STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GREATER PARK SUPPORT STAFF ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL,	:	
Complainant,	:	Case 31
	:	No. 45188, MP-2438
vs.	:	Decision No. 26859-A
MORAINE PARK VOCATIONAL, TECHNICAL and ADULT EDUCATION DISTRICT,	:	
Respondent.	:	

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Appearances:

Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708-8003 by Mr. Anthony Sheehan, Staff Counsel appearing on behalf of the Complainant Moraine Park Support Staff Association.

Edgarton, Ondrasek, St. Peter, Petak & Massey, Attorneys at Law, Post Office 1276, Fond Du Lac WI 54936-1276 by Mr. John A. St. Peter, appearing on behalf of the Respondent Moraine Park VTAE District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Daniel Nielsen, Examiner: The Moraine Park Support Staff Association, Wisconsin Education Association Council (hereinafter referred to as either the Association or the Complainant) having, on January 22, 1991, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the Moraine Park Vocational, Technical and Adult Education District (hereinafter referred to as either the District or the Respondent) had committed prohibited practices within the meaning of Section 111.70, MERA by refusing to provide information alleged to be necessary for evaluating a grievance concerning classification and range determination of the Clerk V position. The Commission appointed Daniel Nielsen, an examiner on its staff to serve as Examiner and to conduct a hearing and make and issue Findings of Fact, Conclusions of Law and Orders A hearing was held before the Examiner on June 18, 1991 at the District offices in Fond du Lac, Wisconsin. The parties submitted post-hearing briefs and reply briefs. Having considered the testimony, exhibits, arguments of the parties, statutory provisions and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant Moraine Park Support Staff Association, WEAC, hereinafter referred to as either the Complainant or the Association, is a labor organization maintaining its offices c/o Gary Miller, UniServ Director, Winnebagoland UniServ Unit-South, 325 Trowbridge Drive, Fond du Lac, Wisconsin 54936.

2. That the Respondent Moraine Park Vocational, Technical, and Adult Education District, hereinafter referred to as either the Respondent or the District, is a municipal employer providing educational services to citizens through campuses in Fond du Lac, West Bend and Beaver Dam, Wisconsin. The District maintains its offices at 235 North National Avenue, Post Office Box 1940, Fond du Lac, Wisconsin 54936.

3. That the Association is the exclusive bargaining representative for support staff employees of the District, including employees in secretarial, housekeeping, custodial and food service positions.

4. That the Association and the District were parties to a collective bargaining agreement for the period of July 1, 1990 through June 30, 1992. This Agreement contained, inter alia, the following provisions:

Article II
Rights Clause

Section 2.01 - Management Rights

> Except as otherwise expressly provided in this Agreement, the management of the District and the directions of all personnel is vested exclusively in the District, including but not limited to the right to discharge, suspend, or otherwise discipline an employee for just cause; the right to establish, revise, and delete policies, procedures, regulations, and other reasonable work rules; the right to ;layoff for lack of work or for other legitimate reasons; the right to transfer, promote, demote, or otherwise assign employees to work, and the right to determine hourly and daily schedules of employment. The District shall be the exclusive judge of all matters relating to the conduct of its business, including but not limited to the buildings, equipment, methods, and materials to be utilized.
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Article V
Wage Schedule and Payment

Section 5.01 - Wage Range Assignments

(a) Each job position occupied by an employee shall be assigned by the District to a specific wage range on the hourly wage schedule established for the employees. Based upon a District evaluation and assessment of the duties involved in any such job position, the District may, from time to time, reassign that position to a different wage range.
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(c) The Supervisor - Employee Services' determination of job placement on the hourly wage schedule after reevaluation shall be subject to the Grievance Procedure, Article XIV, beginning with Step 3. In the event a new bargaining Unit job is created during the term of this Agreement, the District's determination of that position shall be subject to the Grievance Procedure, Article XIV, beginning with Step 3, if the Association disagrees with such placement.

