STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	:	Case 93 No. 35844 MP-1781 Decision No. 23094-A

Appearances:

Schwartz, Weber, Tofte & Nielsen, S.C., Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, 119 Monona Avenue, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondent.

FINDINGS OF FACT CONCLUSION OF LAW AND ORDER

Racine Education Association having, on October 21, 1985, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had committed prohibited practices within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on December 5, 1985, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Racine, Wisconsin on January 13, 1986; and the parties having filed briefs which were exchanged on March 19, 1986 and the Association having waived its right to file a reply brief and the District having filed a reply brief which was exchanged on April 15, 1986; and the Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Racine Education Association, hereinafter referred to as the Association, is a labor organization which functions as the certified exclusive collective bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the Racine Unified School District; that its principal offices are located at 701 Grand Avenue, Racine, Wisconsin 53403; and that at all times material herein, James J. Ennis has been, and is, the Executive Director of the Association and has functioned as its agent.

2. That the Racine Unified School District, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit and education of the inhabitants of the District; that its principal offices are located at 2220 Northwestern Avenue, Racine, Wisconsin 53404; and that at all times material herein, Frank L. Johnson has been, and is, the District's Director of Employee Relations and has functioned as its agent.

3. That the Association and the District have been parties to a series of collective bargaining agreements; that the parties reached impasse on a successor agreement to the 1979-82 agreement and Byron Yaffe was appointed the Mediator/Arbitrator and he scheduled a hearing for November 13, 1984; that the Association subpoenaed various District administrators directing them to bring certain information to the hearing; that many of the District's principals including LaVerne Diem who were subpoenaed called Johnson and explained the difficulty, if not impossibility of complying with the subpoena; that the parties reached a settlement on a successor agreement for the term, August 25, 1982 through August 25, 1985, and no hearing was held; and that not all the information subpoenaed was compiled and that which was compiled was not produced.

4. That the parties again became involved in the mediation-arbitration process for the agreement to succeed that which expired on August 25, 1985; that on or about October 3, 1985, Ennis sent the following letter to Johnson:

> This letter is a request for information which the Racine Education Association needs in order to be able to perform its collective bargaining functions. The information requested, see the attachment, is relevant and pertinent to the successor contract, and is particularly pressing in view of the pending med/arb proceedings, where we anticipate dealing primarily with a mediator rather than face to face negotiations. This information is requested pursuant to secs. 111.70(2) and 111.70(3)(a)4., Stats.
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> In order to allow us time to review the information, convene the bargaining committee, and prepare for the mediation on October 23rd, we need everything by Friday, October 18th at the latest. This information should be readily available since the same attachment was made part of the subpoenaes served on each individual administrator for the arbitration hearing on the 1982-85 contract.
>
> We look forward to hearing from you with regard to this request.;

and that the attachment listing the information requested was essentially the same as that sought in the subpoenas in 1984.

5. That on or about October 11, 1985, Johnson sent Ennis the following letter:

> This is a response to your letter of October 3, 1985. I have three objections. First, the request is overbroad and burdensome, and attempted complaince with the request would be costly to the District. Second, I don't think the requested material is relevant to collective bargaining. Third, I don't think the request is a bona fide request for data to further collective bargaining, but is instead an effort at discovery for pending litigation.
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> The request is overbroad, burdensome, and costly.
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> This request would potentially necessitate the District to have every administrator, every unit employee, and other employees search their notes, correspondence, calendars, or any minutes, of each meeting. Information about meetings or classes may be as available (or unavailable) to you from your members, as from the District.
>
> Compilations of the sort you request do not exist, so far as I can tell. The request, therefore, requires the creation of data which does not exist, such as counting the number of meetings, and calculating the sex and racial composition of classes. Alternatively, the request requires the District to try to deduce what documents or combinations of documents might be used to produce compilations.
>
> It is possible that the request covers virtually every document the District has maintained for the last three years which has anything to do with any meeting, any class, any teacher, and aide, and many physical facilities.
>
> Any combination of documents which might be assembled probably would not produce an accurate compilation, because, for example, there is no assurance that any combination of records would show all meetings.
>
> The cost of copying every such document is not presently determinable, but logic suggests the cost would be great. The personnel cost, and loss of eduational productivity, of

assigning personnel to think up bits of documentary material, and then locate and assemble it, would also be great.

