STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 21, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, Complainant, vs. LA CROSSE SCHOOL DISTRICT, Respondent.	Case 56 No. 44061 MP-2361 Decision No. 26541-A

Appearances:
Davis, Birnbaum, Joanis, Marcou and Colgan, Attorneys at Law, by Mr. James G.
Hale, Skemp, Hanson and Skemp, Attorneys at Law, by Mr. Thomas S. Sleik, 505 Ki

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Local 21, Service Employees' International Union, AFL-CIO having, on May 23, 1990, filed a complaint with the Wisconsin Employment Relations Commission alleging that the La Crosse School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on July 5, 1990, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(5), Stats.; and hearing on said complaint having been held in La Crosse, Wisconsin on September 5, 1990; and the parties having filed briefs which were exchanged on January 18, 1991; and the District having filed a reply brief which was exchanged on February 14, 1991; 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 Local 21, Service Employees' International Union, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 111.70(1)h, Stats., and is the recognized exclusive bargaining representative of all employes of the District classified as Custodian, Apprentice Custodian, Groundskeeper, Warehouse Technician and Engineer Custodian I, II and III; and that its offices are located in La Crosse, Wisconsin 54601.

2. That the School District of La Crosse, 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, and its principal offices are located at 807 East Avenue South, La Crosse, Wisconsin 54601.

3. That the Union and the District are parties to a collective bargaining agreement covering the period of January 1, 1989 through December 31, 1991; that said agreement contains a grievance procedure which culminates in final and binding arbitration; and that said agreement contains the following provision which was new language for the current contract:

ARTICLE V
SENIORITY, PROMOTIONS, LAYOFFS

. . .

> B. It is the intention of the Parties to fill any vacancy with the best qualified candidate. If qualifications are deemed equal, the position shall be awarded according to seniority. The District shall make such determinations but the Executive Board or the Union may, within five (5) days, subject the matter to grievance procedure.

4. That in early 1989, the District posted a vacancy in an Engineer Custodian II position; that at least eight bargaining unit members bid on this position; and that after reviewing the personnel files and the bid applications of the candidates, the District interviewed three employes who

were deemed the most qualified and after the interviews, the District awarded the position to Jim Speropulos who was determined to be the most qualified but was not the most senior candidate.

5. That the Union, on behalf of the seven employes who also bid for this position, filed a grievance alleging the District violated Article V, Section B; that the Union requested that the District supply it with certain information with respect to the selection of Speropulos; that the District gave the Union the actual interview format of the three candidates interviewed including the actual test questions and the interviewers' evaluation of the candidates; that the District allowed the Union access to an individual's personnel file only upon the request of the individual employe; that the District informed the Union the information given to it was sensitive information and was to be used only by the Union and not disseminated to all its members; that after receipt of this information, the Union indicated it would process the grievance on behalf of the most senior bargaining unit employe; and that after processing this matter to Step 3, the Union withdrew the grievance.

6. That on or about March 13, 1990, the District posted a vacancy in an Engineer Custodian I position at the Lincoln Middle School; that the District reviewed the applications and personnel files of the bidders and interviewed those deemed the highest rated candidates; that after interviewing those, the District selected Kerm King as the most qualified bidder; and that Kerm King was not the most senior bidder.

7. That in April, 1990, the Union filed a grievance on behalf of 5 of the 7 bidders for the position awarded to Kerm King; that by a letter dated April 10, 1990, the Union requested "any and all information pertaining to the bidding of the EC1 position at Lincoln Middle School"; that the District refused to give the Union the actual test questions asked of the bidders as well as the test answers or a list showing the actual test scores of named individuals; that the District told the Union it would disclose the raw scores without the names of the respective individuals tied to their respective scores; and that individual employes who requested to see their respective individual scores were shown their scores and informed of any deficiencies.

8. That the District refused to give the actual test questions on the grounds that to do so would eventually exhaust the list of potential technical questions, and with foreknowledge of these questions, the test would not be a true test of knowledge by the candidates; and that the District offered to give the Union the test scores of named individuals upon the consent of the individual.

9. That the information sought by the Union is relevant and reasonably necessary to the Union's responsibility with respect to contract administration.

10. That the District has bona fide good faith confidentiality concerns with releasing to the Union the actual test questions and answers used in the selection of Kerm King so as to justify their non-disclosure; and that confidentiality concerns with releasing the test results without permission of the individual employe justifies the District's failure to provide this data, in light of the minimal burden placed on the Union to obtain consent of employes to obtain the test scores of named individuals.