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Article VIII
Conditions of Employment

Section 8.04 - Personnel Records

Any personnel records maintained by the District with respect to an employee may be inspected by that employee in accordance with and subject to the limitations of Section 103.13 of the Wisconsin Statutes.
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(b) The file will be the property of the District, but each employee will have the right, upon request to the Supervisor - Employee Services to make copies at their expense of any document contained therein, with the exception being credentials and letters of recommendation provided in confidence.
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Article XIV
Status of Employees

Section 4.07 - Job Posting

(a) Any vacant or newly established job position within the employee's bargaining unit will be posted on designated employee bulletin boards within the District. Such posting shall set forth a description of the available position, the work location, the wage range, required qualifications, and the due date by when applications are to be submitted for consideration.***
***

(h) The District shall determine additions, deletions, or any other changes to the occupational skill groups provided that the District does not act in an arbitrary or capricious manner. The District shall notify the Association of any additions, deletions or changes.

The Agreement also contained a grievance procedure culminating in final and binding arbitration.

5. That, in the Fall of 1990, the District created a new secretarial position at its Fond du Lac campus. The position was posted as a Clerk V, in pay range 9 of the contract's pay schedule. Following the posting of the new job, the Association's grievance chairperson, Nancy Nieman, contacted the District's Supervisor - Employee Services, Jan Jensen, and questioned whether the job was not more appropriately placed at pay grade 10. Jensen disagreed. Uni Serv Director Gary Miller sent a letter dated December 1, requesting a meeting between Jensen, Nieman, bargaining unit member Karen Beaman and himself to pursue the issue at Step 1 of the grievance procedure.

6. That Miller, Nieman and Beaman met with Jensen on December 11th. They discussed the appropriateness of the pay range placement. In the course of this meeting, the Association representatives compared the job description for the new position with those of other unit jobs, and argued that the similarity in duties between the new job and other jobs and pay range 10 should yield a higher rating for the new position. Jensen disagreed, arguing that the combination of duties and the value of each duty to a specific job were more important than a simple duty by duty comparison to other positions. The grievance was not resolved at this meeting.

7. That on December 15th, Nieman sent a memo to Jensen, demanding reclassification of the Clerk V position and information relating to the District's method for determining salary placements:

> This memo constitutes the Association's request that the Clerk V Position, which is the subject of a Step 1 (informal) grievance and for which informal discussions were held on December 11, be reclassified at least as an Administrative Secretary III position with at least a salary range of 10.
>
> Further, in order to complete its investigation into this matter, the Association Grievance Committee requests a specific description of the procedure used by management personnel in the determination of the classification and salary range assignment given to positions contained within the bargaining unit represented by the Association.
>
> This specific description must include at least: a thorough verbal briefing of the procedure for reclassification/salary range determination along with supportive forms, documents, instructions, etc., used by management for such determinations.
>
> We wish to have this briefing and accompanying materials/documents as soon after January 1 as can be arranged between Association representatives and

your office. Please contact UniServ Director Gary Miller to arrange for the date and time of the briefing.

The Association Grievance Committee can no longer continue to review bargaining unit position classification and/or salary range determination (sic) without this briefing and information. No longer can the Association accept a "non (sic) of your business" attitude regarding this process on the part of management when it comes to our determination of whether or not to grieve a new position's classification and/or salary range as well as positions which have changes made in them.

Your prompt response to both our requested Step 1 remedy in the instant case and briefing/materials used in determining position classifications and/or salary ranges. (sic)

8. That Jensen met with Miller, Nieman and Beaman on January 22nd and delivered a thorough briefing on the procedures used to determine reclassifications and salary placements. The meeting lasted for approximately 90 minutes, and Jensen answered questions posed to her by the Association representatives. She did not, at that time, provide any of the "supportive forms, documents, instructions, etc." requested in the December 15th memo.

9. That Jensen is the official within the District who designed the process used to make classification and salary placement determinations, and supervised the process which led to the classification of the new position as a Clerk V and placement of the job at pay range 10.

10. That Jensen answered the December 15th memo with a memo of her own on January 26th, in which she denied the grievance and refused to provide the written materials requested by the Association:

In response to the Step 1 Grievance for the Clerk V position dated December 15, 1989:

1. The placement of the Clerk V position at Range 9 has been reviewed by the Supervisor - Employee Services and it has been substantiated that the position is appropriately placed at Range 9.

