STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 286 No. 49515 MP-2757 Decision No. 27807-A

Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, appearing on behalf of the Milwaukee Teachers' Education Association.

Ms. Mary M. Kuhnmuench, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 1, 1993, the Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act. On September 16, 1993, the Commission 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. 111.07(5), Stats. Hearing on the complaint was held in Milwaukee, Wisconsin, on October 21, 1993. The parties filed briefs which were exchanged on December 8, 1993. The parties reserved the right to file reply briefs by giving notice that they would do so within ten days after receipt of the opposing party's brief. The parties did not file reply briefs and the record was closed on December 20, 1993. The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Teachers' Education Association, hereinafter referred to as the MTEA, is a labor organization and is the certified exclusive collective bargaining representative for certificated teachers and related professional personnel employed by the Milwaukee Public Schools, and its principal offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. Milwaukee Board of School Directors, hereinafter referred to as the Board, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. At all times material herein, the MTEA and the Board were parties to a collective bargaining agreement for certificated professional teaching employes which contained the following provisions:

PART III

SALARIES AND FRINGE BENEFITS

. . .

F. PROTECTION OF TEACHERS

. . .

> 4. COMPENSATION FOR LOST TIME. If an assault on an employe results in loss of time, the employe shall be compensated in full for such time minus any worker's compensation, disability, social security, or retirement benefits the employe actually receives for such time and such paid absence shall in no event be deducted from any sick leave. In no event is it intended that the total compensation paid to the employe under this section shall exceed or fall below one hundred percent (100%) of the net compensation due the employe.

. . .

4. At all times material herein, Susan Feil has been employed by the Board as a teacher at Webster Middle School. On or about December 15, 1992, Susan Feil filed a Report of Assault Suffered by School Personnel alleging that at about 12:45 p.m. on December 15, 1992, two students, Korean Williams and Sandtasha Edgerston, were swinging on ropes in the gym. They refused to get off and swung into Feil hitting her chest and back. Incident Referral forms were also filed on each student and a suspension was indicated for each student.

5. Feil submitted an application for worker's compensation. By a letter dated January 7, 1993, to Feil from Abby Goetter, Claims Representative, the following was stated:

> We have received your application for worker's compensation benefits. Based on our investigation, including witness statements, we have determined that no work-related injury occurred at the time and date alleged on your accident report. Because no work-related injury occurred, no medical or lost time benefits can be allowed on this claim.
>
> If you disagree with our decision in this matter, you may file an Application for Hearing with the Wisconsin

> Worker's Compensation Division by calling their local office at 227-4381.

By a letter dated January 12, 1993, to Ms. Goetter from Nancy Costello, MTEA's Assistant Executive Director, the following request was made:

> Please send me copies of the witness statements you referred to in your January 7, 1993 letter to Ms. Feil.
>
> Your cooperation in this matter is appreciated.

By a letter dated January 26, 1993, Ms. Heidi Wick, Assistant City Attorney, who was handling the worker's compensation claim, responded to Ms. Costello's request as follows:

> This letter acknowledges the request made in your January 11, 1993 (sic) correspondence to Ms. Abby Goetter for copies of witness statements in the above-referenced matters. After discussing this matter with the Employee Benefits Department, as well as conducting some research, the City is of the position that the witness statements obtained by the claims adjuster are not discoverable, but rather, they qualify as attorney work product. Further, if it is determined that the witness statements are in fact discoverable under the Worker's Compensation Act, such discovery must be made pursuant to sec. 102.17, Wis. Stats. Disclosure of the witness statements gathered by the Employee Benefits Department will be made only pursuant to discovery permitted under the Act. Lastly, the City is unwilling to exchange such information voluntarily.
>
> If you have any questions, please do not hesitate to call.