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

CONCLUSION OF LAW

That the District, by not supplying the actual test questions used in the selection of the Engineer Custodian I at Lincoln Middle School as well as the answers and the names of the applicants linked with their test results, has not refused to bargain in good faith and has not committed any prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats. and has not derivatively interfered with employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats., nor has it violated any other provision of Sec. 111.70(3)(a), Stats.

Upon the basis of the above and foregoing Findings of Fact and 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 14th day of March, 1991.

By Lionel L. Crowley /s/
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.

La CROSSE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint, the Union alleged that the District committed prohibited practices in violation of Sec. 111.70(3)(a), Stats., by intentionally failing to disclose all job records used by the District to fill a vacancy in April, 1990, thereby bargaining in bad faith. The District denied that it had committed any prohibited practices and asserted that the records were privileged and confidential.

Union's Position

The Union contends that the District has violated its duty to bargain in good faith by its failure to provide the Union with relevant and necessary information to administer the collective bargaining agreement. It points out that the Commission has adopted a broad discovery standard for determining the relevancy of information and it insists that the information requested here is essential to determine if the collective bargaining agreement was violated. It notes that the agreement authorizes a comparison of relevant qualifications of job bidders and a requirement that the District select the most senior of equally qualified candidates. It submits that seniority provisions are of major importance to Union members and to allow the selection of a junior employe is a matter of extreme concern and the only way the Union can determine if there has been a contractual violation is to obtain the data requested. The Union claims that it is not sufficient to have an individual obtain his own data because it is the comparative data that determines whether or not the District has been consistent. It argues that without the data, the Union has only the unsupported assertions of the District that it has been consistent.

With respect to the tests and answers, the Union notes that the test is not validated and the District's untrained and unqualified administrators developed the questions and answers. The Union asserts that it needs the questions to independently determine if they are job related and it needs the answers to check their accuracy. It maintains that as the grading of the test is subjective, the Union has no way to determine if the District has been consistent in the application of the answer standard. It further alleges that the prior practice of the District supplying this information establishes the necessity and importance of providing this information. It concludes that there is no question that this information is relevant and necessary to enforce

the agreement.

The Union contends that the District's basis for non-disclosure of the information is without merit in law or fact. It claims that it is entitled to obtain all information related to wages, hours and conditions of employment and none of the information sought can be construed as confidential such as health, mental health, chemical dependency or other information where some independent claim of privacy may be asserted. It points out that the information sought is credentials, evaluation and job performance over which there is no expectation of privacy on the part of employes nor were employes ever told that this information was confidential. The Union argues that if the District has some fear of liability exposure due to disclosure of this information, such fear is not supported in fact or law. The Union insists that it treated this information discreetly in the past and there has been no complaint by anyone of any disclosure, so any fear of disclosure by the Union is unfounded.

The Union argues that the District has no proprietary basis in the test questions and answers. It points out that they were disclosed in the past, and these were not designated confidential or proprietary nor were employes told they were confidential. It maintains that the test itself is not the kind of test protected by proprietary concerns as it was not developed, purchased or administered by an independent source and because it is not labelled as confidential, employes who frequently bid for jobs are not prevented or discouraged from disclosing it, so it will eventually become common knowledge. The Union insists that the District has failed to carry the burden to establish a privacy or proprietary concern with respect to the requested information. It requests a finding by the Commission of a prohibited practice and an order for the appropriately requested remedy.

District's Position

The District contends that it committed no prohibited practices. It recognizes that the Union is entitled, upon request, to information which is relevant and necessary to fulfill its negotiation and contract administration responsibilities; however, it maintains that the Union's mere assertion that it needs information does not automatically require the District to provide all the information requested or that it be in the exact form sought. The District submits that the Union has the burden of proving that the information requested is relevant and even where it meets this burden, the District is not required to produce information where the District can show legitimate and substantial reasons for its non-disclosure.

The District insists that its offer to provide cumulative scores to the Union provides sufficient information so the Union can fulfill its duty of representation. It claims that the privacy of employes and the need to protect the integrity of the test constitutes a proper objection to disclosure. It further submits that the Union has failed to establish the relevancy for all the information sought.

The District asserts that it has met the burden of proving that it has reasonable and legitimate reasons for not disclosing the test questions and answers, the individual scores and individual responses to the test questions. The District admits it gave the Union this information in 1989 and expressed concerns then about keeping this information confidential, but this one instance does not establish a past practice. It takes the position that it reconsidered its position in order to better protect employe confidentiality and the integrity of its test questions. The District points out that it has offered to provide the list of all scores without names as well as individual scores to those who request them and is willing to review the test questions and answers where appropriate. The District alleges that its test is not a psychological test and does not measure aptitudes but is a general knowledge test which does not require an expert to draw up. The District insists that its conduct is consistent with the test set forth in Detroit Edison Co. v. N.L.R.B., 440 U.S., 301, 50 L. Ed. 2d 333, 99 S. Ct. 1123 (1979), by appropriately balancing the interest to protect confidentiality with a minimal burden on the Union which does not prevent it from carrying out its responsibilities.