2. A thorough verbal briefing of the procedure for reclassification/salary range determination was provided to the Association on January 22, 1990.

3. The Association's request for supporting documents is denied as follows:

a) No bargaining agreement language exists regarding release of such supporting documents. In addition, Article II, Section 2.01 (Management Rights) explicitly states in part, "...the management of the District and the direction of all personnel is vested exclusively in the District..."

b) No statutory obligation exists under Wisconsin Statute 103.13 -- Records Open to Employee. Further, Wisconsin Statute 103.13(6)(d) excludes such supporting documents from release as follows:

"Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes."

Therefore, grievance denied.

11. That the parties processed the grievance through the remaining steps of the grievance procedure without resolving either the underlying dispute or the demand for supporting documents.

12. That the "supportive forms, documents, instructions, etc." requested by the Association constitute information which is relevant to and reasonably necessary for evaluating the merits of the grievance filed over the classification and placement of the Clerk V position. The evaluation of the grievance is one of the Association's functions as the exclusive bargaining representative for the District's support staff employees.

13. That the Association has not identified any specific line of inquiry, question of fact or item of information which might be contained in the requested documents which could not have been verbally supplied through the briefing by Jensen on January 22nd, nor has it ever specified what information it sought through this request for documents beyond that provided in the briefing. There is no evidence that Jensen refused to answer any question posed to her by Association representatives during the course of the briefing.

14. That the briefing on January 22nd constituted compliance with the Association's request for information, albeit in a different form than requested.

15. That nothing in the wording of the Management Rights clause contained in Article II of the collective bargaining agreement creates an absolute privilege against the disclosure of materials contained in files related to the internal decision making processes of management. There is no specific evidence that the requested documents contain confidential or privileged information.

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

CONCLUSION OF LAW

That the District, by not supplying the "supportive forms, documents, instructions, etc." related to the decision to classify the new position as a Clerk V and place the job at pay range 9, but instead making available for a briefing and questioning the individual who made the determination and designed the process, has not committed a refusal to bargain in good faith and has not committed any prohibited practices within the meaning Section 111.70(3)(a)4, Stats., nor has it interfered with, coerced or restrained municipal employees in the exercise of rights guaranteed in Section 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.

On 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.

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1 Any party may file a petition for review with the Commission by following the procedures set forth in section 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 orders 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 in 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 new 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 an exceptional delay in receipt of a copy of any findings or order it may extend the time for another 20 days for filing a petition with the commission.

Dated at Racine, Wisconsin this 1st day of October, 1992.

Daniel J. Nielsen, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

There is little dispute over the events giving rise to this complaint. The contract allows the District to establish new positions, and to unilaterally assign them to one of the negotiated pay ranges. The assignment of a job to a pay range is subject to the Union's right to grieve the appropriateness of the placement if it disagrees.

In the late Fall of 1989, the District established a new job, and assigned it to the Clerk V classification, in pay range 9 of the pay schedule. The District posted the job in late November. Nancy Nieman, the Association's grievance chairperson, contacted Jan Jensen, the Supervisor of Employee Services, after seeing the posting, and questioned the appropriateness of the pay range. UniServ Director Gary Miller followed up with a letter on December 1st, requesting a meeting between Jensen, Nieman, bargaining unit member Karen Beaman and himself to discuss the matter at Step 1 of the grievance procedure.

A meeting was held on December 11th. During the course of the meeting, Nieman and Beaman compared the duties of the new job with those of Beaman's range 10 job and others, arguing that the elements of the job descriptions justified placement in a higher pay range and classification for the new position. Jensen disagreed, and the dispute was not resolved.