6. Nancy Costello sent a letter dated January 29, 1993, to Christine Toth, the Board's Director of Risk and Facilities Management, which stated as follows:

> Recently the City Employee Benefits Department denied the worker's compensation claims of two teachers, Susan Feil (injury date: December 15, 1992) and Michael Zaleski (injury date: November 17, 1992). In both cases, the City made the determination, based on witness statements, that no work-related injury occurred.
>
> I requested copies of the witness statements. Employee Benefits Administration referred my request to the Office of the City Attorney. Enclosed is a copy of a letter from Ms. Heidi Wick, Assistant City Attorney. She advised that the City is unwilling to voluntarily provide the witness statements. This is a policy decision that I am not aware that Milwaukee Public

Schools participated in and which I am asking that you review.

The Milwaukee Teachers' Education Association does not represent employees in worker's compensation claims which we deem to be without merit. Should the City possess evidence in a case that no on-the-job injury occurred, it could save both parties a great deal of time and expense in hearing and preparation time if such information were shared with the MTEA.

Please contact me once you've had an opportunity to review this matter.

7. Costello and Toth met on February 9, 1993, and Costello admitted that Zaleski's injury had not arisen out of an assault, so the Board did not have to provide statements. With respect to Feil, Costello asserted that the injury was the result of an assault and that Part III, Section F., 4. applied and that to process a grievance she needed the witnesses' statements.

8. Toth sent the following letter to Costello dated March 8, 1993:

After receiving your January 29, 1993 letter, we had a brief meeting on February 9th to discuss the issues you raised in this letter. Now, I would like to take the opportunity to confirm my response in writing to you.

You requested copies of witness statements which the City Employee Benefits Department or my department has on industrial injuries which are denied as being work-related. You cited two specific cases. Denials are based on our investigation of the claim and supported by witness statements whenever possible.

Heidi Wick furnished you with a letter dated January 26, 1993 (copy attached) in which she outlines that witness statements are an attorney work product and as such should not be released to you outside of the discovery process covered by the Worker's Compensation Act. As I explained, we are compelled to follow our attorney's instructions and as such will not release copies of witness statements to you.

However, I am always willing to meet with you and review your concerns on specific cases. You had inquired about the reasons for the suspension of the students involved in the alleged injury of Susan Feil. You had indicated that an assistant principal confirmed that the students were suspended because of their assault of teacher, Susan Feil. I just received confirmation from the principal that the suspensions had nothing to do with the assault being alleged by Ms. Feil.

I thank you for bringing this matter to my attention.

9. On March 9, 1993, Costello met with Toth and again distinguished

Feil's case because the injury arose out of an assault and the contract provided a separate level of benefits for people assaulted and the MTEA was entitled to the information requested. Toth responded that she thought Costello was "splitting hairs."

10. On April 20, 1993, a grievance was filed by MTEA on behalf of Feil. It was again reiterated that the MTEA was entitled to the statements related to Feil in order to properly prosecute the grievance over the denial of assault benefits. The grievance was denied.

11. MTEA's request for the statements is relevant and reasonably necessary to carry out MTEA's duty to enforce the collective bargaining agreement as part of MTEA's contract administration role.

12. The Board's rationale that it does not have to release the statements because the statements are attorney's work product and in worker's compensation cases discovery is not permitted is not a sufficient excuse to justify the non-disclosure of the statements to MTEA.

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

CONCLUSION OF LAW

The Board, by its refusal to furnish the statements related to Feil's denial of assault benefits under Part III, Section F., 4. of the parties' agreement, has refused to bargain collectively with the MTEA and has 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 and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Milwaukee Board of School Directors, its officers and agents, shall immediately:

1. Cease and desist from refusing to furnish MTEA with the information requested by the MTEA in its representation of Feil's claim to assault benefits under Part III, Section F., 4. of the parties' agreement and from refusing to bargain with MTEA in any like or related manner.

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

a) Immediately give the MTEA the statements requested with respect to Feil's claim for assault benefits under the contract.

b) Notify Board employes represented by the MTEA by

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

conspicuously posting the attached Appendix "A" in places where notices to employes are customarily posted, and take reasonable steps to assure that said notice remains posted and unobstructed for a period of thirty days.

c) Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the Board has taken to comply with this Order.