The material is not relevant to collective bargaining.

The request establishes what we have been arguing and still argue: your "impact" proposals are designed to impose and control educational policy, in the guise of demands for more pay based upon changes in educational policy. Meetings which professionals attend, the composition of classes and facilities, and the like are not discrete compensable items of professional salary.

The mere cost of keeping track of so many variables gives incidental support to our view that the profession of teaching should not be dissected on the basis of time and function.

I recognize WERC has held that a proposal for more pay based upon class size is mandatory. Even if WERC was right, the scope and focus of many of your requests causes me to believe the WERC would conclude that your "impact" proposals are a sham.

For example: You ask about the race, sex, and special education composition of each class. You ask for the names of the administrators and unit employees who called meetings. You ask (question 6, for example) about only certain types of meetings. You ask (question 9, for example) about events independent of whether unit employees were involved.

By question 16 (e) you resurrect the "comma" litigation, by asking for any evidence that staffing patterns and staff utilization "where (sic) mutually determined." The answer to question 16(e), as you know, is that professional staff give valuable input into educational policy questions, but the elected school board, directly or through their agents, must make the final determination.

The District values professional opinions about educational policy. I think your posture attempts to convert professionalism into an adversary system with you in the middle enjoying the controversy for its own sake.

Your request is to pursue litigation, not bargaining.

You filed a med/arb petition almost immediately after the initial exchange of proposals. Your letter of October 3, 1985, describes your request as pressing because of the pending med/arb proceedings, and refers to the fact that you subpoenaed, "each individual administator" in the last med/arb proceeding. Therefore, I think you do not plan to use the information for bargaining; I think you are preparing for litigation. I don't think you have a right to pre-trial discovery under med/arb. If you know of contrary authority, please let me know what the authority is.

The above three objectives cause me to tentatively reject your request, and to suggest and invite the following:

1. That we bargain or confer about your request, using the services of the WERC investigator/mediator. I don't think your request is a mandatory subject of bargaining, but if it is, we insist on bargaining about it. If your request is not mandatory, I suggest we confer about it.

2. Before or during such bargaining or conferences, the Racine Education Association should tell the District how the Racine Education Association thinks each request is relevant to collective bargaining, so that the District may consider its tentative decision to reject your request.

3. If a relevant request exists, the Racine Education Association should agree to pay both the copying cost and the personnel cost of the work the Racine Education Association is asking the District to do.

4. If a relevant request exists, the Racine Education Association should consider and suggest means of narrowing its requests, in order to reduce the lost time of administrators and other employees.;

that the Association did not respond to Johnson's letter; and that on October 21, 1985, the Association filed the instant complaint.

6. That the District's objections with respect to the breadth, burdensomeness and costs of the request were not frivolous but were bona fide; and that Johnson's letter of October 11, 1985 did not constitute a categorical refusal to supply the requested information but was an offer to bargain on the request.

7. That by a letter dated November 14, 1985, to the District's Records Custodians, Ennis made the following request:

> This letter represents a written request for information pursuant to the public records law of Wisconsin, as contained in Secs. 19.31 through 19.39, Stats., inclusive. The requester is James J. Ennis.
>
> The information requested is a copy of any and all "records", as that term is defined in sec. 19.32(2), Stats., pertaining to the attached list of specifically identified items.
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> This letter and its accompanying attachment are being hand delivered as of November 14, 1985. The requester expects the Racine Unified School District, an "authority" as that term is defined in sec. 19.32(1), Stats., to fill the request as soon as practicable and without delay, pursuant to sec. 19.35(4), Stats. The requester will pay the actual, necessary and direct cost of photographic processing pursuant to sec. 19.35(3), Stats.
>
> In the event the Racine Unified School District decides to deny the request in part pursuant to sec. 19.35(4), Stats., the requester expects the information not denied to be made available without delay.
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> If the requester, who may be reached during normal business hours at the Racine Education Association at 701 Grand Avenue, Racine, Wisconsin (telephone: 632-6181) does not hear from an agent of the authority promptly concerning this request, the requester will commence action, or request the District Attorney of Racine County to, commence action, pursuant to sec. 19.37, Stats.
>
> Thank you for your anticipated cooperation.;

that some of the requested information was similar to that in the October 3, 1985 request; that the District thereafter sent the Association 3400 computer sheets and 800 other documents; and that by a letter dated December 11, 1985, Johnson informed Ennis that the District had completed the records request; that the cost of the request was in excess of $900; and that no further requests for public documents were made by the Association.