On December 15th, Nieman wrote a memo to Jensen, requesting "a specific description of the procedure used by management personnel in the determination of the classification and salary range assignment given to positions contained within the bargaining unit represented by the Association." The requested information included "...a thorough verbal briefing of the procedure for reclassification/salary range determination along with supportive forms, documents, instructions, etc., used by management for such determination." Nieman's memo stated that the Association could "no longer continue to review bargaining unit position classification and/or salary range determination without this briefing and information. No longer can the Association accept a 'non (sic) of your business' attitude regarding this process on the part of management when it comes to our determination of whether or not to grieve a new position's classification and/or salary range..."

Jensen met again with Beaman, Nieman and Miller on January 22nd and gave them a briefing on the process used to determine classifications and pay range placements for new positions and for reclassification requests. She answered the questions put to her by the Association representatives. The meeting lasted between 60 and 90 minutes.

The January 22nd meeting resolved neither the grievance nor the demand for documents related to the District's decision making process. Four days later, Jensen answered the grievance in writing. She asserted that the placement of the Clerk V job in pay range 9 was appropriate, and that the Association's request for documents was beyond the rights specified in the bargaining

agreement, contrary to the management rights clause and inconsistent with the exception to the statute defining Records Open to Employes exempting from disclosure: "Materials used by the employer for staff management planning, including judgements or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes." (§103.13(6)(d), Wis. Stat.).

The parties processed the grievance to the arbitration step, but did not resolve the issue of releasing the requested information. The Association filed the instant complaint, seeking to secure an order for the release of the data.

The Arguments of the Parties

A. The Complainant Association

The Association argues that the duty to bargain includes the duty to provide information relevant to the processing of a grievance, unless it can be shown that good faith employee confidentiality/privacy concerns should prevent disclosure, or there would be an undue burden placed on the employer in compiling the requested information. Neither factor is present in this case. The District admits the relevancy of the requested information, and does not allege any burden in connection with compiling the data. The request was narrowly drawn to include only those "supportive forms, documents, instructions .... used by management for ... determination.[of the classification and salary range assignment]."

The requested documents are reasonably necessary for the Association to make a decision as to the merits of the grievance. Jensen testified that it would be inappropriate to simply compare job descriptions in an effort to decide whether the pay range placement was proper. Thus, even though the Association has the relevant job descriptions for comparison purposes, it must have additional information before it can make an informed decision on whether to proceed with challenges to management's determination of pay range placements. Moreover, the oral briefing covered the procedural steps used by management in its decision making but shed little light on the substance of the decision in this specific instance, nor did it allow the Association an opportunity to review the value assigned to duties performed by the Clerk V relative to those performed by other positions.

The Association dismisses the District's citation of §103.13, Wis. Stats., as a defense in this case. The statute addresses the right of an individual employee to have access to his or her personnel records. The grievant in this case is not an individual employee -- it is the Association. Further, the requested records are not personnel files. Article VIII, §8.04 of the contract makes reference to §103.13, Wis. Stats., and clearly assigns a narrow reading to the statute's application to requests for information: "Any personnel records maintained by the District with respect to an employee may be inspected by that employee in accordance with and subject to the limitations of Section 103.13 of the Wisconsin Statutes."

Neither the statute nor the management rights clause abrogate the Association's right to relevant and reasonably necessary information for grievance processing. By attempting to substitute its judgment as to what is relevant and necessary information for the Association's judgment, the District has committed a prohibited practice within the meaning of Sec. 11.70(3)(a) 1 and 4, MERA.

B. The Respondent District

The District takes the position that, while the statute imposes a duty to provide information, the duty is not unlimited. As a threshhold matter, the union must establish that the information it seeks is relevant and reasonably necessary to processing the grievance. In this case, the Association has not articulated any need for the requested information. The Association has processed grievances involving pay range placements in the past relying on job descriptions and other information made available in this case. The reason for requesting additional information here is the vague assertion that Jensen's extensive briefings were, in UniServ Director Miller's phrase, "unsatisfactory". This, together with the suspicion that the District might have some information somewhere that could bear on the grievance, hardly constitutes a showing of need.