Dated at Madison, Wisconsin, this 21st day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all MTEA-represented employes that:

> WE WILL NOT refuse to bargain with the MTEA by refusing to provide relevant and necessary information as requested by the MTEA that will permit MTEA to properly exercise its function of policing the parties' collective bargaining agreement.
>
> WE WILL NOT refuse to bargain with MTEA in any like or related manner.

Dated this _____ day of _____, 1994.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

By _____

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the MTEA alleged that the Board had violated Sec. 111.70(3)(a)4, Stats., by failing and refusing to supply the MTEA with information which is relevant and necessary for it to make a determination whether there has been a violation of Part III, Section F., 4. of the parties' collective bargaining agreement. The Board answered the complaint denying that it had committed any prohibited practices.

MTEA's Position

MTEA contends that the District has committed a prohibited practice by its refusal to provide the witness statements relied on to deny Ms. Feil's claim for assault benefits. MTEA asserts that Part III, Section F., 4 provides extensive benefits, far higher than those provided under the worker's compensation statutes. It submits that Ms. Costello made a request for the witness statements and made it clear on February 9, 1993, in a meeting with Ms. Toth that the basis for her entitlement to the information was to evaluate the contractual claim as opposed to worker's compensation. It points out that on March 9, 1993, Costello spoke with Toth and again made it clear that she was distinguishing Feil's case from just a regular injury. MTEA submits that the Board refused to supply the witness statements based on the opinion that there was no discovery in worker's compensation cases. MTEA argues that the Board's attorney's advice was formulated in total disregard of the obligation imposed on the Board to furnish relevant and necessary information to the collective bargaining representative pursuant to Sec. 111.70(3)(a)4, Stats. MTEA insists that the worker's compensation statute does not relieve the District of its duty to furnish the witness statements. It submits that because the bargaining unit representative is obliged to prosecute the grievances of its members, an employer must provide all information relevant to the processing of those grievances and it cites past decisions involving the parties to show that the Board furnishes witness statements to the collective bargaining representative when such statements are the basis for adverse action against a teacher. It claims that at no time prior to the instant case has the Board failed to furnish such witness statements to the MTEA. It maintains that had it not been for the instructions of the worker's compensation claims department, the longstanding practice would have obligated the Board to supply the statements. It takes the position that the decision to deny the requested information was entirely isolated from the obligations imposed by the duty to bargain in good faith and to furnish information to the MTEA which is relevant and necessary for it to analyze contractual claims.

MTEA argues that the Board cannot immunize the witness statements merely because their claims adjuster received the statements and the Board cannot claim that any information placed in a worker's compensation file precludes it from furnishing such information to the MTEA. Otherwise, according to the MTEA, it would be impossible for it to carry out its statutory obligation to evaluate the validity of the employe's contractual claim. MTEA insists that the failure to furnish information cases are excluded from the Collyer deferral policy.

In conclusion, the MTEA states that the Board has failed and refused to furnish information to it which is both relevant and necessary for it to make a determination on Feil's claim under Part III, Section F., 4. of the contract.

It asks for a cease and desist order for the Board's failure and refusal to supply such information and that the Board furnish the witness statements as well as an order directing the Board not to order its local administrators at Webster Middle School from discussing the Feil incident with her MTEA representatives.

Board's Position

The Board contends that it has not violated Sec. 111.70(3)(a)4, Stats. It asserts that the Commission has a longstanding policy not to assert jurisdiction over breach of contract claims where the complaintant has failed to exhaust the contractual grievance and arbitration procedures except where the Union has been frustrated in its efforts to utilize these procedures or the parties have waived them. Here, according to the Board, MTEA has failed to provide any evidence of exhaustion or waiver of the contractual procedures. The Board points out that a grievance was initially filed on April 20, 1993, and the Board denied the grievance and MTEA appealed it to the third step on May 26, 1993. The Board refers to the contractual grievance procedure which provides for arbitration after the third step but MTEA has not appealed the grievance to arbitration. The Board notes that in the past, the MTEA has taken questions over Part III, Section F to arbitration. It also argues that there has been no showing of any frustration of efforts to proceed to arbitration or a mutually agreed waiver of arbitration. The Board claims the evidence establishes the MTEA has failed to exhaust the grievance procedure and the Commission should decline to exercise its jurisdiction over this matter.

