employes against their collective bargaining representative. 2/

2/ The City has argued that evaluations should be kept private between the City and the employer. Yet, I note that the City has admittedly taken no steps to ensure the confidentiality of performance evaluations, except to deny them to their employes' duly elected collective bargaining representative.

Therefore, Chapter 19 and the cited sub-sections are not applicable in this case and may not be relied upon to deny the Union the requested information. On the other hand, the case law does not give labor organizations a plenary right to any and all information regarding bargaining unit employes. Rather, unless the requested information is presumptively relevant, labor organization must show both the relevance of requested information and its necessity for the labor organization to discharge its duty to represent unit employes. However, the Commission has found that "presumptively relevant information" encompasses more than wage information.

In State of Wisconsin, Dec. No. 17115-C (WERC, 3/82), the Commission held that the State employer must release a survey of comparable jobs of public and private sector employers which the State expressly relied on in making its wage proposal in contract negotiations and which the union had requested. The Commisson analyzed the duty to provide such information as follows:

> . . . If an employer merely relies on its general impression of the state of the economy, knowledge of its own financial situation, and on its general knowledge of other settlements obtained through newspapers, publications, etc., then a mere statement of same is sufficient and no production of materials is necessary. Nor is an employer obligated to turn over its file to the union upon an overbroad request to provide all information, documents and materials which the employer had used in formulating its initial wage offer. But when a party, as here, conducts a wage survey and then informs the other party that it relies, at least in part, on such survey in justifying its wage offer, the survey since it is tied to the wage offer, becomes relevant to the negotiations and the party is obligated to supply such information upon request. . . .

The evidence here is undisputed that the City intends to cost the 1985 merit pay increases given to some unit employes against any total economic package offered to all unit employes in an initial contract. Furthermore, the City has admitted here that these performance evaluations have a direct and integral relationship to the amount of merit pay granted to employes. Thus, the City is (or will be) relying at least in part upon the 1985 performance evaluations when it makes its wage proposals to the Union and therefore these performance evaluations will be tied to the City's overall wage offer. 3/ It appears, then, that WERC precedent would require the release of these performance evaluations which the City has relied upon and which are admittedly tied to negotiations concerning wages.

But beyond precedent, I note that if these performance evaluations were not released to the Union, the Union would experience certain collective bargaining problems which MERA was designed to ameliorate. Thus, it would be possible in the future for the City to grant large merit increases to employes it deems deserving of such increases and have no monies left over to offer or negotiate with when the Union seeks a general wage increase for all employes upon contract termination. Therefore, it is conceivable that if the Union does not have the right to receive performance evaluations the Union would never have the information, the bases for the City's decisions to grant some employes merit increases of varying amounts while denying such increases to other employes. The ultimate effect could be that the Union would be unable to bargain regarding wages. Such a result would emasculate the Union, potentially taking from it the power to bargain regarding perhaps the most important subject of negotiations in labor relations.

Furthermore, the Union could not effectively address these problems by petitioning the Commisison for Mediation-Arbitration. The Union would lack sufficient information to fight the City's claims regarding the reasonableness of granting merit increases to some employes while, possibly, offering the Union little or no increase in general wage rates. Again in my view, the Union would need the performance evaluations in order to fashion a case for the Mediator-Arbitrator and to defend against a possible City case, as described above.

3/ The parties, at time of hearing, had not yet addressed economic issues in their negotiations. The parties have not reached an agreement to date.

Another practical problem could arise were I to deny the Union the requested forms. In its July 31 letter, the Union stated that it needed the requested evaluations in order to address possible pay inequities created or not considered by the merit pay system. It is certainly a possibility, given the form's structure and content that different criteria might be used by different supervisors in arriving at a recommendation regarding merit pay. The Union could not analyze whether or not uniform standards are applied to each evaluation unless it has a right to receive the forms. Thus, the Union could not police the application of the criteria used in these forms to ensure the equitable treatment of its unit employes. I noted that were I to allow such a result, I would abrogate the Commission's mandate found in School District of Janesville, Dec. No. 21466 (WERC, 3/84). There, the Commission found that requiring that uniform criteria be used in performance evaluations is a mandatory subject of bargaining, and that the Union must also be able to bargain over the procedural aspects of such evaluations or bargaining would be meaningless.

Based upon the above, I find that the City should have released the 1985 performance evaluations for all bargaining unit employes upon demand. This conclusions is supported by the Union's stated reason for requesting the evaluations on July 18 at bargaining and in its July 31 letter to the City 4/-- that the Union needed the evaluations in order to fashion a wage proposal, one which would attempt to correct pay inequities not addressed or created by the merit pay system. Furthermore, the fact that the amount of merit pay granted is directly and integrally related to the contents of the evaluations and the fact that the City will or has costed 1985 merit increases against the total economic package offered to the Union, furnishes further support for my conclusion that these evaluations are inextricably tied to wages, and will be or have been relied upon by the City in support of any unit wage proposal. In addition, the possible effects of denying the Union requested information, detailed above, show the relevance and necessity of the information to the Union's functions as exclusive representative. Therefore, the City should have released all 1985 performance evaluations of unit employes to the Union upon request.

Dated at Madison, Wisconsin this 4th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher
Sharon A. Gallagher, Examiner

4/ In its July 31 letter, the Union concurs in the merit pay increases which were granted to certain known employes retroactive to July 1. I agree with the City's argument that by so concurring, the Union waived its right to bargain regarding the level of 1985 merit increases granted and regarding the identity of recipients thereof.