The briefings by Jensen provided the Association with a detailed explanation of the process used to place positions within salary ranges. The District notes that it is not required to provide information in exactly the form requested, and argues that its duty is satisfied by the verbal presentation of the requested information. This is consistent with the past practice of the parties in similar cases, and reasonably accommodates both the Association's need for information and the District's desire to safeguard the integrity of its internal decision making processes. Inasmuch as the Association has failed to identify a need for the requested information, it has failed to meet its burden of proof.

The District notes that Section 2.01 of the contract reserves to management the right to formulate policies and procedures. This includes the policies and standards used to assess the proper placement of jobs in the wage ranges. The scope of the Association demand in this case would chill the exercise of these rights. The Association admits that its request includes personal memos and handwritten notes from the District's files. If management is to freely exchange ideas regarding the objectives and means for managing the District, it cannot sacrifice the confidentiality and privacy of internal deliberations simply to satisfy a vague and overly broad demand by the Association. This compelling need to protect the free flow of ideas within management councils should outweigh the ill-defined need of the Association for information already provided through Jensen's oral briefings.

The District maintains that the information requested by the Association is shielded by Wisconsin's statute defining which records are open to employees. Section 103.13, Stats. allows an employer to refuse to open personnel records to an employee or an employee representative where the records contain:

(d) Materials used by the employer for staff management planning, including

judgments or recommendations concerning future salary increase and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.
(e) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
(f) An employer who does not maintain any personnel records.
(Emphasis added)

The references to personal information about others and files maintained by employers who do not maintain any personnel records make it clear that this section applies to more than simply individual personnel files and individual requests for information. The request for information in this instance falls squarely within the prohibition on disclosing information related to "staff management planning" under §d. While this would not protect the final versions of forms or reference tools actually adopted and used by the District, it does protect the thought processes of management in selecting, devising, evaluating or interpreting forms and reference tools. Thus the District's refusal to open its files to the Association is within the scope of the privilege granted by Wisconsin law.

C. The Respondent Association's Reply Brief

In response to the District, the Association avers that:

1. Section 103.13 is, on its face inapplicable to this dispute. It applies to individual employment files, while the request here goes to files related to a job classification. These files should not contain anything of a sensitive personal nature about any individual, since such information would not be relevant.

2. The general reservation of rights under the management rights clause of the contract cannot serve to abrogate the statutory right to information or the specific contractual right to challenge job placements under Section 5.01 of the contract.

3. The information requested is vital to an evaluation of the grievance over job placement. This case represents the replacement of one position with a position in a wholly different classification. This is an entirely new situation and one which cannot be judged by the information that might have been adequate in judging past cases of reclassification. The information is also necessary to test the plausibility of Jensen's oral assertions.

D. The Respondent District's Reply Brief

In reply to the Association's brief, the District argues that:

1. The Association's claim for information beyond the job descriptions ignores and distorts the testimony of Jensen, who identified the job descriptions themselves and the duties set forth therein as the key information for evaluating the proper placement of a job in pay scale. The Association has all of the relevant job descriptions, and had the benefit of a thorough briefing by Jensen if they had further questions.

2. A request for information must state the nature of the need for information and the way in which the requested documents will satisfy that need. The Association has made no record concerning the information it believes is relevant but unavailable. It continues to rely upon the bare assertion that it was not satisfied with Jensen's briefings and the job descriptions.

3. Section 103.13 (3) is expressly applicable to this situation:

> "An employee who is involved in a current grievance against the employer may designate in writing a representative of the employee's union, collective bargaining unit or other designated representative to inspect the employee's personnel records which may have a bearing on the resolution of the grievance, except as provided in sub. (6)."

An interpretation which finds Section 103.13 inapplicable to the requests for information under Section 111.70 would effectively render Section 103.13(6) a nullity. Even granting that Article V the collective bargaining agreement may be read as endorsing a narrow interpretation of Section 103.13, the contract is not inconsistent with the exclusion cited by the District In a conflict between statutory and contractual rights, the statute should be prevail. Here, the public policy favoring privacy and confidentiality embodied in the Open Records law should take precedence over an interpretation of the contract which is contrary to that public policy.