The Board posits that the MTEA's substantive arguments lack merit as the requests for the witness statements were all in connection with Feil's worker's compensation claim which were denied by the worker's compensation claims examiner. The Board notes that MTEA has failed to exhaust the worker's compensation process. It submits that the MTEA should not be permitted this blatant attempt at forum shopping.

It concludes that the Commission should refuse to exert jurisdiction in this case and dismiss the complaint.

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

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).

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, Part III, Section F., 4 of the parties' collective bargaining agreement provides for full compensation for lost time due to an assault on an employe. This benefit clearly relates to wages and fringe benefits, and therefore the information relating to denial of these benefits is presumptively relevant and necessary to carry out MTEA's duties and the burden was on the Board to justify its non-disclosure.

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 Casting Co., 24 LRRM 1657 (1949).

The Board has asserted that the requests for the witness statements were in connection with Feil's worker's compensation claim. It is true that the initial request for this information was in connection with the worker's compensation claim. 9/ However, on February 9, 1993, and again on March 9, 1993, Costello made it clear that she was seeking this information pursuant to the contract claim for an injury due to an assault. 10/ MTEA also filed a grievance in this matter which states that the statements were requested in the Feil matter because Feil was being denied contractual assault benefits. 11/ The record thus demonstrates that the request did not relate solely to the claim by Feil for worker's compensation benefits but the demand for statements was related to contractual benefits. It may be inferred that the Board was of the opinion that MTEA was using the contractual claim as a basis to obtain information in the worker's compensation claim; however, the evidence does not support the claim that MTEA's request was for an ulterior purpose other than its obligation to represent Feil in her contractual claim and the mere fact that the MTEA would obtain the statements in its role as exclusive representative and as a result also obtain the information in the worker's compensation claim does not allow the Board to withhold the information. 12/ The Board's assertion that the statements are work product is without merit. Therefore, the Board's defense that the statements and requests related to worker's compensation must fail and the MTEA is entitled to the statements in its representation capacity over the grievance on assault benefits under the contract.

The Board has asserted that the MTEA has not exhausted the grievance and arbitration procedures set forth in the parties' contract. Here, no exhaustion is required. The MTEA is entitled to information that is relevant and necessary to process a grievance. 13/ For example, if the statements establish beyond doubt that Feil was not injured, the MTEA may appropriately decide not to pursue the matter to arbitration. MTEA is not required to expend the time and money to proceed through arbitration on a frivolous grievance. How does it make the decision that a grievance is meritorious without an examination of all the relevant information? The answer is self evident. MTEA is entitled to the information so it can decide whether to proceed to arbitration or not. The

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9/ MTEA Exs. 6, 8; Tr. 20, 21, 23, 28.

10/ Tr. 40-41, 43, 47.

11/ MTEA Ex. 11.

12/ Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), affirmed Dec. No. 24729-B (WERC, 9/88), citing Prudential Insurance Co. v. NLRB, 71 LRRM at 2260.

13/ See footnote 2, supra.

Board's assertion that the MTEA must exhaust arbitration first is without merit.

No other defenses were offered by the Board, hence it is concluded that the Board's failure to provide the information requested was a refusal to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats. With respect to the remedy herein, the Board has been ordered to immediately provide MTEA the requested information as well as a cease and desist order and the standard posting and notification. MTEA had requested that the Board be directed not to order its local administrators at Webster Middle School to refuse to discuss the matter with Feil's representative. The Board can direct who it wishes in management to represent it in matters of contract administration and who it does not wish to represent it in such matters, and the remedy does not derogate the Board's authority in this respect and no order has been issued with respect to whom the Board chooses to be its spokespersons.

Dated at Madison, Wisconsin, this 21st day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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