The District also refers to its concern to protect the integrity of its testing procedure as each applicant is asked a series of technical questions and as the number of such questions is limited, it would not be long before employes would have access to all questions which would then destroy their testing value. It believes this demonstrates the need to keep the questions and answers confidential.

The District contends that the Union has failed to meet its burden of proof regarding the relevancy of the information sought. It claims that the Union has advanced no argument that it needs anything more than the applicants' scores and the Union's only argument that the District did not fill the vacancy with the best qualified candidate is that the candidate selected was less senior than four other candidates. The District maintains that the Union has not asserted that the District's criteria, evaluation process or test questions are unreasonable but simply asserts it needs the information to evaluate for itself that the employe selected is the "best qualified", i.e. substitute its

judgment for the District's and usurp the District's right to determine qualifications. The District insists that the Union does not need scores complete with names as each employe who is grieving can supply his own score and by simple deduction, the Union can determine whether seniority has been followed. The District rejects the Union's arguments with respect to validating the test as bogus because there was no proof offered that a knowledge test need be validated. It submits that the Union has not met its burden of proof and there is no merit to the Union's request for the scores as well as corresponding names of applicants.

The District alternatively argues that if any relief is granted, it should be limited to the cumulative score sheet as this would allow the Union to adequately determine whether seniority was ignored and to determine whether a grievant is as qualified as the employe who was awarded the position. The District takes the position that it has a proprietary interest in the test questions and answers and these should not be disclosed to the Union.

The District insists that it has not committed any prohibited practice, that the Union has failed to prove the relevance of the information sought, and that the information is confidential to protect the rights of the employe and is proprietary to protect the integrity of the tests. It requests a finding that no prohibited practice has occurred.

DISCUSSION

It has long been held that a municipal employer's duty to bargain in good faith pursuant to Sec. 111.70(1)(a), Stats. includes the obligation to furnish, once a good faith demand has been made, information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. 2/ Whether information is relevant is determined under a "discovery type" standard and not a "trial type standard". 3/ The exclusive representative's right to such information is not absolute and must be determined on a case-by-case basis, as is the type of disclosure that will satisfy that right. 4/ Where information is relative to wages and fringe benefits, it is presumptively relevant and necessary to carrying out the bargaining agent's duties such that no proofs of relevancy or necessity are needed and the burden is on the employer to justify its non-disclosure. 5/ In cases involving other types of information, the burden is on the exclusive representative in the first instance, to demonstrate the relevance and necessity of said information to its duty to represent unit employes. 6/ The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employes. 7/ The Employer is not required to furnish information in the exact forum requested by the exclusive representative 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. 8/

Turning to the facts of the instant case, the Union, by a letter to the District dated April 10, 1990, requested "any and all information pertaining to the bidding of the EC1 position at Lincoln Middle School." 9/ This is a very broad request for information but the parties have narrowed this dispute to essentially two pieces of information, namely, the actual test given for the position with the test answers and the test scores of each individual

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2/ Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), affirmed Dec. No. 24729-B (WERC, 9/88); Racine Unified School District, Dec. No. 23094-A (Crowley, 6/86), aff'd by operation of law, Dec. No. 23094-B (WERC, 7/86); Outagamie County (Sheriff's Department), Dec. No. 17393-B (Yaeger, 4/80), aff'd by operation of law, Dec. No. 17394-C (WERC, 4/80).

3/ Proctor and Gamble Manufacturing Co. v. N.L.R.B., 102 LRRM 2128 (8th Cir., 1979).

4/ Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88) affirmed Dec. No. 24729-B (WERC, 9/88) citing Detroit Edison, supra, and Outagamie County, supra at n.2.

5/ Milwaukee Board of School Directors, supra n.2 and 4.

6/ Id.

7/ Detroit Edison, supra; Safeway Stores v. N.L.R.B., 111 LRRM 2745 (10th Cir., 1982); Soule Glass and Glazing Company v. N.L.R.B., 107 LRRM 2781 (1st Cir., 1981).