Discussion

It is axiomatic that the duty to bargain extends to the provision of information necessary to the administration of an existing agreement, as well as the negotiation of a new or successor agreement:

> 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 cases by case by determination of the relevancy of such requests. However this presumption has not been applied to other information sought, and the burden falls initially upon the bargaining agent to demonstrate the relevancy of said information to its duty to represent unit employees. Milwaukee Board of School Directors, Dec. No. 15825-B (Yaeger, 6/79)

The grievance which gave rise to the demand for information in this case deals only tangentially with wages, in that it questions the employer's rationale for arriving at a classification for a new position and, thus, a wage placement. The presumption of relevance does not therefore apply, and the Association bears the burden of showing why the information is relevant. The burden in this regard is measured against a liberal "discovery type" standard, rather than a "trial type standard". 2/ Additionally, the Association must make some demonstration of the necessity of the specific pieces of evidence sought. Even though information may be relevant, the bargaining representative's right to information is not absolute, and the provision of the same information in a form different from that requested will satisfy the duty to bargain. 3/ Furthermore, even relevant information may be withheld in whole or in part if the employer can make a specific and substantial claim that its interest in confidentiality outweighs the union's interest in securing the information. 4/

A. Relevance

Nieman's demand for information from the District encompassed "a thorough verbal briefing of the procedure for reclassification/salary range determination along with supportive forms, documents, instructions, etc., used by management for such determination." On its face, the demand goes to the central issue in the pending grievance -- whether the determination was appropriately made -- by inquiring as to the means by which the determination was made. While the District may argue in the grievance procedure that the ultimate determination is what must be tested, rather than the means by which the determination was arrived at, it is a fairly easy matter to posit circumstances under which flaws in the procedure could be used to attack the validity of the ultimate determination. Given the liberal discovery standard for judging relevance under §111.70(3)(a)4, the Examiner concludes that the subject matter of the request was relevant to the Association's performance of its duties as exclusive bargaining representative.

B. Necessity

The question of whether the information requested is reasonably necessary to the Association's efforts to police it contract is almost indistinguishable from the issue of relevance. If the information is relevant to a grievance, it follows in virtually all instances that it will be reasonably necessary for the Association to secure the information in order to investigate and/or litigate the grievance. This goes to the information in a broad sense. In this case, the District

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2/ La Crosse School District, Dec. No. 26541-A (Crowley, 3/91).

3/ See Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), at page 10, and cases cited therein.

4/ La Crosse School District, Dec. No. 26541-A (Crowley, 3/91); Detroit Edison v. NLRB 440 US 301, 100 LRRM 2728 (1979); Minnesota Mining & Mfg. Co., 261 NLRB 27, 109 LRRM 1345 (1982).

asserts that the Association has argued about reclassifications and pay issues in the past using only job descriptions and thus information about the manner in which the District arrives at its ultimate conclusion is not necessary to the Association's efforts to evaluate the grievance.

The fact that a party has not raised questions about the decision making process in the past does not necessarily mean that the information is unnecessary. If the Association desires to make a more meticulous or determined effort to investigate the instant grievance than it has in the past, or to pursue a different theory of this case than in other cases, the difference in tactics might well render some information necessary which would not have been needed in past cases. The Association has the latitude to determine its own tactics, and the District does not have the right to foreclose the more thorough approach adopted in this case simply because the information has not been sought before. As noted above, the validity of the procedure used to make the decision is a legitimate target in arbitration. Whether it has any dispositive impact on the arbitration turns on the information ultimately disclosed.

C. Provision of the Information in Another Form

Related to the issue of necessity is the District's claim that the information has been provided to the Association, albeit in a different form. The question is narrowed to the necessity for the information in a particular form -- in this case "supportive forms, documents, instructions, etc." -- as opposed to a verbal briefing. The type of disclosure that satisfies the duty to provide information is determined on a case by case basis, and may turn on a balancing of the Association's claimed interest in a particular format and the District's claimed interest in safeguarding its internal files. 5/

The District's Employee Services Supervisor met with Association representatives on two occasions to review the decision on classifying the new position as a Clerk V. On the first of these occasions, the parties compared the duties of the new job with those performed by higher rated jobs, and Jensen rejected the Association's contention that such comparisons, in and of themselves, were legitimate bases on which to challenge the classification decision. 6/ On the second occasion,

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5/ "The exclusive bargaining representative's right to such information is not absolute and is to be determined on a case-by-case basis, *as is the type of disclosure that will satisfy that right.*" Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), at page 10 (emphasis added). See also La Crosse School District, Dec. No. 26541-A (Crowley, 3/91): "The Employer is not required to furnish information in the exact forum (sic) 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." Id, at page 6.