8. That the costs of complying with the Association's request of October 3, 1985 would be substantially in excess of $900.00 in that it was estimated that each of approximately 50 principals together with his or her secretary would spend around 40 hours combined to compile the requested information; and that the District did not supply any information except that under the public records request of November 14, 1986.

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

CONCLUSION OF LAW

That the District's conduct in not supplying the information requested by the Association did not constitute a refusal to bargain in good faith within the meaning of Sec. 111.70(1)(a), Stats., and therefore, the District has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 23rd day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ 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.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint, the Association alleged that the District committed prohibited practices in violation of Sec. 111.70(3)(a)4, Stats., by refusing the Association's request for information relevant to collective bargaining thereby refusing to bargain in good faith. The District denied that it had committed any prohibited practice.

ASSOCIATION'S POSITION

The Association contends that the information requested must be deemed presumptively relevant because this information would be useful in determining the cost of its proposals regarding class size, preparation time, extra duty, responsibilities, etc., all mandatory subjects of bargaining. It submits that as the information relates to mandatory subjects of bargaining, the information is presumed to be relevant and it is not required to prove the specific relevance of each item sought. It asserts that the standard of relevance is that of probable or potential relevance, a standard it has met. It further asserts that if only some of the information requested is deemed relevant, the District should furnish it without delay. It submits that the District's argument that the Association obtain the information from its own members is without merit as it is not obliged to do so.

The Association argues that the District's justifications for not supplying the information are without merit. It notes that the District's first defense, the Association's hearsay refusal to pay costs, was not raised in the October 11, 1985 letter, and thus was not a basis for the District's refusal to supply the requested information. As to the second defense, the use of the information in litigation, the Association contends that it is irrelevant if it is used for that purpose and the information must be furnished if it is relevant to collective bargaining, a part of which is the final and binding arbitration under MERA. The Association also contends that the District's defense of burdensomeness does not justify a categorical refusal to comply with its request. It claims that where the cost and effort in compiling information is demonstrably great, the parties must bargain over the allocation of costs, and if no agreement is reached, the Association would be entitled to access to those records from which it could compile the information. It submits that the District never offered to bargain the costs but demanded that the Association pay the costs.

The Association contends that the District's conduct constituted an attempt to stonewall and an unjustified delay. It claims that any burden on the District is a secondary concern to the Association's need for the information for bargaining. It points out that the purpose of MERA is best served by the expeditious production of records pertaining to collective bargaining. It submits that labor organizations should obtain collective bargaining information with the same facility that the public can obtain information under the public records law. It asks the Commission to find that the District's delay constituted bad faith bargaining and the District should produce the available information without delay.

DISTRICT'S POSITION

The District contends that the Association's request for information is burdensome and costly, and therefore, the Association has a duty to bargain the content and cost of its request. It claims that it would take a great deal of staff time and cost thousands of dollars to compile the requested information because it does not exist in the form requested, if at all, and is not compiled in an useable manner. It adds that the Association's members have access to records and physical facilities that would permit them to obtain the requested information. The District submits that the Association could have narrowed its requests and asked for specific documents instead of using a shotgun approach with attendant time-consuming searches and attendant costs. The District maintains that it does not have a duty to supply information in the form requested and does

not have to pay the costs. It asserts that, contrary to the Union's arguments, the District offered to bargain on the content of the requested information as well as the costs but the Association did not respond to this offer and did not bargain with the District. It claims that the District's objections were in good faith and it did not violate its duty to bargain but had offered to bargain on the issues. The District further contends that the request is overbroad and included non-relevant items. It points out that one request asks for the number of male, female and minority students in each class which request has no relationship to any Association proposal. It submits that despite the District's request as to relevance, the Association has not proven that much of the information is relevant to issues raised in collective bargaining, and therefore, the District has no duty to furnish it. The District insists that the information is not requested for collective bargaining because the Association put in its final offer prior to requesting the information but wants this information for use in the mediation/ arbitration proceeding. The District concludes that the Association's request is not a bona fide request for information relevant to collective bargaining and the District has no obligation to supply it, and while the District has offered to bargain on the issue, the Association has refused and stonewalled and thus the complaint should be dismissed.