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

9/ Ex. 10

employe. 10/

The District has argued that the test questions and answers were not shown to be relevant by the Union to its duty of representing bargaining unit employes and has relied on Detroit Edison, supra, for its non-disclosure of these. The Court did not address the District's relevance argument in Detroit Edison, and applying the liberal test of relevance employed by the Commission, the test questions and answers lead to a conclusion on the relative ranking of bidders for the position. Job relatedness of the test, fairness of administration, clarity of test questions and the correctness of test answers are all relevant to a grievance on the District's selection and thus the request meets the reasonably relevant test. As relevance has been established, the District must demonstrate bona fide reasons for the non-disclosure. The District's reason for its non-disclosure is that after releasing this information over a period of time, the entire gamut of questions will become common knowledge and the test will no longer be a true test of knowledge. 11/ In Detroit Edison, the Court held that an Employer need not disclose to the Union the test battery and answers of a psychological aptitude test. The Court found that the release of the test would compromise its validity. In Detroit Edison, the test was a validated aptitude test, whereas in the present case, the test has not been validated nor is it a psychological aptitude test. This distinction however does not require a different result. It was not asserted that the District could not give employes this type of test. Also, a general knowledge test applies an objective measure of employe qualifications rather than the subjective judgment of the District and this is more desirable because suspicion of discrimination and favoritisim is allayed. 12/ The disclosure of the tests and answers over time would make the test of little value, leaving the District's decision with respect to qualifications to be entirely subjective. Thus, the District has a bona fide and reasonable basis for not disclosing the test questions and answers. The Union's argument that because the District disclosed the first test questions, it is obligated to continue to do so, is not persuasive. The District, when it released the first test, informed the Union that this information was confidential 13/, and while there is no evidence that the Union did not respect the confidentiality of this information, the District is not obligated to rely on the Union's maintaining the confidentiality of such tests. As noted in Detroit Edison, the security of the tests are only as effective as the sanctions available to enforce them and here there is substantial doubt as to what sanctions would be available to the District should confidentiality be breached. The right of the Union to obtain information and the interest of the District in non-disclosure of said information involves a delicate balancing of these conflicting interests. The Union made a blanket request for all information related to the selection of the EC 1 and did not specify that a particular test question or questions were problematical or that the test was unrelated to the job or unfair overall or that this information was critical in determining whether the District's decision as to qualifications was arbitrary, capricious, discriminatory, or unreasonable on the facts. There was no evidence that the Union sought to discuss alternatives that would satisfy its needs and the District's concerns. The grievants who took the test would know what was on the test so that any problems with it could be specified and addressed by the District without disclosing the entire test and answers. The District's interest in confidentiality when balanced against the blanket request of the Union tips the scales in the District's direction. Had the Union articulated a more specific problem with the test, the balance may have tipped in its favor. Thus, it is concluded that the District's refusal to disclose the test questions and answers under the circumstances presented here did not constitute a refusal to bargain in good faith and was not a violation of Sec. 111.70(3)(a)4, Stats.

The second piece of information sought are the scores of individual employes linked to the names of those individuals. The District offered to provide the scores without names attached and gave employes who so requested their actual scores. 14/ The District's refusal to provide names with scores was based on privacy concerns for employes. 15/ In Detroit Edison, supra, the Court conditioned the release of the names linked to the test scores on the Union's obtaining consent from individual employes. The Court found that there was a minimal burden placed on the Union to obtain the consent, and in turn, the information and the Company's interest in preserving individual employe's concerns in the confidentiality of his/her test score was well-founded and the Company's non-disclosure was not instituted to frustrate the Union's discharge of its responsibilities. The evidence presented here established that the

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10/ Tr. 35-36, 67-68.

11/ Tr. 70-71.

12/ Elkouri and Elkouri, How Arbitration Works (4th Ed., 1985) at 619.

13/ Tr. 22.

14/ Tr. 68, Ex. 11.

15/ Tr. 68.

District would not allow the Union to inspect personnel files without the employe's permission and apparently this caused no problem for the Union. 16/ There was no showing that getting the employes' permission to have the District disclose their scores would present any problem except for the candidate selected, but by the process of deduction, that candidate would have the top score which the District was not refusing to disclose. In balancing the interests of the parties here, there is only a minimal burden on the Union to obtain the information sought and the evidence failed to demonstrate that the District's concerns with confidentiality were not genuine or were to frustrate the Union in its representational responsibility. Therefore, the District's refusal to provide names of employes linked to their scores did not constitute a refusal to bargain in good faith with the Union and did not violate Sec. 111.70(3)(a)4, Stats. Additionally, no other provision of the Municipal Employment Relations Act was shown to have been violated by the District, and the complaint has therefore been dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

16/ Tr. 21.