6/ Transcript, pages 51-52.

Jensen described in detail the process used to make the placement decision, and made herself available for questions regarding the decision-making process. 7/

The Association argues that it is unable to determine the exact value assigned to duties for the new Clerk V position without access to virtually all of the information contained in the District's files. 8/ Nothing in this record indicates why this is so, or why this information could not have been obtained by asking Jensen during the January briefing. In fact, the record is devoid of any evidence that information about the weight assigned to each duty was ever requested prior to the prohibited practice hearing. While the degree of specificity required for an information request varies, 9/ an employer cannot be required to guess at the object of an information request in order to avoid liability under the duty to bargain. The District must have some reasonable opportunity to understand what information is sought, so that it can seek to satisfy the legitimate interests of the Association and determine whether the request invades some specific and substantial interest of confidentiality.

The second basis on which the Association asserts a need for something other than the verbal briefing is a desire to use the requested documents to verify the information given by Jensen during the briefing. Acceptance of this argument would create a circular doctrine of law in that its logic requires that, once information is provided, in whatever form, all other forms of the same information be provided for corroboration. This eliminates a party's option of providing information in a form other than that requested, by creating an unlimited right to demand a piece of information in every form in which it exists, so as to cross check the accuracy all of the other sources of the same information. If there is some reason for the exclusive representative to believe that it is being misled, it has the right to seek corroborative data. 10/ However, no such reason has even been articulated in this case.

It appears that Jensen, the official who developed the procedure for determining salary placements and supervised the determination that this position was most appropriately placed at a Clerk V level, explained the process and answered all of the questions posed by Association representatives. While there may be additional information in the District's files, the general request made by the Association does not identify what, beyond the briefing, is sought or why it bears on the Association's grievance. There is no question that the District refused to provide

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7/ Transcript, pages 72-77.

8/ Transcript, pages 34-36.

9/ Fairfield Publishing Co., 275 NLRB 7, 118 LRRM 1636 (1985)

10/ A case in which credibility is an issue would also rather obviously lend itself to a request for corroboration.

documents requested by the Association. The Association's primary claim under the duty to bargain, however, is the right to secure relevant information rather than specific pieces of paper. It is impossible to say, on this record, what relevant information has been requested but not made available to the Association.

D. The District's Claim of Privilege

While the Association has failed to prove that the District refused to make relevant information available, the Examiner must address the claims of privilege raised by the District, if only to make clear that the decision in this case does not turn on these claims. The District asserts a broad right to withhold any information used by management in arriving at a salary placement decision. This claim of privilege is rooted in the management rights clause of the contract and Section 103.13(6)(d) of Wisconsin Statutes.

The management rights clause reserves to the District the right to act as "the exclusive judge of all matters relating to the conduct of its business, including ... methods and materials to be utilized.." to formulate policies and procedures. The District argues that disclosure of documents related to internal decision making would chill the exercise of this right by impeding the free flow of opinions among administrators and policy makers.

While it is necessary in every case to weigh the competing interests of the union to secure information and the employer to preserve confidentiality, the interest asserted by the District is so general, abstract and extravagant that it cannot be assigned much, if any, weight. In this case, the lack of specificity in the Association's request is matched by the breadth of the District's refusal. The fact that a specific document may contain embarrassing, sensitive or privileged information does not translate into a right to withhold every document. Assuming, for the sake of argument, that the files do contain sensitive information, and that the sensitivity of this information rises to the level of a privilege, the District has an obligation to provide whatever information can be made available without compromising the privileged portion of the information. This may be, as in testing cases, a blackening out of the sensitive portions of the document or the preparation of a summary. Absent a specific showing that every portion of every document is somehow protected from disclosure, the District's response cannot be a blanket refusal to provide information.