DISCUSSION

A municipal employer's duty to bargain in good faith pursuant to Sec. 111.70(1)(a), Stats. includes the obligation to furnish upon request information which is relevant and necessary to the union's responsibilities with respect to negotiations and contract administration. 2/ Whether information is relevant is determined under a "discovery type" standard and not a "trial-type" standard. 3/ Information relative to wages and fringe benefits is presumptively relevant to carrying out the union's duties and there is no need to make a case by case determination of the relevancy of such requests. 4/ This presumption has not been applied to other information sought, and the burden thus falls initially on the union to demonstrate the relevancy of said information to its duty to represent unit employes. 5/ Even where the information is clearly relevant, the union is not entitled to the information where the employer has bona fide objections, such as reasonable good faith confidentiality concerns or where there is an undue burden in compilation. 6/ The employer is not required to furnish information in the exact form requested by the union 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. 7/ The costs and burden of compilation will not justify an initial, categorical refusal to supply relevant information. 8/ Rather, where the employer claims that compilation would be unduly burdensome, it must assert that claim promptly at the time of the request so that the parties may bargain to lessen the burden. 9/ Each case must turn on its particular facts and

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2/ Outagamie County (Sheriff's Department), Dec. No. 17393-B (Yaeger, 4/80) aff'd by operation of law, Dec. No. 17393-C (WERC, 4/80); Merton School, Dec. No. 15155-A (Malamud, 5/78) aff'd by operation of law Dec. No. 15155-D (WERC, 10/78).

3/ Proctor & Gamble Manufacturing Co. v. NLRB, 102 LRRM 2128 (8th Cir., 1979).

4/ Milwaukee Board of School Directors, Dec. No. 15825-B (Yaeger, 6/79), aff'd by operation of law Dec. No. 15825-C (WERC, 7/79).

5/ Id.

6/ Safeway Stores v. NLRB, 111 LRRM 2745 (10th Cir., 1982); Soule Glass and Glazing Company v. NLRB, 107 LRRM 2781 (1st Cir., 1981).

7/ Cincinnati Steel Castings Co., 24 LRRM 1657 (1949).

8/ Oil, Chemical & Atomic Workers v. NLRB, 113 LRRM 3163 (DC Cir, 1983).

9/ Shell Oil Co. v. NLRB, 79 LRRM 2997 (9th Cir., 1972).

whether or not under the particular circumstances presented the obligation to bargain in good faith has been met. 10/

Turning to the facts of the instant case, the District with reasonable promptness made three objections to the Association's request for information. These were:

> 1) The request is overbroad, burdensome and costly.
> 2) The requested material is not relevant to collective bargaining.
> 3) The request is to pursue litigation and not bargaining.

With respect to the first objection, the District contends that the breadth, burdensomeness and cost of the request are such that the Association has a duty to bargain the content and cost of the request. Under certain circumstances, the excessive breadth of a request may relieve the employer from the obligation to provide the information. 11/ A cursory review of the Association's request in light of the purpose given for the request indicates that the request may be narrowed considerably. Mr. Wiser testified that the information requested would be used to cost out the Association's impact proposals to prepare its final offers. 12/ For example, Mr. Wiser explained that if class sizes grow beyond a certain point, then compensation would be required by its proposals that set a trigger point which would be as close as possible to the District's present practice and policy. 13/ For the Association's Counter Proposal No. 1 dated 10-28-85, the Association proposed, for example, that teachers in grades Pre-K and K who are assigned twenty-three or fewer students per day shall receive the wage compensation in the Basic Salary Schedule. 14/ The Association's request for information in items 11, 12, 13 and 14 requests, in part, the class size of each grade for the prior three years as well as of October 1, 1985. 15/ This would involve a great number of documents in a District with 21,000 to 22,000 students. 16/ This request could be narrowed to request the number of Pre-K or K class that have more than twenty-three students or what ever the set point has been proposed. A similar analysis is applicable to many of the items in the request. Thus, the undersigned concludes that the breadth of the Association's request can be narrowed.