The District's claim of privilege under Section 103.13, Stats., misapplies the statute. The Examiner is unaware of any case indicating that a privilege under Section 103.13 also constitutes a privilege under Section 111.70(3)(a)4. On its face, Section 103.13 grants individual employees or their collective bargaining representative the right to review individual personnel files, and personnel information related to the employee, and correct errors contained therein. Subsection 6 spells out the exceptions to the employer's duty to disclose:

> **(6) Exceptions**. The right of an employe or an employe's designated representative under sub. (3) to inspect his or her personnel records does not apply to:
>
> (a) Records relating to the investigation of possible criminal offenses committed

by that employee.

(b) Letters of reference for that employe.

(c) Any portion of a test document, except that the employe may see a cumulative total test score for either a section of the test document or for the entire test document.

(d) Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increase and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.

(e) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.

(f) An employer who does not maintain any personnel records.

(g) Records relevant to any other pending claim between the employer and the employe which may be discovered in a judicial proceeding.

The District asserts that this exception covers personnel related files beyond those of individual employees, because it exempts personal information about other persons and does not apply to employers who do not maintain personnel records. and neither exemption makes sense if the statute covers only individual files. The exemption for private information about other persons is not inconsistent with a narrow interpretation of this statute's scope, since an employer might well include information such as comparisons among employees in an individual's file or in files related to a personnel decision directly impacting the employee. Contrary to the District's argument, the exemption for employers who do not maintain personnel files strongly suggests that this statute is narrowly drawn. While those employers are not required to generate personnel files in order to accommodate an individual's information request, nothing cited by the District suggests that they are exempted from the duty to provide relevant information to a union representing employees in bargaining or contract administration. If, as urged by the District, this statute is coextensive with the duty to provide information under Sec. 111.70, employers without personnel files would be free of any obligation to provide information about their personnel policies and practices. 11/ Neither

11/ The inapplicability of Section 103.13 to the duty to provide information is also shown by a review of cases involving testing, such as La Crosse School District, supra. Section 103.13(6)(c) limits test information to individual and cumulative scores. The discussion in La Crosse made it clear that other general information might appropriately be requested, subject to appropriate safeguards to insure confidentiality. Id, at pages 7-8.

the express language of Section 103.13 nor any reasonable inference from its structure supports the District's assertion that the statute itself grants a privilege vis-a-vis MERA.

Even if one assumed that Section 103.13 had application to requests for information under MERA, the collective bargaining agreement appears to grant a broader right to employees in this District than does the statute:

> Section 8.04 - Personnel Records
>
> Any personnel records maintained by the District with respect to an employee may be inspected by that employee in accordance with and subject to the limitations of Section 103.13 of the Wisconsin Statutes.
> ***
> (b) The file will be the property of the District, but each employee will have the right, upon request to the Supervisor - Employee Services to make copies at their expense of any document contained therein, with the exception being credentials and letters of recommendation provided in confidence.

While the introductory paragraph subjects employee requests to the limitations of Section 103.13, the contract provides at sub. (b) a right to copy any documents contained therein except credentials and confidential letters of recommendation. Since reference letters are already exempted by the statute, it appears that this provision of the contract alters and greatly narrows the statutory exceptions. However, given the determination that the information was adequately provided in another form, and that Section 103.13 does not bear on this request, it is not necessary to propose some definitive interpretation of this contract provision.

The information requested was, on its face, relevant to the dispute over placing the new job at the Clerk V level and reasonably necessary to the Association's efforts to evaluate its grievance. However, the record does not show that the information allegedly sought was not available through the briefing provided by Jensen. Thus, even though the District's claims of privilege are not supported, the Examiner concludes that there has been no violation of Sec. 111.70(3)(a)4, Stats., and dismisses the complaint in its entirety.

Dated at Racine, Wisconsin this 1st day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
Daniel J. Nielsen, Examiner