The District also submits that the request is unduly burdensome and the Association could get the information from its own members. With respect to the latter argument, the availability of the information from employe-members is not a sufficient defense to an employer's failure to provide relevant information. 17/ With respect to the burdensomeness of complying with the request, Principal Diem of Goodland Elementary School testified that it would take her and her secretary about 40 hours to comply with the request. 18/ Diem indicated it did not seem realistic in terms of the time involved in complying with the request. 19/ Inasmuch as Diem is only one of approximately fifty principals in the District, the time required would be around 2000 hours for principals and secretaries to gather the information. Thus, it would appear that the District's compliance with the request would be burdensome.

10/ NLRB v. Truitt Manufacturing Co., 38 LRRM 2042 (1956).

11/ Fawcett Printing Corp., 201 NLRB 964 (1973).

12/ Tr-13, 14.

13/ Tr-14.

14/ Ex-6.

15/ Ex-2.

16/ Tr-85.

17/ B. F. Diamond Construction Co., 163 NLRB 161, 176 (1967).

18/ Tr-58, 66.

19/ Tr-58.

The District also asserted that production of the information was costly. The District pointed out that the cost for producing the documents under the public records request was over $900. 20/ It would appear that the costs associated with 2000 hours search time as well as copying cost could be substantial. In Outagamie County (Sheriff's Department), the Examiner held that the County's conditioning the supplying of relevant information on the Association's incurring the reasonable costs of said information did not constitute a refusal to bargain in good faith 21/ It would appear that the District could insist that the Association pay the reasonable costs of producing the information requested. The undersigned concludes that the District's arguments with respect to the broadness, burdensomeness and cost of the request are bona fide and not made in bad faith or for the purpose of delay.

As noted supra, the cost and burden of compliance will not justify an initial categorical refusal to supply the information. Contrary to the Association's claim, the District here did not categorically refuse the Association's request. A review of Johnson's letter of October 11, 1985 clearly indicates that the District tentatively rejected the request and offered to bargain or confer over the request. 22/ This letter cannot be construed to be a categorical refusal of the request. The Association did not respond to this offer. 23/ The above factors were found not to be a refusal to bargain in Shell Oil Co. v. NLRB 24/ where the Court stated the following:

> First, the Company stated specific objections to furnishing information in the form requested, and there was no suggestion of bad faith or that the reasons given were disingenuous or put forward for delay. Second, the Company did not flatly refuse to comply. Rather the Company offered to discuss the request in the light of the Union's needs and the Company's legitimate interests. Finally, the Union did not take up the offer to discuss a mutually satisfactory form for the information sought. Instead, it went immediately to the Board.
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> . . .But the principle is the same: Presentation of bona fide concerns by the Company, coupled with reasonable proposals designed to satisfy the needs of the Union and to achieve a mutually satisfactory resolution of the Union request, is simply not a refusal to bargain. On the contrary this is precisely the conduct the Labor Act is designed to foster.

These same factors are present in the instant case. The District promptly notified the Association of the reasons for not providing the information and the record does not establish that these were not bona fide. The District offered to bargain or confer over the request. The Association did not take up the offer but filed the instant complaint. Under these circumstances, it must be concluded that the District has not refused to bargain in good faith, and the complaint is premature as the Association has failed to take up the District's offer to bargain over the request, and therefore, the complaint has been dismissed in its entirety.

In light of the above, and the record in this matter, the undersigned has not deemed it necessary to determine the relevancy and litigation arguments put forth by the District.

Dated at Madison, Wisconsin this 23rd day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

20/ Tr.- 93.

21/ Dec. No. 17393-B (Yaeger, 4/80) aff'd by operation of law Dec. No. 17393-C (WERC, 4/80).

22/ Ex-3.

23/ Tr-92.

24/ 79 LRRM 2997 (9th Cir., 1972).